THE SUPREME COURT IN THE EARLY PROGRESSIVE ERA

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Abstract:

Between 1890 and 1937, prior to the full effect of the New Deal, the Supreme Court was compelled to review many state laws aimed at regulating local industrial life. Those laws were passed under the authority of state "police power" legislation, or the authority of local governments to regulate "health, safety and morals." Now, however, police power included not only working conditions and union activities, but aspects of industry that seemed to violate the basic principles of republicanism embodied in all American constitutions. Those principles were no longer assumed, but were made explicit in the new Fourteenth Amendment, and its guarantee that no one would be deprived of "life, liberty or property without due process of law." Many business interests claimed that this guarantee protected "liberty of contract," or the right of employers and employees to join for their mutual interests, no matter how unfair it might appear to reform-mined lawmakers. This dissertation challenges the conventional history of that conflict as it occurred in the "Lochner Era" Court, which holds that the justices merely sided with the industrialists because of their own laissez-faire ideology. I propose that the Supreme Court was in fact seeking a constitutional basis for economic regulation – one that sought to allow for reform without depriving the Constitution of its inner republican principles. Based on cases and other legal literature of that era, I hope to show how the Court sought to reconcile nineteenth century Madisonian "neutrality" with the need to recover basic fairness in industrial life. At the same time, they sought to preserve the other Madisonian precept: the need to protect the pursuit of property, the fundamental basis for any free government.

Chapter 1:

The Lochner Era and the Development of the U.S. Supreme Court

This dissertation thesis originates from my interest in American progressivism, what it meant, and continues to mean, for the American proposition embodied in our Constitution, and how the Supreme Court found itself in the middle of that conflict in the early twentieth century. Spanning from 1890 to 1937, the "Lochner Era" featured the Court's attempt to adapt the Constitution to modern conditions while trying to ensure that its relevance to the changes of modern life did not deprive it of its inner republican principles. In many states, activists and legislators pursued a curious blend of social experimentation, genuine compassion, and necessary social reform, all aimed at the new forms of labor and industry which tested the Constitution like never before. These policies received great social support for their promise of reforming unsavory business practices, and seemingly unlimited legal support from state "police powers." State governments discovered a whole new meaning for "numerous and indefinite" modes of authority, applying state power "to all the objects which… concern the lives, liberties, and properties of the people."[1] These policies were pursued in the confidence that the nobility of certain goals really could overcome human depravity, which, as experience always teaches us, is amplified by political power. Yet it became impossible for state governments to legislate in a way that did not benefit one group over another, thereby defying the most basic function of republican government.

[1] Alexander Hamilton, Federalist #28. In James Madison, Alexander Hamilton, and John Jay, *The Federalist Papers*, ed. Charles R. Kesler and Clinton Rossiter (New York: Signet Classic, 1999), 175.

I propose that a correct understanding of the Lochner Era depends on our ability to join the Court in answering a two-part question: First, can there be a constitutional basis for "active state" liberalism? And, second, how does the liberty of contract and, more importantly, the fundamental right to property, inform that principle?

Active State Liberalism and Government Neutrality

The whole point of republican government, practically speaking, is the avoidance of "class legislation," or policies that that favor one special interest over others. It was, of course, the classic problem of faction, that "mortal disease under which popular governments have everywhere perished," as James Madison put it in Federalist #10. Where there is no freedom, the passions that fuel those interests are kept to a minimum; but where there is liberty, their destructive tendencies are frightfully clear. The task of a republic is to shape and channel that force into something constructive – namely, politics. The political life of the nation is to occur on a level where ambition counters ambition, and where all of the negative aspects of power are used to benefit the public as a whole. The American Constitution does precisely that by creating a government "in which the scheme of representation takes place." Where representation falls short, Madison pointed to a secondary precaution: the vast number of interests in so large a republic, which "make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens."[2]

But what if both of these "republican remedies" fail? There is, of course, no promise from the second remedy at the state level: the "extended sphere" is an exclusively national guarantee. Indeed, "factious leaders may kindle a flame within their

[2] James Madison, Federalist #10, in Ibid., 77.

particular states," Madison wrote. The only promise is that it will be "unable to spread a general conflagration through the other States."[3] This leaves the first remedy of representation, standing alone, and vulnerable to the whims of local interests, and there was little to prevent the injustices that might follow. The only appeal, it seemed, was the active power of the national government.[4] Perhaps that would take congressional power, and an extensive reading of the Commerce Clause in Article I; or it might require something like presidential power similar to Lincoln's actions in the Civil War. But rarely were these abuses obvious enough to summon the power of the national government, since they always proceeded according to the "due process" of law, and often sought what appeared to be very sensible remedies to dire problems. Only the judiciary could address those kinds of problems.

In the conventional account of the Lochner Era, the story ends here. Those businesses who lost the fight against state regulations, the story goes, believed they had been deprived of their fundamental rights, and so they pushed their case to the Supreme Court, who agreed, and proceeded to strike down many of the laws that seemed to infringe on that basic liberty.

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[3] Ibid.

[4] Alexander Hamilton certainly anticipated this when he acknowledge how possible it was for the representative of the people to betray their trust. Beyond the last safeguard was the original right of revolution, the Lockean "appeal to heaven." "The citizens must rush tumultuously to arms, without concert, without system, without resource; except in their courage and despair. The usurpers, clothed with the forms of legal authority, can too often crush the opposition in embryo," he wrote. But with a firm union, such a problem could be safely avoided: it was one more way to use dangerous political impulses for the public interest. "The people, by throwing themselves into either scale, will infallibly make it preponderate," Hamilton wrote. Both state and national government could serve as "instruments of redress" – though it was clear that the national government was better for this in Hamilton's mind. "How wise will it be in them by cherishing the union to preserve to themselves an advantage which can never be too highly prized!" Federalist 28, in Ibid., 176-177. Surely Hamilton anticipated something like events of the Lochner Era – though he probably did not anticipate the role of the Court, even with the Fourteenth Amendment.

The glaring fact, however – which is frequently ignored in modern scholarship and even the modern Court's own opinions – is that the Lochner Court *did not* strike down every regulatory law it encountered. Many regulations were declared unconstitutional; but far more were actually *upheld* – sometimes by the same justices who voted to strike others down. Ignoring this, much of the modern scholarship produces little more than "anachronistic readings of early twentieth-century constitutional decisions or indiscriminate labeling of the positions of justices," according to G. Edward White. "It has resulted in the confining to oblivion of a number of legal arguments and propositions that were seriously entertained by participants in early twentieth century constitutional jurisprudence."[5] The Justices of the Lochner Era had *reasons* for what they did, and they meant to make those clear to the public.

Far more important than "fundamental rights" was the Court's attempt to clearly define the constitutional parameters of state police powers, especially in light of the new character of industry, labor, and class conflict, which was such a dominant feature of that era. These problems intensified to the point where such neutrality in the states was in fact a hindrance to justice – or worse, a mechanism that inadvertently protected privilege. "[I]t was becoming more and more clear to great numbers of people that industrialization had robbed the vision of neutrality of much of its attractiveness," according to Lochner Era revisionist Howard Gillman. "For many groups the inescapable coercion of the market led to pleas that public power be used on their behalf to counter private power."[6]

But again, how could public power do this without bringing about the same problem of favoritism that the market itself created, albeit in the favor of big business on

[5] G. Edward White, *The Constitution and the New Deal* (Cambridge: Harvard University Press, 2000), 307.
[6] Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Power Jurisprudence* (Durham: Duke University Press, 2004), 65.

one side, or progressive groups on the other? What was in theory a form of injustice turned out, in practice, to be the only just remedy for the problems that the nation faced. How was a Court to discern between the two things? It called for an entirely new approach to judicial review – one for which precedent offered little guidance. Indeed, it seemed that such regulation was in fact justified. But when, and under what circumstances?[7]

Controlling state-level factions had certainly been the aim of the Fourteenth Amendment. It nationalized citizenship, and it granted a vague concept of "privileges and immunities" (formerly among "the several states," but now among citizens simply). Most importantly, though, it denied any state such power that could "deprive any person of life, liberty, or property, without due process of law." State governments were meant to persist, despite this broad grant of power to the national government; with federalism still in place, the Amendment assumed sound congressional judgment about whatever problems it faced in a post-Civil War America. Yet this greatly complicated the Court's task: many were quite willing to invoke national authority in ways that went far beyond protection of former slaves – and to do so, not by petitioning Congress, but by appealing to the Supreme Court. The Amendment, many claimed, was "made under an apprehension of a destructive faculty in the State governments. It consolidated the

[7] This sheds new light no the "arbitrary" condition of state laws: the disconnection between the statute's enforcement and the social ill that it purports to solve revealed a motive that defied the most basic guarantees of republican government. The Court was "under a solemn duty" to declare "whether the legislature has transcended the limits of its authority," Justice John Marshall Harlan wrote. "If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge" – not according to its pet theories about fundamental rights, but in a way that would "give effect to the constitution." *Mugler v. Kansas*, 123 U.S. 623, at 661. Originally, the Constitution was designed to be effective enough on its own. Clearly, though, something had changed in the Lochner Era: the confidence that veneration for the Constitution itself would ensure the public's attentiveness to the Court's rulings was declining; the Court found itself having to go far beyond "mere judgment."

several 'integers' into a consistent whole." Though the Amendment was designed to emphasize certain points about national authority over the basic rights of citizens, it rendered the purpose and even legitimacy of state governments quite dubious. The Amendment's language was hardly "confined to the population that had been servile"; its guarantees were, after all, not for members of groups, but for individual persons. "The mandate is universal in its application to persons of every class and every condition," attorney John Campbell claimed in his *Slaughterhouse* arguments, thus revealing the puzzle that the Court would be trying to solve for the next forty years.[8]

Natural Rights and Class Legislation

A government's direct involvement in the lives of citizens always proceeds on the basis of some ideal, or some plan whose goal may sometimes surpass consideration of the costs. The experience of communism or Nazism is clear enough. But what about liberty? Under what circumstances is a constitutional republic forced to *actively* pursue a plan of liberty – not a utopian vision of the future, but a return to its own first principles? When is it obligated to override its usual course of neutrality to set things right? While much of the Lochner Era revisionism is correct to point out the Court's concern with class legislation, I argue that such concern is indefensible when it appears at the expense of fundamental ideas about the purpose of government.

The American proposition holds, contrary to most of human history, that a people really can establish their own form of government by consent, one that will protect the natural rights that belong to individual persons. While it originates in the democratic principle of majority rule, it finds its highest end in republicanism that can equally protect

[8] John A. Campbell's argument before the Court, *Slaughterhouse Cases*, 83 U.S. 36, at 52; 54 (1872).

minority rights. The rule of law that ensures this is sustained only by an acceptance of its continuity with the founding, and the confidence that political tradition is the greatest embodiment of liberty. New generations would arrive, and new laws would be necessary; but those new laws, if they had any legitimacy, had to be understood as mere outgrowths of the fundamental law in the Constitution, or else they were void. That makes sense, though, only on the assumption that the Constitution is itself an embodiment of the principles involved.

Those kinds of principles are not imperatives, at least not in the American political tradition. They appear instead as precepts that determine conclusions: if we reject the premise, we deny the conclusion; if we desire that conclusion, we must accept the premise. "As I would not be slave, so I would not a master," Abraham Lincoln said. It is difficult to call such a view of first truths "philosophy," at least in the modern sense. It is instead a clear understanding of the things we must accept in order to proceed with even the most practical things in law and politics. Yet the Court was hardly designed for articulating those assumptions: cases "in law and equity, arising under the Constitution" did not call for expositions on American political theory. Societies that draft and ratify constitutions "contemplate them as forming [a] fundamental and paramount law of the nation," thus settling the first principles and enshrining them in written law.[9] James Wilson saw this clearly enough: the "first rule" is "to discover what the law was before the statute was made," meaning that judges "ought to take for granted, that those, who made it, knew the antecedent law." At the same time, "though an accurate, a minute, and an extensive knowledge of its practice and particularly rules be highly useful," he wrote, "I cannot conceive it to be absolutely requisite to the able discharge of a legislative

[9] *Marbury v. Madison*, 5 U.S. 137, at 77 (1803).

trust."[10] If a constitution meets all of the requirements of republicanism, then plainly citizens and judges alike can regard the document alone as an adequate statement of natural justice, the precepts of which appear as the settled premises by which political life sought its day-to-day conclusions in policymaking.[11]

The problem, though, was precisely how *un*settled those premises had become in the early twentieth century. Understanding the people as the only legitimate source of sovereignty had always depended on public mores, which themselves instructed all on the limits of democratic will. The only sure boundary to that will was, of course, the right to pursue property, particularly through arrangements that were backed and secured by the government. But what if that boundary was broken – even by a legitimate use of political power? This was what happened in the Lochner Era. The Court found itself compelled to make explicit what had formerly been embedded in the text, and to do so on a far greater scale than any previous generation of justices.

There was, of course, a great danger in this: bringing fundamental ideas to light opened the way for "philosophic jurisprudence," which could pull justices away from the law itself, and confuse the distinction between the Constitution's direct intent and the variety of theories that could accidentally displace it. Robert Bork was quite right to point out that "the various systems of moral philosophy that legal academics propound as guides to constitutional adjudication are not capable of constraining the judge. They are capable, instead, of producing any result the judge, or professor, wants." Construing a

[10] James Wilson, *Collected Works, Vol. I* (Indianapolis: Liberty Fund, 2007), 438.
[11] Cf. Thomas Aquinas: "For the written law does indeed contain natural right, but it does not establish it, for the latter derives its force, not from the law but from nature: whereas the written law both contains positive right, and establishes it by giving it force of authority." *Summa Theologica*, II, II, Q. 60, A. 5.

statute according to moral philosophy is not "applying law but creating it wholesale."[12] Yet these conditions are not the result of too much philosophy, as Bork seems to believe: it is instead the legal positivism that came well *after* the Lochner Era that left such a void in the way judges understand the Constitution – a void that would be filled by whatever theory managed to dominate a majority of justices in any given case. In place of first truths came pre-determined conclusions, some rooted in things like "evolving standards" that "mark the progress of a maturing society," or rights "older than our Bill of Rights – older than our political parties, older than our school system," if not "the right to define one's own concept of existence."[13] This offers a critical lesson: rather than trying to avoid a long and complicated slew of moral philosophies by adopting no moral outlook at all, it is better to ensure the *best* outlook that supports the purpose of republican government in general.[14]

Hence, Lochner Era jurisprudence proceeded on two levels: one dealt with the pragmatic aspects of American constitutionalism, while the other dealt with the essential moral foundations of liberty itself. One addressed the challenges to free government, while the other sought to explain the merits of freedom. Any attempt to understand the

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[12] Robert Bork, "Interpreting the Constitution," in *American Political Rhetoric: A Reader*, eds. Peter A. Lawler and Robert Martin Schaefer (Lanham: Rowman & Littlefield, 2005), pp. 139-140.

[13] *Trop* v. *Dulles*, 356 U.S. 86, at 101 (Chief Justice Earl Warren) (1958); *Griswold* v. *Connecticut* 381 U.S. 479 (Justice William O. Douglas) (1965); *Planned Parenthood v. Casey* 505 U.S. 833, at 851 (1992). These present forms of liberty have no qualitative relationship with the form of government established over it. As John Stuart Mill admitted, "[e]ven despotism does not produce its worst effects, so long as individuality exists under it," while "whatever crushes individuality is despotism, by whatever name it may be called" – whether it be a "republic" or a "tyranny." John Stuart Mill, *On Liberty and Other Essays* (Oxford: Oxford University Press, 1991), 71. This, of course, makes even the most radical laissez-faire principles look quite modest by comparison.

[14] Christopher Wolfe explains the difference: there is "interpretive" judicial review, which accepts that the precepts in question are embodied in the Constitution, and "non-interpretive" judicial review, which brings those principles to the surface. Both kinds had always existed, "[b]ut interpretive judicial review was always the dominant mode." "Natural-justice" judicial review was extremely rare prior to the Civil War, and "in each case the natural-justice language was either dicta or was tied to some reference to the letter of the Constitution as well." *Rise of Modern Judicial Review* (Lanham: Rowman & Littlefield, 1994), 110.

rulings of that era, as they sought to craft a basis for constitutional regulation, must consider *both* of these things, and see how they fit together. The gravity of the task does much to explain why many Lochner Era rulings were frequently ungraceful, plagued by rhetorical blunders, heated opinions, and what appeared to be an over-reliance on "an economic theory which a large part of the country does not entertain."[15] It explains the apparent heartlessness on the part of some justices, who seemed more concerned with their abstract legalisms than the suffering of working people and the noble intentions of reformers.

But, again, those cases that struck down state regulations tend to draw excessive attention away from many more that *upheld* the laws. For this Court, fundamental rights did not stand alone as the imperatives that had to be enforced; they were, in fact, "historically contingent and legislatively mutable," David Bernstein writes. "The Lochner Court did not think common law rights were immutable, and the Court frequently interpreted those laws that changed or even abolished the common law." When the Court explicitly referred to common law rights, "it almost always did so to justify upholding government regulations, by finding that common law experience suggested that the regulations in question were within the scope of the police power." If anything, Bernstein writes, the Lochner Court's appeal to fundamental rights "*restrained* the Court's libertarian instincts."[16] Clearly the Court's view of fundamental rights was

[15] *Lochner v. New York*, 198 U.S. 45, at 75 (1905) (Justice Holmes, dissenting).
[16] David Bernstein, "*Lochner*'s Legacy's Legacy," *Texas Law Review* 82, 1 (November, 2003): pp. 26-27; 32-33. (Emphasis added.) In *Arizona Copper Company v. Hammer* (1919), for instance, Justice Mahlon Pitney wrote: "Novelty is not a constitutional objection, since under constitutional forms of government each state may have a legislative body endowed with authority to change the law." 250 U.S. 400, at 419 (1919). This was precisely Justice Rufus Peckham's reasoning in *Lochner v. New York*. The state "has power to prevent the individual from making certain kinds of contracts, and in regard to them the Federal Constitution offers no protection." Uses of property for "immoral purposes," he wrote, "could obtain no

meant to accommodate more practical (and less philosophic) considerations – the problem of class legislation, in particular.

The goal of this dissertation is to reconcile those two views, which are frequently at odds in both the legal-historical literature and in the modern Supreme Court itself. I hope to vindicate Lochner Court's legal arguments: in truth, they sought to show how the Constitution could adjust to present circumstances without forfeiting its inner republican principles, thus allowing for legislation that met its intended goal without encouraging factional politics to the point of political self-destruction. Just how far does the Constitution allow factional politics to go when it is meant to correct social and economic wrongs? At what point does the immediate necessity of active state liberalism undermine the basic guarantees of free government? This dissertation is an exploration in the Supreme Court's attempt to answer those questions. I do not believe the conclusion of my study can possibly save American constitutional law from post-New Deal conditions, but it can certainly give us a better understanding of how we arrived at our present state, whether we deem it good or bad.

A. Interpretations of the Lochner Era

Legal-Historical Judgment

Cass Sunstein's article, "*Lochner*'s Legacy," is the single greatest attempt to give the conventional account of the Lochner Era a solid theoretical grounding. Sunstein argues that the Court should recognize how legal first principles are derived from certain historical periods, meaning that much of the judge's task involves not only training in

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protection from the Federal Constitution, as coming under the liberty of person or of free contract." 198 U.S. 45, at 53-54 (1905).

law, but a careful and enlightened study of social evolution. He acknowledges, of course, how easy it is to see the *Lochner* ruling as quintessential judicial activism. But this is to overlook how essential the Court's interpretive role is: it must interpret law according to "baselines," or foundations for all legal reasoning which are unique to their time. There are fundamentals, or bedrock precepts, which give meaning to the existing regime – and it is, as always, the duty of judges to promulgate them. Yet it is not the fundamentals themselves, but the ways that they change that a judge must understand: the Code of Hammurabi could not possibly apply to today's tort law – not because Hammurabi was not a wise and brilliant man, but because the baseline of ancient Mesopotamia was radically different from that of later times. There is no kinship between law of the past and law of the present; the core assumptions do not apply differently to different circumstances, but actually change *all* the way down. Hence, understood in light of the baseline of the late nineteenth century, we find that *Lochner* was in fact rightly decided. "Market ordering under the common law was understood to be a part of nature rather than a legal construct," Sunstein writes, "and it formed the baseline from which to measure the constitutionally critical lines that distinguished action from inaction and neutrality from impermissible partisanship."[17] At the same time, it was wrongly decided because of the justices' inability to see how that baseline had shifted into one that gave greater support to an expanded role of government in private industry.

To assume that the baseline is somehow unchanging is to commit the height of legal error according to Sunstein. Judges might do it accidentally; but judges who do it deliberately, or hold on to past baselines in the belief that tradition and continuity are essential – they are the true judicial activists. Real judicial deference requires not only

[17] Cass Sunstein, "Lochner's Legacy," *Columbia Law Review* 87, 5 (1987): 874.

deference to legislative will, but also to the spirit of the times. To be sure, legislative will may commit the same error.[18] But Courts *have* to intervene in Sunstein's view: deference to lawmakers, who are out of touch with the baselines of historical values, is little better than judicial activism itself. And if lawmakers are out of touch with changing baselines, then we can be most certain that the people are as well. The Lochner Court's error was its appeal to the status quo, which hardly evolves the way it should without the prompting of judges. So while it falls to judges to ensure law's legitimacy in Sunstein's view, it is also their duty to make sure society stays attuned to its own baseline. Otherwise law will be outdated and useless – or worse, the tool of other judges who try to use traditionalist interpretations for political purposes.

In this way, Sunstein confirms the conventional account of the Lochner Era: after a long and erroneous detour, the Court attuned itself to the evolving baseline in *West Coast Hotel v. Parrish* (1937). The case was not a confession of constitutional error in *Lochner* and subsequent cases, nor was it a mere reaction to political pressure from Franklin Roosevelt. It was instead a philosophic error: the Court had failed to announce the new baseline when it arrived. In *West Coast Hotel*, though, it compensated for its delay in announcing the new order – not better one, nor a worse one, but one that was simply different from the order that had preceded it, and correct in light of the way things had become. The case "signaled a critical theoretical shift, amounting to a rejection of the *Lochner* Court's conception of the appropriate baseline." It was also the recognition that neutrality actually does a great deal in favor of narrow policy outcomes. The Court's

[18] Justice Oliver Wendell Holmes revealed this problem when he defended judicial neutrality beyond both legislatures *and* baselines. "Holmes' opinion treats the political process as a kind of civil war, in which the powerful succeed," Sunstein writes; "if courts interfere, they will be bottling up forces that will express themselves elsewhere in other and more destructive forms." Ibid., 879.

claim in *West Coast Hotel* "is that the failure to impose a minimum wage is not nonintervention at all but simply another form of action – a decision to rely on traditional market mechanisms, within the common law framework, as the basis for regulation." The Great Depression was far more than a difficult economic time according to Sunstein: it represented a radical shift in national consciousness, and the Court was obligated to adapt the law accordingly. "Once the Court's baseline shifted," Sunstein wrote, "its analysis became impossible to sustain."[19]

Owen Fiss has done much to propagate this view: the "question of legitimacy" for the Supreme Court is not demonstrated, but *created*. While *Lochner* is usually a reminder of how judicial power might go astray, there is still a fundamental distinction that appears in the common efforts to separate it from cases like *Brown* and *Roe*. Fiss refers, quite frankly, "to the distinction between the role of the Supreme Court and the substance of the Court's doctrine" – i.e., between its outcome and its method. Following Sunstein, he argues that by giving a strong basis for criticizing the substance of *Lochner*, judges and legal scholars are set free to elevate the judicial function to an entirely new level. Again: "*Lochner* stands for both a distinctive body of constitutional doctrine and a distinctive conception of judicial role: One could reject one facet of *Lochner* and accept another," he writes. "We may wish to criticize its substantive values and yet leave unimpeached its conception of role – which it shared in common with *Brown* [*v. Board of Education* (1954)]," and, of course *Roe v. Wade* (1973) and its subsequent cases.[20]

Such rulings were based on a clear distinction between law and politics, Fiss writes: politics is "will," and law is "reason." It is, after all, the most basic tenant of

[19] Ibid., 880.
[20] Owen Fiss, *History of the Supreme Court of the United States* (Cambridge: Cambridge University Press), pp. 18-19.

Western political thought that reason should rule over will, and that power must be checked. "The Court owed its primary duty to a set of values it saw enshrined in the Constitution and gave itself the task of protecting those values from encroachments by the political branches" – not only on its own sphere of authority, as James Madison would have seen it, but on the rights of citizens, particularly those rights that the Court itself had deemed fundamental. Those rights "existed apart from, and above, ordinary politics," Fiss observes; their duty "was to give, through exercise of reason, concrete meaning and expression to those values." In short, Fiss proposes a theory that allows one, "with perfect consistency," to "remain attached to Brown and its robust use of judicial power to further the ideal of equality, yet be happy that *Lochner* lies dead and buried."[21] To criticize *Lochner v. New York* on both substantive *and* methodical grounds is to strip away the last protection of our most basic rights. The thing that could do the greatest evil through raw assertions of power can also be used to do the greatest good.

Yet this view falls prey to the same problem as historicism in general: why expend so much energy defending and protecting the outcome of today's "baseline" when one also admits that it must one day yield to *another* baseline? Rooting a framework for interpreting the constitution in a historically-bound outlook may give it great utility, but it leaves future judges with a tremendous burden of having to abandon precedent after precedent – a thing that deprives it of its legitimacy. But that is not to say that it cannot articulate a broad and general goal that it shares with the American people as a whole.

[21] Ibid., 21.

Lochnerizing in the Service of Democracy

Other legal scholars have sought to define a "*Lochner*-like role" with greater precision – a task not unlike archaeology. Digging with precision and care, they hope to excavate an artifact – a praiseworthy judicial function – out of the doctrinal dirt. Howard Wasserman, for instance, claims to have found "reinforcement of aggressive rights-based judicial review"; this calls for a careful rethinking of *Lochner*'s "pejorative nature" in modern legal discourse. The outcome of *Lochner* should not obscure what might be a positive role for the Court, particularly when it comes to protecting free speech, for example. Wasserman focuses on the *Bartnicki v. Vopper*, where the Supreme Court declared it unconstitutional to use information obtained by wire-tap in a criminal case. To liken the two cases "is to suggest a structural or procedural problem with the broad enforcement of individual free speech rights," Wasserman explains; this "ultimately serves to obscure meaningful substantive constitutional dialogue about the meaning of the freedom of speech and how that freedom should be balanced against competing constitutional, political, and social values."[22] He considers the classic criteria that have come to define Lochnerizing: it involves extra-textual rights, which depend on "super-protected… common law judicial lawmaking that trumps popular legislative enactments"; it springs from scorn for democracy; it seeks to substitute judicial will for legislative judgment; and it misallocates judicial scrutiny.[23]

And it is, of course, the classic "ideological morality play." "*Lochner* was the old, rigid, formalist regime that had to be slain in order for the progressive, flexible, pragmatic ideals of the New Deal to spread and take hold," he writes. "The New Deal's

[22] Howard Wasserman, "*Bartnicki* as *Lochner*: Some Thoughts on First Amendment Lochnerism," *Northern Kentucky Law Review*, 33 (2006): 423.
[23] Ibid., 426.

turn from *Lochner* reflected eventual judicial recognition of changed social and economic conditions that altered the understanding of the common good, the role of the government in ensuring the public good, and when constitutional liberty must yield to the common good." Absent in this morality play is, of course, the potential for the Court itself to ensure the public good through its rulings, and how it might do so with far greater efficiency and wisdom – if not compassion – than any legislature. When the democratic process is attuned to the need for expanding on and protecting rights, then it may be the Court's duty to step out of the way; when the democratic process fails to ensure them, however, it is a critical duty of the Court to put us back on track. "The point is that slapping the Lochnerism tag on a decision… does not advance the discussion," Wasserman concludes. "*Lochner* ends debate, by defining and intention, de-legitimizing the decision on its own terms. And it does so with a pejorative term whose meaning we do not know and cannot agree upon and whose assumed meaning runs a broad range." While some, like Sunstein and Fiss, see Court-protected and (even Court-made) rights as pitted against an erroneous democratic will, Wasserman sees them as the bedrock that makes democracy possible. To say otherwise is to leave us wondering "whether, one hundred years from now, the constitutional canon and anti-canon might change again."[24] That is a strong possibility; but it is better to focus on making law fit present circumstances than to worry about future consequences. Indeed, this view of history has the same regard for the future as it does for the past.

Hence, Wasserman introduces a view of the "baseline" that is not shifting and changing through different eras, but actually aims at a single goal. More recently, others have sought to give that goal a clear identity, or what Justice Steven Breyer calls "active

[24] Ibid., 457.

liberty." It is a framework by which judges can interpret the Constitution in favor of the document's own democratic underpinnings. It is a principle that gives the Court a basis for scrutinizing those cases that conflict with the general precepts held in the public mind, thus affirming a robust and energetic democratic life. While he is "conscious of the importance of modern liberty," Justice Breyer means to emphasize how "courts should take greater account of the Constitution's democratic nature when they interpret constitutional and statutory texts."[25] This principle, he says, comes from a realization of the judges' lack of expertise when compared to the democratic multitude and its elected officials. Still, to defer everything to the general will is to give away the principles that make that general will possible – not to mention a prominent role for judges like Breyer.

The Court's view of its own history, as we might expect, can be problematic for present rulings. While it did much to establish the authority of the national government through the nineteenth century, it "overly emphasized the Constitution's protection of private property," i.e., in *Lochner v. New York*. "At the same time, that Court wrongly underemphasized the basic objectives of the Civil War amendments. It tended to ignore that those amendments sought to draw all citizens, irrespective of race, into the community, and that those amendments, in guaranteeing that the law would equally respect all 'persons,' hoped to make the Constitution's opening phrase, 'We the People,' a political reality." It was not until the Warren Court arrived that the true intent of those amendments was realized – not by looking to the basic protections of the Fourteenth Amendment, but by actively – if not coercively – "changing the assumptions, premises,

[25] Stephen Breyer, *Active Liberty: Interpreting our Democratic Constitution* (New York: Vintage Books, 2005), 5.

or presuppositions upon which many earlier constitutional interpretations had rested."[26] That was the true starting point for the Court in attuning itself to present values.

Yet it plainly calls for recognition that the democratic process alone is not sufficient to protect its own baseline. It is an age-old lesson in political philosophy: democracy frequently turns against itself, and destroys its own first principles. Many have assumed "that a thoroughly democratic government based on public liberty would naturally protect the individual rights of its citizens," Breyer writes; many have believed that the people can safely govern themselves because the constitution provides all the protections they need, whether looking at the Madisonian "extended sphere" and representative system, or at the pure democracy approach of Robert Dahl and Benjamin Barber. In all instances, the only right that government is bound to protect is participation in the political process. But this has hardly been sufficient in the states: "government experiments in less disciplined democracy had proved disappointing in this respect," he writes, "bringing about what some called a new form of despotism."[27] For Breyer, this calls for a broader judicial role, where the Supreme Court reaches beyond mere national concerns, and involves itself deeply in local affairs; it calls for the Court to maintain the groundwork for democracy. State constitutions, after all, admitted their inefficiency when they framed their respective bills of rights, while the Founding of the national government produced a very insufficient Constitution. But while many would look to the people and their elected officials as the ones who would complete it, Justice Breyer looks to the Court as the institution that moves them along to the proper goal. Once again, this calls for *Lochner*-like rulings without *Lochner*-like outcomes. The

[26] Ibid., 10-11.
[27] Ibid., 31.

"right of contract" was simply the wrong basis for democracy in Breyer's view: but that doesn't mean the Court can't deliver the *correct* basis. More important than the meaning of the text, he writes, are the consequences, i.e., "an appeal to the presumed beneficial consequences for the law or for the nation that will flow from adopting those practices." Nor does this create a radically subjectivist form of judicial review. With "active liberty" as a common goal, even when the Court "radically changes the law," Breyer concludes, "this is not always a bad thing."[28]

Judicial Power and New Fundamental Rights

Justice Breyer admits that "active liberty" achieves only one half of the challenge of modern democracy, i.e., the collective aspect more than individual liberty. ("I focus primarily upon the active liberty of the ancients, what [Benjamin] Constant called the people's right to 'an active and constant participation in collective power,'" he writes.[29]) For others, though, it is more urgent and more legitimate to interpret the Constitution in the opposite direction – a method that is more explicitly dependent on *Lochner*-like outcomes, albeit outcomes of a different kind, pertaining to privacy and sexual freedom. Thomas McAffee, for example, reminds us that "in the most recent era, the Supreme Court has returned to its practice… of imposing unenumerated fundamental rights as limits on the powers of government."[30] This has compelled many scholars to seek "an alternative justification" – not only separating the doctrine of *Lochner* from the method, but also showing how there is a new doctrine that is indeed more sacred than anything the

[28] Ibid., 117-119.
[29] Ibid., 5.
[30] Thomas McAffee, "Overcoming Lochner in the Twenty-First Century: Taking Both Rights and Popular Sovereignty Seriously as we Seek to Secure Equal Citizenship and Promote the Public Good," *University of Richmond Law Review* 42, 3 (Jan. 2008): 600.

Court sought to protect in the Lochner Era. McAffee reminds us that, despite a strong consensus "that the Lochner-era Court was profoundly wrong," there has not been a consensus "about precisely how the Court went wrong." The only clear objection comes from textual literalists like Justice Hugo Black – a position that has proved to be somewhat unworkable and unrealistic about the value-laden nature of law. What plagued the Lochner Era "had little to do with literalism and much to do with the confidence of the Court in asserting, and then concluding, what was fundamental in America and what was universally fundamental."[31] Every "balancing" act that the Court performs is basically concerned with the interests of the community and the fundamental rights of the individual. But, as even the Founders recognized, the community will almost always prevail on its own. It needs no assistance from the Court aside from ensuring that all can participate in the community. The Court may try to channel and shape democracy in such a way that it includes the right people and respects the rights of others; but that can never be as important as protecting basic fundamental rights against direct attacks from the community.

Giving clarity and direction to Lochnerism comes from shifting attention to the correct textual basis for protecting fundamental rights – i.e., away from Substantive Due Process, and toward Equal Protection. Substantive Due Process, after all, invites far too many considerations of principles, which can become confused with the traditionalisms that stifle the Court's judgments. "A governing majority almost certainly viewed interracial cohabitation, let alone marriages prohibited by anti-miscegenation laws, as immoral at the time the legislative prohibitions were enacted," he writes. "But, merely invoking a conventional ground for using state police powers does not liberate a state

[31] Ibid., 623.

from its duty to refrain from enacting racially discriminatory laws or unacceptably creating 'classes' of citizenship in violation of its duty to supply equal protection of the law." Equal Protection, on the other hand, can help us grow out of the traditionalism that informs whimsical democracy. McAffee's primary example is, of course, gay rights, which were easily placed in the cross-hairs of democratic will. While the Court struck down the law in *Lawrence v. Texas* (2003), it did so on the wrong Due Process grounds. In contrast, an equal protection ruling would have recognized that the clause "does not build on long-standing traditions, but instead rejects them insofar as they attempt to devalue or humiliate certain social groups," he writes. "The problem in *Lawrence* is not adequately understood without reference to the social subordination of gays and lesbians, not least through the use of criminal law."[32]

These legal-historicist views – whether aiming at "changing baselines" as Sunstein proposes, or at a democratic ideal of "active liberty," or a "fundamental rights jurisprudence" – feature many mixed feelings about *Lochner*, and the Era that bears its name. The case holds a volatile place in this school of thought, standing between what they want the Court to be and what it was in the past. It is an "unnerving presence," Robert Post writes, "because we do not have a convincing account of the criteria by which our own aspirations to preserve constitutional rights should be compared to, and therefore distinguished from, what has become a paradigmatic example of judicial failure." But for all of their careful treatment of the Supreme Court's role in light of evolving precepts, these scholars overlook one glaring and devastating fact: the Supreme Court *upheld* far more regulatory laws than it struck down. In the midst of the Lochner Era, legal scholar Charles Warren chronicled the police power cases leading up to 1913,

[32] Ibid., 630; 632.

showing just how many of them upheld regulatory laws aimed at labor and industry. The conventional account of the era focuses on unconstitutional regulations at the expense of those that *were* constitutional, and it forgets that there were different conclusions often held by the same justices. Though "*Lochner*'s Legacy" has been very influential, "beyond *Lochner* itself, the article cites only ten out of hundreds of relevant Lochner era cases, and discusses only two of them in any detail," as David Bernstein points out.[33] Some historical facts can devolve into hair-splitting distractions, while others can be exaggerated to outrageous proportions; but this one falls entirely on the myth's most basic claims. The size of a lizard might be exaggerated into a dragon; but a mouse cannot, because it is a different thing in kind.

Yet the Lochner Legend lingers. This is not because it is true, but because, from a historical-legal perspective, it is *useful*. It may be false to say that, in the Lochner Era, "the police power could not be used to help those unable to protect themselves in the marketplace," as Sunstein puts it; but the facts are not as important as the intentions of those who promulgate the story.[34] An account for the "spirit of the times" in the Lochner Era demands far more than a discussion of *Lochner v. New York* itself: it requires a justification for the *other* cases that protected an extensive use of state police powers. "Although recognizing that history, in the form of foundational constitutional commitments, must play a role in efforts to apply the Constitution to contemporary legal disputes," G. Edward White points out, "Sunstein has also frankly described his version of historical research as predicated on searches for 'a usable past,' that is, attempts to

[33] Bernstein, 1-2.
[34] Ibid., 880.

enlist history as a weapon for progressive change."[35] Bernstein concurs: Sunstein did little more than apply an "ideological construct to constitutional history for presentist purposes, while ignoring or neglecting contrary evidence."[36] The utility of a thing is found in its multiple purposes: it needs to give everything its user wants, and nothing he doesn't want. It is, of course, precisely what John Paul Stevens did in is *Roper v. Simmons* concurrence: evolve beyond the grip of tradition by pulling revered or reviled names and symbols over to one's side.

But what exactly was the Lochner Court trying to do – not in *Lochner v. New York*, but in the variety of other cases that upheld regulatory laws?

Positivists and Activists

Other scholars, such a Robert G. McClosky, find the Lochner Era Court entirely to blame (or praise, from other points of view) for the rise of the modern Court. The sole feature of the Lochner Era, in his view, was the justices' own humanity getting the best of them: it cannot be denied, McClosky writes, "that the judges seemed recurrently tempted during these years to have done with temporizing, to attack with their bright new weapons, to rule by flat decree." This is, of course, the positivist critique: the business of the Court is to keep itself out of political judgments. Law is best, in other words, when it is purified of values to the furthest extent possible. True, justices of previous decades could be idealists and approach judicial review philosophically at times; but it had been wise enough to focus on the written law rather than allow its own political judgments to invade its judicial function. In the Lochner Era, though, the Court found a new

[35] White, 25.
[36] Bernstein, 2.

"prevailing habit of mind – the idea that government cannot be left judicially unsupervised in possession of a power that *might* be abused."[37] Such laws challenged the "sacred" principles of laissez-faire – the principles that just happened to have invaded the dominant judicial philosophy of the day.

By allowing such value-judgments to work their way in the judicial review, though, the Court unknowingly opened the way for a variety of others. Though they perceived only one philosophy – one so "fundamental" and "basic," and at the same time, so rooted directly in the Constitution itself – it was, in truth, an opening of the floodgate for a variety of other rights or "evolving standards" theories that would come later. Laissez-faire principles belonged in one branch of the public deliberation about the nature and extent of regulatory policy; but, instead, "it was becoming increasingly apparent to those of even modest political sensitivity that the public demand for economic regulation was rising and could not be altogether gainsaid," McClosky writes. Not that the reasons for regulatory laws were themselves justified: it was more a matter of allowing the people to govern themselves, even if it called into question the most basic principles of government. Without this broad grant of political power through judicial deference, "it becomes harder and harder to sustain the illusion that the judicial yes or no is based on inexorable constitutional commands, and it becomes easier and easier for observers to see that judicial review is operating as a subjective and quasilegislative process."[38]

Such institutionalization of laissez-faire principles, McClosky writes, would inevitably lead to close scrutiny over legislation dealing with hours and wages. Far more than health and safety standards or Congress' use of the interstate commerce clause is the

[37] Robert G. McClosky, *The American Supreme Court: Third Edition* (Chicago: The University of Chicago Press, 2000), pp. 92; 95.
[38] Ibid., pp. 98; 101.

building-block of the whole liberty of contract: the right of employee and worker to agree on the conditions of labor for mutual advantage. "Any state interference with them impinges vitally on freedom of contract," McClosky writes – "the holy of holies for the knights-errant of laissez faire." For all of their fervor over this issue, though, McClosky points out that the Court was hoping for the impossible. The regulatory state was simply the new order of the age. By striking down its enactments, the Court was merely slowing down the process in certain states – at great expense to its own institutional integrity. Only judicial restraint could ensure such a thing. The decline of the Lochner Era is in fact the story of the Court's own awakening to this reality thanks to Justices like Frankfurter, Cardozo, and Franklin Roosevelt's other appointees. But this, of course, stoked even greater reaction on the parts of Taft, Sutherland, Butler, and other "convinced foes of the welfare state," according to McClosky. These justices were quite confident that they understood national preferences better than the people themselves understood them.[39]

Still, McClosky's standard positivist critique falls short for the very same reason the historicist criticism does: it ignores just how much the Supreme Court *upheld* regulatory laws in this era. True, there were "fundamental rights" involved in the cases, and liberty of contract was always in view. But this "natural justice" philosophy that informed so much of their jurisprudence was hardly the rigid sort of thing it is made out to be. As David Bernstein – an avid critic of the liberty of contract himself – points out, the Court "did not see the common law as natural and prepolitical, but as manmade and mutable." The justices showed an "acute awareness that common law rights were

[39] Ibid., 102.

historically contingent and legally mutable."[40] As my own thesis will show, the Supreme Court was hardly concerned with striking down legislation that collided with its own *laissez-faire* philosophy; it was instead trying to craft a constitutional rule that would bring together both a view of fundamental precepts of liberty and avoid class legislation when the system failed to do so on its own.

But what exactly did "public preferences" demand? What so much of the Lochner Era scholarship ignores – even among those like McClosky who defend a deferential Court – is the nature of the popular support behind the legislation. Regulatory laws of this era were hardly the doings of state legislators alone: they were ideas that emerged from a very powerful grass-roots activism. And, according to Matthew Bewig, they were pursued for very common-sense reasons. Lochner era scholarship "has been seriously flawed by over-attention to, and reliance upon, the ideas and arguments preserved in the Lochner Court's written opinions." The opinions only tell the Court's own story, and result in a sort of historical tunnel-vision, giving us the constitutional questions at the expense of the political and social ones. This was, of course, precisely why so many demanded a more thoughtful realism on the Court at the time: judicial review that ignored the broad array of facts would inevitably lead the law away from the reality it was meant to describe, and that would render it irrelevant – or worse, make it the enemy of the public. Today, like then, "little or no attention has been paid to the crucial role played by the bakers of New York in agitating for passage of the bakeshop reform." Bewig points out how the liberal critics of the Lochner Court ignore the presence of economic principles in the Constitution, and how those principles really do matter to laborers at the bottom; conservatives, on the other hand, tend to ignore the

[40] Bernstein, 27.

laborers themselves as central actors – particularly how "it was the efforts of the journeyman bakers of New York over a twenty year period that brought about the passage of the Bakeshop Law," he writes. This calls for a new bottom-up approach to studying legal history – one that accounts for the broader context in which a case was decided, particularly the popular activism that fueled it. Legal history "from the bottom up," he writes, "must tell the collective story of the bakers and insist that we listen to their collective voice in the form that they have bequeathed it to us."[41]

Bewig is quite right to point out the bottom-up reasons for Lochner Era reforms: it was true that the bakers had their reasons for pushing this legislation. Yet there is no denying that this only tells one side of the story. Bewig assumes, of course, that there is only one side that truly matters: the people, independent of the law itself, and that the will of the people is somehow always good, no matter what conclusion they come to. It ignores the basic maxim that law "signifies a rule of action" – that law is "the scaffolding of society," in James Wilson's words: "if society could be built and kept entire without government, the scaffolding might be thrown down, without the least inconvenience or cause of regret."[42] More importantly, such a radical view of popular sovereignty assumes that the democratic will can create its own legitimacy – or, rather, that it has no obligation to justify itself.

But maxims and precepts can be put aside: the problem is clear enough in the *consequences* of such regulatory laws. Though the people may have very good reasons for their demands, it is clear that by denying the premises of free government, they do the

[41] Matthew Bewig, "*Lochner v. the Journeyman Bakers of New York*: the Journeyman Bakers, Their Hours of Labor, and the Constitution," *The American Journal of Legal History*, 38, 4 (Oct. 1994): pp. 415-416; 419.
[42] James Wilson, "Lectures on Law," in *Collected Works*, 452.

greatest damage to themselves. Such regulation of industry inevitably aligns itself with one special interest or another. The "tunnel vision" of New Dealers, as well as the state-level progressives who preceded them, Richard Epstein writes, "let them focus their attention exclusively on the beneficiaries of their programs, be they union members or farmers, while taking no note of the adverse effects that their programs had on the parties excluded from the market or forced to pay the higher prices that the government policies maintained." The very people who attacked the Old Court for its disconnected, if not inhumane, principles of interpretation "were guilty of a massive disregard of the basic established principles of economics," he writes. "No judgment about social welfare can be made simply by celebrating the gains of one preferred group."[43] Hadley Arkes points out that schemes for controlling wages, hours, prices, and other aspects of industry "were supported by nothing more than speculations about the conditions that were likely to raise incomes for one group or another, which were picked out for special benefits in the law." Indeed, the speculation about the outcomes of regulatory laws is far more theoretical and detached from reality than even the most radical proponent of a laissez-faire economy. "The flexing of power could be seen then as an energetic use of the 'public authority,' by a state wedded to the mind of science and devoted to the public good."[44]

In light of these things, the Court's task was to craft a rule that allowed for popular legislation like the bakeshop act, as well as other hours, wages, and price laws, while at the same time preventing those regulations from harming the very people it was meant to serve.

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[43] Richard A. Epstein, *How the Progressives Rewrote the Constitution* (Washington D.C.: Cato Institute, 2006), pp. 72-73.
[44] Hadley Arkes, *The Return of George Sutherland: Restoring a Jurisprudence of Natural Rights* (Princeton: Princeton University Press, 1994), 82.

This led, in other words, to a careful consideration of both the means and the ends of good government – a view of what government was for, and at the same time, how it would be empowered to meet those ends. That rule had been simple enough through the nineteenth century. But in the early twentieth century, there seemed to be a new necessity in the pursuit of justice. "Justice is the end of government," James Madison wrote. "It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit."[45] The goal of the Founding was, of course, to limit and construct that pursuit of justice in such a way that it could coexist with liberty. But if it should happen that liberty surpassed justice, by Madison's principle, it was necessary for the government to reach beyond its own neutrality and set things aright. So when was this justified, and when was it not? This was the question that the Court was forced to answer, and arriving at that answer involved careful consideration of two sides of good government.

B. Central Thesis: Allowing Class Legislation and Protecting Fundamental Rights

The Means: Special Interest Legislation as a Necessity

The Lochner Era features the classic Progressive problem: economic regulation, though driven by the best of intentions, employs methods that have little regard for the true outcome, meaning that the very people it is designed to help end up suffering even more. It begins with an impulse deeply rooted in the American psyche: people in democratic times, far more than in any previous era of human history, are remarkably good at feeling compassion. Alexis de Tocqueville observed how each American "can judge the sensations of all others in a moment: he casts a rapid glance at himself; that is

[45] Federalist #51, in *Federalist Papers*, 321.

enough for him. There is therefore no misery he does not conceive without trouble and whose extent a secret instinct does not discover for him." The American's outlook on pain and hardship "mixes something personal with his pity and makes him suffer himself while the body of someone like him is torn apart."[46] Yet Tocqueville was quite aware of the danger in this. All morality – and, indeed, a great deal of public policy – could be reduced to the inner feelings of those who seek to do good, and the satisfaction of the benefactor could come to mean more than the benefit of those in need. Pity can be a strong motivator, but it cannot possibly give any reliable sense of direction for social reforms.[47]

But that is only one side of the problem. It is inevitable that this distinctly democratic sense of compassion, because of its raw power, sets itself up to be used by other special interests who have a stake in bringing down some other interest, particularly in an industrial society. The outcome of this impulse in modern America was most apparent in the 1930s, when the nation experienced "a depression within the Depression" according to Amity Shlaes. Franklin Roosevelt was blunt about his intentions: the response to mass-suffering did not call for effective measures of relief nearly so much as a pretext for bold experimentation, which "itself created fear. And many Americans knew this at the time," Shlaes writes. "Fear froze the economy, but that uncertainty itself might have a cost was something the young experimenters [in Roosevelt's administration] simply did not consider."[48] Those who paid most dearly and who suffered

[46] Alexis de Tocqueville, *Democracy in America*, trans. Harvey Mansfield and Delba Winthrop (Chicago: Chicago University Press, 2000), 538.
[47] Tocqueville looked to slavery in his day, observing how the "lot of these unfortunates inspires little pity in their masters, and… they see in slavery not only a fact from which they profit, but also an ill that scarcely touches them." Ibid.
[48] Amity Shlaes, *The Forgotten Man: A New History of the Great Depression* (New York: Harper Collins, 2007), 9.

the most under the New Deal were precisely the people it was meant to help. The New Deal, and the progressive experiments that preceded it in the states, had little regard for human costs. The unemployed, or laborers who were abused by their employers, were reduced to public symbols that justified all kinds of projects with entirely different goals. The "better world" was shared by grass-roots social reformers and policy-makers alike. But the latter were more realistic about what that world would be: experts would be at the top, operating as untouchable social engineers, while the suffering people would be at the bottom, where there was no guarantee that the suffering would cease, or even diminish. Yet this overlooked the humanity of those experts, and how they would inevitably align themselves – if not narrowly represent – a specific special interest. It was a "willingness to install 'a rule of factions,' a regime in which interest groups would be licensed to make laws binding on their competitors," Hadley Arkes writes. Under this legislation, "some of those interests would be taxed and coerced, explicitly, for the purpose of delivering benefits to their adversaries."[49] It was the classic definition of corruption, where the political arrangement meant to care for the whole ended up serving only a part.

The most important revision of Lochner Era "class legislation" appears in Howard Gillman's book, *The Constitution Besieged*. The cases of that time "represented a serious, principled effort to maintain one of the central distinctions of nineteenth-century constitutional law – the distinction between valid economic regulation, on the one hand, and invalid 'class' legislation, on the other – during a period of unprecedented class conflict." The Court's rulings were attempts to "cure the mischief of factions," as James Madison would have put it – albeit at a time when the republican forms of government in

[49] Hadley Arkes, *The Return of George Sutherland: Restoring a Jurisprudence of Natural Rights* (Princeton: Princeton University Press, 1994), pp. 91-92.

the states had failed to do so on their own. Again, state-level politics received only half of the Madisonian blessing: the "extended sphere," where all factions are pooled together into a republic so vast that no one of them could overtake the others, only occurred on a national level. In the states, only the constitutional promise of a "republican form of government" remained, and it proved to be a delicate protection. At stake were the principles of political legitimacy, found only in a government that could resist corruption, again, by "serving the whole." They were principles that "advanced the well-being of the community as a whole or promoted a true 'public purpose' and to strike down legislation that (from their perspective) was designed to advance the special or partial interests of particular groups or classes." The goal was a government that did not "play favorites," or allow one interest to pursue its advantage at the expense of others. But for many, Gillman writes, "America's social revolution necessitated a concurrent revolution in political thought and practice." Local reformers lost faith in their own abilities, and began to believe that the way to meet their ends was found only in state power. "Many had become convinced that in the context of the coercion embedded in industrial markets a continuing insistence on state neutrality in fact biased the system in favor of powerful classes."[50] With this, the Constitution was "besieged," with its usual defenses forced back, and its last holdout found only in the Supreme Court. It was precisely this kind of problem that made judicial independence so important. It fell to them, Gillman argues, to deal with a raw reality that had been reserved for the political process; they faced a new American regime, whose merits could not possibly ensure the same government neutrality as the old one. They were forced to formulate new arguments about what was

[50] Gillman, 10; 99.

and was not legitimate use of police power – and in that, restate precisely what the Constitution was for.

The Court pursued this task the only way they could: by seeking and applying the rule as it was handed down to them. This did not result in their repeatedly striking down any legislation that infringed on the right of contract, as the conventional account would hold. It was instead to pursue an understanding of government that was "avowedly hostile to an overtly class-based politics," Gillman writes. This did not mean that government could play no role at all in regulating industry; it meant only "that any such interference or regulation had to be justified in terms unrelated to the desire to service the 'private' interests of groups engaged in economic competition." This restrained view of regulation assumed that many of the social ills caused by bad industry really could be addressed at the local level. But national confidence in the power of democracy was greatly dwindling: between the power of the state and the disparity of political influence among economic elites, "the determination of small farmers, stump speakers, and some sympathetic newspaper editors to transform existing social relations was simply insufficient."[51]

Gillman makes it especially clear, though, that a sound revision of the Lochner Era does not at all mean the redemption of laissez-faire principles or the "right of contract." That is the standard accusation; there is little point in reviving and defending it in his view. While first principles of this kind can easily justify limited government, they can just as well call for a radical increase in regulation and other progressive visions: one political philosophy defends the right to property, while another defends the power of the state to create a Crolyite "Great Community." Yet there is no difference, and there can

[51] Ibid., pp. 32; 83.

certainly be no preference, between these conflicting moralities in the eyes of the law. "Equality, state neutrality, and a demonstrable relationship to the general welfare were the central preoccupations of late-nineteenth-century constitutionalism, not liberty or laissez-faire specifically." Joseph Lochner's own attorney based his brief on cases that looked entirely to the problem of class legislation, demonstrating "that the focus of the discussion in the brief centered not on liberty of contract," Gillman writes, "but rather on the issue of impartial treatment and, especially, whether the special classification used in the state could be rationalized in terms of a legitimate police power."[52]

Were the justices as "formalist" as the conventional account holds, standing by their principles of natural rights and the meaning of property, legal realism would have easily damaged their position, or at least exposed the laissez-faire idealists for what they were. But this was hardly the case, Gillman writes, precisely because the justices were quite open to realism: "From the point of view of the of legal reformers the 'new realism' of sociological jurisprudence achieved some successes," Gillman writes. It was not the persuasive appeal of the new realism that mattered nearly so much as the old realism that the justices maintained. The movement "did little to erase the distinction between illegitimate class legislation and legitimate general welfare legislation." In this transition, the "liberty of contract" never emerged as a thing to be pursued or avoided according to Gillman. Not that "liberty of contract" was irrelevant: it was simply not a goal that the Supreme Court could, or even should, seek. It was instead a natural consequence of avoiding class legislation; that alone was sufficient for the market to thrive. Market freedom was, after all, "not freedom from all restraint; it was freedom from the corrupt use of power by competing social groups," Gillman writes. "Market freedom, or 'liberty

[52] Ibid., pp. 97; 127.

of contract,' was linked inextricably with the commitment to faction-free legislation."[53] It was this – not laissez-faire principles or "liberty of contract" itself – that stood in opposition to the new regime, which would open itself up to whatever philosophy could capture it first.

It was therefore much later in the twentieth century that the Supreme Court entered the business of giving new rights. With the neutral state broken and gone, and unlimited regulation the norm, it became necessary for the Court to develop "some method of identifying a specific set of rights and liberties that could be asserted by individuals as a trump against the state." But the question is, of course, which rights? Which among those rights should be deemed "fundamental"? The story of liberty since *Griswold v. Connecticut* in 1963 is, of course, known to all. But Gillman wishes to make clear that those who accept the conservative side of the Lochner Era myth do more to advocate this view than defeat it. "If nothing else," he concludes, "I hope this study helps remove that weapon from their hands."[54]

It is not correct, though, to blame the economic brand of "conservatives," as Gillman sees them, for the legacy of *Lochner*. There are indeed those who look back to the Court of that era as showing the correct approach to judicial review of regulatory laws. But there are far more who see neutral government having a clearer purpose than what Gillman admits: it was, after all, the view of the Founders that the purpose of government is to protect certain unalienable rights, and that the only legitimate government was one that was founded by consent of the governed. The governed would only consent, of course, if they could see in the proposed system a way to ensure their

[53] Ibid., pp. 104; 114.
[54] Ibid., pp. 199; 205.

rights – and the right that was most obvious was property, both keeping and pursuing it. This is especially clear in the writings of James Madison. While he was the architect of government neutrality, Madison could still recognize that "Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*." Impartiality is the means; but "whatever is his *own*" is the goal, the end for which that means is intended. Accordingly, "[t]hat is not a just government, nor is property secure under it, where the property which a man has in his personal safety and personal liberty, is violated by arbitrary seizures of one class of citizens for the service of the rest," he wrote.

> That is not a just government, nor is property secure under it, where arbitrary restrictions, exemptions, and monopolies deny to part of its citizens that free use of their faculties, and free choice of their occupations, which not only constitute their property in the general sense of the word; but are the means of acquiring property strictly so called.[55]

Gillman is not particularly concerned with this aspect of Madison's thinking. It is, of course, not as prominent in Madison's political philosophy as the extended republic and his method of checks and balances – the low-but-solid safety net of liberty that would limit government. But the end of government was still there, and it cannot be ignored.

The End: Fundamental Rights in Economic Liberty

While some separate the method of *Lochner v. New York* from the outcome, others see the outcome itself as important – which in turn justifies the method. There is far more to the ruling than the mere scrutiny over the effect and justification for law:

[55] James Madison, "On Property," in *Writings* (New York: Library of America, 1999), pp. 515-517.

there is the right of contract at stake, and the right to property that it presupposes. These things are just as relevant today as they were then.

As we might imagine, this view is as rare in the legal-historical scholarship as it is in the Supreme Court. An article from the *Harvard Law Review*, written anonymously, points out that since 1937, "the Supreme Court has not struck down a single economic regulation on substantive due process grounds. Although the Court has never explicitly rejected the idea that liberty guaranteed by the fifth and fourteenth amendments includes some protection of economic rights, its scrutiny of economic and social legislation is so lenient that no law is ever likely to be declared invalid." The author blames the "'progressive' premises and prejudices" that have dominated constitutional law for decades. The rebirth of libertarian thought, however, does not call for anything new in judicial review: if the Court began taking economic rights seriously and interpreting the Constitution as it should, it "might be revived with minimum of constitutional disruption."[56]

Still, what the author gives is a "program for judicial activism." Rather than conforming constitutional law to changing baselines, it would include economic rights into the protection of personal autonomy that it has invoked in so many other cases. It would bring back the basic principles of *Lochner v. New York*, ensuring that regulatory laws are made to fit their end, and test whether or not state and local governments are abusing their power at the expense of fundamental economic rights. The author acknowledges Sunstein's error. One cannot truly say that the Lochner Era was defined entirely by this kind of activity: "more regulations challenged on due process grounds

[56] Anonymous, "Resurrecting Economic Rights: The Doctrine of Economic Due Process Reconsidered," *Harvard Law Review*, 103, 6 (1990): 1363.

were upheld than struck down," he writes. But this was because of the Court's attempt to devise a constitutional principle: it had far more to do with how "the activist Lochner Court practiced a certain amount of judicial restraint." Had they been true to their principles, they would have avoided such self-restraint and defended the right of contract, both as a fundamental precept of freedom and as a right stated in the Fourteenth Amendment. The greatest promise to former slaves was a basic condition of equality in American life; since it couldn't promise them social equality, it guaranteed basic civil rights. But this meant clarifying exactly what those civil rights consisted of for individual persons, and the only clear and reliable answer was the right of contract. This was explicit in the Civil Rights Act of 1866, the author argues, and that in turn informed the Fourteenth Amendment's broader protections. "It was drafted to protect *all* citizens, not just former slaves, from restraints enacted by the states," the author writes. "Recognition of economic liberties and contractual freedom respects the individual's autonomy and his ability to make decisions concerning his interests."[57] Indeed, what is the difference between the right to engage in contract, and the right to engage in "certain intimate conduct"?[58] How could the modern concept of liberty-as-autonomy exclude such a thing?

This, of course, is not the norm of criticism among Lochner Era revisionists. As the author practically admits, hard libertarians understand the role of the Supreme Court – an institution that might limit government down to nothing – the same way current progressives understand it – as the body that creates and steers the direction of evolving social values. In neither case do they even try to discern the true purpose of the Court

[57] Ibid., 1369-1371. Emphasis added.
[58] *Lawrence v. Texas* __ U.S. __(2003).

itself. While it is a pure ideal that has little awareness of the particulars of the American political system, it still informs many studies in Lochner Era revisionism. The purpose of this revisionism is to state an imperative that such rights must be absolutely protected, as the Court frequently does with other fundamental rights.

Richard Epstein, for instance, points out the radical emphasis of Progressive Era assumptions as the Court deals with "prejudice against discrete and insular minorities." There may be a special condition, according to Justice Harlan Stone in his famous footnote four, "which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[59] While that protection included religious and ethnic minorities, Epstein writes, it tends to greatly exclude those who seek to pursue and preserve their property rights – not under the Due Process Clause, nor the Equal Protection, nor even the Takings Clause. The failure of the political process to protect basic rights does indeed require judicial correction, Epstein argues: "[T]here is nothing wrong with Stone's instinct that the court must intervene in those cases in which the political process breaks down. Nor is there any reason to quarrel with his view that the breakdown of the political process was must acute and least defensible in the areas of race and religion that he identified in *Caroline Products*." It should be just as easy to identify "the victims of oppressive legislation are large corporations that lack inside political clout" as it is the victims or racism and religious bigotry.[60] True, it is much easier to identify discrimination against ethnic and religious minorities, and it invokes far greater feelings of national guilt and longing for redemption. But those groups are no

[59] *United States v. Caroline Products Co*., 304 U.S. 144, at 152.
[60] Richard A. Epstein, *How the Progressives Rewrote the Constitution* (Washington D.C.: Cato Institute, 2006), pp. 114-115.

better off, and the Court has no more fulfilled its essential function, when others are still oppressed without a second thought simply because their associations are economic. Hostility toward "the rich," it seems, is always justified.

It may be merely an act of prudence to say that economic rights deserve an equal place alongside civil rights and liberties. But there seems to be more than mere prudence involved in the libertarian reading of the Lochner Era: economic liberty is little more important than reproductive privacy; they are not concerned with the goodness of economic freedom nearly so much as giving it a fair place alongside the Court's current duty to protect civil rights and personal liberties. This is quite different from the view that sees economic liberty as the bedrock for the purpose of government – one which looks to checks and balances and representation as the way to ensure government neutrality, rather than the sole power of judicial review, and which also sees the Court's intervention as a way of *returning* to those timeless principles rather than a way to expand the "baseline" to the rights that free-market-types happen to prefer.

It is better, in David Bernstein's view, to establish precisely why property rights are so essential. Gillman's interpretation of the Lochner Era, however insightful about the Court's concerns over government neutrality, is not quite immune to Sunstein's criticism: such neutrality really is in favor of one interest group, however inadvertent that favoritism may be. Gillman's thesis sees only one side of the story: rather than aiming at the good, it focuses exclusively on the Court's avoidance of the bad – a wise precaution, to be sure, but not the highest purpose of a free government. Bernstein points out how such an inquiry would require the Court to scrutinize legislative motivation; yet "if classification was deemed arbitrary, legislative motive was irrelevant. What was

important was that legislative classification was either arbitrary on its face or reasonable people would deem it arbitrary." They were not as concerned with impartial regulatory laws nearly so much as the actual right that the minority was deprived of. The most important demonstration of this comes from *Lochner v. New York* itself. It would have been easy to construe the legislation in question as "class based": large bakeries benefited from sinking their smaller competitors through the regulatory laws; they could afford to comply with the hours legislation. But this, Bernstein writes, is simply reading a narrow hypothesis into the Court's words. Class legislation was certainly an issue, but it was not the only issue, nor was it the thing that made the statutes unconstitutional. "When the Lochner Court did invalidate regulatory legislation, it consistently relied on liberty of contract arguments under the Due Process Clause rather than class legislation arguments under the Equal Protection Clause." After *Lochner*, the Court "relied on due process as the basis for protection of fundamental rights such as liberty of contract against arbitrary legislation," meaning that the "equality component of due process was minimal, if it existed at all."[61]

To treat the Lochner Court as Gillman does, according to Bernstein, is to fall into the same trap as many other modern theories of historical deconstruction – again, a trap fundamentally no different from Sunstein's attempt to concoct a "useful history" for present purposes. The ideas that the Court sought to protect were the precepts of free government that the Founders left them – precepts that are not created, but discovered. They can be rejected and denied for the sake of "better" things; but those who do the denying in practice must accept what follows: that there is no basis for liberty in any sense. This was what the Supreme Court was after in the Lochner Era, according to

[61] Bernstein, pp. 28-29.

Bernstein. "The Supreme Court's desire to protect fundamental liberties under the Due Process Clause primarily motivated its *Lochner*ian jurisprudence," he writes. The justices followed the same legal philosophy as all judges before them, knowing that the United States "had an unwritten constitution, one that complimented and supplemented the written document." Government had practical constraints, as Gillman points out; but it was "constrained by *both* the written Constitution and unwritten natural law." Where the practical limits on government protected rights to some extent the true genius of the system was when the judiciary, even at the state level, "was the ultimate guardian of American constitutional liberty."[62] The Supreme Court was as sworn to protect the philosophic constitution just as the written one, according to Bernstein – and this included the fundamental right to property, and the liberty of contract that ensured that property.

Much to their credit, Bernstein writes, the Justices of the Lochner Era knew that there was a danger in this approach to judicial review. Justice Holmes' criticism was at least partly legitimate, contrary to Gillman's claim that it was, "to a large extent, somewhat beside the point."[63] It was not that the Constitution embodied no specific theory; were that the case, as Holmes saw it, judicial review would actually be the "potential for fundamental rights jurisprudence to allow judges to read their own views into constitutional law," Bernstein says. Instead, it embodied, and continues to embody, a specific philosophy of rights, and a clear view of that philosophy was the thing that was sure to constrain judges – or, more importantly, constrain state and national legislators

[62] Bernstein, 32.
[63] Gillman, 131. He continues: "[W]hile the Constitution was not intended to embody a particular economic program, it most certainly rested on clearly articulated assumptions about the proper relationship between state and society, and it was on that basis that the majority struck down the act." Ibid.

when the need arose. The Court was simply applying the first principles of free government when it struck down such legislation, not enforcing their own values. "Lochnerian jurisprudence was therefore tempered by the norm that the scope of judicially-enforceable fundamental rights, including liberty of contract, needed to be limited to what was necessary to maintain practices and norms that were essential to the establishment and growth of [Anglo-] American society."[64] Thus, Howard Gillman's popular revision of the Lochner Era is flawed, focusing on only a small aspect of the Court's task at the expense of its true intent – or worse, claiming to understand the Court better than it understood itself by imposing a pet theory onto the Court's actions while all the while ignoring its words.[65]

Bernstein's interpretation of the Lochner Era is considerably wiser than the conventional libertarian defense. Fundamental rights are real, he claims, yet they need to be defended as aspects of the Constitution's intent. While others would simply vindicate Lochner by celebrating the modern Court's strong defense of "privacy," and then extending that privacy to include property rights, Bernstein reminds us of how property, and the liberty of contract, is something far greater: an expression of the spirit of modern republicanism, and what supports the basic precepts of free government. The Taft Court, or the middle part of the Lochner Era, "represented the last gasp of classical liberal principles in American public life for decades to come," he writes. Lochner re-affirmed the critical classical liberal foundations of the Constitution; yet those foundations "could not survive the strains of the Great Depression." All support among the intellectual

[64] Bernstein, 46.
[65] "Gillman's thesis suggests they were actually such sharp thinkers that they anticipated public choice theory by over fifty years by invalidating special interest legislation as class legislation," Bernstein writes. Ibid., 55.

classes failed, while the public increasingly called for radical government intervention. With this, "the Court's commitment to limited government classical liberalism seemed outlandishly reactionary to much of the public."[66] The Lochner Era Court sought to show the nation that there is only one baseline. It was latent in ancient and medieval political philosophy; it was revealed more clearly by classical liberals like John Locke and Adam Smith; it informed the most basic purpose of government for figures like James Madison and Alexander Hamilton; and it will continue to be the basis for all rights and liberties so long as the Constitution endures. There were good and sensible reasons for government regulation in the Lochner Era. The problem, though, was the progressive justification for that regulation: though such regulations came from democratically elected state legislatures, they allowed those regulations to affect the very precepts that made democracy possible. For this reason, the Court was compelled to review those laws, and ensure they were passed for reasons that did not undermine the purpose of the Constitution.

Still, for all his defense of that great tradition, Bernstein finds few purposes for the Court besides protecting fundamental rights. Privacy rulings, for instance, are no less important for the Court: they are simply guilty of using the idea of first principles in the wrong way, when they should focus on class legislation.[67] Bernstein's interpretation of the Lochner Era could be enhanced, I believe, by a more thoughtful reconsideration of the Court's practical concerns.

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[66] Ibid., pp. 51-52.

[67] *Griswold v. Connecticut* (1963), for instance, involved a statute that was "protected from repeal by the local power of the Catholic Church, to the detriment those who did not share the Church's view on the issue. As such, it was blatant special interest legislation, with a nagging establishment of religion issue as well." Had the *Griswold* Court looked to the Equal Protection Clause, he writes, the subsequent abortion cases would not be teetering on the pinpoint of privacy and "health exceptions." Ibid., 57.

Conclusion

In the historical legal literature on the Lochner Era, we witness two conflicting schools of thought. One is concerned with revising the conventional account of the Supreme Court's activity in order to show class legislation as the fundamental concern. The other seeks to affirm the conventional account on new grounds, vindicating the role of liberty of contract in the American constitutional system. David Bernstein looks exclusively to the fundamental rights in the *same way* that Howard Gillman looks only at the Court's scrutiny over class legislation. Here we find two essential components – the ends of government, and the means to those ends – avoiding each other in ways that prevent us from truly understanding the Supreme Court in the Lochner Era, much less the Court in our own time. This dissertation will be a study in the dual nature of the Court's jurisprudence in this era, one that combined both of these views. I believe both of these interpretations are correct, and that a clearer understanding of the Lochner Era depends on reconciling the relationship between the means and ends of government.

This convergence of "power" and "purpose" of government is no novel theory on my part, nor is it an attempt to explain the Lochner Era using the vast categories and schools of thought that dominate the modern academy. My thesis is instead rooted in classical republicanism as the American Founders would have known it. Republicanism was an ancient concept in the West, originating exclusively in classical political philosophy, which came to fullness in practice in the Roman Republic. Even as the Empire collapsed, the Republic's precepts were preserved and expanded in the political philosophy of Saint Thomas Aquinas and the Scholastics, and then given a new means of

preservation in the Enlightenment liberalism of John Locke and Adam Smith. It found both its practical and theoretical greatness, though, in the American Founding.

Classic republicanism endured through much of the nineteenth century, despite the general barrage of Jacksonian politics, and the efforts of the Antebellum South to redefine it along historicist lines. While it came into serious doubt in the years after the Civil War, classical republicanism remained the constitutional framework for the Supreme Court, when it first confronted state legislation that seemed to stretch "police power" quite beyond its true definition. That alone was hardly enough to declare it unconstitutional: republican government was not merely "limited" in its power, but could reach quite far beyond its constitutional restraints. (The history of the Roman office of Dictator gives abundant examples.) The question was not about degrees of power, but about the nature of government, and the underlying basis for all of its actions.

In short, this is the story of a transition from one era into another, or a metamorphosis of the American regime. The judges, legal scholars, political philosophers who were critical of that transition did not necessarily hold on blindly to an old world, but sought to make sense of a new one with the best tools they had. They wanted to vindicate the Constitution, and show it to be perfectly able to meet the needs of a modern progressive society. They wanted to show progressive criticism leveled against it was not founded – and that the progressive criticism leveled against the Constitution, and which inspired so many police power regulations, did not actually have the best interests of the people at heart. Perhaps they were mistaken. But we should find in this study at least some grounds for admiring their willingness to make a last stand in the face

of the inevitable, and the new social and political conditions that have been overtly hostile toward liberty.

Chapter 2:

Police Power and the Purpose of State Governments

Frederic Bastiat gives us the best glimpse into the classic definition of "police powers" in his electrifying (and very French) opening lines from his book, *The Law*:

> *The law perverted! And the police powers of the state perverted along with it* [sic]*! The law, I say, not only turned from its proper purpose but made to follow an entirely contrary purpose! The law become the weapon of every kind of greed! Instead of checking crime, the law itself guilty of the evils it is supposed to punish!*[68]

If this was true, Bastiat wrote, it was nothing less than a "moral duty" of critics like himself to call attention to it – to teach the true meaning of law, and what it means for law to rule. Police power, by his definition, is derived from a very basic right, which precedes all civil society: it is nothing less than self-defense for the right to life through the defense of one's property. This is what best informs the purpose of any legitimate government, in his view. "If every person has the right to defend even by force – his person, his liberty, and his property, then it follows that a group of men have the right to organize and support a common force to protect these rights constantly," he wrote. There can be no other reason why people might join a civil society; anything that does not meet this end is a fraud. All collective right was ultimately the sum of individual rights. The ability of the state to execute police powers came from the power of individuals to do so on their own; the state merely "acts as a substitute." "Force has been given to us to defend our own individual rights," meaning that such a force, once turned against the very people who granted it legitimacy, would plainly defeat itself. It would not be a bad government, by Bastiat's reasoning, but *no* government at all, meaning that citizens were

[68] Fredric Bastiat, *The Law: The Classic Blueprint for a Just Society* (Irving-on-Hudson: Foundation for Economic Education, 1998), 1. (Emphasis original.)

perfectly justified in overthrowing it. "Who will dare to say that force has been given to us to destroy the equal rights of our brothers?" he asked. "Since no individual acting separately can lawfully use force to destroy the rights of others, does it not logically follow that the same principle also applies to the common force that is nothing more than the organized combination of the individual forces?"[69] Police power, as Bastiat saw it, was the surest instrument for safeguarding liberty – which in his mind, made its "perversion" all the more horrific.

Yet how could Bastiat have called protection of property an exercise of "police power"? Consult any American Government college textbook today: police power is the authority of state governments to manage social welfare and public morals – concerns that stand quite apart from economics, which is primarily a national (and increasingly global) concern. Plainly, the term lacks a definition, and any attempt "to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts," according to Justice William O. Douglas. It was not that the definition had evolved or adapted to the times; it had simply become uncertain – so uncertain that it had no reason to be taken seriously. For this reason, not only the issues but the very definition, he wrote, "is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition."[70] Most modern Americans share Justice Douglas' point of view: police power is nothing more than an expression of pure legislative will over local affairs – that the very definition of police power itself is created, and not found. More recently, it is what Markus Dubber, writing for the *Buffalo Law Review*, called "the most expansive, least

[69] Ibid., pp. 2-3.
[70] *Berman v. Parker* 348 U.S. 26, at 32 (1954).

definite, and yet least scrutinized, of governmental powers." The arrangement that placed state authority exclusively at the local level "denied the federal government any police power of its own," he writes. The whole idea of police power "was inherent in the very concept of government"; yet the Founders maintained this while at the same time "erecting a government without that very power." Still, this has no disrupted the "rhetorical usefulness of the police concept over the past two hundred years. The clear assignment of police power to the states, and only to the states, dramatically simplified constitutional analysis. If it was police, it was the states' business."[71] This, of course, means for many Americans that police power can be a serious threat to the rights and liberties of citizens – that "the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of [state] government."[72]

I. Original Meaning of Police Power

A. Classic Definitions

The history of the word "police," though, shows that there was in fact a great deal more confidence about its meaning than Douglas believed. The word is itself comes from none other than the ancient *polis*, and the officials entrusted with maintaining it.[73]

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[71] Markus Dirk Dubber "'The Power to Govern Men and Things': Patriarchal Origins of the Police Power in American Law," in *Buffalo Law Review*, Vol. 52, No. 4 (Fall, 2004): pp. 1277; 1334.

[72] *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, at 772 (1986) (O'Connor, dissenting.)

[73] "Police" was closest in meaning to Greek *politicos*, who were not "politicians" as we think of them today, but the ones who held offices more essential to the general prosperity of the city. "The political partnership requires many functionaries," Aristotle wrote, "so that not all of those chosen by election or lot can be regarded as officials," i.e., as police officers, albeit in the classical sense. Some perform less essential functions, but others "are political and are either over all of the citizens with a view to a certain action… or over a part." Among the things that concern politics is, of course, "management of the household," i.e., economics, in the classical sense. *The Politics*, trans. Carnes Lord (Chicago: Chicago

For William Blackstone, police power was concerned with offences that directly affected the commonwealth, i.e., "those against the public police and oeconomy," he wrote. It is clear, though, that he meant "oeconomy" in the classical sense: it was the life of the home, where property and wealth was stored up by the accumulation of family members, meaning there was no separation at all between economic and moral considerations: the prosperity of the family is the prosperity of the commonwealth. These were the means "whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners," Blackstone wrote.[74] Yet he dealt with an understanding of police power that was a national concern; the question for the generation of revolutionary Americans, however, was not the direction of national police regulation, but its effectiveness, which they found above all at the local level, in state governments. For all of their differences with Blackstone (particularly over the existence of natural rights, as opposed to customary ones), the American Founders held much the same view when it came to the purpose of police power. Such regulation now came, not in the monarchy or the common law, but from state governments, which they made plain enough in their respective constitutions.

Those state governments, when they first formed in late eighteenth century, recognized how dangerous socio-economic inequalities could be. Carter Braxton's address to the Virginia state convention in 1776, for instance, shows how state

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University Press, 1984) 1299a15. Much of Justice Douglas' confusion, it seems, comes from his lack of awareness of "how many modes can exist," as Aristotle put it, and how to "fit the sorts of offices to the sorts of regimes for which they are advantageous" – let alone what police power means in a republican form of government. Ibid., 1299a10.

[74] William Blackstone, *Commentaries on the Laws of England, Volume IV* (Chicago: University of Chicago Press, 1979), 162. All subsequent Blackstone passages are edited into modern English.

governments sought to counter those disparities by encouraging a common prosperity. True, "in some ancient republics, [there] flowed those numberless sumptuary laws, which restrained men to plainness," he wrote – and worst of all, "equality by an equal division of property." Such schemes may be necessary in places with few resources, which were prone to the scarcity that frequently caused violent upheavals. But instead of relying on police power to put down the uprisings of class warfare, why not use it to preempt such problems by encouraging a general condition of common prosperity? Sumptuary laws, after all, "can never meet with a favorable reception from people who inhabit a country to which Providence has been more bountiful," he wrote – much less one experienced in the practice of a free market.[75]

The lay preacher Nathaniel Niles made a similar point in his popular treatise, *Two Discourses on Liberty*. Liberty was not simply the lack of obstructions to prosperity, "but rouses even indolence to action, and gives honest, laborious industry a social, sprightly, cheerful air," he wrote. "In contrast, "a *state* of slavery, sloth hangs heavily on the heels of dumb, sullen, moross melancholy." Such an obligation on the part of liberty caused a spontaneous civil order; it encouraged "every generous sentiment" in the public, thus freeing up the state from having to address civil upheavals that tended to disturb republics. "It discountenances disorder, and every narrow disposition," Niles wrote. "Thus the mind is fortified on all sides, and rendered calm, resolute, and stable." It fell, of course, to the power of the state to positively encourage such a condition of industry and overall self-reliance among all citizens, rich and poor alike. "In such a state, a free people

[75] "A Native of This Colony," in *American Political Writing During the Founding Era, 1760-1805, Volume I* (Indianapolis: Liberty Fund, 1983), 329.

will enjoy composure of soul and their taste will become refined."[76] A republican government, it seemed, was actually able to encourage the very condition among the citizens that made republicanism possible, and police power was the way to do it.[77]

James Wilson concurred, in his famous essay on the origins of property. It was in the interest of a republic – particularly for state governments, who would always be the front line against domestic factions, should they appear – to design police power in such a way that deterred potential violence. "Exclusive property," James Wilson wrote, "prevents disorder, and promotes peace." Private ownership and pursuit of property was not simply a moral imperative: it was the bedrock of a just society. "Without its establishment, the tranquility of society would be perpetually disturbed by fierce and ungovernable competitions for the possession and enjoyment of things, insufficient to satisfy all, and by no rules of adjustment distributed to each."[78] This, as the evidence shows, was precisely what state governments set out to do: their police powers, based on their "republican forms of government," were viewed as the surest safeguards of not only liberty but the overall stability of local affairs.

B. State Governments

Accordingly, the state of Virginia declared that citizens enter the compact in order to protect their property, and cannot "deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and

[76] Nathaniel Niles, "Two Discourses on Liberty," in *American Political Writings*, pp. 267-268.
[77] When the time came to deliberate about and ratify a new Constitution, this idea was still prominent: the whole point of a republican constitution was to create a system that was "vigilant and manly spirit which actuates the people of America – a spirit which nourishes freedom, and in return is nourished by it." Federalist # 57, in *The Federalist Papers*, ed. Charles R. Kesler and Clinton Rossiter (New York: Signet Classic, 1999), 350.
[78] James Wilson, "On the History of Property," in *Collected Works of James Wilson, Volume 1* (Indianapolis: Liberty Fund, 2007), 396-397.

pursuing and obtaining happiness and safety."[79] The state of Pennsylvania recognizes certain fundamental rights, also in Article I, "among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness"; the state of New Jersey also declares a natural right to "acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." All of these are stated in Article I of each constitution, to give only a few examples.[80] Each state "established a constitution for itself, and in that constitution, provided such limitations and restrictions on the powers of its particular government, as its judgment dictated," Chief Justice John Marshall later wrote in *Barron v. Baltimore* (1833). The Constitution's Bill of Rights was, of course, little more than a compromise over ratification, and that the truest securities of liberty were, once again, primarily in the states. The people framed their state constitutions in a way "best adapted to their situation and best calculated to promote their interests," he wrote.[81] For all of Marshall's constitutional nationalism, he was certain that questions of civil liberty were best protected by those institutions that were closest to the people.

This was, no doubt, a result of Marshall's experience in Philadelphia in 1787, where the delegates at the convention agreed that the protection of private property and

[79] Carter Braxton's address to the Virginia state legislature in 1776 shows the reason for state governments to always keep prosperity as their main goal. True, "in some ancient republics, [there] flowed those numberless sumptuary laws, which restrained men to plainness," he wrote – and worst of all, "equality by an equal division of property." Such schemes may be necessary in lands lacking in resources and, of course, untrained in the advantages of a free market. "[B]ut they can never meet with a favorable reception from people who inhabit a country to which Providence has been more bountiful," Braxton wrote. "A Native of This Colony," in *American Political Writing During the Founding Era, 1760-1805* (Indianapolis: Liberty Fund, 1983), 329.

[80] Even the more recent state constitutions include such wording, always at or near the beginning of Article I. The Alaska constitution, for instance, says that all citizens have a natural right to the "enjoyment of the rewards of their own industry," and Hawaii's constitution declares certain unalienable rights, which include not only the "enjoyment of life, liberty and the pursuit of happiness," but the "acquiring and possessing of property."

[81] 32 U.S. 243, at 247 (1833).

the right to acquire it was best left to local institutions at the state level. At one point, delegates proposed that among the enumerated powers of the national government, the Constitution should include the authority "to make laws binding on the people of the United States in all cases which may concern the common interests of the Union; but not to interfere with the Government of the individual States in any matters of internal police which respect the Govt. of such States only, and wherein the general welfare of the U. States is not concerned." Gouvernor Morris opposed this, claiming that "[t]he internal police, as it would be called & understood by the States ought to be infringed in many cases, as in the case of paper money & other tricks by which Citizens of other States may be affected."[82] Elsewhere, he insisted that the Chief Executive should appoint a "Secretary of Domestic Affairs," who would "attend to matters of general police." It was almost an inverse New Deal: an executive power to protect the liberty of contract on a national scale. Such an administrator would include "the State of Agriculture and manufactures, the opening of roads and navigations, and the facilitating communications [throughout] the [United] States."[83] It was Edmund Randolph – the architect of the Virginia Plan – who led the rejection of that proposal. "This is a formidable idea indeed," he wrote. "It involves the power of violating all the laws and constitutions of the States, and of intermeddling with their police."[84] The clause, of course, was soon dropped from the Constitution altogether: there was no need to restrict the national government's interference with police power when it could simply be ignored – or better yet, when the national government could focus its attention only on the property that

[82] July 17.
[83] August 20, 1787.
[84] July 17.

passed through "commerce with foreign nations, and among the several states, and with the Indian Tribes," according to Section 8.[85]

C. Ratification and Union

The Anti-Federalists rarely explained what they meant by "police," though the fact that it was always referred to as "internal police" is revealing. It was internal, of course, because the state governments in question were closest to the people; hence, whatever regulations they imposed were drafted by officials the people themselves had elected. It was inconceivable for those of the Founding generation that a large, consolidated nation could ever ensure a just protection of property, precisely because they could not practice an effective police power. The "Impartial Examiner," as one dissenter called himself, agreed. Under the Articles of Confederation, he wrote, "the internal police of each [state] is left free, sovereign and independent: so that the liberties of the people being secured as well as the nature of their constitution will admit; and the declaration of rights, which they have laid down as the *basis* of government, having their full force and energy, any farther stipulation on that head might be unnecessary."[86] No matter what its stated guarantees or its means of ensuring the liberty of American citizens generally, a national government placed over states was a threat to liberty, above all, because it would stifle the abilities of the states to do those things well enough on their own. Not only was it unnecessary to require a national government to ensure the basics of liberty at the local level; it was also to invite the sort of incompetence that causes

[85] This echoes Aristotle, who saw proximity as the most important aspect of effective officials. "In large cities one can and should arrange to have a single office to handle a single task," he wrote. "In small cities, however, many offices are necessarily brought under a few persons" – a few who know the city's affairs better than a single autocrat. *Politics*, 1299b1.
[86] Letter I, Feb. 20, 1788.

despotism. Broad, national regulations, even when designed to protect rights, would no doubt be a threat to liberty. It was therefore best to leave those affairs at the state level.

None of this should be taken as an argument in purely in favor of the Anti-Federalist position, much less ideas about nullification or "state sovereignty" as they appeared in the nineteenth century.[87] It was simply the realization among many early Americans that states were more effective at protecting basic rights than the national government. Alexander Hamilton, though hardly a proponent of state authority, nonetheless agreed with his opponents on this point: the powers of the proposed national government were not directly concerned with the protection of basic rights. Those holding office at the national level, however powerful on the international scene, would still operate on a plane that had little to do with local affairs. The legislative and executive offices were meant to attract ambitious and "energetic" individuals – and it was this very ambition that would prevent them from bothering state governments. "The regulation of the mere domestic police of a State appears… to hold out slender allurements to ambition," he wrote. With Gouvernor Morris' proposal in mind, he assured the Anti-Federalists that "the supervision of agriculture and of other concerns of

[87] It is worth remembering that the strongest supporters of state supremacy did not view their states as merely the guardians natural rights; they instead held "that all the rights, powers, and immunities of the whole people come to be attributed to the numerical majority," as John Calhoun would later put it. *A Disquisition on Government* (Indianapolis: Bobbs-Merrill Co., Inc., 1953), 24. While checks on political power and protection of rights were important, it was far more important to recognize the origin of rights in the states, which for Calhoun and his colleagues, meant the collective creation of rights. This could only happen, though, in a small community – ideally, a state, as opposed to a national government. Good government "assigns to power and liberty their proper spheres," Calhoun wrote. "To allow to liberty, in any case, a sphere of action more extended than this assigns" – i.e., a national sphere of liberty – "would lead to anarchy; and this, probably, in the end, to a contraction instead of an enlargement of its sphere. Liberty, then, when forced on a people unfit for it, would, instead of a blessing, be a curse," he wrote. It was true enough for the Founders that a people had to live up to their liberty: there were certain social conditions that made it possible, and without them, it would be a disaster. But Calhoun did not see that achievement as a matter of self-government and individual character; it was instead the noble citizen's ability to make that standard for himself – to create his own end. Without this, he wrote, "no people can long possess more than they are fairly entitled to." Hence, government did not exist to protect rights nearly so much as to give them, or to be the instrument by which the people gave those rights to themselves.

a similar nature, all those things, in short, which are proper to be provided for by local legislation, can never be desirable cares of a general jurisdiction."[88] This, Hamilton held, was for the people to resolve. For all his cynicism about democracy, he still seemed to understand the character of the American people, who are "entirely the masters of their own fate." For this reason, they knew the means by which corrupted states governments could be resolved: "Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government." The people, "by throwing themselves into either scale," would use both federalism and nationalism as "instruments of redress."[89]

But his colleague, James Madison, knew which direction that scale would usually lean: "The State governments will have the advantage of the Federal government," he wrote, especially because of "the powers respectively vested in them," which would ensure the "predilection and probable support of the people." State governments were, after all, closest to the people, who were always the surest defenders of their own liberty. This confirmed the classic definition of police power: the protection of liberty occurred through popular local institutions, "which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State."[90] The constitution was ratified in large part because of the people's recognition of all the things that the proposed national government would *not* do; it would allow their state governments to operate on their own to protect their rights through their institutions that would ensure their neutrality.

[88] Alexander Hamilton, Federalist #17, in *Federalist Papers*, 114.
[89] Federalist # 28, in Ibid., 176-177.
[90] James Madison, Federalist #45, Ibid., 287; 289.

It was obvious, of course, that there would be instances when "instrument of redress" would fail – and when the national government would have to become involved in local affairs. The quick and peaceful end to the Whisky Rebellion proved that well enough, if not the calm and logical Supreme Court ruling in *M'Colloch v. Maryland* (1819). But in all cases, Hamiltonian nationalism had the same objective: if it ever happened that the United States government over-rode state authority, it did so only in order to correct states by the states' own principles. It was not meant to permanently usurp state governments, which happened in the New Deal Era or, as some would argue, through modern judicial review in the later twentieth century. It was instead a far more pointed goal: to bring a state (or a group of states) back to the purpose for which states are intended – and then proceed with national concerns. Perhaps this would involve certain protections of rights. "Executive energy" in particular was designed for "the protection of property," according to Hamilton. But that protection was attained, he wrote, when the government exercised its power "against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice," and the "security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy."[91] When the course of justice was restored, ambition defeated, and factions put down – then the national government could return to its intended purpose.

All of his proves how Justice Douglas' claim about the ambiguity of police power is not true in light of the historical evidence. State governments, it appears, had a specific purpose when it came to their police powers: they existed to protect the right of citizens to keep and pursue private property, and to involve the national government only when necessary.

[91] Federalist #70, Ibid., 421.

It may be overly simplistic, or even laughable, to view states in such a way, given the sad history of their governments since the Founding, and especially since the Civil War. Perhaps they were doomed to fail over time – creating monopolies and Black Codes on one hand, and then slowly giving way to incorporation into the national government on the other. It was, of course, a tremendous gamble to say that such institutions, so closely tied as they were to popular factions and mob impulses, could maintain such protections of liberty, or even the basic Article IV requirement of a "republican form of government."

It may very well happen, many knew, that states might abuse their power over the people. "The despotic power," Justice William Patterson later wrote, was defined entirely as "taking private property." Hence, the opposite of despotism, the practical and most prominent feature of liberty, could only be the protection of property. Patterson knew, though, that such taking of property "exists in every government," because "the existence of such power is necessary; government could not subsist without it" – i.e., governments must have the power to tax. For this reason, he wrote, such a power "cannot be lodged any where with so much safety as with the Legislature. The presumption is, that they will not call it into exercise except in urgent cases, or cases of the first necessity."[92] Whether or not it was truly a necessity was for the people, above all, to decide. Yet that sort of legislative process could only occur in a government that was close to the people, as only the states were.

[92] *Vanhorn's Lessee v. Dorrance*, 2 U.S. 304, at 311 (1795).

D. Police Power in Practice

Many Americans turned their attention to France (as many Frenchmen turned attention to America) in an effort to understand what makes a successful revolution. The final outcome of France's failure was, of course, the "universal perversion of the law," as Bastiat wrote, where "instead of checking injustice," the law becomes "the invincible weapon of injustice."[93] Yet Bastiat did not see the necessary cause of that condition: it was simply the national scope of the French government. Bastiat's homeland had always been far more nationally than locally minded, and it was, by the early nineteenth century, growing to a vast bureaucratic order. Joel Barlow, an American businessman, seized on Bastiat's missing ingredient during his visit to France in 1805. Like Bastiat, he recognized that with a civil society, "personal strength becomes no longer necessary to personal protection"; at the same time, though, "it is a general maxim, that individual safety is best secured where individual exertion is least resorted to," whether because the government is too weak to protect citizens, or too powerful to control itself. But Barlow went on to recognize the value of American federalism, and the ability of states to ensure the basic protections of citizens. "The few men to whom the government of a state must be confided, cannot extend their knowledge nor multiply their attentions to such a degree as the affairs of a great people would require," he wrote. "France, in her present limits, presents a mass of population and territory sufficient for at least twenty integral and well constituted states." The French Assembly, while numerous, was still encumbered with full scope of national business, which it could not possibly manage on its own: "not half the affairs which are necessary to the people are ever brought up for its deliberation," he

[93] Bastiat, *The Law*, pp. 6-7.

wrote. "This republic, for the purposes of interior or local legislation and police, should be organised into about twenty subordinate republics," i.e., like the American states.[94]

This was the outlook of even the most nationally-minded Americans. Though a thoroughgoing Federalist and champion of constitutional supremacy, Chief Justice John Marshall could see well enough that states did have a distinct purpose, which was best omitted from national concerns. The national government, while "limited in its powers," was "supreme within its sphere of action." Its relationship with the states, according to Marshall, "would seem to result necessarily from its nature." "The people of a state," he wrote, "give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituent over their representative, to guard them against its abuse."[95] It was, of course, the Sixteenth Amendment that complicated the nature of taxation in the twentieth century. But in Justice Marshall's day, such policies were a clear indication of the purpose of state governments – the only institutions that could tax directly because they consisted of officers closest to the people. To assume, as he did, that the national government has a distinct nature is to assume the same thing about state governments. In light of the Constitution's specific function, he wrote that it was "neither necessary nor proper to define the powers retained by the states," because it was simply understood, and required no explanation from the Court. "These powers proceed, not from the people of America, but from the people of the several states," he wrote, "and remain, after the adoption of the constitution, what they were before, except so far as they may be

[94] Joel Barlow, "To His Fellow Citizens of the United States. Letter II: On Certain Political Measures Proposed to Their Consideration," in *American Political Writings*, pp. 1100-1104.
[95] *M'Culloch v. State of Maryland*, 17 U.S. 316, at 405; 428 (1819).

abridged by that instrument." Much of Marshall's teaching is vague, at least when it came to state police power and its relationship with property. But this much was certain: that the Court should "consider the power of the states as existing over such cases as the laws of the Union may not reach."[96]

Justice Douglas' claim about the vagueness of police powers, which is shared by many, is not latent in the term itself, but in the way it developed through the course of the twentieth century. It was due to a growing lack of confidence in the purpose of republican government, on both the state and national level. The assumption, of course, was that some rights were so fundamental – "older than the Bill of Rights… older than our political parties, older than our school system" – that their surest protection could only come from the federal government, and the Supreme Court in particular.[97]

But for the Supreme Court in the Lochner Era, the meaning of police power was still quite clear – even as conditions changed in such a way that made that definition more difficult to apply. The essential question for the Court was this: if state police power is broken in such a way, or if it fails to meet its pre-existing goal, on what principle is it corrected? Does it depend on permanent incorporation into the national sphere? Or is it a matter of returning state governments to their own first principles?

II. The Fourteenth Amendment and Police Power

There was, of course, one major outlier in this common understanding of police power: Chief Justice Roger Taney. Justice Marshall left it vague because it was universally understood; but Taney gave police power the strongest definition it had ever

[96] *Sturges v. Crowninshield*, 17 U.S. 122, at 192-193; 195 (1819).
[97] *Griswold v. Connecticut*, 381 U.S. 479, at 486 (1965).

received from the Court in the *Charles River Bridge* case (1837) – and in doing so, he introduced a view of government that diverged from the old way, would trouble the Supreme Court's treatment of the issue for decades. It was "the object and end of all government," he wrote, "to promote the happiness and prosperity of the community by which it is established; and it can never be assumed, that the government intended to diminish its power of accomplishing the end for which it was created." Happiness and prosperity clearly had nothing to do with rights or freedoms, at least in Taney's mind. They depended instead on the unrestrained and absolute power of the people, exercised through the instrument of a state government. Any appeal to rights, even of the most basic economic kind, would stifle freedom – albeit freedom understood as an assertion of power. "While the rights of private property are sacredly guarded," Taney wrote, "we must not forget, that the community also have rights, and that the happiness and well-being of every citizen depends on their faithful preservation." Even if there were natural rights, they could not be used to second-guess the community's general interest. This meant that a state was quite within its legitimate authority to favor one part of society over another – in this case, granting exclusive privileges to the proprietors of the Charles River Bridge in the state of Massachusetts. He concluded that the Court cannot "take away from them any portion of that power over [the states'] own internal police and improvement, which is so necessary to their well-being and prosperity."[98]

[98] *Charles River Bridge v. Warren Bridge*, 36 U.S. 420, at 548-549; 552 (1837). Justice Taney's view of "state sovereignty" would later develop into the progressive state government of the Lochner era; it would go from the absolute right of states to manage their own affairs to the ability of social reformers to experiment on the public. "Denial of the right to experiment may be fraught with serious consequences to the nation," according to Justice Louis Brandeis. But it was "one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, at 311 (1932). (Brandeis, dissenting).

If the Thirteenth Amendment was designed to cancel the affect of Justice Taney's other infamous opinion in *Dred Scott v. Sanford* (1857), then the Fourteenth Amendment could be said to address this view of police power in the *Charles River Bridge* ruling. The Amendment empowered Congress to repair state governments according to the states' own first principles, i.e., that a state exists to protect the rights of individuals. Communities certainly had rights, as Justice Taney saw it; but those broad political rights were only legitimate if they favored the whole population, rather than a single part – not in terms of public benefits as a bridge would provide, but in terms of the right to keep and pursue property. It was a goal far greater than resolving the ill treatment of former slaves. The Thirteenth and Fifteenth Amendments did that well enough (with the government's limited ability, at least), emphasizing the racial aspect of factional state laws. But Congress understood that its future ability "to enforce, by appropriate legislation, the provisions of this article," as the Amendment says, depended on a much broader understanding of rights, and privileges – one that transcended race, and established a clear view of citizenship. This was a result of the lesson of the Civil Rights Act of 1866.

The act, which passed over President Andrew Johnson's veto, embodied the same wording and general structure as the later Amendment, still acknowledged of racial problems: while it nationalized citizenship, it also said in Section 1 that such citizens, "of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States." It was clear, though, that the goal of those protections found their basis in economic rights.

Former slaves now had the right "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens," according to Section 1.

In his veto message, President Andrew Johnson wrote that it would certainly result in an "absorption and assumption of power by the General Government which, if acquiesced in, must sap and destroy our federative system of limited power, and break down the barriers which preserve the rights of the States." What was worse according to Johnson was how the bill "proposes a discrimination against large numbers of intelligent, worthy and patriotic foreigners, and *in favor of the negro.*" The very awareness of African-Americans in the bill was no doubt "made to operate in favor of the colored against the white race," and by doing that, "the tendency of the bill must be to resuscitate the spirit of rebellion, and to arrest the progress of those influences which are more closely drawing around the States the bonds of union and peace." Johnson's objection was obviously fueled by the usual racism of the time, which saturated much of his other writings and speeches. (The legislation sought "a perfect equality of the white and colored races," he wrote.)[99] But despite his bigotry, he brought attention to an important point: no matter how severe the oppression, no matter how grave the injustice, civil rights legislation is not meant to favor one particular class of citizens over another. Such policies are legitimate when their goal is general; it must be broader and more basic than mere social inequalities.

Congress certainly had these things in mind when it drafted the Fourteenth Amendment. They omitted any specific reference to race, and sought to ensure the most

[99] Andrew Johnson, "Veto of the Civil Rights Bill," March 27, 1866.

general guarantees, i.e., "life, liberty and property." The only way to solve the problem of racial discrimination was to envelop the injustice of "Black Codes," thus correcting it according to a much broader and more fundamental understanding of rights. Ideally, this meant *natural* rights, or the sort that all human beings had *as* human beings. This was not President Johnson's objective, but it certainly presented the challenge that any new Amendment had to include if it was to protect former slaves in a just manner. In this case, the Amendment (and ensuing legislation) should be greater than negative feelings that come from slavery and segregation by helping African-Americans, on the one hand, *and* appealing to even the most racist white supporters of Johnson on the other.[100]

This explains the simplicity of the provisions of the Amendment's Section 1: citizenship is nationalized; state laws cannot abridge privileges and immunities; "nor shall any person be deprived of life, liberty, or property without due process of law"; nor shall any state deny persons of "equal protection of the laws." It was a remarkably calm and simple set of provisions, given the extremism tendencies of the Reconstruction Era Congress.[101] But more importantly, it was a calm that gave way to careful thinking about how to best correct state governments: the task was to bring them back to their true purpose, i.e., to protect the ends of government through due process guarantees of "life,

[100] The opinion in *Plessy v. Ferguson* (1896) was a tremendous misuse of that principle. Justice Henry Brown could perceive no difference between the disapproval of segregation on equal protection grounds and mere emotional distaste for it among African-Americans. Such laws did not give a "badge of inferiority," he wrote, came only from how "the colored race chooses to put that construction upon it," he wrote. The assumption here, according to Justice Brown, echoed President Johnson's point: legislation that seeks to extend civil rights only to African-Americans will no remedy the problem, but simply favor that particular class over everyone else. "If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals." 163 U.S. 537, at 551. But Brown was mistaken about the Amendment's true intent, which was to correct the error of the Civil Rights Act: to seek a basis for equality that was more fundamental than race alone.

[101] Consider also the modest punishments placed on the South in Section 3: only those who had "engaged in insurrection or rebellion" were forbidden from entering public office, though Congress could remove such restrictions by a two-thirds vote in each house for the truly repentant.

liberty and property," and then protect the proper means of attaining those ends through equal protection, which would prevent class legislation. It was, again, a principle that was meant to be realized in the states; the national government's involvement, whether thought legislation or litigation, was only meant to set things right according to a universal view of justice.[102]

B. Theory in Practice

But here is the problem: the Constitution was not meant to make such universal things explicit. As all the evidence of the Convention and the ratification debates shows, it was meant to deal only with broad questions of national interest, stated in terms of distinctly positive law. The particulars of moral philosophy and political theory, much less natural or God-given rights, were no less important; but they were best kept in the realm of public consciousness, and general understanding among a free people. They were premises, not conclusions: they were "settled usages and modes of proceeding"[103]; they constituted the "basis on which the whole American fabric has been erected, and, "so established are deemed fundamental," and were "designed to be permanent."[104] To

[102] The modern understanding of justice reverted back to the "preferred class" approach in later years with the rise of twentieth century affirmative action policies in state universities. Setting things right was not a matter of looking to universal precepts of justice; it was instead a matter of correcting past wrongs through policies that explicitly favored minority students. The Supreme Court never supported it on that basis, of course; it always maintained Justice Powell's "diversity" standard in the interest of the institution. But according to Justice Thurgood Marshall, there was no ignoring the "legacy of unequal treatment." Such a troubling history required the Court to "permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America." It was only when at legacy was corrected that we could begin to discuss justice meaningfully. "I do not believe that anyone can truly look into America's past and still find that a remedy for the effects of that past is impermissible," he wrote. *Regents of the University of California v. Bakke*, 438 U.S. 265, at 401-402 (1978). Just how long or to what degree public institutions should favor one group over another has never been entirely clear.

[103] *Murray's Lessee v. Hoboken Land Improvement Co.* 18 Howard 272, at 282 (1865).

[104] *Marbury v. Madison*, 5 U.S. 137, at 76 (1808). The bedrock principle of those rights was, of course, the right to keep and acquire property. There were "certain vital principles in our free Republican

make those precepts explicit in the document itself, as the Fourteenth Amendment does, is to invite a great deal of complexity. Like many other clauses in the Constitution, they are stated in broad ambiguities. "If the controversy about the meaning of its provisions, which existed from the first case in which it was interpreted, was partly the result of the defects or limitations or preference of its interpreters, it must also, to some extent, be blamed on the defects of the draftsmanship," Christopher Wolfe writes.[105] But those ambiguities were there for a reason: like many clauses in the Constitution – that Congress shall do whatever is "necessary and proper"; that the President shall "take care that the laws be faithfully executed"; that the Constitution itself shall be the "supreme law of the land" – the Fourteenth Amendment was meant to offer flexibility.

It is one thing to give Congressional or Presidential power a broad, sweeping grant of authority, especially when the institutions are elected by the people and then pitted against each other in a system of checks and balances. It is quite another thing to place substantive rights explicitly in the domain of positive law. This leaves far fewer chances to declare something a "political question," and it creates far more serious responsibilities for the Supreme Court. Most of the Court's earlier statements about "fundamental laws" and "natural rights" and the "fabric" of our republic appeared in dictum, or words that were not essential to the outcome of the case. But now, it would become an essential interpretation of the law of the land, and open up vast new precedents. "The historic irony is that the ambiguity of the Fourteenth Amendment,"

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governments, which will determine and over-rule an apparent and flagrant abuse of legislative power," Justice Samuel Chase wrote. To not review laws that sought to restrict this right would "authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof of the government was established." *Calder v. Bull*, 3 U.S. 386, at 388 (1798).

[105] Christopher Wolfe, *The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law* (Lanham: Rowman & Littlefield Publishers, Inc., 1994), 141.

Wolfe writes, "which should have served to minimize judicial review, has become instead the very basis for judicial review."[106]

III. Origins of Police Power Jurisprudence: *The Slaughterhouse Cases*

In the years leading up to the Court's first stand-off with state regulatory laws, the justices held to the classic definition of police power as it had been handed down to them – and, of course, in opposition to Justice Taney's distortion of that definition, which the Fourteenth Amendment had plainly cancelled. They emphasized that state police power had its own specific aim: it was, again, meant to protect private property and the right of citizens to acquire that property.

Obviously, state and local governments had a legitimate interest in regulating the misuse of that right; business practices could be harmful to public health and morals, and require state intervention to prevent it from threatening public health and safety. The transportation of flammable lamp-oil, for instance, required cautious state laws. "Standing by itself, it is plainly a regulation of police," Chief Justice Samuel Chase wrote, meaning that Congress had no authority to regulate it, no matter how serious the public interest was. "As a police regulation, relating exclusively to the internal trade of the State, it can only have effect where the legislative authority of Congress excludes, territorially, all State legislation, as for example, in the District of Columbia. Within State limits, it can have no constitutional operation."[107] But many times in this era, the Court went further and recognized this is the mere surface of state police power: far more important was its ability to protect property and trade.

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[106] Ibid., 143.
[107] *U.S. v. DeWitt*, 76 U.S. 41, at 45 (1869).

A. Appeals for Constitutional Protection

The Slaughterhouse Cases involved what appeared to be a standard safety concern: city butchers could not dispose of large amounts of animal remains without creating a serious threat to public health, especially in the sub-tropical environment New Orleans. The state therefore required them to take their livestock to a central location with all the necessary facilities to dispose of waste in a safe and clean manner – a slaughterhouse owned and operated by a single company. While it was a sensible regulation, such a law revealed a clear threat, not only to business, but to everyone, the butchers claimed: the regulations tended to violate the most basic goal of good government by favoring one interest (the company-owned slaughterhouse) over all others.

But why exactly did so many object? Attorney John A. Campbell's amicus brief (which was so important that the Court included the entire text in the actual *Slaughterhouse* opinion) seems to have offered the objection that prevailed when the Court finally struck down many state regulatory laws. Campbell and his associates saw something far worse than a treat to public health: a menace to the common good, as the regulations tended to violate the most important guarantees of the Fourteenth Amendment. No state, the law said, shall "deprive any person of life, liberty, or property, without due process of law." The "process," in this case, had singled out one special interest – the slaughterhouse – over all others. In doing so, it may not have infringed on the right to property; but it certainly limited the "liberty of contract," "discovery," – i.e., the ability to *acquire* property. Such protections were not yet viewed as "substantive."

While the right to keep wealth was clear in his mind, Campbell was focused primarily on the means to that end – "that every man has a right to his own faculties, physical and intellectual, and that this is a right, one of which no one can complain, and no one deprive him," he wrote. Accordingly, all laws relating to that process had to conform to a predictable pattern – a "due" process, expected of any government worth calling "just." Hence, the basis for Campbell's objection: "The act was a pure MONOPOLY; as such against common right, and void at the common law of England. And it was equally void by our own law." Campbell also pointed out how many state constitutions explicitly outlawed government-sponsored monopolies, because "every species of exclusive privilege is an offence to the people."[108]

While monopoly was certainly a concern, Campbell's brief was far more focused on the "fundamental rights" aspect of the law. The mandate of the Fourteenth Amendment, he argued, was "universal in its application to persons of every class and every condition." It was "the right to labor… and to the product of one's faculties," which resulted in no ordinary product, but "property of a sacred kind." The Amendment, as Campbell and his associates claimed, was "made under an apprehension of a destructive faculty in the State governments," which could easily destroy those rights. "It consolidated the several 'integers' into a consistent whole," meaning that the reason for federalism, either in the Founders' sense, or in the Southern "states rights" view, was long gone. Though the Amendment was designed to emphasize certain points about national authority over the basic rights of citizens, it rendered the purpose and even legitimacy of state governments quite dubious. The Amendment's language was hardly

[108] Ibid., 48-49.

"confined to the population that had been servile"; its guarantees were, after all, not for members of groups, but for individual persons.[109]

That was the extent of Campbell's concern. At best, states took preventative measures against their own abuses of power; the possibility that police power was itself meant to *encourage* a certain level of economic well-being was not at all on Campbell's mind. There was no end of any importance, in his view, for state governments; he was quite uninterested in whether or not the states were fulfilling their intended purpose through the police powers.

B. Dissents: The Court's Power Over the States

The Court, of course, did not side with Campbell and the butchers. In response, though, the dissenting justices raised the "fundamental rights" view of the Constitution to

[109] Ibid., at 52; 54. It was a strange argument, coming from a man who had been so involved in the Confederacy during the Civil War. The truth is, of course, that Campbell did not care at all about the butchers, much less the right to property of liberty of contract. His aim was instead "to employ the new constitutional realities of Reconstruction as a legal weapon to bring about its ultimate demise." Ronald M. Labbe and Jonathan Lurie, *The Slaughterhouse Cases: Regulation, Reconstruction, and the Fourteenth Amendment* (Lawrence: University of Kansas Press, 2003), 183. Such litigation would shift the effect of the Fourteenth Amendment away from civil rights legislation: if the war had settled the power of the national government over the states, that power should at least concern itself with rights that would not cause the sort of dreaded "equality of the races" that so many white Southerners feared. Campbell's brief was obviously in reaction against the existing cases dealing with the various reconstruction acts, where the Court proved to be quite willing to allow even the most radical reconstruction laws to move forward. "Can the President be restrained by injunction from carrying into effect an act of Congress alleged to be unconstitutional?" Chief Justice Chase asked? The answer in a series of unanimous cases, decided by Abraham Lincoln appointees, was no. Clearly, from a Southerner's point of view, this called for a different approach to undermining the Amendment.

Some of the early pleading indicates the source of Campbell's argument. Reconstruction was not a political question at all, "but one of property, appropriate for judicial cognizance," wrote a certain Mr. Austin in a case that challenged the military occupation of Georgia. "The right of property was undoubtedly involved." The attorney based his argument, though, on a curious formulation of state sovereignty. In the new world, "where feudal tenures are abolished… the State takes the place of the feudal lord, by virtue of its sovereignty, as the original and ultimate proprietor of all the lands within its jurisdiction." *State of Georgia v. Stanton*, 73 U.S. 50, at 73 (1867). The Court, of course, responded with a simple denial of its own jurisdiction over this question. Such a simple solution would no doubt become greatly disrupted with the passage of the Fourteenth Amendment, which would be exploited in the same way by the likes of John Campbell. Campbell finally had his way several years later when the Court handed down *Plessy v. Ferguson* (1896), which cancelled the effect of the Equal Protection Clause by introducing the "separate but equal" doctrine.

even greater heights – an approach to jurisprudence that would introduce an entirely new view of constitutional law. Justice Field in particular was the classic defender of fundamental rights at all costs; though aware of the threat to health and safety, he remained certain that the right to property and liberty of contract were still "fundamental principles," which surpassed all other considerations – that "the State cannot be permitted to encroach upon any of the just rights of the citizens, which the Constitution intended to secure against abridgement." Field was concerned enough about monopolies and the usual problems of class legislation[110]; but, like Campbell, he was far more concerned about what he perceived to be the end of government, which was, again, the protection of fundamental rights. Yet, it was an end which, in his view, state governments were entirely unable to protect: there was no purpose to those governments other than very basic local concerns. The Fourteenth Amendment was meant to do nothing less than place all citizens "under the protection of the National government," he wrote. "The amendment does not attempt to confer any new privileges or immunities upon citizens, or to enumerate or define those already existing. It assumes that there are such privileges and immunities which belong of right to citizens as such, and ordains that they shall not be abridged by State legislation."[111] For the first time, it seemed clear that state police powers just might have very little to do with the fundamental rights of citizens. It fell instead to the national government to ensure them; to argue otherwise, according to Field, was to invoke the earlier views of rights as emerging out of state sovereignty, thus

[110] Justice Field was in fact open to the possibility of extreme class legislation, so long as it did not damage the right to property. He even stated that "[s]pecial burdens are often necessary for general benefits, – for supplying water, preventing fires, lighting district, cleaning streets, opening parks, and many other objects." *Barbier*, at 32.
[111] *Slaughterhouse*, at 87; 93; 96 (Field, dissenting).

reviving the political thought of John Calhoun, which had caused the Civil War in the first place.

State governments, he pointed out, were not competent to protect the sort of freedoms guaranteed to citizens anyway. The Fourteenth Amendment was meant for the "protection of every citizen of the United States against hostile and discriminating legislation against him in favor of others," he wrote, "whether they reside in the same or in different States." Even if state governments were meant to protect the rights of the individual, there was little they could do in the latter situation. It was better for the national government to secure these rights, and leave state governments aside. Justice Field based this view of the Fourteenth Amendment on the Declaration of Independence: rights exist by nature, meaning the purpose of government was to protect those rights. The Fourteenth Amendment, he wrote, did not draw from the intent of the Constitution or the political power of Congress; rather, it was intended to give effect to "inalienable rights, rights which are the gift of the Creator, which the law does not confer, but only recognizes." American political institutions were reliable enough when it came to protecting those rights; but according to Field, there was only one final safeguard: the judiciary itself. He insisted that "whenever this has occurred, with the exception of the present cases from Louisiana, which are the most barefaced and flagrant of all, the enactment interfering with the privilege of the citizen has been pronounced illegal and void."[112]

Justice Bradley reinforced this view in his own dissent, where he addressed the Court's role squarely: did it afford the butchers a remedy? He acknowledged that "[p]rior to the fourteenth amendment this could not be done," which meant that there was indeed

[112] Ibid., at 100-101; 105; 106.

a time when states were entrusted with the very duties that now fell to the Court. He wrote that the "protection of the citizen in the enjoyment of his fundamental privileges and immunities… was largely left to State laws and State courts, where they will still continue to be left unless actually invaded by the unconstitutional acts or delinquency of the State governments themselves." But such protections were never the fundamental safeguard, and it was clear that police powers had declined in their ability to fulfill their end. Indeed, it was possible that such an end was never fully present in the first place. It was instead the national government of the union that guaranteed both the fundamental rights of citizens and the means to those rights; it was the "the intention of the people of this country in adopting that amendment to provide National security against violation by the States of the fundamental rights of the citizen."[113] The structure of Section 1 of the Amendment made this clear enough: equal protection was the means to that end, since it prohibited class legislation and monopolies; due process would ensure that the end – that the right of property and the "liberty of contract" by which they might acquire it are protected. Justice Bradley therefore had at least some sense of the purpose of state governments: they had a role to fulfill in the lives of their citizens, which they shared with the national government. It was only time and circumstances that changed this.

C. Justice Samuel Miller: State Purpose and National Intervention

Justice Samuel Miller is best known for his restrained approach to judicial review, a broad definition of state authority, and an awareness that judicial involvement "would constitute this court a perpetual censor upon all legislation of the States," and that the Court would intervene only to maintain "a steady and an even hand the balance between

[113] Ibid., at 121-122. (Bradley, dissenting.)

State and Federal power," and nothing more.[114] For this reason, his *Slaughterhouse* opinion has received little more than shallow interpretation, from both his critics and his fans. Charles L. Black, for instance, writes that the ruling "was a judicial rehabilitation of the states, as semi-independent political entities, with inflexible legal claims of power." Reconstruction was not sufficient, it seemed; the supremacy of the national over the state governments was meant to become apparent inside the states as well: "nothing could have been so apt to give to that rehabilitation to firmness of unimpeachable legality as a judicial decision by a Court representing that very government that had just won a war vindicating federal supremacy." With this, "vast areas of state activity are stamped as legitimate."[115] At the same time, Justice Miller receives much praise for his "moderate" approach to judicial review of state laws, or what Chief Justice William Rehnquist called his "great gift of common sense." This made him the last remnant of a great legal establishment, which had far more to do with sharpening the legal mind to focus on positive law and clear facts, rather than philosophic abstractions. Having received such training, Miller "was able to emancipate himself from current fashionable intellectual dogma, which possessed much of his profession and many of his colleagues," Rehnquist writes, "and thereby to establish his reputation as one of the great justices who had served upon the Court."[116]

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[114] Ibid., at 78; 82.

[115] Charles L. Black, *The People and the Court: Judicial Review in a Democracy* (Englewood Cliffs: Prentice, 1977), 153-154.

[116] William Rehnquist, *The Supreme Court* (New York: Vintage Books, 2001) 99. It is worth considering how much Rehnquist's view of the legal profession actually diverged from that of William Blackstone, who opened his *Commentaries* with a lament about the scornful treatment of law among the "academics" in the universities. "[S]uch persons I am afraid either have not considered the constitution and design of an university or else think very meanly of it," he wrote. Law was for the vulgar, it was thought, and was therefore excluded from the liberal arts. But "[i]t must be a deplorable narrowness of mind, that would confine these feats of instruction to the limited views of one or two learned professions." Men trained in philosophy, it seemed, would make exceptionally good lawyers and judges, and the common law would

But a careful study of Justice Miller's *Slaughterhouse* opinion reveals more to his thinking than his latter-day critics and friends realize. Miller was not fearful of the new duties left to the Court at this time. Nor did he believe that the Fourteenth Amendment had no place function over state police power, or that it was the Court's obligation to allow state governments to do anything within their local spheres of authority. For Miller, the Amendment was in fact meant to bring state governments back to their intended purpose, which Campbell, Field, as well as Black and Rehnquist, have all ignored. It fell to the Court in this era to determine whether or not that goal was met. Did a state law actually do what it was meant to do, in light of what state governments were for?

Circumstances had, of course, made that question unclear, leaving the Court "incapable of any very exact definition or limitation" Miller wrote. But he was certain that upon this question "depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the *beneficial use of property*."[117] Such a rule might apply to any number of careless business practices, which could damage public welfare. But for these justices, while it was good to protect the public, it was even more important that the

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benefit greatly from philosophic clarity about first principles. Yet it was not their vast intellect that would make them blessings of the legal profession, as Rehnquist would have it; it was instead the way their liberal education gave them the necessary disposition of character to judge well. The study of law would be "no small improvement of our antient plan of education," he wrote, "and therefore I may safely affirm that nothing…is, under due regulations, improper to be taught in this place, which is proper for a gentleman to learn." The study of law was, after all "a science, which distinguishes the criterions of right and wrong; which teaches to establish the one, and prevent, punish, or redress the other; which employs in [its] theory the noblest faculties of the foul, and exerts in [its] practice the cardinal virtues of the heart." The quality of a judge did not come from purity of disinterest, as Rehnquist would have it, but from goodness as a person. *Commentaries on the Laws of England, Volume 1* (Chicago: University of Chicago Press, 1979), pp. 26-27.

[117] Ibid., at 62. (Emphasis added.)

public to receive the "beneficial" presence of industry. For Miller, much like the Founders, state police power existed to encourage that.

But, as my thesis holds, this involved two parts: the ends of government, as well as the means to those ends. Justice Field and Attorney Campbell emphasized the end, i.e., the protection of property and the right to pursue it through one's chosen trade. But it took Miller's guidance to show them the whole picture by emphasizing the means as well: a government that used its police powers to encourage that end.

Still, the misuse of Miller's opinion remains strong among even the most thoughtful critics. Howard Gillman points out, for instance, that the Court's rulings in this era were concerned above all with maintaining government neutrality at the state level. The question before Miller's Court, according to Gillman, was nothing more than "whether the slaughterhouse should be treated as a legitimate promotion of the interest of the community as a whole or whether it as an illegitimate use of government power to advance the special interests of a privileged elite at the expense of the well-being of many others."[118] There was only one true reason it was upheld: the slaughterhouse "furthered the well-being as a whole," meaning that inquiries into "fundamental rights" or laissez-faire principles were quite separate from the Court's concerns.

But it is plain that Justice Miller did not hold the view that Gillman ascribes to him. Though he approached the question with a physician's expertise, Miller still knew that "the interest of the whole" was not reducible to mere well-being understood as the "community interest" in health, safety, and general comfort, as Justice Taney would have it. It was instead a certain enjoyment of basic economic rights that mattered most. Miller

[118] Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (Durham: Duke University Press, 1993), pp. 65; 67.

was quite concerned about Sections 3 and 4 of the state law declared that the company "shall have the sole and exclusive privilege of conducting and carrying on the live-stock landing and slaughter-house business," and that the animals shall be slaughtered in the company's central location – "and nowhere else."[119]

In this, Justice Miller was not entirely unaware of the importance of Campbell's objection to the law, or Justice Field's dissent, either; the right to keep and pursue property was abundantly important. But to treat it as an absolute, fundamental, untouchable right, and as the end of government, was to forget the means by which a republican government was designed to protect that end – and how states themselves were designed to do precisely that. This, in turn, would *include* – not oppose – the more pragmatic considerations of health and safety. Hence, the true reason for the Court's ruling in *Slaughterhouse*: while the only way for the law to be effective was to require a central location, operated under a single company, "it is difficult to see a justification for the assertion that the butchers are deprived of the right to labor in their occupation, or the people of their daily service in preparing food, or how this statute, with the duties and guards imposed upon the company, can be said to destroy the business of the butcher, or seriously interfere with its pursuit."[120] If the statute did deprive them of that right, then it was indeed the national government's duty to correct that error. Were those rights not as important as the need to break down class legislation, as Howard Gillman would have it, Miller would have made that clear. But he did not, and kept substantive rights very much in view. It was not true "that it deprives the butchers of the right to exercise their trade,

[119] *Slaughterhouse*, at 59. Justice Miller emphasized "nowhere else" twice, also at 61.
[120] Ibid., 62-63.

or imposes upon them any restriction incompatible with its successful pursuit," he wrote.[121]

Accordingly, the Lochner Court upheld the earlier state regulatory laws because the majority understood the goal, which was still implicit in the definition of police power, and made explicit by Justice Miller in the *Slaughterhouse* opinion: that "the entire domain of the privileges and immunities of citizens of the States, as above defined, *lay within the constitutional and legislative power of the States*, and without that of the Federal government." On the purpose of the Fourteenth Amendment, Justice Miller asked: "was it intended to bring within the power of Congress the entire domain of *civil rights* heretofore *belonging exclusively to the States*?"[122] The answer was no; but the reason why is apparent in Miller's understanding that the national government might very well corrupt the ability of the states to effectively protect the most fundamental rights if it intervened at the wrong time or for the wrong reason.

Miller's position on the Fourteenth Amendment actually encompassed Attorney Campbell's accusation: it *did* mean something bigger than the mere protection of former slaves. If it happened that "other rights are assailed by the States which properly and necessarily fall within the protection of these articles," he wrote, "that protection will apply, though the party interested may not be of African descent." True, he did say that "it is necessary to look to the purpose which we have said was the pervading spirit of them all," and "the evil which they were designed to remedy."[123] But it proceeded on the understanding that slavery was not simply a wrong done to African-Americans in this case: it was a wrong done to all people of all colors *everywhere* – and worst of all, it was

[121] Ibid., at 60.
[122] *Slaughterhouse*, at 77. (Emphasis added.)
[123] Ibid., at 72.

the greatest harm a free nation could ever inflict on itself. The only reason slavery had persisted for so long was, of course, because of the states: it was therefore a failure of each slave state to fulfill its intended purpose, not only for the slaves, but for all citizens.

Hence, the Amendment's necessary remedy: citizenship was to be nationalized – but not in a way that rendered all state governments irrelevant, because there continued to be "a state wherein [citizens] reside." Forbidding states from abridging the "privileges and immunities" of those citizens was meant for the "protection to the citizen of a State against the legislative power of his own State," Justice Miller wrote. "It is too clear for argument that the change in phraseology was adopted understandingly and *with a purpose*," i.e., a purpose that had state governments very much in mind.[124]

This point, though, was even more apparent in Miller's treatment of the Privileges and Immunities Clause. That guarantee, of course, preceded the Fourteenth Amendment in the original Bill of Rights; it was an expression of the purpose, not only of the national government, but for the idea of republican government in general. This principle plainly included state governments, where such rights "must rest for their security and protection where they have heretofore rested," Miller wrote, "for they are not embraced by this paragraph of the amendment." This was not for a lack of nationalizing effect of the Amendment, but because of a recognition of what state governments were designed to do on their own. There were a few nation-wide restrictions in the original Constitution – no ex post facto laws, no bills of attainder, and no laws impairing the obligation of contracts. "But with the exception of these and a few other restrictions," Miller wrote, "the entire domain of the privileges and immunities of citizens of the States, as above defined, lay within the constitutional and legislative power of the States, and without that of the

[124] Ibid., at 74.

Federal government." But Miller went on to point out something that is quite ignored in the literature, though it became the central question for the Lochner Era Supreme Court in later years: if it happened that the consequences of state legislation "are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions," he wrote, there was certainly a call for national authority to step in. Regular occurrences of this would, of course, "fetter and degrade the State governments by subjecting them to the control of Congress"; it would "radically [change] the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people." But that did not exclude Miller's most essential point: states could proceed with great exertions of police power "until some case involving those privileges may make it necessary to do so."[125] Despite the basis of this ruling – that the Louisiana statute did not deprive butchers of their livelihood, that it "does not… prevent the butcher from doing his own slaughtering," nor "deprived [them] of the right to labor in their occupation," nor does it "destroy the business of the butcher, or seriously interfere with its pursuit"[126] – it was apparent that there was a guideline for states, and that the Court as quite willing to address it if the occasion arose. The need for the Court to be a "perpetual censor upon all legislation of the States" would indeed be a burden for the Court, and Miller sought to avoid that.[127] But a censor imposes obligations more than he corrects the broken system. Maintaining a "a steady and an even hand the balance between State and Federal power" assumes that there are two equal weights – each

[125] Ibid., at 75; 77; 78-79.
[126] Ibid., at 61-62.
[127] Ibid., at 78.

depending on the other to know its proper place. Such was the case with state and national governments in Justice Samuel Miller's mind.[128]

IV. Conclusion: The Framework of the Lochner Era

The typical accounts of the *Slaughterhouse Cases* holds that the justices were too weak, perhaps intimidated by the task of reviewing state laws, or sympathetic to Southern state affairs in the wake of the Reconstruction Era. But there appears to have been much going on. There was in fact a broad array of questions about state police power under the Fourteenth Amendment: Justice Miller did not give the final work on post-war state supremacy, his critics would have it; he instead revived the traditional view of what state governments were for, and how they related to the Constitution.

The public perception of the case at the time shows what had actually happened. *The New York Times* reported that the opinion "is calculated to throw the immense moral force of the Court on the side of rational and careful interpretation of the rights of the states of the Union." One would think, on first glance, that the Court had asserted national power like never before, and affirmed the position of Campbell and Field. Clearly there was more to this case the Court's refusal to fulfill a critical duty as professor Black would have it, much less an act of "judicial restraint" by Justice Rehnquists' account. Despite its immediate ruling, there was no doubt what the opinion itself meant for the nature of national supremacy. "It is also a severe and, we might also hope, fatal blow to that school of constitutional lawyers who have been engaged, ever

[128] Ibid., at 82.

since the adoption of the Fourteenth Amendment, in inventing impossible consequences for that addition to the Constitution."[129]

This is the critical insight about the early days of the Lochner Era: there was, in fact, no conflict between state legislation and judicial philosophy. What eventually did occur was a conflict within the meaning of police power itself. Correcting that inner flaw meant a great deal of judicial intervention, not only in striking down state laws, as they did in *Lochner v. New York* (1905) and *Adkins v. Children's Hospital* (1923), but in agreeing to review those cases in the first place.

A. Concurring Interpretations of Police Power and the Fourteenth Amendment

Many justices confirmed Miller's view of state governments. Justice John Marshall Harlan, for instance, wrote that the Court sought to ensure that "State police regulations which were enacted in good faith, and had appropriate and direct connection with that protection to life, health, and *property*, which each State owes to her citizens." Police regulations were not concerned with any ordinary set of guarantees, but a "complete and salutary power with which the States have never parted," he wrote. This was not to equate property with the usual health and safety concerns: it was in fact a fundamental basis for those conditions. Police regulations went even further than the right of property: "The right of property in the physical substance, which is the fruit of the discovery, is altogether distinct from the right in the discovery itself," he wrote.[130]

[129] "The Scope of the Thirteenth and Fourteenth Amendments," *New York Times*, April 16, 1873.
[130] *Patterson v. Kentucky* (1878) 97 U.S. 501, at 506. It is a curious irony, or at least a reaction to new conditions, that Justice Harlan would later change his mind on the purpose of state police powers. In his famous *Lochner* dissent, for instance, he wrote: "All the cases agree that this power extends at least to the protection of the lives, the health, and the safety of the public against the injurious exercise by any citizen of his own rights." 198 U.S. 54, at 65. Property is conspicuously omitted. It is plain that by 1905, as I will later propose, the nature of police powers had turned to a different kind of regulatory law – one that was far

Perhaps states could regulate the ways that people would "discover" or make their property; but they would only do this to ensure that the end was something achievable, and that it would serve as the basis for the sort of equality of opportunity that prosperity would ensure. "Undoubtedly the amendment forbids any arbitrary deprivation of life, liberty, or property, and secures equal protection to all under like circumstances in the enjoyment of their rights," Chief Justice Melville Fuller wrote, thus giving more credit to the states themselves to meet this end than to the abilities of his own Court. The Fourteenth Amendment, as his court interpreted it, "was not designed to interfere with the power of the state to protect the *lives, liberties, and property of its citizens*, and to promote their health, peace, morals, education, and good order."[131] Consequently, much of the Lochner Era Court was concerned with recovering that aspect of state police power – to make each state fulfill its reason for existing. Perhaps that is an abuse of judicial power, as many critics of that era claim. But it is important to see how different it is from the reason why the justices viewed it as such an abuse: it was, as Bastiat claimed, a "perversion" of what police powers were for.

Even Justice Stephen Field appeared to change his mind, at least on occasion. Unlike his dissent in *Slaughterhouse*, he later insisted that the Amendment, "broad and comprehensive as it is," was not meant to infringe on the states, particularly because they could protect these rights well enough on their own. The authority of state governments, "sometimes termed its police power," was certainly meant "to prescribe regulations to promote the health, peace, morals, education, and good order of the people." This, however, was merely the surface of what police power actually meant: far more

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more concerned with the popular social goals of regulation itself, thus leaving questions of property and liberty of contract to the Congress and the Court.

[131] *In Re Kemmler*, 136 U.S. 436, at 448-449 (1890). (Emphasis added.)

important was the way local governments were at their best when they sought to "increase the industries of the state, develop its resources, and *add to its wealth and prosperity*," Field wrote. "From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains."[132] This, according to Field, was the bedrock principle for promoting the general good; no amount of moral legislation could surpass in importance the ability of government to not only ensure the protection of property, but to positively encourage popular accumulation of wealth. It was only when those states had failed to fulfill this end that the Amendment applied.

It is critical to see that these justices did not say these things as a guise for defending the interests of "the rich," much less some abstract and untouchable laissez-faire doctrine. It was instead a recognition that laws encouraging wealth and prosperity were in fact most attuned to a neutral form of public interest – even more so than conventional "health and morals" social policy. Police power that encouraged industry overcame the perennial danger for every piece of legislation, i.e., that such law would favor one interest group over all others, thus violating the fundamental principle of neutral government.

B. The Framework and its Problems

As we know, things became more complex in the following years, when legislators were not seeking to correct health and safety problems, but to remedy something far more troubling than public sanitation from animal remains social and economic injustices: in light of this new condition, the Court did not seek to limit state

[132] *Barbier v. Connolly* (1884) 113 U.S. 27, at 31-32.

police power, but to follow Miller's method in defining the *constitutional* reason for it. Most of the time, the state was meant to be neutral; but when was it allowed to break that neutrality, and engage in "active state" liberalism? Such a rule required a clear understanding of both the ends of government and the means to that end – and just how broad those means were.

As we know, the question evaporated with the rise of the New Deal. But it is worth recovering, at least so we might understand why the New Deal happened, as well as the Progressive Era that preceded it. It was an explicit rejection of republican government. The evidence shows, however, that republican government was in fact designed to confront these problems directly, and to set things right – to allow its means to *surpass* its end, in order to better preserve it.

Hence, the opinions of the early Lochner Era were full of references to the "proper exercise" of police power, which shared the classic definition. It was a principle much older than the term "police" itself – older than American Federalism, in fact, and having much more to do with the definition of government than the static sort of federalism that would come later. It brings out an important aspect of early American constitutionalism, which is the central challenge to a study of this kind: much of what the justices wrote proceeded on unspoken assumptions rather than clearly stated precepts.

Constitutional scholarship is a challenge in that it depends on our ability to read things the justices did not write – while at the same time, not attributing ideas to them that they did not have. But on the issue of state police powers, at least, Chief Justice John Marshall did give us a reliable point: he looked to principles that were "now universally admitted," ones that "could command the universal assent of mankind." They were

"now" understood; yet there was nothing new involved at all according to Marshall. It was the truth "that the government of the Union, though limited in its powers, is supreme within its sphere of action." There were "spheres," the national encompassing the federal. There were, of course, certain "enumerated powers" that established these spheres; they allowed the national to encompass the federal, and kept the two distinct in their operations. But as the present case demonstrated, enumeration was only a method of understanding the more important basis for state and national governments: "[t]his would seem to result, necessarily, *from its nature*," he wrote. For Marshall, it was enough to say the explicit, written, enumerated powers were meant to show the government's "great outlines should be marked"; all other principles could "be deduced from the nature of the objects themselves."[133] What happens to our understanding of police power, state government – or republican government in general – when we lose sight of such an essential precept?

[133] *M'Culloch v. Maryland* (1819), 17 U.S. 316, at 405. (Emphasis added.)

Chapter 3:

Munn v. Illinois: The Schism Between Active State Liberalism and Natural Right

The previous chapter explained how the classic meaning and exercise of state police power was not merely restrictive. State authority over the lives of citizens was not intended only to regulate unruly business practices, making it bound to clash with capitalism and laissez-faire economics in the coming industrial age.[134] Police power was instead, by the classic definition, the means by which a state could ensure the protection of property, and the ability of citizens to pursue it – i.e., how it could protect both the end of government, as well as the means to that end, which is the central point of my thesis. This included, of course, the ability of state governments to make the pursuit of wealth a benefit for the whole, whether that meant preventing dangerous or immoral business practices, or simply ensuring that no business interests came to benefit too much at the expense of others; and, based on that, it then included the variety of moral laws and protections of religious liberty that would follow. But those were secondary aspects of what police powers were for: it was to protect existing property, and encourage the pursuit of more, among all citizens equally.

This was the point of Justice Samuel Miller's opinion in the *Slaughterhouse Cases* (1873). Miller hardly did the things for which he was later blamed, insisting on a "hands-off" approach for the Court when it came to reviewing state laws. The fear of becoming a "perpetual censor" might have resonated with his fellow justices in the

[134] Nor for that matter was it meant to conflict with "civil rights" and "privacy" and "autonomy," as it did in later decades, since those things were increasingly the goals up public policy at the state level.

majority, but his reasoning indicated that there was indeed much more to do when it came to police power jurisprudence: each state had an intended purpose, and, should the occasion arise, it was indeed the mandate of the Fourteenth Amendment to compel states of fulfill that end, primarily through Congress, but also through the Supreme Court. This might include ensuring that the state's use of police power, when directed at industry, fulfilled its own intended purpose of protecting the rights of all citizens to keep and pursue property – which might indeed involve very un-even regulatory laws meant to set things right. Perhaps there was a "virtual" monopoly, an unfair business practice, or ill-treatment of laborers, which might include excessively low wages or high hours, as it happened in later years. But such a problem could only be remedied by a specific sort of state intervention: the reforming legislature had to protect the end of government – the right to keep and pursue property – but also the means to that end – the ability of state power to go against its own republican neutrality, for a time, in order to recover a just order in the long run. It was the intent of the Fourteenth Amendment to empower the national government to ensure that such regulations really did fulfill the right purpose, and in the right way.

Yet the Supreme Court encountered difficulties in maintaining this view in the years following the *Slaughterhouse* precedent. There was in fact a split between the ends and the means of a republic, as my thesis holds, in the case of *Munn v. Illinois* (1877). The ruling established the power of state governments to go quite beyond their intended purpose, and become the mere levers of popular movements rather than serve the whole as truly republican institutions.

I. Republican Remedies Face New Problems: The Grain Elevator

A grain elevator would have been a marvelous thing to see for American farmers in the 1870s. By this time, it had become an icon of the Midwest. At the annual gathering of the American Institute, a congregation of science enthusiasts, Reverend F.A.P. Bernard identified the true fruits of modern science in his keynote address: "the industrial arts were born of it." In the "concourse of industries," the president "was proud to affirm that America held an honored place." Among other things, "[t]he planning machine is American. Navigation by sea is American. The mower and reaper are American." And, last but not least: "the grain elevator is American."[135] It was the classic synthesis that Americans were particularly adept, the coming-together of modern technology with ancient agrarian life. One imagines second, third, or fourth generation country-folk, so attuned to the dignity of working the land and transporting one's own good to the market, now gazing in awe at this new contraption – not only for its ability, but now for its necessity.

There was indeed no other way to distribute grain without railroad lines and freighters in the Great Lakes; this called for vast quantities of grain stored in central locations, and available for rapid movement on to railroad cars and sea vessels. "In this way the largest traffic between the citizens of the country north and west of Chicago and the citizens of the country lying on the Atlantic coast north of Washington is in grain which passes through the elevators of Chicago," Ira Munn's Brief said in *Munn v. Illinois* (1876). "[T]he trade in grain is carried on by the inhabitants of seven or eight of the great States of the West with four or five of the States lying on the sea-shore, and forms the

[135] "American Institute Fair," in *New York Observer and Chronicle*, September 12, 1872.

largest part of inter-state commerce in these States."[136] Clearly this was not the sort of Dynamo-like technology one would see at the World's Fair; it was instead a machine that would soon work its way directly and permanently into the critical needs of national life. It would, of course, be dwarfed in height by sky-scrapers in the twentieth century, and surpassed in principle by airplanes, microchips, and administrative management that followed to make the modern American mind. But given its newness, the grain elevator was able to teach the true lesson about modern technology: the greater the technological power, the more exclusive the privilege among those who hold it. In practice, in the 1870s, that exclusivity meant monopoly, and the outrageous fees that companies could impose on farmers. The high prices of such machines no doubt compounded with greater safety precautions, in light of many horrific incidents: the floor of one elevator in Boston "gave way, burying a man under the grain, so as to cause death by suffocation," the *Christian Union* reported in 1870. The owner was acquitted of manslaughter, since the jury recognized that "everything was done which, under the circumstances, could be done to relieve the building."[137] Market competition might have improved on the situation over time, providing lower prices for safer elevators; but those improvements were slow in developing, and the farmers and laborers were left to suffer.

The Illinois Constitution framed in 1870 reflected the condition of local politics of the time. Urban interested dominated the state convention: the entirety of Article 13

[136] *Munn v. Illinois*, 94 U.S. 113, at 130-131 (1876).
[137] *Christian Union*, August 6, 1870. The reporter went on to say that, to "an unprejudiced mind," a building that is "liable to become overloaded by almost insensible degrees, should be build strong enough to sustain any weight that can possibly be placed upon its floors." Keenly aware of the plight of laborers, he wrote that "[n]o engineer, thinks of constructing a reservoir without a waste-weir which will not suffer the water to overstrain the dam, and in like manner some self-acting gauge might be contrived which would prevent the overloading of elevator floors." Ibid. This and other safety devices would, of course, raise the cost of the elevator in general, thus raising the cost of its services. It is easy to see the reason for the high fees that were such a challenge in *Munn v. Illinois* (1876).

granted specific protections of the elevators, also called "public warehouses." It seemed to reflect the same classic definition of police power, particularly in Section 7, which stated that the state assembly would be empowered to pass legislation for the "protection of producers, shippers and receivers of grain and produce"; in practice, though, this opened the way for monopolies, thus revealing how difficult it would be to maintain the classic view of police power with the rise of modern industry.

In reaction to the former provision, though, came one of the most influential agrarian movements of its day: the Order of Husbandry, better known as the "Granges." It was "not a mere concourse of people impelled by causal emotion," the *Massachusetts Plowman* reported, but "an organized system, possessing vast influence and capable of concerted action." This was hardly the sort of organization expected from farmers, who tended to be more isolated from each other than urban labor unions and other political interests. "The political significance of such an organization can hardly be overestimated. A body of such thorough organization is a formidable instrument in the hands of able men, and the Order comprises many such." It could, no doubt, "affect permanent changes in legislation."[138] In some states, the Granges simply purchased the elevators themselves. But in Illinois, where the elevators were reserved for public use under the state constitution, they sought were forced to seek greater political control their state assembly. Since the grain elevators in Illinois were protected by the state constitution, the Grange's political leverage could only have one goal: price controls. The butchers in the *Slaughterhouse Cases* had challenged the Louisiana state law under the Fourteenth Amendment as well; but the Supreme Court had sustained the law because

[138] "The Order of Husbandry," in *Massachusetts Plowman and New England Journal of Agriculture*, May 10, 1873.

of the critical health and safety concerned involved, and the way they did nothing to prevent butchers from pursuing their vocation. The Illinois state law, however, had nothing to do with health and safety concerns; it was entirely about prices.

A. Ira Y. Munn, Citizen of the United States

From Ira Munn's point of view, this certainly appeared to be a use of public power for very narrow factional interests – as indeed it was. Munn and his associate, George Scott, otherwise known as hard-working, self-made businessmen, who had suffered and survived the recent fires that devastated Chicago, and developed a newer and safer sort of grain elevator, were now charged under the Act to Regulate Public Warehouses of 1871. The rate had in fact been settled for the past nine years; they were always "agreed upon and established by the different elevators or warehouses in the city of Chicago," according to the Plaintiff's amicus brief. "[T]he rates have been annually published in one or more newspapers printed in said city, in the month of January in each year, as the established rates for the year then next ensuing such publication."[139] They were certain that the sudden and recent nature of the law indicated a truly arbitrary and unfair attack on their business. Indeed, later historians looked back and showed just how fair and stable the prices had been. "The elevator price in Chicago was set by concerted action of the owners and was stable for years," according to Edmund Kitch and Clara Ann Bowler in their archival research on the era. The statue was not aimed at collusive pricing designed to gouge farmers, since "the statute explicitly provided a procedure for

[139] Amicus brief quoted in *Munn v. Illinois*, 92 U.S. 113, at 131 (1876).

uniform price setting."[140] This raised serious question about the fairness of the law, since it charged the warehousemen for the rates they had always held, and which the farmers had always agreed to until quite recently.

For this reason, Munn and his associates felt justified in ignoring the legislation, and continued to charge the same amount they had for the last ten years of business. Those prices, which were long viewed as fair and had not changed over time, had only recently invoked the ire of local farmers. Their capture of the state legislature was no doubt a shock. Facing the sentence of a $10,000 fine and the possibility of losing his state license, Munn pled guilty and appealed his case to the Illinois Supreme Court, where he challenged the Act under the state's own Bill of Rights, its contraction to Article IV – and, most importantly, under the Fourteenth Amendment of the U.S. Constitution.

B. Illinois, the Sovereign Community

Chief Justice Sidney Breese of the Illinois Supreme Court acknowledged the challenge under the Fourteenth Amendment in his opinion, yet he dismissed it in two short paragraphs. He agreed to at least one aspect of Justice Samuel Miller's opinion in the *Slaughterhouse Cases*, i.e., that the Amendment was meant to "shield a certain class, who had been born and reared in slavery, from pernicious legislation, by which their newly acquired rights by their emancipation might be so crippled as to render them wholly worthless."[141] It appeared to be a surface-level application of Justice Miller's opinion in *Slaughterhouse*: the only meaning the Amendment could possibly have was its short-term, immediate, Reconstruction-era goal, and treating it as anything else was an

[140] Edmund W. Kitch and Clara Ann Bowler, "The Facts of *Munn v. Illinois*," in *The Supreme Court Review* (1978): 316.
[141] *Ira Y. Munn et al. v. People of the State of Illinois*, 69 Ill. 80, at 3 (1873).

abuse of judicial power. Breese, however, paid no attention to the long-standing nature of the fee, and the sudden ire of the Grangers in support of the law.

Breese instead devoted greater attention to Munn's appeal to the state constitution – which, like many state constitutions, was a grant of substantive rights, and a series of institutions designed to protect them. He looked in particular to Article IV, which in Sec. 22 prohibited the state legislature from "[g]ranting to any corporation, association or individual any special or exclusive privilege, immunity or franchise what-ever." This, of course, was in plain contradiction with Article 13, which, again, granted special protections specifically for grain elevators – a point that Chief Justice Morrison Waite would make much of when the case reached the Supreme Court. But Judge Breese paid no attention to this, and proceeded to defend the legislation on the basis of what he saw as the public interest. It was, of course, a public interest that had much to do with the critical role of farmers in local affairs; he considered an interest "general in its objects, operative throughout the State," and having everything to do with an "existing business closely associated with the agricultural interests of the state."[142]

The Illinois Bill of Rights began with the standard set of basics: that all men are born free and equal, with respect to certain God-given rights to "life, liberty, and the pursuit of happiness," and that "[t]o secure these rights and the protection of property, governments are instituted among men, deriving their just powers from the consent of the governed" (Sec. 1); and that "[n]o person shall be deprived of life, liberty or property without due process of law" (Sec. 2). The current Bill of Rights, though, was hardly as fixed and enduring in Justice Breese's mind, since he had the curious fortune of occupying the bench for the last three constitutional conventions in Illinois, in 1818,

[142] Ibid., at 5.

1848, and finally 1870.[143] Witnessing such a repeated resetting of all precedent might explain his conclusion in the *Munn* case: the state constitution was in fact a less significant thing compared to the state legislature. Indeed, Justice Breese had little concept of what a constitution was for, compared to the power of a sovereign body, nor did he see any qualifications of legislative legitimacy aside from the rights appearing the letter of the law itself.

There was only one distinguishing feature of a state law that went too far: when it strips something "of those attributes by which alone it is distinguished as property," Breese wrote. A state legislature could regulate trade in property of all kinds, but they could not totally annihilate commerce in any species of property, and so condemn the property itself to extinction."[144] But plainly those who owned and operated grain elevators were not deprived of their livelihood in the least by having to limit their rates to what the state legislature thought was a fair standard. Despite the extent of the regulation, the existence of the right was still there.

It was, no doubt, a strange idea of fairness: there was practically no limit, it seemed, to what a state could regulate, so long as it did not destroy the property involved. Gone were the days of Chief Justice John Marshall's maxim, that "[a]n unlimited power to tax involves, necessarily, a power to destroy." Breese, like Marshall, thought of it in terms of degrees, knowing that "there is a limit beyond which no institution and no

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[143] State of Illinois, "The Third Branch: A Chronicle of the Illinois Supreme Court"; available from http://state.il.us/court/supremecourt/justicearchive/bio_breese.asp; accessed June 18, 2009. Breese also served one term as a United States Senator from 1843 to 1849, and no doubt witnessed the struggle that yielded the Missouri Compromise of 1850. His contact with Senator John Calhoun may have influenced his views of state power.

[144] *Munn*, at 5. Breese had only one precedent to depend on, a certain New York prohibition case, *Wynehamer v. People of New York* (1856). The case held that only the destruction of intoxicating liquors was unconstitutional, while the prosecution of moon-shiners and distributors was not. It was indeed a stretch to say that a form of legislation so laden with clear police power concerns could also explain the role of grain elevators in an agrarian society.

property can bear taxation."[145] But unlike Marshall, there was only one degree that mattered: so long as there was still even the slightest glimmer of substantive rights remaining, there could be no complaint against a regulation, at least until voters took it to the polls. At best, such a system could at least guarantee that "private property may not receive remote and consequent injury." All of this depended on the state constitution's guarantee that the "owner shall not be deprived of his property without due process of law, etc.," Breese wrote. "If, in the exercise of any one of the admitted functions of government, a person's property is rendered less valuable, can it be seriously claimed this provision in the Bill of Rights has been infringed?" Breese was clearly certain that substantive rights were protected well enough through procedural due process; it was apparently inconceivable that an exercise of local legislative power could harm its own members, nor could Munn even remotely claim that level of harm here. The law was passed, following all necessary parliamentary procedure, through an elected Assembly and Senate, which was "the guardian of the public interest and welfare," he concluded. State legislative powers were, after all, what "[e]very sovereign power possesses, inherently," meaning that its acts were "unrestricted legislative power, where the organic law imposes no restraints."[146] Certainly such a power would seem to include the ability to break up monopolies, which held sole control over grain-storage technology, and threatened to harm the people with exorbitant fees. It was, of course, the view of state authority that would ultimately prevail when the case made its way to the Supreme Court.

[145] *M'Culloch v. Maryland*, 17 U.S. 316, at 369 (1819).
[146] Ibid., 5; 8.

II. The Fourteenth Amendment Returns

The justices of the United States Supreme Court probably thought, or certainly hoped, that such disputes between state legislation and the Fourteenth Amendment were settled with *Slaughterhouse*. The role of becoming a "perpetual censor" on all state legislation was a troubling prospect, which was no doubt mounting with each new claim against state legislative power among special interests and their attorneys who wished very much to invoke national judicial authority over local laws. It was clear, though, that Justice Miller's opinion did not exclude the Court's involvement in local police power cases as so many supposed: there were still questions about the "beneficial use of property," and there was still the need to declare the proper function of police power, which could proceed only "until some case involving those privileges may make it necessary to do so," i.e., when the Court would need to intervene.[147]

It was hoped that the judiciary could stay out of Fourteenth Amendment dilemmas. There was, after all, an Enforcement Clause, which empowered Congress to produce extensive Reconstruction legislation intended specifically for the protection of former slaves. The Amendment was meant to direct attention to state governments. The claim that "no state shall" could only mean to limit the sovereign power of local legislatures. But many critics pointed out that the nature of Reconstruction legislation was aimed far more at individuals, contrary to the Amendment's Equal Protection Clause. Samuel T. Spear, for instance, writing for *The Independent*, pointed out that the Ku-Klux Act of 1871, better known as the Enforcement Act, "professes to be an act to enforce the Fourteenth Amendment." The problem, though, was that "all the provisions of the act are unauthorized by the amendment," i.e., that no person, now a citizen, will receive any of

[147] *Slaughterhouse*, at 62; 79.

the discriminatory treatments that the Amendment forbids states from committing. "Does the amendment authorize this legislation?" Spear asked. "There is not a particle of authority for it. It is simply usurpation." It would, no doubt, lead to a congressional takeover, of the sort that Anti-Federalists feared a century before; it would "extend its jurisdiction over the whole field hitherto occupied by the states," he wrote. If the nation continued down such a path, the only possible check on the national government would be the government itself, since the states lost their ability to limit the national scope of power. "A more dangerous political heresy never existed in this country, or one more fruitful of ultimate evil, unless it be seasonably corrected," he concluded. There was only one possible correction: "the judicial mind of the nation."[148] Spear, of course, hoped that the Court would rule on the narrow focus of reconstruction legislation (i.e., laws intended exclusively for protecting former slaves), and declare void those acts that went against the Fourteenth Amendment's general protections. But it was inevitable that such generality, expressed in such vague clauses, would draw greater attention from the likes of John Campbell, the attorney for the butchers in *Slaughterhouse*.

For the Supreme Court, there was indeed no escaping the Fourteenth Amendment – though some of the justices certainly tried.

A. Justice Morrison Waite: The Means of Government Without the End

When he was appointed Chief Justice in 1874, an editorial in the *Maine Farmer* noted that Morrison Waite "has not that rational reputation which many of this predecessors enjoyed at the time of their appointment," since he "had but little connection with politics." But for all his lack of experience, Waite was still "devoted to his

[148] Samuel Spear, "The Fourteenth Amendment," in *The Independent*, Nov. 26, 1874.

profession, [and] has enjoyed much esteem in his own State, for his integrity and sense of honor."[149] What he did have, though, was legal expertise, making him one of the new professional lawyers who would be appointed to the bench in the Lochner Era. "His knowledge of the law extends to all branches, including admiralty and constitutional law, in both of which specialties he had the reputation o being very strong," the *New York Times* reported. No other judge had, "at the time of his appointment, the same versatility and range of practice and legal experience."[150]

It was certainly this outlook that moved him to take control over the Court in his two years as Chief Justice. In that time, he not only followed but made explicit his adherence to Roger Taney's understanding of state sovereignty; this meant passive judicial deference to state laws, blended with bold declarations that would "settle" the more troubling questions in national life. It was at once an extreme deference to politics, and at the same time, a willingness to override political decisions with judicial rules when necessary.

Waite viewed government as a social compact: people joined it and became citizens, and in doing so, gave up their rights in order to preserve purely political rights through the system itself; the freedom of the individual was nothing more than the freedom of the whole. "Citizens are the members of the political community to which they belong," he wrote in *U.S. v. Cruikshank* (1875). There, the Court refused to apply the provisions of the Enforcement Act that Mr. Spear lamented to the perpetrators of the Colfax Massacre in Louisiana. "They are the people who compose the community, and who, in their associated capacity, have established or submitted themselves to the

[149] *Maine Farmer*, January 31, 1874.
[150] *New York Times*, January 20, 1874.

dominion of a government for the promotion of their general welfare and the protection of their individual as well as their collective rights." Governments were simply the aggregate authority of those who had submitted, and the purest expression of that was, of course, the states. Those states had in turn been the vehicles by which the Constitution was ratified, meaning that they were, and continued to be, the superior institutions. "The government thus established and defined is to some extent a government of the States in their political capacity." True, it was also "a government of the people" according to Waite. The powers over the states were "limited in number, but not in degree." Beyond the enumerated functions of the national government, it not only lacked authority on certain questions – but "it has no existence," he wrote. "It was erected for special purposes, and endowed with all the powers necessary for its own preservation and the accomplishment of the ends its people had in view. It can neither grant nor secure to its citizens any right or privilege not expressly or by implication placed under its jurisdiction."[151] Waite did not view the Constitution as any sort of empowerment of the national government; it was instead a specific list of limitations on what it could do. Accordingly, the Fourteenth Amendment was little more than a broadening of that power – not a restatement of what both national and state governments are for.

Justice Waite maintained this principle in *Minor v. Happersett* (1875), where he wrote that the most basic guarantee of the Fourteenth Amendment – the Citizen Clause –

[151] 92 U.S. 542, at 549-550 (1875). This echoed the state of Maryland's point in *Mc'Culloch*, i.e., that the Constitution was ratified through state conventions, meaning that the act of consent was not from individual citizens, but from states. Chief Justice John Marshall admitted that, from these conventions, "the constitution derives its whole authority." Still, he wrote that "[t]he government proceeds directly from the people; is 'ordained and established,' in the name of the people." *Mc'Culloch*, at 404. The states were merely the instruments of the popular will. The process of ratification did not do this out of any recognition for state sovereignty; it was instead the only feasible way to do such a thing, since a national popular convention was impossible. It was the opposite view, though, that Justice Taney would revive, and Justice Waite would then maintain in the early Lochner Era.

is, once again, "suited to the description of one living under a republican government." He admitted that this included women, who were seeking a judicial guarantee for the right of suffrage. At the same time, though, the meaning of citizenship contained within itself no guarantee of the right to vote. "Certainly, if the courts can consider any question settled, this is one," Waite wrote, with distinctly Taney-style language. "For nearly ninety years the people have acted upon the idea that the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage."[152] The Nineteenth Amendment, of course, would eventually override this ruling, and nationalize the woman's right to vote. But at the time, Justice Waite's opinion damaged far more than the female population. Plainly, for Waite, a "citizen" was a mere resident, or individual subject to the laws; it had nothing to do with the self-evident nature of political *participation* that had given the word its definition for eons. Perhaps state governments had their reasons for denying women the right to vote; but that did not call for a nation-wide denial of what citizenship itself meant, or that it truly was a right that ought to be extended to all at some point in national development. Once again, it would require an amendment, the Nineteenth in this case, to make explicit what should have been obvious, not only by the words of the Fourteenth Amendment, but in national consciousness in

[152] 88 U.S. 162, at 166; 177 (1874). Also like Justice Taney, Waite was always willing to invoke the social, political, and economic conditions of the Founders' day to support his position – and never the ideas. "At common-law, with the nomenclature of which the framers of the Constitution were familiar," he wrote, citizenship did not in practice include the rights of women to vote; therefore, the Fourteenth Amendment did not offer any such guarantee itself. Compare this with Taney's words in *Dred Scott v. Sanford* (1856): we must look above all to "the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted," he wrote. Such a view "displays it in a manner too plain to be mistaken." 60 U.S. 393, at 407. Plainly the conditions of their time were far more important than their own thoughts or words. It was, of course, the classic attempt to understand the past even better than it understands itself – which always results in an abuse of history for short-sighted purposes.

general.[153] But this was the natural consequence of Justice Waite's adherence to Roger Taney's doctrines in judicial review.

In short, Justice Waite's understanding of state governments appears, on its face, to be very much like that of Miller. Indeed, he wrote that the "principle of republicanism" is that government's duty to "protect all its citizens in the enjoyment of this principle, if within its power," and that this duty "was originally assumed by the States; and it still remains there." Accordingly, the "only obligation resting upon the United States is to see that the States do not deny the right." Yet, unlike Miller, that duty was no longer a general principle, understood by all, and based on the meaning of a republic. It was instead a far more democratic view of republicanism: the states still embodied the true definition. The powers of the national government granted by the Fourteenth Amendment, as well as ensuing Reconstruction legislation, were mere anomalies of positive law; as such, Justice Waite and the Supreme Court were merely forced to interpret them in the most modest fashion. The powers of Congress were "limited to the enforcement of this guaranty," i.e., the right to peacefully assemble.[154] It

[153] The "self-evident" basis of women's suffrage is best seen in the Seneca Falls Declaration of Sentiments (1848), which was modeled after the original Declaration of Independence. The list of grievance included the fact that man "has never permitted her to exercise her inalienable right to the elective franchise." The way to resolve this and many other crimes against women was, of course, an appeal to natural right. The "law of Nature being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other. It is binding all over the globe, an all countries and in all times; no human laws are of any validity if contrary to this, and such of them as are valid, derive all their force, and all their validity, and all their authority… from this original." It was, of course, an appeal to conscience that required women's suffrage – not positive law, as Justice Waite later saw it. *American Political Rhetoric*, ed. Peter Lawler and Robert Schaefer (Lanham: Rowman & Littlefield, 2005), pp. 317; 319.

[154] *Cruikshank*, at 91-92. Justice Waite seemed particularly concerned with the definition of a republic in this case. It was not only a regime that guaranteed certain rights, but had as its central feature "[t]he right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for any thing else connected with the powers or the duties of the national government." There appeared to be little difference between a republic and a pure democracy. For him, it was little more than a democracy of a more orderly sort; even the most unjust deprivations of basic rights and the most privileged class legislation could still be called "republican," so long as it proceeded according to legislative procedures. "The very idea of a government, republican in form, implies a right on the part [sic] of its citizens to meet

was not the nature of the government, but the limits placed upon it that mattered. States, on the other hand, which were more essentially republics, had powerful levers made to serve the democratic will – even as they lacked any clear goal. These, it seems, were the assumptions that Justice Waite held when he wrote the *Munn* opinion.

B. The *Munn v. Illinois* Decision

It is striking how this opinion, though only the second instance of a Fourteenth Amendment question arising for the Court, was approached with such a routine attitude. "We do not conceal from ourselves the great responsibility which this duty devolves upon us," Justice Miller had written, elaborating on the thoughtful caution in their approach to the question, and an awareness that the issue was hardly settled[155]; Waite, however, did not give the same preface, nor did he even acknowledge the importance of the question itself. Instead, he wrote the opinion as if the question was quite settled. It was not settled by the *Slaughterhouse Cases*, though: Waite did not cite the *Slaughterhouse* opinion, nor did he even mention Justice Miller. It seems he sough to solidify the limited scope of the Fourteenth Amendment on a completely different basis – to essentially patch up Miller's holes through which an exception might sneak in and require the Court to strike down a state regulatory law. He would thus ensure that state authority was final, and that the protections of the Amendment would stay out of local economic affairs. There could be neither an appeal to substantive rights, nor an adjustment of state governments so as to bring them back to their intended purpose as

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peaceably for consultation in respect to public affairs and to petition for a redress of grievances," he wrote. Ibid., at 553.

[155] *Slaughterhouse*, at 67.

republics. For Waite, it seems, neither of these things existed, at least from the law's point of view.[156]

This was quite intentional on his part: he looked, after all, to the common law, and the organic view of government, which he believed was part of the American mind at the time of the Founding, and was still present when the Fourteenth Amendment was drafted. It involved, of course, "a limitation upon the powers of the States," one that was "old as a principle of civilized government"; certain limitations appeared in Magna Charta, and had been a central feature of the state constitutions and the national Constitution when it appeared. But it was based on an understanding of the social contract as a whole, which excluded any claim to rights that were outside of or preceding the formation of government. "When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain," he wrote.[157] The social compact, though, had not occurred at the national level; the meaning of United States citizenship only mattered for Americans involved in classic diversity cases or affairs overseas. The rights of the state citizen were therefore conditional, and quite subordinate to the whims of popular legislation. This plainly led to a broad understanding of the public interest; there were a variety of instances where the pursuit and keeping of private property might injure it.

In Justice Waite's mind, it was clear that preventing such public injuries was the only possible meaning of state police power. There could be no alignment between the two, as the classic definition held (cf. Chapter 2); there were instead different things in kind, and bound to conflict. Given this understanding of the social contract, it was clear

[156] It is possible that Waite was concerned about the cases that would soon arrive, based on challenges to local regulations of the railroads.
[157] *Munn*, at 123.

that the state ought to prevail over everything else. "Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good," Waite wrote. "In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold." This was such a standard practice, and already so common in state legislation, that it "has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property."[158] Justice Waite therefore held a distinctly organic understanding of government, much like Justice Breese. This was hardly an attempt to avoid the sort of difficulties that might come from holding the Fourteenth Amendment over state legislation, which appeared in the *Slaughterhouse Cases*; it was instead a wholly different view of government – one that was not founded on the right to keep and pursue property, but one that simply tolerated its existence, and let all other affairs be dominated by the idea of "the public interest."

Justice Waite looked entirely to the common law background of economic rights, and derived from it the rule that some forms of property and contract were in fact "affected with the public interest." When this happens, according to such common law jurists as Lord Chief Justice Hale, it ceased to be "private," and could receive no such

[158] *Munn*, at 124; 125 (1876). Waite invoked Chief Justice Roger Taney in this case as well, citing the License Cases, which defined police powers as "'nothing more or less than the powers of government inherent in every sovereignty, . . . that is to say, . . . the power to govern men and things.'" Ibid., 125. There was simply no rights that stood apart from state power in Taney's mind, meaning that if a right conflicted with a state regulation, it was to be treated as a subordinate thing, and deserving no remedy.

protection. "When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control."[159] Waite then offered a long slew of examples covering over five pages, of common law regulations of property and contract, all of them showing that the public interest far surpassed that right. It was, of course, a right that received abundant protections; but never did Waite view it as an aspect of police power, and the proper function of the state. It did not seem that there was any difference in America when it came to the standard definitions of fundamental terms in his mind. It would be easy to point out James Wilson's words, "that the principles of the constitutions and governments and laws of the United States, and the republicks, of which they, are formed, are materially different from the principles of the constitution and government and laws of England" – or, for that matter, that "the principles of our constitutions and governments and laws are materially *better* than the principles of the constitution and government and laws of England."[160] But what Justice Waite is truly missing is the place of police power in the proper function of state governments, or any government – a point that the Americans realized in a far greater way than the British

[159] Ibid., 126. This point was later developed quite independent of English common law by progressives like Walter Rauschenbusch, who wrote that "[s]ociety has rights even in the most purely private property. Neither religion, nor ethics, nor law [sic], recognizes such a thing as an absolute private property right," i.e., of the sort that Stephen Field was sure existed. Rauschenbusch showed how progressivism was itself an outgrowth of common law reasoning of the previous generation by the likes of Justice Waite when he wrote that private property was little more than an "offshoot of communal property," and that it "exists because it is for the public good that it shall exist." *Christianizing the Social Order* (New York: Macmillan Company, 1912), 426.

[160] James Wilson, "Lectures on Law," in *Collected Works of James Wilson, Vol. I* (Indianapolis: Liberty Fund: 2007) 440.

ever had. It was the political truth that the "public interest" was not in conflict with private property, but embodied it within the definition of the purpose of a republic itself.

Still, Justice Waite could not perceive the grain elevators as anything but the public interest; nor was it possible that a degree of corruption had occurred in the process of legislation. For Waite, it was legislation in which the "whole public has a direct and positive interest." Yet what the Court, as well as the Illinois state legislature, meant by "whole" came at great expense for the likes of Mr. Munn and others like him. It was a constructed "whole interest," one that did not depend on what was actually of benefit for all citizens, but for only a portion. In ruling this way, Justice Waite made it clear that he was quite attuned to the times: the law was in fact the "application of a long-known and well-established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress." We should recall that Justice Miller never once referred to "progress," or the need for local legislation to stay attuned to the times; while the law in question was upheld, in light of the serious health and safety concerns in New Orleans, Miller never suggested that republican government must alter its inner principles in order to adapt. But Waite plainly saw state sovereignty differently, and it was clear that "popular sovereignty" of the previous generation had now evolved into the legitimate use of public power to ensure that society could "progress." In light of these principles, he wrote, "there is no attempt to compel these [elevator] owners to grant the public an interest in their property, but to declare their obligations, if they use it in this particular manner."[161]

Indeed, the basis of political legitimacy had shifted: where it had once been natural, it was now a historical thing. Common law judges might have viewed their craft

[161] *Munn*, at 133.

as an embodiment of natural law, bringing to light through practice the timeless and eternal precepts of justice, as even Blackstone claimed. But now, the flexibility of that law was of greater emphasis – not so much because of its ability to adapt to the times, but the ability of legislators to make "the whole" adapt as well. For this reason "[a] person has no property, no vested interest, in any rule of the common law," Justice Waite concluded, emphasizing that property "is only one of the forms of municipal law, and is no more sacred than any other." The right of property, after all, was not natural, but was "created by the common law," meaning it "cannot be taken away without due process." But that was the only true protection. Beyond the required procedures, "law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations." Waite was not in the least uncomfortable with the "whims" of the legislature; as the sovereign elected body in a state, it could do no wrong, because the rights in question spring from the same assertion of political power that created that institution. "We know that this is a power which may be abused; but that is no argument against its existence," he wrote. With these words, Justice Waite introduced a particularly novel understanding of the purpose of government: that even the gravest abuses of power were still legitimate – that corruption was equal to goodness, so long as it abided by the due process of law. Here, he gave his most famous quip: "For protection against abuses by legislatures the people must resort to the polls, not to the courts."[162] This was, of course, a purely democratic understanding of state governments; even constitutions were subject to popular vote, as far as Waite was concerned. It did not

[162] Ibid., at 134.

seem to occur to him that the polls themselves might invite the sort of class legislation that could undermine the whole point of a republican government.[163]

There were, of course, plenty of instances that such class legislation was legitimate, as my thesis holds. Perhaps it was necessary to correct the sort of monopolies that could spring up spontaneously in society – or, in this case, perhaps the owners of grain elevators *were* charging exorbitant rates, meaning that the legislation in question was in fact justified. But Justice Waite did not see any such distinction: class legislation was always justified, not as the means by which a state government might recover its own ends, but so it might bring the sort of progress that elected officials thought essential for social development and the role of the state in the lives of citizens.

C. Justice Stephen Field: The End of Government Without the Means

There was substantial public dissent against the Munn ruling, far more than Slaughterhouse had received. *The New York Times*, fast becoming the Supreme Court's watchdog, reported that there was "little consolation" from the "legal assurance that the

[163] Justice Waite's view of rights was therefore bound by the community. But what kind of thing did he suppose rights were? His opinion in *Reynolds v. United States* (1879) is revealing, and reveals the extent of his modernized outlook that dominated his jurisprudence. The Mormon polygamy case, which featured a challenge to a national anti-polygamy law under the First Amendment's Free Exercise Clause was, of course, a sensible ruling on its face. Yet Waite's perception of substantive rights was clear: they were fundamentally autonomous, and reserved for the individual person who might well face tremendous regulations in all other areas of life. Waite wrote: "it is impossible to believe that the constitutional [guarantee] of religious freedom was intended to prohibit legislation in respect to this most important feature of social life." This, of course, was a considerable echo of his *Munn* opinion. The institution of marriage was quite "affected with the public interest," and was therefore subject to local and, in this case, federal legislation. Congress was therefore within its power to enact anti-polygamy laws. "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may [do so] with practices." To say otherwise, Waite concluded, "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances." *Reynolds v. United States*, 98 U.S. 145, at 165; 167 (1879). Yet it was clear that such rights persisted, and were still protected under the law, though this could only happen if they were reduced to a very miniscule condition, as Justice Breese also claimed: the pursuit of property could be whittled down quite far under regulatory laws; but so long as the right itself was not completely destroyed, there could be no grievance.

principle thus sanctioned by the court is in conformity with the common rule, which required that the rates charged shall bear a reasonable proportion to the services rendered. Who shall determine the reasonableness of the charge, is the question which underlies the distrust awakened by the decision."[164] This point was no doubt inspired by Justice Stephen Field's dissent in *Munn*. There, he declared in the first paragraph the fundamental problem: "The principle upon which the opinion of the majority proceeds is, in my judgment, subversive of the rights of private property, heretofore believed to be protected by constitutional guaranties against legislative interference, and is in conflict with the authorities cited in its support." He recounted the same points that Mr. Munn and his associates mentioned in their own brief: the warehouse and elevator had been constructed by their own efforts, at their own expense; the rates were long settled between the businessmen and the farmers; and the state Constitution gave specific protections for those elevators, which the rate-setting law plainly defied. Munn had done much to comply with the earlier state laws when he sought a state license. Unlike Justice Waite, Field pointed out how the question presented was "one of the greatest importance." It was important, though, because of something much greater than the Fourteenth Amendment: "whether it is within the competency of a State to fix the compensation which an individual may receive for the use of his own property in his private business, and for his services in connection with it."[165]

Field argued that these things had made the grain elevators a private business, and no amount of interaction with the public interest could change that. Hence, while Justices Breese and Waite claimed that regulation is no violation of a basic right so long as the

[164] March 29, 1877.
[165] *Munn*, at 136; 138. (Field, dissenting.)

right itself persists, Field extended it in the opposite direction: private property was meant to be protected even if it came at the greatest expense to the public good. There any regulation that a state could impose without causing a "partial destruction of the value of the property, if it fall below the amount which the owner would obtain by contract, and, practically, as a complete destruction, if it be less than the cost of retaining its possession."[166]

While Justice Waite broadened the precedent in favor of a radically new version of state police power in *Munn*, in much the same way, Justice Field broadened the concept of substantive rights. "There is no magic in the language, though used by a constitutional convention, which can change a private business into a public one, or alter the character of the building in which the business is transacted," he wrote. "One might as well attempt to change the nature of colors, by giving them a new designation."[167] Private meant private, and public meant public. The purpose of the public sphere, and the public power of the government in particular, was to protect that end. It was not that the public had no interest in protecting others from that pursuit, according to Field. It was simply the fact that such a protection could not be allowed to infringe on that fundamental right – and, of course, it was the duty of the Court to say so, and to strike down conflicting laws accordingly.

For Field, there seemed to be no limit at all to what the Court should do to protect the pursuit of property – that this "equality of right" meant that "all pursuits, all professions, all avocations are open without other restrictions than such as are imposed equally upon all others of he same age, sex, and condition." The Fourteenth Amendment

[166] Ibid., 143.
[167] Ibid., 138.

had simply unleashed the judiciary's authority to protect substantive rights, which had always been there. But Field said this because he saw the right to keep and pursue property in a purely nationalized way. At best, state governments existed to ensure safety and health, and, of course, to pass an unlimited array of moral legislation. But when it came to property and business per se, the states could have no place – not in restricting or even encouraging the pursuit of property. It was "the fundamental idea upon which our institutions rest," he wrote, and anything less would mean "our government will be a republic only in name."[168] Plainly, the states were not "republics." Perhaps they had been at one time; but there was no doubt that modern states were little more than mobs, while their constitutions and local legislation were only shields that hid great injustices, if not pulled aside by the national government – the Supreme Court in particular.

All of these things should be considered in light of Justice Field's words, which would set the tone for the ongoing judicial dilemma of the Lochner Era: "If this be sound law, if there be no protection, either in the principles upon which our republican government is founded, or in the prohibitions of the Constitution against such invasion of private rights, all property and all business in the State are held at the mercy of a majority of its legislature." His assessment was quite correct; his solution, though, was questionable. The seriousness of legislative interference in business would only intensify as it became involved in labor, hours, and wages, and as the legislation was increasingly informed by the sort of progressivism that had no ambiguities about its hostility to the entire American system. Field knew that there were necessary expectations of government that established its legitimacy, no matter how well its legislative branch abides by the process of law making. But he did not see the full scope of what a

[168] *Slaughterhouse,* at 108 (1873).

republican government was for. He plainly limited the definition of a republic to the sort of government that did little more than protect the rights it had deemed fundamental, because they were stated as substantive freedoms in the law. Field gave an elaborate description of those substantive rights, going quite beyond what Justice Miller had done in *Slaughterhouse*. Where the Amendment's protections of "life" and "liberty," "are of any value, [they] should be applied to the protection of private property," he wrote.[169] They could have no meaning beyond that absolute requirement.

There was, of course, a broad range of police power concerns, which the Constitution itself specified. States were required to give "just compensation" for whatever property it took for public purposes; it had the power to tax (assuming that all "bills for raising revenue originated in the assembly); and, of course, it had the power to regulate the keeping and pursuit of property – but not because of its impact on the public, but "so far as it may be necessary for the protection of the rights of others, and to secure to them the equal use and enjoyment of their property." Again, much like "life" and "liberty," all police power concerns about "health" and "safety" were reducible to concerns about property according to Field. "The doctrine that each one must so use his own as not to injure his neighbor," he wrote, "is the rule by which every member or society must possess and enjoy his property; and all legislation essential to secure this common and equal enjoyment is a legitimate exercise of State authority." Here, Field showed his fundamental departure from Justice Miller, as well as the whole meaning of police power as it existed in both the common law and the American Founding. "Except in cases where property may be destroyed to arrest a conflagration or the ravages of pestilence, or be taken under the pressure of an immediate and overwhelming necessity to

[169] *Munn*, at 140-141; 142.

prevent a public calamity, the power of the State over the property of the citizen does not extend beyond such limits."[170] Clearly, he did not perceive the need to help farmers as an "overwhelming necessity" – nor could he have imagined the plight of laborers in the coming industrial era as a "public calamity." The fundamental right to keep and pursue property, so long as it was absolutely protected, would create its own means.

In fact, the business interest was one with the public interest in his mind. "There is no business or enterprise involving expenditures to any extent which is not of public consequence and which does not affect the community at large, he wrote in his *Stone v. Wisconsin* (1876) dissent, handed down the same year, and on the same principle, as *Munn v. Illinois*. "There is no industry or employment, no trade or manufacture, and no avocation which does not in a greater or less extent affect the community at large and in which the public ahs not an interest in the sense used by the Court."[171]

D. Justice Stephen Field and the Lochner Era

While Justice Waite saw an unlimited political power within state governments, Justice Field saw only the end of government – and nothing to support it other than the judiciary. The right to keep and pursue property was a thing to be protected at all costs, in the confidence that it would actually create the solutions to its own problems – or, if it failed to do that, it should be protected anyway, because that was the meaning of freedom. Perhaps protecting such a right *would* allow "virtual" monopolies to form, and overtake otherwise fair trade by raising exorbitant rates, or, as it happened later, reduce wages and increase hours on workers beyond basic standards of fairness. It might be a

[170] Ibid., 146.
[171] 94 U.S. 181, at 185. (Field, dissenting.)

source of tremendous injustices, as liberty was allowed to overtake equality. But Field was confident that a clear protection of those fundamental rights would eventually lead to the best solutions, and that apparently even those who suffered under such conditions could also rest in the joy that their rights were protected as well.

For Justice Field, it was plain that republican governments themselves had no special role in protecting those rights. That Field would find so inconceivable what earlier Americans thought self-evident – e.g., that the "preservation of property… is a primary object of the social compact," and on *this* basis, every state constitution "was made a fundamental law" – indicates just how different his liberalism was from that of the Founders and their Constitution.[172] Liberty of contract, or even the most radical laissez-faire principles, it seemed, were no longer rooted in the nature of man or the purpose of government. This was obvious enough in his language: all business was now "placed at the mercy of the legislature of every state."[173] There was no *correcting* those governments and recovering the purpose of state police powers, because they were not truly corrupted. There was only a critical review of their activities – which placed tremendous authority in the hands of the Court.

In the *American Law Review*'s special issue on the centenary of the Supreme Court, Field wrote that "as inequalities in their conditions of men become more and more marked and disturbing," it was the role of the judiciary to do what it had always done: keep those popular impulses from crushing fundamental rights, before they "encroach upon the rights or crush out the business of individuals of small means." This was sure to happen "as population in some quarters presses upon the means of subsistence, and angry

[172] Justice William Patterson, *Vanhorne's Lessee v. Dorrance*, 2 U.S. 304, at 310 (1795).
[173] *Stone*, at 185.

menaces against order find vent in loud denunciations." Field's assessment of class animosity may have been quite correct, and it would only become worse in the next few years. But to assume, as he did, that there were no "republican remedies," as Madison understood it, nor even regulatory solutions that might step on fundamental rights for a time, was indeed to re-define government in radical new ways. For this reason, "it becomes more and more the imperative duty of the court to enforce with a firm hand every guarantee to the constitution," he wrote. "Every decision weakening their restraining power is a blow to the peace of society and to its progress and improvement."[174] The judiciary was indeed the whole reason for the rule of law, and therefore the jewel of the republic. Upon his retirement in 1897, which came after a stunning 37-year career, Field's farewell address to his fellow justices was reprinted in the *New York Times*. There, he restated the same idea, identifying the "great glory" of the American people as one thing that was central to the success of a free government: it "always and everywhere has yielded a willing obedience to them," i.e., not the laws, as those who stand by the classic definition of a republic would suppose – but to the Court's rulings. This fact, and this only, showed the "stability of popular institutions, and demonstrates that the people of these United States are capable of self-government."[175]

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[174] *United States Supreme Court Reports, Vol. 131-134*, ed. Stephen K. Williams (Rochester: The Lawyers' Co-operative Publishing Company, 1889), 1105.

[175] "Justice Field's Farewell: The Senior Member of the United States Supreme Court Announces His Retirement," *New York Times*, October 15, 1897. This view of the Court re-emerged in the later twentieth century. Far more than institutions and political procedures, the "root of American governmental power is revealed most clearly in the instance of the power conferred by the Constitution upon the Judiciary of the United States, and specifically upon this Court," according to Justice Anthony Kennedy in *Planned Parenthood v. Casey* (1992). The Court cannot raise money, nor can it execute the law, or even enforce its own rulings. "The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means, and to declare what it demands." Kennedy, and presumably his fellow justices who joined the narrow majority in this case, held precisely the same skepticism as Justice Field about the ability of republican institutions to serve their purpose. Though we might identify Field as a "conservative" by our terms, we should not ignore his understanding of what government, and the absolute necessity of the Supreme Court.

It was what Howard Jay Graham would later identify as "judicial trusteeship," which was "manifested both doctrinally and psychologically in Field's work," and which no doubt kept him on the Court for so long – longer than any other justice, and, by all accounts, longer than his own health could handle. All the while, he held great anxiety about the conditions of American politics, and seemed painfully aware of the necessity for men like himself to stand as guardians of fundamental rights, which could easily be usurped by legislative processes and become the victims of bad legislation – if not violence. He had a dark outlook, and a sense of "confused frustration that at times seemed to heighten anxiety and reveal a partial awareness that even the staunchest resistance to paternalistic trends might prove fruitless and self-defeating."[176] It was, no doubt, an aspect of the age: the nineteenth century was all about the loss of confidence in fundamental principles – even the most basic precepts of human dignity. All of the most sacred ideas that defined a civilization, or even a nation devoted to liberty, were suddenly in tremendous doubt. Progressivism would later offer a historical basis for natural right; but until that time – and even *after* that time – there was only one thing to do: insist on fundamental principles, and show their supremacy with raw assertions of power. Field found himself with precisely that duty on the Supreme Court – and in this he was

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Moreover, neither Field nor Kennedy could perceive their principles as the axioms or premises of free government. They were not beginning points, or the ideas that served as the bedrock for democracy; they were instead the things that democracy could not touch – or "beyond dispute." Hence, Kennedy wrote, "[t]he Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. 505 U.S. 833, at 865-866.

[176] Howard Jay Graham, "Justice Field and the Fourteenth Amendment," *Yale Law Journal* 52, 4 (Sept. 1943): pp. 853-854.

"obviously an anxious and troubled man, committed to policies whose ineffectiveness he sensed, yet to which he clung all the more tightly," Graham wrote.[177]

At the same time, strange as it sounds, he was really no different from Justice Waite, or those who wrote later opinions from which he dissented: they emphasized the power of the state legislatures, maintaining the confidence in democratic processes that would later come to define the progressive era. Field, however, emphasized the power of the judiciary, and its role as the guardian of rights that the nation had traditionally held sacred. But why, exactly, did he do this? It was strange to hear such praise of the judiciary coming from a justice who so frequently dissented when it came to the most pressing questions. Had his jurisprudence prevailed most of the time, this statement would make sense; but since it had not – since the Court had repeatedly sided with the regulatory laws that he believed were such a threat to the most basic liberty – justice Field made it clear that the principles behind his own dissents were in fact no more preferable than their opposites. Though Field asserted with all his might that there was a fundamental right to property, it appears that the ruling itself was far more important than his own principle. The Court, he wrote, "possesses the power of declaring law, and in that is found the safeguard which keeps the whole mighty fabric of Government from

[177] Justice Field's approach to judicial review seems to have evolved within the course of his career, largely in response to the appearance of socialism in America, and talk of communist revolution in Europe at the time. Howard Jay Graham argues that Field's tendency to enforce laissez-faire doctrine increased in reaction to these very real threats to liberty. At a time "when Justice Field's opinions were veering more and more in the direction of conservatism, he had reason to be troubled by the trend in domestic affairs and by his colleagues' decisions," Graham writes. There had been the impeachment of President Johnson, resulting in "months of widespread demoralization in all departments of government, state and national"; there had been equal public contempt for state legislatures (which no doubt resulted in the sorts of legislation we find in *Munn v. Illinois*). "Finally, climaxing the circumstantial case, is the fact that a great social cataclysm – the first to be reported by cable and exploited by modern journalistic devices – may well have been one of the decisive factors in reorienting Field's outlook," Graham writes. Incidents like the Paris Commune "produced a hysteria in conservative circles in the United States which caused such current indigenous forms of radicalism as the Granger and labor movements to be attacked as conspiracies against the institution of property." "Justice Field and the Fourteenth Amendment," pp. 160; 165.

rushing to destruction," he wrote. With this, he reminded his fellow justices that "this negative power, the power of resistance, is the only safety of a popular Government, and it is an additional assurance which the power is in such hands as yours."[178]

Still, it was only a matter of time before Field's view would prevail, not only in favor of laissez-faire principles, but as the only way the Court might find its place in national life in the coming century. The difficulty, of course, was how it carried this groundless nature with it. The rights that Field was so certain about depended entirely on the judiciary for their place in public life, and the sort of hostility that it would receive for going against what was thought to be the true public interest.

IV. The Remnants of Classic Police Power

Justice Waite would continue to apply this reading (or no-reading) of the Fourteenth Amendment in a flurry of cases, some of them stated in only a few paragraphs, dealing with state regulations of railroads. They were, no doubt, the decisions he anticipated when he wrote the *Munn* opinion, and he sought to apply it fully in what would otherwise be very difficult decisions. In *Chicago, Burlington, & Quincy v. Iowa* (1877) that railroads were "given extraordinary powers, in order that they may the better serve the public in that capacity." For this reason, they were "engaged in a public employment affecting the public interest, and, under the decision in *Munn v. Illinois*… subject to legislative control as to their rates of fare and freight, unless protected by their charters." The railroad was exactly like the grain elevators, and though it passed between the borders of several states, "[i]ts business is carried on there, and its regulation is a matter of domestic concern," he wrote. "It is employed in State as well as in inter-state

[178] "Justice Field's Farwell," Ibid.

commerce, and, until Congress acts, the State must be permitted to adopt such rules and regulations as may be necessary for the promotion of the general welfare of the people within its own jurisdiction, even though in so doing those without may be indirectly affected."[179] The railroad companies were therefore left to adapt themselves to the "patchwork" of state regulations, and could expect no protection from the federal government for even a fair protection of their interests. The rule, which was also decided in *Munn*, determined that "[w]here property has been clothed with a public interest, the legislature may fix a limit to that which shall in law be reasonable for its use." From here, though, he revealed just how far he was willing to let the power of state legislatures go – to the point where it overcame even the Constitution itself, and the Court's role in interpreting it. "This limit binds the courts as well as the people, he wrote. "If it has been improperly fixed, the legislature, not the courts, must be appealed to for the change."[180]

A. Justice William K. McAllister's Defense of Natural Right

Justice William K. McAllister was as obscure as a judge as his ideas were in the judiciary at the time. He was elected to the state judiciary in 1870, when the state held its convention, and then resigned after only five years. His dissent, though, was the strongest approach to police power jurisprudence, and would have offered tremendous guidance, not only for the outcome of *Munn* and subsequent cases, but for the whole course of the Lochner Era. He began his dissent on "elementary grounds." In language that was quite remote from the rest of his fellow justices, he wrote that the "natural

[179] 94 U.S. 155, at 161; 163 (1877).
[180] *Peik v. Chicago & Nw. R.R.*, 94 U.S. 164, at 178.

rights" of individuals are no more the creations of legislative power as they are of judicial power. They are instead "antecedent to and exist independently of the constitution." People joined civil societies and formed constitutions – and indeed, they created state police power – in order to protect those rights, which they held simply by being human. "Therefore the extent of constitutional protection can only be determined by a correct definition of the rights it was intended to secure."[181]

For McAllister, the common law was insightful and helpful only so long as it stayed rooted in its own first principles. To have those principles at hand, though, was the great advantage of the American republics. He looked primarily to the constitution of the state, and the super-political principles that it referred to: after listing the basic rights, it guarantees that "'to secure these rights and the protection of property, governments are instituted among men,' etc." In words that surpass Justice Field's attempt at a philosophic dogma of property, McAllister wrote: "It must be admitted that the sense of property is deeply implanted in human nature – is inherent in man." At the same time, though, McAllister went quite beneath Field's view, and acknowledged the pragmatic side of natural right, which informed the structure of republican government and its institutions, and, of course, the reason why government existed to protect property. "[I]f we are to infer a purpose from results," he wrote, "this sense must have been bestowed for the purpose of rousing men from sloth, and stimulating them to activity, and has, in fact, had far greater influence in founding civil government upon correct principles than any other motive or perception of the human mind."[182] Government, according to McAllister, had a distinct nature, and the purpose of law was to make it realize that end. This did not mean

[181] *Ira Y. Munn et al. v. People of the State of Illinois*, 69 Ill. 80, at 9 (1873) (McAllister, dissenting.)
[182] Ibid.

that there were abstract principles of right that rose far beyond all other considerations of public necessity; at the same time, it did not mean that public necessities trumped all need for protecting property, recognized as its end. It was, as my thesis holds, both of these things.

McAllister revived the principle of republican government that James Madison had explained in Federalist #10 – that the true mark of a republic was its ability to contain factions, or at least ensure that legislation was not completely in favor of one class over another. "Our government is one of the people, and its functions subject to disturbance by popular excitements, by which one class of men with certain particular interests or prejudices, either political or otherwise, may come into power, displace all against whom those prejudices run, and oppress them with unfriendly legislation." There was a difference between legislation that was an exercise of one class over another, and the sort that sought to remedy a certain injustice that had occurred spontaneously in society. The former proceeds on the assumption that justice is a matter of compensating for past wrongs; it is often driven by the righteousness of the cause, as populist farmers frequently did in this era. The latter, though, seeks to recover a lost form of justice that applies equally to all – a process that might very well require legislation that is class based for a time. Once that standard of fairness is recovered – once the means achieve their ends – then the task is complete. It is, of course, a fine line between these two views; but Justice McAllister was clear that forgetting it would only bring peril. The regulation in question may very well have been justified; but to allow it for the reason Justices Breese and Waite did – that state legislative power is the supreme expression of the social contract – is to invite great confusion.

With this in mind, McAllister proposed the ideal thought experiment: "Suppose the displaced class to be those engaged in agriculture," he wrote. Suppose laws are passed "to cripple the interests of those engaged in it." Suppose rates are adjusted entirely in favor of urban manufacturing interests; all regulation is aimed at agriculture, particularly the price of grain. "Now, in none of these instances, would property itself be taken or the title to it disturbed" – and by the existing rule, there could be no recourse for the farmers. Here he asked the critical question: "can there be any doubt that, by the principles of the Bill of Rights, all such legislation would be unconstitutional and void? It was for the prevention of such things that constitutions are adopted."[183]

McAllister once again sought a great authority on this question – at once the greatest challenger to Justice Taney's doctrine carried on by Morrison Waite, and the man who gave far greater assurance to the right of private property than Justice Field ever did. It was, of course, Chief Justice John Marshall. He had established how certain degrees of state regulation really could destroy not only the fundamental right of property, as Field would have it, but the government itself. Perhaps property was not threatened under the existing state law in Illinois; but "if the legislature can fix the rate of compensation, then make it criminal to prosecute the business unless they shall obtain a license to carry it on, and give the bond required to submit to the rate so fixed, then the power is limited only by the pleasure of the State, and it may fix the rate of compensation so low that the business can not possibly be continued under it, and is therefore suppressed – destroyed."[184] He quoted from Justice Marshall's opinion in *Brown v. Maryland* (1827), a case dealing with the authority of a state government to place a fee

[183] Ibid., at 10.
[184] Ibid., at 11, quoting *Brown v. State of Maryland*, 12 Wheat 419, at 439 (1827).

on imported goods, obviously in the interest of its own citizens. The law fell plainly within the Constitutional prohibition in Article I, Section 10, that "No State shall, without the Consent of the Congress, lay any imposes or Duties on Imports or Exports." In ruling on the question, though, Justice Marshall explained the precise reason behind that prohibition, and why it was essential to the republican form of government expected in the states: "It is obvious that the same power which imposes a light duty can impose a very heavy one, one which amounts to a prohibition." Contrary to Justice Waite's opinion, he pointed out that "[q]uestions of power do not depend on the degree to which it may be exercised." Degrees of power did not establish what *kind* of thing was exercising that power; it placed an elected assembly of a republic on equal footing with a tyrant. The state of Maryland, of course, made its case much as the Illinois State Assembly did in Munn: it argued that the power simply did not go that far, and that there was no infringement on substantive rights. "We are told that such wild and irrational abuse of power is not to be apprehended, and is not to be taken into view when discussing its existence," Marshall wrote. But it was clear that "[a]ll power may be abused, and if the fear of its abuse is to constitute an argument against its existence, it might be urged against the existence of that which is universally acknowledged, and which is indispensable to the general safety."[185]

Justice Stephen Field gave no attention at all to McAllister in his *Munn* dissent. It was most likely because he did not share the same view of natural right: his was absolute, having everything to do with the rights themselves, and nothing at all to do with the sort of government that was designed to protect them. It placed the Supreme Court and its defense of fundamental rights at the center of the regime, rather than the Constitution, the

[185] 25 U.S. 12, Wheat 419, at 439-440.

republican state governments, and the institutions they created. This does much to explain the nature of the Lochner Era, and the meaning of the New Deal revolution that brought it to an end: insofar as Field's view prevailed in that period, it was destined to collapse.

Conclusion

Justice Samuel Miller silently joined the majority in *Munn v. Illinois*. It would appear that he abandoned his initial position presented in the *Slaughterhouse Cases*. But in truth, he had not changed his mind at all, at least according to his majority opinion in *Davidson v. City of New Orleans* (1877), handed down that same year. The case involved yet another challenge to a piece of state legislation under the Fourteenth Amendment; it sought the sort of exception that Miller believed existed, but which Justice Waite had removed. "The prohibition against depriving the citizen or subject of his life, liberty, or property without due process of law, is not new in the constitutional history of the English race," he wrote. "It is not new in the constitutional history of this country, and it was not new in the Constitution of the United States when it became a part of the fourteenth amendment, in the year 1866." It had been part of the "law of the land" long before the American Constitution declared that title for itself in Article IV. The due process guarantee in English common law was not directed at the British constitution (which did not exist in written form), nor at Parliament. It was simply understood as the sort of thing a republican government did, by definition. This was the way state constitutions understood themselves at the time of the Founding. Those guarantees were

"embodied in the constitutions of the several States, and in one shape or another have been the subject of judicial construction."[186]

But Miller saw a new trend in recent years: for all their republican institutions – their checks and balance sand frequent elections and guarantees of substantive rights – the states were not only falling short of their own principles, but were increasingly willing to reject them for the sake of very partial and short-sighted concepts of justice and the public good. There were sensible remedies to legitimate problems; but then there were unlimited regulations that would never remove state power from the private sphere. At the same time, there was a whole new basis of complaints against state regulations. Before, the remedy was based on a public movement, a weighing of alternatives, and finally a vote – always guided by an appeal to the basic precepts of justice and neutral government understood by all. But now, it involved far greater attention to the federal government, and the Supreme Court's interpretation of the Constitution. "It is not a little remarkable, that while this provision has been in the Constitution of the United States, as a restraint upon the authority of the Federal government, for nearly a century," Miller wrote, referring to the Bill of Rights, "this special limitation upon its powers has rarely been invoked in the judicial forum or the more enlarged theatre of public discussion." But now, while the Fourteenth Amendment had only existed for a few years, he observed that "the docket of this court is crowded with cases in which we are asked to hold that State courts and State legislatures have deprived their own citizens of life, liberty, or property without due process of law." The hope had been that the Amendment, and maybe handful of cases, would be a sufficient reminder of what a republican government is, and that Congress could enforce that view accordingly. But by this time, it was thought that the

[186] 96 U.S. 97, at 103-104.

national government would no longer be a temporary, adjusting, remedying thing, but a permanent and fixed presence in local affairs. This, he thought, could only be the result of "some strange misconception of the scope of this provision as found in the fourteenth amendment." That misconception would increase, and come to reshape political life and American self-understanding for decades to come. Stranger still, based on "the character of many of the cases before us," the Court seemed to find itself the institution that would no longer interpret positive law, but enforce the "abstract opinions of every unsuccessful litigant in a State court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded," he wrote. "If, therefore, it were possible to define what it is for a State to deprive a person of life, liberty, or property without due process of law, in terms which would cover every exercise of power thus forbidden to the State, and exclude those which are not, no more useful construction could be furnished by this or any other court to any part of the fundamental law."[187] It was, of course, not the kind of thing that the Supreme Court could promulgate because it was something already known to mankind – or at least such a thing was presupposed of republican citizens.

[187] Ibid., at 104.

Chapter 4:

The Constitutional Word Incarnate: The Problem of the Fourteenth Amendment

What exactly was the Fourteenth Amendment supposed to do – not in 1868, but in the future of American constitutionalism? Understandably, the question was slow to appear in the years following the Civil War and Reconstruction Era. In the 1860s, the structure and purpose of the Amendment was *determined* by immediate needs: it was critical that the Constitution empower Congress "to enforce, by appropriate legislation, the provisions of this article," to decisively bring the South back into the Union, and bring Southern Society into line accordingly. The hostility in the South was predictable. One Southern protestor, a certain "G.T.C," wrote in *The Round Table* in 1868 that "without scruple, straight to its object, and directly athwart the sovereign rights of those peoples, the Radical Congress moved in a solid phalanx to the accomplishment of its purpose, and crushed out beneath the heel of military power the very political and sovereignty which it should have respected as constituting the state." Even more horrific for Southern sensibilities was the policy of "equalizing" the races. It was an impossible thing for the South, so convinced it was that "there is to be subordination of one race to the other," he wrote – and that Reconstruction could only mean its turn to be dominated had come. This was the disruption of a critical social hierarchy for most Southerners; they were sure that freedmen could not possibly use their new voting rights merely for their own interests, and an equal station as citizens; given their condition of slavery, it was perfectly logical to assume that they would use whatever political power they could find to strike back in any number of horrific ways, allowing African Americans "to wield

an undue proportion of political power," and "hold a majority of the whites in a condition of disenfranchisement just so long as they please."[188] Much like President Johnson's veto of the Civil Rights Act in 1866, these circumstances also revealed the need for a carefully crafted amendment that would make the precepts of republicanism clear – a system that guarantees the equal rights of all sides, rather than allowing the proverbial "oppressed to become the oppressors."

I. The Fourteenth Amendment in the Moment: Dealing with the South

The difficulty of framing the Fourteenth Amendment came above all from the urgency of the task.[189] Looking back on the critical days, Congressman James G. Blaine, who had opposed many of the Radical policies for a more moderate approach, still admitted that it was "not uncharitable or illogical to assume that the ultimate reenslavement of the race was the fixed design of those who framed the [Jim Crow] laws, and of those who attempted to enforce them." The only way to prevent this, beyond the Thirteenth Amendment, was to grant a basis for liberty that was far broader than the immediate problem – and to do so quickly, completely, and decisively. Legislative action had to happen before Southern states could escape the Union's intent for the nation; at the same time, though, they had to ensure a just and fair new solution. Plainly, these were not easy things to reconcile. Such haste in the formation of a constitutional amendment

[188] Letter to the Editor in *The Round Table: A Saturday Review of Politics, Finance, Literature, and Society*, Aug. 15, 1868, p. 104.

[189] Thomas Cooley's warning was particularly apt here: even when "persons skilled in the use of words" draft a law there can be confusion; but when "draughtsman are careless," he wrote, "these difficulties are increased; and they multiply rapidly when the instruments are to be applied," especially to the "new circumstances which could not have been anticipated, but which must nevertheless be governed by the general rules which the instruments establish." *A Treatise on the Constitutional Limitations which Rest upon The Legislative Power of the States of the American Union, Vol. I* (Boston: Little, Brown, and Company, 1927), 97.

would, no doubt, come with a great lack of foresight, especially when Congress proceeded on what Blaine thought to be inevitable circumstances. "To restore the Union on a safe foundation," he wrote, "to reestablish law and promote order, to insure justice and equal rights to all, the Republican party was *forced* to its Reconstruction policy," i.e., forced by conditions in the South. "To have destroyed the rebellion on the battlefield, and then permit it to seize the power of eleven States and cry check on all changes in the organic law necessary to prevent future rebellions, would have been a weak and wicked conclusion to the grandest contest ever waged for human rights and for constitutional liberty."[190]

But, for all the congressional haste, the Fourteenth Amendment did feature a thoughtful and deliberate structure – at least for a society where the pre-modern assumptions about republicanism still prevailed. Section One of the Amendment was, in truth, only half of is intent. Far more important for the Reconstruction Congress was Section 2, which would base representation on "the whole number of persons" (rather than the previous three-fifths of the slaves); this, in turn, would bring greater representation of Republican interests in the House, and enable Congress to more fully realize its goals. The importance of Section 2 was obvious "when South Carolinians by the hundreds were indicted for interfering with the freedom of elections in killing negroes by the score, it was found impossible to convict one them," Blaine wrote. "Against the clearest and most overwhelming evidence, those murderers were allowed to go free, and the prosecutions were abandoned." Such horrors were plainly in defiance of the principles stated in Section One; but no amount of congressional power could actualize them on its own. It required a method by which Congress could overcome these things.

[190] James G. Blaine, "Article 8," in *The North American Review* (Mar. 1879): 77.

It was the distinctly republican means to liberty – the very sort of active state liberalism that many state governments would later employ to remedy economic injustices. But again, the necessary assumptions about republicanism – that there is a place for active state liberalism in the service of the right end, as my thesis holds – are the only ideas that make sense of the Amendment.

Section One did not occupy much time for the Reconstruction Congress, nor did Blaine have anything to say about it. Yet the idea of Section One was abundantly present in Blaine's words: "In a fair and generous struggle for partisan power let us not forget those issues and those ends which are above party." Achieving those ends, though, meant that "the Republic must be strong enough, and shall be strong enough, to protect the weakest of its citizens in all of their rights."[191] These claims are plainly full of ideas about "privileges and immunities," "equal protection" and "due process" – all of which are quite "above party"; there was nothing partisan about them, because they were the precepts which made the political life of a republic possible. Blaine simply stated them as the assumptions of the time, or ideas that were inherent in all republican forms of government.

For Congressman Blaine and his fellow Republicans, only Congress could make the guarantees of Section One a reality for freedmen, especially now that it was empowered by the electoral support from the Amendment's Section 2, as well as the Fifteenth Amendment. They were aware that even the noblest legal promises, though declared in the law of the land, would not enforce themselves – that right always depends on a tremendous amount of political might. Never did it seem to cross their minds that that the judiciary – inherently the weakest, most un-enforcing branch of government –

[191] Ibid., 283.

would eventually become the institution devoted to protecting the rights, liberties, and equality of citizens as stated in the Amendment, thus protecting the end of government regardless of the means.

In truth, later twentieth century civil rights cases, as well as rulings on sexual and reproductive privacy, and the whole range of liberties guaranteed by the "incorporated" Bill of Rights, were, I propose, entirely because of the Fourteenth Amendment. It stated in fact what was supposed to only exist in theory; the purpose of the law became present within the law. In this, it was the gateway to modern judicial review. In our own time, many of those rights would eventually detach themselves from the Constitution altogether, depending entirely on the Court's own will rather than the law. The Supreme Court in the late nineteenth century struggled to avoid such a duty. Its approach in *Munn v. Illinois* (1876), and subsequent cases, was but a crude attempt to sever itself from such a role; but, as the history of the Court shows us, it was a hopeless endeavor on their part, and it was only a matter of time before the Court would find itself forced to be the sole guardian of liberty.

A. Freedmen, the South, and the Judiciary

The strongest feelings toward the Supreme Court's Fourteenth Amendment jurisprudence came from the ruling in *Strauder v. West Virginia* (1880), and its companion case, *Ex Parte Virginia*. The cases were plainly judicial questions: they upheld major civil rights legislation, which declared that a state cannot forbid freedmen from serving on juries in criminal trials, especially when the defendant was black. Justice William Strong, who wrote the opinion in both cases, appeared to understand the true

intent of the Amendment, i.e., that it was designed to empower Congress to compel states to grant the rights of United States citizens, now seen as individuals before the law. True, state governments were well within their rights to determine who was fit to serve on a jury. "But, in exercising her rights, a State cannot disregard the limitations which the Federal Constitution has applied to her power," Strong wrote. "Her rights do not reach to that extent. Nor can she deny to the general government the right to exercise all its granted powers, though they may interfere with the full enjoyment of rights she would have if those powers had not been thus granted." At the same time, he was not entirely clear on *why* Congress could do such a thing. It appeared to be a transaction of enumerated powers, that "every addition of power to the general government involves a corresponding diminution of the governmental powers of the States" – that it was in fact "carved out of them."[192] Did the national government exist merely because it had "carved out" a space for itself? If so, how did that justify Congress' ability to enforce such civil rights – much less the Court's authority to rule on them?

This confusion explains Justice Strong's ruling in *Strauder*. Speaking of the Fourteenth Amendment, he asked: "What is this but declaring that the law in the States shall be the same for the black as for the white," or "that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color?" Justice Strong acknowledged that all juries are more or less slanted, and that the selection of jurors in a criminal case was never perfect; but with random selection, careful screening, and the requirement of a unanimous majority for the more serious crimes, it was the best method of justice a free

[192] *Ex Parte Virginia*, 100 U.S. 303, at 347 (1879).

people could find – and one that was most certainly promised to those who had been formerly enslaved. But Justice Strong and the majority could not allow that the Amendment meant anything more than this: states could still have requirements for who could and could not serve on a jury, and those rules might exclude women, the poor, or the uneducated. "The Fourteenth Amendment makes no attempt to enumerate the rights it designs to protect," Strong wrote. The Amendment did not grant privileges, because "its language is prohibitory."[193]

Hence, the case actually did little in favor of former slaves.[194] Though one would never guess that based on popular reactions to the case. The "Legal Department" section of the *Christian Advocate* declared the ruling a victory for freedmen. Forbidding them from serving on juries was the worst denial of equal protection, "since the constitution of juries is a very essential part of the protection which the trial by jury is intended to secure." The article expressed how sacred the jury was in the American mind, and how great the responsibility of citizens was in light of life-and-death questions in criminal law. Yet it was for the same fundamental reason that such guarantees had to be extended to former slaves, who were now part of the polity. A jury is "composed of the peers or equals of the person whom rights it is selected or summoned to determine; that is, of persons having the same legal status in society as that which he holds," the article stated. "These decisions of the Supreme Court leave no doubt that the Fourteenth Amendment is broad enough and plain enough to secure to colored citizens the enjoyment of those rights

[193] 100 U.S. 303, at 307; 310 (1880).

[194] The Court slightly broadened Justice Morrison Waite's view on this issue. Consistent with his Cruikshank ruling, he wrote that a trial by jury is not "a privilege or immunity of national citizenship, which the States are forbidden by the Fourteenth Amendments to abridge." Nor was there any damage to the Constitution's Due Process requirement, "which is met if the trial is had according to the settled course of judicial proceedings," he wrote. "Due process of law is process due according to the law of the land. This process in the States is regulated by the law of the State." *Walker v. Sauvinet*, 92 U.S. 90, at 92-93 (1875).

which have been flagrantly denied to them."[195] *The Independent* had much the same praise for the Court: "[t]he exclusion of the colored race, as s race, from the jury-box is at an end in this country." It was here that the article declared *Dred Scott* officially overturned, showing that "the American people have taken a long stride in the direction of equal rights… Chief Justice Taney, if now living, would not repeat the utterance of 1856."[196]

The truth, however, was not so glorious: the ruling was not that broad in its protections, nor was the Fourteenth Amendment very broad at all when it came to later civil rights legislation. And, of course, compliance with the act and the subsequent ruling was minimal. The *Albany Law Journal*, for instance, reported that a certain Judge Christian in Richmond, Virginia, would "summon them whenever he deems it best for the enforcement of the laws. 'When I find that I can best do this by selecting colored juries, I will do so, but not till then,'" he said. All of this is quite true for the proper functioning of a jury in a criminal trial: "'Education, elevation of character, and the legal qualifications are the only things that I know of necessary to render any person 'liable' to such duty in this court.'"[197] Yet, much like literacy tests for voting, it was plain that it left much room for the sort of jury selection that would appease white Southerners, and avoid both the civil rights law and the intent of the Amendment as the Court has interpreted it *Strauder*.

The Court further minimized the effect of the Fourteenth Amendment in the *Civil Rights Cases* (1883), when it struck down Congress' protection of freedmen to use

[195] "Colored Men as Jurors," *The Christian Advocate*, Mar. 18, 1880.
[196] "Colored Jurors," *The Independent* 32, 1653 (Aug. 5, 1880): 17.
[197] "Current Topics," *Albany Law Journal: A Weekly Record for Law and Lawyers* 19, 24 (June 14, 1879): 465.

"public conveyances on land or water, theaters, and other places of public amusement." Just before the cases were handed down, the *New York Times* reported that in the last few years, "Congress appears to have gone far beyond its limits in what was assumed to be appropriate legislation for the enforcement of its provisions"; at the same time "judicial interpretation has been gradually undoing some of its work." Such legislation would not stand "until public sentiment is brought into accord with it" – which was plainly something that Congress could never do, at least not through sheer force. "[T]he national Government cannot deal with offenses which are those of persons or corporations and not of States."[198] *The Independent* concurred: "It is just as important that the Federal Government should keep within the sphere assigned to it by the Constitution as it is that the states should keep within the sphere of the powers reserved to them by the same Constitution," the columnist wrote. "In this way and in no other way can our duplicate system of government be harmoniously and successfully worked."[199]

The Court largely agreed with this view. The Fourteenth Amendment, according to Justice Joseph P. Bradley, only meant to empower Congress to regulate states – not society. "In other words, it steps into the domain of local jurisprudence, and lays down rules for the conduct of individuals in society towards each other, and imposes sanctions for the enforcement of those rules, without referring in any manner to any supposed action for the state or its authorities." To do so would be to state a whole range of nation-wide laws of interpersonal conduct. The intent of the Fourteenth Amendment was aimed only at state governments, not the values or chosen lifestyles of individual white Southerners. "An inspection of the law shows that it makes no reference whatever to any

[198] "The Question of Equal Rights," *New York Times*, Jun. 17, 1883.
[199] "The Civil Rights Decision," in *The Independent*, Feb. 1, 1883, p. 17.

supposed or apprehended violation of the fourteenth amendment on the part of the states," Justice Bradley wrote. "It is not predicated on any such view. It proceeds *ex directo* to declare that certain acts committed by individuals shall be deemed offenses, and shall be prosecuted and punished by proceedings in the courts of the United States."[200] This the Supreme Court could not allow, especially when so many civil rights were already granted protection. Such narrowing of the congressional use of the Fourteenth Amendment was, of course, complete when the Court handed down the infamous *Plessy v. Ferguson* decision in 1896; the case held that "separate but equal" Jim Crow laws were in perfect accordance with the Equal Protection Clause, thus undermining once and for all civil rights legislation that might prevent broad social injustices against freedmen.

Many critics of failed civil rights legislation came to the conclusion that Congress was not supposed to concern itself with constitutional issues as construed by the Court. It was instead meant to simply enforce the sort of nationwide racial equality that they deemed appropriate. Max West, writing for the *American Journal of Sociology* in 1900, observed that the Amendment's "language is so mathematically explicit that it requires no interpretation, but requires simply to be enforced." This meant the power of Congress to ensure voting rights, which in turn would secure the legislative basis for enforcing the desired social equality. This was most essential, according to West, in the issue that would come to dominate civil rights cases in the mid-twentieth century: education. "Evidently something must be done either to prevent or to neutralize the discriminations of the state educational systems," he wrote. "If discrimination in educational facilities be a violation of the Fourteenth Amendment in letter as well as in spirit, Congress has the

[200] *Civil Rights Cases*, 109 U.S. 3, at 10; 14 (1883).

power to order it stopped." It was plain, though, that Congress did *not* have that power, at least under the Supreme Court's ruling in the *Civil Rights Cases*. Yet West did not even bother to criticize that ruling; Congress had the mandate, and that was final. This reveals the new vision of legislation then emerging: it was to proceed on experimental grounds, informed by the social science research that flooded West's article – not on matters of law, or even justice. "If discrimination cannot be altogether prevented, the national government should make an effort to counterbalance its effects by supplementing the educational work carried on by the states," he wrote.[201]

This was, of course, the spirit of the coming progressive era, i.e., unlimited government action in the name of ideal goals. But, as history shows, it would have very little regard for the plight of African Americans and their promises under the Reconstruction amendments, as West hoped: it would turn attention entirely to class relations, and the need to engineer a perfect democratic order, albeit exclusively among white people. But this would still bring about a great clash of ideas: are there enduring rights, precepts of equality, and a proper end of government, as the Fourteenth Amendment holds? Or is there only social evolution, to which governments are meant to conform – if not enforce? This, the latter view of government, would inevitably collide

[201] Max West, "The Fourteenth Amendment and the Race Question," *American Journal of Sociology*, 6, 2 (Sep. 1900): pp. 250-252. This was, of course, the sort of jurisprudence that eventually prevailed in *Brown v. Board of Education* (1954). There, Chief Justice Earl Warren wrote that the intent of the law has no meaning: "[w]e must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws." This called, of course, for sound social research, psychological studies in particular. "Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*," he wrote, "this finding is amply supported by modern authority." 347 U.S. 483, at 493-494. Such authority, which Warren cited in his 11th footnote, established that segregation instilled children with "feelings of inferiority," which were detrimental to learning. Like West, Warren was quite unconcerned with explaining how the facts of social science led to his own normative conclusions, nor the cost and challenge of enforcing them methods other than the legislative process.

with such constitutional protections, especially when the Supreme Court is sworn to uphold them.

But, as we can see in the judicial thought of Justice John Marshall Harlan on racial questions, this did not need to happen.

B. John Marshall Harlan's "Corrective" Solution

When the Court announced its ruling in the *Civil Rights Cases*, the *New York Times* reported: "it seems as though nothing were necessary but a careful reading of the amendment [to see] that it did not authorize such legislation as the Civil Rights act." Perhaps freedmen were entitled to a basic social equality, beyond merely political rights. "But it is doubtful if social privileges can be successfully dealt with by legislation of any kind… If anything can be done for their benefit it must be through state legislation."[202] This was, of course, an indictment of Justice John Marshall Harlan's reading of the Fourteenth Amendment, which he explained in his dissenting opinion. For the *Times*, it seemed Harlan was "laboring to give a forced construction to the amendment and to import into it something which the ordinary mind cannot find there." The Amendment granted certain specific, basic rights; but "[i]t does not say that no person or corporation within a State shall interfere with the rights of citizens or make discriminations in their treatment." To read it as Harlan did would give Congress a power that "could be exercised in every case in which the privileges and immunities of citizens are liable to infringement," calling for endless, confusing, and potentially oppressive legislation.[203]

[202] "Civil Rights Cases Decided," *New York Times*, Oct. 16, 1883.
[203] "Judge Harlan's Reasoning," *New York Times*, Nov. 21, 1883.

Indeed, for all its authority and noble intentions, Congress could have no legislative power over people's hearts.

But this was a grave misunderstanding of Justice Harlan's legal reasoning. The ruling in the *Civil Rights Cases*, he believed, was a plain denial of the full authority of Congress – not a claim for itself of the things that states could not do, as Justice Strong would have it, but, as my thesis holds, a way of compelling the states into what they were supposed to be.

It was contended, of course, that a broad reading of the Fourteenth Amendment would amount to a congressional takeover of the entire nation. "Not so," Harlan insisted.

> Prior to the adoption of that amendment the constitutions of the several states, without, perhaps, an exception, secured all persons against deprivation of life, liberty, or property, otherwise than by due process of law, and, in some form, recognized the right of all persons to the equal protection of the laws. These rights, therefore, existed before that amendment was proposed or adopted.

It was therefore the purpose of the Amendment to return the states to their own constitutions and republican principles, and the guarantees that existed for all citizens, regardless of race (or class). "If, by reason of that fact, it be assumed that protection in these rights of persons still rests, primarily, with the states, *and that congress may not interfere except to enforce, by means of corrective legislation*," he wrote, "it does not at all follow that privileges which have been granted by the nation may not be protected by primary legislation upon the part of congress."[204]

Hence, the critical difference between "correction" and "domination" of the national government over the states – an important aspect of my thesis. Congress was empowered to correct the states, to recover their lost heritage, and bring them back to their own first principles, through the persistence of slavery before the war and Jim Crow

[204] *Civil Rights Cases*, at 55-56 (Harlan, dissenting.) (Emphasis added.)

laws after. Such legislation, though, was never meant to overpower them completely, or to practice social engineering as the majority in the *Civil Rights Cases* held. Such corrective measures, aimed at the states, had a clear problem to solve; once that task was finished, the Amendment's purpose would be complete.

Perhaps Justice Harlan did apply the idea of "corrective" legislation too broadly in this case. It might have been an instance of Congress doing too much, or reaching too deeply into social legislation, perhaps seeking reforms in the South that were premature and excessive. But his point was clear, and crucially important: the best Fourteenth Amendment legislation proceeded, not on the arbitrary whim of the Union (or its own "values," as we might call it today) but on the basis of a truth so plain that we might call it self-evident, according to Justice Harlan: if, at one time, "it is the colored race which is denied, by corporations and individuals wielding public authority, rights fundamental in their freedom [then at] some future time it may be some other race that will fall under the ban," Harlan wrote. Indeed, any principle that one part of society lays down to deny others their basic natural rights is equally applicable to themselves. "If the constitutional amendments be enforced, according to the intent with which, as I conceive, they were adopted, there cannot be, in this republic, any class of human beings in practical subjection to another class, with power in the latter to dole out to the former just such privileges as they may choose to grant."[205] In practice, Harlan assured his critics that any law that overstepped the "corrective" intent – one that imposed any of the abuses or acts of class legislation that white Southerners feared – would indeed be declared unconstitutional for precisely that reason. But truly corrective legislation was, or had to be, perfectly legitimate.

[205] Ibid., 62.

But, of course, this view of the Fourteenth Amendment was rejected in the *Civil Rights Cases*, and it continued to decline by the end of the nineteenth century, even as the Court's involvement in such questions increased. "Correction" assumes that there is a proper condition of the thing corrected; if it is corrupt, then correction recovers what it is supposed to be. This is not simple when the thing corrected is as vast and complicated as a state. Nonetheless, that is what the Reconstruction amendments were meant to do, in the most prudent way possible.

Inevitably, Harlan's view of the original intent for the Fourteenth Amendment slowly broke down into two parts: political power on one hand, and "fundamental rights" on the other. It was the latter that gave rise to the idea that there was, in fact, a new American regime, entirely different than the one left us by the Founders.

II. The Fourteenth Amendment in the Future: A New Regime of Rights

It was no doubt difficult to read the Fourteenth Amendment without a sense of novelty in the text, at least when it came down to serious judicial questions about Section One. There had certainly been such a spirit in Abraham Lincoln's understanding of the Civil War, which inspired the Reconstruction Congress. What else could the President have meant in the Gettysburg Address when he said that "that this nation, under God, shall have a new birth of freedom"? This appeared to be the spirit of Reconstruction: the new order would be based only in part – or perhaps not at all – on the older order. Just as the old regime was framed and ratified, so too was the new one.

Was the Amendment the foundation of a new regime? Was it substantially different from the previous order of the American Founders, thus requiring the Supreme

Court to promulgate its substantive grants and restrictions? Or was it in fact an outgrowth of that order, as Justice Harlan saw it, featuring a great deal of both institutional and philosophic continuity – and therefore still demanding the "that veneration which time bestows on every thing," as James Madison described it?[206] Which of the two options prevailed – and which one *ought* to have prevailed?

A. States in the New Regime of Rights

Critics of the Fourteenth Amendment, aware of what it meant in the long run, knew that for all its noble intentions, it still contained a "fatal defect." That defect "consists in an assumption which, if it were true, would revolutionize our whole system of government," one editor wrote in an 1876 issue of *The Independent*. It was correct to say that "the object aimed at by Congress was to extend the protection of the General Government to the colored people of the Southern States"; had it been a question of pure justice, "it would have our hearty sympathy," the editor wrote. But that should have stayed a concern of legislation, not the reason for altering the constitutional basis for federalism. "Here we insist that the General Government shall not keep within the limit of its constitutional power, and not undertake to discharge its police duties, which the Constitution assigns exclusively to the state governments."[207] For all his concern about the dignity of the states, one thing was obviously missing from this editor's point of view, i.e., that state governments had any respective ends to fulfill. Plainly, according to this editor, police power was more a matter of local self-legislation than the realization of

[206] James Madison, Federalist #49. Alexander Hamilton, Federalist #28. In James Madison, Alexander Hamilton, and John Jay, *The Federalist Papers*, ed. Charles R. Kesler and Clinton Rossiter (New York: Signet Classic, 1999), 311.
[207] "Congress and the Supreme Court," *The Independent*, Apr. 13, 1876.

republicanism; the national government was best when it stood by a policy of non-interference. "Corrective" Fourteenth Amendment legislation, as Justice Harlan described it, was in fact the display of political power by a new regime, itself a threat to the old one.

The Independent, though a Boston-based magazine, was adamant in this view of states rights in the face of the Fourteenth Amendment's political novelty. Over a decade later, one editorialist wrote that "the Government of the United States is one of *enumerated* powers." The rights of citizens came above all from the states, as an aspect of their collective consciousness. "[I]n respect to these rights the states are supreme, except as limited by the Federal Constitution," he wrote. Yet this editor had a peculiar way of describing popular sentiment, claming that "[t]he states themselves are Republican in their form of government." This meant that "although there may be great abuses in the exercise of their powers, the theory of the Constitution is to take the hazard of such possible abuses, rather than dispossess them of these powers and virtually absorb them in the powers of the General Government." Something had happened, it seemed, to the definition of a "republic" after the Civil War: it was no longer the sort of government that, theoretically, recognized certain basic rights of citizens; nor was it practically a set of institutions arranged by a neutral laws into a self-checking system. In fact, it did not resemble any of the classic definitions.[208] It was instead little more than local self-

[208] This was, of course, a timeless tendency in political life. Marcus Tullius Cicero, for instance, wrote that "there is no state to which I should be quicker to refuse the name of republic than the one which is totally in the power of the masses." The absolute power of the few can certainly use that name for its advantage; but so too can the democratic mob, and make it all the more convincing. In truth, there is no republic unless the people are "held together by legal agreement." The democratic mob, on the other hand, "is just as tyrannical as one man, and all the more repellent in that there is nothing more monstrous than a creature which masquerades as a [republic] and usurps its name." *The Republic and the Laws*, Trans. Neill Rudd (Oxford: Oxford University Press, 1998), III.45. The difference in the United States was, of course, the

determination. It was still the rule of the majority in the interest of the whole. It did not conform to any idea of "interests" as pre-existing rights. Instead, it created them. To forget this, though, was to "not understand the political system under which we are living."[209] It was, in short, a confusion of the basic difference between a democracy and a republic. At the state level, there was only democracy, and any tampering, whether to make a state more republican or to directly protect the basic rights of its citizens, was nothing less than usurpation of sovereignty.

For all these objections, the revolutionary nature of the Fourteenth Amendment was a quite favorable idea for most Americans at the end of the nineteenth century. The enduring sense after the Civil War was that the original system was indeed broken and irredeemable; the nation was therefore better off as it left the old American proposition behind. The destruction of federalism, the most prominent feature of that old order, was an easy thing to accept for a society that had lost over six-hundred thousand of its own in an effort to realize that ideal. The American founders had left it a puzzle for future generations; yet no one imagined there would be such a high cost of solving it. The war "tore a hole in their lives," according to Louis Menand in his study on the origins of modern America. "To some of them, the war seemed not only just a failure of democracy, but a failure of culture, a failure of ideas," and in this it had "discredited the beliefs and assumptions that preceded it." While the war had effectively destroyed the South, "it swept away almost the whole intellectual culture of the North along with it. It took nearly half a century for the United States to develop a culture to replace it, to find a set of ideas, and a way of thinking, that would help people cope with the conditions of

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way that due process could still be in place, and all the outer forms of a republic could persist – i.e., the "masquerade" could be even more convincing than it was in republican Rome.

[209] "Rights of United States Citizens," *The Independent* 39, 2022 (Sep. 1, 1887): 18.

modern life."[210] The Fourteenth Amendment and its place in the judiciary was at least the initial attempt (before the Progressive Era) to do that for the United States, and contrary to the earlier protests, many interpreted it accordingly.

In practice, though, this meant that the days of federalism, in any original sense, were numbered. Far more than the design of political institutions or separation of powers, people like David Dudley Field, the brother of Justice Stephen Field and a prominent Union Democrat who had a change of heart after the Civil War, maintained the idea that "a Federative Union" was itself the single greatest protection of freedom. In 1881 he wrote: "The vital principle of this system is the balancing of the governments national and State, in such manner as to hold them forever in equipoise." But from its earliest days, that dual system of federalism had been gradually declining, and leading to the sort of "consolidation" that the early defenders of state sovereignty had feared all along; the Fourteenth Amendment had only finalized that trend, and now threatened to complete it – and public opinion seemed to give its strongest approval. "There is not a city in any of the States, there is not a village along the rivers, and scarce a hamlet among the hills, that does not look to Congress more than to its own legislature to determine the occupations of its people," Field wrote.[211] This was a tremendous departure from the American way of politics and self-government.[212]

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[210] Louis Menand, *The Metaphysical Club: A Story of Ideas in America* (New York: Farrar, Straus and Giroux, 2001), x.

[211] David Dudley Field, "Centralization in the Federal Government," in *The North American Review* CXXXII, CCXCIV (May, 1881): pp. 407-408.

[212] Such a system maintained the all-American precept of freedom, i.e., that "the individual remains his own master in all that concerns only himself," Field wrote. This is a revealing passage: that guarantee is precisely what the Fourteenth Amendment offered "all persons," and which most Reconstruction legislation (as well the Supreme Court's twentieth century civil liberties rulings) sought to protect. But Mr. Field maintained a different view: that individual liberty was only realized through a collective sort of freedom found in local governments. "When [one citizen's] actions interfere with the actions of another, the two act together. Whatever may have been the origin of the social compact or body politic, this is the theory on

Others, though, focused on the cases themselves, and gave strong criticism of the Court when it refused to realized its new duty and apply the principles of the new regime. Congressman John S. Wise wrote in *The North American Review* that the Court had "reestablish[ed] the very States Rights doctrines for the suppression of which the country had expensed so much blood and treasure." He was sure that when the scholar of the future "shall come to examine into the changes in our written Constitution resulting from the war, he will doubtless be astonished to see how few changes there are" – despite how many there should have been. The Supreme Court had essentially undermined those efforts, and left state sovereignty just as it always was, thus greatly undermining the new order. Yet, much like Mr. Field, Wise understood that this existing interpretation of the Fourteenth Amendment would not stand for long, and that the Court could not refuse its latent duty. There was something about the Amendment, on the one hand, and the nature of the Court's jurisprudence on the other, that would eventually come together. One need only consider the Court's early history, particularly in the era of Chief Justice John Marshall, to see its essential role in national life: so long as the Constitution was the supreme law of the land, the rulings of the Supreme Court were final, and provided the

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which joint action is founded, whether of two persons or of many," he wrote. Whatever concerns one alone is for him to do; whatever concerns his neighbor and himself is for the two do to together; and soon through all aggregations of individuals until we arrive at that final organization which we call the state." To proceed too far from the interest of the individual, though, is to usurp the collective basis of freedom. This, Field believed, was the result of the Civil War and the Amendments that ensued, all passed at the whim of a Republican Congress seeking to aggrandize its power for a very short-sighted goal. Such a mechanism in the Constitution would certainly "reduce the States to insignificance," and bring all things into the prevue of the Congress, long after its desired Reconstruction legislation was passed. Ibid., 419. Mr. Field knew that the Supreme Court's involvement was a far greater thing than that of Congress. The Court's decisions, "it must not be forgotten, are reasoned out of the doctrine that Congress is the sole judge of the means it may use to carry its express powers into effect." Ibid., 413. Obviously, his worry could not have been about the Court's rulings on the state regulatory laws in *Slaughterhouse* or *Munn*, which allowed extensive regulation at the state level, and had nothing to say about the power of Congress over the states. About these rulings, Field could have no complaint. It seems, therefore, that he saw something else changing at the heart of American constitutional law. It was the allure of absolute and untouchable rights, which the Court could only refuse appellants so many times, as it tried to deny the regime that had emerged.

bedrock on which all other national questions stood. There was no denying that "a tribunal essentially Federal, more independent of the power of the States than any other body or officer in any of the departments of Government, has from the beginning oftener pointed out the boundary where Federal power ends and State power begins than any other in our Government." It was, after all, entrusted with protecting the Constitution, and it was always aware of those forces and ideas that wished "the Constitution shall be blotted out."[213] When the time came, it would prefer that fundamental law over any concept of state sovereignty.

A new regime of liberty, a new emphasis on substantive "fundamental" rights, a "new birth of freedom" – what else could these things mean but a movement away from the political institutions of government, and toward the one that would articulate them, and protect them accordingly? Those political departments, which were elected by the people, would proceed with legislation and enforcement as they always had; but it was the judiciary who would limit and contain their power, drawing the line for the extent of legislation into the lives of individual citizens. Eaton S. Drone, long-time Editor of the *New York Herald* and frequent commentator on the Supreme Court, promoted the view that the judiciary was quite simply the voice of the Constitution itself. The Constitution was at once the "supreme law of the land" and an ambiguous document.[214] But, according to Drone, such open-endedness was meant for the Court itself, and only the Court, as "the authoritative interpreter of the Constitution of the United States." As such, the Court's rulings "are binding on the executive and legislative departments of the general

[213] John S. Wise, editorial in *The North American Review* Vol. CXXXVIII, No. CCCXXVIII (Mar. 1884): pp. 302; 311.

[214] This, of course, was intentional, expressed in such things as Congress' "necessary and proper clause," or the president's requirement that he "take care that the laws be faithfully executed"; these clauses that made the Constitution a political document, meant to be interpreted by all branches.

government, and on every State government," he wrote. "When the Supreme Court interprets the Constitution, its opinion practically becomes a part of the fundamental law of the land, a part of the Constitution itself."[215]

Such a view of judicial duty was, of course, amplified greatly by the Fourteenth Amendment. The limits on state governments were "more radical and far-reaching than are imposed by all the rest of the Constitution," Drone wrote. "It brought the States, in their internal affairs, under federal power to an extent unknown before its adoption" – and, most importantly, it "transferred from the State to national control the great body of the people's civil rights."[216] As other critics pointed out, the Supreme Court had so far failed to fulfill this reading of the Amendment; but Drone, like so many others, remained confident that it would eventually live out its true purpose: to be the consistent guardian of fundamental rights against all political forces – once thought to be the main practices of a republican form of government, but now reduced to mere democratic power that had

[215] Eaton S. Drone, "The Power of the Supreme Court," *Forum* (Feb. 1890): 654. True, the Constitution did not specifically proclaim such a role for the Court; it was, like so many other things, an "implied power," according to Drone. Yet it was an implication that became explicit with the Fourteenth Amendment, given the prominence of substantive rights in Section One. This did not mean they could go against the fundamental law, any more than any other branch of government. "They are sworn to obey it," he wrote. Here, Drone introduced a novel concept – an idea of judicial power that set the tone for modern judicial review for the rest of American political history: for all their absolute power of constitutional questions, the justices "have no right or authority to give the Constitution any other meaning," Drone wrote. "They have no business to import into their own notions of what the Constitution should be, or what they may think the people or any political party would like it to be." Ibid., pp. 656-657. The only thing that could prevent the Court from being captive to a narrow political philosophy was, of course, the conscience of the justices themselves, who looked strictly at the letter of the Constitution; at the same time, Drone did not give any second thought to declaring that the Constitution means whatever the Court says it means – again, that "its opinion practically becomes a part of the fundamental law of the land, a part of the Constitution itself." Ibid., 654. Such a judicial philosophy is, of course, quaint in hindsight; for modern Americans. But in Drone's day, such an idea was still quite novel, and it introduced the progressive reasoning that would bring on the era of modern judicial review.

[216] Ibid., 663. Drone's greatest concern was the voting process on the Court: the most important cases that might have protected the rights of citizens were frequently determined by a 5-4 decision. "Its record in this matter furnishes an extraordinary instance of the power of five men to sacrifice or save one of the chief results gained by the greatest war known in history," he observed, "and suppose to have been securely embodied in their fundamental law by the people of the nation." Ibid. Drone did not offer a prescription to this problem, but it seemed that some restructuring of the Supreme Court to realize its purpose in the new regime was quite necessary.

to be contained and restricted in its authority over the fundamental rights of United States citizens. So who exactly was promulgating this view with such persuasive force?

B. The New Regime and the Professors

The place of the judiciary in the new regime was received well by major figures in the legal community, which was developing a whole new sense of itself by the end of the nineteenth century. Few perceived it as a grant of excessive power or "judicial supremacy," in the modern sense; it was precisely what many popular figures thought it was, as they called for professionals to act as guardians of the public interest against the broad range of political forces in the states. This was, after all, the era of specialization, where the measure of a professional was not experience or even character so much as formal schooling, which immersed students into their respective "science," and awarded them the essential degree. This did not eliminate the bar exam as the final entrance into the legal profession, but the education that preceded it was gaining much more importance than it had in the days of common law apprenticeships and self-taught jurists. Law, like other professions, now consisted of "graduates" who relied greatly on those new publications that could perpetuate the critical discussions that informed the craft: the law review. Here, "doing law" was gradually mixing with "the study of law," and though lawyers and judges no doubt maintained a distinction between the two, it was inevitable that they would blend as new generations of specialists emerged from American law schools. Such a transition in the legal profession could not help but be shaped by the Fourteenth Amendment; the Amendment and the legal profession, it seemed, were made for each other.

1. "Political Science"

Legal specialization did not begin in law, but in the new field of study known as "political science," which emerged in the late nineteenth century alongside economics and sociology. Westel W. Willoughby, the first professor of political science at Johns Hopkins University, was one of many figures who developed a new view of the Court. Law, of course, was merely a sub-discipline of his own study of political behavior and the administration of the State; but his most important writings focused greatly on the Supreme Court. Willoughby held that of all the innovations of 1789, the greatest was none other than the judiciary; it was in fact a critical institution for the success of the American system, and its role would become all the more essential in the new century with the advent of "the State."

As we know, later progressive critics, as well as many other American political figures informed by this new social science, would oppose this concept of the Supreme Court as the institution entrusted with maintaining this version of the older version of liberalism, limited government, and natural rights. How exactly did Willoughby square his view of the Court with its actual tendencies in American political life – particularly when it shows greater willingness to review and possibly strike down popular progressive legislation, as it finally did in *Lochner v. New York* (1905)?

The answer appears in Willoughby's aptly titled essay, "The Right of the State to Be." The central truth about in modern political thought is that there are no "rights," in the natural sense. What rights people have, i.e., "claims of the individual to certain spheres of activity within which they shall not be limited by other individuals," he wrote,

"are not only rendered possible of realization by society and the State, but they are created by society and the State, and cannot be conceived as existing either actively or potentially apart from the social and political body." Rights, in the older liberal tradition, had existed as the measure of good government: that government was best which protected the rights that citizens already had. But this was no longer the case in modern times, according to Willoughby: the standard of goodness of the State came from within the State itself. "It is not until the State manifests its power and authority that material is afforded to which moral estimates may be applied," he wrote. The only concern for the citizen as an individual "morally responsible person," was whether he "should obey or disobey," knowing that the state is in fact the purest reflection of the general will. Rights were therefore granted, and liberties protected, but only so far as they were conducive to the State's own supremacy. The only liberty is "social freedom"; "social freedom and restraint are but the obverse sides of the same shield," he wrote; "freedom has no meaning apart from restraint… metaphysically as well as practically the two concepts are united."[217]

Accordingly, the Supreme Court – whether it applied the most stringent fundamental rights, or allowed unlimited state regulation – was in fact working from within the State. The rights and liberties protected were meant to serve the State's ends, and no other. Given such a duty, the Court could essentially complete the State, and make it the sole horizon in the lives of citizens.[218] The supremacy of the State, after all,

[217] Westel Woodbury Willoughby, "The Right of the State to Be," *International Journal of Ethics*, 9, 4 (Jul. 1899): pp. 471; 475; 480.

[218] Willoughby's philosophy of law was apparent in his willingness to "equate state and government," according to Dorothy Ross. He did not see himself as torn between the competing visions of American political institutions; the progressive state and the constitutional government were in fact quite consistent in his view. "The political usefulness of the old theory probably discouraged an effort to rethink its premises with the aid of liberal theory. Traditional Whig principles already provided a powerful government and a

"could be peacefully maintained only by clothing the federal government with judicial and executive power adequate to interpret and carry into execution its commands."[219] Such a role for the Supreme Court, now unified with the executive who stood at the top of a vast bureaucratic order, was essential for the development of the modern State. The legislative branch, the legislative process, and the republican form of government at the state level – none of these things could ensure "the right of the state to be" like the full exercise of judicial power.

It was obvious to Willoughby how such judicial authority in the service of Congress was essential in the early Reconstruction years, when there was tremendous doubt on all sides about constitutionality of such radical measures imposed on the South. "The exercise of all these powers was claimed, of course, to rest upon constitutional authority," Willoughby wrote, "and in connection with them arose constitutional questions which had to be settled by the Supreme Court." Far more than granting a constitutional basis for the acts of Congress, and especially the ensuing Amendments, the Court was "a barrier against the tide of opinion which threatened to set too strongly

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socialized individual." Dorothy Ross, *The Origins of American Social Science* (Cambridge: Cambridge University Press, 1991), pp. 180-181. True, Whig theorists had not seem themselves that way; but there was no reason that a modern theorist, now steeped in the social sciences, and holding a German Historicist outlook, could not appreciate such ideas as critical steps in the historical dialectic.

Even federalism, among other constitutional principles, was left to the Court to protect according to Willoughby. There was nothing in the practice of law that demanded a total nationalization of citizen rights to the detriment of the states. With the Fourteenth Amendment, the Court acted, not only as a check on "undue State action, but as a protection to the States against too great federal interference," he wrote. "As in the early years of our constitutional history the Supreme Court had been a potent factor in protecting the then weak Union against the more powerful and aggressive States, so now it saved the victorious Unionists from being hurried in their excitement and passion to a too great movement in the opposite direction towards centralization." Ibid., 62-63. The entire federal system, it seemed, did not find its grounding in the Constitution, universally understood by all Americans equally, but in the legal profession itself – the specialization of law that would maintain that framework, and impress it upon American political life accordingly.

[219] Willoughby, *The Supreme Court of the United States*, 43.

towards centralization."[220] The judiciary had to be part of the organic whole, and to ensure that the nation could move in unison with all other departments toward the correct end, at once latent in the public mind and discerned by visionary who understood the grain of History.[221] In short, the judiciary's most important role, which it was yet to fully realize, was to use the all-American respect for the rule of law to ensure the broad public acceptance of those policies deemed essential. It was true that "more than any other nation in the world," the American people "possess this law-abiding spirit," he wrote; after all, such "[o]bedience to the rule of law is characteristic of all Teutonic folk."[222]

2. Law Professors on a New Judicial Duty

[220] Ibid., 101.

[221] Woodrow Wilson described the same unified, organic government in his later works. "No living thing can have its organs offset against each other as checks, and live. On the contrary, its life is dependent upon their quick cooperation, their ready response to the commands of instinct or intelligence, their amicable community of purpose." Wilson differed from Willoughby by ignoring the importance of law. The American veneration for the Constitution was precisely the problem, he believed, and it could never be used to create such unison. What it did require was "creative statesmanship." "There can be no successful government without leadership or without the intimate, almost instinctive, coordination of the organs of life and action," he wrote. *Constitutional Government in the United States* (New York: Columbia University Press, 1917), pp. 56-57. Willoughby acknowledged Wilson's work in his last chapter of *The Supreme Court*, observing "in his critical analysis of this working of our government, subjects the executive and Congress to most severe criticism, and find much that might be bettered." About the judiciary, though, "he does not find it necessary to animadvert." Willoughby, *Supreme Court*, 114. It was true: Wilson never criticized the Court like his fellow progressives did. It was, perhaps, because he believed the importance of the institution would simply wither away as the "creative statesman" and his vast administration would gain prominence.

[222] Ibid., 112-113. Again, Woodrow Wilson expressed much the same idea in his work, *The State*, published in 1889. It would be becoming of such a work to account for the social customs of all people. "But, practically, no such sweeping together of incongruous savage usage and tradition is needed to construct a safe text from which to study the governments that have grown and come to full flower in the political world to which we belong," Wilson wrote. Only the "Aryans" could offer any basis for the State, in the modern sense, or what he called "those stronger and nobler races which have made the most notable progress in civilization" – not those with the strongest view of permanent things about man or God, but those who realize their own racial identities. "The existing governments of Europe and America furnish the dominating types of to-day," Wilson wrote. "To know other systems which are defeated or dead would aid only indirectly towards an understanding of those which are alive and triumphant." *The State: Elements of Historical and Practical Politics* (Boston: D.C. Heath & Co., Publishes, 1898), 2. Like Willoughby, Wilson could allow that the Whig way of framing a government was indeed a good thing; but it was good, not in light of the principles expounded by its framers, but because of its advanced state of evolution – one that would advance further still into the sort of administrative government that Wilson thought so essential in later years.

Carl Evans Boyd observed the open-ended character of such a judicial philosophy when he wrote that it is "altogether too early to expect any elaborate and well-rounded treatise upon this newest branch of our constitutional law." Though the decisions of the Court were numerous, there was still no definite rule on how the Fourteenth Amendment actually applied in a long-term sense. Until such an idea emerged in the actual practice of law, "discussions of decisions rendered and of the principles underlying them will form an important part of our legal literature."[223] Still, there were a variety of guesses, which pulled Lochner Era lawyers and judges in different directions in their legal education, and which members of the Supreme Court would bring with them to the bench.

Boyd wrote this in his review of William Dameron Guthrie's collection of lectures published in 1898. Guthrie was a professor of law at Yale University, who went on to become President of the Bar Association in 1926, and made much of his scholarship to justify the "guardian" approach to judicial review exemplified by Justice Stephen Field. His series of lectures in the 1890s described the law as a true profession, in much the same sense as Willoughby understood his own political science. Guthrie announced that the Fourteenth Amendment had done precisely what many popular sources believed: it created a new regime – one that placed his own legal discipline at its foundation.

True, most of the provisions left with the judiciary were already in the state constitutions, and had been the aim of those republics from the beginning. But the conditions of the Civil War had proved how inefficient the states actually were in protecting those rights and liberties, meaning that neither the power of Congress nor the

[223] Carl Evans Boyd, "Review of *Lectures on the Fourteenth Article of Amendment to the Constitution of the United States*, by William D. Guthrie," in *Annals of the American Academy of Political and Social Science*, Vol. 14 (Sep. 1899), 88.

interpretive authority of the Court could redeem them. Indeed, there was no "corrective" legislation, as Justice Harlan understood it. This had "convinced the people that fundamental rights could no longer coexist in safety with unrestrained power in the States to alter their constitutions and laws as local prejudice or interest might prompt or passion impel," Guthrie wrote. For this reason, "[t]he rights of the individual to life, liberty and property had to be secured by the Federal Constitution itself, as, indeed, they should have been when it was originally framed." This was the reason for the Amendment's limitations, which compensated for the defects of the original Constitution. But, as the Civil War proved, those defects were so extreme that only a new order could truly compensate for them. Those provisions are "universal in their application," he wrote. "They are directed against any and every mode and form of arbitrary and unjust state action."[224]

Professor's Guthrie's judicial philosophy was based on his concept of American political life: politics was little more than power, which was by definition "arbitrary," even when it was "constitutional" by state standards. The only rational response to such a dangerous force was judicial containment; the Court's role was not a matter of teaching the presuppositions of legislation, but of merely defining its boundaries, and curbing its excesses. It assumed, of course, that the law of the Constitution was itself a fundamentally different thing in kind from American political life, thus breaking a great deal of continuity with the American political tradition. Politics had made the Constitution at the convention in Philadelphia, and politics had given it life and substance for almost two generations since. But now, deliberation, compromise, and even prudence

[224] William Dameron Guthrie, *Lectures on the Fourteenth Article of Amendment to the Constitution of the United States* (Boston: Little Brown & Company, 1898), 2-3. (Emphasis added.)

were in conflict with the fundamental law, and it was the duty of the judiciary to make it prevail.

It was one thing to hear this from popular sources; it was quite another thing, though, for the members of the legal community to announce it with such boldness. Professor Guthrie did not view this new role of the judiciary with any caution: there was no question in his mind, it seemed, that judicial power was nothing if not absolute in its ability constantly limit politics. "Great cases involving constitutional rights are continually being decided and should be carefully studied by lawyers. The importance which the Fourteenth Amendment has attained in our system of constitutional law will then be realized," he wrote. "We shall also be led to the immense labors which the Supreme Court performs and the inestimable services which it renders to the nation sometimes unperceived and frequently by the people at large." Those entering the legal profession, his own students, no longer faced the expectations of judges and lawyers; more than wisdom or a love for justice, it was competence that truly mattered, and an awareness of the heritage behind their honored profession. Previous generations of lawyers and judges "solved the great problems of the war and of the reconstruction period and in the Fourteenth Amendment they gave us as our heritage a new Magna Charta" – and what Magna Charta had done to contain the arbitrary power of the King, the Fourteenth Amendment would do to the power of American politics.[225] Each generation of jurists, at least in the great English tradition of freedom, faced the same problems, and were called upon to exercise the same heroic duty. This would continue to be the role of the American judge, according to Professor Guthrie.

[225] Ibid., 28; 30.

Such a fear of political power was not entirely unfounded. Given the popular trends of modern times, Guthrie found that judicial power was no ordinary method of heroism. The "levers of legislative power" were designed to be quite responsive to local majorities; but, according to figures like Guthrie, this made them quite legitimate threats. He reminded his students that there is "a growing tendency to invade the liberty of the individual and to disregard the rights of property, a tendency manifesting itself in many forms and concealing itself under many pretexts."[226] This was not the usual class hostility, which had always existed to some extent in free societies. Socialism, or the American version known as "nationalism," had tremendous allure, and while the way to achieve it was not as violent as it was in Europe, it was nonetheless a great threat to American liberty.

But how exactly could judges "act" in such a way? As always, they had "neither the sword nor the purse." For Guthrie, much like Professor Willoughby, it depended entirely on the respect for the rule of law, then so engrained into the American mind. "So long as the Constitution of the United States continues to be observed as the political creed as the embodiment of the conscience of the nation, we are safe," he said. It was the enduring "veneration" for the Constitution that would allow judges to take the sort of drastic action necessary to contain these dangerous impulses. But far more than guardians on the old order, the judges entrusted with this duty were the ones who could make the Constitution adapt – and do so even better than the elected branches could. "A constitution is designed to be a frame or organic law of government and to settle and determine the fundamental rights of the individual." This "organic" structure, rather than its intended meaning, was what allowed it to "endure for all time," he wrote. "Its

[226] Guthrie, *Lectures*, 30.

provisions should not in any sense be limited to the conditions happening to exist when it is adopted although those conditions and the history of the times may well throw light upon the provisions and reveal their true scope."[227] So while the most modern rights happened to involve property and the economic liberties the Guthrie believed were under such threat, there was no denying that this too could change – that, in time, there could be a new set of fundamental rights, and that the Court would discover and protect them accordingly. The problem for dangerous popular movements was not their disregard for the rule of law understood as an *enduring* thing; it was instead their tendency to seize the sort of adaptations and changes that could usurp the Court's own authority.[228]

Hence, there were two philosophies that sought to define the new regime, and the place of the Supreme Court in it. One, following Professor Willoughby, allowed for the full power of national and state government, especially with the advent of the progressive philosophies that would constitutionally justify such broad and unlimited use of active state liberalism. The other, according to Professor Guthrie, meant the opposite need to limit and curb that state power when it went too far. Neither understanding of judicial duty looked to constitutionalism in the original sense. As always, the advocate of judicial

[227] Ibid., 33.

[228] True, the Constitution enumerated rights and institutions that were meant to be enduring. But the broadness of those provisions appeared primarily for the Court's disposal: it was "a declaration of general principles to be applied and adapted as new conditions presented themselves." Ibid., 33-34. The malleability of the Constitution might have existed in the people themselves granted them in Article V; but by exercising that power in 1868, by ratifying Section One of the Fourteenth Amendment, the people essentially passed that power to the true amending institution designed to protect those rights through interpretative enforcement. Justice William Brennan seemed to restate this idea in his famous speech at the Text and Teaching Symposium in 1986. There, he referred again and again to our "amended Constitution," which is the "lodestar for our aspirations" toward social justice. It is difficult to see how such amendments inform the duty of the Court – especially with the most important amendments of the Reconstruction Era were designed to override the Court's decision in *Dred Scott v. Sanford* (1857). Still, for Justice Brennan, the fact that it had been amended at all indicates great ambiguity, which "calls forth interpretation, the interaction of reader and text" – which he was quick to identify as "my life's work." In *American Political Rhetoric: A Reader*, eds. Peter A. Lawler and Robert M. Schaefer (Lanham: Rowman & Littlefield, 2005), 132.

rationalization of regulatory laws saw the means without any fixed or permanent end, while advocates of the "guardian" of Court saw the end of government existing without the means. Ultimately, though, it was the latter, Professor Guthrie's view, that won out, at least in the study and training of law.

3. The Modern Jurist: Thomas McIntyre Cooley

Professor Guthrie represented the judicial philosophy that continued to embrace the Fourteenth Amendment as formal permission to review practically any piece of legislation. One reviewer of Guthrie's book noted that "[h]is views are the 'views of the day' in an exaggerated degree," in that he "expresses in the most pronounced form the present increasing tendency to shoulder upon the Federal courts responsibility for everything."[229] Other legal scholars presented a much tamer approach. As Dean of the University of Michigan Law School, Thomas M. Cooley became an American jurist in the style of Joseph Story and James Kent, doing for the modern Constitution what William Blackstone had done for the common law. A mind so attuned to the law would certainly reflect the sort of shift that occurred with the Fourteenth Amendment. It was, for Cooley, a constitutional fact; unlike Guthrie, he at times accepted the Amendment with apprehension, but more often a simple acceptance of what the Amendment meant for the judicial craft. He knew that the days of the *Munn* doctrine were truly numbered, though not by any choice of the Supreme Court.[230]

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[229] R.W.W., in *American Law Register*, 47, 4 (Apr. 1899): 267.

[230] Hadley Arkes describes Cooley well in his judicial biography of George Sutherland, the jurist's most famous student at the University of Michigan. The professor "suffered no epistemological doubts when [he] made the rudimentary point that the purpose of the Constitution was to protect its citizens from the 'arbitrary' uses of political power." Procedures of law did not mean that the law passed was truly fair and just. Such procedures could go quite far to protect the rights of the people, or of equal classes of the people; but, as Arkes points out, they had their limitations. "The Constitution implied, in short, the

Such a transition was meant to happen as it did under Article V: the nation had calmly and deliberately altered its Constitution to fit certain dire needs, precisely as the Founders anticipated. "The Constitution provides a simple, easy, and peaceful method of modifying its own provisions, in order that needed reforms may be accepted and violent changes forestalled," Cooley wrote. Such a quiet method had occurred fifteen times. But plainly the newer amendments had done far more than the older ones. The most recent amendments were shaped by the destructive effects of the Civil War, which actually lasted well after the fighting was over; even in peace, "the same divergence in sentiment and a like estrangement in feeling still prevailed, and were now found to centre on the policy to be adopted for restoring and strengthening the shattered fabric of government," Cooley wrote. In such conditions, there was, quite simply, no way to preserve the old Constitutional order, at least not in its entirety; the amendment process, for all its careful steps, could still take on a revolutionary intent – in this case, putting rights and liberties at the forefront, and leaving institutions and procedures in obscurity. Such a transition was plain in the design of the older amendments themselves. "While, therefore, the first amendments were for the purpose of keeping the central power within due limits, at a time when the tendency to centralization was alarming to many persons, the last were adopted to impose new restraints on state sovereignty, at a time when state powers had nearly succeeded in destroying the national sovereignty."[231] The guarantees in the first set

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possibility of distinguishing between the legitimate and illegitimate exertions of political authority," Arkes writes, "and it was assumed that the distinction had to be accessible to any person of wit." Hadley Arkes, *The Return of George Sutherland: Restoring a Jurisprudence of Natural Rights* (Princeton: Princeton University Press, 1994), 43. Plainly the "person of wit" was losing sight of such realities – nor for lack of intelligence, but because such ideas were becoming unbelievable in the modern world. If the reality of rights and principles of justice were no longer present in the popular mind, they would have to be promulgated. Hence, the coming role of the Supreme Court in the twentieth century.

[231] Thomas McIntyre Cooley, *The General Principles of Constitutional Law in the United States of America* (Boston: Little, Brown & Co., 1890), pp. 218; 220.

of amendments were, for the most part, superfluous: the government checked and limited itself through the interaction of its institutions, and therefore required no preventative measures in law to keep it from abusing its power. The latter amendments, however, called for another method entirely.[232]

This was most apparent in the Privileges and Immunities clause – a right that was abundantly obvious even without the Fourteenth Amendment. "It is plain that State laws cannot impair what they cannot reach," he wrote. The national government, by its mere existence, ensured the privileges and immunities of citizens. The postal service, patents, copyrights, or assistance with trouble overseas – these things were never in doubt. "Nevertheless this portion of the Fourteenth Amendment has its importance in the fact that it embodies in express law what before, to some extent, rested in implication merely" – an implication that was far to weak to deserve respect, much less command the consent of the public for the existing government.[233] The new Amendment, however, commanded far greater consent (or, in some cases, provoked repugnance) for the existing regime. This, in turn, indicated that there truly was a new order, a transformed regime that had very little in common with the previous one, and the prominence of its substantive rights called for some kind of direct recognition and enforcement.

[232] This was precisely James Madison's understanding of amendments in Federalist #49. For all the need for long-term stability in the constitutional order, it was still true that "the people are the only legitimate fountain of power"; for this reason, it made sense, "strictly consonant to the republican theory, to recur to the same original authority." Such a return to the people could indeed "enlarge, diminish, or new-model the powers of the government" – i.e., restrict *or* expand its power. More often, though, he believed such restrictions were not a matter of shielding state governments; it was instead "whenever any one of the departments may commit encroachments on the chartered authorities of the others," he wrote, i.e., whenever the president or Congress infringed too much on each other's authority. *Federalist Papers*, pp. 310-311. Hence, there appears to be in Madison's constitutional thinking a place for the sort of "active state liberalism" that would later occur, both in national and state governments.

[233] Ibid., 227.

Cooley enumerated and explained the significance of "due process of law," "life, liberty, and property," and "equal protection" knowing that they would gradually become, in many issues, the sole concern of judges facing Fourteenth Amendment questions. Cooley allowed that the extent of police powers was still quite broad within the states, and that the Amendment is held "held not to have taken from the States the police power reserved to them at the time of the adoption of the Constitution," he wrote. Still, in the exercise of police power, "regard must be paid to the fundamental principles of civil liberty, and to processes that are adapted to preserve and secure civil rights; persons cannot arbitrarily be deprived of equal protection of the laws, or of life, liberty, or property."[234] Again, the possibility that the police power of the state was meant to protect certain rights – keeping and pursuing property, in particular – was no longer present for Cooley. Legislation was merely power, and rights were rights.

Professor Cooley elaborated on this in his most famous work, *A Treatise on the Constitutional Limitations*. The massive two-volume set, which went through seven editions between 1868 and 1927, was constantly looked to and cited in both popular and professional writings of the Lochner Era; it made him "the high priest of the theory that revolutionized thinking about the power of state legislatures and the role of the courts," according to Paul Kens.[235] For all the sensible legislation a state legislature may produce,

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[234] Ibid., 251.

[235] Paul Kens, *Lochner v. New York: Economic Regulation on Trial* (Lawrence: University of Kansas, 1998), 100. Later reviewers could only write of their awe at the size of Cooley's work, as he applied his legal reasoning to the vast amount of case law, both state and federal. Many pages of the latest edition consist almost entirely of footnotes. One reviewer in 1904 noted that "[a] comparison of this edition with the one preceding shows that some two thousand new cases are cited, making the total number more than twelve thousand, while the volume has swollen in size from 993 to 1159 pages, 215 of which are given up to the tame of cases and the index." *Columbia Law Review* 4, 3 (Mar. 1904): 241. Others, though, found the book unworkable in later years. "There is a limit to what an editor can do to make effective for present use a legal classic originally published nearly sixty years ago," another reviewer wrote. Cooley had merely "crystallized and strengthened the legal movements of his day." W.F.D., *The Yale Law Journal* 37, 1 (Nov.

Cooley wrote, "general rules may sometimes be as obnoxious as special if they operate to deprive individual citizens of vested rights." Cooley's concern was very much about the problem of class legislation, or the tendency of state regulations to favor one interest over another. But, "[w]hile every man has a right to require that his own controversies shall be judged by the same rules which are applied in the controversies of his neighbors," he wrote, "the whole community is also entitled at all times to demand the protection of the ancient principles which shield private rights against arbitrary interference, even though such interference may be under a rule impartial in its operation." Even impartial legislation, which did not single out or favor one class over another at all, could still quite easily deprive individual persons of the fundamental rights to which they are entitled. "It is not the partial nature of the rule so much as its arbitrary and unusual character that condemns it as unknown to the law of the land." Should such cases come to the Supreme Court, its duty was clear: assume that the state is not equipped to protect such rights, that all exercises of police power were potential threats to property, and that state constitutions are only the feeblest safeguards. "When the government through its established agencies interferes with the title to one's property, or with his independent enjoyment of it, and its action is called in question as not in accordance with the law of the land," Cooley wrote, "we are to test its validity by those principles of civil liberty and constitutional protection which have become established in our system of laws, and *not generally by rules that pertain to forms of procedure merely*."[236] Concerns about

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1927): 136. Thomas Reed Powell of Harvard Law School concurred: "Unless one were to smash the mould of the original, a new edition could do little but add new information." *Harvard Law Review* 41, 2 (Dec. 1927): 273. This certainly gave a "bird's eye view" of the topic, but it did little to assist judges doing modern law.

[236] Thomas McIntyre Cooley, *A Treatise on Constitutional Limitations which Rest upon the Legislative Power of the States of the American Union* (Boston: Little, Brown and Company, 1903), pp. 504-506.

procedural due process could only go so far; at some point, the rights that such a process was designed to protect emerged on their own, and required the careful attention of the judiciary.[237]

In this, of course, both Guthrie and Cooley (perhaps one more than the other) endorsed the jurisprudence of Justice Stephen Field. Guthrie praised Field as "one of the greatest judges that ever sat in the Supreme Court."[238] They shared the view that there could be no other institution, nor institutions checking each other, nor any other method, that could secure the new substantive rights of the Fourteenth Amendment than the Supreme Court could. Yet Justice Field, for all his generalizations about rights and liberties, did restrict his view of "fundamental rights" considerably, as would anyone who tried to protect rights in such a way: they were absolute on some points, but non-existent in others. Field's dissent in *Ex Parte Virginia* (the companion case to *Strauder*), for instance, could not have sounded more out of character for Justice Field. When the question was whether or not a state could bar freedmen from serving on a jury, suddenly the sovereignty of state governments was immensely important. "The government created by the Constitution was not designed for the regulation of matters of purely local concern," he wrote, while "the central government was created chiefly for matters of a general character, which concerned all the States and their people, and not for matters of interior regulation." To say otherwise, as the majority did in this case, was to "destroy the independence and the autonomy of the States," and "reduce them to a humiliating and degraded dependence upon the central government, engender constant irritation, and

[237] As Felix S. Cohen later put it, this made the courts "lunacy commissions sitting in judgment upon the mental capacity of legislators and, occasionally, of judicial brethren." Quoted in Bickel, *Least Dangerous Branch*, 37.
[238] Guthrie, *Lectures*, 26.

destroy that domestic tranquility which it was one of the objects of the Constitution to insure."[239] But Field did not contradict himself: for him, if the Amendment was meant to grant solid, undeniable, untouchable protections of business interests, then it had to come at some expense – in this case, the due process guarantees of criminal procedure for blacks. To broaden in one area, such fundamental rights had to be narrowed in another.

This rationing of rights exposes the problem of a "new regime" reading of the Fourteenth Amendment, especially when the sole institution entrusted with that task is the judiciary.[240] While it might have been based on a great many claims about the equality and rights and liberties of citizens, and while the Court would be the institution to secure such things, this reading was, in fact, greatly limited in what it had to offer. This was usually the case with generalizations: when such dogmas about "rights" and "liberties" "are once dragged down into the mud of practical politics, and are cut to the measure of party tactics," William Graham Sumner wrote, "they are the most pernicious falsehoods," in that they always result very favorably for one group, and not at all for another.[241] It was quite predictable that African Americans would be the ones to not

[239] *Ex Parte Virginia*, at 354-355; 358 (1879). (Field, dissenting.) Any decision from an interracial jury "would hardly be considered just," since it would be "reached by a sort of compromise in which the prejudices of one race were set off against the prejudices of the other," Field wrote. Such juries, of course, would be impossible anyway in most states; hence, most juries would consist entirely of blacks, including the judge, which, Field believed, would always proceed with bias, and could never determine guilt, no matter how obvious. Ibid., 368-369.

[240] Justice Field confirmed this point as well: because the power in question is "judicial in their nature" – far more than anything having to do with local legislation – it could not be tampered with by any legislative act. Judicial authority was meant "to determine who were qualified to serve in that character, and, for that purpose, whether they possessed sound judgment and were free from legal exceptions." Ibid., 359. Far greater than the pursuit of justice in a fair trial was the pure authority of the legal profession, according to Field. Such authority of local judges was, at the national level, the authority of the Supreme Court to apply the Fourteenth Amendment's substantive rights.

[241] William Graham Sumner, "Democracy and Plutocracy," in *On Liberty, Society, and Politics: The Essential Essays of William Graham Sumner*, ed. Robert C. Bannister (Indianapolis: Liberty Fund, 1992), 142. Sumner pointed out the distinctly democratic problem in the "absolute rights" view of things: those who receive such rights in practice are always only a part of society, which is common sense. But the increased certainty of those rights raises majority tyranny to dangerous new levels.

receive these protections – even though they were supposed to be the primary recipients when the Amendment was framed. By the time of *Plessy v. Ferguson* in 1896, the judicial process of rights-rationing was complete: by interpreting the Equal Protection Clause to allow for "separate but equal" Jim Crow laws, the rights and freedoms there stated were left to white men only, and it would stay that way for some time. Indeed, in this respect, there is a greater continuity between Justice Field and the *Plessy* decision than there is between the fundamental rights jurisprudence and the Lochner Court.

Still, despite these problems, the advocates of Fourteenth Amendment judicial supremacy proceeded with their teaching, so certain that this was the judicial philosophy of the future. As the new century arrived, "proponents of liberty of contract had argued that the intended role of the Court was to protect individuals from the tyranny of the majority," according to Paul Kens. "For people such as William D. Guthrie [and] Thomas Cooley, substantive due process and liberty of contract represented not only reasonable but necessary interpretations of the Constitution."[242] As prominent as this view was, it was but one theory of judicial review that competed for adherence on the Supreme Court itself.

III. Justice John Marshall Harlan's Road Not Taken

According to Justice Thurgood Marshall, in his reflections on the bicentennial of the Constitution in 1987, the Civil War had in fact destroyed the American regime. It was reborn, however, in the Reconstruction Era. Marshall did not believe "that the meaning of the Constitution was forever 'fixed' at the Philadelphia Convention" anyway; nor, for that matter, was there anything worth maintaining in the original American

[242] Kens, *Lochner v. New York*, 179.

regime. Far more important was what it had become in practice, particularly in modern times. Indeed, "[w]hen contemporary Americans cite 'The Constitution,' they invoke a concept that is vastly different from what the framers barely began to construct two centuries ago," he wrote. When the original Constitution ended, "[i]n its place arose a new, more promising basis for justice and equality, the fourteenth amendment, ensuring protection of the life, liberty, and property of all persons against deprivations without due process, and guaranteeing equal protection of the laws."[243] True, even this Amendment would require almost a century of interpretation before its promises could be realized, especially for African Americans. Yet Justice Marshall did not credit political figures like Martin Luther King, or the Civil Rights Movement, nor the Civil Rights Acts of the 1960s, with realizing that promise; those, after all, gave far too much credit to the Founding, and relied too much on the political process. Instead, Marshall credited none other than his own Supreme Court. With *Brown v. Board of Education* (1954) and subsequent cases, the new regime matured, as the judiciary finally asserted itself as its primary institution. The Court's humanity and good sense were what prevented American life from descending into barbarism, which, he was sure, lay just beneath the surface of even the most thoughtful election or sensible legislative process.[244] This was, of course,

[243] Thurgood Marshall, "Reflections on the Bicentennial of the U.S. Constitution," from the *Harvard Law Review*, 1987, in *Supreme Justice: Speeches and Writings of Thurgood Marshall*, ed. Jay Clay Smith, Jr. (Philadelphia: University of Pennsylvania Press, 2002), 284.

[244] So complete was the Supreme Court's authority for Justice Marshall that even history itself was subject to judicial interpretation. On the question of what the Constitution meant to those living in slavery (or to African Americans in his own time) the answer was, of course, nothing. The Constitution was, after all, "a product of its times, and embodied a compromise which, under other circumstances, would not have been made," Marshall wrote. "But the effects of the framers' compromise have remained for generations. They arose from the contradiction between guaranteeing liberty and justice to all, and denying both to Negroes." Ibid., 283. It was a contradiction that could never be reconciled; it required a radial overhaul of the entire American regime. Yet to support this view, he did not cite a single one of the Founders, nor did he pay any attention to the Founders' many condemnations of slavery, and what they hoped their regime would one day mean for all people. He instead cited Chief Justice Roger Taney's opinion in *Dred Scott v. Sanford*

an easy thing to believe for a man who witnessed the abusive tendencies of police powers against African Americans, both before and after *Brown*. What could state police power be if not a façade for institutionalized hatred and oppression? And what was the Fourteenth Amendment for if not to reduce all state and local government to the absolute minimum level of activity?

Historian Howard Jay Graham, a contemporary of Justice Marshall's in the days of *Brown*, offered a different answer. The Civil War did not mark the end of the old regime, nor did the Fourteenth Amendment bring the birth of a new one. Nor were police powers inherently oppressive; in their right condition, they were, in fact, the surest enjoyment of liberty and civic participation. The Amendment was "declaratory" of the original American proposition, in that it restated basic truths on which the nation had been founded, thus reviving them in positive law. It was therefore a means of assessing state police powers – and a congressional means of correcting them when they were in error, as they were with the variety of segregation laws.

The passage of the Fourteenth Amendment "was one of the most subtle and evanescent of all the possible changes in law and government," Graham wrote,

> a transubstantiation of values from the ethical to the civil and constitutional plane. It was a delicate, uneven and above all a continuing change – a 'constitutionalization' of the old law of nature. It modern terms, under our system of government, it meant that there was under way a large-scale shift from general, abstract, and really hypothetical rights to specific, concrete and enforceable constitutional ones.

Such "transubstantiation" – the real presence of such an abstract truth appearing in positive law – made it inevitable that the judiciary would soon be quite involved in Fourteenth Amendment jurisprudence, as it was to a great extent by Graham's time. "Enlarged judicial responsibility was for the most part implicit in the antislavery

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(1857) – a man he certainly despised for his racist views, but whose judicial authority he accepted without question, even as Taney did not produce a scrap of evidence for his claims.

generation's position," Graham wrote, "just as was the acceptance of evolving standards of public ethics and protection in matters pertaining to race." The framers of the Amendment, Congressman John Bingham in particular, "really were trying to convert ethical into political power, and moral into constitutional rights."[245]

But in this, Graham observed a whole new problem: that the written Constitution "was competing with, and must somehow be articulated with, another 'higher law.'"[246] This put tremendous strain on words and ideas; theoretical concepts simply did not belong in practical politics. The Fourteenth Amendment was the American truth incarnate, or the presence of abstract reality about "personhood," "life," "liberty," "equality," and, of course, "property." Despite the simplicity and clarity of these ideas, when it came to realizing them in political practice, "it was readily conceivable that thinking and communicating might break down entirely" in congressional deliberation as well as public discourse about how to apply those principles in practice – not to mention the truth of the principles themselves, in light of the onslaught of Darwinism and other progressive philosophies of government. Americans "were left without adequate points of reference," he wrote; "they did not agree about what their old Constitution meant because they never squarely faced the problem of who decided what it meant."[247]

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[245] Howard Jay Graham, "Our 'Declaratory' Fourteenth Amendment," *Stanford Law Review* 7, 1 (Dec. 1954): pp. 8-9.

[246] Ibid., 4. Justice Strong said this in his opinion for the Court in *Ex Parte Virginia* (1879), the companion case to *Strauder v. West Virginia,* put it precisely that way: the guarantees of the Fourteenth Amendment are "declaratory of rights, and tough in form prohibitions, they imply immunities such as may be protected by congressional legislation." 100 U.S. 303, at 345. This was, of course, the great lesson from Edmund Burke. "We know that we have made no discoveries; and we think that no discoveries are to be made in morality; nor many in the great principles of government, nor in the ideals of liberty, which were understood long before we were born," he wrote. *Reflections on the Revolution in France* (London: Penguin Books, 1987), 182. Such basic moral-political knowledge always had an institutional source. To look for it in the abstract realm, though, was to invite a far more authoritarian and oppressive institution than what had previously existed.

[247] Ibid., 38. This understanding of the Constitution was held by none other than Fredrick Douglass, who wrote in 1864, in the midst of the Civil War, "that the Federal Government was never, in its essence,

However compelling Graham's argument might have been, it was clear from the historical evidence that Thurgood Marshall's judicial philosophy was advancing toward triumph from day one, while that of Justice John Marshall Harlan would pass into obscurity. But what if it had not?

Justice Harlan maintained what thoughtful Americans had long understood: that the institutional design of a republican government, for all its flaws, was still the best possible means of both protecting basic rights and ensuring a neutral government. Legions of lawyers and judges, despite their public respect and good will, simply could not compete with political power; such power therefore had to be restricted in such a way that it could do that protecting on its own. It was by arranging the "several offices in such a manner as that each may be a check on the other," according to James Madison, "that the private interest of every individual may be a sentinel over the public rights"; and, of course, this was "requisite in the distribution of the supreme powers of the State" as well.[248]

Yet limitations alone were not the sole feature of republican government: there was also "energy." Checks and balances – ambition "made to counteract ambition" – would compel each institution toward its highest end, and make them actively fulfill the purpose of republican government. It was not the checks and limitations, but the energetic outcome that would ensure the "protection of property against those irregular

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anything but an anti-slavery government." Even without such thing as the Fourteenth Amendment, it was clear that if the nation "abolished slavery tomorrow… not a sentence of syllable of the Constitution need be altered." The original Constitution's spirit was mean to "give no claim, no sanction to the claim, of property in man," he wrote. "If in its origin slavery had any relation to the government, it was only as the scaffolding to the magnificent structure, to be removed as soon as the building was completed," (i.e., speaking of the Constitution's three-fifths and fugitive slave clauses). *American Political Rhetoric*, 256. Plainly, though, the view of Justice Marshall and others was that the structure under the scaffolding was not worth redeeming, and that it would have to be perpetually remade through the act of judicial review.

[248] James Madison, Federalist #51. In *Federalist Papers*, 319.

and high-handed combinations which sometimes interrupt the ordinary course of justice," Alexander Hamilton wrote, and provide the "security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy."[249]

This was Justice Harlan's position, among many others, prior to the end of the nineteenth century. It was especially true of earlier justices on the Court who had "always given a broad and liberal construction to the constitution, so as to enable congress, by legislation, to enforce rights secured by that instrument," he wrote. "The legislation congress may enact, in execution of its power to enforce the provisions of this amendment, is that which is *appropriate to protect the right granted*." Reviewing such laws, therefore, meant determining if the means were *in*appropriate to the end, and of ensuring that the end was actually in view. "Under given circumstances, that which the court characterizes as corrective legislation might be sufficient," he wrote.[250] This was the view of his namesake Chief Justice John Marshall, who wrote that "[t]he sound construction of the constitution must allow to the national legislature that discretion, with respect to the *means* by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, – let it be within the scope of the constitution, – and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional."[251]

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[249] Federalist #71, in *Federalist Papers*, pp. 421-422. Hamilton spoke here of the Chief Executive; but it was plain that the advantages of energy were true of good government as a whole. Energy is, after all, the active condition of the thing – a full realization of its proper function.
[250] *Civil Rights Cases*, at pp. 50-51. (Harlan, dissenting.) (Emphasis added.)
[251] *McCulloch v. Maryland*, 17 U.S. 316, at pp. 421 (1819).

Obviously, though, such a proper function is a delicate thing, especially at the state level. It can be distorted and corrupted, and made to fall terribly short of the ends for which they were intended. Mass-democratic impulses can use the levers of local government for its advantage – against ethnic, religious, and indeed economic minorities. At the same time, such state police powers can move in a very good direction. Knowing this, it is also obvious what "correction" of that error means: it is a matter of ensuring that the power of government is designed to meet its purpose. Congress framed Fourteenth Amendment to do precisely that: to empower Congress to make states live up to their respective ends in the Reconstruction Era. But just as it fell to the Court to review those acts – to ensure that they did not surpass the means – it also fell to them to review such acts at the state level. Yet it assumed that the essential terms – "persons," "privileges and immunities," "due process," and "equal protection" – would go on meaning what they had always meant, and that the assumptions about the nature of republican government would not change in the future. Indeed, if Justice Harlan's understanding is correct, the Fourteenth Amendment should have fulfilled its role, and then gone the way Article VII on the ratification process, or the Third Amendment on quartering soldiers. But, given the nature of Section One, as well as the onslaught of modernity, this could not last.

Conclusion

"Recent excursionists to the top of the Rocky Mountains tell us that they can scarcely realize their actual elevation when upon them; it is only at a distance that their real altitude appears," one editorialist wrote in the Christian Advocate in 1868. "So of the great events through which we are passing" – namely the Fourteenth Amendment,

and the way it was no doubt impacting the deeper currents in American political and constitutional thought. They make but little impression upon the unthinking, and men may talk of the times as dull and humdrum. But after-times will see in these things the great events that shall stand out as mountain peaks in the landscape of history."[252] Whatever the Reconstruction Congress intended for the Fourteenth Amendment, Section One became in the minds of many an attempt to make might not only obey right, but somehow *become* right – to convert the "ought" into an "is." It was assumed, of course, that Congress would do what it had always done, and that such broad statements about fundamental rights would not disrupt the political process, nor cause the sort of philosophic conflicts that would call for intense judicial power in later years. It was only a matter of time, though, before Americans would begin to accept that the "ought" *really did* come from the "is" – the "is" of judicial ruling, rather than an act of Congress. They would cease to find the fundamentals at the core of American political consciousness, or at the bedrock of our self-understanding, and find it instead an aspect of written law. Like all written laws, it would not have life until it was enforced – and it would fall to the judicial branch to make that happen.[253]

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[252] "The Constitutional Amendment," *Christian Advocate* 43, 31 (Jul. 30, 1868): 244.

[253] Alexander Bickel had much the same lament: "Our point of departure… has been that judicial review is the principled process of enunciating and applying certain enduring values of our society," he wrote. Again, the variety of values that would emerge from the words of the Fourteenth Amendment – an problem that would compound with the new "incorporation doctrine" – made it inevitable that the final decision would fall to the Supreme Court. "When values conflict – as they often will – the Court must proclaim one as overriding, or find an accommodation among them," he wrote. The root idea, which makes the Court even more essential than our democratic institutions, "is that the process is justified only if it injects into representative government something that is not already there; and that is principle, standards of action that derive their worth from a long view of society's spiritual as well as material needs and that command adherence whether or not the immediate outcome is expedient or agreeable." *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New Haven: Yale University Press, 1962), 58. Since those "fundamentals" are not longer latent in the American mind, it falls to the Court to provide them. It is not a matter of getting them right, for Americans admit of no standard by which they may judge such rulings. Far more important is that they Court render some ruling – any ruling – and essentially create the fundamentals by which politics might operate.

Chapter 5:

Constitutionalism in Modern Times – Part One: Social Problems and Historical Skepticism

A large segment of society viewed the Supreme Court as the last holdout for liberty in a failing republic. But others saw it quite the other way around. An 1895 issue of *The Christian Statesman,* a popular magazine on faith and public affairs, featured an alarming rumor about the United States Supreme Court, which seemed to confirm suspicions about its secret distain for democracy: "Our Supreme Court has followed the example of Congress in holding a session on the Lord's Day," the paper reported. This was no light accusation in the nineteenth century: "Sunday closing laws" were quite common, and they were frequently enforced against public and private business in many states. The rumor, which appeared to have no source, claimed that one Sunday afternoon, "the highest judiciary court of the nation went about its business without any shadow of excuse either on the ground of necessity or of mercy." The justices had no obligation to respond to such a charge given the gravity of other matters, which, in many instances, were quite important enough to break the Sabbath. Judicial duty was not exactly laborious anyway: it involved the sort of calm contemplation that even the most pious Americans engaged in on Sunday afternoons. Still, the accusation was particularly troubling for Justice David Brewer, when his Court received a flurry of letters after the rumor was reprinted in *The Congregationalist*, his own church's publication. He admitted that there was a common tendency in modern life "to make no distinction between Sunday and other days of the week." But as far as the Supreme Court was concerned, the accusation was "absolutely untrue."

> Neither on the Sabbath of April 7, nor on any other Sabbath to my knowledge, certainly not since I have been on the bench, has the Supreme Court, formally or otherwise, ever met for the transaction of business, either hearing of arguments, examination of opinions, conference or other matter. I mean to make this denial as broad and comprehensive as anything in the statement either in letter or spirit can suggest.[254]

Based on other documents from this era, it seems there was more to this critique than concern about the piety of the nation's highest Court. Congressmen and state assembly-members could lose their seats for such a disregard for the nation's religious heritage; but not so the occupants of the judiciary, who were quite immune to popular criticism. This made their disregard for the Sabbath all the more troubling, because it also meant a disregard for the people and their fundamental institutions. This, combined with their growing tendency to review many local pieces of legislation under the Fourteenth Amendment, grew suspicion that the Court had taken on a certain elite attitude, which had nothing but scorn for all things democratic.

In fact, for many, the mere existence of the judiciary was the strangest of conspiracies, and it only became stranger as the Court reviewed more and more popular pieces of reform legislation. "The ancient traditions of the United States Supreme Court are peculiar," one *New York Times* editorialist wrote a few years before, eager to point out what he thought to be the reappearance of ancient mystery cults.

> We were wont to consider Minos and Rhadmanthus of the Supreme Bench as belonging to a race of superior beings. What was said and done in the awful seclusion of the consultation room was impenetrably hidden from common men… Into the arena… walked the Justices in their robes, far removed from the passions and prejudices of mankind; no vulgar reporter, no tattling *raconteur* could enter. For generations no human being has been able to tell us what the Justices of the Supreme Court of the United States have said, or thought, about any given subject. The Justices have been a sort of Delphic oracle multiplied by nine, a Sphinx rolled out into several excellent gentlemen in silk gowns.[255]

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[254] David Brewer, "The Supreme Court Not a Sabbath-Breaking Body," *The Congregationalist*, May 9, 1895.

[255] "A Garrulous Judge," *New York Times*, Aug. 29, 1877. This was a particularly ironic statement: the "garrulous judge" was, in fact, Justice Stephen Field, who put his suspicion of American democracy in full view. It is interesting to see, though, how the religious accusation frequently found itself shoved back and forth between both sides of the argument. While some view the Supreme Court as a sort of modern temple,

It was a silly accusation, of course; but it revealed a legitimate worry, partly about the Court, but also about the people, who seemed to be drifting back into the conditions of pre-enlightenment from which it had emerged only a century before. Democracy required that all things be public, and that nothing be so hidden that the people could not know it clearly and distinctly; so far as that slipped away, American democracy was in great danger.

Another critic of the Court observed how its decisions aimed to "impress upon the public's mind with unusual force the extraordinary powers exercised by that tribunal." What exactly that force was, the author could not say. Just as it was in its earliest days, the Court had no way of "enforcing" its rulings; it was designed to merely render judgment on constitutional questions, and to do so only when those questions came to them through the lower courts. Still, he had no doubt that the American judiciary "determines the constitutional law of the country to a degree and in a sense that is true of no other judicial body in the world." This criticism was not at all based on any judicial failure to interpret the Constitution correctly, for, as this critic admitted, such a judgment did not belong to the public; ultimately, "the Supreme Court is the final arbiter of what that Constitution requires and intends" – a point that this editorialist granted without question. To say that the Constitution was superior to Congress would always call for the

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Fredric Bastiat was sure that it was not the advocates of laissez-faire but the socialists who were "nourished on the study of antiquity." Throughout ancient records we find "the spectacle of a few men molding mankind according to their whims, thanks to the prestige of force and of fraud." This, however, should not make such conditions desirable: "It proves only that since men and society are capable of improvement, it is naturally to be expected that error, ignorance, despotism, slavery, and superstition should be greatest towards the origins of history" – the greatest improvement coming through liberalism, or the ability to leave the past behind by establishing government purely in natural law reasoning. These ancient writers and the more recent theorists who praise them "did not understand that knowledge appears and grows with the passage of time; and that in proportion to this growth of knowledge, *might* takes the side of *right*, and society regains possession of itself." Fredrick Bastiat, *The Law* (New York: The Foundation for Economic Education, 1998), pp. 50-51. The critical question is this: which view maintains the greater elitism? Is it the liberalism that views liberty as civilization's final and greatest end, or the progressivism that is quite unable to give a clear vision of where progress is supposed to lead.

superiority of the interpretive institution, "rather than the Constitution itself," he wrote. True, there was no reason to believe that the current justices "would disregard the clearly-defined limits of legislative power, as laid down in the Constitution." But the problem was not what the Court did in fact, but what it could do, given the nature of judicial review. "[I]f it ever should do so its judgment would have to be recognized as decisive," because the judiciary was, once again, "the final arbiter of constitutional principles," he wrote – in fact, it is "the oracle that utters the voice of the Constitution."[256]

Public resentment against the judiciary came from an intensely optimistic view of American democracy, which appeared to be far more wise and benevolent than its critics believed. There were many frightening trends afoot, of course: socialists threatened to use popular reform measures to implement total state control, while Marxists threatened all-out revolution. But in the minds of most Americans, those were European problems. There were some domestic radicals, but modern American democracy was far too sensible to succumb to such delusions, and it was quite able to calm them, and create a consensus behind prudent reform measures. The need for a judicial overseer of popular will and protector of the minority was therefore quite unnecessary; it was only an irrational fear of democracy, while the Court's own rulings were informed by a suspicion of freedom itself, if not a malicious intent to undermine it. But far more troubling for many was the mere presence and meaning of the Constitution itself.

Many twentieth century scholars have taken these things as signs of the democratic nature of constitutionalism: the Court, they claim, is but a medium between

[256] "What the Supreme Court Can Do," *New York Times*, May 24, 1890. The author emphasizes the superiority of the British Constitution, where "all constitutional principles are embodied in legislation, and the chief function of the judiciary, in deciding questions in which they are involved, is to construe and apply the enactments of Parliament." Ibid. It is, of course, an organic view of government that he found superior.

the people and their own fundamental law, meaning that the final interpreters are the people themselves. Yale law professor Alexander Bickel found his claim to fame in saying that "when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people"; in doing so, it "exercises control, not in behalf of the prevailing majority, but against it. That, without mystic overtones, is what actually happens." Perhaps the Court has done great good for society by striking down corrupt legislation; perhaps it has the noblest intentions for the future of American freedom and the dignity of man. But "nothing in these complexities can alter the essential reality that judicial review is a deviant institution in the American democracy," Bickel wrote.[257]

Worse than the Court's "counter-majoritarian" tendencies, though, is the willingness of the public to *accept* that the constitutional interpretation is exclusively a judicial duty, regardless of whether or not the rulings are favorable to certain policy preferences. The greatest objection to this view in recent years comes from Professor Larry D. Kramer, currently the Dean of Stanford Law School, in his study of "popular

[257] Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New Haven: Yale University Press, 1962), pp. 17-18. For Bickel, the Court's "deviance" came, though, not so much from its usurpation of the people's Constitution, but from the displacement of legislative authority. This is precisely what happened in the days of *Brown v. Board of Education* (1954), the era which Bickel devoted so much attention: state legislatures were gradually breaking down segregation laws, bringing the races closer together, and fulfillment of the republican conscience and the right ordering of heart in a peaceful and enduing way; but it was horribly disrupted by the Supreme Court's school segregation ruling – not only with the violent backlash against the bussing scheme in the South, but in the way the Court became the bastion of the nation's values. Such values, he wrote, "do not present themselves ready-made. They have a past always, to be sure, but they must be continually derived, enunciated, and seen in relevant application." Given the nature of fundamental public values, "it remains to ask which institution of government – if any single one in particular – should be the pronouncer and guardian of such values." It is a critical question, yet Bickel was quite content to place that authority, not in the people and the way they view their Constitution, but the political institutions it creates. The turn to the Court came from the growing need for "an institution which stands altogether aside from the current clash of interests, and which, insofar as is humanly possible, is concerned only with principle." Ibid., pp. 24-25. So far as the Court usurped their role, it greatly damaged the public sense of right. As likely as this was, Bickel's criticism had little to do with the Constitution itself.

constitutionalism" in early America. Kramer points out that the most important aspect of the Constitution's design, which the people readily accepted for much of the nineteenth century, was the "institutional and intellectual solutions to preserve popular control over the course of constitutional law – a kind of control we seem to have lost, or surrendered, today." According to Kramer, the critical thing for the original Constitution was its ability to shape politics in such a way that political life – i.e., the "people themselves," as it appeared again and again in early political writings on the subject – would do so on its own. All popular legislation would draw its premises from the Constitution, follow its procedures, and aim at it as their final conclusion. The Founders realized that there was quite simply no stopping democracy: "popular pressure was the only sure way to bring an unruly authority to heel," Kramer writes. The Courts and judges were never very prominent in early America, in large part because they had no inherent power to even command the attention of the people. "The idea of depending on judges to stop a legislature that abused its power never even occurred to the vast majority of participants," he writes.[258] The surrender of the people's sovereignty occurred, according to Kramer, when they allowed the Court become the sole defender of rights in the face of overbearing majorities – and allowed themselves to believe that the Constitution was not theirs after all, but a document best left in the hands of judicial experts.[259]

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[258] Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford: Oxford University Press, 2004), pp. 7; 91.

[259] Aware of the gravity of that expertise, Justice Stephen Breyer later argues that judicial duty must be seen as "a source of judicial authority and an interpretive aid to more effective protection of ancient and modern liberty alike," i.e., the ancient right of the people to rule democratically, and the modern right of the minority to have their rights protected. In other words, judicial review is the power to fuse the people to their Constitution – to not only reflect, but *create* "popular constitutionalism." In practice, this might involve bending the Constitution in such a way that it receives democracy; at other times, though, it might mean compelling the public into the democratic mentality that the judges deem necessary. The latter is plainly more important: as Breyer admits, the task involves "changing the assumptions, premises, or presuppositions upon which many earlier constitutional interpretations rested" – i.e., judicially engineering

As correct as Kramer might be about the "people's Constitution" in the early republic, his description of the Lochner Era is much harder to sustain: by his account, it was "a golden age of popular constitutionalism," a time "rife with popular movements mobilizing support for change by invoking constitutional arguments and traditions that neither depended upon nor recognized – and often denied – imperial judicial authority."[260] In truth, as I will show in this chapter, popular critics of judicial review in the Lochner Era were not as troubled by the Court, as Kramer claims, nearly so much as the *Constitution itself*. The Progressive era was a story of estrangement – a disconnection between the "reason of the people" embodied in the Constitution from the people themselves. As shown above, there is an abundance of early twentieth-century rhetoric denouncing the Court; but, of course, there is an abundance of praise, calling it the last bastion of liberty, particularly with the passage of the Fourteenth Amendment. What all agreed on, though, is that the Constitution itself did not belong to the people. What had once been the people's own fundamental law was looking more and more like a great mystery, which spoke in riddles and metaphysical oddities, which required a group of sacred interpreters; so far as this duty fell on the Court, it was an elite office indeed. Given the new anti-constitutional tendencies in both the public and intellectual circles, however, the judicial office was actually little more than an unfortunate messenger.

But what caused that separation of the people from their Constitution? True, the system was broken after the Civil War, as everyone knew. But why, for so many, was it not worth fixing? What was it that seemed so much better to the people than their own republic?

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the underlying principles that make democracy possible. *Active Liberty: Interpreting Our Democratic Constitution* (New York: Vintage Books, 2005), pp. 6; 11.

[260] Kramer, *The People Themselves*, 215.

I. Social Realities

The conditions of that era were a reasonable cause for despair: the division between the wealthy and the poor had never been greater, nor was it ever based more on what seemed to be a fraudulent social hierarchy. This created an unprecedented tension in society, whose resolution might very well be a second Civil War. The nation, and indeed the whole industrialized world, had staked everything on a series of Enlightenment-era ideas, the most prominent being the claim that each individual human being had certain inalienable rights; that the most tangible of these was the right to keep and acquire property; and that government existed to protect that right. Any other system or way of ordering life was an invitation to tyranny.

A. Liberalism's Original Promise

The idea at the root of the free market, and the liberal government that could sustain it, had done much good for industrial societies. The belief, which many held with absolute certainty, was that each individual human being had certain inalienable rights; that the most tangible of these was the right to keep and acquire property; and that government existed to protect that right. As John Locke put it, it was not natural resources, but labor "which puts the greatest part of value upon land, without which it would scarcely be worth any thing." What was true of land was true of all private estates and companies. The desire of individuals to get rich, he wrote, is the reason for "greatest part of all its useful products; for all that the straw, bran, bread, of that acre of wheat, is more worth than the product of an acre of as good land, which lies waste, is all the effect

of labour," he wrote. Nature offers basically "worthless materials, as in themselves." But the vast number of human hands that transform it create abundant goods at increasing quality and lower prices, and, of course, allow each their own livelihood. "[A]s different degrees of industry were apt to give men possessions in different proportions," Locke wrote, "so this invention of money gave them the opportunity to continue and enlarge them." One could only store up the fruit of labor so far; but in money, it could increase without end. "Find out something that hath the use and value of money amongst his neighbours," he wrote, and "you shall see the same man will begin presently to enlarge his possessions."[261] The greatest promise of the market was that wealth could cease to be zero-sum give and take, because it could instead be *created*, and offer opportunities to all to improve their conditions. This view of liberty began by assuming the worst in people.

There were, of course, nobler motives, as the prominent Scotch economist Adam Smith later pointed out. But "it is in vain for him to expect it from their benevolence only," he wrote. "He will be more likely to prevail if he can interest their self-love in his favor, and shew then that it is for their own advantage to do for him what he requires of them." Greed was a base and ugly motive; but for the advocates of liberty, it was the surest foundation for establishing a government or an economic system that could benefit all. Much like Locke, Smith identified the value of labor as the essential thing, and pointed out that a truly liberal society was one that unleashed that wealth-creating force as far as possible for each individual: it was "the only universal, as well as the only accurate measure of value, or the only standard by which we can compare the values of different commodities from century to century," he wrote. Letting labor run its course, and allowing each individual to keep and pursue what he makes through his own labor

[261] John Locke, *Second Treatise on Government* (Mineola: Dover Publications, Inc., 2002), 20.

would be the surest way to overcome mankind's natural scarcity. It was, of course, the central principle of liberty. "All systems either of preference or of restraint, therefore, being thus completely taken away, the obvious and simple system of natural liberty establishes itself of its own accord," Smith wrote. "Every man, as long as he does not violate the laws of justice, is left perfectly free to pursue his own interest his own way, and to bring both his industry and capital into competition with those of any other man, or order of men." This gave a certain benefit for liberal government as well: its tasks were greatly minimized, and the most essential needs of society were met by the by society's own commercial power. Government in such a system is, in fact,

> completely discharged from a duty, in the attempting to perform which he must always be exposed to innumerable delusions, and for the proper performance of which no human wisdom or knowledge could ever be sufficient; the duty of superintending the industry of private people, and of directing it towards the employments most suitable to the interest of the society.[262]

This form of liberalism was nothing new. For both Locke and Smith, it was simply a matter of returning to the things human beings had always known, but had only recently been realized. It was a Platonic principle: societies only needed to be reminded, and the productive power of the market would not only grant greater prosperity, but also realize more fully the basic form of justice.

This was, needless to say, an assumption that the American Founders held as axiomatic when it came to framing a new government. The lack of opportunity that dominated the Old World was much on their minds, as indicated by Thomas Jefferson's famous letter to James Madison in 1875. Marveling at the vast numbers of poor in France, he asked the famous question: "what could be the reason so many should be permitted to beg who are willing to work, in a country where there is a very considerable

[262] Adam Smith, *Wealth of Nations* (Amherst: Prometheus Books, 1991), pp. 20; 43; 466.

proportion of uncultivated lands?" Labor could be unleashed, and abundance created for everyone, if only the political establishment would let it.

> I am conscious that an equal division of property is impracticable, but the consequences of this enormous inequality producing so much misery to the bulk of mankind, legislators cannot invent too many devices for subdividing property, only taking care to let their subdivisions go hand in hand with the natural affections of the human mind.[263]

Jefferson was thinking primarily of agriculture, of course, and this proved to be the source of the Founding paradox between he and Alexander Hamilton, who held that the "prosperity of commerce." It was, without a doubt, "the most useful as well as the most productive source of national wealth, and has accordingly become a primary object of their political cares," Hamilton wrote.

> By multiplying the means of gratification, by promoting the introduction and circulation of the precious metals, those darling objects of human avarice and enterprise, it serves to vivify and invigorate the channels of industry, and to make them flow with greater activity and copiousness.

Much like Adam Smith, the assumption was that it is better to assume the baser impulses in people rather than the nobler ones, and to use those tendencies for the benefit of the common good. "The assiduous merchant, the laborious husbandman, the active mechanic, and the industrious manufacturer, – all orders of men, look forward with eager expectation and growing alacrity to this pleasing reward of their toils." It was, once again, the power of labor, and the ability of a liberal system to let most of that labor go to the laborer himself, which ensured the greatest happiness and property – and, above all, the creation of wealth. "It has been found in various countries that, in proportion as commerce has flourished, land has risen in value. And how could it have happened otherwise?" The free market was indeed a novel thing in human history, precisely as Locke and Smith understood it. "It is astonishing that so simple a truth should ever have had an adversary," Hamilton wrote, thinking of the eons of human history where laborers

[263] Thomas Jefferson, *Writings* (New York: The Library of America, 1984), 841.

toiled and the sovereign, under some delusion of divine or royal authority, collected the fruits of that labor. Those civilizations, though, simply lived under a delusion, or a rejection of the "plainest truths of reason and conviction," he wrote.[264] The American regime, by contrast, again, would be founded on precisely the truths that human beings had known all along, and it would in large part be the unleashing of industrial energy, which would create unlimited opportunity and great wealth for all.

The free market, and the sort of government that was designed to encourage it, was indeed "liberal," when compared to the far more ancient order of human societies. It was a perfectly novel turn in human history, and it offered things that no previous civilization had ever experienced. It was a particular triumph for the common man: the level of opportunity was so great, and the standard of living war far better than ever before, that the free market could be viewed as the single greatest philanthropic movement ever. All of this came at significant cost, of course: in the old world, the "family represented the land, and land represented the family," Alexis de Tocqueville wrote. "It is not that there are no rich in the United States as elsewhere; indeed, I do not know a country where the love of money holds a larger place in the heart of man and where they profess a more profound scorn for the theory of equality of goods," i.e., the early theories of socialism. "But fortune turns there with incredible rapidity and experience teaches that it is rare to see two generations collect its favors."[265] Wealth was a churning and volatile thing, rather than the stagnant hierarchy of previous centuries,

[264] Alexander Hamilton, Federalist #12, in James Madison, Alexander Hamilton, and John Jay, *The Federalist Papers*, eds. Charles Kesler and Clinton Rossiter (New York: Signet Classic, 1999), pp. 86-87.
[265] Alexis de Tocqueville, *Democracy in America*, Trans. Harvey Mansfield and Delba Winthrop (Chicago: Chicago University Press, 2000), pp. 48; 50.

when it was aligned with family estate far more than labor. Labor, though, was now the basis for liberation, and mankind was truly liberated in the United States.

Moreover, American ingenuity was a remarkable thing, of the sort the world had never seen before. By simply opening up the channels of opportunity, the nation produced marvelous inventions. Some were simply entertaining things like the phonograph; others, though, were the sort of ideas that saved labor – and in some cases, saved lives. And, most of all, many of these labor-saving and life-enriching devices were placed within reach of even the poorest Americans. These things placed the United States "far in advance of other nations," according to Andrew Carnegie – a man who certainly knew what it meant to use science to meet mankind's most practical needs, particularly in the production of steel. "No other people have devised so many labor-saving machines and appliances."[266] Steamboats, steamships, the cotton gin, the mowing reaping and sewing machines – and, more recently, electricity and the earliest development of the telephone – were all wonders of the free market. Carnegie's own railroads and skyscrapers were, of course, iconic of what mankind could achieve, and how the market was the single greatest means to that new world.

Yet the promise of the old liberalism, which had become so central to American life in practice, was now colliding with the conditions of the working classes. Those who taught the principles of the free market knew that such a system could witness a variety of new problems. Adam Smith in particular was sensible enough to know that a free market system would have considerable ups and downs, and that downturns could have a terrible impact on the laboring classes. The common people could suffer from inflation

[266] Andrew Carnegie, *Triumphant Democracy: Sixty Years' March of the Republic* (New York: Charles Scribner's Sons, 1893), 11.

in the price of basic goods, or face their own unemployment. The conditions of industrial laborers, and the vast amounts of wealth accumulated at their expense, were actually quite contrary to the principles of the free market. Both theory and practice taught that it was not at all in the long-term favor of the capitalist class to acquire wealth in such a way. But Smith was confident that there was always a "natural price" in each thing, and that it was the "central price to which all other commodities are continually gravitating," he wrote. "Different accidents may sometimes keep them suspended a good deal above it, and sometimes force them down even somewhat below it. But whatever may be the obstacles which hinder them from settling in this center of repose and continuance, they are constantly tending toward it."[267] As true as this might have been, though, it seemed that the market's ability to correct itself could take a very long time, and that there could even be a deliberate resistance against it among the capitalist classes: a "bad effect of commerce is that it sinks the courage of mankind, and tends to extinguish martial spirit." The classical problem of commerce still lingered, even in modern people; luxury could corrupt – and if it could rob them of the "martial spirit," it could most certainly undermine their sense of justice as well, and how it related to the conditions and wages of laborers. "[H]aving their minds constantly employed on the arts of luxury," he wrote, "they grow effeminate and dastardly."[268] Hence, capitalist tycoons could easily bring about their own destruction. In a republican system, though, the self-correcting, if not totally resetting market could drag on for many years. But until the market corrected itself, and until industrialists admitted the possibility of their own ruling, laborers suffered.

[267] Ibid., 61.
[268] Adam Smith, *Lectures on Jurisprudence* (Oxford: Oxford University Press, 1978), 40.

B. The Old Liberalism and the New Labor

The most disturbing thing about the conditions of labor was, of course, the sheer poverty that accompanied it. The "urban poor" would have been an oxymoron for Locke or Smith; but the conditions were there, and they were quite real, and growing desperate. It was one thing to have poverty due to popular moral failings of citizens or the corruption of governments; but it was quite another thing to have all of the necessary conditions for vast creations of wealth and opportunity and still find so many laborers living in such desperate conditions. "We have constant calls for the relief of suffering and distress," one editorialist in the *New York Evangelist* wrote in 1880. "Many will say that charity begins at home, and so excuse themselves from any attempt to relieve [sic] suffering which is far off. What they do not see with their own eyes, and hear with their own ears, is as if it did not exist."[269] The ordinary American response was, of course, to focus on the condition with great intensity, bordering on obsession over the suffering of others. "The fact is, that of the iron grip of poverty, people in general, by no means excepting those who have written about it, have had very little experience," the popular English novelist James Payn wrote; "whereas of the pinch of it a good many people know something." It took novelist's descriptive abilities to bring the "pinch of poverty," as he called it, before everyone else's mind.[270] American readers faced many long and painful images of the plight of urban families and children struggling to survive through long hours in factories, and then finding ways to live on meager rations. The need for such

[269] "Wealth and Poverty – Famine and Plenty," in *New York Evangelist* 51, 10 (Mar. 4, 1880): 4.
[270] James Payn, "The Pinch of Poverty," *Littell's Living Age* 145, 1876 (May 29, 1880): 570.

"relief" appeared again and again. Yet the public's ability to find clear, tangible, workable solutions were often sparse in the popular discourse.

Blame came easily, and it was usually found precisely where the critic chose to place it. There were, on the one hand, those who found easy and self-satisfying solutions to the plight of workers. In defense of capital, the popular columnist Howard Crosby argued that "poverty is never caused by wealth." Poverty itself was no doubt an oppressive thing. But "[t]his oppression is not making men poor nor increasing poverty, but only treating the poor unjustly – a bad thing, but not *the* bad thing that is alleged," he wrote. Still, because of the delusion, "many have kicked up their antics of late, this whole question being woefully confused, and crude philosophers have rushed upon the stage from all quarters, bellowing out their nonsense, to the applause of all those primitive minds that delight in noise." In truth, Crosby wrote, "it is not the fact of poverty that troubles these people, but sheer envy. They are vexed in soul that they are not themselves millionaires."[271] This itself was only a small part of a much broader moral depravity among the laboring poor – a lack of frugality and dignity in work, the unwillingness to seek a better education, drunkenness and debauchery, and a constant tendency to blame someone else. The blame, though, also went in the opposite direction. "The primal causes of poverty lie at the very base of our social system, and cannot be rooted out without radical change in the system itself. They are organic – sanctioned by custom, sustained by the church, enforced by law, and interwoven with the very fabric of society." What was it at the root of poverty, not to mention "the main cause of crime," and "degradation through the world"? It was none other than business monopolies – "the

[271] Howard Crosby, "The Forgotten Cause of Poverty," *Forum* 3, 6 (Aug. 1887): 568.

usurpation by the few of that which by right belongs to all," one anarchist wrote.[272] Anarchism was rare, of course, but the sort of anger against the system was common throughout the laboring classes, who were easily convinced, especially in moments of great passion, that destruction really was the only alternative.

Even the most vehement critics of labor unrest could not deny that the old liberalism had been stretched to its limit – or perhaps beyond their limit – by the conditions of modern industry. The old liberalism, it seemed, carried with it its own destruction. It was a system that, on one hand, would create a vast new kind of wealth and means of production, while at the same time, it was doomed to not keep up with it. Damaged most of all were, of course, the industrial workers, who had become terribly alienated from the fruit of their own labor. General Nelson A. Miles of the U.S. Army, who was frequently on call to respond to a potential threat to national security from labor uprisings, understood well enough that "the condition of the laborer has changed entirely" since the time of the Founding. Liberalism proved quite unable to adapt to modern circumstances, at least not with the same ease that Smith believed it could. The Western frontier and the endless amount of fertile land had allowed labor enough opportunity to dissuade it from the sorts of frustrations that now shook the modern world. What industry there was occurred in the few urban centers, and had sufficient demand to keep a perfect level of fairness in wages and hours. "All this is now changed," he wrote. "For the last few decades the tendency has been to the congregation of the people in large cities and towns; and a feeling of discontent, unrest, and disaffection has become almost universal." Most troubling of all, "[t]he employer has too little confidence in his

[272] "Monopoly, the Cause of Poverty," *Liberty (Not the Daughter but the Mother of Order)* 1, 20 (May 13, 1882): 4.

employee, too little consideration and sympathy for his condition, and too little interest in his welfare; while, on the other hand, the employee had a feeling of hostility and prejudice, in many instances amounting to almost actual hatred of his employer."[273] General Miles spoke as a Civil War veteran, who knew first hand how this kind of disparity could work itself out. Should the occasion arise, he made it clear that he would indeed lead his army in putting down yet another domestic insurrection; but he hoped that the public would understand the nature of the crisis first.

After a serious of sporadic labor uprisings by disorganized unions, which did not achieve their long-term goals, urban labor interests found their best organizer in Samuel Gompers, who led the American Federation of Labor, founded in 1886. "It is now almost unanimously acknowledged that employees have the right to strike," Gompers wrote, "and having the right to strike, they have the right to use all constitutional means to make the strike successful." Striking and negotiating with management was never a matter of angry protest for him, much less was it a matter of revolution or remaking society: far more important was the old Lockean principle of labor as the determining source of value in both goods and wages. "As a strike the withholding of labor for a better condition of the market, it must be conceded that the laborer had the right to fix the price and conditions upon which he will put his labor into the market," he wrote. Gompers also recognized that such a right to receive the fruit of one's labor was a constitutional thing in the American system: "Having the inalienable right to organize for mutual protection and benefit, they have the right to use all the rights, customs, privileges and immunities of

[273] General Nelson A. Miles, "The Lesson of the Recent Strikes," *North American Review* Vol. CLIX, No. CCCCLIII (Aug. 1894): pp. 181-182.

organized bodies."[274] Whatever venture Gompers set out on would eventually find fulfillment; it was a common standard of fairness he hoped to achieve, rather than a total upheaval. This set the AFL quite apart from domestic socialists, since it proceeded with great respect for American capitalism, and saw itself as an institution that could correct errors and recover an order that could benefit workers and management alike. Under Gompers' organization, it seemed "the army of labor is willing to submit to discipline and conduct its campaign as a united force, fighting one battle at a time," the *Christian Union* reported in 1890. But, of course, "if the strike fever turns the army into a mob, defeat is almost inevitable."[275]

That was what eventually happened again and again, beginning with the Homestead Strike of 1892. The incident showed that the AFL and similar unions, while respectable in principle, did not necessarily have control over their members. The views of laborers themselves, it seemed, were evolving quite on their own: the point of a strike did not necessarily have a fixed end after all, nor was such an undertaking aimed at recovering a basic standard of fairness. Steel workers in Andrew Carnegie's own company hub in Pennsylvania went on strike over wage disputes, and then clashed with the company's security forces when they tried to escort scabs into the factory. The situation grew so intense that the state militia was finally called in to restore order. Responses were varied, and many tried to apply classic maxims to resolve the situation. "This is and should be a country where law and order, and the rights of property are just as sacred as the rights of labor," one editorialist in the *Burlington Hawkeye* reported. "Without respect for the one there can be no safety for the other; there can be no two sets

[274] Samuel Gompers, "The New York Central Railroad Strike," in *The Independent* 42, 2183 (Oct. 2, 1890): 2.
[275] "The Outlook," in *Christian Union* 41, 18 (May 1, 1890): 615.

of law, one or labor, and the other for capital."[276] Similarly, another editorialist claimed in the *Independent* that "[t]here is no question of wages in the deeds of Pittsburg: no question of workmen's rights in the acts of Homestead. It is a question simply of crime." More importantly, though, was the general tendency of labor. "It is from the ranks of labor that these acts of violence have proceeded. Labor had denounced the horrible affairs at Pittsburg, but not with unanimity, not always with the abhorrence which such a cowardly deed, done in its name, should excite. Labor will not win battles while it countenances a policy of violence."[277]

No one, of course, was more shocked than Carnegie himself, and he reflected on the Homestead strike extensively in his autobiography. He believed he had been quite good to them, as any owner of such a massive company should. "For twenty-six years I had been actively in charge of the relations between ourselves and our men, and it was the pride of my life to think how delightfully satisfactory these had been and were." they had far better working conditions, largely because of his own inventions. "The work of the men would not have been much harder than it had been hitherto, as the improved machinery did the work," he wrote, thinking once again of the marvelous labor-saving devices that inventors like himself had offered the public. "This was not only fair and liberal," he wrote; "it was generous, and under ordinary circumstances would have been accepted by the men with thanks." Above all, he believed that he had offered them the best wages and hours possible: it was a policy of "patiently waiting reasoning with them and showing them that their demands were unfair; but never attempting to employ new

[276] Quoted in "Opinions of the Homestead Strike," *The Christian Union*, 46, 4 (Jul. 23, 1892): 187.
[277] "Guiteausim," *The Independent* 64, 4 (Jul. 28, 1892): 187.

men in their places – never."[278] Perhaps it was entrepreneurial common sense, or perhaps it was blind obstinacy; but either way, Carnegie's view revealed the position of capital that simply would not budge in the face of popular pressure, both for its own sake, and for the sake of industry itself. For all their good intentions, those sharing Carnegie's outlook were quite blind to the plight of workers, it seemed, and no amount of concessions and accommodations, much less brilliant labor-saving intentions, could solve the problem.

This became even clearer during the Pullman Strikes in 1894 – this time a nation-wide strike among railroad workers by employees of the Pullman Palace Car Company. Strikes began in Chicago's manufacturing center in response to a massive company pay-cut; it quickly spread to all urban railroad centers, resulting in sporadic violence and fatalities, and ending only when Grover Cleveland dispatched federal troops to restore order, often in pitched battles with strikers.[279] This, of course, had a direct and frightening impact on the public: "why should this matter turn the whole world upside down?" the *Maine Farmer* asked. While the Homestead strikers simply walked out of the steel mill, and only engaged in brief violence with the company's security forces, Pullman strikers

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[278] Andrew Carnegie, *Autobiography of Andrew Carnegie* (Boston: Houghton Mifflin Company, 1920), pp. 228-230.

[279][279] It was, of course, General Miles who was called upon to put down the insurrection. On this point, and when dealing with Debs, all of his sensibility for the plight of labor vanished: most Americans, he wrote, could easily judge for themselves "whether the acts which drew forth these expressions are in the interest of organized labor, or whether it is re-hot anarchy, insurrectionary and revolutionary!" he wrote. "The Lesson of the Recent Strikes," 186. Debs certainly led his strike in the belief that he was helping the most oppressed people in America; but he was quite blind to the destructive impact of his actions. "Millions of people are dependent upon [the railroads] for their daily food," Miles pointed out; "and if the line should be blocked or paralyzed, famine, pestilence, and death would overshadow thousands of villages and citizen that are now enjoying life and prosperity. It would be like cutting the great arteries between the heart and the brain of the physical system." Ibid., 183. The logic of mob-violence was clear, and no amount of self-righteousness on Debs part could avoid it. Even if they did succeed in gaining complete control over the big businesses like the railroads, "then the cottage, the hamlet, and the little personal property of the humblest citizen is in jeopardy, liable at any moment to be confiscated, seized, or destroyed by a traveling band of tramps." Ibid., 186.

"burned trains of cars and destroyed their contents," the paper reported, thus halting railroad service nation wide, and placing it "in the hands of a murderous mob." "Engineers and firemen have been gagged and thrown from their locomotives, and various acts of violence resorted to, in order to carry out their wild schemes."[280] Samuel Gompers was at a loss trying to explain what happened. He sought to remind the American people that the whole point of unions was, again, to organize in such a way that workers could have some leverage over capital in an effort to achieve an original sense of fairness and decency in their wages an hours. "I can scarcely bring myself to the belief that the [American Railway Union] imagined that the movement would be as extended as it became into, nor that it would last as long as it did," he wrote. In truth, "[t]he reform elements in our country seem to have unconsciously created their own Frankenstein, the breath of life being injected into it by plutocracy in the shape of ill-gotten gains." Contrary to the violent uprising, though, Gompers was certain that American unions could still achieve their ends in a positive way. "We insist upon the right to organize," he wrote, and "to protect ourselves, our homes, and our liberties, and work out our emancipation. We are confident we shall secure them, and that the world will stand surprised that they were accomplished through the means of an enlightened public opinion and by peaceful means."[281] The Pullman Strikes were a mere anomaly – or so he hoped.

But this was plainly a different sort of strike, and it revealed the possibility of a complete overturning of the existing social and political order, which might eventually become unstoppable, even for the power of the federal government. The most troubling

[280] "The Great Strike," in *The Maine Farmer* 62, 36 (Jul. 12, 1894): 4.
[281] Samuel Gompers, "Article 3," *North American Review* Vol. CLIX, No. CCCCLIII (Aug. 1894): pp. 203; 204-206.

thing, though, was the total lack of a clear goal in the strikes; there was no sense of justice in view, but simply a mixture of anger, and the belief that vengeance would set things right, since there was no pre-existing purpose to achieve. Americans could understand that sort of outrage if things were, in fact, unfair. "We make no objection to the peaceable strike of the Pullman employees," one editorialist in *The Independent* wrote. "They had a right to leave their work when they pleased." But, conversely, "it is a terrible feature of this strike that the whole body of men engaged in it seems to have been determined to secure the purpose of their strike not by peaceable but by violent means."[282] It was the violence that many felt necessary for a new order, confident as they were that the old one was a complete failure framed in the days before class consciousness, much less railroad tycoons. The system needed to be destroyed in order to introduce a whole new order.

The leader of the uprising was Eugene V. Debs. Debs had worked for the railroads himself, and had climbed his way up through the ranks of the American Railway Union, certain from the beginning that the solution to the labor problem would take something far more radical than any union's current tactics. Union strikes could bring short-term solutions by constantly appealing to standards of fairness and justice; but those victories would always recede, and lead workers back to exploitation again and again. Placing these labor disputes in the context of world history, Debs believed that "the work of evolution and revolution has so far progressed as to inspire hope of some sort of millennium in the not distant future."[283] The need for such a radical leap was quite obvious, given the brutal conditions of labor and capital, and the blindness of people like

[282] "A Strike or a Rebellion?" in *The Independent* 46, 2380 (Jul. 12, 1894): 16.
[283] Eugene V. Debs, "Confederation of Labor Organizations Essential to Labor's Prosperity," *American Journal of Politics* 1, 1 (Jul. 1892): 64.

Carnegie, among several others, to the plight of their own workers. It was a step in history that seemed to justify anything – even the sort of violence that broke out in the Pullman Strikes, and finally the principle of socialism he adopted after being released from prison in 1895. "It is said that the American people like 'fair play,'" he wrote, but when "those who are the victims of injustice" complain or even resist their condition, "they are denounced as 'anarchists,' enemies of capital, blatant agitators, breeders of riots and sedition, conspirators, criminals, who should be fined and imprisoned for the public good."[284] It was this revolutionary outlook that Debs took with him in later years as a presidential candidate for the Democratic Socialist Party – running an election within a government which he had absolutely no faith in for its own sake. His intention was, of course, to destroy the system from the inside. Indeed, Debs was sure to distance himself and his followers from the likes of Samuel Gompers for their constant appeals to market-based ideas of fairness. "The American Federation of Labor, as an organization, with its Civic federation, to determine its attitude and control its course, is deadly hostile to the Socialist party and to any and every revolutionary movement of the working class," he wrote. "To kowtow to this organization and to join hands with its leaders to secure political favors can only result in compromising our principles and bringing disaster to the party."[285] For all its efforts, the AFL was enslaved to the very ideology it sought to correct from Debs point of view. All of this made Debs, if nothing else, an extraordinary rabble-rouser – a man whose ideas were not compelling at all, but whose leadership and rhetoric could instill the masses with dangerous delusions, and incite them to great violence. This was, in part, because of the inability of American labor movements to

[284] Eugene V. Debs, "The Cry of 'Anarchist'," *American Magazine of Civics*, Apr. 1895, p. 408.
[285] Eugene V. Debs, "Danger Ahead," *International Socialist Review*, reprinted in *Labor and Freedom: The Voice and Pen of Eugene V. Debs* (St. Louis: Phil Wagner, 1916), 91.

organize into a partly like the one in England. "On the other hand," Paul Johnson wrote, "even respectable labor unions in the United States failed to escape entirely from the stigma of violence created by the many militant unions which nonetheless flourished alongside them."[286]

Adam Smith saw the potential problems well enough: in all labor disputes over wages or hours, "masters can hold out much longer," he observed. "A landlord, a farmer, a master manufacturer, a merchant, though they did not employ a single workman, could generally live a year or two upon the stocks which they have already acquired." In contrast, "[m]any workmen could not subsist a week, few could subsist a month, and scarce any a year without employment." The agreement between employers and employees must always realize the "natural prices" involved, or else both are destined to suffer. Such violations are everywhere a most unpopular action," he wrote, "and a sort of reproach to a master among his neighbours and equals." Consumers really do make judgments about the labor that goes into their goods, and a company with shady business practices is sure to lose them. Hence, most of the arrangements to lower wages in some way are done in "the utmost silence and secrecy"; but once they are public, the employer is sure to suffer for his misdeeds. Indeed, the Adam Smith, the single greatest philosophy of capitalism, sanctioned strikes: "In order to bring the point to a speedy decision," he wrote, "they have always recourse to the loudest clamour, and sometimes to the most shocking violence and outrage. They are desperate, and act with the folly and extravagance of desperate men, who must either starve, or frighten their masters into an immediate compliance with their demands." A contract is a contract; anything that forces one party into a situation which he did not originally choose is quite simply a perversion

[286] Paul Johnson, *History of the American People* (New York: Harper Perennial, 1997), 568.

of that obligation. But this was not just a matter of precepts; the practical consequences of violating that contract were also obvious. All employers must know "that, in order to bring up a family, the labour of the husband and wife together must, even in the lowest species of common labour, be able to earn something more than what is precisely necessary for their own maintenance."[287] Any employer who failed to realize this, which he may gain massive amounts of wealth in a very short time, nonetheless faced his own doom; a decline in the numbers of family members, from even the greediest point of view, ultimately means less human capital. It is therefore in the greatest interest of the capitalist to allow the excess capital to be shared among all, in the form of higher wages.

Hence, by Smith's own principles, he fact that the capitalist class would continue with such short-sighted schemes – in a "get rich quick" plan that would come at horrific human cost – did not indicate anything about the nature of capitalism itself. By Smith's principles, it indicated instead a tremendous moral failing among the wealthier business classes – a refusal to let the free market work its own wonders for the sake of their own vast amounts, which were themselves very insecure.[288] Still, many critics ignored this aspect of capitalism to live up to its own basic principles, and concluded that it was flawed through and through, and demanding a complete overhaul of the social order. "The problem is how to accomplish these very righteous ends without inflicting too much incidental suffering," social gospel icon Walter Rauschenbusch later observed. "Some

[287] Smith, *Wealth of Nations*, pp. 70-74.

[288] Smith made a similar point about monopolies. In such schemes, "by keeping the market constantly under-stocked, by never fully supplying the effectual demand, sell their commodities much above the natural price," Adam Smith wrote, "whether they consist in wages or profit, greatly above their natural rate." As a consequence, the price of such goods "is upon every occasion the highest which can be got." The price set by the market, "the price of free competition," which is the "lowest which can be taken," is corrupted when this happens. In a monopoly, though, such capital is "squeezed out of the buyers, or which, it is supposed, they will consent to give: The other is the lowest which the sellers can commonly afford or take, and at the same time, continue their business." Ibid., 65.

suffering there is bound to be. It is humanly impossible to straighten a crippled limb without pain." But that transition, which would certainly be achieved, was itself minor thing compared to "the far greater suffering that is now inflicted every day and hour by the continuance of ancient wrongs, and the still vaster suffering that will grow out of our sins if we fail now to right them. For the wages of sin is death and humanity is so closely bound together that the innocent must weep and die for the sins the dead have done."[289]

C. Social Science Explains

The intensity of class antagonism drew much attention from researchers in the new social sciences. There were explanations for poverty and the condition of the working class, as well as the meaning of wealth and social privilege, which had very little to do with the conventional explanations of eighteenth century political economists. Henry George, for instance, in his highly influential work, *Progress and Poverty* (1879), pointed out that industrial societies did not rise up out of a primitive state, as conventional Lockean theory believed. The old notion was, of course, that poverty is the starting point for all human societies, and that the free market under a liberal government was the surest way out. "If man in the state of nature be so free," Locke asked, "why will he part with his freedom?" The answer: people sought "mutual preservation of their lives, liberties and estates, which I call by the general name, property."[290] But this, according to George, was quite incorrect: industrial societies did not emerge out of primitive, poverty-stricken conditions; advanced civilization occurred because of the depths of poverty in which many of its members lived. Notions about the free market, even in its advanced

[289] Walter Rauschenbusch, *Christianizing the Social Order* (New York: Macmillan, 1914), 429.
[290] Locke, *Second Treatise*, 57.

stage of capitalism, "have sunk so deeply into the popular mind, as radically to change the currents of thought to recast creeds and displace the most fundamental conceptions," George wrote. "Now, however, we are coming into collision with facts which there can be no mistaking. From all parts of the civilized world come complaints of industrial depression; of labor condemned to involuntary idleness; of capital massed and wasting of pecuniary distress among business men; of want and suffering and anxiety among the working classes."[291] The current doctrine of wealth-creation, however real it might have been in the early part of the industrial era, could not even fully explain, let alone solve, the problem of poverty in modern America.

The inequality of classes persisted because of the delusion about what liberty actually was. Had people seen capitalism for what it truly was in its earliest days, they never would have chosen it – nor would they have ever ratified a government that was so designed to protect it, as the American Constitution did. Capitalism succeeded because it was "eminently soothing and reassuring," George wrote; it convinced many that they were fleeing poverty, when in fact it was creating a whole new system of oppression. Those who benefited unfairly from it did not succeed by conquest and dominance, as it was in previous centuries; it was instead their ability to "dominate thought," he wrote. "At a time when old supports were falling away, it came to the rescue of the special privileges by which a few monopolize so much of the good things of this world, proclaiming a natural cause for the want and misery which, if attributed to political institutions, must condemn every government under which they exist." But it was obvious that such a delusion could not last forever, especially with the growth of the

[291] Henry George, *Progress and Poverty: An Inquiry into the Cause of Industrial Depressions and of Increase of Want with Increase of Wealth* (New York: Doubleday, Page & Company, 1879), pp. 5-6.

popular democratic sense in the people. George wrote that "the condition of the masses in every civilized country is, or is tending to become, that of virtual slavery under the forms of freedom." In fact, of all the different kinds of slavery, "this is the most cruel and relentless. For the laborer is robed of the produce of his labor and compelled to toil for a mere subsistence; but his taskmasters, instead of human beings, assume the form of imperious necessities."[292] The consequences of such a prolonged condition as this would most certainly lead to some form of catastrophe. Industrial society had gone down the wrong road, and it had traveled too far to ever turn back.

For most social observes trying to explain the nature of wealth and poverty, George certainly had the right idea. But for Thorstein Veblen, a professor of sociology at Yale University, the causes of these things were much deeper, and scrutiny of them required a more critical eye than the standard perceptions of wealth and poverty. Unlike George, Veblen did not see capitalism as the emergence from the serene state of primitive society. Those societies were, in fact, brutal and hierarchical – and with capitalism, the institutions and practices that perpetuated the dominance of one class over another were simply carried on in a different form. Seeing them, though, demanded far more than mere economic explanations: dress, architecture, music, everyday utensils, tools, habits of speech, writing, thought, worship, and education, and the subtle signals of tastes and preferences – these were the true explanations of social reality. They were, in fact, recurring barbarian customs, merely polished up and repackaged for democratic times. Anyone who refused to look deeply enough to see this was simply as blind as everyone

[292] Ibid., 98; 351.

else.[293] For Veblen, all of these aspects of the "leisure class" taught that the system of oppression was as strong as ever. "The development of these institutions is the development of society," he wrote. "The institutions are, in substance, prevalent habits of thought with respect to particular relations and particular functions of the individual and of the community." Formal institutions were the mere surface of the real ones, which were not economic or political, but social and cultural. They all create "a prevalent spiritual attitude or a prevalent theory of life."[294]

The most important "attitude" in modern America was, according to Veblen, the cult of the "leisure class." It was more than "the rich": it was the class that created the perceived purpose of human life, even among the laboring masses who could never fully partake of it. The market may very well produce all sorts of wonders, and it could put them within grasp of the laboring classes; but this would further blind them to their condition. In truth, the leisure class "acts to make the lower classes conservative by withdrawing from them as much as it may of the means of sustenance, and so reducing their consumption, and consequently their available energy to such a point as to make them incapable of the effort required for the learning and adoption of new habits of thought," Veblen wrote; such conservatism, or such acceptance that the current practices and conditions are as good as the people will get, "is a serious obstacle to any

[293] In this theory, Veblen introduced a formative approach to American social research: it would now devote total attention to the "social construction" of certain realities. The distinction between "nature" and "convention" was, of course, a timeless thing in Western political thought. But now, nature was to be perfectly absorbed into convention, and all "natural" things, at least in human affairs, were mere extensions of the constructions themselves. In this, it is easy to see the origins of American "social consciousness," which drives so much activism and social engagement of the past century: on one hand, the science offers detailed descriptions of oppression; on the other hand, it never explains how an objection to that oppression, or any system implemented to destroy it, is not *itself* a social construction, fundamentally no more preferable than the oppression to which the social researcher objects.

[294] Thorstein Vebelin, *A Theory of the Leisure Class: An Economic Study of Institutions* (London: George Allan and Unwin, Ltd., 1899), 190.

innovation."[295] Hence, while social hierarchy of the past was based on power, the capitalist version was based on fraud.

Plainly constitutional government was complicit in that fraud. So far as its goal was the protection of the free market, it was the greatest tool of the leisure class – the supreme aristocracy in disguise. Government was merely one of four things that perpetuated that supremacy according to Veblen, the other three being war, sports, and religion. "At this as at any other cultural stage, government and war are, at least in part, carried on for the pecuniary gain of those who engage them," he wrote. All of the good administration, separation of powers, checks and balances, executive energy, the means of republican government, or the protection of life, liberty and property – all of these things amounted to nothing more than "gain obtained by the honorable method of seizure and conversion." Government, like the other marks of leisured nobility, was "of the nature of predatory, not productive, employment," he wrote.[296] Hence, taking away the layers, and looking at political economy through the new and enlightened lens of sociology, one could find that the basic distinctions between regimes, which had been so essential to political understanding in the West, was collapsed into the same tyrannical oligarchy. It had not gone away, but simply found ways to adapt to modern times by dressing itself up in the guise democratic legitimacy. The "overbearing manner of government," he wrote, "has been greatly softened through the milder manners and the soberer habits of life that characterise those cultural phases which lie between the early

[295] Ibid., 204.
[296] Ibid., 40. Veblen made this point many times throughout his work. All government, "in point of origin and developmental content, is also a predatory occupation"; "the office of government is a predatory function, pertaining integrally to the archaic leisure class scheme of life It is an of control coercion." Ibid., 247.

predatory stage and the present."[297] Though it appeared as "natural rights" or neutrality, republican government under the Constitution's design was just as "predatory" as everything else. Should the people finally see this, and learn to group it together with the general fraud of the leisure class and their culture, then it would make the Constitution a much easier thing to abandon.

II. American Optimism and Alternatives to the Constitution

In the whole canon of world literature, there is only one novel we might call a futurist-economic-love-story: *Looking Backward*, by Edward Bellamy, published in 1888. It was certainly a novel made to sell, since it appealed to all levels of popular interest – a mixture of intimate experience with broad social and economic theory. Here, young Julian West, a wealthy member of New England's high society, sleepless at the prospect of class-warfare, falls into a deep hypnotic trance; he wakes up in the year 2000, where he discovers the whole world has been transformed into a pristine paradise – still industrial, but administered to perfection. Bellamy's utopia was the final outcome of American-style socialism, which received a name that would resonate through American public discourse for the next few decades: "Nationalism." Rather than the socialism of Eugene Debs and other radicals, Nationalism was the peaceful public construction of order along the lines of national sovereignty, rather than global revolution.

Many of his readers formed "Nationalist Clubs" across the country, intent on making the novel a reality in the United States. This was, no doubt, because of Bellamy's realistic imagery, and the simple path that led to it, all of which presented a tangible alternative to what many "desponding observers" thought would be an "an

[297] Ibid., 303.

impending social cataclysm" in the next century. "Humanity, they argued, having climbed to the top round of the ladder of civilization, was about to take a header into chaos, after which it would doubtless pick itself up, turn round, and begin to climb again." It was a hopeless cycle, which all previous civilizations experienced. It seemed quite likely that one of those cycles was nearly complete in the modern industrial world. It created wonders greater than the pyramids and constitutions greater than the Law of Moses or the Code Hammurabi. But it carried with it its own destruction, risking everything for the sake of a few Enlightenment ideas, and creating the conditions that would eventually lead to class-warfare. Indeed, many accepted that "[t]he idea of indefinite progress in a right line was a chimera of the imagination, with no analog in nature."[298] The noblest and most effective reform measures – liberal government, the free market, even religious reforms – were only attempts to delay the inevitable.

But none of this was necessary according to Bellamy, since Americans had discovered an unprecedented new way of knowing and reforming themselves in Darwinian Evolution.

A. Social Darwinisms in Conflict

In social terms, evolution reveled just how changeable things were; it provided a way of escaping what was thought to be a fixed human condition, determined by the economic, political and social facts of human nature.[299] It was, according to Dr. Leete

[298] Edward Bellamy, *Looking Backward: 2000-1887* (New York: Signet Classics, 2000), 12.
[299] Bellamy seemed aware that there would be more to the end of history than mere economics; the true frontier was human nature itself, i.e., concepts of gender-roles, marriage, and family. It was, of course, the sort of liberated image that would have scandalized his book in the 1880s (though it would not have hurt his book sales). But he was willing to dance around the idea. About his love relationship with young Edith Leete, West claimed: "I must remember that this, after all, was the twentieth and not the nineteenth century, and love was, no doubt, now quicker in growth, as well as franker in utterance than then." The bonds of the

(Juilan's host, and the author's mouthpiece) a matter of finally recognizing that we can participate in our own evolution, break the horrific cycles of history, and bring the human story to a happy end. Economically, this came through the "'final consolidation of the entire capital of the nation,'" according to Dr. Leete. "'The industry and commerce of the country, ceasing to be conducted by a set of irresponsible corporations and syndicates of private persons at their caprice and for their profit, were entrusted with a single syndicate representing the whole people, to be conducted in the common interest for the common profit.'" The massive growth of monopolies led to one final consolidation of all industry into the state, and all its capital into the vast public fund, which was distributed equally among all – on "credit cards." All it took was the maximization of nobler human capacities, which all previous generations assumed were either too weak or simply non-existent. "'The courser motives, which no longer move us, have been replaced by higher motives wholly unknown to the mere wage earners of your age,'" according to Dr. Leete. By far the coarsest motive, mankind's militaristic impulse, was transformed into something far more beneficial than war: "'as you used to supplement the motives of patriotism with the love of glory, in order to stimulate the valor of your soldiers, so do we,'" i.e., as an industrial army of highly trained young recruits, whose raging *thymos* was channeled into the factories. Bellamy's work was rich in futuristic technology, but it always came with a certain symbolism: "in the nineteenth century, when it rained, the people of Boston put up three hundred thousand umbrellas over many heads, and in the twentieth century they put up one umbrella over all the heads," i.e., one huge umbrella,

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most fundamental human institutions were, from the future's point of view, "'more jealous than fond.'" Ibid., pp. 197; 199. This was, no doubt, a step in the direction of modern sexual liberation: as even the most basic economic rights would become laughable, sexual freedom and reproductive rights would become quite fundamental. What Bellamy could not have imagined, though, was how central the Supreme Court would be in that process in the 1960s and 70s.

covering the whole city.[300] The whole served the individual, and the individual served the whole. Clean, simple, full of labor-saving and sophisticated planning and distribution of public luxuries, it was, no doubt, a hopelessly alluring image for many Americans of the late nineteenth century. Indeed, more than overcoming the frightening realities of class-struggle, it was the image of perfect progress – of mankind finally becoming content in the world.[301]

This was the sort of idea that prompted the work of another Darwinist, William Graham Sumner, long-time professor of social science at Yale University. Sumner maintained a simple truth in his book, *What the Social Classes Owe to Each Other*, first published in 1883: government involvement in private business would always lead to disaster, for such things were a meddling with the natural order, which was best when it was left alone. Not only was Bellamy's world impossible, but even striving for it would always require vast government experimentation in private life, which would inevitably

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[300] Ibid., pp. 37; 36; 99-100.

[301] Bellamy's novel created quite a cult obsession. While it seemed to be written "without a thought of the great and immediate influence which it was destined to have on the public mind," according to one reviewer, it "was having a steady sale of a thousand copies a week," though he was sure that it was "double that number." Alexander Young, "Boston Letter," *The Critic: A Weekly Review of Literature and the Arts* 11, 287 (Jun. 29, 1889): 322. The "Nationalist Clubs" (or, in some alarming cases, "National Socialist Clubs") formed with great excitement across the country. "Indeed, the seeds of Nationalism seemed to take root and grow with astonishing rapidity wherever Mr. Bellamy's ideal presentation of nationalistic co-operation is read," according to John Ransom Bridge, who served as Secretary of the club in Boston. Plainly, he could not contain his enthusiasm: "this can only be so because the most favorable conditions are present for the growth of this flower, whose unobstructed development will bring with it a revolution in our social life without strife or bloodshed," he wrote. It was "only the logical outcome of what is taking place in all departments of our life." "Nationalistic Socialism" *The Arena* I, 2, (Jan. 1890): pp. 184; 186.

The book drew abundant criticism, of course. Some wrote it off as silly, but others were aware of the inner problem. "[W]hy cannot just such a state be realized?" asked R.S. Best, a *Zion's Herald* columnist. "The only trouble is that for the erection of such a superstructure the material is not forth-coming; it cannot be made to order." Indeed, the inherent corruption of human nature was too fixed and permanent, and the methods needed to change it would be far more painful than anything Bellamy describes. "The mass of humanity is like a huge bowlder embedded in the earth; the problem is, how is this rock to be raised to a given elevation?" Not even ropes and pulleys and the greatest engineering might could lift it. "Now the trouble with the author is, that he attempts to raise up this immense mass of fallen humanity without as much as a spool of Clark's six-cord cotton thread" – or that the rock itself can be persuaded to move, by the "power in its own organization." "A Look at Looking Backward," *Zion's Herald* 67, 33 (Aug. 14, 1889): 258.

cause tremendous human suffering. "In all these schemes and projects," he wrote, "the organized intervention of society through the state is either planned or hoped for, and the state is thus made to become the protector and guardian of certain classes." He emphasized that the privileged class was not necessarily the poor: in such schemes, the "oppressed" existed for the social prestige of the reformers – an elite class far worse than "the rich." "The friends of the humanity start out with certain benevolent feelings toward 'the poor,' 'the weak,' 'the laborers,' and others of whom they make pets," he wrote; plainly nothing was so harmful and degrading for the working classes than when such theories became law. Mandatory wage increases brought lay-offs; hours legislation sunk the ability of small businesses to compete; health and safety laws favored the large companies who have the funds to comply (if not bribe inspectors). It was, again and again, the classic definition of corruption: though it always justified by the rhetoric of good intentions, it always ended in greater misery, and social inequalities far worse than what existed before. "Hence, the real sufferer by that kind of benevolence… is the industrial laborer," Sumner wrote, "and the friends of humanity once more appear, in their zeal to help somebody, to be trampling on those who are trying to help themselves."[302]

[302] William Graham Sumner, *What The Social Classes Owe to Each Other* (Charleston: BiblioBazaar, 2007), pp. 20; 69-71. One editorialist in the *New York Evangelist* found Sumner's arguments quite persuasive: "[i]t must be confessed that he says many things which are painfully true, and makes suggestions of great weight." More importantly, though, Sumner showed those involved in Christian social work economic truth: that "one of the best service a man can render to his fellows is to set them an example of industry, integrity, purity, and honor; a truly Christian character is itself one of the highest social benefactions." "Evening with Authors: Duties of Social Classes," *New York Evangelist* 54, 43 (Oct. 25, 1883): 1. Compassion had to be effective, and aim at the best condition of those being helped, or else it was merely a form of self-help, providing a sense of self-satisfaction, for the Christian charity workers themselves.

Sumner plainly looked at human affairs in a spirit of brutal realism. But his work was really driven by a love of justice, and an awareness of how it functioned in a struggling world. He expressed it best in his famous maxim:

> The agents who are to direct the state action are, of course, the reformers and philanthropists. Their schemes, therefore, may always be reduced to this type – that A and B decide what C shall do for D. It will be interesting to inquire… who C is, and what the effect is upon him of all these arrangements. In all the discussions attention is concentrated on A and B, the noble social reformers, and on D, the "poor man."

Sumner gave C the famous title of "Forgotten Man" – the hard-working individual who made such schemes possible, but who, at the same time, was quite ignored in such schemes.[303] According to Bellamy, though, C was not "forgotten" at all: he was well known for his great crime of taking everything from D, of which he would not repent. Making him give up that wealth (or, in Bellamy's scheme, sweetly persuading him) was the supreme act of justice. C lived in luxury and decadence: "[t]hese costly viands, these rich wines, these gorgeous fabrics and glistening jewels represented the ransom of many lives"; such things could only come from D's labor, for which he received pennies. Still, even the most blatant guilt was forgivable, because it was fundamentally born of ignorance, and a social consciousness that was not yet transformed by the knowledge of evolution. "The folly of men, not their hard-heartedness, was the great cause of the world's poverty," he observed. "It was not the crime of man, nor of any class of men, that made the race so miserable, but a hideous, ghastly mistake, a colossal world-darkening blunder." The solution, though, was so simple: "[l]et the famine-stricken nation assume the function it had neglected, and regulate for the common good the course of the life-giving stream, and the earth would bloom like one garden, and none of its

[303] Sumner, *Social Classes*, 20; 65.

children lack any good thing."[304] For Bellamy, the error was a mere inability to think big; the remedy only required that human beings do what they had always done with their private estates – planning, cleaning, organizing, and loving their own – but now on the grand national scale. This was mankind's capacity for complete self-redemption, which was best realized through evolutionary theory, and the deliberate movement forward into the end of history.

But Sumner saw it quite the other way around: the individual liberty to acquire wealth was the greatest advance that mankind had ever achieved – in fact, the greatest it ever *could* achieve – and was therefore the mark of true progress. Bellamy's Nationalists spoke as if capitalism was an ancient thing, claiming that their solution was an escape from "the barbaric industrial and social system, which has come down to us from savage antiquity."[305] But this was quite untrue, according to Sumner: a simple glance at world history showed how much better capitalism was for mankind, and for all social classes, than any previous system.[306] It was capitalism that perfected Darwinism. But while Nationalists (and later progressives) depended on Darwinism to show a path to the highest and last stage of evolution, Sumner found a reliable framework for describing social reality: "survival of the fittest." Darwinism taught, above all, that the powerful would achieve greatness only by dominating the weak. With capitalism, however, social

[304] Bellamy, *Looking Backward*, pp. 214-215.
[305] Ibid., 220. Bellamy wrote this in his own words, in the novel's postscript.
[306] Sumner, *Social Classes*, 21. Sumner was keenly aware of this all-American problem: history was meaningless in democratic times, and what little they knew of it existed in vague and false abstractions. This came from the belief that the average American "is supposed to possess some secret organ which is infallible in regard to all political wisdom," he wrote. For this reason, "[h]e discards history which is really the chief guide and teacher in politics"; this created a class of people "ready at any moment to overturn a state, nor doubting but they can build a better one tomorrow." "Individualism," *On Liberty, Society, and Politics*, 11. They were ready to run once more into the same brick wall, for lack of memory, again and again. It was, in later years, precisely the thing that progressivism both presupposed and caused in public opinion.

stratification was tilted vertically: the "unfit" failed only because of their own vice, while the "fit" succeeded because of their virtue – with no harm to the unfit; the personal failure of the unfit was far better than slavery or death, as it was in pre-capitalist societies – and, even in the must degraded condition, the avenue for self-correct was always open. "Liberty does not by any means do away with the struggle for existence," Sumner wrote. "What civil liberty does is to turn the competition of man with man from violence and brute force into an industrial competition under which men vie with one another for the acquisition of material goods by industry, energy, skill, frugality, prudence temperance and other industrial virtues." In a capitalist society, it became "the man of highest training and not the man of the heaviest fist who gains the highest reward."[307] Any attempt to do better for society without reference to capitalism itself "would bring back personal caprice, favoritism, sycophancy, and intrigue," he wrote. Bellamy's perfect society was not the end of history at all; if tried, for all its promises, it would still be a return to a quite old and dreary social order, which mankind had only recently escaped. "A society based on contract is a society of free and independent men, who form ties without favor or obligation, and co-operate without cringing or intrigue."[308] The Nationalists held that social organization and planning were essential; in truth, however, a capitalist society was quite organized and planned already; but the planning was spontaneous, without active state involvement, and following the natural and ordinary principles of human life. It was quite impossible for the whole to serve individuals; it could only corrupt and degrade them by telling them what was good for them – a thing it could not possibly know, and could only pursue by coercion.

[307] Sumner, "Socialism," *On Liberty, Society, and Politics: The Essential Essays of William Graham Sumner* (Indianapolis: Liberty Fund, 1992), 165.
[308] Sumner, *Social Classes*, 21.

The individual, however, could do the greatest good for society, simply by seeking his own self-interest. In his aptly titled chapter, "That it is not Wicked to be Rich," Sumner wrote that the "aggregation of large fortunes is not at all a thing to be regretted. On the contrary, it is a necessary condition of many forms of social advance." To put limits on the accumulation of wealth was, quite simply, to punish the achievers, who were now society's greatest benefactors; it was to say to them: "'We do not want you to do us the services which you best understand how to perform, beyond a certain point.' It would be like killing off our generals in war." Certainly every technological novelty, advance in industry, every product and every service appeared because of someone's desire for gain; but so too did every opportunity for all others to improve their condition, care for their families, and, with strong character and good sense, make their own fortune. "This tendency is in the public interest, for it is in the direction of more satisfactory responsibility," he wrote. Capitalism benefited all. It presupposed the self-serving impulse in man – and then used that for the common good. True, there were many instances of capitalist blunder, abysmal wages, excessive hours, inflated prices, and corrupt monopolies. But Sumner was sure that such things were "chiefly due to ignorance and bad management, especially to State control of public works." By contrast, left to itself, the market would continue to do the greatest good for mankind. Sumner wished this to never be forgotten: "This development will be for the benefit of all, and it will enable each one of us, in his measure and way, to increase his wealth."[309]

[309] Sumner, *Social Classes*, Ibid., pp. 34-35. Accordingly, Sumner recognized the deeper goal of the Nationalist project, should it be realized: the socialists "have always recognized the fact that property and the family are inextricably interwoven with each other from their very roots to the remotest origin of civilization," he wrote. "The more logical they are, the more fearlessly they follow out this fact, and attack the family in order to succeed in their attack on property." "The Family Monopoly," *Liberty, Society, and Politics*, 136.

Sumner was not insensible to the social realities of industrialization. He could allow that there were tremendous economic injustices, which emerged quite spontaneously, without government involvement. Though they were private, many industries were very intertwined with the public interest, and their pursuit of capital really could come at great cost to the people. "The progress in material comfort which has been made during the last hundred years has not produced contentment," he observed in an essay on labor unrest. Much of that unrest was because of the change in material conditions, or the prospect of achieving luxury, and the lack of attainment, compounded that discontent. The solution was in the people's ability to recognize that wealth was only a means to that contentment, and that any sort social progress that proceeded without that I mind would lead nowhere. "All that we call progress is a simple enlargement of chances, and the question of personal happiness is a question of how the chances will be used," he wrote. Such over-dependence on means without ends, by both the wealthy business owners and the laboring poor, might very well lead to disaster as many predicted. But this was only the "penalty of failure to maintain due proportion between the popular philosophy of life and the increase of material comfort." A disconnection between those things will certainly bring "social convulsions, which will arrest civilization and will subject the human race to such a reaction toward barbarism as that which followed the fall or the Roman Empire."[310] Such problems, though, were for the people themselves to correct. This would only occur with education which produced civic and economic competence, and the good character in individual citizens that would yield fair and decent business practices – things that could take shape only from the bottom up. These were, after all, the central assumption about citizens of a republic: its

[310] "The Philosophy of Strikes," *On Liberty, Society, and Politics*, pp. 127-128.

success did not depend on laws per se, because the laws themselves depended on the people.[311] The only other solution was to call the regulatory state down, and further damage the conditions of society. Again, such regulations, contrary to Bellamy, were always experimental – and since every successful experiment came with a million failures, such an approach was "only a way of courting new calamity."[312] The United States was a "commercial republic"; but the "commercial" aspect was only incidental to its identity – a useful means to republican ends. Hence, if the means were corrupted, this required a republican remedy, which Sumner saw only in the people themselves. Altering the nature of the republic, inspired by a false view of Darwinism, would base the solution on a false understanding of the problem, and allow government to become a truly monstrous thing.

Still, Sumner's modern republicanism had a shaky foundation. For all its pragmatic goodness, he admitted that there was simply no such thing as a "natural right," or else "there would be something on earth which was got for nothing, and this world would not be the place it is at all." True, rights-talk could easily distract people from their self-reliant and virtuous work-ethic, which Sumner thought was so essential; but it also stripped away the fundamental guarantee of American republicanism, i.e., "life, liberty

[311] A republic, Sumner write, "assumes, or takes for granted, a high state of intelligence, political sense, and public virtue on the part of the nation which employs this form of self-government." The way to solve these problems was, as always, to correct them from the inside, as Justice John Marshall Harlan had proposed, albeit as a public effort. Indeed, [a] people who live in a republican form of government take back into their own hands, from time to time, the whole power of the state"; this occurs primarily through elections, but also in a more fundamental method of national discourse. "Republican Government," in *Liberty, Society, and Politics*, 84.

[312] "The Philosophy of Strikes," in *On Liberty, Society, and Politics*, 132. The railroad strikes were formative of Sumner's thought: it was a "traumatic realization," according to Dorothy Ross, and a "catalyst that joined his conservative economics and politics into a new sociology." *Origins of American Social Science* (Cambridge: Cambridge University Press, 1991), 86. His was a public social science, meant entirely for a popular education of the masses, rather than the tools of social control, as it would become for later progressives. This and the popular nature of most of Sumner's writings both revealed his fundamental goal: modern republicanism.

and the pursuit of happiness." Those were not exactly rights that one demand at society's expense, but a condition of which they could no be deprived. Sumner, though, held that whatever rights we not natural, but *inherited*, and "won by the struggles and sufferings of past generations," he wrote. In fact, if anything, such rights were because of "victories over Nature," which was "one of the facts which make civilizations possible."[313] Hence, Sumner's conservatism accepted a truth whose implications were far broader than he could admit: Darwinism was fundamentally at odds with republicanism. It was not the descriptive "survival of the fittest" aspect, but the evolutionary side that prevailed in the long run.

But Bellamy and the Nationalists held the final point that was sure to triumph over all other views.[314] Ultimately, all of them, in their sophisticated theories and advanced learning, overlooked the most obvious truth: America was *special* – "'the pioneer of the evolution'" in fact. And this is what made such Nationalism prevail.

III. Historicism and the Deconstruction of American Exceptionalism

"Exceptionalism" was, of course, a very old thing in American national identity. The American Founders, and the Puritans before them, certainly saw something in the new regime that was important for the whole world. It was a realization scattered throughout their writings, and it showed through in even the most un-philosophic texts of that era. Even the ultra-pragmatic Alexander Hamilton claimed that it was left to the

[313] Sumner, *Social Classes*, 74.
[314] Bellamy, *Looking Backward*, 91. The novel was selling well in Europe, though "it remains to be seen," one commentator wrote, how far the principle of "the brotherhood of humanity, which is the basis of the new American school of socialism, will be relished by rulers who favor paternal government because it keeps the people under tutelage." Alexander Young, *The Critic*, Ibid. Other nations, it seemed, simply did not have the full Nationalist blessing; they therefore relied entirely on the exceptional character of the United States.

people of this country to show "whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force"; that the failure to prove the latter would "deserve to be considered as the general misfortune of mankind"; and that "[i]t belongs to us to vindicate the honor of the human race."[315] But the original view of "exceptionalism" had one primary feature: it was an idea, or a perception of the "palpable truth," as Thomas Jefferson put it, "that the mass of mankind has not been born with saddles on their backs, nor a favored few booted and spurred, ready to ride them legitimately, by the grace of God" – and that, most importantly, "[t]hese are grounds of hope for others."[316]

But the older view of American exceptionalism became very difficult to maintain in the later nineteenth century. The Constitution was still revered and honored, but this was only because of a habit, and the reason for that habit became vague, if not in complete doubt. "Beginning with that great objector Jefferson," popular historian Edward Stanwood wrote, "there has been an almost unbroken succession of statesmen and politicians who have been disquieted in their righteous minds lest the Republic should receive an injury by an infraction of the Constitution." The republic stood quite apart from the law that unified it and created its institutions according to Stanwood; were the Constitution to disappear, government would carry on just as it always had. Still, there were so many who maintained a very blind devotion to the "fundamental law," and were quite unwilling to see its possible defects – much less the possibility of a better way.

[315] Alexander Hamilton, Federalist #1; #11, in *Federalist Papers*, 27; 79. The idea provoked a rare exclamation from the cool-headed Hamilton: the Union would be "able to dictate the terms of the connection between the old and the new world!" Ibid.
[316] Thomas Jefferson, "Letter to Roger Weightman," June 24, 1826.

Stanwood chronicled many recent instances, and showed how they "exhibit the state of mind into which gentlemen of large mental grasp and high attainments, who also know as well as any one the value of social science and vital statistics, can bring themselves, when they are in a mood to fret about the Constitution." Though the social sciences showed a far more promising way than what the old republic had to offer, it seemed "there will always be people to be afraid that [the Constitution] is to be broken up and carted away piecemeal."[317] The hope, of course, was not so much for the abolition of the Constitution itself. It was a practical document, and, on simple matters it still served its purpose well enough. But the greater problem was when it began to have such sway over the political institutions and practices themselves, which were far more attuned to the realities of life than the written document, left by the Founders over a century before. The amendment process in Section V was left in the Constitution for precisely that reason; but plainly it was not as efficient as the times demanded, according to columnist Goldwin Smith. While state constitutions were frequently amended, given the authority of state legislatures, "of the Federal Constitution there was no amendment for sixty years" – and even the amendments the nation received, as discussed in the previous chapter, only made the document even more rigid. Like Stanwood, he chronicled the variety of restrictions, some of them as petty as requiring a presidential inauguration to occur in a blizzard, but others as grave as the process of naturalization of foreign citizens – all of them rules the people accepted even without a Supreme Court ruling on the question. Given the new class tensions in the United States "may in some measure be practically covered, and the edifice may be patched so as to stand, though it cannot be thoroughly repaired," he wrote. "Its soundness is apparently about to be tried by the stress of no

[317] Edward Stanwood, "Fretting About the Constitution," *North American Review*, Jul. 1890, p. 122; 124.

ordinary storm."[318] It appeared to many the sort of thing that the existing constitutional system simply could not have anticipated.

The germ of this problem was present from the beginning: the exceptional vision of the American regime was not fully realized at the time of the founding, given the persistence of slavery; it was gradually rejected through the course of the nineteenth century, and was almost entirely abandoned in the Civil War era, despite Abraham Lincoln's efforts to recover it. The Progressive Era found the American proposition lingering as an empty ritual – albeit one that obstructed a great many improvements that seemed quite necessary. This required a certain reconsideration of what actually happened in the American Founding; a contextualization of both events and thoughts in the broader development of Western history might show just how empty that ritual had become, which might ease the difficulty of radically revising it. A critical history could show that the American Constitution was not unique, but only a sign of deeper trends – and that those trends had developed considerably since the eighteenth century. A vast amount of literature appeared in this era addressing what exactly happened when the document was framed, which seemed to give a different perspective on what the Constitution itself actually meant for American life. George Bancroft, for instance, in his five-volume work on the history of the Constitution, explored in intricate detail the Founding era, all in an attempt to show one critical thing: the Constitution was, in fact, a product of its time. Many believed, like William Gladstone that "'[t]he American constitution is the most wonderful work ever struck off at a given time by the brain and

[318] Goldwin Smith, "Is the Constitution Outworn?" *The North American Review* 166, CCCCXCVI (Mar. 1898): pp. 259; 267. Smith was referring, of course, to the election between William Jennings Bryan and George McKinley, which embodied the essential problem of class-tension – or possible class-warfare – at the end of the nineteenth century.

purpose of man,'" – but, as Bancroft was eager to remind everyone, "it had its forerunners." This historical school of critical realism, for all its pessimistic views about the American Founding, still opened the way for a more malleable understanding of constitutional law, which the public was eager to receive. "The men who framed it followed the lead of no theoretical writer of their own or preceding times," he wrote. "They harbored no desire of revolution no craving after untried experiments. They wrought from the elements which were at hand, and shaped them to meet the new exigencies which had arisen." For this reason, there was nothing in the Constitution that demanded permanent adherence, since "the least possible reference was made by them to abstract doctrines," Bancroft wrote; "they moulded their design by a creative power of their own, but nothing was introduced that did not already exist or was not a natural development of a well known principle. The materials for building the American constitution were the gifts of the ages."[319] If the ideas and methods of constitutionalism had developed to the point at which the Founders used them, then surely they could continue to develop the same way for modern Americans.

Much of this view required an ability to see government as a thing that existed apart from the Constitution's design. Robert Ludlow Fowler, for instance, lamented the tendency for "the majority of ordinary citizens" to "applaud decisions which help them to hold fast to existing and time-honored institutions of government." The Supreme Court,

[319] George Bancroft, *History of the Formation of the Constitution of the United States of America Vol. IV* (New York: D. Appleton and Company, 1885), pp. 441-442. Bancroft admitted his primary reason for writing the book in his Preface for Volume I of the first edition, written in 1834: it was meant to be purely "authentic." This would be achieved by applying "the principles of historical skepticism," he wrote. Though studying the "witnesses or consulting codes of laws," he wrote, "I have endeavored to impart originality to my narrative by deriving it from writings and sources which were the contemporaries of the events that are described." Ibid., *Vol. I*, p. v. It was a method he maintained through all nine volumes, which he completed in his old age. He would employ the modern methods that encompassed the past, certain that these could enable him and his readers to understand the Founders even better than they understood themselves.

however, was only partly to blame: the habit of mind was already there, despite the awareness of the need for new innovations in light of class-struggle. The greatest lesson was that "the Constitution of the United States is only an evolution of Magna Charta, the Petition of Right, the Habeas Corpus Act and the Bill of Rights," (which apparently preceded the actual Constitution, in Fowler's mind). All of this proved that "the institutions of this country present the truer unfolding and embodiment of the essential principles of the public side of the common law of English-speaking peoples," he wrote. What were perceived to be the most brilliant innovations in the American Constitution were in fact "already ancient" at the time; they were developmental things, which reflected the evolution of English-speaking thought and practice. The danger was in the tendency, "after a considerable lapse of time," to lose sight of the continuity of governmental institutions," he wrote. "Even revolutions rarely make much change in the laws of a country. They simply sow the seed of future changes." The Constitution was merely "declaratory" of the institutions that already existed – full of human beings and human habits, and bound to grow and evolve on their own, regardless of what the Constitution itself said. The Founders themselves understood this well enough: the Declaration of Independence did little more than state the obvious, as hostilities with the British had commenced almost a year before July 4, 1776. Plainly "the student of institutions must go behind declarations in order to determine the real origin of institutions," he wrote. Ultimately, it was critical to understand that "[d]ocuments can not create a sovereign power," meaning that they "can only declare where that power is lodged, and if they mistake the fact, the document and not the power, will in the course of events first disappear."[320]

[320] Robert Ludlow Fowler, "The Origin of the Supreme Judicial Power in the Federal Constitution," *The*

This theory of historical self-understanding was obviously not home-grown for Americans. It grew out of the various philosophic schools in Europe – many of which were initially inspired by developments in the United States. Alexis de Tocqueville was the perfect example. He had mastered the genre of American studies, and made a name for himself by reporting on America for his colleagues at home. Yet Tocqueville did this to show how inevitable the democratic movement was: "When one runs through the pages of our history one finds so to speak no great events in seven hundred years that have not turned to the profit of equality," he wrote. So far as America was leading the way in that development, it was proper for serious European thinkers to understand it. After all, "to stop democracy would then appear to be to struggle against God himself, and it would only remain for nations to accommodate themselves to the social state that Providence imposes on them."[321] But this changed by the end of the nineteenth century: America had far less to offer Europe, in terms of constitutionalism and protection of liberties – but Europe now had everything to offer America. By far the most popular gift was the academic training in Historicism, which had become the central feature of German universities. All major themes in political thought were, in fact, steps in a much broader development; even the most rigorous and comprehensive philosophies were little more than products of their time; a study of them, though, revealed the trajectory of Western thought, which culminated in the present condition. John W. Burgess was one of many figured who accepted this view completely. He returned from Germany with a new sort of lesson: the Constitution was best understood as a monument of the past – albeit one that was best studied as it had developed through time in ways that maintained

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American Law Review 29 (Sep./Oct. 1895): pp. 711; 712; 719.

[321] Alexis de Tocqueville, *Democracy in America*, Trans. Harvey Mansfield and Delba Winthrop (Chicago: Chicago University Press, 2000), pp. 5; 7.

too much of its original plan. All of Burgess' works came down to one critical lesson: that [the] Constitution must be studied historically and sociologically more than from the juristic point of view, because it is an historical document, sociological, revolutionary product rather than a legal product." It would not stop functioning as a legal document, of course; but its foundation, according to Burgess, was something that the popular critics of both the Supreme Court and the Constitution would welcome, and which its defenders needed to understand: that it was a thing "whose truthfulness depends only upon its real correspondence with the developments of our history and the conditions of our political sociology."[322]

The original idea of American exceptionalism was therefore debunked in professional circles, and remained only as a shadow of itself in the public. Again, this was especially easy to believe in light of the sort of class antagonism of the era. If "being American" meant anything, it was now being on the winning side of primordial forces, and the development of Teutonic folk-traditions; hence, if the Constitution belonging to "We the People" meant anything, it was a mere outgrowth of white Anglo-Protestant folk traditions, whose development had been unconscious until quite recently. No longer as it a regime dedicated to a proposition: no longer did it look up to anything permanent and enduring; American identity was instead found within the people, and understood more in racial and ethnic terms than ephemeral concepts of eighteenth century political theory. The main point of this work, according to Dorothy Ross, "was to show that American institutions were part of a changing history, not timeless exceptionalist principle." Such ideas, though, were formed almost entirely on the basis of "preformed generations," she

[322] John W. Burgess, "The Constitution of the United States, Part III" *The Chautauqian: A Weekly Magazine* 22, 4 (Jan. 1896): 400.

wrote; they did not employ a skeptical sort of historiography out of curiosity, but for the sake of establishing a way of self-understanding that could be more malleable.[323] But malleable according to what? Perhaps many of these historians did not entirely know. But there can be no doubt that their readers who went on to become prominent progressives certainly did.

Conclusion: The Groundwork for Progressivism

Woodrow Wilson, perhaps the single greatest architect of Ameircan progressivism, expressed much the same idea in his earlier work, *The State*, published in 1889. It placed custom at the center of the state: "practically, no such sweeping together of incongruous savage usage and tradition is needed to construct a safe text from which to study the governments that have grown and come to full flower in the political world to which we belong," Wilson wrote. Only the "Aryans" could offer any basis for the State, in the modern sense, or what he called "those stronger and nobler races which have made the most notable progress in civilization" – not those with the strongest view of permanent things about man or God, but simply those who could realize their own racial identities. "The existing governments of Europe and America furnish the dominating types of to-day," Wilson wrote. "To know other systems which are defeated or dead would aid only indirectly towards an understanding of those which are alive and triumphant." Wilson could allow that the Whig way of framing a government was indeed a good thing; but it was good, not in light of the principles expounded by its framers, but because of its advanced state of evolution – one that would advance further still into the sort of administrative government that Wilson thought so essential in later years.

[323] Ross, *Origins of American Social Science*, 261.

Hence, while American exeptionalism could not be realized in the principles of the Founding, which were little more than expressions of their time, it *could* be realized in the future, which became for many "a distinctly American task." It placed America "at the forefront of or the quintessential center of liberal change," and "cast universal progress in specifically American shapes, so that America retained its exemplary or vanguard role in world history."[324] Hence, with a view of developmental nature of political institutions, and all other tenants of German philosophy, as well as the malleability of human nature according to the Darwinian view, American exceptionalism could be remade anew: Americans could create it for themselves. Progressivism was an awakening to the fact that the old order was gone, but that the void we had entered offered an entirely new opportunity, of the sort that no nation had human history had witnessed. America stood "at the frontier, [where] the bonds of custom are broken and unrestraint is triumphant."[325]

[324] Ross, *Origins of American Social Science*, 69; 150.
[325] Fredrick Jackson Turner, "The Significance of the American Frontier in American History," *Annual Report of the American Historical Association for 1893* (Washington D.C., 1994), 227.

Chapter 6:

Constitutionalism in Modern Times – Part Two: Progressivism, Democracy and the State

The advent of American progressivism was not a happy occasion. Rather than a brilliant new idea, it was instead, for many, the only alternative to the social void left over after a series of failed Enlightenment promises – the most immediate proof appearing in the possibility of class warfare, and national ills that the power of constitutional government could not seem to remedy. Those tensions reached their highest point in the Election of 1896. For the laboring classes, William Jennings Bryan's defeat finalized the loss of faith in the existing political system; the vast political machines in the industrial centers that gave the presidency to William McKinley made the claims of Eugene Debs and other radicals appear all the more likely. For progressives, though, whose vision was re-born and given a national, unified point of focus in Theodore Roosevelt's 1912 campaign, the true problem was even deeper and broader than that: the lesson of progress was that the American Constitution simply failed to evolve and grow the way governments should. The way it harbored elite interests or undermined the people's efforts at pursuing social justice were but symptoms of the true problem.

The major progressives, namely Herbert Croly, John Hart Ely, Lester Frank Ward, as well as their popular spokesmen like Roosevelt and Woodrow Wilson, did not defend progress on its merits, but on what seemed to be its absolute necessity. It was the *via negativa* of Darwinian thought, the last alternative to the current course of history, whose outcome only appeared in flashes like Edward Bellamy's novel. They introduced

what would become the definitive feature of Western thought in modern times: that History was itself the fundamental order or reality, and that it contained a purpose to which all human things must be carefully attuned. The nation's ills could not be understood in terms of pre-modern notions about human vice or corruption, since those things presupposed a certain end for individuals, and a corresponding end for civil society; social and political problems were instead the result of stagnation, or of allowing the past to dominate the future. History moved on its own, meaning that law, politics and society had to move with it. Hence, between the radical advocates of *laissez-faire* on the one hand, and those clamoring for socialist revolution on the other, there was progressivism. It was the only plan that was truly based on History, rather than pre-modern concepts of "rights," if not short-sighted vengeance against industrialists. It offered a "third way" – or what was, in fact, the only alternative to civil warfare. The cliché was quite serious for most Americans: the only way to avoid bloody revolution was with the careful implementation of evolution.

Yet progressivism called for a certain tradeoff: it meant accepting the tenants of social Darwinism, which in turn meant letting go of the beloved American idea of natural right. "[C]onsider the doctrine of the natural, inalienable, and imprescriptible rights of the individual," columnist W.S. Lilly wrote in 1886. "How is it possible to predicate such rights of an animal whose attributes are constantly varying?" How is it possible to say such things when the original man is not an independent being in the state of nature, but "a troglodyte with half a brain, with the appetites and habits of a wild beast, with no conception of justice, and with only half-articulate cries for language? Of the absolute reason, which modern democracy progresses to worship, usually under the strangest

travesties, Darwinism knows nothing."[326] It was, no doubt, an agonizing decision to accept the full scope of modernism – and it was not because of affection for old customs and religious beliefs. The mark of modern sophistication was a certain tough-minded intellectual honesty, or the ability to look into the void and accept the truth that the world was not a life-affirming place after all. Yet accepting this also meant finding a willingness to cope with it, or to progress out of the hopelessness toward a self-created goal. Where the old Enlightenment promise failed, the new promise of progressivism could be *made* to succeed.

Henry Adams, the quintessential mugwump lost and bewildered in the new century, exemplified this spirit of modern America in its early days. For him, Darwinian progress was "a dogma to be put in the place of the Athanasian creed; it was a form of religious hope; a promise of ultimate perfection." Like many others who came of age between two colliding worlds, Adams "warmly sympathized in the object," he wrote (writing in third person); "the idea of one Form, Law, Order, or Sequence had no more value for him than the idea of none; that what he valued most was Motion, and that what attracted his mind was Change." The greatest truths were gone – which was no doubt a sad and terrifying thing; but, at the same time, the new way was opened up, and the possibilities were limitless, so long as modern man was willing "to discover and admit to himself that he really did not care whether truth was, or was not, true."[327]

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[326] W.S. Lilly, "Darwinism and Democracy," *Littell's Living Age* 186, 2174 (Feb. 20, 1886): 456.

[327] Henry Adams, *The Education of Henry Adams* (New York: The Modern Library, 1931), 231-232. This mixture of terror and excitement about modernity was made especially famous in Adams' depiction of "the dynamo," the symbol of the new technological age. "To him, the dynamo itself was but an ingenious channel for conveying somewhere the heat latent in a few tons of poor coal hidden in a dirty engine house carefully kept out of sight; but to Adams, the dynamo became a symbol of infinity." It was, in fact, a method of power that actually created right – "a moral force, much as the early Christians felt the Cross." Ibid., 380. This, of course, brought an end to any fixed concept of good government. A rightly-ordered society was, as it had always been, a permanent idea, which stood unchanging against the flux of human

This was, for all thoughtful Americans, the way the world would have to think in the future. Yet it was not entirely an intellectual thing, which flew in the face of the old Christian West: many who espoused the Darwinian-progressivism admitted that it came with a certain spirituality all its own, a sort of primordial pantheism. The popular British columnist Sidney Low, for instance, admitted that there was a

> habit of endowing Nature with an anthropomorphic character, making her, in fact, a kind of supreme deity, perpetually at work to reward those who obey, and punish those who transgress, her commandments. The very men who scoff at the notion of an impersonal God have reared their alters before the image of this mighty and terrible goddess, bestowing on her will, caprice, initiative, anger, all the attributes of personality.[328]

All of this was the inevitable outcome of "laying hands upon the sacred ark of absolute permanency," according to John Dewey in his essay on the broader philosophic significance of Darwinism. The importance of Darwin's teaching was far more than biological: it "introduced a mode of thinking that in the end was bound to transform the logic of knowledge, and hence the treatment of morals, politics, and religion."[329]

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life. For all the confusion that came with the lives of nations, there had always been a view of the general good, which founders tried to approximate, and which reformers sought when they hoped to improve things. It was nothing they created, but a set of self-evident truths known to all. But such predetermined goals about human ends, even as they appeared explicitly in the American proposition, were "clouded by the undetermined values of twentieth-century thought," according to Adams. In this, he spoke for his entire generation, who suffered the bleakest despair with the loss of American natural right. In all areas of life, "the American boy of 1854 stood nearer the year 1 than to the year 1900. The education he had received bore little relation to the education he needed." Receiving the sort of education in the context of the old world – focused, as it was, on eternal things – was "no education at all," he wrote. "He knew not even where or how to begin." Ibid., 53.

[328] Sidney Low, "Darwinism and Politics," *Living Age* 263, 3403 (Oct. 2, 1909): 6.

[329] John Dewey, "The Influence of Darwinism on Philosophy," in *The Influence of Darwinism on Philosophy and Other Essays in Contemporary Thought* (New York: Henry Hold and Company, 1910), 1. Its true significance was greatly confused by the religious clamor about the way evolution conflicted with the Book of Genesis. There was far more to it than that, according to Dewey: evolution undermined both Jerusalem *and* Athens, though it was a far greater problem for philosophy than revelation; it did more damage to Plato, Aristotle, and the whole legacy of Western philosophy than it did to the Bible. He was quite correct in his assessment of Darwinism's place in modern America. One editorialist in an 1867 issue of the *Round Table* argued that "[a]s science advances and nature is more and more penetrated, we must all be willing to admit that that our previous conception of the Deity and his modes of action… is necessarily imperfect." The whole idea of natural selection "strengthens our faith in intelligent action, and adds to our conception of its grandeur," he wrote. But, as always, such notions were presented not so much as descriptive methods, but as the groundwork for manipulation: "Natural selection is a law which works toward its good, and only the good, of every existing thing," and its unfolding "will open a vista to human progress the grandest which has been presented by any philosophy of history"; in this, it was "eminently in

Darwinism was concerned above all at establishing a non-teleological view of living things, thus making it the most fundamental form of metaphysical atheism. A "species" was a "form" or an "idea"; it was the permanent aspect of each thing, or its condition when it realized its end. So to say that species did not have respective ends but "origins" was to say that they were not so fixed and unchanging as eons of human intellect thought – that they had evolved, and that they would continue to evolve. This was not incidental, but central the Darwinian view of the world: the highest scientific method no longer aimed at discovery, but at conquest. "To idealize and rationalize the universe at large," Dewey wrote, referring the ancient emphasis on unchanging "ideas," is a "confession of inability to master the course of things that specially concerns us." Darwinism, and the broad progressive project that rose out of it, revealed that "the things that concern us" are not to be discovered as existing apart from human affairs; they are instead to be realized through social experiments. This meant that "philosophy must in time become a method of locating and interpreting the more serious of the conflicts that occur in life, and a method of projecting ways for dealing with them," he wrote; it was "a method of moral and political diagnosis and prognosis." True "intellectual progress" is practical progress, not growth in knowledge. "Old questions are solved by disappearing, evaporating, while new questions corresponding to the changed attitude of endeavor and preference take their place," Dewey concluded. "Doubtless the greatest dissolvent in contemporary thought of old questions, the greatest precipitant of new methods, new intentions, new problems, is the one effected by the scientific revolution that found its climax in the

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harmony with the Christian conception of the destiny of humanity and of the supernatural power which guides the progress of the race." "The Religious Aspect of Darwinism," *The Round Table* 6, 129 (Jul. 13, 1867): 22. All Darwinism, it seemed, was social Darwinism, and for many Christians, it appeared to be a far clearer way of seeing God's purposes on earth.

Origin of Species."[330] This was the new fact of life, and all subsequent thought, in philosophy, theology, ethics, and (in our own time) "the self" would proceed on its premises.

This was Woodrow Wilson's outlook on progress, and the whole basis for his State-driven view of liberalism, which he believed so essential for modern America. He did not believe progress was choice-worthy for its own sake, nor did it deserve a careful defense or promulgation on its merits; instead, like Adams, and so many others, Wilson was "forced to be a progressive." The fact was that "we have not kept up with our change of conditions," he wrote, "either in the economic field or in the political field." The horrifying symptoms of the age, though, showed how dire it was to keep apace with History. The task of a progressive government was to adjust to the "facts of the case," since they "will always have the better of the argument; because if you do not adjust your laws to the facts, so much the worse for the laws, not for the facts, because the law trails along after the facts."[331] To embrace tradition or to conserve any idea about the purpose of government was to ensure irrelevance – and that, for Wilson and many other progressives, was the true meaning of social injustice. Hence, not only biological and philosophic questions, but even the most important questions and dire issues a political community could face had to begin from within the proper framework. "In our own day," Wilson wrote, "whenever we discuss the structure or development of anything, whether in nature or in society, we consciously or unconsciously follow Mr. Darwin."[332]

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[330] "The Influence of Darwinism on Philosophy," Ibid., pp 17; 19.
[331] Woodrow Wilson, *The New Freedom* (New York: Doubleday, Page & Company, 1918), 34.
[332] Woodrow Wilson, *Constitutional Government in the United States* (New York: Columbia University Press, 1917), 175. *Constitutional Government* was a series of lectures that Wilson delivered at Columbia University in 1907. The book itself received scant attention until it was reprinted in 1912, when Wilson ran for president. His publisher, Harper & Brothers, "recommend it as a 'vivid portrayal' of its subject," according to one reviewer in the *New York Times*, "and, remarking that at that time 'the author had no

Hence, the progressive era was born from a mixture of terror at what was lost and excitement at what mankind might soon gain. It was a painful and sad experience, but one that found home in the confidence that it would soon complete itself: once progressivism was fully realized, once man was put into perfect harmony with History, and the methods of following it were given absolute power, the sorrowful aspect would disappear, as liberty and notions of human happiness would be so fulfilled that they would cease to matter. But, again, such a thing was possible only when society fully accepted the bleaker side of the proposition. With a mixture of neo-Darwinian philosophies, progressives emphasized "growth" and "development" over the ancient Western view of permanent moral truths. They looked to History rather than nature. They placed an assumption firmly in the American mind that "[d]ignity is not fixed," and that "it has no principles or laws beyond those governing its internal evolutionary dynamic," Bradley C.S. Watson writes. "In fact, the very act of looking for fixed principles or laws is regressive, for in so acting we cast a glance toward a past wherein dignity was, always and everywhere, less developed and more stultified."[333] I argue that this dual aspect of progressivism did much to inform its political development: it was, on one hand, the only way to freedom, and the way to truly realize Edward Bellamy's happy "Nationalism," or what came be called "the promise of American life"; at the same time, though, beneath that image which appealed so much to the populist classes, was a scheme

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thought that he would occupy the great office of which he wrote,' venture the suggestion that 'it is of peculiar interest to note how theory and practice have met.'" Wilson's second run in 1916 was, no doubt, an "aspiration with admirable candor. He invites general comparison of his conduct and his character with the lofty standard elaborated in his study." "Mr. Wilson's Study of the Presidency," *New York Times*, Aug. 20, 1916. This demonstrates how well Wilson's progressive vision resonated with the American people at the time, though his approach would collide with the very people the state was meant to serve in later years with the rise of anarchic protests in continued labor unrest.

[333] Bradley C.S. Watson, *Living Constitution, Dying Faith: Progressivism and the New Science of Jurisprudence* (Wilmington: ISI Books, 2009), 5

that was quite un-free, and had little regard for human dignity. That dignity was no longer to be found; it therefore had to be created. But like all created things, it had to begin with the acceptance that the material involved – human beings – were nothing.

I. The Appeal of Progress for Populists

One of the settled precepts of political thought (which Darwinism showed to be not so settled after all) was the distinction between "elites" and "populists," the Aristotelian "few" and "many." The distance between those social classes was frightening by the end of the nineteenth century. William Jennings Bryan understood first hand how elite interests "could act in concert on a moment's notice, while prompt co-operation was difficult, if not impossible, among the masses." Worse still, political education was weak among the populists, and the "campaign did not afford sufficient time to bring clearly before the people an important truth which investigation must reveal, namely, that on the money question the interests of the money-owning classes are not identical with the interests of the money-producing classes."[334] With progressivism, that distinction was almost entirely blurred. The new elites showed a much greater willingness to praise and maintain "democracy" – not so much the democratic principle of majority rule (since that would hardly be in their favor) but more often a sentiment expressed by their scorn for the Constitution, and the broader framework of pre-modern thought in which it was drafted. It was the sort of instrument that seemed to harbor the "other" sort of elite, from which academic and intellectual elites sought to distance themselves.

[334] William Jennings Bryan, "Has the Election Settled the Money Question," in *North American Review* 163, CCCCLXXXI (Dec. 1896): 703.

Theodore Roosevelt made the distinction especially clear: it was "between the men who, with fervor and broad sympathy and imagination, stand for the forward movement, the men who stand for the uplift and betterment of mankind, and who have faith in the people." These were never to be confused with the other sort – "the men of narrow vision and small sympathy, who are not stirred by the wrongs of others," he wrote. The one who doubts and questions progress is a "reactionary" – the one who "upholds privilege and favors the special interests, whether he acts from evil motives or merely because he is puzzle-headed or dull of mental vision or lacking in social sympathy, or whether he simply lacks interest in the subject."[335] This was no doubt a reflection on his own experience: he assumed the presidency in 1901, upon William McKinley's assassination, aware that the Republican Party could not only appeal to the populist elements among the Democrats, but also forge a whole new concept of politics itself: it would now deliberate about the means to progressivism. In this, Roosevelt sought to redeem his party, as well as the current generation of his own social class. His friend, Herbert Croly, marveled at how Roosevelt "had never been an ordinary Mugwump."[336] He had lived out his progressivism: "Instead of representing a limited class in the eastern cities, he had mixed with all sorts of Americans in many different parts of the country." In this, Roosevelt exemplified the stepping-down aspect of progressivism: though it originated with the privileged classes, it was nothing if not democratic. Reactionaries may speak of the greatness of tradition, or even the concessions that the Constitution makes for American democracy; but, according to Roosevelt and Croly, no matter how meticulous the argument, such people merely

[335] Theodore Roosevelt, "Who is a Progressive?" *The Outlook* (Apr. 13, 1912): 809.
[336] Herbert Croly, *Progressive Democracy* (New York: The Macmillan Company, 1914), 11.

rationalized continued oppression. Progressivism therefore offered a way for social elites to accept the blame for social and economic ills, and then use their station to remedy those problems through the application of advanced education in the social sciences rather than a continued emphasis on liberty and good government. One's progressivism hinged entirely on the willingness to renounce the old order, and the role of one's Mugwump background in founding and maintaining it. Indeed, it was an act of penance to be a progressive.

A. The New Elites

F.A.P. Barnard was a prime example of social privilege used to advanced education, in turn used to serve the public interest. The long-time President of Columbia University wrote in 1887 that "the experiment has been made," and that American republicanism was a success. But the success was more for the Constitution itself than it was for the nation. The original Constitution "has given us a government *of* the people, but not a government *by* the people, nor a government *for* the people." Beneath the republican surface, the American regime had become a plutocracy. This was not an accident: all its checks and balances, and all its limitations on the popular will, served to make it the refuge of the wealthy few who naturally exploited the many; the people had no claim on the Constitution, since the oppressors could insist on the neutrality of republican government whenever regulations appeared to threaten their interests. According to Barnard, "we are governed for the benefit of this oligarchy, which employs the dignities and emoluments of political place, for its own private advantage, or to reward the services of its henchmen." The concept of liberty continued, despite the flaws

inherent in the system: the people were still viewed as "the sovereign," who were, as always, the alpha and omega of American political life. And it was true that the people had consented, again and again, to their established form of government, and partaken in the deliberative process of selecting their public officials. Representation, however, was the sort of thing that opened itself up to vast amounts of corruption, not only among those who held office, but among the people who elected them. It was, of course, a timeless complaint: the people did not deliberate about candidates, but voted on party affiliations; once elected, officials only served their chosen special interests. For these reasons, the government, whether local or national, "has long since ceased to be representative of the popular sovereignty," but had passed into the hands of the wealthy elites, who hid behind its republican forms. For this reason, Barnard concluded: "our presumably democratic system of government has, thus far, proven a failure."[337]

This was no doubt a spectacular claim. But it is worth noting that it came from a man who had no political experience, nor was he a member of the humble masses he addressed. Barnard's formal training was in physics, chemistry, and the natural sciences, and a professional life devoted primarily to the fund-raising duties of a university president.[338] It was a lofty position in society that caused no small amount of self-consciousness on his part. Still, his rhetoric directed at the common folk had a curious tone: "If the people generally can be induced to *think*," he wrote, "the resultant

[337] F.A.P. Barnard, "Republican Government Under the American Constitution," *The Chautauquan: A Weekly Newsmagazine* 8, 1 (Oct. 1887): 11.

[338] His training and his status were no coincidence: "By mid-century, the synthesis of physics and chemistry in the principle of conservation of matter, new theories of thermodynamics, and advances in physiology and biology that were bringing fundamental facts of organic and human life under scientific explanation, all suggested that natural science had the power to provide a total worldview," according to Dorothy Ross. "At the same time, through technology, science was literally remaking the world." *The Origins of American Social Science* (Cambridge: Cambridge University Press, 1991), 54. Plainly, such expertise did not require careful thinking about politics and society; scientific progress was, quite simply, the absolute doctrine of the day.

conclusions of the mass, whatever may be the varieties of individual opinion, will usually be right." The lack of "thinking," he was sure, came from the willingness of so many to "borrow their opinions from others, accept, with blind faith and without inquiry, the dictation of those whom they have been taught to regard as authorities." Such enduring faith in American constitutionalism even seemed to have a biological explanation: "too many – perhaps even a very large proportion – inherit the political views, as they inherit the features and other physical qualities (it may be even the diseases) of their fathers," Barnard wrote. "All this we must get rid of. We shall never have a healthy, honestly genuine public opinion, until authority, tradition, [and] prescription, cease to govern habits of thought, and men learn to think for themselves." The Constitution, which the American people still revered, not only failed to restrain "great political evils"; it also "encourages, and even stimulates their growth," indicating that the causes of the ills in modern times were "lurking within the folds of that revered instrument itself."[339] It did not seem likely to Barnard that "thinking people" would recover the value in American republicanism; true mass-enlightenment meant rejecting those things.

Hence, the entanglement of popular and academic thought that was a chief feature of progressivism – while at the same time, it proceeded on quite specific expectations about the people themselves. James Madison had insisted that in "a nation of philosophers," there was no need for designing laws so they could command the favor of popular opinion," because they would be well enough ruled "by the voice of an enlightened reason." But a "nation of philosophers is as little to be expected as the philosophical race of kings wished for by Plato. And in every other nation, the most rational government will not find it a superfluous advantage to have the prejudices of the

[339] Ibid., 12.

community on its side."[340] Prejudices and opinions, though, were only mere imitations of real knowledge; and now, the elites believed, that sort of knowledge really could be passed down to the whole public. The bulk of academic writing sought t to address and instruct the public, while much of the popular writing began to espouse the ideas of the new sort of elite. And, of course, there was a growing abundance of such elites, many of them former Mugwumps who jettisoned their heritage for the sake of a newer American identity. This was no doubt a response to the criticism like that of Thorstein Veblen; the privileged members of the "leisure class" who came of age witnessing violent strikes, and feeling no small amount of guilt, began to renounce their status and think of ways to put their leisure to use for the public good. Theodore Roosevelt insisted that "[a] leisure class whose leisure means idleness is a curse to the community, and in so far as its members distinguish themselves chiefly by aping the worst – not the best – traits of similar people… they become both coming and noxious elements in the body politic."[341] There was a new kind of civil servant, or at least a new school of thought that could make progressive civil service work – one that could not be corrupted by wealthy special interests on one hand, nor succumb to administrative incompetence on the other.

Columnist William V. Rowe concurred, claiming that "much can be done to stem this tide of discontent, and to satisfy this existing public opinion," not through reform measures per se, but by the privileged classes offering themselves as the servants of the people, who were fully equipped to implement those measures. Constitutional governments, both state and national, lacked the sort of expertise necessary for realizing such a goal; the change needed to occur all the way down, in the deepest depths of social

[340] Federalist #49, in Alexander Hamilton, James Madison and John Jay, *The Federalist Papers*, eds. Charles R. Kesler and Clinton Rossiter (New York: Signet Classic, 2003), 312.
[341] Theodore Roosevelt, "What 'Americanism' Means," *Forum* (Apr. 1894): 102.

consciousness. Only a radically new civil service, staffed by highly educated administrators, could bring such a thing. This was how the "possessors of wealth, in wisely chosen ways," might give back what they owed to the people.

> [They] not only will return to the public service a fair share of their accumulations, but also will devote themselves to the creation of a leisure class, of wide culture, training and experience in the affairs of state, whose lives shall be given to public service and to the general welfare, and upon whom the workers of the community may learn confidence to rely for skilled and expert guidance in public affairs, and for an efficient, clean an decent performance of their duties of public office.

To think of one's social status any other way was to become lumped together with the upper classes of privilege, who, as everyone believed, benefited quite unfairly at the expense of the poor and unprivileged. "This is the real use, as distinguished from the selfish abuse, of wealth," Rowe claimed. "Let the gospel of service become the gospel of wealth, and purely obstructive distrust will give place to an uplifting of mutual confidence."[342] This was, of course, an appealing image: the wealthy would not squander their time on frivolous pursuits, but would instead step down, Publius Valarius-like, and directly serve the people. At the same time, though, they would in practice occupy positions of power far greater than those the capitalist classes ever held. To be responsive to the people, they had to make the people whole, unified and articulate – a conditioning that went far beyond merely listening and serving.

Herbert Croly gave progressivism its popular appeal in a book whose title said it all: *The Promise of American Life*, first published in 1909. The book pulled together the strands of both Nationalist and progressive thought – again, of both the populist and elitist impulses – into a single whole, and summed up completely the new concept of American identity for the new century. It was, in many ways, the bedrock book for

[342] William V. Rowe, "National Tendencies and the Constitution," *The North American Review* 186, 615 (May 17, 1907): 149. Rowe referred, in particular, to President Theodore Roosevelt, whose "life and action" were an example, "and of his personal force and initiative in what we may term this new life of the nation." Ibid.

American liberalism. Croly spoke very directly to the post-Civil War generation, and its descriptions of the "promise" were always overshadowed with the lesson of that conflict, and the enduring sense among nearly all Americans that the original system had failed, just as the advocates of judicial absolutism did. "The only fruitful promise of which the life of any individual or any nation can be possessed, is a promise determined by an ideal," Croly wrote. "Such a promise is to be fulfilled, not by sanguine anticipations, not by a conservative imitation of past achievements, but by laborious, single-minded, clear-sighted and fearless work." There was no real gift to posterity according to Croly. In this, he was in perfect agreement with the school of critical historians. Tradition was void of any real promise; it was the sort of thing that a people made for themselves – and it was only real for those who could admit that, and let go of all notions of inheritance from the Founding. Arduous work was the thing that would fulfill the new promise. Such an accomplishment, though, meant admitting one devastating truth: "An individual has no meaning apart from the society in which his individuality has been formed." There were no rights aside from those the community decided to construct for itself. It is only when all impulses are unified around a single goal that a people can claim such a thing – and even then, they can only claim it for the community, never for themselves, however far the community may seek to deprive them of it. "The growing and maturing individual is he who comes to take a more definite and serviceable position in his surrounding society he who performs excellently a special work adapted to his abilities," Croly wrote. "There is no way in which a higher type of national life can be obtained without a corresponding individual improvement on the part of its constituent members."[343] Only in this way

[343] Herbert Croly, *The Promise of American Life* (New York: The MacMillan Company, 1911), pp. 5-6; 263.

could a people truly progress into their own self-made promise. All other concepts of that promise were merely stagnant, disorganized, and more often façades that hid the true misery from view. People were to find the American promise, above all, in each other – or, more specifically, they had to be *made* to find it in each other.

The Constitution was, of course, the single greatest obstacle to realizing that end according to Croly. The success of the American Founding was indeed monumental in human history; but it was a success that came at tremendous cost to later generations of Americans. The fundamental law, he insisted, was framed on the basis of the old elites' distrust of the people. It was "not as the expression of a democratic creed, but partly as a legal fortress against the possible errors and failings of democracy," he wrote; it was "the expression not only of a political faith but also of political fears." As the social elites of their day, the Founders viewed all democratic impulses as hostile and turbulent. The task was therefore to frame a document that could control them, and let it be ratified, so as to trick them into believing it was their own. In truth, though, the Founders "sought to surround private property, freedom of contract, and personal liberty with an impregnable legal fortress; and they were forced by their opponents to amend the original draft of the Constitution in order to include a still more stringent bill of individual and state rights." These were certainly good things; but they their inclusion was unnecessary, given the true nature of democracy, which was finally realized in modern America. It was not, however, that democracy had learned to respect the rights of individuals; it was instead the ability of Americans to create a general will. Such a will, should it finally be allowed to emerge, would "in the end and after a necessarily prolonged deliberation, possess the power of taking any action which in the opinion of a decisive majority of the people is

demanded by the public welfare," he wrote.[344] Plainly, though, this was not the intent behind the Constitution, which meant the time for national transcendence of that law had come.

The development of pure democracy was slow, and had occurred quite in spite of the Founders constitutionalism, which was largely imposed on the people through a false sense of consent. The current task for the new elites, in their absolute devotion to public service, was to fully expose that latent democratic will, and then perfect it.[345] The task, according C. Lloyd Morgan, was to understand natural selection in order to better *defy* it, and empower "the fittest in raising the level of the less fit."[346]

B. The New Democracy

This was the crux of Theodore Roosevelt's campaign in 1912, as he ran for president for the Progressive Party. For him, it was the only party, and the only school of American political thought, which still maintained the most obvious principle of American national life: "the right of the people to rule." There was, as always, the threat of the "tyranny of the majority." But for Roosevelt, that was the concern of centuries past, which where still unenlightened by progress. In truth, the real problem, the modern

[344] Ibid., pp. 30; 35.
[345] John Dewey was aware of this tendency among new schools of "liberals." Precisely the same thing had happened with the older liberalism of John Locke and Adam Smith. The rise of manufacture and commerce created a whole new industrial aristocracy; but "[t]his statement does not imply that the intellectual leaders of the new liberalism were themselves moved by hope of material gain." For all their praise of the reliability of selfishness in framing a social order, "they formed a group animated by a strikingly unselfish spirit, in contrast with their professed theories." This was detached point of view was, of course, "a function that defines the genuine work of the intellectual class of any period." Still, there was no denying the flawed nature of their motive: they might have been as voices crying in the wilderness if what they taught did not coincide with the interests of a class that was constantly rising in prestige and power." *Liberalism and Social Action* (New York: Capricorn Books, 1962), pp. 12-13. The first edition was published in 1935, when the older liberalism was obviously in serious question for many Americans.
[346] C. Lloyd Morgan, "The Conditions of Human Progress," in *The Monist: A Quarterly Magazine Devoted to the Philosophy of Science* 10, 3 (Apr. 1900): 438.

problem, was "the tyranny of minorities," he claimed in a campaign speech – delivered, of all places, in Carnegie Hall. "It is a small minority that lies behind monopolies and trusts," he declared. "It is a small minority that stands behind the present law of master and servant, the sweat-shops, and the whole calendar of social and industrial injustice." If the majority were given its true blessing, and seen in light of history rather than classical political theory about the nature of regimes, there would be no need for such concern. The majority would rule peacefully – and, more importantly, it would absorb the few into itself. This would happen, he believed, through a variety of sensible reforms: initiatives and referendums, direct primaries, and the recall of judges. The Constitution, and the whole framework of political thought that went into it, was, after all, "a straight-jacket to be used for the control of an unruly patient – the people," he claimed.

> Now, I hold that this view is not only false but mischievous, that our constitutions are instruments designed to secure justice by securing the deliberate but effective expression of the popular will, that the checks and balances are valuable as far, and only so far, as they accomplish that deliberation, and that it is a warped and unworthy and improper construction of our form of government to see in it only a means of thwarting the popular will and of preventing justice.[347]

Real freedom, it seemed, did not come from checks and balances designed to contain society's mob-like impulses against individual rights. It was instead the recognition that the people themselves, through some historical process, had become quite good – so good, in fact, that pure democracy was now the truly desirable political arrangement in the United States. Representation, elections, and term of office were beginning to appear more obsolete. It was believed that just beneath the surface of the political institutions, left over by old men who had unfounded and absurd views of mankind, one could find a multitude fully capable of governing itself on its own. The ability to see it, and allow it to rule the way it should, rested entirely on the people's willingness to adopt a

[347] Theodore Roosevelt, "The Right of the People to Rule," in *American Progressivism: A Reader*, ed. Ronald J. Pestritto (Lanham: Rowman & Littlefield, 2008), pp. 251-252.

progressive point of view, which Herbert Croly explained at length in his later work, *Progressive Democracy,* published in 1914. Despite the obstructions to democracy, or the "certain forms of representation," which were "imposed upon progressive nations by conditions of practical efficiency," democracy grew and developed in its own way; it reached its pinnacle in America, where it "become not merely possible but natural and appropriate."[348] There were great doubts about the abilities of democracy, which were perhaps even more justified than they had been in the earlier part of American history.

The "township," as Alexis de Tocqueville knew it, was far closer to Croly's democratic ideals than anything in modern America. "The freedom of a township in the United States," the French observer wrote, "flows from the very dogma of the sovereignty of the people." Yet democracy was something that could only work on the local level: it was not a national democracy, but the sum of "all American republics" – and even then, such democracy was only complete in New England. The whole scope of American political life "was born in the very bosom of the townships; one could almost say that each of them at its origin was an independent nation." The national or even the state government held their power only because "it was they that seemed to relinquish a portion of their independence in favor of the state," he wrote. They were close communities of citizens who knew how to connect and sympathize with each other; and they had deep, old habits of public deliberation and respect for collective reasoning about important public questions. They knew how to distrust themselves, always aware of their tendencies of drifting back into mob behavior. "See with what art they have taken care in the American township, if I can express myself so, to *scatter* power in order to interest

[348] Herbert Croly, *Progressive Democracy* (New York: The Macmillan Company, 1914), pp. 265.

more people in public things."[349] But by the twentieth century, it seemed the township was gone, lingering only in cultural small-town life, as public affairs accumulated in the national interest far more than in the local one. Americans now lived primarily in cities instead of towns, and their sense of community was defined far more by national consciousness, which itself consisted of a variety of conflicting and colliding factions. It did not at all seem wise to allow any sort of township-style democracy to rule from the top down: it would cause those factions to fragment, and most certainly turn the power of one major faction against others.

But according to Croly, American democracy had not broken down at all; instead, it was "still in its early youth." Most of its doubts were self-imposed, and caused by society's irrational attachment to "legalism," which was not only constitutionalism, but the idea that democratic power must be justified, or follow the classic rules of majority rule and minority rights. None of this was necessary according to Croly:

> if, as a consequence of its rupture with legalism, the American democracy undergoes a change of spirit, if the attempt to discharge new and responsible activities in connection with its own government brings with it a positive inspiration and genuine social energy, the result may be to renovate American representative institutions and afford novel and desirable opportunities for effective political leadership.

Even the friends of direct democracy were blinded to the possibilities, because they held on to those old legalisms of classic political thought. William Jennings Bryan, for instance, held that "[c]hanges of opinion will go on until the best solution of every question is found"; opinion, in other words, would move in cycles, and the current approach to democratic life would continue as it always had. The task was therefore to simply make the best of it. Even as he lost the critical election, which embodied the hopes of millions of laboring Americans, he remained confident that given the

[349] Alexis de Tocqueville, *Democracy in America*, translated by Harvey Mansfield and Delba Winthrop (Chicago: Chicago University Press, 2000), pp. 62; 63.

unchanging nature of politics, the American form of government was still the best possible; the Constitution was, in fact, "based upon the theory that the people are capable of self-government" in Bryan's view.[350]

For Croly, though, true self-government meant seeing that those ideas were "merely another expression of the old superstitious belief in political mechanics against which progressive democracy is bound to protest." The mark of progress, of "renovated representation" or "effective political leadership," appeared when all people were "resolutely pursuing a vigorous social program," he insisted; it was a program "whose object is fundamentally to invigorate and socialize the action of American public opinion."[351] Giving the nation a clear goal, and presenting it with the most dire urgency, would overcome the problem of factions and create a general will – a majority that would essential swallow up the minority.

The greatest obstacle for progressive democracy was one "legalism" in particular: natural, individual rights. The sort of unified democracy that Croly envisioned could have no place for such guarantees, either among citizens in general, or for the minority who required protections. It had to rise above the "abstract legal individualism of Jeffersonian democracy" – a democratic notion which knew nothing of progress, but only mathematically certain concepts of the "rights of man." The government that sprang from these ideas, no matter how Jeffersonian, was anti-democratic; they showed how Jefferson himself carried with him the "legalisms" that made his own efforts futile. The American political system, however popular it was in its day, "was not intended to be the instrument of important popular social purposes," Croly wrote; it was hopelessly derived

[350] William Jennings Bryan, "Has the Election Settled the Money Question," 709.
[351] *Progressive Democracy*, pp. 268-270.

"from the old individualistic social economy."[352] By contrast, progressivism meant admitting that there were an abundance of "vigorous social programs" for which people would surrender their rights; but such crises only appeared sporadically. The task was to create an enduring sense of public action that would persuade the people to relinquish those rights for good. That, Croly believed, would break the final barrier to pure democracy: the whole would become the only individual that mattered, and all would learn to rest in that, instead of anything above or beyond political life.

C. Nationalism: Elites and the People Together

The idea of "Nationalism" grew out of "Americanism" as it was understood at the end of the nineteenth century. It was rooted, above all, in the anthropological notion of an "American culture," or the Anglo-Protestant identity which critical historicists (discussed in Chapter 5) traced back to ancient Teutonic folk-minds. With that primordial basis for American identity uncovered, it took a modern political movement to complete it, progressives believed; something had to realize the potential that the people had within themselves. If human dignity could not be found in anything permanent or fixed in mankind, as the Darwinian revolution proved, it had to be made for itself – and the way to do it was a racial, imperialist, ethnocentric notions that took such hold of modern America at the time.

For Theodore Roosevelt, that "Americanism" was only realized when it became reform-minded – a point he believed was proven again and again in national life since the time of the Founding. It had to be rescued, Roosevelt believed: there were, as always an abundance of demagogues who wished to manipulate public patriotism. "[B]ut this does

[352] Ibid., 271.

not alter the fact that the man who can do most in this country is and must be the man whose Americanism is most sincere and intense." One must not say patriotic things; one must *mean* it – or live it fully. Those are the people who find reform as the central thing in American life. There were "many evils," he said, yet each must be approached with the same "intense and fervid Americanism."[353] Culture was the solution to all economic and social problems for Roosevelt – a culture that could transform all minds into a common purpose.

Such a cultural transformation became clearer, though, when it merged into Nationalism. Edward Bellamy's concept of the future, with its peaceful, happy, communal society – achieved through peaceful means, rather than violent revolution – had, no doubt, an irresistible appeal. Any public figure who espoused it was not only making a promise, but showing himself to be on the right side History, and attuned to the way of thinking which that history dictated. Roosevelt declared Nationalism as the goal of Ward's view of social progress most prominently in his articles and speeches leading up to the 1912 campaign. Nationalism was the new name for the democratic ideal, which had been developing into its present form all along. But that democracy could not find its way alone: it required a government that was "thoroughly efficient in Nation, State, and municipality," so as to make "government action absolutely responsive to the need and will of the people." It was, above all, the thing that could overcome all class divisions in society, precisely as Bellamy had envisioned it, by offering the appeal of a "third way." All the same impulses would be there, but rather than causing the class distinctions that could lead to social warfare, those impulses could be channeled and shaped into the perfect sort of common good. This had been Abraham Lincoln's task, according to

[353] Theodore Roosevelt, "What 'Americanism' Means," pp. 196-198.

Roosevelt – to rise above secessionist and unionist alike, so as to bring them back together under one progressive vision. While this involved a radical new role for government, it was not "over-centralization," Roosevelt insisted; it was simply a way of empowering democracy to serve the whole. "We are all Americans," he wrote, and plainly "[o]ur common interests are as broad as the continent." Accordingly, the government ought to belong "to the whole American people, and, where the whole American people are interested, the interest can be guarded effectively by the national government." As always, though, this was the only way, because History demanded it. If the critics of progressive nationalism do not approve, "do they wish to leave things as they are? If not, what alternative do they propose?"[354]

The ideal social project was the sort of domestic mobilization that usually came with war. Roosevelt's summoning of Lincoln was not metaphorical: the nation was as divided as it had been in the Civil War, meaning it fell to great men – namely himself – to carry America through. Roosevelt presented this in his most famous speech, "The New Nationalism," delivered at the 1910 Progressive Convention. "I ask that civil life be carried on according to the spirit in which the army was carried on," he wrote, meaning free of politics, with action over deliberation – and with no dissent. The "effort in handling the army" – no doubt an authoritarian thing, when that army is the whole of society – "was to bring to the front the men who could do the job," Roosevelt wrote. Such a militaristic rule would certainly distribute "punishment for the coward who shirked his work. Is that not so?" The "Grand Army," as he called it, could not persist in the mode of normal civilian life, given the immediate necessities it faced. The Civil War taught the lesson best: "You could not have won simply as a disorderly and disorganized

[354] Theodore Roosevelt, "Nationalism and Progress," *Outlook* 97, 2 (Jan. 14, 1911): pp. 57-59.

mob," i.e., the conditions of peacetime politics. "You needed generals; you needed careful administration of the most advanced type; and a good commissary – the cracker line." More importantly, though, was the broader public support: "it would all have been worthless if the average soldier had not had the right stuff in him. He had to have the right stuff in him, or you could not get it out of him," Roosevelt wrote. The influence of Edward Bellamy was abundantly obvious: all the energy that would go into warfare, particularly civil warfare, could be used for nationalistic ends. But that required a certain amount of conditioning: the productive capacity had to be turned away from self-interest, and toward the common interest; people had to be as greedy for the whole as they were had been for themselves. It called for the "right type of good citizenship, and, to get it, we must have progress, and our public men must be genuinely progressive."[355] Such a re-education would of course require coercion; but it was an error to think of such force as oppressive or unjust from a progressive point of view. The meaning of "oppression" rested on the precepts of justice; but once those precepts were understood as historical, there could be no objection to the force used, because it was used to realize History itself. No legitimate criticism could exist without drawing from the same source – nor would the new Nationalism even feel coercive.[356]

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[355] "The New Nationalism," in *The New Nationalism* (New York: The Outlook Company, 1910), pp. 10-12; 31-32.

[356] Richard T. Ely proposed this long before Roosevelt, when he claimed that the whole point of progressive education was to create a militaristic sense of urgency and action in the people. Earlier approaches to education, while they might train people for democracy, "did not go far enough," he wrote. "It is a more and more difficult undertaking to fit the individual for complicated modern society, and what is needed is that socially we should undertake this with as great care as a powerful military nation like Germany devotes to the preparation of each individual soldier for warfare." This was the kind of education that would prepare the people "not only for maintaining but for advancing civilization." "Social Progress," in *The Cosmopolitan: a Monthly Illustrated Magazine* 3, 1 (May, 1901): 62. Ely's article featured an elaborate illustration of a young man in front of a book, with the banner behind him saying "Social Progress." Behind him was a sphere labeled "social selection," which encompassed one that said "individualism." Beneath him were two fishermen, one with a hat that said "optimism," and another labeled "pessimism," the optimist catching the fish. It was plainly a cryptic image, which perhaps not even Ely

Lyman Abbott, one of Roosevelt's strongest religious supporters, insisted that "[t]he New Nationalism is simply a later stage in the development of a continually developing Nationalism." Accepting it was not any sort of discontinuity with the American promise at all: "it was never the intention of the founders that it should always be in its cradle." The strongest opponents of Nationalism were, of course, the capitalist classes who viewed individual economic rights as the core of the American promise. But Abbott placed greater blame on the perpetuation of state governments, which were little more than a separation of power that prevented the growth of a progressive government. The Founders were never entirely clear on the nature of federalism anyway, nor were immediate developments in American political life in the favor of local governments. In fact, "[i]f the opponents of the New Nationalism in the successive stages of its development could have their way, the Constitution would never have been accepted by the colonies, and the Federal Union would not have been formed."[357] Abbott saw the steps toward the Nationalist state early on, even in the free market's spontaneous "division of labor," as Adam Smith described it. While that spontaneous organization is a miraculous thing, it could not perpetuate itself alone; the state, so far as it merged with society, had to maintain it. "What limit shall we put on the development of man; on his power and his right to combine and co-operate for the common welfare?" Abbott asked. "No limit. Absolutely none." It was, quite simply, what human beings did to show their nobler capacities. The times had taken modern civilization to its present point, which meant that "[w]e cannot go back to the older order of we would; we would not if we

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could understand. Such was the opaque nature of progressive teachings, at least when they were presented to a popular audience.

[357] Lyman Abbott, "The New Nationalism," *Outlook* 96, 9 (Oct. 29, 1910): pp. 484-485.

could." The world had realized, in a variety of ways, that palpable truth, articulated best by Edward Bellamy, that

> [i]ndustrial interdependence is better than industrial independence. Combination and co-operate are better than isolation and competition. The way to destroy monopoly is not to destroy combination, but to take from combination the power which makes it monopoly… When it can neither induce nor compel such service, then it should undertake the service itself. Disorganization of industry is not a remedy for industrial justice.[358]

But, much as Bellamy claimed, this was the necessary next step in human evolution. Theodore Roosevelt presented it in immediate political terms; but for other progressives, there was far more to Nationalism, or to collectivism in general, than what he portrayed for the public. Lockean liberalism of the previous century had seen itself as the end of human power, and nothing would surpass it. But there was more to do: bring about "interdependence." Upon the year 1776, Richard T. Ely observed, there was "something axiomatic, as something belonging to the realm of natural law, that liberty is an inalienable right of all men." From this came the truth that governments existed only to protect that liberty – and the best government was one that restrained itself in such a way that it could do nothing but protect that liberty. This "runs, as a red thread, through the entire social philosophy of that age, and must be borne in mind by one who would understand the theoretical and practical conclusions reached by that philosophy." But the problem, Ely observed, was that such freedom was "essentially negative," meaning it only sought to ensure the people of what the government would not do, or what they would be free from. "The restrictions on liberty which were then noticed were restrictions of a political nature." The American Founders, and their liberal counterparts in Europe, were doing little more than rehashing the very presuppositions they meant to escape. It presupposed as well the basic self-interest of individual persons. "Inasmuch as

[358] Lyman Abbott, "An Open Letter," *Outlook* 104, 17 (Aug. 23, 1913): pp. 890-891.

men were essentially equal," he wrote, "each one could best guard his own interests individually, provided only the hampering fetters of the law should make way for a reign of liberty."[359]

This liberty remained hopelessly negative, constantly placing restraints and guarantees of what "none shall be deprived" of, and thus restricting the sort of positive, active freedom that had appeared in more recent times. The unfolding of history, though, showed a different story: true liberty, it turns out, means the positive, active, assertive power of the individual, albeit realized through the collective whole.[360] This, Ely wrote, "was the "expression of the philosophy of liberty with which the twentieth century opens." The basic facts about mankind were mere abstractions compared to the vast complexities of what truly made people what they were. Among other problems, this masks the sort of inequalities that occur behind legitimate and "free" institutions: the truth is that "in contract men who are in one way or another unequals, face each other, and that their inequality expresses itself in the contracts which determine their economic condition." Usually, the "liberty of contract" thought to be so foundational to freedom as Americans understood it, so highly developed by the philosophers of liberty and so loved by the common people, is, in fact, "like the freedom of a slave, who chooses to work

[359] Richard T. Ely, *Studies in the Evolution of an Industrial Society* (New York: The Macmillan Company, 1911), pp. 339-400.

[360] On this point, Ely quoted at length the influential Thomas Hill Green, who claimed that "'[w]hen we measure the progress of a society by the growth in freedom, we measure it by the increasing development and exercise on the whole of those powers of contributing to social good with which we believe the members of the society to be endowed; in short, by the greater power on the part of the of the citizens as a body to make the most and best of themselves.'" Ibid., 403. No other freedom was as true as the assertive kind, which even the followers of John Locke and Adam Smith realized when it came toe contracts formed for the acquisition of wealth. At the same time, no other kind of freedom was more restricted by all of the others seeking their wealth. The unleashing of real liberty came when the individual could work through the whole.

rather than to suffer under the lash."[361] Surely, there was a form of freedom truer than this.

II. The New Liberalism

The pursuit of Nationalism was but a method of drawing popular support to the broader progressive project; it was the hope that could be pulled out of the Darwinian despair that saturated modern America. It was meant to persuade many that Edward Bellamy's vision of the future was achievable; that it would not require violent means, but simply modifications, which would bring out the nobler things in human nature; and that its greatest end would be the happiness of the American people. It presented to the people a vision of exactly what progressivism would do, should they choose to fully accept it. Something so unsettling obviously required a public surface, or an appearance as appealing as Theodore Roosevelt himself. Only an inspiring and visionary individual with a supremely good will and fiery patriotism could Mr. Roosevelt's plan, as his friend Herbert Croly observed, was "either better than he knows or better than he cares to admit. The real meaning of his programme is more novel and more radical than he himself has publicly proclaimed. It implies a conception of democracy, and its purpose very different from the Jeffersonian doctrine of equal rights."[362] Roosevelt put a friendly face on the progressive project, to make all of its inner mysteries palatable. This was abundantly necessary, though, since those mysteries ran quite deep.

A. Civil Service for Democracy

[361] Ibid., pp. 403-404.
[362] *Promise of American Life*, 173.

What kind of thing was "the state" when it held such a relationship with democracy? It was quite different from the ancient city, the Roman idea of "government," or even the Machiavellian "principality." And, on its face, it seemed contrary to the ability of a democratic people to govern themselves. The perfection of democracy, though, would not happen on its own: it would require "mechanisms of developing and exchanging opinion," as Croly put it, quite apart from "representative assemblies."[363] For American progressives, that was the true function of the state – precisely because it was un-elected, and designed to receive commands from the popular will. "Representation" was the fundamental problem: assuming that certain individuals could know the interests of the people on the basis of their personal virtue – that it could "obtain for rulers, men who possess most wisdom to discern, and most virtue to pursue the common good of society" – was to ignore how disconnected from the people those officials could be. James Madison had been certain that "[d]uty, gratitude, interest, ambition itself, are the chords by which they will be bound to fidelity and *sympathy with the great mass of the people*."[364]

Still, Madison admitted that these things may be "insufficient to control the caprice and wickedness of man." But, he asked, "are they not all that government will admit, and that human prudence can devise?"[365] Early teachers of progressivism believed they found the superior approach in Europe, particularly the Prussian civil service. This was the means to the goal of history – and "the goal is to be realized, made actual,"

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[363] *Progressive Democracy*, 265.
[364] James Madison, Federalist #57, in *Federalist Papers*, pp. 348. (Emphasis added.) Populists like William Jennings Bryan were still confused about the possibilities of the progressive State. Those who "framed financial policy for the whole people" could not do so "unless they are entirely free from the selfishness which is generally supposed to be a well-nigh universal trait of mankind." Hence, the only solution was to have a populist victory, or allow the people to seize the power of government through peaceful elections.
[365] Ibid., 350-351.

according to Georg Hegel, the single most important philosopher of Historicism and the subsequent American forms of progressivism. The State was the only means powerful enough to make society evolve as it should, and keep apace with History: it is "the externally existing, genuinely ethical life," he insisted. Hegel was convinced that "the laws of ethics" could not simply reside in individual persons, because they are "the rational itself." The state was the purest expression human reason could ever achieve in society; it organized the public order according to the moral order of the human mind.[366] "The proper goal of the State is to make this substantiality count in the actual doings of human beings and in their convictions, making it present and self-sustaining there." Indeed, the State is nothing less than "the divine Idea, as it exists on earth. In this perspective, the State is the precise object of world history in general. It is the State that freedom obtains its objectivity, and lives in the enjoyment of this objectivity."[367]

Like many American intellectuals of his day, Economist Richard T. Ely traveled to Europe to witness the wonder of the Hegelian civil service first hand, in hopes of bringing it back and finding ways to implement it in the United States. The civil service was "the one department of government in which Germany excels," having been established under the diligent eye of Fredrick the Great. It rested on the advanced science of management, which borrowed from Adam Smith's "division of labor" in business, but

[366] The idea that government is an expression of public reason was the Founders' idea as well. James Madison said in Federalist #49, for instance, that "the reason, alone, of the public, that ought to control and regulate the government." The difference, though, is the fact that reason was not meant to rule pure and simple; "the passions ought to be controlled and regulated by the government." *Federalist Papers*, 314. Without that right ordering of law over politics – which resembled the classical reason over passion in the human soul, political factions would dominate law, and overpower a just order. For Hegel, however, and the American progressives who followed him, the problem of politics was not human passions at all. Such tendencies did not need to be controlled when they could be eliminated through the right sort of education and public conditioning. Far more dangerous was the tendency of old things to dominate new things.

[367] Georg Hegel, *Introduction to the Philosophy of History*, Translated by Leo Rausch (Indianapolis: Hackett Publishing Company, 1988), pp. 19; 41-42

applied it to the complexities of public life. More importantly, he understood that the state by its nature "existed for the people as a whole," rather than the sovereign; the State was meant to become one with them, and, as Hegel taught, they were to find their place within it. This, of course, made tremendous demands on the Prussian civil servants, who held a truly elite social position, "ranking with the law, medicine, and theology." This produced in them a certain honor code, which surpassed the same professional code that existed among doctors and lawyers. "They feel that they belong to an educated, honorable body of gentlemen. They have a high sense of honor, and strive to do nothing which shall bring reproach on their class." They looked upon the downfalls of human nature as the purest evil – and something unthinkable among right-minded professionals like themselves. After "extensive conversations with civil service officers," Ely was convinced that the education and organization of civil servants in Prussia was, in fact, a method of arranging government that made the Madisonian system in America quite obsolete: there was no need for checks and balances on such inherently good men. "There is generally a manifest desire on the part of the authorities to secure the best man for the place," he wrote, "and in a majority of cases the best man is found." What he meant by "best," however, was not the sort of character that Madison and the Founders, as well as the whole English Parliamentary system, looked to. Virtues were not as important as right principle – and above all, duty. Ely was quite aware of the difference: "While I should say that the development of morality in Germany is in some respects decidedly inferior to that in America and England, I believe it is undoubtedly superior in regard to the idea of duty accompanying a public trust."[368] The sort of character-based

[368] Richard T. Ely, "The Prussian Civil Service," *Overland Monthly and Out West Magazine* 1, 5 (May, 1883): pp. 451; 453-454; 458. The Prussian civil service was, of course, the fulfillment of William T.

morality that persisted in the constitutions of the United States and England was, after all, the product of a world that held a cyclical view of history, and held that man's highest end would always be something he could never attain. But Hegelian political philosophy proved otherwise, and the proof was evident in Prussia.

Still, others could not deny just how alien Prussia was from the United States.[369] Much of this was clear in the fate of Hegel's philosophy: the popular English translation of his work, while it may be "doubtless excellent," was still "absolutely unintelligible to any but trained Hegelians," according to Lester Frank Ward. Hegel's work "consists of long, tedious passages, clothed in the most abstruse metaphysical language, which, though grammatically in construction, express to the ordinary reader no thought whatever." And that was the least of his problems: even the handful of Americans with enough patience to labor through the old philosopher's writings "will probably be disappointed with Hegel's doctrines." Indeed, the philosopher who had done so much to

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Rowe's idea for American social elites. Ely quotes from one of the royal statements on civil service from October 23, 1817: "It is the object of the government to make use of the intellectual powers of the nation and of the individual in the administration, and to do this in the most simple effective manner. Opportunity will be afforded to distinguished talent, without regard to social rank or station, to employ the same for the general good." Ibid., 546. Ely's encounter with the Prussian system inspired his call for a new kind of American university. For many years, "[t]hose who desired to pursue a course of study designed especially to enable them to become well-informed editors, skillful chemists, or thorough teachers in our highest institutions of learning, were obliged to go to Europe," he wrote. Even those who those who wished to study their own American history and institutions went to Germany to understand them better. But "[t]he necessity of this was first removed six years ago by the establishment of Johns Hopkins University." Johns Hopkins was, of course, the first American university based on the German model, with a variety of specialized majors, where "advanced students" take classes on "the best methods of carrying out proposed reform," in a class called "'Principles and Practice of Administration with special reference to Civil Service problems and Municipal Reform.'" The concern was, of course, that the university would neglect its liberal arts curriculum, which might ensure that the next generation of reformers and civil servants would be moral. Ely promised that "[a]mong the its professors and students are to be found numerous workers in missions and Sunday-schools, particularly among the convinced in the Maryland State Penitentiary." That was adequate guidance for the students who would no doubt wield tremendous social power, should the United States government ever appoint them to the position of civil servants. "It is safe to predict," Ely concluded, that Johns Hopkins "will continue to satisfy in increasing degree the need of the country for a true university." "The Johns Hopkins University," *Christian Union* 26, 8 (Aug. 24): 146.

[369] Ely later admitted that "the role which we assign to the state as a cooperative institution will depend upon our wishes and ideals" – and those would be a reinforcement of the basic precepts that make democracy possible. Richard T. Ely, "Paternalism vs. Paternalism in Government," *Century Illustrated Magazine* LV, 5 (Mar. 1898): pp. 783.

frame the modern mind, contribute to the metaphysical groundwork of progressivism, and give Darwinism its "spirit" and sense of direction, had himself become old – and, on the basis of his own philosophy, irrelevant. Ward confessed that in Hegel's works, "there is nothing in them that can be considered profound, original, or even important."[370] Indeed, the man who foretold the end of history was unimportant to the people who were meant to receive it. Hegel provided the secret gnosis of History, which the elites knew, and the common people were expected to live.[371]

It was Woodrow Wilson who best adapted the Hegelian teaching to the American mind. While a devout follower of Hegel, Wilson knew that the Prussian would never quite fit in with American democracy. Still, Wilson emphasized that the sort of administration which Hegel envisioned, and which Prussia had utilized, was not the sort of thing that characterized any particular order. "Bureaucracy" did not describe a certain kind of regime; it was instead the apparatus that made all regimes possible, even representative republics. Of each government, administration was the "most obvious part." But that science had not developed well in the United States: as the people and their elected officials focused more on the Constitution and the institutions it created than the way those institutions carried out their tasks, administration was left to develop almost entirely by chance rather than thoughtful planning. Those who had truly meditated on administration were in Europe. "[I]t is a foreign science, speaking very little of the language of English or American principle," Wilson wrote; it is

[370] Lester Frank Ward, "Hegel on the State," *The Social Economist* 7 (Jul. 1894): pp. 32-33.
[371] Ward knew that "this is perfectly commonplace": a philosophy that presents historicism must itself be subject to History when history moves on. Hegel "evidently believed that mankind had attained in Germany in the first quarter of the nineteenth century the highest estate that philosophy could prescribe." Such a pinnacle of intellect, though, could not be maintained; "[o]ne is perpetually surprised at the smallness of the results achieved through such heavy muffled blows. The mountain labors and brings fourth a mouse." Ibid., pp. 34-35.

"consequently in all parts adapted to the needs of a compact state, and made to fit highly centralized forms of government." The United States may have been decentralized in an institutional sense – certainly a problem for a government that meant to endure when evolution taught the need for perfect synchronizing and unity. But, much like Croly, Wilson saw a more important unified body: the people themselves. Just as select bodies of servants had been gathered to aid kings, nobles, republican officers, or even tyrants, so too would could administration be used to serve the new sovereign, who now spoke through a general will. We could "Americanize it," Wilson wrote; administrative science "must inhale much free American air."[372] In America, administration would not work for the body that did the ruling; it would instead directly serve the multitude. If nothing else, democracy signified a people who were no longer ruled from the outside. The people had become the sovereign itself, and were aware of their sovereignty – meaning that the administrative state was meant to serve them directly.[373]

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[372] Woodrow Wilson, "The Study of Administration," *Political Science Quarterly* 2 (July, 1887): 202.

[373] Much of this had to do with Wilson's historicist perception of human ends. James Madison pointed out that, for all its institutional safeguards, it rested "above all" on "the vigilant and manly spirit which actuates the people of America – a spirit which nourishes freedom, and in return is nourished by it." Ibid. For all its institutional checks, the Constitution still depended on the virtue of citizens; the capacity of personal self-government was *the* condition of self-government politically. Wilson, on the other hand, did not view man's highest end as something that rested in the individual, but as part of the collective whole, organized by the state. Hence, the qualities that seemed to make "great Americans" were not their habits and inner dispositions, but "a peculiar stamp of character," making them the "specific product of our national life." There was, in fact, "an American type of man," Wilson believed, "and those who have exhibited this type with a certain unmistakable distinction and perfection have been great 'Americans'." "A Calendar of Great Americans," *Forum*, XVI (February, 1894): 715.

This was most apparent in great leaders: their greatness was not in themselves, but in their ability to shape that whole, and change it according to their own exertions of power. Such a leader "handles questions of change: his constitution is always a-making." Accordingly, the leader's standards are set "not by law, but by opinion: his constitution is an ideal of cautious and orderly change." Ibid., 717. This was the necessary consequence of rejecting virtue: character could only mean a matter of force. "We are on the eve of a great reconstruction," he wrote. "It calls for creative statesmanship [sic] as no other age has done since that great age in which we set up the government under which we live." *The New Freedom* (New York: Doubleday Page & Company, 1913), 30. That reconstruction, though, did not occur inevitably, nor, if it did occur, did it depend on the virtue of political prudence. "Those only are leaders of men, in the general eye, who lead in action," he wrote. "The men who act stand nearer to the mass of men than do the men who write; and it is at their hands that new thought gets its translation into the crude language of deeds." He

The success of any administration was, of course, its people who staffed it. Herman Belz points out the premise in the progressive rejection of the rule of law: it was "the sense in which government affairs turned upon the political will and action of men rather than the automatic operation of impartial law." That had always been the case, but for previous generations, it was understood that the rule of law was the rule over those men, not simply the power of law itself – for there was no such thing. [374]They had to be faithful servants devoted to their tasks; yet their basic weakness was always the way they could become infected with a special interest. Regimes could have their own priorities, but the administrators who served those regimes were, by definition, without priorities at all. But that problem existed before the advent of modern scientific education, now applied to social science with the same training in the natural sciences. It was the sort of "conscientiousness in spirit" that liberated them from the usual human passions; it gave them pure, absolute, scientific certainty rather than the old form of judgment and use of practical wisdom. Their education and professional calling "is removed from the hurry and strife of politics," he wrote. Administration in a progressive age is "raised very far above the dull level of mere technical detail by the fact that through its greater principles it is directly connected with the lasting maxims of political wisdom, the permanent truths

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wrote this several years before his presidency. His ideas on leadership were fully developed when he entered the White House, and they were deeply rooted in his philosophy of progress. Progress happened, not through deliberation, but by powerful assertion. Yet it was not so much the leader's own assertion as the way he reflected the people, particularly through sympathy. "That the leader of men must have such sympathetic insight as shall enable him to know quite unerringly the motives which move other men in the mass is of course self-evident," he wrote. He was to be the sum of their hopes and fears; the true leader was one who could understand the people as a multitude, and become the embodiment of their general will. At the same time, though, what the people actually were was something of the leader's own making. He would sympathize with the very condition that he himself engineered through his own assertive power. This was necessary in light of the diversity of views that appear in society – especially American society. The solution to the problem of faction was, quite simply, the leader.

[374] Herman Belz, "The Critique of Constitutionalism in the Progressive Era," in *Living Constitution or Fundamental Law?: American Constitutionalism in Historical Perspective* (Lanham: Rowman & Littlefield, 1998), 59.

of political progress." The State, as Wilson understood it, was a thing that assumes an organic character of society: all parts were perfectly adapted to the whole. "Society is not a crowd, but an organism," he wrote, "and, like every organism, it must grow as a whole or else be deformed." Like any organism, it must receive the conditions that would secure its growth, not according to a settled good, like the liberty of individual persons, but "by the development of its aptitudes and desires, and under their guidance." The Madisonian representative sought something "better" than the mere desires of the public; but, for Wilson, that was a mere private judgment, or more often one shaped by the narrow-minded political forces in Washington, if not old-fashioned greed and ambition. The advantage of the State, however, was its ability to purify itself of those things by admitting those whose education had taught them the proper principles of progress. In this, it could reflect popular desires perfectly, and ensure that every one of the people's demands and expectations were met. Wilson was aware of how even the most competent group of administrators could not always understand what the public required. This, for him, was the importance of the chief executive – not a product of the Constitution, but the individual who could become the supreme "leader of men." An individual could be sensitive enough to the popular will to understand it, and order his administrative state accordingly. "He must read the common thought: he must test and calculate very circumspectly the preparation of the nation for the next move in the progress of politics," Wilson wrote. That meant, of course, distinguishing the "firm and progressive popular thought from the momentary and whimsical popular mood, the transitory or mistaken popular passion." Such a leader must always "discern and strengthen the tendencies that make for development. The legislative leader must perceive the direction of the nation's

permanent forces and must feel the speed of their operation."[375] Wilson, like Croly and other progressives, saw within the people an inclination to develop into a whole, despite the pessimism of the Founders and the Constitution they left behind.

The Constitution itself was not the sole obstacle to progress. Far more troubling was the "veneration which time bestows on every thing," i.e., the oldness of the institutions it created, which had endured almost three generations and a civil war. When the things that support an opinion "are *ancient* as well as *numerous*, they are known to have a double effect."[376] The Constitution had lasted, though, because of its ability to check the base passions in people, which were the cause of destructive revolutions everywhere else. This, far more than oldness, commanded great respect: Americans could understand well enough by simply looking within themselves – a deep habit of Protestant faith, with its emphasis on the inherent depravity of the human will. That showed the value of a system that restricted most of the things the government might do – even the good things. It was a safety-net to the depravity of political impulses, which themselves sprung from the fallen condition of man, the scarcity of virtue, and the vast propensity toward vice, particularly when human beings are given power. But now, according to Wilson, there was a new kind of person: the public administrator, who was highly educated in the new social sciences. Such a character was pure of heart – an "angelic" type that Madison believed we would never meet, much less govern. Such a man therefore did not require any checks or restraints, because his scientific training ensured that he could only do good. Hence, the devices that would prevent us from sinking into the lows of tyranny were now the very things that prevented us from

[375] Ibid., pp. 221-222.
[376] Federalist # 49, in *Federalist Papers*, pp. 311-312.

ascending to the heights of progress. The safety-net, once so wise and well-constructed, was not the greatest hindrance for the wonderful things government might do.

Herbert Croly also viewed the state as the essential apparatus for pure democracy and nationalism. Rather than represent, in the classic sense, government was meant "to provide a mirror for public opinion." Democracy could proceed "independent of representative assemblies"; it found something "superior to that which it formerly obtained by virtue of occasional popular assemblages." The State, just as Wilson envisioned it, was a mechanism that could become one with the people, and in that way, make them become one with each other. It would not only serve the sovereign like administrators had done for kings and aristocracies of the past; it would also help the democratic whole to improve itself. The State could become an extension of the general will – and at the same time, make the general will all the real. Croly knew that there was no small amount of danger in this: "Every precaution should be adopted to keep it in sensitive touch with public opinion," he wrote. Any "lack of responsiveness to public opinion" could most certainly lead to a "domineering and oppressive" State. Nonetheless, such a "mechanism of direct government" was essential, and the ability to develop such a servant-State seemed very likely, given the Prussian model, and the visionary education that administrators would receive.[377] "Though taking a cynical view of the conservatives' rule of law," Herman Belz observes, constitutional realists and progressives "did not relinquish altogether the constitutional symbol. What they did was to try to fill it with a different content. In general, realist critics were unreconstructed democrats who in their scholarship sought to provide an intellectual basis for political action" – i.e., to rationalize political power with the philosophy of progress – that would

[377] Herbert Croly, *Progressive Democracy*, pp. 264-265; 272.

"revitalize constitutional government." That meant, however, "energizing government to make it responsive to social needs and accountable to the popular will."[378]

This progressive turn to the State assumed that the most important feature of the Constitution was now void: there was no need for limits on political power because society could evolve beyond politics altogether; there was no need to check civil servants because they would be trained to do only the purest good. In earlier and less enlightened times, James Madison insisted that "[i]f men were angels, no government would be necessary" – or, more importantly, if "angels were to govern men, neither external nor internal controls on government would be necessary."[379] If angles came to rule over us – if even *one* angel appeared to rule over mankind in his omnicompetent benevolence, the most basic precepts of politics would wither away, and the system designed around those precepts would yield before the absolute rule of that perfect creature. But, of course, Madison's point was that there are no angles, at least not when it came to framing and maintaining governments. In those tasks, mortals were alone. But progressives disagreed: education in the social sciences could turn some people into angles after all.

B. The State over the People

The difference between the active and passive principle was never clear when it came to understanding the progressive style of "democracy." Was the state a direct reflection of the people, or were the people subject to the state? Did great leaders like Theodore Roosevelt embody their highest hopes, or did he *give* them those hopes? It did not entirely matter, though: such concepts of means and ends were, once again, pre-

[378] *Living Constitution or Fundamental Law?* 72.
[379] James Madison, Federalist #51, in *The Federalist Papers*, 319.

Darwinian notions. Once progressive methods were fully realized, there would be no reason for concern about what the people did with their government – nor would it matter at all what the state would do to the people. The state, understood in such a way, would always find justification for such actions, policies and experiments by appealing to the same sense of historical necessity from which it began. In this, progressivism was more rigid and hierarchal than the old Mugwumish elitism that existed before. Yet it was a good hierarchy, so far as it created an American democratic sense; the people would rule because the elites would serve them – and they would serve them best by shaping the public into the sort democracy it was supposed to be.

The fear of the Nationalist-progressive project came, of course, from those who saw it as "paternalism," or the dominance of the state over the whole sphere of national life, which would not only stifle the wonders of the free market, but suffocate the human spirit. The disciples of William Graham Sumner and Herbert Spencer held that, for all its sentimentalism about human goodness, the only way for a progressive-style state to form was through coercive measures. The response to that criticism was one that would echo down into modern discourse on the role of administrative government in public life: that the current system *already* does all of the things that the capitalist class dreads, and that it should therefore progress in the direction it is already moving, rather than try to resist the obvious dictates of History. Richard T. Ely, for instance, wrote that the bulk of existing paternalism in the United States "is found in the industrial field." The capitalist classes, who form the "modern industrial paternalism" are, in fact, no different from the feudal aristocracy of pre-modern times: they "enjoy large revenues, and they let others labor and fight and die for them. They support their own private armed troops [e.g., the Pinkertons]

exactly as did the old feudal lords, and the basis of both claims is divine private rights." There was "a paternalism of the rich."[380]

This was one more example of the escape from modern dichotomies, or the belief that there really was a way for society to evolve beyond politics and all of its usually distinctions. As Lester Frank Ward put it:

> On the whole, there seems to be little danger that any of the extremes of popular opinion will ever prevail, but at the same time there is always a moderate, often rhythmic, drift in some direction, so that what were extremes are so no longer, and other unthought-of schemes occupy the van. It is this that constitutes social progress.[381]

Similarly, Ely claimed like many others that the old perception of freedom was merely a step in the development of the current one. What progressives sought was not really "paternalism" at all. Such a word better described the older order, where the capitalist class ruled: the rich determined what was good for society, and had tremendous sway over the direction of what was supposed to be an objective, un-tainted constitutional republic. The true form of liberalism, the real severing from the past and vindication of human power, was "fraternalism." It came from the recognition that "[t]he state and the state alone stands for us all." Comparatively, all other institutions "are more or less exclusive, and stand for part of us – for some of us, not for all of us. As the state advances, as it becomes more ideal in its constitution and in its administration, as its fraternal, ethical essence becomes purer, its functions must ever grow wider and wider." In modern times, though, the new stage of History was clear: "freedom implies participation in the activity of the state."[382]

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[380] Richard T. Ely, "Paternalism vs. Paternalism in Government," Ibid., 782.
[381] Lester Frank Ward, "Plutocracy and Paternalism," *Forum*, Nov. 1895, 300.
[382] Ibid., 781. Ely revealed a view of man that explained a great deal about why the state was meant to do what he claimed. An honest view of mankind was one that knew "there are many classes in every modern community composed of those who are virtually children, and who require paternal and fostering care, the aim of which should be the highest development of which they are capable." Ibid. This did not mean they

That was, once again, the view of Woodrow Wilson: a purified democracy had to be made, and the State was the instrument that could do it. The advantage of good administration had previously been its "definite locality, that it was contained in one man's head, and that consequently it could be gotten at." But now, with democracy,

> the reformer is bewildered by the fact that the sovereign's mind has no definite locality, but is contained in a voting majority of several million heads; and embarrassed by the fact that the mind of this sovereign also is under the influence of favorites, who are none the less favorites in a good old-fashioned sense of the word because they are not persons by preconceived opinions; *i.e.*, prejudices which are not to be reasoned with because they are not the children of reason.[383]

If the administrative state was to work for the democratic sovereign, that sovereign had to be taught to express itself in a way the state could hear. Plainly, that meant that the state would not only have to reform itself; it would have to assume a major role in reforming the public it was meant to serve, and conditioning it to speak with one voice. That, however, meant overcoming the timeless problem of democracy: the tendency of society to fragment into factions. It was a matter of "giving to every citizen the same opinions, the same passions, and the same interests," and doing away with the things that incited people to care more about their own self-interest than that of the whole. The greatest obstacle was, of course, the fact that the "reason of man continues fallible," according to Madison – a fact of human life that would never change, and would therefore always determine the course of politics. In every citizen, there was a connection "between his reason and his self-love," meaning that most of what passes for reason is, in fact, mere rationalization of what he has already decided he wants.[384] For Wilson, though, that was

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were meant to become adults, politically or morally speaking, or that they would realize the end for which they were intended as individual persons. It was instead the sort of end which they created for themselves, as expressions of democratic ideals, and which the state would then help make them realize. If human beings have it within them to be kind and generous and community-minded, and all the other priorities so central to democracy, the progressives asked: what is the purpose of government if not to *make* them realize those things?

[383] Wilson, "The Study of Administration," Ibid.

[384] James Madison, Federalist #10, in *Federalist Papers*, pp. 72-73.

not such an impossible thing after all. It was simply untried, particularly in Madison's pre-Darwinian world, which was unaware of how malleable human beings actually were. This was an essential condition of progress: human nature had to be changed. It was a radical proposal for reform, but Wilson presented it knowing that "no reform may succeed for which the major thought of the nation is not prepared: that the instructed few may not be safe leaders, except in so far as they have communicated their instruction to the many, except in so far as they have transmuted their thought into a common, a popular thought."[385] It an arduous task, no doubt, where the people underwent a drastic social transformation. It was what Croly meant by "clear-sighted and fearless work."[386]

For some, the greatest obstacle for realizing that goal was the lingering effects of William Graham Sumner's descriptive "survival of the fittest" style of Darwinism. The popular British columnist, Sidney Low pointed out that "survival" was not necessarily an indication of what was "fit." "The survival of the fittest, as everyone knows, or ought to know by this time, does not mean the survival of the best," he wrote. Rats and roaches could survive under conditions were eagles or lions could not; plainly, those who feared the "Cult of the Unfit" taking advantage of them by surviving missed the point of evolution. "It means only that those individuals and species have the best chance of living which are best adapted to their environment." Since the "best" is a highly relative term, Low insisted that the point of evolution falls far more into man's hands. It had to be admitted that Darwinism describes nothing; it only unleashes human power. It is man's business "to see that the survival of the fittest does mean the survival of the best, and to adapt the social environment to that purpose." This meant, of course, that

[385] Woodrow Wilson, "Leaders of Men," in *Woodrow Wilson: The Essential Political Writings*, ed. Ronald J. Pestritto and William J. Atto (Lanham: Lexington Books, 2008), 221.
[386] Croly, *Promise of American Life*, 6.

"competition" could not be the prevailing thing. But "[c]ompetition is very far indeed from always leading to upward movement."[387] It is a stagnant cycle, and does not show the true value of evolution the way the progressive interpretation does.

The State, on the other hand, was a thing that would ensure that the whole of society would progress as it should. Indeed, Mr. Darwin himself merely offered one small idea which greatly surpassed his immediate biological teaching. As the state "moves toward completeness," Low wrote, it will surely discover its own "full and specialized functioning, of all its members by means less terrible and more effective than the ruthless 'selection' of nature, the waste and cruelty of unrestrained competition." The state is to protect people, not only from foreign enemies, but "against ignorance, poverty vice, sloth, selfishness, avarice, and cunning, as well as against disease and crime." The State, in other words, is not to "'defy' natural laws"; it will instead "employ them for the general benefit."[388]

Hence, the ability of the people to rule over themselves in the progressive sense would require no small amount of state control and conditioning: just as the direct experience of politics could train members of the township for political life, the State could teach them to join the national township. Tocqueville's maxim, though, was a serious test of Croly's claims: he was wise to point out that the enemies of democracy, both around the world and throughout history, held that central government "administers localities better than they could administer themselves." Such a State was established on the fact that "central power is enlightened and localities are without enlightenment, when it is active and they are inert, when it is in the habit of acting *and they are in the habit of*

[387] Sidney Low, "Darwinism and Politics," in *Living Age*, pp. 6-7.
[388] Ibid., pp. 10-11.

obeying." It was quite the other way around "when people are enlightened, awakened to their interests," as only the small, local township could do. It was not that administration could be made to serve democratic will; administration was fundamentally different in kind from democracy and all of the things that made it possible. The sort of democracy that Croly and Wilson sought to produce was therefore a construction of the State, rather than the next step in popular control. Ultimately, Tocqueville wrote, "when the central administration claims to replace completely the free cooperation of those primarily interested, it deceives itself and it wants to deceive you."[389]

C. Forced Evolution

Most progressives who might read this would, once again, declare with Herbert Croly that such warnings spring pre-Darwinian views of politics. But there is no denying that Alexis de Tocqueville was not entirely pre-Darwinian: he was quite aware of the developmental nature of things, as well as the general movement of history in his time. All progressives could agree that "[e]vereywhere the various incidents in the lives of peoples are seen to turn to the profit of democracy"; all people over the last couple of centuries, he observed, "have been driven pell-mell on the same track, and all have worked in common, some despite themselves, others without knowing it, as blind instruments in the hands of God." Hence, Tocqueville's warning was perfectly sound: democracy could be a tremendous fraud, and the pursuit of such a finely conditioned social order might very well be the condition of a new sort of tyranny.

Charles Darwin's own protégé, Alfred Russel Wallace, showed this well in his teachings on human evolution and society. "We have risen, step by step, on the ladders

[389] *Democracy in America*, pp. 85-86.

and scaffolds erected by our predecessors," he wrote. Yet this did not mean that modern civilization was any greater than those that preceded it: no matter how high it was on the evolutionary scale, one error could always bring collapse. The greater task was therefore to discover "the conditions under which that advance may be continued in the future." Wallace emphasized that it was dominance that brought out the "higher types" of human beings: they were only realized when they were willing to make themselves perfect successors of the lesser classes. Simply being aware of this, though, as Wallace and so many other social Darwinists were, meant understanding the dire need of perpetuating the "higher types" – "whether any agencies are now at work or can be suggested as practicable, which will produce a steady advance, not only of human nature, but in those higher developments which now, as in former ages, are the exceptions rather than the rule."[390]

For Wallace, the only logical step after knowing evolution was deliberately *participating* in it. This was something that progressives said again and again; but it was only people like Wallace who fully articulated what that meant: the power of some had to be made absolute over others. But there was only one entity that could leave nothing to the deadly game of chance and ensure the fullest participation: the State. So while William Graham Sumner looked to a moralized "survival of the fittest," Wallace looked to a planned and carefully managed evolutionary process. The "fittest" were not the most moral, or those who had received Sumner's ideal private education; they were instead the "fortunate intermingling of germ-plasms of several ancestors calculated to produce or to intensify the various mental peculiarities on which the exceptional faculties depend."[391] If

[390] Alfred Russel Wallace, "Human Progress: Past and Future," *The Arena*, Jan. 1892, pp. 145-145; 149.
[391] Ibid., 155.

society had such a critical dependence on the genetic morality of its members, it could not be left to mere "evolutionary drift"; it had to be planned, and coordinated by the sovereign, which had to have the competent power to manage the most intimate aspects of private life.

On this point, however, Wallace's socio-biological jargon took a sudden turn for the political, thus allowing him to join the progressive pundits of his era. In truth, the greatest threat to the full participation in evolution and the emergence of "higher types" was none other than liberty itself. Such an aimless and unplanned condition allows for "those vicious practices and degrading habits which the deplorable conditions of our modern social system undoubtedly foster in the bulk of mankind," he wrote. People needed to be managed, or else they would all chase after their own pursuits, and develop all sorts of practices that might very well let the "unfit" types come to dominate. The potential for self-destruction was apparent: "[t]hroughout all trade and commerce lying and deceit abound to such an extent that it has come to be considered essential to success," he observed. It was, of course, a strange complaint: were the base aspects of business the cause of bad "germ-plasms," or were they merely the symptom? For Wallace, the difference was unimportant. "No dealer ever tells the exact truth about the goods he advertises or offers for sale, and the grossly absurd misrepresentations of material and quality we everywhere meet with have, from their very commonness, ceased to shock us."[392]

The idea of planned, deliberate, participatory evolution had been the key feature of Edward Bellamy's thought as well. It was Darwinism, after all, that could bring a peaceful transition into Nationalism in his view, rather than violent socialist revolution.

[392] Ibid.

Speaking in an age of perfect Nationalism, one could say that "'humanity has entered on a new phase of spiritual development of higher faculties, the very existence of which in human nature our ancestors scarcely suspected… We believe the race for the first time to have entered on the realization of God's ideal of it, and each generation must now be a step forward.'"[393] But, much like Sumner, he did not admit the full extent of Darwinism in this project. To hope for a mere mass-awakening, as he described it, or to achieve any meaningful social organization, was to ignore just how deficient certain segments of society were.

This was not at all to say that progressives based the entirety of their thinking on eugenics. Eugenics itself was but one school of thought in the progressive era. Darwinism was only the framework, not the sole explanation of how human beings could evolve. The popular British social-psychologist C. Lloyd Morgan, for instance, did much to distance progressivism from such a radical approach. The greatest kind of evolution was not biological, since that was only crude sort of materialism, which left out a great deal about what human beings actually were. According to Morgan, it was human consciousness that had to evolve, regardless of genetic dispositions. He wrote: "if natural selection be still operative among the individuals which constitute a civilized community, it follows that, by survival of the better endowed *intellectually and morally*, the level of human faculty must steadily rise from generation to generation." Morgan conceded that evolution was not inevitable, and that it needed to be managed. But that management did not require anything so coercive as eugenics. It was, instead, a matter of education. Wickedness and corruption was a moral failing, just as common among those Wallace

[393] Edward Bellamy, *Looking Backward: 2000-1887* (New York: Signet Classics, 2000), 190. These were the words of a sermon, delivered by Mr. Barton, a prominent minister in Bellamy's utopia.

deemed "fit" as among the "unfit." Such education came with the realization of progress itself – that the Nationalist promise was something that people had to earn, and that the State would train them to receive it, regardless of their genetic makeup. This meant, of course, letting go of all things traditional: "The authority of to-day is not, and should not be, the authority of yesterday. If it were, social evolution would be impossible." If human beings were as much products of their society as progressive claimed, there was no reason to locate the core problem of politics within individual genetics: even the truest signs of "unfitness" were matters of social conditioning, based on needs and desires that all could understand. The way to improve them was to focus on elevating society, and teaching all that "they are heirs to a more highly evolved social environment; they are not themselves inherently brighter, but they reflect the brightness of a more luminous social sky."[394]

Morgan saw poverty as the most obvious example. One could blame it on bad genetics, as Wallace did, or one could simply study the poor in order to see very plainly their desire to do better, if only they were shown the way out of their condition. The urban slum was nothing more than the "misapplication or the thwarting of the wholesome tendencies which man inherits," Morgan wrote; it was not at all "the hot-bed of innate inequality and the spawning ground of hereditary vice," as Wallace and his followers believed. The way to truly progress is by bettering the environment and brining all people under that conditioning power, "by original work in art, science, and industry, and by education," Morgan wrote.[395] Consciousness of evolution was not itself an evolutionary principle; it occurred in human thought – and it would continue that way.

[394] C. Lloyd Morgan, "The Conditions of Human Progress," pp. 423; 432; 434.
[395] Ibid., 435.

The science columnist E. Kay Morgan agreed, when he pointed out how much the theory of evolution itself had evolved since Darwin wrote the *Origin of Species* nearly fifty years before. He asked, "What is it which struggles for existence in each creature?" Such a "Force of Life," as he called it, could not simply be assumed; it too needed an explanation. The "New Evolutionist" addressed it, and recognized its tendency to deny the very evolution that gave it life. Survival of the fittest, particularly as it persisted in the *laissez-faire* views of William Graham Sumner, had to be defied and resisted: only then would evolution happen as it should, bringing "a certain advance beyond the necessities of life and exhibit[ing] excellence in form or conduct which cannot be explained as the mere result of adaptation to their surroundings." The obvious proof of this was altruism. There was no Darwinian explanation for such behavior; it did not advance those who showed it, nor did it put the "unfit" in their proper place. Such goodness "should be suicidal from the point of view of the struggle for existence, yet those types become more and more dominant as the advance of civilized humanity proceeds." It was therefore obviously an extension of the truly advanced thing in man – and the true explanation for progress itself.

But views like these were difficult to sustain: individuals were still parts of the polity, and its overall strength depended entirely on how each of them was prepared to serve the whole. Eugenicists were quick to point out how altruism could, in fact, positively encourage the sort of behavior that made democracy, or a social order of any kind, quite unworkable. For Wallace's American devotee, Charles Davenport, there was no more fundamental source of the problem, nor a more certain place to begin creating the social conditions that progress required, than in the genetic makeup of the couples

who produced offspring. Davenport made this point especially clear: the "lower types" were the single greatest social burden, and neither Nationalism nor education nor any other social organization could succeed until they were somehow purged out of the new system. It would take something more like "experimental evolution," or what came to be called eugenics. It was critical to see that "until recently at least, human society was founded on a fundamentally wrong assumption that all men are created alike free agents, capable of willing good or evil, and of accepting or rejecting the invitation to join the society of normal men." Letting go of such notions as rights and equality and dignity was the way to make evolution happen as it should. It began by recognizing that there are no such generalities about human society aside from the ones that power could impose on it; in truth, "the human protoplasm is vastly more complex than their philosophy conceived, and that the normal man is an ideal and hardly a real thing." Davenport catalogued a long list of deep-seated genetic features that made the members of society what they were – and which, in turn, determined the condition and fate of the societies in which they lived. Such features could be maximized or rightly ordered, since "[n]o amount of training will develop that of which there is no germ," he wrote; "you may water the ground and till it and the sun may shine on it, but where there is no seed there will be no harvest." Like Wallace, Davenport's only solution was therefore a method of *complete* social control, all the way down to the most intimate aspects of each individual life. It was the same principle that appeared in Roosevelt's conservationism: it came from knowing "that this protoplasm is our most valuable national resource, and that our greatest duty to the future is to maintain it and transmit it improved to subsequent generations, to the end that our human society may be maintained and improved." Davenport allowed the same Bellamy-

esque humanity and kindness of heart in such a eugenic project: since "reason cannot overcome the sentiment against destruction of the lowest-grade imbeciles," the next best thing was mandatory sterilization, which many state legislatures implemented as an aspect of their police powers.[396]

Wallace and Davenport captured the true condition of the progress that people like Roosevelt and Croly and Wilson were seeking: they saw that all of the talk of progressive democracy required some sort of radical alteration, not of society or government, but in the actual human beings who constituted those things. "It is no doubt true," Herbert Croly admitted, that the progressive project depended greatly, if not entirely, on the "possibility of improving human nature by law." Though Croly may not have embraced the full scope of eugenics, that sort of social control was latent in his thought, and he did occasionally concede it: to be "successful in its purpose," the progressive State "would improve human nature by the most effectual of all means, that is by improving the methods whereby men and women are bred." Indeed, there could be no doubt that "[d]emocracy must stand or fall on a platform of possible human perfectibility."[397] The American people could find a pure democracy on the surface only when affairs beneath the surface were controlled and conditioned rightly. No amount of education, as Morgan and the more gentle progressives saw it, could ensure such a thing. Croly asked the right question, and the eugenicists gave the only plausible answer. If reform meant rejecting American natural right, the only thing that could replace it, and

[396] Charles B. Davenport, "Influence of Heredity on Human Society," *Annals of the American Academy of Political and Social Science*, Vol. 34, No. 1 (Jul. 1909): pp. 16; 20-21. The special issue was titled, "Race Improvement in the United States."
[397] *Promise of American Life*, 39-40.

give justification for "progressive democracy" was power, and absolute control at the hands of those who could create the right kind of community.

Conclusion: Cycles of American Liberalism

Some who identified with the progressive movement showed refreshing candor about their views. One editorialist in *The Living Age* put it this way: "Of all modern ideas, the belief in progress is perhaps the one which has come nearest to the strength of a religion; and like a religion, it is exposed to the vicissitudes from the moods and circumstances of believers." Still, all those conflicts among the faithful would never raise any doubts about one common assumption; they would only argue about the proper means of realizing progress, or meeting the new demands of History. Progressivism was, of course, an idea which fit well with the era in which it appeared. "There is something in its very nature which invites us to embrace it in passionate action, or repose on it comfortably as a fact."[398] This revealed the inner pragmatism of the era: the truth of progress, like anything else, rested on its ability to *work* for people. It was, objectively speaking, no better than the conventional order of things it denounced; for all its claims about the reality of History, the more thoughtful progressives admitted that it did not actually lead anywhere, or offer any substantial promises. As Louis Menand put it in his study on the origins of modern American thought: "In the end, you will do what you believe is 'right,' but 'rightness' will be, in effect, the compliment you give to the outcome of your deliberations." The whole perception of the good so central to political deliberation and the framing of government "is something that appears in its complete form at the end, not at the beginning, of you deliberations." It boiled down to a single

[398] "What is 'Progress'?" *The Living Age* (Jul. 24, 1920): pp. 222-223.

claim: "people are the agents of their own destinies" – not in choosing the good, but *making* the good.[399] Progressivism was preferable to all other things because progressives chose to believe in it.

For all its weaknesses, such pragmatism was the only measure of political truth left, as the American promise collapsed with the Civil War. It was not only because of the loss of faith in the Union, or the assumption that belief in absolutes of any kind leads to violence; the precepts of the Union itself had disappeared, and brought down the entire Western intellectual tradition with it. "Stately edifices of presumption or idea have crashed into the dust, and left us with a new view of the civilization that we dwell in"; progress was plainly "the refuge men discovered when the idea of Providence was shaken… [it was] the impulse to make a shelter against an indifferent universe," the columnist wrote. Beneath all of the calls to overcome class-struggle, cure political corruption, and seek a Bellamy-style Nationalism, or even the view of History or the next step in human evolution, there was the realization that there is no objective foundation for modern values, and that chaos is no less preferable than peace; "[p]rogress is an empty vessel till it has been filled with our ideals, and it cannot even be imagined except in terms of some value beyond itself."[400] But the point, once again, was to face that horrifying void – and then choose peace, because that was simply the choice of decent, rational, civilized people.

This, no doubt, is the best explanation for the second wave of liberalism to overtake the country in the 1960s. Consider the words of the Port Huron Statement, the bedrock of campus radicalism in the early Vietnam Era. The most revolting thing for

[399] Louis Menand, *The Metaphysical Club: A Story of Ideas in America* (New York: Farrar, Straus and Giroux, 2001), pp. 352; 370.
[400] Ibid., 225.

these students was not "conservatism" in today's sense (which did not fully appear as a substantial political force until the 1980s). It was instead the ideas from the *previous generation* of Wilsonian progressives, who then occupied faculty positions at the major universities. They were the intellectual decedents – if not the direct descendents – of what was once the "new elite," entrusted with maintaining the administrative state in the service of democracy, so idealized by young Woodrow Wilson and Richard Ely. The campus radicals of this era took direct aim at what liberals of the previous generation preached, which had become "dominant conceptions of man in the twentieth century: *that he is a thing to be manipulated*, and that he is inherently incapable of directing his own affairs." That idea, so central to making democracy work and ensuring that political life was attuned to history, was not the most horrific idea, which the New Left sought to disown. "We oppose the depersonalization that reduces human beings to the status of things – if anything, the brutalities of the twentieth century teach that means and ends are intimately related, that vague appeals to 'posterity' cannot justify the mutilations of the present."[401] Such a protest rings with opposition to the Wilsonian vision of the malleable society at the hands of a "leader of men" – that "men are as clay in the hands of the consummate leader" – which carried on the campus culture and understanding of curriculum they so despised.[402] The previous generation of progressives achieved nearly everything they wanted – and the new generation of 60's progressives revolted against them.

This happened, though, because the deeper foundation for progressive American democracy was unveiled – and it turned out there was nothing to see. With the secret out,

[401] "The Port Huron Statement," in Peter Lawler and Robert Schaefer, *American Political Rhetoric: A Reader* (Lanham: Rowman & Littlefield, 2005), 204.
[402] Woodrow Wilson, "Leaders of Men," in *Woodrow Wilson: The Essential Political Writings*, 214.

there was a new distrust of the administrative state, however idealized it might have been among the older generation of progressives; there was only the power of the people themselves – or, rather, the youths who had the sort of explosive energy to make democracy work. It would work through radical activism, since carefully planned scientific know-how had failed to create a new kind of human dignity, and therefore needed to be destroyed.

Hence, the broader difficulty that the United States Supreme Court faced as it addressed the major cases of this era. Within their new police powers jurisprudence – within even the most mundane legal questions – there was a fundamental shift in what it meant for a nation to have a Constitution and a rule of law. But still, the cases came.

Chapter 7:

What a Republic is For:
The Constitutional Basis for Labor Regulations

The Supreme Court justices who saw the apparent meaning of the Fourteenth Amendment wished very much to avoid it. It was, no doubt, a frightening thing from a judge's point of view: the floodgates of litigation always threatened to burst open with a single precedent; by calling certain rights "constitutional," one interest group could find itself permanently lodged under the Court's protection, where it might use judicial leverage against all opponents. For this reason, there was "a disposition on the part of the court to keep away from the danger line of interference with the operation of the local police power."[403] Perhaps there really were certain natural rights that government was meant to protect. But the Court was never meant to defend and protect those rights directly, save for extreme circumstances. It was designed to focus on institutions, separation of powers, federalism, and other things related solely to the letter of the Constitution – which in turn could secure those rights, as they were designed to do. American political institutions were sufficient to ensure neutrality, thereby protecting rights in the way they checked and limited each other. Left to itself, the American political system was quite well designed to fulfill this end; judicial meddling might very well disrupt it beyond repair.

For many, this seemed to have been Justice Morrison Waite's point in *Munn v. Illinois* (1876), i.e., when there is unwise or even unjust legislation, "the people must

[403] Shepherd Barclay, "The Danger Line," *American Law Review* (May/June, 1898): 24.

resort to the polls, not to the courts."[404] This was a popular position, and it was the surest maxim that lower courts could fall back on. Judge Hiram Gray of the New York Supreme Court gave what many believed to be the bottom line: "[t]he police power extends to the protection of persons and of property within the state." This meant that "[t]he natural right to life liberty and the pursuit of happiness is not an absolute right," he wrote.

> It must yield whenever the concession is demanded by the welfare health or prosperity of the state The Individual must sacrifice his particular interest or desires if the sacrifice is a necessary one in order that organized society as a whole shall be benefited That is a fundamental condition of the state and which in the end accomplishes by reaction a general good from which the Individual must also benefit.[405]

But other saw a more elaborate explanation (or, perhaps, a post facto rationalization) of those words in his state's own grain elevator case, *People v. Budd* (N.Y. 1889). According to Judge Charles Andrews of the New York Circuit Court, "life, liberty, and property" did not need judicial protection at all, because it would always find its greatest defense in "a pervading public sentiment which is quick to resent any substantial encroachment upon personal freedom or the rights of property." Thankfully, that public sentiment was always present, and always reliable; "[i]n no country is the force of public opinion so direct and imperative as in this." Obviously, the judiciary had little to do when it came to protecting basic rights; that was the power of the people themselves. True, the people could do very unjust and foolish things left to themselves; but it was worth reflecting on how often those pieces of legislation "have generally been the result of haste or inadvertence, or of transient and unusual conditions in times of public excitement which have been felt and responded to in the halls of legislation." But, in the end,

[404] Ibid., at 134.
[405] *People ex rel. Nechamus v. Warden of City Prison*, 144 N.Y. 529, at 535 (1895).

> no serious invasion of constitutional guarantees by the legislature can for a long time withstand the searching influence of public opinion, which sooner or later is sure to come to the side of law and order and justice, however much for a time it may have been swayed by passion or prejudice, or whatever aberration may have marked its course.[406]

All of this may have been true in practice. But Judge Andrews quite overlooked the institutional aspect of American democracy. There was, indeed, a sensible, rational, aggregate public opinion, as he described it; but that phenomenon owed itself entirely to the constitutionalism that shaped and directed the public. The point was not the effectiveness or wisdom of a law, but whether or not it abided by the more fundamental law that made the whole democratic arrangement possible. Andrews seemed to ignore the intent behind some of these state laws: more than whims that might be corrected by the legislative process, they were often rationalized by progressive notions of local experimentation, which, as the previous chapter showed, were quite hostile toward the Constitution's intentions for national life.

In truth, Justice Waite's doctrine simply could not endure. Fourteenth Amendment constitutionalism, so far as it embodied the idea of constitutionalism itself, was simply incompatible with "general will" democracy, however construed. The Amendment did grant real substantive rights, and stated quite plainly what "no state" shall do; and, in doing so, it presented the nature of republicanism, and the point from which all free government found its origin. In light of those words, the Court could not escape its duty to ensure that no troubling legislation "takes place in the absence of an investigation by judicial machinery"; it was no transient thing when a citizen was "deprived of the lawful use of… property, and thus, in substance and effect, of the

[406] *People v. Budd*, 22 N.E. 670, at pp. 680-681 (N.Y. 1889).

property itself, without due process of law… in violation of the constitution of the United States."[407]

The Supreme Court, particularly under the leadership of the new Chief Justice, Melville Fuller, had to confront the Fourteenth Amendment squarely and ensure that the states did as well. Whatever their approach, this would mean a limitation on the uses of police power, which had become an essential instrument for the peculiar alliance between reformers and progressives (cf. Chapters 5-6). "The liberty of contract doctrine, which restricted legislative authority, stood in sharp contrast to the tenants of the Progressive movement, which called for a more active governmental role in regulating the economy and addressing social problems," according to James W. Ely, in his study on the Fuller Court. "The Progressives especially urged a more expansive reading of the police power to support legislation designed to correct perceived imbalances of economic power associated with the new industrial order."[408] More troubling still, the rule could not be drawn from any clear precedent. No one had ever needed a definitive explanation of police power, since it was always understood as the proper character of the states. The justices on the Fuller Court would have to discover it and develop it – knowing all the while that their efforts might come to nothing, as indeed they did with the New Deal.

I. In Search of a Fourteenth Amendment Rule

There were, of course, many obvious things that the Amendment would not do, especially in light of the challenges to the "moral" aspect of police powers. For such legislation to appear at the dawn of advanced modernity, where the grounding for moral

[407] *Chicago, Minneapolis, & St. Paul Railway Company v. Minnesota*, 134 U.S. 418, at 457-458 (1890).
[408] James W. Ely, *The Fuller Court: Justices, Rulings, and Legacy* (Santa Barbara: ABC-Clio Supreme Court Handbooks, 2003), 110.

questions was slipping away, was to invite serious disapproval; here, it became more and more difficult to see prohibition as anything other than the arbitrary will of righteous reformers intent on bullying those into compliance when their only wish was to be left alone. "The likings and dislikings of society," John Stuart Mill observed, "or of some powerful portion of it, are thus the main thing which has practically determined the rules laid down for general observance, under the penalties of law or opinion."[409]

Peter Mugler certainly felt the full brunt of the "dislikings of society" in the state of Kansas. The entrepreneur spent over ten thousand dollars of his own money to build a brewery, in close contact with the necessary grain, only to witness the passage of an amendment to the state constitution that prohibited the sale of alcohol. Mugler complied, and stopped selling alcohol within the state; but the state then passed a law under the amendment prohibiting the manufacture of alcohol as well. "The effect of the act is to close the doors of his business, and leave what had been valuable property, recognized and protected by the law, lifeless… as if consumed by fire," his attorney claimed. "There is no notice, no hearing, no opportunity for redress; nothing is heard but this inexorable decree of annihilation, and the defendant sits in the midst of the ruins of that which years of toil had accumulated, under the vain hope that he had security under the law." This was plainly not a question of rates, much less health and safety standards, since "not a drop of liquor of his manufacture" was sold within the state.[410] It was, above all, an objection to "paternalistic" legislation – a term that would become essential in the coming Lochner Era.[411] Despite all the claims of nineteenth century temperance

[409] John Stuart Mill, *On Liberty* (Minola: Dover Publications, Inc.), 6.
[410] Council for appellant Peter Mugler, quoted in *State of Kansas v. Peter Mugler*, 29 Kan. 252, at 1; 5; 3 (1883).
[411] Mill certainly had people like Mugler in mind when he lamented the "limitation in number… of beer and spirit-houses, for the express purpose of rendering them more difficult of access, and diminishing the

movements, there was simply no reason to believe that alcohol consumption, much less manufacture, could affect public health to a degree that called for such patently unjust state regulation according to Mugler's attorney. This may have been true, but for Justice John Marshall Harlan, it was no grounds for usurping legislative judgment about the requirements of public morality: "society has the power to protect itself, by legislation, against the injurious consequences of that business." To not allow the state legislature such authority was to allow the few to dominate; these few, "regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please," Harlan wrote. "Under our system that power is lodged with the legislative branch of the government"; it was representation, checks and balances, and the political process that would ensure the best judgments. This constituted "what are known as the police powers of the state, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety."[412] To do otherwise, to rule against a legislative determination of public health and safety, would in fact be a violation of

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occasions of temptation." It was nothing less than a modern society's refusal to fully realize itself; it was an arrangement "suited only to a state of society in which the laboring classes are avowedly treated as children or savages, and placed under an education of restraint, to fit them for future admission to the privileges of freedom." Mill, *On Liberty*, 85-86.

[412] *Mugler v. Kansas*, 123 U.S. 623, at 660-661 (1887). The opinion upheld the Kansas Supreme Court's ruling, which maintained Justice Morrison Waite's rule in *Munn v. Illinois* (1876): only when actual property is taken away without just compensation can there be a complaint. "We suppose that the defendant founds his right to continue to manufacture and sell beer solely and exclusively upon his supposed vested right to operate his brewery in undisturbed tranquility forever" according to Justice Daniel Valentine. Mugler could have no protection of liquor "which had not yet been brought into existence." Justice Valentine admitted that Mugler may have suffered great loss, "but such loss is not the direct and immediate result of such act." Such state legislation was indeed no different from natural disasters and fires in Justice Valentine's view: Mugler's loss was "simply the remote and consequential result of the act, and is wholly speculative and problematical," he concluded. "Such indirect and remote losses cannot render acts of the legislature unconstitutional." *State of Kansas v. Peter Mugler*, at 11. The Court, it seemed, existed only to shape and channel the various legislative outcomes that may appear.

separation of powers according to Harlan: it would force the Court to assume the role of a legislature.

There was a natural consequence of such broad legal guarantees, which the justices rightly feared. If they proposed a "right" that appears generally applicable, everyone would suddenly have a claim to protection against the most common-sense legislation – even a variety of swindlers and scam artists. The rights umbrella, so to speak, would cover a great many things. Hence, the "oleomargarine butter" case, which involved a product that was made primarily from animal oils rather than pure milk. A certain Mr. Powell, a food distributor in Pennsylvania, found himself in violation of "an act to prevent deception in the sale of butter and cheese." It was not a complete scam on his part: Powell made it known that this was no ordinary butter by stamping "Oleomargarine Butter" "upon the lid and side in a straight line, in Roman letters half an inch long."[413] Still, "if this statute is a legitimate exercise of the police power of the state for the protection of the health of the people, and for the prevention of fraud, it is not inconsistent with that amendment" according to Justice Harlan, who seemed to be the one entrusted with writing the opinion for such rulings. It is "the settled doctrine of this court that, as government is organized for the purpose, among others, of preserving the public health and the public morals, it cannot divest itself of the power to provide for those

[413] 127 U.S. 678, at 681 (1888). It was not only an honest announcement to the consumer, but "a matter for congratulation on the part of the state that in the progress of science," which yielded a cheaper and equally nutritious food for the public, Justice Stephen Field wrote in dissent. "Thanks and rewards would seem to be the natural return for such a discovery, and the increase of the article by the use of the means thereby encouraged. But not so thought the legislature of the commonwealth of Pennsylvania." Ibid., at 689. (Field, dissenting.) It was a rare instance of Field's recognition that the market can produce such fruits. But even if it did not – even if the butter was full of unhealthy materials and produced at great risk to the public or even to the food producers – it was clear that Field would have still abided by his principles, and his belief that the Court existed to ensure them.

objects."[414] Plainly, the Fourteenth Amendment could not require them to do any such thing. Harlan restated Justice Morrison Waite's point in *Munn v. Illinois* (1876): if the law was unfair, the way to correct it was through the state legislature itself, not the courts.[415]

The existence of these cases, though, raises an important question: given how adamant the Court was about keeping the Fourteenth Amendment out of state business following the *Munn* doctrine, what inspired these people to continue pursuing a judicial decree on constitutional rights? If a service as essential as a grain elevator could not receive constitutional protection, why would it be granted to alcohol production in a dry state, or the distribution of fake butter? "In spite of this emphatic language," Charles Warren wrote, "council for the defendants, whether by reason of ignorance, [or] incorrigible optimism" continued to insist that there were certain constitutional guarantees that applied directly to them.[416] Whatever the short-term intent of the Fourteenth Amendment might have been, however "declaratory" and "corrective" its purposes, it gave a new constitutional reality that the Supreme Court could not escape; this, the Court slowly, carefully, and reluctantly admitted.

Justice John Marshall Harlan was the first to do this. He wrote in the *Mugler* opinion that there are, "of necessity, limits beyond which legislation cannot rightfully

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[414] Ibid., at 685.

[415] According to Thomas Cooley, this was but an extension of a state legislature's power over business – not only a regulation, but an authority that enabled it to squelch the business entirely. "An occupation opposed to public policy, like that of gaming, may be prohibited altogether," he wrote. The manufacture of liquor could be prohibited "because the evils are supposed to exceed any possible benefits," he wrote, "and the prohibition invades no principle of constitutional liberty," thus going against the principle in Munn, i.e., that if the property involved is not completely destroyed, the individual can have no due process complaint. *General Principles of Constitutional Law in the United States of America* (Boston: Little, Brown and Company, 1898), 257.

[416] Charles Warren, "The New 'Liberty' Under the Fourteenth Amendment," *Harvard Law Review* 38, 4 (Feb. 1926): 436.

go," and that reaching beyond such boundaries could only destroy the whole point of American constitutionalism. "While every possible presumption is to be indulged in favor of the validity of a statute," he wrote, "the courts must obey the constitution rather than the law-making department of government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed." This placed the Court under a "solemn duty, to look at the *substance of things*, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority." If the Amendment was going to live on in national life – if it was not a short-term provision after all – its application to the states needed to be all the more clear, even in cases where extensive police regulations were upheld. Hence, the rule, which would endure throughout the Lochner Era:

> [if] a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution.[417]

There is an end for republican government, i.e., to preserve the right to keep and pursue property. But there is also a means, or a method by which a government might attain that purpose in the long-term life of a republic. Again, the means might go very far – in fact it might even surpass or violate the end, at least for a time. It might monopolize a slaughterhouse or limit grain elevator rates – or, more importantly, it might set the wages and hours of laborers by what it perceives to be fair and just. It was a question of constitutional judgment, though, to ask whether or not such extreme means were designed to meet the ends they sought to achieve, or if they were used for motives that

[417] *Mugler*, at 661. (Emphasis added.)

might favor one class over another, and deprive citizens of basic rights. And that was precisely the sort of judgment that the Supreme Court was forced to make.

This was a fundamentally different rule from the Stephen-Field-style absolutism that preceded it. The Court could have issued the final say about police powers: Peckham, Harlan, Fuller and later, George Sutherland, among others, might have consistently stood by the judicial philosophy of *laissez-faire*, and convinced the majority to strike down state regulations again and again; they might have sought to beat back the onslaught of progressivism with their pens, and issued multiple edicts about the duty to preserve liberty and forbid paternalism. But we find no such thing in their jurisprudence. In truth, they were not dogmatizing, but struggling to define the indefinable, or to forge a Fourteenth Amendment rule that met the demands of the document itself.

If the judiciary should become involved in such a way, the justification had to be complete. Justice Harlan admitted that this judicial task was one of "extreme delicacy" – a duty that indeed required them to "determine whether such enactments are within the powers granted to or possessed by the legislature." It was impossible, it seemed, to patch up every last hole in the Fourteenth Amendment's protections, as Justice Waite and the *Munn* majority believed they could do. Whether intentional or not, Amendment had broader purposes for the nation, and it was "the duty of the court" to declare whether or not a "state legislature, under the pretense of guarding the public health, the public morals, or the public safety, should invade the rights of life, liberty, or property, or other rights secured by the supreme law of the land."[418] This did not mean the Court would become a "perpetual censor"; Harlan seemed to know that there would be many cases like *Mugler* and *Powell* where the Court would uphold the law in question. His concern

[418] *Powell*, at pp. 686-687.

was that the Court would ensure the right trajectory of the legislation, and make the people know that there was indeed a *constitutional* reason for each regulatory law.[419]

How exactly the Court would do this, though, was not yet clear – and the uncertainty would only increase, as the Amendment's "declared" principles and its "corrective" method slowly declined. When was a state regulatory law beyond its proper end? When was it not? Those laws might address a legitimate grievance, and seek a popular solution; but it could do so in terrible ways, and provide solutions that have nothing to do with recovering the end of government. This was, of course, a common feature of Justice Harlan's legal reasoning: he was quite able to state the ideal, but not always coherent on how to get there. But then, the path was not clear to anyone, and it would require some time for the Court to find it. In this, it was Harlan – not Stephen Field – who set the tone for the Lochner Era.

Elihu Root explained things this way:

> How can we adapt our laws and workings of our government to the new conditions which confront us without sacrificing any essential elements of this system of government which has so nobly stood the test of time and without abandoning the political principles which have inspired growth of its institutions?[420]

However unclear the answer was for the Court itself, the question for constitutionalists was not in doubt. The point here is to show that the Constitution really was on the side of

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[419] This view of Fourteenth Amendment jurisprudence seems to have reached Justice Stephen Field – at least for a time. Amid his usual "fundamental rights" objections to the *Powell* ruling, Field wrote that the statute "must have in its provisions some relation to the end to be accomplished. If that which is forbidden is not injurious to the health or morals of the people, if it does not disturb their peace or menace their safety, it derives no validity by calling it a police or health law." Ibid., at 695. (Field, dissenting.) If health was the goal, as the state of Pennsylvania claimed, then it must be demonstrated that the law was designed to achieve that goal, or else it was not a law. This appears to have been an anomaly of sorts in Justice Field's legal thinking, in the twilight of his career: such a concern about the need for republican legislation was never restated in his opinions for the Court. Field is frequently cited as the intellectual vanguard of the Lochner Era. But given the Supreme Court's willingness to apply Justice Harlan's ends-means test, this claim is difficult to maintain.

[420] Elihu Root, "Experiments in Government and the Essentials of the Constitution," in *Addresses on Government and Citizenship* (Harvard: Harvard University Press, 1916), 87. This essay originally appeared in the July 19 issue of the *North American Review*.

laborers, so far as they too were citizens of a republic; and that there was not a single complaint that progressives had about modern industrial life that could not be met on constitutional grounds. As Chapters 5 and 6 showed, the objection to the Supreme Court's involvement in these cases was, in fact, an objection to the Constitution itself – not on pragmatic grounds, but for philosophic reasons. It was an intentional departure from the Founders system, and the basic assumptions about human beings embodied there. This chapter, however, will show just how pragmatic the Constitution itself was, both in its letter and spirit, as the finest expression of republicanism.

II. Justice Rufus Peckham versus the Social Darwinists

No Supreme Court Justice of the Lochner Era was as iconic as Rufus Peckham. His name is associated today with *laissez-faire* judicial activism, or the feature of a judge who was quite unable to approach his task without the pro-capitalist assumptions that dominated his own socio-economic class. He was one of the "relics of the era of entrepreneurial capitalism, incapable of comprehending an economy dominated by corporate capitalism, judicially woolly mammoths frozen in the ice of a Jacksonian Democratic worldview."[421] Peckham was the quintessential "reactionary," or the sort of man who not only refused, but who was wholly incapable of seeing the spirit of the times, and the truth of human evolution. His appearance certainly never helped him escape this accusation: every photograph reveals an intense gaze, showing a mood of certainty about his task, and an unswerving devotion to a single cause. He was "a man of clean-cut, aristocratic presence," according to one observer; "[t]hough somewhat brusque in his

[421] William M. Wiecek, *The Lost World of Classical Legal Thought: Law and Ideology in America, 1886-1937* (Oxford: Oxford University Press, 1998), 152.

manner, behind the apparent roughness is a vast fund of sympathy and kindness," accompanying a "strong and virile personality."[422] His fellow justice, Oliver Wendell Holmes, was known for his affection for Peckham, despite vast disagreements. This was probably due to a certain amount of sympathy for Peckham's reputation: the positivist wished there *was* a perfect moral truth about how to order society and interpret law, but knew that such a thing existed only in the realm of dragons and unicorns. The skeptic no doubt felt some amount of sorrow in the presence of the true believer.

All of this may be correct about Peckham himself and his general political outlook. But it ignores a great deal about who he was as a judge. Much of his life was saturated with law, far more than the practice of big business or the academic social Darwinian philosophies so common in his day. His father was a prominent lawyer in the firm, Colt & Peckham, where "he began the study of law, which he pursued with diligence, acumen and analytic industry for the term of three years" before going to the bar, following his older brother into the legal profession.[423] He went on to be a state attorney general, and served in the New York Supreme Court before President Grover Cleveland summoned him to Washington in 1896. He most certainly knew how to relate with the other justices on a purely legal level. It could not have been his persuasive power that forged the majorities in *Allgeyer v. Louisiana* (1897) and *Lochner v. New York* (1905): how could he compete with the poetic powers of Holmes, not to mention the "perpetual censor" warning of previous courts? Plainly there was something more to Peckham's approach to constitutional law than the conventional account gives: he saw the problem clearly enough to draw the support of his fellow justices, even as he was

[422] "Rufus W. Peckham," *The American Lawyer* 4, 1 (Jan. 1896): 36.
[423] L.B. Proctor, "Rufus W. Peckham," *The Albany Law Journal: A Weekly Record of the Law and the Lawyers* 55, 18 (May 1, 1897): 287.

unable to articulate the solution. One thing was certain: *laissez-faire* social Darwinism was not the answer, however alluring it might have been for judges like Peckham.

A. Peckham's Constitutionalism

In *New York v. Gillson* (1888), the court confronted a penal statute that prohibited the inclusion of "gifts," or free products in retail stores, along with formal purchases, presumably to avoid sales taxes on those goods. Such two-for-one sales techniques brought a fine of twenty-five dollars and misdemeanor charges, as it happened to a clerk who wished to include a free cup and saucer with a purchase of coffee. In his *per curiam* opinion for the Court, Peckham stressed the importance of finding an obvious conflict with the Constitution in addressing such things. Among them, he gave this surprising qualification: "it may not be declared void because a court may deem it opposed to natural justice and equity." He did not believe he was doing such a thing when he proceeded to examine the meaning of "liberty," as it appeared in a variety of previous cases. Precedence held that liberty was more than mere non-restraint. It was a positive thing, or "the right of a man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare." Yet this was not the point that determined the case, or made the statutes unconstitutional. While that view of liberty was important, and while "some or all of these fundamental and valuable rights are invaded, weakened, limited or destroyed by the legislation," Peckham found a far greater problem in the way such laws favored one class over another.

> It is evidently of that kind which has been so frequent of late, a kind meant to protect some class in the community against the fair, free and full competition of some other class, the members of the former class thinking it impossible to hold their own against such competition, and therefore

> flying to the legislature to secure some enactment which shall operate favorably to them or unfavorably to their competitors in the commercial, agricultural, manufacturing, or producing fields.[424]

Hence, Peckham could define liberty and identify it as the end of good government, and then decide the case, not on liberty itself, but on the constitutional means to that end. He was, perhaps, not as clear about it as he might have been, and it was possible that the distinction was not even clear in his own mind. Indeed, the two were often blended together in his own thinking. But for all his lack of rhetorical skill, Peckham could at least see the true nature of the question, and knew that neither *laissez-faire* purity nor unlimited police power could explain the meaning of the Constitution. Only the precepts of classic republicanism could do that.

That republicanism was central to the definition of police power (cf. Chapter 2). True, Peckham wrote,

> it is generally for the legislature to determine what laws and regulations are needed to protect the public health and serve the public comfort and safety, and if its measures are calculated, intended, convenient or appropriate to accomplish such ends, the exercise of its discretion is not the subject of judicial review.

But those laws had to abide by the republicanism found in the Constitution, and in state constitutions. The Madisonian system of checks and balances could go very far in ensuring this; but if that system failed, it was the duty of the judiciary to intervene. The reason for such intervention had to be definite and decisive, and serve as a sound basis for showing the spirit and intention of the fundamental law. To identify and apply that law, Peckham stated the rule: "those measures must have some relation to these ends." The power of the state police power had to actually recover the just order that was missing in society. "Courts must be able to see, upon perusal of the enactment, that there is some fair, just and reasonable connection between it and the ends… Unless such

[424] *New York v. Gillson*, 109 N.Y. 389, at 398-399 (1888).

relation exist the enactment cannot be upheld as an exercise of the police power." He may have drawn this from Justice Harlan's *Mugler* opinion, though it was more likely that the rule was latent in the idea of police power itself: it was not a matter of allowing police power to reach a certain extent before it was contained by the Constitution; the question instead concerned the meaning of police power itself.

The following year, the State Court of Appeals handed down to companion cases, *People v. Budd* and *Annan v. Walsh* (1889) dealing with the same set of facts as *Munn*. It was, of course, bound to rule in the same way, according to Judge Charles Andrews (discussed above): the state had the power to regulate "business affected with the public interest." In his lengthy dissent, Peckham recognized that "in such cases it is our duty to follow in the footsteps of [the Supreme Court], and to be guided and controlled by its decisions." But in when it came to reading the state constitution, the state court was under no such obligation – even as it read the same Due Process Clause. It was true, Peckham admitted, that the "common carrier" has a substantial and important effect on the public. It was "a kind of public office," in the sense that consumers voted with their feet when the consented to use those services. The owner maintains his services because of his "dedication to the general public, and this legal right of the public to demand this service springs from such dedication." Far more than the mere monetary interest, Peckham insisted that "they held themselves out as such to the public, and, as was said in some of the old books, entered into a general contract with the whole public to do the work, and hence arose the right of the public to call upon them to fulfill this contract."[425] To think that there was any reason to regulate such a private and reasonable arrangement was, in

[425] *People ex. rel. Annan v. Walsh* , 22 N.E. 682, at pp. 682; 685; (N.Y. 1889) (Peckham, dissenting.)

fact, to revert to pre-modern times, or to apply the sort of rules that American society had so recently escaped.

Peckham took great issue with Justice Morrison Waite's dependence on old English law in the *Munn* decision. True, that tradition did much to inform American constitutionalism; but the American system was hardly a mere product or outgrowth of English legal custom. He agreed with James Wilson, that there was something qualitatively better about American constitutionalism, not because of its novelty, but because it was able to see more clearly the precepts that had always been there. This was an important aspect of Peckham's legal thought: he looked with great admiration on the American political system, and was confident that it existed to maintain and even grow the sort of liberty that Americans – and only Americans – could enjoy. "The habits, customs, and general intelligence of the people of those days [in medieval England] were far different from those of today"; hence, similar laws "can have no such justification in our times." Vast, overbearing, micro-managing regulatory laws sprang from "paternal government"; they were meant to "watch over and protect the individual at every moment, to dictate the quality of his food and the character of his clothes, his hours of labor, the amount of his wages, his attendance upon church, and generally to care for him in his private life." Peckham gave a long slew of examples of how oppressive most local regulations actually were. He did not deny that such laws were well drafted, and quite fitting for medieval England; but those who became Americans had no need of them because they had learned to be free. There was therefore no reason to extend common law rules into the present century, because Americans had already benefited from them by improving upon them, through such things as bills of rights, the procedures of self-

government, and a general sense of mutual responsibility that "common carriers" and consumers had toward each other.[426]

Peckham knew that praising and defending liberty per se was not a sufficient protection of it. He admired Justice Stephen Field, but he understood that there was far more to the defense of liberty than direct judicial protections. There were means to protecting liberty: a social condition of republican neutrality. "Paternalistic" regulations, he observed, were always drafted in the favor of one group seeking to take advantage of another. Here, Peckham offers the most revealing insight into his own legal thought, which he no doubt brought with him onto the Lochner Court in later years. To uphold such extensive abuses of the police power "is to provide the most frequent opportunity for arraying class against class," he wrote. Along with "the ordinary competition that exists throughout all industries, a new competition will be introduced, that of competition for possession of the government"; it would be incited by groups hoping that special "aid may be given to the class in possession thereof in its contests with rival classes or interest in the second and corners of the industrial world." There was only one sure way to prevent this – a method that had nothing to do with *laissez-faire* social Darwinism or the absolute sanctity of rights, for which Peckham is frequently accused of defending at great cost to democracy. It was instead an instrument that had been there long before those ideas existed. "The only safety for all, is to uphold, in their full vigor, the healthful

[426] Peckham was especially critical of Justice Waite's admiration for Lord Hale, the common law jurist. Hale was, of course, a great lawyer, "but he wrote regarding the law as it then existed… and he was naturally and necessarily affected by the atmosphere of the times in which he lived." For all his brilliance, Hale's outlook was restricted to his society; his mind worked marvelously within the framework it was given, but it was, nonetheless, a far narrower framework than that of modern Americans. Hale, after all, was a believer in witchcraft, "and presided at the trials of old women accused of such crime, and condemned them to death on conviction thereof." Ibid., at 686.

restrictions of our constitution," he wrote. The Constitution itself did not directly protect rights, as Field believed; instead, it offered institutions

> which provide for the liberty of the citizen, and erect a safeguard against legislative encroachments thereon, whether exerted today in favor of what is terms 'laboring interests,' or tomorrow in favor of the capitalists. Both classes are under its protection, and neither can interfere with the liberty of the citizen, without a violation of the fundamental law.[427]

Should those institutions fail to secure liberty, the Court's task was not to step in and assert its interpretive power over state legislatures, but to ensure that their laws actually achieved the end for which they were created, and did not succumb to a single set of interests using the power of the state against others. The abuse of police power was, after all, the abuse of republicanism itself, or a failure to achieve the greater purpose of government, the protection of natural rights. Peckham would bring this understanding with him to the federal bench.

B. Rights and Liberties versus Social Darwinism: *Allgeyer v. Louisiana*

Since the Reconstruction Era, the Supreme Court had given abundant attention to laws that seemed to conflict with the Fourteenth Amendment. All of them were upheld; but it was apparent that certain kinds of state statutes laws might be unconstitutional after all, as the later opinions admitted. That judgment finally appeared with *Allgeyer v. Louisiana* in 1897. The case seemed to be the moment when the wave of police power jurisprudence finally crested, as the Court lived up to its stated principles. But this was not entirely true, considering the facts of the case. The Louisiana legislature had passed a law in 1894 prohibiting its residents from purchasing out of state maritime insurance. E. Allegeyer & Co. sought insurance on its cotton products bound for Europe, and was fined

[427] Ibid., 694.

the specified amount. The State Supreme Court of Louisiana applied the general rule handed down to it from *Munn v. Illinois*: it devoted only four pages to its unanimous opinion, which held that the state could indeed prohibit insurance contracts from out of state. Still, there was some indication of the judges' awareness that the issue was not so simple as many supposed. Judge McEnery, writing for the majority, admitted that the right of contract was indeed an important thing, and that it was actually something quite attuned to the purpose of police power. But, in truth, "we are not dealing with the contract," he claimed. The only legal strategy he could find was to weave his way around the question, and say that "[w]e are concerned only with the fact of its having been entered into by a citizen of Louisiana, while within her limits, affecting property within her territorial limits. It is the act of the party, and not the contract, we are to consider." McEnery and the state court focused on the enforcement and procedural process aspect of the question: "[i]ndividual liberty of action must give way to the greater right of the collective people in the assertion of a well-defined policy, designed and intended for the general welfare."[428] "Well-defined" was, of course, a promulgated and enforced law; the constitutionality of the law itself, and the way it reached across state lines, was plainly a matter for a federal court.

The outcome of the case was inevitable: it was a contract existing between U.S. citizens, and the state could claim no impact on the well-being of Louisiana residents. The law might have been reached by way of the contract clause in Article I, without any reference to the Fourteenth Amendment. The case was important, though, not because of the ruling, but because of the thinking behind Justice Peckham's opinion, which would lay the groundwork for a coming Fourteenth Amendment rule. The absence of even a

[428] *State v. Allgeyer et al.*, 48 La.Ann. 104, 18, at pp. 106-107; 109 (1895).

concurring opinion in the case indicates its persuasiveness over the other justices. They saw more disputes between state police power and the Amendment on the way; it was therefore worth articulating, in Peckham's words, what the point of its review would be. Such rulings would have to involve careful thinking about the meaning of the word "liberty" as it appeared in the Fourteenth Amendment.

Peckham defined liberty as a condition quite outside the Constitution, or any positive law. The defendant was fined for receiving notification of the established contract, but "[t]he letter of notification did not constitute a contract made or entered into within the state of Louisiana." The nature of a contract was plainly greater than any civil order; it was, for him, the sort of thing that preceded all government, and continued to exist above all civil society even after civil society was made. The statute was unconstitutional, not because it deprived any procedure of due process, but because it contradicted that substantive right – a transcendent thing, albeit one explicitly embodied in positive law itself through the Fourteenth Amendment.

> The "liberty" mentioned in that amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the tern is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to life and work where he will; to earn his livelihood by any lawful calling; to pursue any contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.[429]

There was a different reason to declare the law unconstitutional: while the law was meant to increase regulation on local insurance companies, its effect was to monopolize them, and compel state residents to buy insurance plans exclusively from a single set of local companies. It was, in short, a flagrant instance of class legislation on the part of a state government. But Peckham did not emphasize this aspect of the issue at all. Instead, he wished to specify something far more important than that: the subsequent cases "well

[429] *Allgeyer v. Louisiana*, 165 U.S. 578, at pp. 588-589 (1897).

describe the rights which are covered by the word 'liberty,' as contained in the fourteenth amendment." Peckham was so intent on defending that right per se that it he abandoned the classic definition of police power. "In the exercise of such right," he wrote, "care must be taken not to infringe upon those other rights of the citizen which are protected by the federal constitution."[430]

Hence, in *Allgeyer*, Peckham was indeed guilty of all the things for which he is accused – though not for entirely the same reason his accusers have believed. The standard charges are legion: "[h]is decisions were prime applications of the dominant legal thought of the day – using the law as the barrier against interferences with the operation of the economic system," according to one critic. If the *laissez-faire* principles of William Graham Sumner and Herbert Spencer were "read into the Due Process Clause, that was true in large part because of Justice Peckham's opinions."[431] Similarly, Henry Julian Abraham, in his study on judicial appointments, claims that "Peckham embraced a social Darwinist approach that went considerably beyond that of his nominator," i.e., President Grover Cleveland. With such views, he found himself "fitting in comfortably with the kindred views of such established laissez-faire specialists" currently on the Court. He found much favor in the eyes of Darwinian tycoons and intellectuals, Abraham claims; "he would not disappoint them during the 14 years he served on the Supreme Court."[432] These are easy explanations: following the usual socio-economic methods of understanding human behavior, we find Peckham trying to articulate something not entirely clear, which surely meant he was only expressing the dominant

[430] Ibid., pp. 590-591.
[431] Bernard Schwartz, *A History of the Supreme Court* (Oxford: Oxford University Press, 1993), 179.
[432] Henry Julian Abraham, *Justices, Presidents, and Senators: A History of U.S. Supreme Court Appointments from Washington to Bush II* (Lanham: Rowman & Littlefield, 2008), 116

theory of his time and social class. But such a claim demands a careful comparison of his words with those of premiere social Darwinists.

Peckham's primary concern was liberty, and how both the spirit and (since the Fourteenth Amendment) the letter of the Constitution sought to preserve that condition. It was, of course, a word whose definition was in great peril. But for William Graham Sumner, no doubt the premiere social Darwinist of the day, liberty had nothing to do with the natural condition of man. The whole modern notion of liberty was born of revolt against the pre-modern medieval order. In his essay titled "Liberty," Sumner wrote:

> It meant to affirm that laws and state institutions ought to be built upon an assumption that men were, or would be but for law, not all unfree, but all free, and that freedom ought to be considered, not a product of social struggle and monarchical favor or caprice, but an ideal good which states could only limit, and that they ought not to do this except for good and specific reason, duly established.

It was not long before the initial revolutionary basis for liberty was forgotten, and the philosophy of freedom drifted into even more abstract notions, in Sumner's view. Nearly all modern political institutions were developed "as if man had been, anterior to the state, and but for the state, in a condition of complete non-restraint."[433] This was, of course, one of many delusions that separated men's minds from social facts; it was the basis for many reforms and social crusades, which sought to recover a freedom that people never really had in the first place. Indeed, such words make readers wonder what the difference really was between Sumner and the collectivists he criticized. Elsewhere, Sumner wrote that liberty was instead "maintained by law and institutions," and was therefore "concrete and historical." "[I]f there be any liberty other than civil liberty – that is, liberty under law – it is a mere fiction of the schoolmen, which they may be left to discuss."[434] Such high-

[433] William Graham Sumner, "Liberty," in *On Liberty, Society, and Politics: The Essential Essays of William Graham Sumner*, ed. Robert Bannister (Indianapolis: Liberty Fund, 1992), pp. 238-239.
[434] William Graham Sumner, *What the Social Classes Owe to Each Other* (BiblioBazaar, 2007), pp. 22-23.

flying liberty was always weighed down by responsibility and moral obligation, a thing as obvious in human life as gravity itself. The question of freedom depended on how much freedom is understood as the power to do one's duty, rather than live according to whims and passions.

More important than liberty, though, was the centrality of rights for Peckham, which was the practical foundation or liberty – a view that Sumner most certainly did not share. Liberty did not stand alone, but was "deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties," etc.; citizens have "a right to contract outside of the state for insurance on his property – a right of which state legislation cannot deprive him," he wrote.[435] Sumner, however, was quite certain to distance his social philosophy from all notions of rights, which was little more than a "sentimental philosophy," or the proposition that "nothing is true which is disagreeable," which called for "a genial platitude, a consoling commonplace, [and] a gratifying dogma." Such a thing was a "natural right" according to Sumner; it was always the tool of collectivists, who could use rights to spread self-righteousness, and incite the masses to all kinds of wild demands, and dangerous expectations of government. "The notion of national rights is destitute of sense, but it is captivating, and it is the more available on account of its vagueness."[436] If such things existed, "there would be something on earth which was got for nothing, and this world would not be the place it is at all," which, of course, defied the most basic common sense of human experience, now made more obvious by Sumner's "survival of the fittest." It was not the notion of rights per se that he objected to; there

[435] *Allgeyer*, pp. 589; 590-591. Peckham also took no issue with the Louisiana State Court's claim that abuse exercise of police power "violates one of those inalienable rights relating to persons and property that are inherent, although not expressed, in the organic law" Ibid., 584-585.
[436] William Graham Sumner, "Socialism," in *On Liberty, Society, and Politics,* pp. 168-169.

were indeed "rights, advantages, capital, knowledge, and all other good things which we inherit," which were "won by struggles and sufferings of past generations," he wrote. A "natural right," on the other hand, "is not to be found on earth." Indeed, the whole notion of rights defied Sumner's idea of virtuous self-reliance, and the basis of justice; it fit far better into the hands of collectivists, as far as he was concerned. "[I]t comes to mean that if any man finds himself uncomfortable in the world, it must be somebody else's fault, and that somebody is bound to come and make him comfortable," Sumner wrote. In fact, the appeal to natural rights "turns out to be in practice only a scheme for making injustice prevail in human society by reversing the distribution of rewards and punishments between those who have done their duty and those who have not."[437] This certainly fit with the Darwinian outlook on things: if all is flux and change and growth, then there can be no place for timeless principles, of any kind. But, of course, Sumner and Spencer and like-minded thinkers never claimed republicanism as their goal. They were more concerned with criticizing collectivism than praising the institutions that would prevent it, and the principles for which those institutions were designed.

Paul Kens points out how easy it was to blur and entangle the two views.

> This tradition of individualism may well have allowed Americans to feel comfortable with the language of laissez faire. However, it does not necessarily follow that the laissez-faire brand of individualism is the exact counterpart of that tradition or that people thought it best for each of them to be isolated in a struggle for pecuniary advantage.

True, American natural rights individualism shared a "common ancestry" with laissez-faire, found in the classic liberalism of John Locke and Adam Smith. But those siblings "developed along somewhat different paths."[438] Sumner understood his social philosophy as a consequential thing: allow *laissez-faire* to work itself all the way out, and justice will

[437] Sumner, *Social Classes*, pp. 74-75.
[438] Paul Kens, *Lochner v. New York: Economic Regulation on Trial* (Lawrence: University Press of Kansas, 1998), 84.

be maintained; place vast regulations on it, and someone is bound to benefit unfairly, at someone else's expense. All of this is true, but it had no objective measure, nor a sense of how there might be "social" injustice, nor even how the pursuit of neutrality might indeed benefit the wealthy over the poor. Peckham's view, so far as it followed classic republicanism, did offer a solution to these problems. Rights were not ends that conflicted with liberty, as Sumner saw it, but the axioms that made liberty possible. Sumner might have appreciated this, had his social Darwinism and sociological positivism not forbade it.[439]

This was the true foundation for the development of a Lochner Era doctrine – an aspect that is long ignored in the conventional account. True, "Rufus Peckham was no Blackstone," Howard Gillman observes, "but neither was constitutional law during the Lochner era empty rhetoric. It represents a well-developed, albeit increasingly untenable, conception of the appropriate relationship between the state and society."[440] Indeed, Peckham was not exemplary in his philosophy of constitutional liberty. He was, no doubt, an intellectual light-weight, which makes him contrast sharply with his colleague,

[439] Peckham's view of liberty was far more positive than Sumner's. Both could agree that collectivism posed a serious threat to liberty; but Peckham alone emphasized the practical advantage it offered. Perhaps there were "virtual" monopolies, arising spontaneously out of the free market. But there was no reason to believe that such phenomena were perpetual, provided the government keep itself from involvement. In practice, "capital, if allowed absolute freedom and legal protection, will flow into the business until there is enough invested to do all or more than all the work offered, and then, by the competition of capital, the rate of compensation would come down to the average." In the case of monopolistic grain elevators,"[t]his reduction of charges will most surely take place before the owners of the elevators would allow the business to pass out of existence, provided the compensation after such reduction would enable them to realize the average rate of profit for their capital." Without a fair judgment about the price, which would emerge in rational negotiations between members of the free market, those elevators "could no longer be conducted with profit to all parties… and men will not continue to transport grain or any other commodity at a loss, or upon such terms that they cannot earn a livelihood." *People v. Walsh*, at 695 (N.Y. 1889) (Peckham, dissenting.) The injustice was as real for Peckham as it was for the agricultural classes forced to pay exorbitant prices. Indeed, he was not detached from socio-economic facts at all, as his critics often claim; he was quite close to the ground on these issues.

[440] Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Power Jurisprudence* (Durham: Duke University Press, 2003), 18.

Justice Holmes (who most certainly was not concerned with constitutionalism or liberty). Still, Peckham could agree with other constitutionalists that at the heart of liberty stood one single right, from which all others were derived, and which ensured the legitimacy of all republics: property. What was the "enjoyment of all faculties" the right to "live and work where he will," or to "earn his livelihood" if not the right to keep and pursue property? It was the only bedrock principle that could give spirit to the laws. An editorialist in the *Central Law Journal* commented on the case, and recognized the way property served as the bedrock for other economic rights: "in the privilege of pursuing an ordinary calling or trade, and of acquiring, holding and selling property," the law must acknowledge "the right to make all proper contracts in relation thereto." True, the police power over such things may be extensive, "yet the power does not and cannot extend to prohibiting a citizen from making contracts of the nature involved in this case outside of the limits of jurisdiction of the State."[441] Similarly, the *Central Law Journal* pointed out how the case allowed a broad use of police powers, even as it made clear its own disposition "to strictly uphold the fundamental rights of the individual from invasion through the pretext of a corporate regulation"; in this, the ruling was "eminently proper and just."[442] This was not only because it drew the line which police powers could not cross, thought it was frequently expressed in those terms; it was, instead, because it ensured that such legislation proceeded justly, in a way becoming of a republican form of government.

[441] "Article 1," *Central Law Journal* (Apr. 9, 1897): 299.
[442] Quoted in Ibid., 300.

III. Labor Regulations

By the turn of the century, members of the legal community took greater notice of the new species of local legislation appearing in the states. Justice Peckham spoke for many when he announced in his *Lochner v. New York* opinion that the "interference on the part of the legislatures of the several states with the ordinary trades and occupations of the people seems to be on the increase."[443] It was not enough to say that vast new regulatory laws were mere reactions against the new conditions of industrialization. In truth, the legislative process itself proceeded on wholly different assumptions from what it had before. It came with all of the usual features of due process, passing through both houses of each elected legislature, and signed into law by each governor. But beneath that process frequently appeared a goal quite different from republicanism.

A. The New Character of Social Legislation: "Health, Safety and Morals" in Question

One editorialist in *The American Law Review* declared such laws to be "of doubtful expediency and untried value, which may be useful to-day and disastrous tomorrow." This was always the effect of urgency in policy-making, whether real or imagined: it did not consider the long-term consequences, nor the precedent it would set both in politics and culture. Reform legislation could be the object of praise when signed into law; but it can become the cause of even greater suffering when it is carried all the way out – even as its first proponents walk away, or even continue to draw praise. Necessary reform was one thing, but reform that trumped the most fundamental rights of citizens was quite another and it was plain that there was far more at work in these kinds

[443] *Lochner v. New York*, 198 U.S. 45, at 63 (1905).

of regulations than solving social problems. The spirit of modern police power look upon "the ideas which inspired our early constitutions" as notions that should be "relegated to the past… we hear the demand for *change*, for an 'up-to-date constitution,' as if we were well-nigh prepared to abandon the fundamental ideas of the fathers in the mad rush to be in the latest fashion." What was worse, such assumptions behind those laws stripped away the important social feature of freedom: the free citizen "is not produced by the aid of a paternal government, but by assurances of protection in his natural rights, which encouragement to individual character." The worst aspect of such legislation was the way it corrupted individual virtue "so that he no longer appreciates the necessity of preserving this natural right."[444] Indeed, the corruption of police power could not be more obvious: "health and safety" were legitimate concerns, but "morals" was a far greater thing. Any police regulation that caused a decline in those morals had most certainly failed to achieve its end.

Law professor Glenda Burke Slaymaker observed the same legislative trend. Once, police power legislation was aligned with the right of property and the liberty of contract; it recognized that "labor is the chief, if not the only source of wealth," meaning that wealth was "of grave importance to the State." This came from that classic concept of property as the bedrock of all other rights and liberties: all others social goods, including those that fell within the police power, were dependent on solid economic rights, which all citizens were meant to enjoy in any republic worthy of its name. "A degraded industrial system superinduces, nay, inevitably fosters and produces, a degraded social system, and impairs the efficacy of the entire polity," he wrote. True, as Morrison Waite would have it, "the organic law of every State declares as an inherent one, the right

[444] "Dangerous Tendencies of Legislation," *The American Law Review*, 37 (Nov./Dec. 1903): pp. 846-847.

of every man to acquire and enjoy property." But those communities, however organic they are in practice, are really the "constitutional recognition of a right which existed long before constitutions were framed; such provisions are but the reflections of those immutable principles upon which all popular government has its support." That had to be the final resting place of such legislation – a recovery of just conditions in society, and a return to the fair dealing between employer and employee that ensure the economic foundation of the public good. This could make class legislation quite necessary: again, the means of republican government might have to surpass the end, and take the form of what appeared to be "paternalistic" government, which the advocates of *laissez-faire* so despised. But this was not to be confused with the proper power of constitutional government. There was, at that time, a rule developing that would explain that kind of government action, which Slaymaker restated: "[t]here must be some reasonable, some substantial ground of classification, based upon distinctions which inhere in the subject-matter of regulation, bearing on a just and proper relation to the necessities of the entire group similarly situated, excluding none, the facts of whose cases are essentially the same."[445] A reasonable law was one that sought to recover a just social order; an unfair law was one that failed to achieve that end, and thus resulted in true paternalism.

But for all the times law professors and judges might restate it, this rule was hopelessly vague. It existed in the realm of generalities about republicanism, and offered little guidance in practice – least of all in an age of industrialization. "Helpful as this definition is as a means of distinguishing the power of police from other powers, it obviously throws little light on the scope of this power," according to Henry R. Seager,

[445] Glenda Burke Slaymaker, "Labor Legislation: Its Scope and Tendency," *The Albany Law Journal* 64 (Jul. 1902): pp. 227-229; 231.

professor of economist at Columbia University. Decisions in the state and circuit courts were "confused and conflicting," and proved that "the courts will sustain any measure which they think [is] really calculated to promote the public welfare." Though this was the most tangible rule – though it was true when it came to defining the power of a republican form of government – it still seemed to open the way for endless and open-ended judicial interpretation. There was serious question about whether or not the courts "are really so bound by our written constitutions as some of these decisions seem to imply." It was up to the judiciary and its own sense of justice to decide what was and what was not a proper use of police power. "I may say, at once," Seager wrote, "that the conclusion to which I have been brought is that under the flexible provisions of our constitutions the question of the constitutionality of a restrictive labor law is inseparably connected with the question of the wisdom of such a law." If a restriction is wise, "it is an easy task to prove that it is also constitutional."[446]

That, of course, appeared to be a stretch on Seager's part: it is a basic political truth that the wisest choices are not always legal, nor is the law, with all of its limits and bounds, necessarily wise, even when it can account for all necessary exceptions and loopholes to its own rules. But this shows the novelty and genius of American constitutionalism: those laws assume political wisdom, and allow it much free reign within its broad and flexible sphere of authority. The Constitution is, after all, more than a text – a point that is apparent in the word "constitution" itself. It is the general outline of the institutions and procedures that "constitute" a government, and an overall spirit that animates them. Interpreting it, therefore, involves a great deal of consideration about

[446] Henry R. Seager, "The Attitude of American Courts Toward Restrictive Labor Laws," *Political Science Quarterly*, Volume XIX, Number 4, Dec. 1904, pp. 593; 589.

the wisdom of a statute, and whether it is a fulfillment of republican purposes, or is an enemy to them.

Yet some law review critics pointed out that the only reason judges were compelled to declare such things was precisely because they had fallen into doubt in the public's mind. "It can in fact be safely said that when the constitutions, both state and federal, were adopted, the words 'liberty' and 'property' used in them had a definite and well defined meaning," according to Andrew Alexander Bruce, an Associate Justice of the North Dakota Supreme Court, and prolific commentator on legal questions. Such a meaning required no explanation on the judiciary's part, because it was already understood that it "excluded all those acts and things which were actually injurious to the body politic, and which it would be the province of no sane government to encourage or to protect, much less perpetuate by a constitutional guarantee."[447] The meaning of police power, which meant the same thing as republican government (cf. Chapter 2), was so firmly planted in the American mind that even the most radical and over-bearing legislation was made pursuant to that end. The judiciary did not usurp the authority of state legislatures at all when it reviewed or even struck down their statutes; it was, in fact, granting state legislatures a firmer and more enduring basis for authority, not in power, but in the justice expected of republicanism.

Some critics of the conflict between police power and individual rights were keen to acknowledge the most essential aspect of police power: it was not health or safety, but morals that mattered most of all. If "carried too far," state police regulation "will dwarf the individual in the alleged effort to protect him and better his condition"; allowing such

[447] Andrew Alexander Bruce, "The True Criteria of Class Legislation," *The Central Law Journal*, 22 (Jun. 2, 1905): 435.

a method of law would allow "the degrading influences of a *paternal government*," according to an American Law Review editorialist (discussed above). He could not perceive, however, that such laws might actually be conducive to that public virtue and preservation of national right – indeed, what became of the "morals" that police powers were meant to preserve? Those who lamented "paternalism" might have been quite correct to say that most police power regulations failed to achieve – or intentionally avoided – that end. But by ignoring the possibility that such laws could recover that condition, that they might aim at the very self-reliance that judges like Stephen Field held so dear, critics missed an important aspect of constitutionalism. Not surprisingly, such critics did not look to the electoral process as the thing that taught public virtue – an activity that could "refine and enlarge the public views," or one "which nourishes freedom, and in return is nourished by it."[448] They looked instead to the "the wise and courageous courts of the several States," who had "stood in defense of manhood and liberty, against a policy which would finally weaken and destroy the independence of the individual."[449] Not local communities, domestic education, nor presumably even religion could maintain the moral foundations of society. That was the duty of elites in the legal community.[450]

Judge Bruce, however, did not agree. He drew a sharp distinction between moral character as radical individualism, and the sort of individualism that fit within the older

[448] James Madison, Federalist #10, in Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, ed. Charles R. Kesler and Clinton Rossiter (New York: Signet Classic, 1999), 76; Federalist #57, in Ibid., 350.
[449] "Dangerous Tendencies in Legislation," 860.
[450] A certain Judge Gordon on the Pennsylvania State Supreme Court agreed, in a ruling that forbade the same scrip program that would later appear in *Knoxville Iron Co. v. Harbison* (1901). Worse than an insult to the contract between employer and employee, the law was "an insulting attempt to put the laborer under a legislative tutelage," which was "degrading to his manhood." *Godcharles & Company v. Wigman*, 113 P.A. 431, at 437 (1886).

classical tradition, transmitted to the United States through Anglo-Saxon customs. The term "individualism" was terribly ambiguous: was it "the non-resistant anarchist," the "militant Saxon or Norsemen," or the personal autonomy of Jeremy Bentham and John Stuart Mill? Bruce argued that the greater tradition, both in terms of its justice and reliability, was, of course, the second of those three. Anglo individualism was "of the self-assertive, acquisitive kind," and therefore "did not admit of the need of the governmental protection of the weak." This was, of course, the brutal condition of pre-liberal society, when "seventy-five percent of the people were in practical serfdom," and lived under a class who believed "the only function of government was [to] advance their own individual protection and advancement." Still, the germ of happier condition was there. "The advocates of this individualism, however, were not anarchists. They believed in law," however distorted to fit narrow privilege it might have been. The development of that law, especially in the United States, was to allow the same "acquisitiveness" to occur, but at no expense to others. This was the basis of the moral self-reliance at which true police powers aimed. A failure to achieve that end was, in fact, a drifting back into the days when such legal protections and due process rights were designed to protect some entirely at the expense of others. This was the true meaning of "paternalism." It was no mere scare tactic; it was a real possibility, and the moral purpose of police power had everything to do with avoiding it, or of reinforcing the view that "the strength of a nation or of a state depends upon the strength and manliness and intelligence of its citizens, and that the preservation of these virtues is essentially a matter of governmental concern."[451] A police regulation that defied that end – one that made citizens weak and dependent – was a horrific thing indeed.

[451] Andrew Alexander Bruce, "The Individualism of the Constitution," *The Central Law Journal*, 62 (May

But just how rugged and independent and virtuous were those modern laborers? Perhaps a correct exercise of state police power was meant to elevate the condition of citizens to a level of equal self reliance, where none were "weak," but more or less strong. But recovering that state of things would indeed require the sort of legislation that allowed the power of republican government to set aside its natural for a time, the better to maintain it in the long run – or, again, to allow the means to surpass the end. It was obvious, though, that such laws were difficult to distinguish from the new species of legislation and the "paternalistic" tendencies that others feared: to what extent did the acknowledgement of weakness actually *make* people weak?

For others, such questions did not matter. Remarkably, many could admit that it was not the dire needs of laborers seeking relief through state legislation, but an actual shift in the understanding of what government was for, and what freedom actually meant. The old basis for freedom – the equal right to keep property, and to contract with others to acquire more – had long yielded to "social freedom," according to George W. Alger, which was "not freedom from law, but freedom by law," or the power to use the state to serve the collective interest, rather than that of the few. Hence, the vast new police regulations in the states, which were only the beginning point, the governments of closest proximity to the people, which had reason to expect far more from the national government in the future. Rather than an adaptation to modern industry, these things seemed "to indicate an almost conscious purpose of society," he wrote, "constrained by its own necessities to limit the range of individual freedom." Alger went even deeper than that, and explicitly denied that police power could have any control over the "morals" of citizens. In truth, "law cannot transform the character of the avaricious and cruel."

18, 1906): pp. 378-380.

Perhaps law could "create conditions under which men who are willing to conduct business on a plane higher than that of mere dollars and cents" – i.e., not by pursuing the good of individual persons, as Judge Bruce and others would have it, but by maintain social, collective freedom.[452]

The pressure was building on the judiciary to respond more decisively to these questions – not so much by the public, save for a minority of tycoons and *laissez-faire* idealists, but by the honor of the judicial vocation itself. "We understand the difficulty which judges encounter who conscientiously strive to master the practical question of the extent of their constitutional right," Shepherd Barclay wrote. What was a judge to do in the face of "crude and arbitrary enactments [which] seem, at times, to call loudly for corrective"? Yet it also called for a willingness to see the injustice that those laws were meant to solve – and allow that, for all their crude and arbitrary effects, they really were the only way to solve the sort of social injustices that came with rapid industrialization. Barclay's conclusion was especially precise: "The American courts cannot stand absolutely aloof in the struggle. The proper constriction of the organic laws demands clear conception and expression of the moral meanings of law. Effect must be given to the spirit which true law gives fourth." That, however, called for judges "to recognize the spirit of the actual law and not substitute its view of what the law should be."[453] That puzzle was presented, time and again, in the state courts; but now it made its way to the top, and compelled the U.S. Supreme Court to choose between the power of popular government, and the authority of the Constitution.

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[452] George W. Alger, "The Law and Industrial Inequality," *Albany Law Journal: A Weekly Record of the Law and the Lawyers* (Apr. 1907): 122; 125. Judge Bruce rightly identified the tendency among those who have "merely asserted another and higher individualism, the individualism of the state itself." "Individualism of the Constitution," 380.
[453] Barclay, "The Danger Line," pp. 28-29.

B. State Courts Confront Police Powers

While the Supreme Court sought to avoid ruling against police power regulations, the lower courts were not so timid. There was a certain logic to this: if the highest judiciary made it plain that it would abide by Morrison Waite's rule and refuse to strike down any police power regulations, there was no danger in opinions that might venture into new territory, summoning a great deal of history and legal theory to determine exactly what the Fourteenth Amendment had done to the Constitution. The decisions of lower courts were bound by state constitutions, and, given the newness of those documents, they often dealt with actual clauses addressing labor regulations rather than mere statutes; but in terms of interpreting the generalities of the federal constitution, the invitation for dictum was wide open. The U.S. Supreme Court may deny an expansive reading of the Constitution's due process clause; "nevertheless, we ought, as we think, to give expression to our own judgment, under the sanction of our official duty, to declare the law as we believe it to exist, notwithstanding we differ with the conclusions arrived at by the federal court," Peckham wrote.[454]

Most prominent among these cases was Judge Robert Earl's opinion for the New York State Supreme Court in *in Re Jacobs* (1885). The case involved a law restricting "tenement-house" cigar makers from working within their homes. It was, no doubt, a favorable condition: cigar makers could pursue a strong livelihood in their living rooms and near their children. A law restricting such activity was no doubt an insult for those who had long depended on such labor, since it involved no transportation fees, employee salary or overhead cost. Judge Earl noted just how disastrous this law actually was:

[454] *People ex rel. Annan v. Walsh* 22 N.E. 682 (N.Y. 1889) (Peckham, dissenting.)

under its requirements, ordinary citizens could find themselves criminals for things they never considered wrong or dangerous, and which cigar smokers never cared about in the least. More importantly, though, he reminded readers that the violation of basic constitutional rights did not have to involve the "physical taking of property for public or private use," he wrote. "Its capability for enjoyment and adaptability to some use are essential characteristics and attributes without which property cannot be conceived; and hence any law which destroys it or its value, or takes away any of its essential attributes, deprives the owner of his property." True, the meaning of police power was not entirely clear in the face of these things, "and the courts have not been able or willing definitely to circumscribe it." But he could still say with certainty that, whatever police power was, it "is not above the Constitution." When the fundamental law speaks, "its voice must be heeded." Most importantly, he pointed out that the Constitution "furnishes the supreme law, *the guide for the conduct of legislators*, judges and private persons, and so far as it imposes restraints, the police power must be exercised in subordination thereto."[455] It did not place limitations on the power of local legislatures; instead, it existed, once again, to guide them to their proper end.

The failure to achieve that end came, of course, with one dominant feature: the intent of the law, which was meant to serve a narrow interest within the state. Demonstrating this was difficult with descending into the depths of the legislative record and vast social research to prove that the legislature really was concerned about the health, safety and morals of tenement-house cigar makers. But Earl knew that such a task was quite beyond his duty. But none of this was necessary, because Judge Earl could simply ask: "What possible relation can cigarmaking in any building have to the health of

[455] *In Re Jacobs*, 98 N.Y. 98, at 105; 108 (1885). (Emphasis added.)

the general public?" If the statute itself could not demonstrate this, then its constitutionality was in question. He carefully illuminated all possibilities: smoking was not considered a threat to the health of nearby nonsmokers; therefore, neither could the manufacture of cigars. Similarly, there was no threat to the health of smokers who purchased such cigars – and even if there was, smokers knew exactly where their items came from, and agreed to it on the basis of the price. Hence, the legislation had some other motive, and it used the apparatus of the state to favor one class over another – presumably the moral reformers who simply did not like smokers. Even if it came from the purest good intentions, the economic effect could be disastrous. "Such governmental interferences disturb the normal adjustments of the social fabric," he wrote, "and usually derange the delicate and complicated machinery of industry and cause a score of ills while attempting the removal of one."[456] The only thing that could prevent this was the ability of state and national constitutions to shape the direction of legislation according to republican principles, and it was the judiciary's duty to ensure this.

Other cases followed suit, showing remarkable clarity about the purpose of republican government at the local level. *Ex Parte Jentzsch* (1895), for example, involved a classic Sunday closing law in California, aimed particularly at barber shops, who found those afternoons their prime hours of business. Judge Fredrick Henshaw was not being sarcastic when he wrote that "that our government was not designed to be paternal in form." This had everything to do with the sort of "public morals" for which police powers were designed. "Our institutions are founded upon the conviction that we are not only capable of self-government as a community," he wrote, but that people were also capable of "individual self-government." Like Judge Earl, Henshaw agreed that

[456] Ibid., at pp. 114-115.

police power was no easy thing to define. Yet he seemed remarkably aware that the difficulty was not because of its complexity, but because of the public's own struggle to sort through its own modern assumptions and forgetfulness about what republicanism meant. "[T]he difficulty which is experienced in defining its just limits and bounds, affords a temptation to the legislature to encroach upon the rights of citizens with experimental laws, none the less dangerous because well meant." The religious basis for the law was, no doubt, a thing worth mocking for Henshaw, and he had no small amount of hostility toward purely spiritual priorities affecting all of society. "Such protection to labor carried a little further would send him from the jail to the poorhouse," he wrote. Still, Judge Henshaw saw a serious problem of class legislation involved: if the state was going to insist on Sunday closing laws, it could not allow them to apply so narrowly as to punish one group and favor another. "How comes it that the legislative eye was so keen to discern the needs of the oppressed barber, and yet was blind to his toiling brethren in other vocations?" he quipped, and pointed out the variety of other private industries that continued to labor straight through the Sabbath. "The bare suggestion of these considerations shows the injustice and inequality of this law."[457]

But others saw things differently. The Minnesota Supreme Court confronted the same question, but could hardly see the statue as anything but a help to barbers and those in similar occupations. "The object of the law was not to interfere with those who wish to be shaved on Sunday, or primarily to protect the proprietors of barber shops," Judge William Mitchell wrote, "but mainly to protect the employees in them by insuring them a day of rest." It was up to the legislature to decide what was actually good for people, in even a religious sense. On this principle, the court sustained the law, in the certainty that

[457] *Ex Parte Jentzsch*, 112 Cal. 468, at pp. 472-474 (1896).

policymakers understood their subject better than the courts and even the people whom their laws so affected. The supreme wisdom of the law demanded "judicial notice": without such a regulation, "the employees in them work more, and during later hours than those engaged in most other occupations," he wrote, and given the habit of people to postpone trips to the barbershop until Sunday, "if such shops were to be permitted to be kept open on Sunday the employees would ordinarily be deprived of rest during half of that day."[458] For these reasons, Mitchell was certain that the state did not exceed its police powers regulations.

The central issue in these cases was, of course, about the good of individual persons, and whether that good aligned itself with the rights protected under the state and federal constitutions, or if it fell entirely within the judgment of lawmakers. One saw the good of individual persons as a matter of self-reliance in the face of all kinds of industrial adversity and struggle; the other saw it as that good as communal, and depending entirely on the power of the state to maintain a semblance of comfort and ease. The difference was, of course, the sort of fragmenting that occurred with a loss of political teleology in the minds of judges as well as legislators and the people. Both views were equally valid; but the ends were disconnected from the means, and this was sure to bring new difficulties as that forgetfulness spread even to the Supreme Court.

C. Natural Rights that Yield to Unnatural Necessity: *Holden v. Hardy*

The mining industry was the most appropriate place to begin review of police power legislation pertaining to wages and hours. Mines were, after all, the most extreme labor condition: the possibility of collapse was the least of the dangers; miners faced

[458] *State of Minnesota v. Petit*, 48 Minn. 57, at 58 (1898).

"[p]oisonous gases, dust, and impalpable substances" floating in the air, not only in the mines themselves, but in "smelters, and other works in which ores containing metals, combined with arsenic or other poisonous elements or agencies, are treated, reduced, and refined, and there can be no doubt that prolonged effort, day after day, subject to such conditions and agencies, will produce morbid, noxious, and often deadly effects in the human system."[459] No other industry demanded quite the same regulatory attention. For the obvious health-related issues, the state of Utah felt it necessary to pass a law limiting all mine workers to eight hours per day, except in cases of emergency. Mr. Albert Holden, manager of the Old Jordan Mine outside of Salt Lake City, allowed an employee to work overtime, by his own choice, in hopes of earning extra income. For this, Holden was arrested, and charged with the required misdemeanor.

The Utah State Supreme Court upheld the legislation. But it was not at all because the mining industry was "affected with the public interest," nor was it on the basis of the dire conditions of mine workers. Instead, Judge Charles S. Zane applied the same rule expressed by Harlan and Peckham: to be constitutional, "[t]he law must be connected with some of the objects named, and calculated to effect that purpose." The power of the state must show that it actually achieves the just and fair conditions it claims to seek; without that, it is most likely meant to serve a single special interest, meaning it cannot be called a law in any proper sense. "If it is not so connected and adapted, the court has the right to hold that it is not within the scope of that provision." Like his predecessors, Zane admitted that this was no simple thing: the judiciary was called upon to make explicit something the people were supposed to know well enough on their own. "The court must be able to see clearly that the law was not so connected before holding it

[459] *Holden v. Hardy*, 169 U.S. 366, at 396 (1898).

void for that reason." It could not strike down a law because it appears "unnecessary or injudicious," he wrote, nor could it deem itself "more sagacious than the legislature" on the ability of a law to "promote progress and prosperity."[460]

But Zane seemed unsure about how to judge whether or not the law did such a thing. "We do not agree with defendant's counsel that the business of mining is affected with the public interest, and the legislature has the power to pass the law for that reason," he wrote

> Mines are used by private persons or corporations, who have the exclusive use and control of them, as a farmer may own his farm, and have the exclusive use and control of it. The fact that the business may benefit the public does not give the public any interest in the mine or its business, or affect it with the public interest.

Were it a matter of rates on the sale of goods or taxes on the mining company, there would be serious constitutional doubt about the state law. But the hours of mine workers was a separate issue: while the state could not touch the mining company or the labor agreements it had with employees, the state could legislate with respect to the health and safety of miners as individual citizens. "Whatever difference of opinion may exist as to the extent and boundaries of the police power," he wrote, "however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does exist to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public good."[461] Hence, the law could acknowledge the rights of private business, while at the same time uphold the needs of individual persons, and allow the latter to surpass the former. Exactly when and how this was justified was, of course, yet to be determined.[462]

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[460] *Holden v. Hardy* 14 Utah 71, 46 p. 756, at 758 (1896).
[461] Ibid., 761.
[462] On this point, Zane appeared to follow the reasoning of other state courts who acknowledged the blatant nature of the class legislation, yet protected it anyway because of the nature of mining. In *Ermert v. Dietz*,

This was what Justice Henry Billings Brown had in mind when said in the Supreme Court's *Holden v. Hardy* opinion, "that law is, to a certain extent, a progressive science."[463] He did not mean that law was progressive as the "progressives" proper meant it, for law could do no such thing. It was a science, rather than an art, in other words; it progressed toward specific goals, or the deeper and more complete discovery of things already apparent. In this case, it meant the development of a Fourteenth Amendment rule.

Brown did seem to have a strong idea of what that rule might be prior to addressing the *Holden* case. In *Lawton v. Steele* (1894), he agreed with the conventional view that police power concerned "everything essential to the public safety, health, and morals." But more than that, he saw a correlation between those concerns and the ones embodied in the Fourteenth Amendment. "To justify the State in thus interposing its authority in behalf of the public," he wrote, it must appear "that the interests of the public generally, as distinguished from those of a particular class, require such interference." Hence, the qualification of neutrality: public power could not be used to serve a single interest. More importantly, though, Brown said that for such law to be constitutional, it was critical that "the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals." It was the qualification that the means and the end come together, and that an instance of the means surpassing the end – even as it deprives private business of some of its livelihood – still seek a just and fair

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the Kentucky Supreme Court claimed that the "classification or apparent discrimination made in the statue is permissible, because it is natural and reasonable and, moreover, entirely consistent with the end sought to be accomplished by the organic law." No amount of fairness could overcome the conditions of mines, and the need for the state to single out the citizens who labored in them. For this reason – but only this reason – the legislature was right to "apply the benefit of the constitutional provision to that portion of the class only which needs the benefit." 58 Ky. 442 (1900).

[463] *Holden v. Hardy*, 169 U.S. 366, at 385 (1898).

order. The problem was not the broad use of police power per se; it was the when a legislature would "arbitrarily interfere with private business," or regulate without a purpose, save for short-term interests.[464]

It was reasonable to place a variety of restrictions on the power of the state legislature; but progress in law meant realizing that restrictions per se did not actually amount to republicanism in the style of the Constitution's Article IV. It meant realizing that "in some of the states, methods of procedure which, at the time the constitution was adopted, were deemed essential to the protection and safety of the people, or to the liberty of the citizen, have been found to be no longer necessary," he wrote. Those general guarantees, the right of property and liberty of contract, though as absolute as Justice Field and Professor Guthrie believed, were nonetheless the ends that could yield to necessities. The general principles had to be applied to the particular circumstances – not so they could be abolished at the hands of progressive reformers, but so those governments might better preserve them in the long run. The enduring aspect of republicanism was the essential point: society might very well need broad regulations to solve immediate problems; and those regulations might deprive private citizens of their natural rights to private property and liberty of contract. But such solutions could fit with the general purposes of the regime. "This case does not call for an expression of opinion as to the wisdom of these changes, or their validity under the Fourteenth Amendment," Brown wrote. Here, he stated the concept of law central to the Western intellectual tradition: "[W]hile the cardinal principles of justice are immutable, the methods by which justice is administered are subject to constant fluctuation." This explained a great deal about the Constitution of the United States: it is, indeed, "necessarily and to a large extent

[464] *Lawton v. Steele*, 152 U.S. 133, at pp. 136-137 (1894).

inflexible, and exceedingly difficult to amend." It could only be that way because it was "the law of the land," and dealt only with broad, enumerated, national concerns. Yet even with the Fourteenth Amendment, it "should not be so construed as to deprive the states of the power to so amend their laws as to make them conform to the wishes of the citizens, as they may deem best for the public welfare, without bringing them into conflict with the supreme law of the land."[465] As alluring as this might have been, Brown seemed to miss a fundamental point: republicanism, in its truest sense, was not something that "conflicted" with the supreme law of the land; it was pursuant to that law.

Nor was his choice of words very sensible: why he said "progress" rather than "improvement" was perhaps an attempt to modify his meaning to fit the times; what he meant was plainly not the same thing as "progressivism." True, police power had broad and expansive legitimacy by Brown's definition; "[w]e do not wish, however, to be understood as holding that this power is unlimited," he wrote. While state governments may exercise broad power over their own affairs, depending on their respective customs and local conditions, "the people of the entire country have laid in the constitution of the United States certain foundational principles, to which each member of the Union is bound to accede as a condition of its admission as a state," he wrote. Those "foundational principles" had everything to do with the Due Process clause, appearing in both the Fifth and Fourteenth Amendments; they did not establish, but *recognized* "that there are certain immutable principles of justice, which inhere in the very idea of free government, which no member of the Union [i.e., a state] may disregard." Those principles of justice forbade "that one man's property, or right to property… be taken for

[465] *Holden*, at pp. 385-386; 387.

the benefit of another," nor shall a state "deprive any class of persons of the general power to acquire property."[466]

As correct as Justice Brown might have been about those "immutable principles," he was not so clear about what they meant for government, or how it was that government might achieve those ends. His immediate solution was therefore a pragmatic one, dealing with the facts of the mining industry rather than the way the law related to the recovery of justice. While the police power was "inherent in all governments," he wrote, it had

> doubtless been greatly expanded in its application during the past century, owing to an enormous increase in the number of occupants which are dangerous or so far detrimental to the health of employees as to demand special precautions for their well-being and protection, or the safety of adjacent property.[467]

True, that sort of police regulation was "sparingly used" in the earlier part of American history. But, as the standard historical view maintained, the nation was agrarian then, and it was industrial now, which meant the rule had to be modified to fit the times. Yet it was not that such regulations might protect those rights in the long run – rights that might very well include the miners themselves; for Brown, it was simply the way the times had changed, which did not make the precepts of republicanism more present, but less. It was not that the "immutable principles" he so revered could be modified to fit the times; instead, the times had surpassed those things, and compelled them to yield to new necessities, as dictated by the state legislature.

Ultimately, it was not essential for Justice Brown that the rights of citizens be preserved. Instead, the question in each case "is whether the legislature has adopted the statute in exercise of a reasonable direction, or whether its action be a mere excuse for an

[466] Ibid., at pp. 389-390.
[467] Ibid., at pp. 391-392.

unjust discrimination, or the oppression or spoliation of a particular class."[468] Yet even with this keen view of ulterior motives behind local legislation, he failed to examine this one very closely. It is curious that this list of hazards did contain the more obvious one: the psychological effects of being underground for many hours. This would seem to be the primary reason for an eight hour law. If the Utah legislature was concerned about labor conditions, they would seek to regulate and require a vast array of health and safety concerns in the mines, rather than focus on hours.

Justice Brown certainly wished for police power and the rights stated in the Fourteenth Amendment to prove congruous, but the method of showing the way was crude. He knew that both Justice Waite and Justice Field had only parts of the whole picture of what the Fourteenth Amendment was for, but how they fit together was not entirely clear in his mind. The facts of mining did not relate in any way to the precepts of the law, nor was it a judicial duty to explain the connection; instead, the facts simply overrode the precepts, which, for Brown, could receive little more than glowing praise and philosophic reflection, as the object of sacred piety, which stood very much apart from real life. "On the whole, his willingness to construe the police power broadly and to sanction legislative modification of laissez faire principles was more pervasive than his invocation absolute principles of private property," according to Robert J. Glennon of Brandies University (in his aptly titled article on Brown's "values in tension"). For this reason, "the police power overrode contentions of private property and freedom of contract because facts existed demonstrating dangers to the health of employees."[469] This most certainly explained his ill reasoning in *Plessy v. Ferguson* (1896), where he and the

[468] Ibid., at 398.
[469] Robert J. Glennon, Jr., "Justice Henry Billings Brown: Values in Tension," *University of Colorado Law Review*, 44 (1973): pp. 567-568.

majority held that racial segregation was constitutional under the "separate but equal" doctrine: it was an attempt to make the law appease both sides, even as it came with a tremendous cost to African Americans. But Justice Brown was only presenting the rudiments; subsequent cases would have far more to say: the law would indeed progress in the way that Justice Brown hoped.

But the *Holden v. Hardy* opinion was not taken the way he meant it in the legal and academic community. The fact that he could identify "immutable principles" and "unalienable rights" within positive law opened the way to a whole new kind of jurisprudence, something that went far beyond anything Justice Stephen Field had espoused. Field's concern, once again, was the sanctity of property and the liberty of contract; but Brown, and Peckham before him in the *Allgeyer* case, looked to something even more fundamental than that. Such rulings could "give some contracts immunity from legislative regulation," according to Circuit Judge Shepherd Barclay in his commentary on the *Holden* ruling. These cases compelled him to suggest that "the judiciary is approaching the danger line of conflict with the principles of popular government which the Federal and State constitutions of our country intend to express." It was not that popular government was inherently void of those principles, as Justice Waite and, later, Justice Oliver Wendell Holmes would claim. In truth, American democracy had always embodied a sense of its own precepts. For the Court to articulate them, though, was to assume that the Court was also the institution that made popular government possible (as our own Justice Stephen Breyer claims). The judiciary most certainly had a role in this process. But it was not to enforce those precepts, but to ensure that they endured in the public mind, or what Barclay called the "noble self-restraint,"

which the people learned from their own Constitution. They learned it, though, in large part because the judiciary could teach it to them through the rational and persuasive arguments that it gave in their opinions. This never meant that the Court was the sole instrument of protecting liberty – nor could it do such a thing. That interpretive, teaching, instructing power "has successfully stood the scrutiny of that final arbiter of all things in a republican State – public opinion."[470] But, it seemed, for the first time in the nation's history, the Court and the people were only disagreeing, but moving on divergent paths.

Conclusion: Constitutional Limitations versus Republican Ends

"Limitations" might very well direct the course and development of a government; but they could not give it its nature, nor ensure that it realized the end for which it was intended. True, the Constitution explicitly says what "no state shall do," on multiple occasions. But there is reason to believe that these were not mere restrictions, or attempts to contain raw political power. The end of Article I, in Section 9, for instance, states that "[n]o state shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for the execution of its inspection Laws." Yet this was part of a positive definition of congressional power: it was not about what states could not do, so much as what Congress could do – and *would* do if it collided with state governments, since "all such Laws shall be subject to the Revision and Controul of Congress." So too with military matters and foreign affairs:

> No state shall, without the Consent of Congress, lay any duty on Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in imminent Danger as will not admit

[470] Shepherd Barclay, "The Danger Line," pp. 26-27.

of delay.

Most of this clause specified the extent of congressional power; but the rest admitted the power of the states: like any republican form of government, they were justified in defending themselves from invasion, or some other danger "as will not admit of delay."

Article IV of the Constitution, which establishes the authority of the states under the Union, is even more revealing, in that it never once refers to limitations on states, nor does it use the common phrase, "no state shall." True, Congress has power over "Full Faith and Credit," but only to "prescribe the Manner in which such Acts, Records and Proceedings shall be proved." Citizens of states are entitled to the "Privileges and Immunities" of all others; traitors, felons and other criminals are to be returned to the state in which they committed the crime. And, of course, Congress has the power to admit new states and govern territories. All of this, though, came from the underlying principle stated in the end of Article IV, which is central to any right understanding of the Supreme Court in the Lochner Era: "The United States shall guarantee to every State in this Union a Republican Form of Government." Indeed, far from a limitation, the Constitution was a powerful affirmation of what states were for, and it existed to ensure that they lived out that end as they were supposed to. The ability of the United States Supreme Court to maintain this would be put to the test, as it finally turned to the first case that failed to achieve that end – the era's namesake from 1905, *Lochner v. New York*.

Chapter 8:

Lochner v. New York and the Decline of American Natural Right

Aristotle framed the classic challenge of republicanism this way: "If the poor by the fact of being the majority distribute among themselves the things of the wealthy, is this not unjust?" The poor might respond: "'it was resolved in a just fashion by the authoritative element!'" i.e., it was resolved through "due process of law," involving deliberation, votes and all of the requirements of legislation expected of a just society. Considering a society as a whole, though, "if the majority distributes among itself the things of the minority, it is evident that it will destroy the city." At the same time, though, Aristotle was aware of the other side of the problem. Perhaps the right to keep wealth ought to be protected; but "is it just, therefore, for the minority and the wealthy to rule? If they act in the same way and rob and plunder the possessions of the multitude, is this just? If so, *the other is as well*."[471] This was a view of natural justice, and an understanding that laws and social arrangements had to apply universally to a given society, and be neutral in the way they dealt with groups of citizens. It was never a perfect arrangement, of course, and all regimes were more or less depraved versions of the one that was truly just; but this kind of neutrality was still the sort of thing that all regimes at least aimed at, whether they chose it or not. For this reason, the republic (or "polity," as Aristotle knew it) was the best regime in practice, or the goal that all founders and reformers at least had in view when they went about their political tasks.

[471] Aristotle, *The Politics*, trans. Carnes Lord (Chicago: Chicago University Press, 1984), 1281a15-20. (Emphasis added.)

This was true in the early Christian era, even as republicanism was frowned upon as a pagan notion that the world had grown out of, as it turned to more trustworthy Christian kings. But Thomas Aquinas saw far more to politics than that. All laws had the character of republicanism, even if they were not made through republican institutions or processes, in that "the law must needs regard principally the relationship to happiness," he wrote. This could never mean the happiness of a special class; it was, in fact, the happiness of the whole, "since every part is ordained to the whole, as imperfect to perfect," he wrote; "and since one man is a part of the perfect community, the law must needs regard properly the relationship to universal happiness." It was not the comfort and safety an ease of a political community that gave it its just character; all of those things were conducive to such a condition, but they were not the same thing as the purpose for which each individual was intended. "[S]ince the law is chiefly ordained to the common good, any other precept in regard to some individual work, must needs be devoid of the nature of a law, save in so far as it regards the common good."[472] This was not a requirement for law; it was, in fact, the thing that made all law possible. Without the precept of the common good, the whole definition of "law" crumbled away, leaving only power. Perhaps that was the truth of all things; but for Aquinas, it could not be called "law."

This view of natural justice persisted into early modern times, even among the most novel schools of political thought. This was true even in the liberal political philosophy of John Locke. He was, of course, quite smitten with the idea of natural God-given rights, and found himself among other "Rights of Man" enthusiasts of his era. But Locke understood that even the most righteous revolutionary was inadequate when it

[472] *Summa Theologica*, I, I, Q. 90, A. 2.

came to protecting those rights over long periods of time, nor was rights enthusiasm alone enough to ensure those rights for everyone equally. Such protections and guarantees came only from "settled standing rules, indifferent, and the same to all parties; and by men having authority from the community, for the execution of those rules, decides all the differences that may happen between any members of that society concerning any matter of right." This guarantee came from something far better than regimes and laws: it came from government. It consisted of elected officials, who could at once exercise sufficient power over the people, and at the same time, have that power checked through certain administrative procedures. Any decision of such a body "passes for the act of the whole, and of course determines, as having, by the law of nature and reason, the power of the whole." It was not that governments had to work this way, as a matter of imperative; it was instead the only reason a government could exist in the first place, because only such a system would be worthy of the consent of the people who chose it. He wrote: "nothing but the consent of every individual can make any thing to be the act of the whole."[473]

Latent within these various concepts of a just political order is the truth that would come to make itself explicit in the American regime. The Founding arrived at the destination that Aristotle, Aquinas and Locke could only point to. Beneath many layers of ancient tradition and custom, there was the self-evident truth about equality of all human beings, a series of rights that they receive from their creator, and the truth that government existed to protect those rights. It would take several centuries to come into focus, and only gain complete clarity when Thomas Jefferson penned his explanation for the colonies' separation from Britain in 1776. The truths he saw were not meant

[473] John Locke, *Second Treatise on Government* (Minola: Dover Thrift Editions, 2002), pp. 39; 44-45.

exclusively for "citizens" of a common racial or religious identity, as in was in Rome and Geneva; the Founders borrowed the lessons from those regimes to design a system meant to protect the freedom of human beings simply. These principles, stated in the Declaration of Independence, were "[n]either aiming at originality of principle or sentiment, nor yet copied from any particular and previous writing." It was instead the truths that human beings had always known, and appeared within such philosophies "as Aristotle, Cicero, Locke, Sidney, &c."[474] The United States was not novel in this respect; it was simply the first regime to ever found itself on the self-evident truths that human beings had always known. What was formerly taught only by the wisest was now public, and in the open for all of mankind to appreciate.

There was more to that achievement than natural rights per se. It was, of course, a timeless fact of political life, and the constant realization of political philosophy, that natural justice does not defend itself. Those who sought to found civil societies or reform unjust ones had to devote far greater attention to the method of protecting natural right than articulating it, however beautiful those discussions might be. The statesman reserved his philosophizing for private life; the rest of the time, he dealt in terms political power and manipulation like everyone else. This appears to have been an especially strong point in the "American mind" as Jefferson knew it: early Americans were able to look at both the high and the low in human nature; to see that abstract truths had to be put aside occasionally to better understand the brutal realities of power and corruption; and, at the same time, to never lose sight of natural justice and natural rights – to see how the "sacred fire of liberty" shines deeply into even the darkest and most depraved corners of the human heart.

[474] Thomas Jefferson, "Letter to Henry Lee," May 8, 1825.

Daniel Webster saw something of this in his famous testimony before the Court in *Dartmouth College v. Woodward* (1819). For him, the letter of the Constitution mattered only in relation to its meaning, and its meaning could not be maintained without the procedures that the document created. The spirit of the Constitution was the same in all republican forms of government, i.e., "that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society." This meant that republican procedures did not stand alone, but existed as means for the sake of a much greater end. "Everything which may pass under the form of an enactment, is not therefore to be considered the law of the land," Webster wrote. If this were so, if mere procedure was the only feature of a free government, then a vast variety of injustices could be committed without the slightest damage to the fundamental law. "Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void," he wrote. "It would tend directly to establish the union of all powers in the legislature," meaning justice itself "would be an empty form an idle ceremony."[475] It was as simple as acknowledging that justice is a more fundamental thing than law, and that legal procedures alone are only good insofar as they seek or at least approximate natural right.

Before the American Constitution, the devices used to protect these kinds of rights were feeble in their task. This was what Alexander Hamilton had in mind when he wrote that "the science of politics," like all sciences in the Enlightenment era, "has received great improvement. The efficacy of various principles is now well understood,

[475] Daniel Webster, *Speeches and Forensic Arguments, Vol. 1* (Boston: Tappan, Whittemore and Mason, 1848), 128.

which were either not known at all, or imperfectly known to the ancients."[476] The way the design of a government could better ensure the promise for which all governments come into existence, i.e., the protection of property, which is itself the bedrock for life, liberty, and the pursuit of happiness. The answer was plain enough: it must act as a powerful, efficient, energetic tool – and a deadly one, when necessary, but one that could function only in the right way, and for the right reason.

Hamilton and the Founders knew, though, that there would be times, perhaps frequent, when such a government would need to extend beyond basic neutrality, the better to preserve it in the long run. Federalist #23 is often associated with presidential power, given its explanation of constitutional "authorities essential to the common defense." But Hamilton's point was not about presidential power per se; it was a description of the nature of republican energy, and the vast extent to which it could go to fulfill its purpose. True, the contingences of international affairs are far more rapid and unpredictable than those of local affairs. Developments in domestic life are slow and quiet, and major transitions occur primarily in thought and language; it is their consequences that grab national attention through domestic upheaval, or at least realignment elections. His description of that energetic government is essential: the means at a republic's disposal "ought to exist without limitation," he wrote. Constitutional "limitations" were not essential to American republicanism, aside from qualifications for certain offices and the relationship between state and national government. Far more important was the life and spirit of such a government, as it existed in light of its *telos*, and the corresponding happiness of citizens.

[476] Federalist #9, in James Madison, Alexander Hamilton, and John Jay, *The Federalist Papers*, ed. Charles R. Kesler and Clinton Rossiter (New York: Signet Classic, 1999) 67.

> This is one of those truths which, to a correct and unprejudiced mind, carries its own evidence along with it; and may be obscured, but cannot be made plainer by argument or reasoning. It rests upon axioms as simple as they are universal; the *means* ought to be proportioned to the *end*; the persons, from whose agency the attainment of any *end* is expected, ought to possess the *means* by which it is to be attained.

This was a description of all republican forms of government, even in the states, and it offered the reasons for those governments to override their neutrality for the sake of preserving it better in the future.

But all of this was lost in modern America. Far more than industrial transformation, the rise of cities, or the new conditions of labor and trusts and monopolies, there was the slow, careful and deliberate rejection of these axioms, in government and biology and metaphysics alike. Darwinism shook the Western way of thought so completely that even those who sought to resist it could not escape its grasp. Even as they sought to apply the classic Western view of republicanism to present times, they more often surrendered the axioms that made it possible. Oliver Wendell Holmes' famous dissent in *Lochner v. New York* (1905) spoke for many in the way it took one small step forward and then several back: it was quite true that the Constitution "is made for people of fundamentally differing views"; at the same time, for Holmes, no procedure or institutional check could distinguish "certain opinions natural and familiar" from those that were "novel, and even shocking."[477] Hence, the outward forms of liberty carried no basis for liberty at all.

What was missing – what was rejected and then forgotten with the rise of advanced modernity – was the classic view of republican energy. It was not the same thing as power, which had no direction or bounds; energy was, instead, something that realized its own proper function. Energetic republicanism was not the same thing as

[477] *Lochner v. New York*, 198 U.S. 45, at 76 (1905). (Holmes, dissenting.)

power, nor did it need to be limited, because it could only act according to its own nature. But that was an idea whose day had passed in the minds of most Americans. And, indeed, many of them welcomed it. Richard T. Ely, for instance, wrote on the "forces which are everywhere manifesting themselves in the most enlightened nations, and are resulting in the evident increase of the sphere of industrial liberty for the masses of men" i.e., not for individuals. Ely understood precisely the connection, though, between the rights of individuals and the neutrality of government. Violations of neutrality were not mere means of preserving the natural rights of all in his view; they were, in fact, the new way government would have to work. "It is absurd to say that we must not pass any law in the interests of a single class of men," he wrote; "inasmuch as men exist in classes… industrial laws, to be effective must deal with them as they exist in classes."[478]

Still, the Fourteenth Amendment was framed in the twilight of the era when classical republicanism was still a firm concept in the minds of its framers. It was, in the short run, a pragmatic tool, or the necessary empowerment of Congress over the South in the Reconstruction Era (cf. Chapter 4). It was proof that even the hardest-fought and bloodiest military victories were unrelated to the true battles, which occurred above all among the minds of men. The problem, though, was how the victory went to the other side, and created a political and philosophic environment where the Constitution would find itself estranged. The Amendment was an attempt to establish the Declaration of Independence against those institutions and practices that were "founded upon exactly the opposite idea," which would go on to become an irresistible historical fact.[479]

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[478] Richard T. Ely, *Studied in the Evolution of an Industrial Society* (New York: Macmillan Company, 1913), 422.

[479] Alexander Stephens, "Cornerstone Speech," March 21, 1861. Darwinian historicism, and the progressivism that grew out of it, would go on to refute the "errors of the past generation," whose modern

It was always understood that the Constitution was "declaratory of principles of natural constitutional law which were to be deduced from the nature of free government," Roscoe Pound observed. Questions of procedure were secondary. "In substance they were questions of a general constitutional law which transcended the text; of whether the enactment before the court conformed to principles of natural law 'running back of all constitutions' and inherent in the very idea of government of limited powers set up by a free people." But the connection between process and substance was broken – or, according to Pound, it was never there to begin with. "The interpretation of a written instrument, no matter by whom enacted, may be governed by law, indeed, but can yield no law." Letters on a page were letters on a page, and the written law itself could never carry within itself any meaning beyond the literal thing itself. Still, the belief persisted. Older courts and jurists "sought to make our positive law, and in particular our legislation, express the nature of American political institutions," Pound wrote; "they sought to shape it and restrain it as to make it give effect to an ideal of our polity." The ideal was, of course, the natural rights stated in the Declaration, and understood in terms of property and liberty of contract. But that was before the coming of a "metaphysical-historical theory worked out in the continent of Europe." History showed us it was otherwise – that the basis for those rights was malleable and changeable. It did not require any serious look into the precepts of justice, but an "inquiry into the pre-existing

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advocates "still cling to these errors, with a zeal above knowledge," itself the result of "an aberration of the mind from a defect in reasoning," Stephens said. That was, of course, precisely the criticism aimed at opponents of progressivism in later years: they were reactionary, Constitution-worshipers, and blind devotees to the past. It was no mere claim that mass-democratic equality was foolish, and tended to punish all honor and excellence; men with lesser talent than Stephens' could show that. His objection instead went all the way down to what he declared "fancied or erroneous premises." The facts of slavery, beliefs about racial superiority, or the economic consequences it had on the South were all peripheral, or mere consequences of the truth that the South embodied. Those who disagreed "were attempting to make things equal which the Creator had made unequal," Stephens wrote; they were defying history, which had become one in the same with God himself. Ibid.

law and the history and development of the competing juristic theories." The guiding basis of all law in modern times "is not logic only but moral judgments s to the particular situations and course of conduct in view of the special circumstances which are never exactly alike."[480] It was, in other words, law based on experience rather than reason, and the way felt needs determined the meaning of things that were otherwise seen as permanent and unchanging.

Who, then, should wonder at the befuddled tone of Lochner Era Supreme Court opinions, caught as they were between the ancient way of law embodied in the Constitution and the modern trends that were intensely opposed to it?

I. The New York Bakeshop Act and the Constitution

The coming of the *Lochner v. New York* ruling in 1905 was preceded by a few important cases. In *Knoxville Iron Co. v. Harbison* (1901), it upheld a Tennessee law forbidding companies from restricting employee salaries to company scrip rather than cash payments. The contract was abundantly clear for those who accepted the job, and the scrip could be used to purchase all things employees might need in the company store, probably at below-retail prices. Still, the state legislature found this a violation of the right of contract, since employees had a right to acquire wealth and spend it as they thought best. Justice George Shiras deferred almost entirely to Judge Caldwell's opinion for the Tennessee Supreme Court, who observed that the law was "general in its terms, embracing equally every employer and employee who is or may be in like situation and circumstances." For this reason, Caldwell believed it was "entitled to full recognition as

[480] Roscoe Pound, *An Introduction to the Philosophy of Law* (New Haven: Yale University Press, 1922), pp. 20-21; 61-62.

the 'law of the land' and 'due process of law' as to the matters embraced." The act was constitutional, not because of the social contract basis of the state, nor because of the perfect wisdom of the legislature; it was upheld because it was a legitimate use of the police power, leaving the court with "no hesitation in holding that it is valid both as general legislation, without reference to the state's reserved police power, and also as a wholesome regulation adopted in the proper exercise of that power."[481] Judge Caldwell never referred to "limitations on police power," or saw his own duty as one of containing the democratic impulses in the states; he was concerned, above all, with whether or not police power functioned according to its proper end, which, in this instance, it did.

Yet Justice George Shiras misunderstood the state court's point, even as he quoted Judge Caldwell at length. It was not the "proper exercise" of police power that concerned him; instead, he wrote, while "the right of contract is not absolute in respect to every matter," it may be subject to the "restraints demanded by the safety and welfare of the state and its inhabitants."[482] State police power had no specified end as Judge Caldwell saw it; it, for Shiras, a thing to be contained, and for him, this particular police regulation was within its sphere of legitimacy.

Justice John Marshall Harlan sought to clarify this, once again, in his opinion for the Court in *Atkin v. State of Kansas* (1903). The case involved the hour legislation, but this time, relating to civil servants working for the state government itself. The *Holden* rule might have been the guiding principle here: the conditions of laborers determined the necessity of the law under the *Holden* ruling; an office job was certainly the most comfortable positions of the day; hence, it would seem right to strike it down under the

[481] Quoted in *Knoxville Iron Co. v. Harbison* 183 U.S. 13, at pp. 19; 20-21 (1901).
[482] Ibid., at 22.

Fourteenth Amendment's Due Process Clause, as the plaintiff claimed. "He insists that the Amendment guarantees to him the right to pursue any lawful calling, and to enter into all contracts that are proper, necessary, or essential to the prosecution of such calling," and that the state plainly interfered with that right. He acknowledged that "the work performed by defendant's employee is not dangerous to life, limb, health," and that extended hours could never become dangerous. But Harlan and the majority upheld the law, for an important reason: it was a fulfillment of a proper state function. The objections "seem to place too attach too little consequence to the relation existing between a state and its municipal corporations," he wrote. "Such corporations are the creatures – mere political subdivisions – of the state, for the purpose of exercising a part of its powers." True, like any legislative body, the state was restricted to exercising only enumerated powers, or, at most, those "that may be necessarily implied from those granted." It may have been true that the state was concerned with all of the usual aspects of the workers' general welfare, the "promotion of morality," and the leisure necessary for good citizenship. But the Court had "no occasion here to consider these questions," Harlan wrote.[483] Such things fell within the proper functioning of the state, and could not conflict with the Fourteenth Amendment because they were, in fact, part of the Amendment's own expectations about what a state does.

Such was the reasoning that the Court brought with it in deciding the case of *Lochner v. New York*. Those facts were typical for their time: under pressure from lobbyists, the New York State legislature passed the Bakeshop Act in 1895 which restricted the hours of labor for bakers, and the Supreme Court, for the first time, stuck it down on the basis of the Fourteenth Amendment's Due Process clause. The act was met

[483] *Adkin v. State of Kansas*, 191 U.S. 207, at 219; 222-223; 224 (1903).

with great approval on all sides: it was introduced to the state legislature in February, and it passed a month later with a unanimous vote in both the Assembly and the Senate. Mr. Joseph Lochner, an immigrant businessman from Bavaria of decent community standing in Utica, then found himself in the crosshairs of state law because he allowed his employee, a certain Aman Schmitter, to work over the prescribed number of hours. Lochner had always found himself in tension with local factions, particularly the journeyman bakers' union in the Utica area. The popular push for legislation was no doubt a result of his willingness to incite their anger with his distain for anyone who wished to tell him how to run his bakery. The most striking thing, though, was how the overtime was *voluntary* on Mr. Schmitter's part; it was not only Mr. Lochner but his employee, and presumably other employees, who did not fall into line with local baker unions. People like Schmitter were potential scabs; a law under the guise of legitimate police power was therefore favorable for union organizers who wished to punish those who did not fall in line with their schemes.

Lochner and his attorney, William S. Mackey, refused to plead at the criminal trial with the intention of pressing their case forward into the higher courts. If there was a constitutional issue, they were going to be the ones to find it, and they detected much sympathy for the plight of business owners in the judiciary.

A. Defining the "Public Interest": *Lochner* in the Lower Courts

Judge John M. Davy of the Fourth Appellate Court, there was a fundamental difference between a regulation and a prohibition. "The statute in question does not restrict the right of the defendant to carry on his business," he wrote. For this reason,

"the statute does not prohibit any right, but regulates it; and there is a wide difference between regulation and prohibition – between prescribing the terms by which the right bay be enjoyed, and the denial of that right altogether." Regulations could be extensive and even "paternalistic" in the opinions of some; but there could be no grounds for objection when the basic right was still intact, and still enjoyed. So it was with hours legislation: the contract between employer and employee had not changed at all, and though the state may place layer upon layer of regulation on it, even affecting the hours of work, the right of property and liberty of contract remained the same.[484]

More importantly, Judge Davy found that there was a tremendous public interest, not only in the health and safety of the bakers, but of the food they produced. "It is very important for the health of the community that bakers should supply people with wholesome bread and pure food." The need to protect consumers appeared to be even more important than protecting the bakers. Intense heat and the health risks that came from inhaling flour for several hours "might produced a diseased condition of the human system"; far worse, though, was the fact that bakers "would not be capable of doing their work well, and supplying the public with wholesome food."[485] In saying this, it appeared that Judge Davy was seeking an "evidence based" ruling, devoting careful attention to the facts on the ground rather than letting law slip into abstractions that had little relation to the needs and priorities of society. Yet for all his careful attention to detail, he could not see how consumers really could make that judgment on their own, and either pay more for a better-made loaf of bread, or accept the lower quality for a lesser price. There most

[484] *People v. Lochner*, 76 N.Y.S. 396, at 401 (1902).
[485] Ibid., 402.

certainly was a public interest involved in the food produced in Joseph Lochner's bakery, but it was an interest that the public itself could judge.

Or perhaps not: once again, the question over the "public morals" aspect of police power hinged entirely on what truly constituted the "public good," and if that concept aligned itself with the inherent dignity of the individual person, or if it created that sense of dignity by rooting it in the general will that created it. The latter view invited extensive state involvement, given the state's duty to not only care for society but create the public good; but dignity of individual persons might require state action as well. It might appear overbearing and "paternal," and critics might attack it on those grounds. But that exercise of state power is fundamentally different in kind from the sort that puts regulations on industry for lesser reasons – and, indeed, there are far more of those lesser reasons than the end that truly matters.

Judges who did not hold this understanding of police power did not necessarily forget it. More often, it was rejected among those who were convinced that industrialization had so radically transformed society that the usual modes of thinking about justice, the public good or individual flourishing were all swept away. This was the view of Chief Judge Alton B. Parker on the Appellate Court. It was not that constitutionalism became pointless in the face of dire needs; it instead evolved along with society, "tending to justify the boast of the devotees of the common law that by the application of established legal principles the law has been and will continue to be developed from time to time so as to meet the ever-changing conditions of our widely diversified and rapidly developing business interests." This was an easy thing to believe at the time, and the need for a careful interpretation of law in light of dire social needs

made sense. One could list a variety of reasons, and endless justifications for extensive state action. But none of those necessities could ever give the definition of a "good society." Still, Judge Parker was confident that it could – and that it was the judiciary's task to do so. By "forceful examples," it could show "the necessity of recognizing in legal decisions the change of conditions."[486] It was not that the Constitution would determine the statute; the statute would, in fact, determine the Constitution. This was, of course, surpassing the approach of Justice Morrison Waite: it was not that local legislatures were wiser in dealing with their own affairs; more importantly, they were more attuned to what the Constitution had to mean at any given point.

Judge Parker gave the classic warning, which is practically a cliché of an accusation since the time of the Lochner Court: "[t]he courts are frequently confronted with the temptation to substitute their judgment for that of the Legislature," he wrote. They had put a "border line" in place, in the belief that there really were limits to what police powers could do. But according to Parker, such limitations on police power were wholly unnecessary, and could only exist to defend the judges' own perceptions of what was fair. He gave the standard indictment of the judiciary in the Lochner Era, which persists in our own time: "[t]he courts are frequently confronted with the temptation to substitute their judgment for that of the Legislature." Judge Parker did not mean to say that the power of state legislation was omnipotent. Legislators were still elected by the people, and were meant to abide by the basic rules of due process. This could yield an abundance of unjust and foolish laws, and these could "strongly tempt" a court to strike them down "instead of waiting, as the spirit of our institutions require, until the people can compel their representatives to repel the obnoxious statute." But again, in saying this,

[486] *People v. Lochner*, 177 N.Y. 145, at pp. 150-151 (1904).

Judge Parker did not see the classic understanding of the Constitution – the true "will of the people," far more than any vote or popular petition. They did not control the legislature simply by electing officials and placing direct demands on them; they gave their consent to the fundamental law which would itself determine the nature and character of all subsequent legislation. The fundamental law, to which they had consented, stood at the origin of all other laws, as the rational will of the people themselves – a far more important thing than a mere limitation on legislative bodies. This was the true criticism of those on the Court who wished to meddle in state affairs; but instead, he chose to agree with them about the existence of a Fourteenth Amendment "border," and that bad legislation may find itself "on the wrong side of that border line."[487] Such a notion, he believed, was a recipe for judicial hegemony.

Parker found something inherently noble in the unlimited use of police power. But, for him, the moral object of laws that sought to preserve "public morals" was not in the condition of individual persons: it was the duties of both the employer and the state to ensure the comfort and ease of employees – even if it came at the expense of their individual dignity. He wrote: "many medical authorities classify workers in bakers' or confectioners' establishments with potters, stonecutters, file grinders, and other workers whose occupation necessitates the inhalation of dust particles, and hence predisposes its members to consumption," which was thought to be the cause of a variety of respiratory ailments. Looking to medical and sociological authorities, which he quoted and discussed at length, Parker concluded that "it is the duty of this court to assume that the section was so framed not only in light of, but also with full appreciation of the force of the medical authority bearing upon the subject – authority which reasonably challenges

[487] Ibid., 157.

attention and stimulates the helpfulness of the philanthropist."[488] In this, we find direct judicial acknowledgment of the alliance between progressive experimentation for the sake of social research, and tender-hearted philanthropy – neither of which could perceive "public morals" as relating to the good of individual persons, much less the fulfillment of republicanism. True philanthropy may very well include such an end: the dignity of the human person is quite lacking when employees are over-worked and sick from hours of exposure to extreme heat and clouds of flour and dust. But to treat that condition of comfort and ease itself as the source of human dignity was to lower the concept of "public morals" considerably.

As Paul Kens points out in his study of the case, for Judge Parker, "[t]he need for this type of legislation had accompanied modernization." The claim of "paternalism" was simply the reaction against the inevitable, and it came from a refusal to understand how society had evolved, and how law needed to evolve with it. Though they may have spoken the language of philanthropy and concern for the public welfare, such policies also "represented legitimate experiments by the state to deal with modern problems."[489] The two things were closely aligned for Parker; yet it never occurred to him how one of them might corrupt the other. Could philanthropy still have human flourishing in view when it was the pretext for social experimentation? At the same time, could social experimentation really strive for and achieve its goal when it was weighed down with concerns for the public good?

Judge John Clark Gray pointed out the difference in his concurring opinion, thus showing himself to be far more constitutionally minded than his colleague. "We must

[488] Ibid., 165.
[489] Paul Kens, *Lochner v. New York: Economic Regulation on Trial* (Lawrence: University Press of Kansas, 1998), 94.

presume that the legislative body was animated by a reasonable intention to promote the public welfare, and if the courts can give effect to it, because tending to guard the public health they should unhesitatingly do so." But for all the vast objects of police powers, "[l]egislation will not be allowed arbitrary interference with the personal liberty of the citizen under the specious guise of an exercise of the police power," he wrote, "and therefore it is that our courts may supervise, as a judicial question, a determination of the Legislature to exercise the police power in restraint of some trade or calling." In this, he restated the classic maxim of law: legislation was not mere policymaking for Gray; it was either an outgrowth of the fundamental law, or it was no law at all. While he sided with Judge Parker in the ruling, Gray was also careful to distinguish his reasoning from *laissez-faire* absolutism as well. He sympathized with those who feared "excess of paternalism in government," but still knew that they were no necessarily unconstitutional for that reason; their methods might be extreme, but their goal could still be correct.

B. *Lochner v. New York* and the U.S. Supreme Court

In the opinion that would immortalize him, Justice Rufus Peckham announced that the Bakeshop Act in New York "necessarily interferes with the right of contract between the employer and employees, concerning the number of hours in which the latter may labor in the bakery of the employer." That right "is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution," as Peckham himself had explained in *Allgeyer* a few years before. The greater problem in this case, though, was not the substantive right that Peckham and *Lochner* majority sought to protect. It was instead the nature of the "somewhat vaguely termed police powers," he

wrote – "the exact description and limitation of which have not been attempted by the courts." There can be only one explanation of why that definition had "not been attempted": police powers were always generally understood to be an essential aspect of republicanism, and meant to protect the very right to property and liberty of contract that so concerned Peckham. So far as the states, as republican institutions, fulfilled those ends, they were working correctly, "and with such conditions the 14th Amendment was not designed to interfere."[490]

It did grant interference, though, when states functioned as something other than republics. The Union meant more than a confederation of states; it defined each of them, not in terms of universal precepts that would be forced onto all communities, but in terms of the general precepts that all republics share. They could be applied in a broad variety of ways to all kinds of local circumstances; but the point of republicanism would always stay the same. The fundamental law was there to ensure that the connection between local life and general precept did not stretch so far that it broke. In this instance, that break occurred when "the right of the individual to labor for such time as he may choose" collides with "the right of the state to prevent the individual from laboring, or from entering into any contract to labor, beyond a certain time prescribed by the state" – i.e., when the power of the state failed to align itself with the good of the citizen. In a passage that is almost entirely ignored by Peckham's readers, he reminded them that the Court had, in fact, "been guided by rules of a very liberal nature" in its willingness to allow a vast array of regulatory laws since the days of the *Slaughterhouse Cases*. Many of these

[490] *Lochner v. New York*, at 53.

cases, though, were "border ones," meaning that such rules really did stand near the edge of constitutional legitimacy.[491]

Peckham once again showed his weakness on this point. He could not explain the Court's duty without insisting that there was, once again, "a limit to the valid exercise of the police power by the state." Without the Fourteenth Amendment, "legislatures of the states would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the safety of the people." Without constraints, that legislation "would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext – [it would] become another and delusive name for the supreme sovereignty of the state to be exercised free from constitutional restraint"; with such a claim, "there would be no length to which legislation of this nature might go."[492]

Yet even as he said this, he reverted to the classic view, and allowed all ideas of "restraint" to wither away. The question in reviewing such laws was whether or not it was an "appropriate exercise of the police power of the state," or whether or not it was "unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty, or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family[.]"[493] The contradiction did not seem to surface in Peckham's mind: the need for "restraint" appeared right alongside the need for "appropriate exercise." What explains this seemingly paradoxical idea?

[491] Ibid., at 54.
[492] Ibid., pp. 56; 58.
[493] Ibid., 56.

One reason might have been the conditions of bakeries, which, of course, were quite different than the conditions of mines. The *Holden* ruling was determined entirely by the fact that mines were especially dangerous, and that long hours in and around them could take terrible tolls on the health of the citizens they employed. Bakeries, though, for all their toil, were simply not as dangerous. Peckham was aware of how unhealthy long hours there might be: the bakeries were, after all, in the basements of buildings, where the ovens kept them very hot at all hours, and inhalation of flour could cause a variety of respiratory illnesses. "It is unfortunately true that labor, even in any department, may possibly carry with it the seeds of unhealthiness," he wrote. "But are we all, on that account, at the mercy of legislative majorities?"[494] The police regulations had to have a reason for what they did; but in the absence of a clear constitutional basis for such laws, the Court was left only with limitations. It seemed it did not know what it was looking for within police power that aligned itself in any way with the Constitution.

The more likely explanation, though, was the "public morals" basis of Peckham's view of police powers. He probably borrowed from Judge Parker's point in the Appellate Court's ruling, even as his disagreed with it: "It is to the interest of the state to have strong, robust, healthy citizens, capable of self-support, of bearing arms, and of adding to the resources of the country. Laws to affect this purpose, by protecting the citizen from over-work and requiring a general day of rest to restore his strength and preserve his health, have an obvious connection with the public welfare."[495] It was, again, the very social condition that state legislation was meant to uphold: there really was a choice that all workers made to pursue their particular vocation, which, in their judgment, would

[494] Ibid., 59.
[495] *People v. Lochner*, 16 Bedell 145, at 155 (1904).

allow them the livelihood they needed. State police powers, at least in these kinds of cases, really were aimed at regulating the businesses who employed them; but Peckham wished to make it clear that their greater effect was on the laborers themselves. Perhaps the plight of those laborers demanded state action, regardless of their free choice. But on this assumption, without a clear constitutional basis for such state action, "[a] printer, a tinsmith, a locksmith, a carpenter, a cabinetmaker, a dry goods clerk, a bank's, a lawyer's, or a physician's clerk, or a clerk in almost any kind of business, would all come under the power of the legislature," he wrote. "No trade, no occupation, no mode of earning one's living, could escape this all-pervading power, and the acts of the legislature in limiting the hours of labor in all employments would be valid, although such limitation might seriously cripple the ability of the laborer to support himself and his family."[496] There was no need to state such a thing as explicitly as others: the need for public morals was generally understood – or so Peckham assumed. If that was the case, then there was no need to ensure such a law actually fulfilled its end, but that it simply did not cross what he saw as the proper boundary, set by the Constitution's Fourteenth Amendment.[497]

The great criticism of Peckham is that he did not specify exactly what those "other motives" were. But the truth is, he did not need to: like all judges, he looked entirely at the law, where the public intent was most clearly embodied. To approach the

[496] Ibid.

[497] This might explain Judge Earl's paradoxical statements in *In Re Jacobs* as well. For all his clarity about the purpose of police power, Jacobs still claimed that it was "not without limitations, and that in its exercise the legislature must respect the great fundamental rights guaranteed by the Constitution." Without constitutional restraints, which were up the courts to declare, police power would be "practically without limitation," and "every right of the citizen might be invaded and every constitutional barrier swept away." 98 N.Y. 98, at 110. Indeed, it is strange to hear a judge who sounds like Illinois' Judge McAllister one minute and Justice Stephen Field the next. But the fact is that republican ends involved a clear explanation of limitations as well. The way judges of this era tended to blend them together may not be because of their confusion, but a strong sense of how they actually mean the same thing. It is their separation that is more of a problem.

question any other way would require him to summon the legislative record, public opinion polls, and do a long slew of investigative research, which would have taken him quite out of the legal profession. "The purpose of a statute must be determined from the natural effect of the language employed," he wrote; "and whether it is or is not repugnant to the Constitution of the United States must be determined from the natural *effect of such statutes* when put into operation, and not from their proclaimed purpose."[498]

This was the most striking aspect of the *Lochner* ruling: Peckham saw the trend in legislation, and he wished to articulate exactly why it was a threat to the constitution – even as it *did* abide by all of the usual forms and procedures of due process. He mentioned "extreme cases" of state governments exerting themselves: "doctors, lawyers, scientists, [and] all professional me, as well as athletes and artisans, could be forbidden to fatigue their brains and bodies by prolonged hours of exercise," he wrote. These were, of course, exaggerations, and cases so extreme as to be laughable. But it was not that such regulations existed in practice; it was, instead, the assumption that compelled them, which Peckham knew would reach more deeply into the fabric of economic life if it continued on its present course. "We mention these extreme cases because the contention is extreme," he wrote.[499] The land had to be drawn – not so much to protect constitutional liberty, but to at least remind Americans that there was, in fact a line – a difference between political power that conformed to republicanism, and the sort that did not, and would inevitably destroy freedom beneath the outer appearance of free government.

[498] Ibid., 64. Emphasis added.
[499] Ibid., pp. 60-61.

For all his lack of intellectual prowess, Peckham knew well enough that such things did not occur rapidly and in broad daylight, in statutes that were, on their face, unobjectionable from even the strictest constitutional point of view. In practice, this meant understanding the exact nature of the new species of legislation: it was, once again, the sort of law that employed the full means of government, but made them disconnected from the end. In truth, it was "not possible in fact to discover the connection between the number of hours a baker may work in the bakery and the healthful quality of the bread made by the workman," he wrote. "The connection, if any exist, is too shadowy and thin to build any argument for the interference of the legislature."[500] Inevitably, such legislation might very well contain the possibility of class legislation of some kind or another. To stand for such a law was, quite simply, to let state governments slowly and quietly destroy themselves from the inside out.

C. The *Lochner* Dissents

Justice John Marshall Harlan's dissent is best known for its statement of what seemed perfectly obvious only to him. He had no doubt that "there is a liberty of contract which cannot be violated even under the sanction of direct legislative enactment." At the same time, though, he was aware of the broad range necessary for state police power. "Upon this point there is no room for dispute," he wrote; "for the rule is universal that a legislative enactment, Federal or state, is never to be disregarded or held invalid unless it be, beyond question, plainly and palpably in excess of legislative power."[501] Judging statutes against what was "plainly" and "palpably" an abuse of police powers offered no

[500] Ibid., pp. 62-63.
[501] Ibid., at 68. (Harlan, dissenting.)

guidance at all – though Harlan invoked it four times throughout his dissent. Such an ambiguous standard left it entirely to the Court to determine the legitimacy of local laws, which, of course, had little to do with their constitutionality.

But there appears to have been more to Harlan's dissent than this. Loren P. Beth, one of Harlan's biographers notes that while his judicial philosophy was "deeply flawed," he often "reached conclusions in dissent that later Court majorities have also reached." He was bold and outspoken, and a large presence on the Court and in public life generally as a great American full of patriotic vision and devout certainty about the republican purposes of the American regime. Still, he was no judicial leader, and his dissenting opinions, which numbered seventy-nine, could rarely gain the support of a single colleague. By many accounts, he was more likely to lecture his colleagues, pounding his fist on the table, than try to persuade and win them over. As Justice David Brewer put it, Harlan went to sleep every night "with one hand on the Constitution and the other on the Bible, safe and happy in a perfect faith in justice and righteousness."[502] But this did not alter his importance: "Harlan's influence was on the future," Beth writes.[503] He had a way introducing the puzzle rather than solving it. He no doubt agreed with Justice Henry Brown, who claimed that law had a way of progressing, and realizing itself more fully over time; but he also appeared to know that such development could not happen if it began with false premises. This was what happened in the Court's earlier police power jurisprudence, and Justice Harlan was intent on resolving it.

[502] Quoted in Kens, *Lochner v. New York*, 134.
[503] Loren P. Beth, *John Marshall Harlan: The Last Whig Justice* (Lexington: University Press of Kentucky, 1992), 269.

Harlan accepted natural right, yet he was never so reckless as to think that it was solely the Court's duty to protect the rights of individuals; but he was not so careless as to say those rights were perfectly subject to police powers, either.

True, there was a great duty of judges to "devise the methods necessary to protect the rights of the against the aggressions of power," Harlan claimed many years before, at a proceeding of the Bar Association. But that was not the whole story: "they are also in the best sense ministers of justice." That did not mean the protection of rights per se; it also meant the preservation of the institutions and procedures designed to protect those rights by keeping themselves neutral, and only breaking that neutrality when it was absolutely necessary, and with clear justification."[504] Harlan could see very well the intent behind American republicanism, and how the Madisonian system was designed to maintain natural justice and protect natural rights well enough on its own, by always connecting the power of government to its proper end. "If there be doubt as to the validity of the statute," he wrote, that doubt was to be "resolved in favor of its validity, and the courts must keep their hands off, leaving the legislature to meet the responsibility for unwise legislation." This is a vague and open-ended passage, until we consider exactly what republicanism was for Harlan: he understood even the most overwhelming exercises of police power as consistent with neutral government – *if* the statutes actually achieved the end for which it was drafted, pursuant to both the federal and state constitutions. "If the end which the legislature seeks to accomplish *be one to which its*

[504] "Address of Mr. Justice John Marshall Harlan," in *United States Supreme Court Reports, Vol. 131-134,* ed. Stephen K. Williams (Rochester: The Lawyers' Co-operative Publishing Company, 1889), 1106.

power extends, and if the means employed to that end," he wrote, "then the court cannot interfere."[505]

The "plainly and palpably" test was therefore clearer in Harlan's mind than it appears at first sight: it was, once again, attuned to the natural right underpinnings of American constitutionalism, and a view of government power that was designed to be proportionate to those ends. His Lochner dissent seemed to build on the reasoning in his previous opinions, which, as Beth pointed out, were all looking to the future: given the development of modern life, there would need to be expansive industrial regulations; the task of the Court, as Harlan saw it, was to ensure that those regulations stayed rooted in the Constitution. As he wrote in an earlier opinion, the Court had, "with marked distinctness and uniformity, recognized the necessity, growing out of the fundamental conditions of civil society, of upholding State police regulations which were enacted in good faith, and had appropriate and direct connection with that protection to life, health, and property, which each State owes to her citizens."[506] This was not the same as Justice Brown's notion of the relationship between police power and the rights stated in the Fourteenth Amendment: broad uses of state power, if they were constitutional, did not override natural rights for Harlan, but sought to better secure them. Harlan knew that republicanism was nothing if it could not adapt to radically changing circumstances. His reasons for maintaining such a view become clearer when contrasted with the judicial philosophy of his colleague, Justice Oliver Wendell Holmes.

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[505] Ibid. (Emphasis added.)

[506] *Patterson v. Kentucky*, 97 U.S. 501, at 506 (1878). Harlan also cited Justice Peckham on this point: such regulations of industry "are of very frequent occurrence in the various cities of the country." Their constitutionality, though, actually "comes within the proper exercise of the police power by the state," i.e., not from the Constitution applied by force through the judiciary, but from within police power itself. That was the standard, and the reason Peckham and Harlan could distinguish between an "unreasonable and extravagant" statute, and one that fell in line with the republican purposes of the Constitution. *Gundling v. Chicago*, 177 U.S. 183, at 188 (1900).

There are only so many ways to restate the same fact about Holmes' judicial philosophy: for him, the role of a judge was to leap of the way of progress, or at least yield to the social experimentation that might bring it about; this was the only thing that could preserve the dignity of law. "Holmes voted to uphold progressive laws," Jeffrey Rosen observed, "but he also voted to uphold illiberal and fascistic laws." His attitude to judicial deference did not distinguish between humane and compassionate legislation and the experimental or overtly tyrannical sort: due process was due process, and the intent or the outcome of the process was of no concern to him. Holmes' view of judicial authority "he voted to uphold virtually all laws, because he restrained view of judicial authority stemmed from his view of politics as war and of life as a Darwinian struggle for power."[507] Holmes could only see the unconstitutionality of a law based on judicial moralizing, which had no place in constitutionalism.

The same was true of his *Lochner* dissent. His claim was, of course, that the case was "decided upon an economic theory which a large part of the country does not entertain." Perhaps one policy was more effective than another, based on the theoretical merits; "I should desire to study it further before making up my mind," Holmes wrote. The truth was, of course, that Holmes *had* made up his mind long ago: right of property and liberty of contract, as they were conventionally understood, were symptoms of "the confusion between legal and moral ideas," he wrote in his famous 1897 essay, "The Path of Law." "Among other things, here again the so-called primary rights and duties are

[507] Jeffrey Rosen, *The Supreme Court: The Personalities and Rivalries that Defined America* (New York: Henry Holt and Company, 2007), 77. This came, of course, from Holmes' service in the Union Army during the Civil War. For Homes, "war itself was a brutal waste, and the only thing that could redeem its senseless carnage was the professionalism and effectiveness of individual soldiers – honor could be achieved, in other words, not by intensity of belief but by the iron self-discipline that led to ultimate success in a Darwinian struggle whose ends were immaterial." Ibid., 87. The Union cause, in other words, was an illusion: the principles of Lincoln did not stand on their own, but were affirmed by the struggle itself, which might very well have gone the opposite direction in favor of the Confederacy.

invested with a mystic significance beyond what can be assigned and explained."[508] There were no precepts or underpinnings of constitutionalism according to Holmes; there were only the favored predetermined conclusions of *laissez-faire* fans, which, from the judges' point of view, were no more or less preferable than those of the progressive reformer or the radical socialist. Constitutionalism instead amounted to one simple fact: the "right of a majority to embody their opinions in law."[509] Holmes meant far more than the inclination of popular tastes; in saying this, he recognized the drift toward Darwinism – the evolutionary sort of Darwinism – that had come to determine key assumptions in the public mind. It was the self-determination of public power that mattered, or its ability to make right out of its own evolutionary drift. It meant, in other words, the rejection of other sort of Darwinism with which Holmes did not agree – the "survival of the fittest" model of William Graham Sumner, and his teacher, Herbert Spencer.

Howard Gillman is quite right about Holmes' dissent: "to a large extent, someone beside the point, and it should come as no surprise that his remarks were joined by none of his brethren." He treated Peckham's opinion (and presumably even Harlan's dissent) as a mere attempt to embody political values in law. "[W]hile the Constitution was not intended to embody a particular economic program, it most certainly rested on clearly

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[508] Oliver Wendell Holmes, "The Path of Law," in *The Essential Holmes: Selections from the Letters, Speeches, Judicial Opinions, and Other Writings of Oliver Wendell Holmes*, ed. Richard A. Posner (Chicago: University of Chicago Press, 1992), 164.

[509] *Lochner v. New York*, at 75. Richard T. Ely understood the progressive nature of Holmes' judicial philosophy early on, when he was Chief Justice of the Massachusetts Supreme Court. He frequently ruled in favor of the "right of the state to regulate free contract in the interests of a larger freedom, as to show a clear insight into the underlying principles involved [sic]." It was natural to expect this in a place like Massachusetts, according to Ely, for several reasons. "One is the progressive character of the state, due t general enlightenment; another is the altruistic spirit of the age, which finds such gratifying expression… and a third is the fact of its high industrial development, as a result of which it has had to deal for a longer period than other states with those questions growing out of an intensive industrial life." These were the things that converged to form the sort of political community that could override all consideration of due process, both procedural and substantive, for the sake of something far better. *Studied in the Evolution of an Industrial Society*, 415.

articulated assumptions about the proper relationship between state and society, and it was on that basis that the majority struck down the act."[510] Had Justice Peckham looked purely to *laissez-faire* principles in any sense, Holmes might have had a better point. For Spencer, the whole belief in rights was derived from the same selfish motivations that drove the "struggle for existence"; this, of course, was better understood on its own terms than by way of moral imperatives. Rights were the sort of humanitarian impulses that had to be resisted if society was to flourish the way it should. The mortal enemy of that flourishing was the regulatory state, and over-bearing social legislation that attempted to control what was best left alone. The state may not be concerned with rights; but it arose from the same belief that "something could be got for nothing," as William Graham Sumner put it. For Spencer, rights-talk brought endless troubles: if rights existed, then all could make equal claims to their protection. "And hence there necessarily arises a limitation," Spencer wrote. "For if men have like claims to that freedom which is needful for the exercise of their faculties, then must the freedom of each be bounded by the similar freedom of all. When, in the pursuit of their respective ends, two individuals clash, the movements of the one remain free only in so far as they do not interfere with the like movements of the other."[511] It was the perfect recipe for abuse of state power: the pursuit of rights would justify all kinds of class legislation, of one group using the power of the state against another.

Least of all was there any "right of property" or "liberty of contract" in the classic sense according to Spencer. The Lockean notion was that labor makes a thing the

[510] Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Power Jurisprudence* (Durham: Duke University Press, 1993), 131.
[511] Herbert Spencer, *Social Statics, Abridged and Revised; Together with The Man Versus the State* (New York: D. Appleton and Company, 1897), 36.

property of the laborer; "but the question at issue is, whether by labour so expended, he has made his right to the thing caught or gathered, greater than the pre-existing rights of *all* other men put together," Spencer wrote. "And unless he can prove that he has done this, his title to possession cannot be admitted as a matter of *right*, but can be conceded only on the ground of convenience." Perhaps there was a place for rights in Spencer's system; but a right was hardly the kind of thing that could be derived in any way from "nature," for nature did not ensure anything other than what human beings could make out of it. Certainty of rights, he wrote, "gives birth to such a host of queries, doubts, and limitations, as practically to neutralize the general proposition entirely."[512]

The great problem for Holmes' claim was, of course, that Peckham's opinion was positively saturated with references to "rights," and they were described in ways with which Spencer could never agree. The problem with the Bakeshop Act was not that it stifled energetic survival, but that it "violation of the rights secured by the Federal Constitution," Peckham wrote; the bakers were protected in their ability "to assert their rights and care for themselves without the protecting arm of the state"; the law was an "illegal interference with the rights of individuals, both employers and employees," and a "meddlesome interferences with the rights of the individual." Most importantly, Peckham wrote, "the individuals whose rights are thus made the subject of legislative interference are under the protection of the Federal Constitution regarding their liberty of contract as well as of person."[513] It was the sort of legal rights reasoning that Spencer feared most – even if it was used for the sake of limiting government.

[512] Ibid., 63.
[513] *Lochner v. New York*, at pp. 54; 61.

Hence, there was little seriousness in Holmes' dissent in *Lochner*: well-read as he was in the texts that created the modern world, he did not appear take the time to see the important differences between Peckham's constitutional reasoning and the political philosophy of Herbert Spencer. Still, he quite out-did Harlan in terms of future-looking opinions, and surpassed all other justices in formulating the new foundation for law in the twentieth century. Constitutional law has maintained the Holmsian accusation that the Lochner Court created "the authority for the federal courts to immunize fundamental rights from all legislative regulation," or that they "transformed the Fourteenth Amendment from a bar to arbitrary and unequal state action into a charter identifying fundamental rights and immunizing them from all legislative regulation."[514] Judge Robert Bork is the purest embodiment of this criticism: "Lochnerizing" is a perennial threat, especially when he examines modern judicial activism. It is a fine point of criticism when he can say that it was his own fellow conservatives who got it so wrong once upon a time, and that the "temptation of politics" can so easily infect the judicial craft. States had always enjoyed the full extent of police power, he claims. But a new understanding of state government came into being, which held "that the power had inherent limits [sic] independent of any constitutional prohibition, and that judges could enforce those limits by invalidating legislation even when the Constitution was silent." It was, of course, not a limitation at all according to Bork, but an active exercise of judicial policymaking; it "gave judges free rein to decide what were and were not proper legislative purposes." Bork could admit that *Lochner v. New York* and subsequent cases were mild compared to many contemporary ones. But the germ of the problem was there, since "the Court chose to use the undefined notion of substantive due process," he wrote. However restrained it

[514] William E. Nelson, *The Fourteenth Amendment*, 199.

was at the time, that notion "was wholly without limits, as well as without legitimacy," and it "provided a warrant for later Courts to legislate at will." Though the modern Court would never rule in the same way, it would inevitably use the same reading of the Due Process Clause "to create new rights which are neither mentioned nor implied anywhere in the Constitution or its history."[515]

But this is entirely untrue if one examines the bulk of constitutional and judicial writings between the Founding and the progressive era: the right of property and the liberty of contract were not created, but discovered. It was not that the Constitution could be interpreted without those rights, because indeed it could; the problem was that the Constitution could not make sense without at least having them in view.

D. *Lochner* and the Constitution: The Remnant of Natural Right

Neither Justice Peckham nor Justice Harlan articulated the problem with the bakeshop act, much less the true intent of the Constitution, as well as Judge Dennis O'Brien in his dissenting opinion for the Appellate Court. There, he emphasized the actual consequence of the law: "It is a crime for the master to require or permit his servant to work over the statutory time, no matter how willing or even desirous the servant may be to earn extra compensation for his overwork," he wrote. Indeed, the greater harm came to the employee himself – the very person who the law sought to protect; he was deemed unfit to judge for himself the meaning of his own welfare, and to exercise his own voluntary will. Hence, this was "obviously one of those paternal laws," albeit paternal in the truest sense. It was "enacted doubtless with the best intentions," he

[515] Robert Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Touchstone, 1990), pp. 45; 49.

wrote, but "its operation must inevitably put enmity and strife between master and servant. They are not left free to make their own bargains in their own way, but their mutual interests are governed by statute."[516] Given the concern for his already struggling business, it would have become clear to Joseph Lochner – if it wasn't already – that overworked bakers do not yield good food, and thereby diminish customers who are willing to pay more for better products, or find ways to compete with lower prices. But all of that was ephemeral for Judge Parker and the legislature: the true concept of the public good was for them to create, not discover.

More stunning was the broader affect of the Act: while it professed to regulate all production of bread, neither Judge Parker nor the state legislature cared to notice that it only fell on certain kinds of businesses. Hence, O'Brien did not insist on the inalienable, untouchable right to liberty alone; he looked instead to the ability of constitutional government to protect it, and the duty of the Court to strike down those laws that failed to do so. The law "applies only to bakers who find it necessary to employ labor, and they alone are subject to criminal prosecution," O'Brien wrote. "The law does not even apply to bakers in the small towns and villages who do their own work," he wrote. The intent of the statute was quite separated from what it was supposed to do – and the inevitable result was class legislation, or the favoring of some businesses over others. Judge O'Brien did not invoke the Due Process clause; he looked instead to Equal Protection, which did not protect the fundamental right to liberty per se, but preserved the conditions were it was protected well enough on its own. The problem reached far beyond bakeries alone: "The very small fraction of the community who happen to conduct bakeries or confectionary establishments are prohibited, under pain of fine and imprisonment, from

[516] *People v. Lochner*, at 185. (O'Brien, dissenting).

regulating the conduct of their own business by contracts or mutual agreements with their employees," he observed, "whereas all the rest of the community who find it necessary to employ labor in private business may do so. Class legislation of this character, which discriminates in favor of one person and against another, is forbidden by the Constitution of the United States, if not by the Constitution of the state."[517]

Judge Parker was quite correct when he saw such constitutional tests as little more than the judges' own preferences imposed onto local statutes. But in saying this, he assumed that such tests could only amount to constitutional limitations on police power. O'Brien, though, proposed a whole different way of reviewing police power. It was not according to limits and bounds and borders; it was a question of whether or not "an exercise of the police power is really what it is claimed to be." A labor law "must stand or fall upon its *own intrinsic character,* and can receive no support from the company in which it is found."[518] This was a basic acknowledgment that the judges' task deals entirely with the way words represent reality: it was no small grievance to say that the term "police power" could mean anything if it was not clearly understood.

Thankfully, the meaning of the term did not require any new rules or judicial formulas. It was, once again, imbedded in the meaning of republicanism itself, which was fully capable to meeting every necessity of an industrialized society, and allowing a vast range of government regulations, provided they all achieve the same end. Such an understanding of government was declining, though, not because it was trying to cope with modernity, but because it submitted completely to it.

[517] Ibid., at 181.
[518] Ibid., at pp. 183-184. (Emphasis added.)

II. "The Solemn Duty of the Courts": The Supreme Court Post-*Lochner*[519]

Lochner v. New York demonstrated the simple fact that the Court would indeed strike down police regulations. Constitutionalism aside, it proved that the institution was willing to act in aspects of local affairs previously untouched, even under the most stringent Reconstruction Era legislation. Once, it was easy to make the case that police power ought to align itself with the natural rights of citizens, and fulfill the end of republican government by protecting those rights. But now, popular government had largely forgotten itself: it was increasingly in conflict with its own end. The Supreme Court's attempts to articulate that end collided with the new notion of collective freedom. One or the other would have to prevail.

A. Due Process of Law and Police Power

Observers in the legal community saw well the change that had occurred in the meaning of police power. B.J. Ramage pointed out the "disposition on the part of government to extend its influence to domains until recently considered as belonging either wholly or in great measure to the sphere of individual discretion." This frequently occurred, though, on the basis of "those great laws of progress as yet but imperfectly understood." As Judge O'Brien pointed out, there were vast unintended consequences that came with every piece of legislation. The act itself might be perfectly constitutional on its face, under even the narrowest reading of police power; but it could result in all kinds of new social conditions that might not only harm society but conflict terribly with

[519] These are Justice Harlan's words in *Lochner v. New York*, at 74.

the fundamental law. These attributes of modern society "are at once its noblest and the most needful of watching."[520]

Others, though, did not feel the need for such caution: the new and expansive regulatory laws within the states were not an abuse of police power at all, but its highest realization of itself. It was, for him, a way of synthesizing the power of the free market with the public interest. "We have an immense modern development in this country of the police power of the state." It was the "general welfare power" – which, for Ely, was all about "restricting and limiting contract in the interests of freedom." It was, of course, the use of police power for exactly its opposite function. It was the sort of legislation that admitted everything Justice Peckham accused it of – and then rationalized itself by changing the definition of words. But for Ely, this "shows the adaptability of law to changing industrial and economic conditions." The whole definition of the public good changed on its own; the new use of police power was merely an attempt to keep pace with the times, which were no choice of the people who suffered through them. "It has been difficult for our courts to adjust themselves to the restrictions upon nominally free contract demanded by the interests of a larger and truer freedom," he wrote.[521]

The more difficult aspect of police power had to do with the Fourteenth Amendment's Due Process Clause. It was an ancient concept, of course: the guarantee was that there would be a specific procedure to prosecution in a criminal trial – arrest, arraignment, hearing, prosecution and defense, cross-examination and jury ruling. These things would occur before anyone could be deprived of property through fines, liberty through imprisonment, or life through capital punishment. As one columnist in the

[520] B.J. Ramage, "Social Progress and the Police Power of a State," 681.
[521] *Studied in the Evolution of an Industrial Society* (New York: Macmillan Company, 1903), pp. 413-414.

Central Law Journal observed, "the term used in the amendment in 1868 was to be constructed in harmony with a practice long before declared by the legislative departments of most of the state governments, sanctioned without interruption by the state courts through a long serious of years," and it constituted the way "rights and titles had long been vested" since Western antiquity.[522]

But, as Thomas Cooley wrote regarding due process, "the bounds of the judicial authority are much better defined than those of the legislative, and each case can generally be brought to the test of definite and well settled rules of law."[523] The Judiciary was, after all, the "least dangerous branch"; it was more essential that those rules apply to the legislative bodies would follow all of the logical steps of lawmaking, as outlined by the customs handed down to them – or, in the United States, as outlined in the Constitution. To leave it at that, however, seems to merely state the obvious: of course law must not be made on a whim, or skip the essential procedures in giving it sovereign rule. There is more to it than that – something beyond procedure itself.

The clause's placement in the Fifth Amendment does appear strictly procedural, relating only to criminal trials. Placing it on legislative procedure was pointless, given the extensive description of Congress and the presidency in the original Constitution; it focused instead on judicial procedures alone. The Due Process Clause in the Fourteenth Amendment, however, made no such distinction: it was due process generally understood, applying to criminal courts and legislatures alike. Considering that fact, its placement in a section defining "citizen," and its juxtaposition with the Equal Protection clause, it seemed to mean more than mere constitutional procedures. The Due Process

[522] "Due Process of Law," *Central Law Journal*, 7 (Sep. 27, 1878): 256.
[523] Thomas Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* (Boston: Little, Brown and Company, 1908), 575.

Clause meant to ensure both the procedures and the rights that those procedures were for, i.e., life, liberty and property."

Cooley insisted that he "had written in full sympathy with all those restraints which the caution of the fathers had imposed upon the exercise of the powers of government, and with faith in the checks and balances of our republican system," i.e., the essential component of due process in legislation. He acknowledged that even under this system, "there is inherent authority to appropriate the property of the citizen for the necessities of the State, and constitutional provisions do not confer the power though they generally surround it with safeguards to prevent abuse." But Cooley maintained that procedural due process, for all its extensive power in police regulations, still had inherent limits. The primary proof of this was in the fact that "there is no rule or principle known to our system under which private property can be taken from one person and transferred to another for the private use and benefit of such other person whether by general law or by special enactment." The true restriction on this kind of legislation, though, was not based on the defiance of procedure or the abuse of public power for class legislation; all of those things were conditions for a much greater end. "The chief restriction upon this class of legislation is that vested rights must not be disturbed," Cooley wrote.[524] He did not hesitate to say that "[t]he right to private property is a sacred right" – not for its own sake, but because it was the only thing that could give justification for government neutrality and due process. It was the only reason citizens should prefer constitutionalism to tyranny, and showed republican government as something more than a mere cultural preference.

[524] Thomas Cooley, *A Treatise on the Constitutional Limitations,* pp. vii; 507-508.

Law professor John G. Egan saw something of this in the classic definition of due process, in his study on the relationship between the clause and the meaning of contracts. "At an earlier time the phrase 'due process of law' came to be used as an equivalent expression for 'law of the land,'" he wrote.[525] The law of the land was by definition a just law, and framed on the basis of reason rather than mere whim. Indeed, the whole notion of due process was a reference to reason itself, as the underlying principle of any law worthy of the name. The courts had long recognized this, according to Egan: they had "not hesitated to affirm that the phrase includes the enforcement of substantive rights as well as a formal procedure." There was, of course, a danger here, even in the earliest days of "substantive" due process: there was an inclination toward "[z]eal and ingenuity" when it came to pulling rights out of the clause. But this was no serious threat, and they had sought, "often without plausibility, to appeal to this provision in controversies belonging solely to the province of ordinary law," he wrote, "but these efforts have usually been without avail." This did not mean that there were no substantive rights; it meant that there was one right, property, which served as the foundation or all others. The Court had held that there really were "certain vital rights" under our constitutions – that constitutionalism did not even make sense without such things. They were therefore "not left entirely to implication," but were "formal expressions of a principle inherent in republican institutions, which are founded to conserve and advance the welfare of the people and to which every assertion of arbitrary power is repugnant."[526] Due process was

[525] This was apparently drawn from Sir Edward Coke, as Justice Samuel Miller confirms in his opinion for the Court in *Davidson v. New Orleans* (1878): "The equivalent of the phrase "due process of law," according to Lord Coke, is found in the words "law of the land," in the Great Charter, in connection with the writ of habeas corpus, the trial by jury, and other guarantees of the rights of the subject against the oppression of the Crown." 96 U.S. 97, at 101.

[526] John G. Egan, "Protection to Contracts by the Due Process of Law Clause in the Federal Constitution," *American Law Review*, 36 (Jan./Feb. 1902): pp. 74; 75-76.

an explicit prohibition, not only against laws that defied the procedure of lawmaking, but against the sort of laws that defied substantive rights.

For others, though, this view of due process could not be sustained. Again and again, critics of substantive due process could only see irresponsibility in the face of urgent social needs. The idea this kind of interpretation of the Constitution might still be on the side of laborers – and that it might be quite favorable to them, if rightly understood – seemed difficult to believe. Judge Learned Hand, probably the most outspoken legal scholar of his era, saw the *Lochner* ruling as complete misuse of judicial review. The true task of the Court "was to assert that there were certain subject-matters of possible control within which the legislature was free to act as it thought best," he wrote; "when it passed an act which in fact did regulate those matters the act was due process of law." Perhaps the justices who sought to protect substantive rights were indeed doing what judges had always done. But, for Hand, that was precisely the problem. Maintaining the conventional reading of the Constitution was what opened judicial duty up to values that defied the necessities of the times. "In short, it is too late for the adherents of a strict *laisser faire* to condemn any law for the sole reason that it interferes with the freedom of contract," he wrote. The new era demanded a new kind of legislation, as so many others believed; it was the duty of the judge to allow for this – to go about the craft of law in such a way that it let government take its course. Hand said it all in this stunning sentence: "In short, the whole matter is yet to such an extent experimental that no one can with justice apply to the concrete problems the yardstick of abstract economic theory." Notions about fundamental rights could not be discovered; they had to be made – and not by judges, but by the collective mind of society, best expressed in the state legislatures.

"The only way in which the right, or the wrong, of the matter may be shown, is by experiment," he wrote; and the legislature, with its paraphernalia of committee and commission, is the only public representative really fitted to experiment." Legislatures may be corrupted by all kinds of special interests, which could easily overcome their standard position of neutrality toward all social classes; but, Hand insisted, "so may even the court."[527]

B. The Natural Rights of Women

The Supreme Court returned to its usual approach three years later when it handed down its decision in *Muller v. Oregon* (1908), despite the gravity and implication of *Lochner*. The unanimous ruling upheld the state law prohibiting women from working more than ten hours a day; like many previous labor laws, it appeared to be the recognition that such police regulations were in line with the right of contact that all citizens were supposed to enjoy. But this was hardly the case, if one considers Justice David Brewer's rationale.

Brewer saw the judiciary as a mediator, at once the guardian of rights *and* the protector of the public interest. Both were fundamental, meaning the fairness of a statute depended not on its ability to align itself with the liberty of contract, nor its ability to advance progressive ends, nor did it seem possible, in his mind, that republican institutions and procedures could do that well enough on their own. The Court, and it alone, fulfilled the "demand for arbitrators to settle all disputes between employer and employees." There were abundant criticisms of this view, which claimed that judges were

[527] Learned Hand, "Due Process of Law and the Eight-Hour Day," *Harvard Law Review*, Vol. 21, No. 7 (May, 1908): pp. 498; 502; 507-508.

quite inadequate for such a task; many believed that judges "lack acquaintance with affairs and are tied to precedents." But this was hardly the case, according to Brewer. In truth, "the great body of judges are well versed in the affairs of life as any," and where therefore quite able to "extract all the truth from the mass of scholastic verbiage that falls from the lips of expert witnesses." Judges, in other words, were fully capable of being far more than mere judges: they could understand the full extent and complexities of the facts, and keep pace with the abilities of legislators. "I am firmly persuaded that the salvation of the nation, the permanence of government of and by the people rests upon the independence and vigor of the judiciary," he wrote.

> To stay the waves of popular feeling, to restrain the greedy hand of the many from filching from the few that which they have honestly acquired, and to protect in every man's possession and enjoyment, be he rich or poor, that which he has, demands a tribunal as strong as is consistent with the freedom of human action and as free from all influences and suggestions other than is compassed in the thought of justice, as can be created out of the infirmities of human nature. To that end the courts exist, and for that let all the judges be put beyond the reach of political office and all fear of losing position or compensation during good behavior.

Like Roman Tribunes, the Supreme Court was to be the central feature of the republic, or the indispensable office that could mediate all conflicts and act as the sole source of good government – of "right and justice as it exists in written constitutions and natural law."[528] He gave no explanation of what natural law was, or how it related to positive law. Such an open-ended concept gave tremendous interpretive power to judges: Did natural undermine the truths of social research? or did social research confirm the natural law? It could go either way for a judge, as it seemed to have done in Brewer's opinion for the Court in *Muller v. Oregon*.

On one hand, Brewer could not deny the "natural law" basis for the equal rights of women when it came to the liberty of contract. The principle of equality was plain in his

[528] David Brewer, "Address Before the New York State Bar Association," Jan. 17, 1893, in *Indian Jurist: A Journal and Law Reports,* Vol. 17 (Mar. 31, 1893): pp. 149; 151.

words: it appeared that, "putting to one side the elective franchise, in the matter of personal and contractual rights they stand on the same plane as the other sex. Their rights in these respects can no more be infringed than the equal rights of their brothers."[529] He cited the *Lochner* ruling, and how the liberty there protected extended to all human beings as such.

At the same time, though, Brewer was compelled to face the findings of social science, which documented the effects of long hours of labor on women. Indeed, it was an error to assume "that the difference between the sexes does not justify a different rule respecting a restriction of the hours of labor." This was, of course, the big break for Louis Brandeis: Brewer gave special mention to his extensive amicus brief, which was based almost entirely on the medical and social research documenting the effects of labor on women, and, in turn, how that affected the overall health of the community. All of this cancelled the importance of the natural law regarding the rights of women – but it confirmed *another* view of natural law that recognized their inferiority to men. Brewer admitted that there was "little or no discussion of the constitutional question presented to us for determination"; but this did not matter, since they demonstrated a law more fundamental than the Constitution. That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious," he wrote.

> This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.

[529] *Muller v. Oregon*, 208 U.S. 412, at 418 (1908).

In short, this meant that "she is not an equal competitor with her brother."[530] Brewer's reasoning was very much like that of Justice Henry Brown in *Holden v. Hardy* (1896): there was indeed a right, which was absolute and sacred, and always worthy of protection; at the same time, though, there was a necessity that overrode that right, and required the law to bend in order to fit the times. For Brown, this was the case because of the dire conditions of labor in mines. For Justice Brewer, though, it was because of the natural law distinction between the sexes, and what the Court perceived to be the role of women in society.[531]

This view of equal rights in the workplace has, of course, completely disappeared since the days of *Muller* and its ruling which was so favorable to progressivism. Indeed, even with all of the social science in the world, such a law could never find acceptance in the public mind. As Richard Epstein points out, "the modern feminist has rightly cast her lot with the libertarian. Differences in aptitudes and abilities there may well be, but this hardly justifies a set of public restrictions on the occupational choices open to women." It may not be too much conjecture to say that what social science we have on gender in the workplace shifts its attention away from gender differences and in the direction of attitudes toward women, hiring practices, and sublimations for discrimination – all real things, but facts that do not offer any guidance about how to pursue the public good. Social research may yield an abundance of facts, but they can never truly inform law because it does not deal in real questions of right.

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[530] Ibid., at pp. 418-419; 421.

[531] Even Justice Holmes, who was so adverse to any kind of natural law reasoning, joined the majority without concurrence. His perception of women, it seemed, was immune from us usual positivism. "*Muller v. Oregon*, I take it, is as good law today as it was in 1908," he wrote in *Adkins v. Children's Hospital* dissent in 1923. "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. 261 U.S. 525, at pp. 569-570. Property was nonsense for Holmes; but sex differences were rock-solid, and undeniable in every way.

B. The New Limitation on Rights

In any case, the *Muller* decision revealed especially well the new disconnection between the means and the ends of government. Notions of natural law were directly invoked, and so too were descriptions of how state police powers could range far and wide in protecting the well-being of workers; rarely, though, was the Court able to show how the two fit together, nor how either related to a republican form of government. Only a year later, *McLean v. Arkansas* (1909) upheld a state law prohibiting coal mining companies from paying workers by the pound only after the coal was separated from extra pounds of useless waste. It was predictably a source of "disputes concerning the introduction and use of screens," and these led to "frequent and sometimes heated controversies between the operators and the miners." In his opinion for the Court, Justice William R. Day acknowledged the Court's tendency to acknowledge the rights of citizens worthy of protection, and that they Court showed itself willing to rule on that principle in *Lochner v. New York*. Still, those rights did not receive universal protection in all circumstances.

But here, Day announced a completely new shift in the understanding of the conflict between police power and due process:

> in many cases in this court, the right of freedom of contract has been held not to be unlimited in its nature, and when the right to contract or carry on business conflicts with laws declaring the public policy of the state, enacted for the protection of the public health, safety, or welfare, the same may be valid, notwithstanding they have the effect to curtail or limit the freedom of contract.

Once, the "limitation" was on police power, in the name of the right of property and the liberty of contract. But now, the limitation moved in the opposite direction: liberty was to yield to police power. Subsequent precedents showed "the established doctrine of this

court that the liberty of contract is not universal, and is subject to restrictions passed by the legislative branch of the government in the exercise of its power to protect the safety, health, and welfare of the people."[532] If that was true, it was also a mystery that the Court even continued to hear police power cases, unless it was a matter of protecting what tiny enjoyment of economic rights were left. As far as the purpose of police power was concerned, or the "republican form of government" in general, there seemed to be no limit to what it could do.

III. Progressive Constitutionalism versus Progressivism for Progress' Sake

For progressive critics, the endurance of the Constitution, in any sense, was exactly what these property-rights-obsessed defenders thought it was, i.e., a thing for lawyers and judges to interpret, and that was precisely the problem. This was the opinion even as the Court still allowed tremendous use of the police power. The legal professional, "when consecrated as Justice of the Supreme Court, has become the High Priest of our political faith," Herbert Croly wrote in *The Promise of American Life*, invoking the usual pseudo-religious imagery. "He sits in the sanctuary and guards the sacred rights which have been enshrined in the ark of the Constitution." The more recent problem was the rising social tensions, which compelled to the Court back into the temple, so to speak, and profess to be interpreting the Constitution in an effort to quell it, albeit in a reactionary direction. "The legal profession is risking its traditional position as the mouthpiece of the American political creed and faith upon the adequacy of the existing political system."[533] This was little more than an attempt to treat the Constitution

[532] *McLean v. State of Arkansas*, 211 U.S. 539, at 549; 545; 547 (1909).
[533] Herbert Croly, *Promise of American Life* (New York: The Macmillan Company, 1911), pp. 133; 137.

as the final solution, or to say that the text could somehow solve social and economic problems better than the people themselves could. By its nature, the Court was the sort of institution that obstructed progress. Any principle of law, any purpose of the Constitution, any guiding tradition of interpretation – the things that were so integral to the rule of law itself were viewed as enemies of the real freedom. That freedom had nothing to do with rights; it appeared only through the perpetual reinvention of the social order expected of a modern society.

A. Theodore Roosevelt's and the Nationalist Attack on the Judiciary

Theodore Roosevelt presented himself as the embodiment of trans-political government: it was not that the American people would learn to rise above partisanship through a system of representation that would "refine and enlarge the public views," nor that the system of legislative deliberation would yield a wise and fair result that would please everyone. It was not ideas or institutions that would do such a thing, but heroic leaders – the visionary men who would resolve dialectic political tensions, and move society forward into the next stage of history. Progressive leadership had much to do with the purpose of the federal judiciary, and Roosevelt had plenty to say about it.

Roosevelt approached the judicial question with much "actual experience in governmental work," having been governor of New York when *In Re Jacobs* (1885) was handed down. Though they stayed home with their families and worked a safe and always steady occupation, he was convinced that it was "an evil thing from every standpoint, social, industrial, and hygienic." For this reason, he supported the bill, which was then promptly struck down by the State Supreme Court. The ruling was plainly

formative of Roosevelt's judicial views: he could not help but notice how "[t]he judges, as was quite natural, shared the feelings of the classes from which they were drawn, and with which they associated." This, he believed, made them especially blind to the social and economic realities they were dealing with. They could only fall back on a sterile construction of the State Constitution and its protection of property and the liberty of contract. The judges were upright and honorable, in Roosevelt's view; but those were virtues that could not stand alone in modern times. "If those judges had understood 'how the other half lived,' if they had possessed a working knowledge of tenement-house dwellers and factory workers… I am absolutely certain that they would have rendered no such decision as was rendered," he wrote. "It was this lack of knowledge and the attendant lack of sympathetic understanding that formed the real barrier between the judges and a wise judgment." It was the sympathetic judge's duty to ensure rulings that reflected social realities. Without it, "decisions may result in as much damage to the community as if the judge were actually corrupt."[534]

Roosevelt's understanding of corruption, though, had little to do with classic definitions: it was not that the judges would use their public authority to abuse power or benefit themselves; far worse was their tendency to maintain something old in new times. The Supreme Court was by nature the sort of institution that would lag behind. That was simply the meaning of precedent: to maintain the past, often against the conditions of the present. The collision was especially clear in Roosevelt's teaching on his New Nationalism, which he frequently held in sharp contrast with traditional judicial duty. His criticism of the New York Supreme Court was pointed enough, but Roosevelt then

[534] Theodore Roosevelt, "A Judicial Experience," *Outlook* 91, 11 (March 13, 1909): pp. 91, 11, pp. 563-565.

devoted fuller attention to the Judiciary as a whole in his eight-part series in the progressive magazine, *Outlook*. "Justice is based upon law and order, and without law and order there can be no justice," he wrote. It was a true enough maxim, but the sort of justice then gaining attention was no longer the basic political kind: it was now the newer and broader species of "social justice," which focused on concerns beyond the blind sense of public fairness and legal detachment. As one editorialist in the Arena had put it, constitutional questions were "legal arguments, by legal disputants, over a legal document," and they "took no account of the various other elements which entered in, the factors of the problem which involved emotions, desires, interests, tendencies, doings of the people at large."[535] Hence, it was obvious that the current conditions of industry and class relations, the detachment of the law from such concerns, resulted in a "triumph of disorder and lawlessness." A law that could not actively correct social injustices was as corrupt as if it was used by one special interest against another. "So it is with the judiciary," Roosevelt wrote – though rarely could judicial critics see the problem. Judges were declared "independent" and "objective" when their tended to favor a narrow set of political views. In practice, this was most often the capitalist classes, or those who thought primarily along the lines of Guthrie and Stephen Field. Even as the Court upheld regulatory laws in the states, it was declared a "bulwark of property," to which popular classes agreed, and declared it their enemy. Far better, Roosevelt believed, would be the sort of judge who knew "his duty to act as representative of the permanent popular will," and, once again, "possessed of understanding of and sympathy with popular needs and

[535] "The Evolution of the Constitution," *The Arena*, XXX, 2 (Aug. 1903): 7.

desires."[536] The sort of representation Roosevelt had in mind was plainly quite beyond the classic republican sort: it was not the elected officials, but the entire system of government – even those wholly devoted to interpreting the supreme law of the land – had to represent the people, and represent them directly.

For Roosevelt, it was foolish to ignore the fact of judicial review: it was an act of legislation, regardless of the "interpretive" claims of the justices themselves. "There is no need of discussing the question whether or not judges have a right to make law," he wrote. "The simple fact is that by their interpretation they inevitably do make law in a great number of cases. Therefore it is vital that they should make it aright." In this, he admitted a fundamental precept of his own political philosophy: power is what makes right. Hence, the greatest hope was that power would create a decent and humane right – one that was not driven by capitalist self-interest or mob-rule socialism, but one that encompassed the whole public interest."[537] His view of the judiciary was very much attuned to his understanding of leadership. Again, it was not principles of laws that carried the nation through political crises, but visionary individuals. It was the greatness of those men, far more than their purposes, that ensured freedom.

In this, Roosevelt gave the most revealing statement about the constitution in the progressive era: "We must bare in mind the office," he wrote, "but we must also bare in mind the man who fills the office." This may very well be "a government of law," he admitted. But even the wisest constitutional architects admitted that "every government always has been and always must be, a government of men; for the worth of a law depends as much upon the men who interpret and administer it as upon the men who have

[536] Theodore Roosevelt, "Nationalism and the Judiciary: Part Six" *Outlook*, 97, 8 (Feb. 25, 1911): pp. 383-385.
[537] "Nationalism and the Judiciary: Part Seven," *Outlook* 97, 9 (Mar. 4, 1911): 490.

enacted it."[538] People had indeed believed that law was an expression of public reason. But now, not only was the truth of the matter revealed, but it became critical that the nation accept it. Justice depended not on abstract ideas of fairness, but on the ethical sense within individual human beings.

"I say it soberly," he wrote in 1912, in his proposal for judicial recalls:

> [D]emocracy has a right to approach the sanctuary of the courts when a special interest has corruptly found sanctuary there; and this is exactly what has happened in some of the States where the recall of the judges is a living issue. I would far more willingly trust the whole people to judge such a case than some special tribunal – perhaps appointed by the same power that chose the judge – if that tribunal is not itself really responsible to the people and is hampered and clogged by the technicalities of impeachment proceedings.[539]

B. The Constitutionalism of William Howard Taft

Roosevelt's proposals gained much attention from William Howard Taft. The incumbent president did much to ensure that his Republican Party made constitutionalism its primary concern. It was a peculiar duty for a president: the Constitution was a thing he was sworn to protect – not only in his execution of the law, but in his arguments in its defense. Abraham Lincoln had certainly made abundant defense of the document, but his reasoning was in many ways surpassed and outdone by his military action. Taft, on the other hand, faced a purely legal executive duty. This was, perhaps, equally heroic: the future of the Union was not threatened by a foreign enemy, but by domestic foes who had no intention of seceding – and, what was more troubling, they saw themselves as wholly devoted to a national cause, in the belief they were the true heirs of Lincoln and all-American spirit of reform, the next logical step whose origins could be traced straight back to the Declaration of Independence. Conservatives like Taft sought to show that his political thought – and his party, in particular – was the true embodiment of the Founders'

[538] Ibid., pp. 492-493.
[539] "The Right of the People to Rule," in *Outlook,* 100 (Mar. 1912): 620.

promise – and, more importantly, demonstrate that it was the only true basis for meaningful social reform.

"The Republican Party stands for the Constitution as it is," Taft said in a reprinted speech appearing in the *New York Times*, "with such amendments adopted according to its provisions as new conditions thoroughly understood may require. We believe that it has stood the test of time and that there have been disclosed really no serious defects in its operation."[540] That Taft would have to make such a claim revealed the novelty of the era: for all its conflicting views, party politics always saw itself as conducive to the Constitution's meaning. Herbert Croly admitted as much, saying that progressives were forced "to challenge the old system, root and branch [sic], and to derive their own medium and power of united action from a new conception of the purpose and methods of democracy." Taft's concerns were perfectly legitimate, since "[a] sharp issue was created between radical progressivism and its opponents, which could not be evaded or compromised."[541]

In many ways, Taft appeared to side with the rights absolutists, especially when he looked to the judiciary as a linchpin institution. In his earlier career, Taft maintained that "[t]he highest function of the Supreme Court of the United States is the interpretation of the Constitution of the United States, so as to guide the other branches of Government and the people of the United States in their construction of the fundamental compact of the Union." For this reason, he believed that the "judiciary department is the most novel, as it is in many respects the most important, branch of the Government." It is,

[540] William Howard Taft's speech in the *New York Times*, August 2, 1912.
[541] Herbert Croly, *Progressive Democracy* (New York: The Macmillan Company, 1915), 14.

in fact, "the background of the whole Government."[542] Taft also understood the significance of progressivism in his day, and how it was no ordinary call for reform at the national level. Long before Theodore Roosevelt began formulating his New Nationalism, Taft pointed out the danger of ideas that could bring down popular government. "The present is a time when all our institutions are being subjected to close scrutiny," he wrote – not in terms of their own inner principles, but along new evolutionary lines, in the belief that "some of them should be radically changed."

"The chief attack is on the institution of private property and is based upon the inequalities in the distribution of wealth and of human happiness that are apparent in our present system." The right to property was hardly the refuge for social privileged that progressives made it out to be, in Taft's view: "next to personal liberty, [it] has had most to do with the uplifting and the physical and moral improvement of the whole human race," he wrote.[543]

Taft maintained precisely this view as 1912 approached, saying that the judiciary was "the keystone of our liberties and the balance wheel by which the whole government machinery is kept within the original plan." Still, what Taft meant by "the original plan" was hardly the sort of thing Justice Field or Professor Guthrie believed it was. In this, Taft presented the sort of conservatism that was not at all in conflict with the social reforms as progressives claimed. His party, and its support of the Constitution, was "the nucleus of that public opinion which favors constant progress and development along

[542] William Howard Taft, "Delays and Defects in the Enforcement of Law in this Country," *The North American Review* 187, 631 (Jun. 1908): pp. 852.
[543] William Howard Taft, "The Delays of the Law," *The Albany Law Journal: A Weekly Record of the Law and the Lawyers* (Oct. 1908): pp. 300-301.

safe and sane lines under the Constitution as we have had for more than 100 years."[544] The purpose of the Supreme Court in Taft's view was not to place barriers on legislation. It did not exist to police the boundaries of policymaking to strike down every act that overstepped the right of property and liberty of contract, as the likes of Justice Field and Professor Guthrie would have it. The Court existed to ensure that the aim of reform legislation actually lived up to the whole point of constitutioanlism itself. In practice, this meant ensuring that the proposed legislation actually did what it was supposed to do, or that the means of government were rightly adjusted to the end.

This was the reason for Taft's intense criticism of Roosevelt, whose proposal for a more "sympathetic" and "representative" judiciary amounted to a radical new plan: the popular review of judicial decisions, and the removal of unpopular judges. "I have said again and again that I do not advocate the recall of judges in all States and in all communities," Roosevelt reassured. But it was essential for preventing "wrong headed judges," who aim to "thwart the people in their struggle for social justice and fair-dealing." There was no other remedy for this problem but the people themselves taking direct democratic action, and there was no way for the people to seek such a solution without these progressive reforms, he believed. "I say it soberly – democracy has a right to approach the sanctuary of the courts when a special interest has corruptly found sanctuary there."[545] The protection of property was, in the minds of judges at least, the essence of judicial neutrality. But in practice, whether justices meant to or not, such neutral protection of property rights was entirely in favor of the capitalist class in Roosevelt's view.

[544] Taft's speech in the *New York Times*, August 2, 1912.
[545] Theodore Roosevelt, "The Right of the People to Rule," 619.

But for Taft, such a proposal "lays the axe at the foot of the tree of well-ordered freedom and subjects the guarantees of life, liberty and property without remedy to the fitful impulse of a temporary majority of an electorate." It could not be said that the Court was currently doing such a thing in his view: again, it sought to carefully define a justified approach to reform legislation, or determine when the means of government could justly surpass the ends. Never, though, was the Court meant to protect rights against all considerations of public necessity as Roosevelt and other progressives claimed: such rights would indeed be the sanctuary for only one privileged class. But since the right to property and liberty of contract really were meant for all, it was the duty of the Court to allow legislation to protect it – even if such legislation seemed to go against that right among the privileged classes. "It is a complete misunderstanding of our form of government, or any government that exalts justice and righteousness, to assume that Judges are bound to follow the will of the majority of an electorate in respect of the issue for their decision," he said. Roosevelt's proposals would do nothing more than shift the judiciary into the hands of the majority, and "deprive an individual or a minority of a right secured by the fundamental law." Should they become the sort of "sympathetic" representatives that Roosevelt so idealized, they would cause the very problem he sought to avoid: if they were meant "to carry out its will they would lose their judicial character entirely and the so-called administration of justice would be a farce."[546]

But why exactly did Taft say this? For Roosevelt, it was nothing more than an attack on popular government. Taft's constitutionalism was at odds with "government by the people," as far as he was concerned, meaning that the law judges were sworn to

[546] Taft's speech was quoted at length in "Taft Shows Peril in Roosevelt Policy: Recall of Decisions would Sow Seeds of Confusion and Tyranny, He Says," *New York Times*, March 9, 1912.

interpret was as subject to the multitude as elected officials. "It is wholly unfounded," Roosevelt said, and "it is founded on the belief that the people are fundamentally untrustworthy." There were no higher and lower aspects of human nature in Roosevelt's view; hence, there was no law over politics, nor reason over passion. The will of the people was a single, homogeneous thing, and if only fragmented because of needless misunderstandings – if not self-fulfilling doubts about the abilities of democracy. "How can the prevailing morality or a preponderant opinion be better and more exactly ascertained than by a vote of the people?" he asked. To allow such traditional authority in judicial review was to deprive the people of their moral determination – or else the people were left to "sit meekly by," and have their moral views dictated to them by "well-meaning adherents of outworn philosophies, who exalt the pedantry of formulas above the vital needs of human life."[547]

Yet Roosevelt's language of "vital needs" did not at all conclude with methods of actually *meeting* those needs. He was certain that "the Constitution is a straight-jacket to be used for the control of an unruly patient – the people." Taft looked to the neutrality of checks and balances, claiming that "'every class' should have a 'voice' in the government." But Taft's ideal seemed to blind him to political realities: "The real trouble with us is that some classes have had too much voice" – usually the class "to which he himself belongs."[548] There was only equal representation when the social classes were reconciled and unified, a thing that neutral, republican government could never do. Hence, there was a disconnection between the problems he described and the remedy he

[547] Ibid.
[548] Roosevelt, "The Right of the People to Rule," 620.

proposed: pure democracy was not a solution to social problems, so much as a goal in itself.

Taft did not hesitate to call this what it was, asking, "[w]ould we not in giving such powerful effect to the momentary impulse of a majority of an electorate prepare the way for the possible exercise of the greatest tyranny?" This might have been partly fueled by campaign-season emotions; but Taft's words were in fact quite principled, and intended to remind the public that the only alternative to the rule of law was, of course, the rule of men.

C. Elihu Root and the Constitutional Basis for Social Reform

President Taft's constitutionalism received its greatest influence from Judge Elihu Root, perhaps the finest defender of the existing political system. For Root, the independent judiciary – exempt from election or recall, and able to issue rulings that were final – was *the* essential aspect of American constitutionalism. Roosevelt's "sympathetic" official was not to be found on the judiciary, but in Congress.

Root pointed out the core of judicial criticism coming from the likes of Roosevelt: it was "based on upon the idea that judicial decisions are something quite distinct and different from the expression of economic and social theories." The popular claim among progressives, and constitutional realists generally, was that judges were hopelessly bound by the spirit of their times, and that court decisions were nothing more than products of the socio-economic class from which those judges came. Even if this was true, even if it was the drab reality that lay beneath the liberty that Americans enjoyed, it was not the sort of thing that would change the deep-seated "devotion to the reign of law," he wrote.

That devotion, "with its prescribed universal rules, as distinguished from the reign of men, with their changing opinions, desires, and impulses, has inclined us always to ascribe a certain sanctity to the judicial office." Indeed, the truer realism was not the sort that looked at judicial review as a mere product of socio-economics; it was the kind that acknowledge the faith of the people, in even its silliest forms, as a fact of mass-psychology that would never go away; and that all attempts to implement a purely rational public would only lead to greater majority tyranny. That, Root believed, was precisely what Americans could expect through the popular recall of judges.[549]

Root acknowledged that the people really were as "sound and wise" as the likes of Roosevelt claimed, and that there were many instances that could prove this. "But they are sound and wise because the wisdom of our fathers devised a system of government which prevents our people from reaching their conclusions except upon mature consideration," he wrote. Root recognized, like the Founders, that there was no eliminating sentiments and passions and opinions – that they were always the mere shadow of pure truth and goodness. He used words that may have been penned by James Madison himself:

> When the passion of the moment comes in to play, when religious feeling is rife, when political parties are excited, when the desire for power here or the desire to push forward a propaganda of views there comes into play, the inherent weakness of human nature makes it certain that any opposing fundamental principles of right will be disregarded, if possible.[550]

[549] Elihu Root, "The Importance of an Independent Judiciary," in *The Independent*, Apr. 4, 1912, 704. On this point, Root acknowledged the peculiarly religious undertone of the American political system. It was not at all founded on the lofty goodness of Christians, but upon a view of human nature that could "distrust its own impulses and passions and to establish for its own control the restraining and guiding influence of declared principles of action." Ibid., 705. This was precisely the claim that progressives like Roosevelt sought to disprove: pure democracy could work because the people were good; and civil servants could work for them because they too were noble and pure-hearted.
[550] Ibid., 407.

This was precisely what progressives were asking for when they called for popular recall of judges and the popular review of decisions. This was not "progress," Root insisted, but degeneracy, or a "movement backward to those days of misrule and unbridled power, out of which the world has been slowly progressing." The new appeal of progress was not progressive at all, since "[t]he essential condition of true progress is that it shall be based on grounds of reason, and not prejudice." There was, of course, no perfect reason in politics; but there were political prejudices that at least conformed to reason as closely as possible. They were, at best, "truisms," Root wrote, "but they are also essentials," and whenever they are forgotten, "we should recall them and insist upon them and preach them, for they are a most important part of the gospel of human freedom."[551] True progress was the sort that moved toward a fixed idea of what was good and just; the progress of Roosevelt, on the other hand, was little more than a return to the rule of men rather than the rule of law; no matter how good and noble those men were, it was the same feudal-like arrangement that the American Constitution had done so much to liberate mankind from.

Like Taft, Root was keenly attuned to the principles of natural right that lay beneath the surface of American political institutions, and he was quite willing to look to the judiciary as the sole institution devoted to preserving them. But also like Taft, this was not the whole story. Root's political philosophy revealed much about the important relationship between the ends of government and the means – between the purpose of government, and the institutions designed to achieve that purpose, as far as possible. Root understood that natural right was meant to be a guide for social necessity, rather than the legal absolutes that would trump it.

[551] Ibid.

Indeed Root had no problem admitting all of the things progressives claimed. Root could admit that industrialization had grown quite beyond the Founders' Constitution, which seemed to demand a radical new form of government to meet present needs. The independence of laborers and their families, which was once the cornerstone of free government, was greatly reduced. Similarly, the relationship between individual persons and their employers was far too distant for "contract," as it was once understood, with owners of major companies at the top, thousands of laborers at the bottom, and many layers of management in between. Moreover, the conditions of private industry overflowed into the public realm, which seemed to demand public attention accordingly. "It is manifest that the laws which were entirely adequate under the conditions of a century ago to secure individual and public welfare must be in many respects inadequate to accomplish the same results under all these new conditions," Root wrote. Plainly, "a good deal of experimentation will be necessary to find out just what government can do and ought to do to meet them."[552]

But Root wished to emphasize that experimentation for its own sake could only lead into a void. Progress was a perfectly legitimate desire when it sought a better route to freedom; but it could not be the thing that would re-create freedom itself. "The process of devising and trying new laws to meet new conditions naturally leads to the question whether we need not merely to make new laws but also to modify the principles upon which our government is based and the institutions of government designed for the application of those principles to the affairs of life." The means of progress and the extent

[552] Elihu Root, "Experiments in Government and the Essentials of the Constitution," in *Addresses on Government and Citizenship* (Harvard: Harvard University Press, 1916), 82. This essay originally appeared in the July 19 issue of the *North American Review*.

of experiments might go quite beyond the end, the better to achieve it; but in no way could experimentation create the end itself.

For Root, appreciation of the Constitution came from one's ability to recognize the true depth of human depravity, especially when exposed to political power. Government could not make people good: "[t]he utmost that government can do is measurably to protect men, not against the wrong they do themselves but against the wrong done by others," he wrote. Government had to begin with the assumption that people were bad. But Root knew that a sober understanding of that badness could allow political institutions to serve as their own checks, and "promote the long, slow process of educating mind and character to a better knowledge and nobler standards of life and conduct." This had been the downfall of all free governments: they hoped too much in man's goodness, and the ability of a republic to constantly cultivate the necessary virtues. But, of course, those virtues could never last, even in their most glorious age. Contrary to the views of Roosevelt and others who embraced such progressive optimism, "the complete control of such motives will be the millennium," Root wrote. In this, he explained the maxim whose decline in the public mind no doubt made the whole progressive era possible:

> Any attempt to enforce a millennial standard now by law must necessarily fail, and any judgment which assumes government's responsibility to enforce such a standard must be an unjust judgment. Indeed, no such standard can ever be forced. It must come, not by superior force, but from the changed nature of man, from his willingness to be altogether just and merciful.

Such was the fundamental assumption behind the Constitution, and the idea that so many progressives rejected. Still, Root could allow that there was a certain kind of reform measure that was not so adamant in its denial of this. Broad new steps might be taken to remedy social injustices, but "they should be taken only so far as they are necessary and

are effective." Effective reforms involved a strong sense of history – no doubt a difficult thing for Americans, who were so accustomed to living in the future. "It is not unusual to see governmental methods reformed and after a time, long enough to forget the evils that caused the change, to have a new movement for a reform which consists in changing back to substantially the same old methods that were cast out in the first reform."[553] Improvement of social conditions was not a matter of rejecting the older order over and over; it was a matter of understanding that progress often created its own problems, meaning the solution might be a willingness to admit that progress is not the solution after all.

Conclusion

When John Marshall Harlan passed away in 1911, on the eve of that transformational election, it was Elihu Root who delivered the great Justice's eulogy. He pointed out that Harlan "was the sole connection between the Court of the [Civil] war, the Court of Lincoln and Grant with the new Court that faces the new problems in a new period of our national development." It was true: Harlan was the only appointee who remembered the old Court, which itself remembered the classic basis for republican government before it was so complicated by the Fourteenth Amendment on one side and so threatened by progressivism on the other. What Harlan learned was very simple: "in every judicial decision there are two primary elements: one is the ascertainment of the

[553] Ibid., 87.

law and the other is the application of the law to the human problems of the moment."[554] The law and its underlying principles could not change; but obviously their application could, and often must. The mark of a strong judge, though, was his ability to apply as necessary without ever wavering on what things stayed permanent.

It was easy to say that police regulations had be neutral in their application, that they could not single out or favor one group over the rest. All laws affecting society were to be made "on broad and general grounds which embrace the welfare of the whole community, and which seek the equal and impartial protection of the interests of all." That was the surest sign that the procedural aspect of due process was fulfilling its proper end – and it required no direct reference to that end, i.e., the protection of natural rights. "Nothing has been said as to the abstract justice of such law," one columnist wrote, "for no power is admitted to exist in the courts of the Union to declare void statutes of the states, because they conflict with the notions of the judges on the 'first principles of justice.'"[555]

This was a fundamental expectation among all citizens. "In organized society, every man holds all he possesses, and looks forward to all he hopes for, through the aid and under the protection of the laws," Thomas Cooley wrote.

> [B]ut as changes of circumstances and of public opinion, as well as other reasons affecting the public policy, are all the while calling for changes in the laws, and as these changes must influence more or less the value and stability of private possessions, and strengthen or destroy well founded hopes, and as the power to make very many of them could not be disputed without denying the right of the political community to prosper and advance, it is obvious that many rights, privileges, and exemptions which usually pertain to ownership under a particular state of the law and many reasonable expectations cannot be regarded as vested rights in any legal sense.

[554] Elihu Root, *Miscellaneous Essays,* eds. Robert Bacon and James Brown Scott (Cambridge: Harvard University Press, 1917), 233
[555] "Due Process of Law," *Central Law Journal*, 256. (The editorialist was anonymous.)

When this happened, it was essential for the Judiciary to articulate the purpose of government – to state due process, not as a procedure, but in terms of substantive rights – and to ensure that extensive police regulations were still pursuant to those rights. Those laws may deprive certain members of society in an immediate sense; but it was the Court's duty to determine whether or not the measure protected them in the long run. This was, of course, a novel judicial duty for its time, and it was due to "circumstances of irregularity"; but it was not meant to be permanent.[556] If police regulations aimed at industrial life were true to their own republicanism, they would set things right, bring society back to a just condition, and then expire.

Without this reason for police power jurisprudence, the Court faced a role as either the sole institution in a regime of absolute rights, as Justice Stephen Field would have it; or it was compelled to look only at the procedural aspect of legislation, and allow it an unlimited power to regulate all of society. If it was given that sort of blessing from the judiciary, they could be certain that the deprivation of rights would not be the exception, but the norm; that class legislation would not be for the sake of recovering the just end of republican government, but the trend that would seize all modern government. When that happened, there would be nothing left to protect state and federal constitutions, nor would they be documents that anyone could point to with the rise of independent administrative agencies, as it finally happened with the New Deal, the Great Society, and, in our own time, the Obama Administration's attempt to "remake America." Perhaps all of this is a great advance for society, and the progressive experiment has finally yielded real, tangible and enduring solutions. But to they allow us to accurately

[556] Ibid., pp. 509-510.

understand how we got to where we are at? And do those developments enable us to see our true situation – severed, as we are, from our Founding?

Chapter 9:

Conclusion: Legitimate Lochnerizing

The guiding idea behind modern judicial review after the passing of the Lochner Era first appeared in an obscure footnote, in an even more obscure case known as *U.S. v. Caroline Products*. There Justice Harlan Fisk Stone declared that the Supreme Court had an unexplored kind of jurisprudence, which he believed was far more in line with its proper function than any previous series of cases. It dealt, of course, with instances of "prejudice against discrete and insular minorities." There may be a special condition "which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities," he wrote, "and which may call for a correspondingly more searching judicial inquiry."[557] Plainly there were many instances of oppression, of one faction using the apparatus of a state government to dominate another. The republican design of state governments was not infallible, and they frequently found themselves unable to resist alignment with a single special interest at the grave expense of the whole. But later litigation based on *Caroline Products* made it clear that there was one sort protection that the Court would concern itself with – a sort that had nothing at all to do with property owners, much less those who pursued property through a right of contract. Civil rights, it seemed, *had* to come at the expense of property rights.

Prior to the civil rights era the national government's noblest promise for African-Americans was rooted almost exclusively in economic liberty. The freedom of slaves certainly meant a lot of things; but the only freedom that government could reasonably

[557] *United States v. Caroline Products Co*., 304 U.S. 144, at 152.

protect was their right to property, and the right of these new citizens to pursue it. It was not ownership of persons that defined slavery in the Thirteenth Amendment, but "involuntary servitude," i.e., labor without the mutual advantages of a contract that should exist between equal parties. For all of his brilliant public philosophy, Abraham Lincoln's teaching on the wrongness of slavery seemed almost cold and amoral. "I protest against that counterfeit logic which concludes that, because I do not want a black woman for a slave I must necessarily want her for a wife," Lincoln said. All inequalities and divisions, whether based on "color, size, intellect, moral developments, or social capacity," may well persist in Lincoln's view of a just society. "[B]ut in her *natural right to eat the bread she earns with her own hands* without asking leave of any one else, she is my equal, and the equal of all others."[558] As always, Lincoln echoed Thomas Jefferson's understanding of property and what it meant for freedom. The plight of slaves was above all their condition of "labor[ing] for another"; for this reason, Jefferson wrote, I "tremble for my country when I reflect that God is just, and that his justice cannot rest forever." The wrong of laying claim to something without putting one's labor into it was found not only in another person's body, but in land as well. Traveling across the French countryside, Jefferson observed the vast plots of undeveloped land held by the aristocracy and royal family. He reflected on the "unequal division of property which occasions the numberless instances of wretchedness which I had observed in this country

[558] Abraham Lincoln, Second Inaugural Address, March 4, 1865, *Lincoln: Selected Speeches and Writings* (New York: Library of America, 1992), 120. (Emphasis added.) This is what set Lincoln quite apart from the abolitionists, who defined freedom in far more philosophic and spiritual terms. The difference went all the way down: if a slave-owner decides that it is "God wills" that his slave be free, his primary action is not to send the slave away, but to "walk out of the shade, throw off his gloves, and delve for his own bread," i.e., labor for his own property rather than systematically take it from another. Ibid., 176. This emphasis on property and fair contract appeared again in Lincoln's Second Inaugural Address, by far the most religious of his speeches. It was not the cruelty of slave-owners that defied the will of God, but "wringing their bread from the sweat of other men's faces" that violated His divine attributes. Ibid., 450.

and is to be observed all over Europe." He asked: "what could be the reason so many should be permitted to beg who are willing to work, in a country where there is a very considerable proportion of uncultivated lands?"[559]

Of course, property was not the only right according to Lincoln and the Founders. Nor was it the noblest, compared to free exercise of religion, freedom of assembly, free speech – or, for that matter, "adequate food and clothing and recreation," "adequate medical care" and "a good education," as Franklin Roosevelt later promised.[560] Yet property was the *foundational* right; no other right, however humane, was as solid and tangible, nor could any serve as the bedrock on which other kinds of freedom stood. Only property "embraces every thing to which a man may attach a value and have a right," James Madison wrote. In a primary sense, it involved merchandise, money, and land. But in a broader sense,

> a man has a property in his opinions and the free communication of them. He has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them. He has a property very dear to him in the safety and liberty of his person. He has an equal property in the free use of his faculties and free choice of the objects on which to employ them. In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights.[561]

The distinctive feature of the new form of judicial review introduced in *Caroline Products* is the Court's protection of secondary rights, without what Americans of earlier generations perceived as the primary right. Perhaps there is a place for "strict" or "intermediate scrutiny" in cases involving a "suspect class," or even a civil liberties

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[559] Thomas Jefferson, "Letter to James Madison," Oct. 28, 1875, *Writings* (New York: Library of America, 1984), 841. The solution was, of course, the state policy of primogeniture, which would overcome the "natural affections of the human mind," particularly among aristocrats, to cling to a single piece of land. Ibid.

[560] Franklin D. Roosevelt, Message on the State of the Union, 1944, *American Political Rhetoric: A Reader, Fifth Edition*, ed. Peter Lawler and Robert Schaefer (Rowman & Littlefield, 2005), pp. 201-202. Roosevelt listed these new rights without a whiff of "contract" or "property." They were not the basic promises of good government, but "new goals of human happiness and well-being." Ibid.

[561] James Madison, "Property," in *Writings* (New York: Library of America, 1999), 515.

issues involving reproductive privacy or religious liberty. But to argue that property owners – "powerless groups and individuals the Public Use Clause protects," facing confiscation at the hands of local governments aligned with large corporations and development firms – do not deserve the slightest attention indicates a doubly radical shift in constitutional priorities.[562] That shift became especially clear in the recent case of *Kelo v. City of New London* (2005).

Justice Clarence Thomas pointed out the peculiarity of the situation in his dissent. All protections of poorer property owners were now removed from urban renewal programs: "no compensation is possible for the subjective value of these lands to the individuals displaced and the indignity inflicted by uprooting them from their homes." Such a broad understanding of "public purpose" "will fall disproportionately on poor communities," Thomas wrote. "Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful."[563] So far as they were members of ethnic minority groups, they could find abundant legal protection, and innumerable grounds for litigation against public and even private facilities; but as mere property-owning citizens, they were without defense.

The protection of the Public Use Clause of the Fifth Amendment, according to Justice John Paul Stevens in the *Kelo* opinion, was not broad enough to trump the public interest in state plans to develop land. "Without exception, the Court has defined that concept broadly, reflecting its longstanding policy of deference to legislative judgments as to what public needs justify the use of the takings power." Such public needs, according to Stevens, could include practically anything that state governments felt

[562] *Kelo v. City of New London* (2005) (Justice Thomas, dissenting). (No citation given.)
[563] Ibid.

necessary, even under such highly subjective terms as "beautiful" and "spacious."[564] "Viewed as a whole," Stevens concluded, "our jurisprudence has recognized that the needs of society have varied between different parts of the Nation, just as they have evolved over time in response to changed circumstances" – clearly an allusion to changes that provoked the Court's ruling in *West Coast Hotel v. Parrish* (1937).[565] Since then, the Court had wisely "eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power."[566]

Justice Stevens' glowing reverence for state authority over the private property of citizens contrasts greatly with his regard for state government on other issues. Indeed, Stevens' own opinions "viewed as a whole" reveal a very selective approach to federalism. When the state of Arkansas decided to place term limits on its representatives in Congress, for instance, Stevens was quite sure that this was "inconsistent with the Framers' vision of a uniform National Legislature representing the people of the United States." It was not protected under the Tenth Amendment's guarantee of "reserve powers"; a state could not pass such a law, however popular, without approval from the national government. Allowing individual states to apply

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[564] It was highly subjective, that is, by the Court's own reasoning. If obscenity is determined by whatever "average person, applying contemporary community standards" believes is lacking in "literary, artistic, political, or scientific value," then surely whatever is "beautiful" or "spacious" is also determined entirely by community perceptions. *Miller v. California*, 413 U.S. 15, at 25 (1973). Indeed, Justice Potter Stewart's "I know it when I see it" criteria offers no guidance on property rights in this respect. *Jacobellis v. Ohio*, 378 U.S. 184, at 197 (1964).

[565] Justice Stevens' jurisprudence is quite focused on the social evolution of the constitutional text: "that our understanding of the Constitution does change from time to time has been settled since John Marshall breathed life into its text," he writes. "If great lawyers of his day – Alexander Hamilton, for example – were sitting with us today, I would expect them to join Justice Kennedy's [majority] opinion." *Roper v. Simmons*, ___ 543 U.S. ___ (2005) (Justice Stevens, concurring). While other living Constitutionalists view the document as meaning entirely different things at different times, Stevens' views it as an outgrowth of previous generations.

[566] Ibid.

diverse qualifications would bring about a regulatory "patchwork" of election policies, "undermining the uniformity and the national character that the Framers envisioned and sought to ensure," he wrote. "Such a patchwork would also sever the direct link that the Framers found so critical between the National Government and the people of the United States."[567] Arbitrary use of private property at the hands of local governments, it seemed, did not create a patchwork at all. Similarly, high school student government voting for one of their own to deliver a prayer at a football game would guarantees "that minority candidates will never prevail and that their views will be effectively silenced," Stevens wrote. The school district's promise that those elected would abide by "civic or nonsectarian" prayer did not matter: it was the endorsement of religion in general by a local government that was unconstitutional. The "needs of society [varying] between different parts of the Nation" clearly had their limits. And, of course, when it came to the partial birth abortion procedure, Stevens could not understand "how a State has any legitimate interest in requiring a doctor to follow any procedure other than the one that he or she reasonably believes will best protect the woman in her exercise of this constitutional liberty." All abortion procedures were the same in Stevens' view, no matter how late or early the term; "that the State furthers any legitimate interest by banning one but not the other, is simply irrational."[568]

Justice Stevens is not arbitrary in his treatment of federalism: the bottom line is that property does not matter in his constitutional judgment, while a vast array of secondary rights – whether freedom from prayer or abortion in even the latest trimester – are essential.

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[567] *U.S. Term Limits, Inc. v Thornton*, __U.S.__, at 44. (1995).
[568] *Stenberg v. Carhart*, 530 U.S. 194 (2000) (Justice Stevens, concurring).

One may grant that the Supreme Court in the Lochner Era stretched the meaning of the Fourteenth Amendment too far in saying that states could not infringe on the "right of contract." But to witness the rejection of an even more basic right to property – the right of citizens to keep what they *already have* – indicates an entirely new understanding of the purpose of government. Modern jurisprudence had embraced an extreme quite opposite from what it was (or what many *think* it was) in the Lochner Era; in doing so, it has abandoned not only what it regards as a shaky "right of contract" philosophy, but also the more fundamental basis of liberty, without which a republican form of government makes very little sense.

Yet it seems to make perfect sense for the point at which our Constitution has evolved, in the minds of some justices. Justice Thurgood Marshall, for instance, found it unthinkable to use the "rational basis" test once used for economic rights in the obsolete "days of *Lochner*." This appears in Marshall's dissent in *Cleburne v. Cleburne Living Center* (1985), which featured a challenge to the denial of a city housing permit for the mentally retarded on what appeared to be plainly discriminatory grounds. In a unanimous opinion, the Court held that they were indeed entitled to the permit under the Equal Protection Clause of the Fourteenth Amendment. Yet the majority declined to extend the "suspect class," or even a "quasi-suspect class," to the mentally retarded, thus leaving the basis for judicial review of discriminatory legislation toward such groups up to mere "rational basis" scrutiny. Such an un-principled test, though, applied to what was clearly a "discrete and insular minority," was, in Justice Marshall's view, terribly inadequate. "The refusal to acknowledge that something more than minimum rationality review is at work here is, in my view, unfortunate," Marshall wrote.

> The suggestion that the traditional rational-basis test allows this sort of searching inquiry creates precedent for this Court and lower courts to subject economic and commercial classifications to similar and searching "ordinary" rational-basis review – a small and regrettable step back toward the days of *Lochner v. New York*.[569]

For Marshall, using the "rational basis" form of scrutiny, in place of strict or at least intermediate scrutiny, indicated that the Court was not taking discrimination seriously. It was using a hand-me-down rule for a deeply important dispute, which ought to be settled by a more reliable test.

But it is hard to tell what Marshall felt to be less important: the rule applied in this case, or the importance of property rights in general. What would Marshall do if the property rights of the mentally retarded were threatened? Would he allow strict scrutiny to encompass protection of their contracts and estates? Worse than the whimsical and ideology-laden view of Lochner Era as it appears in other cases, this instance of Lochnerizing features an undignified and demeaning rule for the protection of a minority group. Clearly, in Justice Marshall's view, the American people deserve something greater from their Supreme Court – a sort of Lochnerizing that reaches what Marshall himself viewed as the correct goal worthy of the institution. What exactly would constitute the "correct" form of Lochnerizing?

We can at least be certain of what is not considered Lochnerizing. In *Seminole Tribe of Florida v. Florida* (1996), for instance, the Court struck down Indian Gaming Regulatory Act, which protected the ability of Native American tribes to sue state governments in federal courts, thereby protecting the sovereign immunity of the states under the Eleventh Amendment. In a lengthy dissent, Justice David Souter referred to such judicial second-guessing of congressional power as yet another return to the

[569] *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, at 459-460 (1985).

Lochner Era. It was, for him, yet another instance of common-law reasoning and determinations of fairness operating at the national level, thus usurping constitutional law. "It was the defining characteristic of the Lochner era," Souter wrote,

> and its characteristic vice, that the Court treated the common-law background (in those days, common-law property rights and contractual autonomy) as paramount, while regarding congressional legislation to abrogate the common law on these economic matters as constitutionally suspect.[570]

Not suspicious at all, in Souter's view, was the authority of Congress to grant the Judiciary far greater scrutiny in local disputes. Lochnerizing is a problem, it seems, only when it deals with issues that judges like Souter have deemed undeserving of constitutional protections. The right to sue, particularly in federal courts, was vastly more important than the right of contract.

Justice Souter was consistent in this view of congressional supremacy over local economic affairs when it came to interstate commerce – no matter how the Congress defined that clause. When the opinion in *United States v. Lopez* (1995) declared that Congress' power to regulate interstate commerce did not extend to regulation of handguns, Souter was certain that the Lochner Era had returned. "The fulcrums of judicial review in [the Lochner Era] cases were the notions of liberty and property characteristic of *laissez-faire* economics," he wrote in dissent; "under each conception of judicial review the Court's character for the first third of the century showed itself in exacting judicial scrutiny of a legislature's choice of economic ends and of the legislative means selected to reach them."[571] It was revealing that the "sea change" bringing this era to an end occurred at the same time the Court abandoned its restrictive reading of the Commerce Clause: both involved judicial scrutiny of matters best left to the government.

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[570] *Seminole Tribe of Florida v. Florida*, __U.S.__ , at 71-72 (1996) (Justice Souter, dissenting).
[571] *United States v. Lopez*, __U.S.__, at 4 (1995) (Justice Souter, dissenting).

In "the past half-century the Court has no more turned back in the direction of formalistic Commerce Clause review… than it has inclined toward reasserting the substantive authority of *Lochner* due process," he wrote. Such an "inflated protection of contractual autonomy" was nothing less than a "return to the untenable jurisprudence from which the Court extricated itself almost 60 years ago."[572] Certain forms of liberty were "untenable" according to Souter; others needed to be upheld at all costs.

Justice Souter was quite right to say that this was a divergence from the accepted rule. Just ten years before, in *Community Communications v. Boulder* (1985), the Court sought to grant "extensive powers of self-government" to cities, which created serious conflict between competing cable television providers who faced monopolization caused by improved technologies. The city council of Boulder, Colorado issued an emergency ordinance to block outside cable suppliers from competing with their own, thus creating a legal standoff between big business and local government. It was a situation not unlike *Lochner* in terms of the facts of the case, though here the regulation did not come from a state legislature, but from a city council, itself a much clearer exercise of democracy.

Here, the Court looked back to *Parker v. Brown* (1943), which addressed whether or not federal antitrust laws could keep a state from exercising its own powers to either restrict or protect local competition. If the state had such a power – and the Court ruled that it did – then surely city governments had the same power to restrain the growth of monopolies. But this was not true according to the Court in the *Boulder* case: a deliberate state law was one thing, but such a broad grant to of regulatory power to city governments simply went too far. Cities were therefore not allowed exemptions from antitrust laws. At issue, of course, was the meaning of federalism: was it state

[572] Ibid., 5-6.

sovereignty alone, or did it mean a broader understanding of municipal sovereignty? Was there a difference between state and local government, at least in terms of exemptions from federal statutes, or were cities somehow subject to national authority while states were not?

The Court decided it was the latter. But this, according to Justice Rehnquist, opened the way for even more minute judicial management of local affairs, drawing a great deal of city politics into the national scope. It was, of course, "reminiscent of the *Lochner* era," he wrote in dissent. "Once again, the federal courts will be called upon to engage in the same wide-ranging, essentially standardless inquiry into the reasonableness of local regulation that this Court has properly rejected"; but in place of "liberty of contract" and "substantive due process," the guiding principle would be that of the Sherman Act. "Neither the Due Process Clause nor the Sherman Act authorizes federal courts to invalidate local regulation of the economy simply upon opining that the municipality has acted unwisely." In a footnote, Rehnquist gives a brief summary of the Lochner Era: the Court quite simply "forbade government interference with competitive forces in the marketplace."[573]

Justice Rehnquist cited *Lochner* more frequently than any other modern figure on the Supreme Court. Any case that looked beyond the strictest guidelines of judicial restraint, or proved too leaky to prevent the judge's moralizing, was "reminiscent of the long-repudiated *Lochner v. New York*"[574]; it was a return "to the bygone era…in which it was common practice for this Court to strike down economic regulations adopted by a State based on the Court's own notions of the most appropriate means for the State to

[573] *Community Communications Co. v. Boulder,* 455 U.S. 40, at 67-68 (1985) (Rehnquist, dissenting).
[574] *Central Hudson Gas & Electric v. Public Service Commission*, 447 U.S. 557, 589; 591 (1980).

implement its considered policies"; it was an attempt "to resurrect the discredited doctrine of cases such as *Lochner*."[575] It should even be likened to the infamous *Plessy v. Ferguson* decision.[576]

Privacy and the Origins of Legitimate Lochnerizing

Lochner's most important appearance in the Supreme Court's decisions has been in its privacy rulings, particularly on reproductive rights and sexual privacy. Given the volume of cases that protect a radical definition of privacy over any moral expectations of local government, it makes sense that the Court would be forced to explain the difference between their current rulings and what they perceive to be the ruling in *Lochner*. The method of the Lochner Era – finding constitutional protections for such fundamental rights, especially when the political system fails to do so on its own – is considered the Court's highest and noblest duty; it is what allows them to "function as the Supreme Court of a Nation dedicated to the rule of law."[577] The nobility of such privacy rulings resides above all in what certain justices deem a correct and legitimate form of Lochnerizing. It was slow in developing, and the justices involved were reluctant to identify their methods until quite recently.

Griswold v. Connecticut (1965) was the first step in that process, distancing itself from the old *Lochner*-type ruling while at the same time introducing the germ of what would become the new one. Here, the state law banning contraceptives was unconstitutional under the Bill of Rights – or, rather, the right to privacy "formed by

[575] *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 359 (1987).
[576] *Thornburgh v. American College of Obstetrics and Gynecology* 476 US 747, 788 (1986) (Justice Sandra Day O'Connor and William Rehnquist, dissenting opinion).
[577] *Planned Parenthood of Southern Pennsylvania v. Casey*, 505 U.S. 833, at 865 (1992).

emanations from those guarantees that help give them life and substance"; this was incorporated and applied directly to the states by the Fourteenth Amendment. Justice William Douglas wanted to make it clear, though, that such protection of privacy was not an instance of judicial review driven by the majority's own moral theories, as it had been in his view of the Lochner Era. "[W]e decline that invitation as we did in *West Coast Hotel Co. v. Parrish*," he insisted. "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."[578] Economics and social conditions were little more than light and transient issues. Marriage, however, was far more fundamental – a precept of the Bill of Rights that gives those rights "life and substance," rather than a whimsical reading of the Fourteenth Amendment. It was, after all, "older than the Bill of Rights – older than our political parties, older than our school system," Douglas wrote. His conclusion is quoted often, though few have grasped his essential point.

> Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not *commercial or social projects*. Yet it is an association for as noble a purpose as any involved in our prior decisions.[579]

The right of contract of the Lochner Era was little more than another "commercial or social project," and was therefore an ephemeral issue; the pursuit of property was a mere judicial construction compared with the natural givenness of marriage, meaning it hardly deserved the same protection. Douglas' claim was essentially a declaration that all previous Courts had been terribly distracted from the real issue. After all, the Connecticut statue was from the late nineteenth century, meaning it sat unacknowledged for decades, and all the way through the early twentieth century while the Court was

[578] *Griswold v. Connecticut*, 381 U.S. 479, at 484; 482 (1965).
[579] Ibid., 486. (Emphasis added.)

preoccupied with the notions of contracts and regulatory laws. Clearly Douglas saw his own reading of the Bill of Rights as the true way.

Yet the broader difference between Douglas' opinion and what he perceived as Lochnerizing was not clear at all. Douglas *had* to address marriage in such a way because the statute itself was concerned about the effects of the availability of contraception on marital fidelity, which placed it well within the state's police power. His seriousness about the meaning of marriage completely vanished, however, when he joined the majority in *Eisenstadt v. Baird* (1972), which extended the "penumbras" of privacy to include single people. Even as the opinion of the Court rejected *Griswold*'s narrow scope of marital privacy, Douglas himself was far more concerned with the plaintiff's First Amendment rights.[580] Nor was he particularly worried about it when he silently joined the majority in *Roe v. Wade* (1973) a few years later.[581]

Justice Hugo Black, however, knew precisely what was happening, and was quite unwilling to let the majority claim it was not Lochnerizing when in fact it was, and doing so even more shamefully, in his mind, than the *Lochner* Court itself. Yet his objection is

[580] 405 U.S. 438, at 454. It was the right to "[address] an audience of students and faculty… on the subject of birth control and overpopulation" rather than the privacy of marriage, to be specific (Ibid.).

[581] Justice Douglas' words seem to echo a most unlikely document: Pope Leo's 1891 encyclical, *Rerum Novarum*. The idea "that the civil government should at its option intrude into and exercise intimate control over the family and the household is a great and pernicious error," Leo wrote; the family is indeed "older than any State." For this reason, "it has rights and duties peculiar to itself which are quite independent of the State." But Leo's call for the state's non-involvement in private affairs rests entirely on the right to pursue property – precisely *because* it involved children. Leo echoes the ancient meaning of the household, the most basic economic unity, when he declares that children "should be by [the parent] provided with all that is needful to enable them to keep themselves decently from want and misery amid the uncertainties of this mortal life. Now, in no other way can a father effect this except by the ownership of productive property, which he can transmit to his children by inheritance," thus revealing freedoms "which are prior to those of the community, and founded more immediately in nature," as Douglas would later put it, albeit with a modernized meaning. *Rerum Novarum* (1891), no. 12-14. This certainly explains the transition in the Court's understanding of the right of contraception as a fundamental aspect of marital privacy: it was inevitable that it abandon Douglas' manta about the sanctity of marriage, and look to more radical liberties of the individual as it did in *Eisenstadt* and *Roe* – and, of course, a greater emphasis on its *own role* as the sole defender of those liberties.

very insightful about the latter-day view of the Lochner Era: he plainly confuses legal reasoning from first principles with the philosophy of historicism. "I realize that many good and able men have eloquently spoken and written, sometimes in rhapsodical strains, about the duty of this Court to keep the Constitution in tune with the times," Black wrote. "The idea is that the Constitution must be changed from time to time and that this Court is charged with a duty to make those changes." For him, neither "evolving standards of decency" nor a practice's "full development [and] present place," it seemed, were any different from the "right of contract" that drove the Lochner Era.[582]

The philosophy of natural justice that informed so many rulings in the Lochner Era is entirely about truths that do *not* change, and which inform the Constitutional text even as its adapts to the most radically new circumstances; the philosophy of staying "in tune with the times" however is *entirely* about change. It is a distinction that requires no agreement with either side from the one studying it. It was true, as Black insisted, that this could invite much confusion, and drag constitutional law into the realm of philosophic debate about what precisely those first principles are – the right of contract versus marriage, in particular. But whatever the first principles behind the law might have been, there was no denying how different that approach was from the progressive "living constitutionalism" that was emerging in Black's time. To his credit, Black was aware of the change in his fellow justices regarding the economic aspect of the Lochner Era, noting that they had "less quarrel with state economic regulations," turning their attention instead to social policy. "But any limitation upon their using the natural law due process philosophy to strike down any state law, dealing with any activity whatever,

[582] *Trop v. Dulles*, 356 U.S. 86, at 101 (1958); *Brown v. Board of Education*, 347 U.S. 483, at 492-493 (1954).

will obviously be only self-imposed."[583] It was a change from apples to oranges, it seemed; the Court had simply abandoned one form of Lochnerizing for another. Any judicial review that looked to any framework other than the letter of the law was based on "an 'arbitrary and capricious' or 'shocking to the conscience' formula," he claimed; that formula had been

> liberally used by this Court to strike down economic legislation in the early decades of this century, threatening, many people thought, the tranquility and stability of the Nation. That formula, based on subjective considerations of "natural justice," is no less dangerous when used to enforce this Court's views about personal rights than those about economic rights.[584]

Justice Douglas' strange re-definition of Lochnerizing, itself a straw-man-decoy argument, along with Justice Black's crude association of natural law with historicism, indicates how unclear the modern Court was about the Lochner Era – at a time, no less, when it was turning to Substantive Due Process in far more radical way. That confusion was passed on to *Roe v. Wade*, where the accusation of Lochnerizing was much more direct. It was an instance of both sides – the majority opinion and the dissent – accusing the other side of allowing personal philosophies to get in the way of objectively measuring the statute against the Constitution. "Our task is to resolve the issue by constitutional measurement," Justice Harry Blackmun wrote, "free of emotion and of predilection." The case was decided on "medical and medical-legal history"; this adhered to a pure and objective approach to judicial review, once espoused by Justice Oliver Wendell Holmes' "now-vindicated dissent" in *Lochner v. New York*. The Constitution, Holmes wrote,

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[583] Ibid., 524.

[584] Ibid., 522-523 (1965) (Black and Stewart, dissenting). Douglas, oddly enough, was free from this charge, at least on the surface of his legal reasoning: he never described marital privacy as an evolutionary thing, since it was "older than the Bill of Rights," etc.; in this, it was more concerned with a fundamental principle than an evolutionary leap (Ibid., 486).

> "is made for people of fundamentally differing views, and the accident of our finding certain opinions 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."[585]

For all of Blackmun's Holmsian certainty that the right to abortion was as "fundamental" as the letter of the law itself, the outcomes of the case were based far more on his own arbitrary construction of legal rules. First, he declared that states did have a "compelling" interest in protecting fetal life; but a line had to be drawn between that interest and the "fundamental right" declared in this case. Blackmun chose "viability," the point at which a fetus can survive outside the womb; despite its "substantial problems for precise definition," he placed the viability mark at "*approximately* the end of the first trimester." He then added that the state's compelling interest was subordinate to the judgment of an "attending physician, in consultation with his patient," and his judgment about the need to "preserve the life and health of the mother" – even the very physician who would be performing the abortion procedure.[586] It was, of course, a ruling that invited a flood of litigation. The remaining state authority to regulate abortion in the later trimesters repeatedly clashed with the "constitutional" authority of doctors and the expanding definition of "the woman's health," placing the Court at the center of the abortion controversy, and creating an environment far more intense and divisive than anything seen in the Lochner Era despite Blackmun's claim that the abortion question was "settled."

The more interesting part of *Roe v. Wade* and what it meant to the modern view of Lochner was, of course, Justice William Rehnquist's dissent. The Justice seemed resentful that Blackmun should mention Holmes' judicial philosophy, hiding behind a

[585] *Roe v. Wade*, 410 U.S. 113, at 116-117 (1973).
[586] Ibid., 163-164.

claim of legal objectivity while handing down a ruling that was in his view an assertion of judicial supremacy in an area best left to the democratic process. His resentment came, of course, from his feeling of kinship with Justice Holmes and his philosophy of legal positivism, and his resistance to the very thing that Blackmun was doing in Holmes' name. The ruling was "more closely attuned to the majority opinion of Mr. Justice Peckham in that case," Rehnquist wrote. This was no less problematic when applied to social rather than economic policy.

> [T]he adoption of the compelling state interest standard will inevitably require this Court to examine the legislative policies and pass on the wisdom of these policies in the very process of deciding whether a particular state interest put forward may or may not be "compelling."[587]

Rehnquist's greater concern here was very much in line with his general theory of democracy: the legality of abortion meant the same thing as its rightness, and that rightness was best determined by the prevailing traditions of the day – not the moral truths they conveyed, but the popular preferences they expressed. Those popular preferences were not more or less moral; they were simply more *powerful*. This meant they alone deserved to have the final say, and that the rule of law maintained its dignity by quietly submitting. Lochnerizing was not a problem for the Constitution itself and the principles that it embodied according to Rehnquist; it was wrong because it defied the will of the majority, which preferred the Constitution, and which preferred its abortion laws passed through its state legislatures.

> The fact that a majority of the States reflecting, after all, the majority sentiment in those States, have had restrictions on abortions for at least a century is a strong indication, it seems to me, that the asserted right to an abortion is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental." Even today, when society's views on abortion are changing, the very existence of the debate is evidence that the "right" to an abortion is not so universally accepted as

[587] Ibid., 174 (1973) (Justice Rehnquist, dissenting).

the appellant would have us believe.[588]

Principles and political philosophies, in other words, could not be allowed to influence a cool, black and white, text-centered form of judicial review that Rehnquist thought best; these methods in turn shaped his view of judicial deference to legislative authority in these cases, provided there was a clear and rational reason for the regulatory law itself. Otherwise, there is a "great danger that the Court will expand beyond their fair meaning some of the provisions of the Constitution that restrict governmental authority." This would "impair not individual rights but the principle of majority rule."[589] He likened *Lochner* to none other than *Dred Scott v. Sanford*, calling both cases the most shameful instances of judicial error.

Such errors "come not from any caution induced by credible political threats to the Court's autonomy but by the Court's mistaking its own views of policy for the restrictions contained in the Constitution," Rehnquist wrote. "The justices were not appointed to roam at large in the realm of public policy and strike down laws that offend their own ideas of what is desirable and what is undesirable." But this was not because of the merits of the Constitution itself, much less the veneration the people have for its design. It was not that these kinds of rulings involved bad "value judgments," but that they involved values at all. Such values, whether those of judges or of common people, must be seen as "personal moral judgments until in some way they are given the sanction of supreme law." In a democracy, in Rehnquist's view, it is the people who do this – not by their choice, but by their will, thus requiring judges to step aside. Such a "value-free"

[588] Ibid., 274. Quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).
[589] William H. Rehnquist, *The Supreme Court* (New York: Vintage Books, 1987), 274.

basis for the judicial craft is, of course, quite reminiscent of Chief Justice Oliver Wendell Holmes's moral skepticism – which Rehnquist believed "makes eminent good sense."[590]

Justice Black's influence on his Court was arguably greater than that of Justice Rehnquist. Yet it was not intellect or strength of personality that made the difference, so much as the gradual decline of the legal positivism that they both shared, in light of more modern theories of natural right. It was, as Alexander Bickel put it, the "Infirm Glory of the Positive Hour" – a phase that was doomed to be short. Justice Holmes lived at its birth; but Justices Black and Rehnquist witnessed its death. "It was never altogether realistic," Bickel wrote in 1962,

> to conclude that behind all judicial dialectic there was personal preference and personal power and nothing else. In any event, that is a reality, if it be true, on which we cannot allow the edifice of judicial review to be based, for if that is all judges do, then their authority over us is totally intolerable and totally irreconcilable with the theory and practice of political democracy.[591]

The fact is that law always depends on some kind of philosophic underpinnings; it always teaches some kind of morality, even when it believes it is not. "The law could never stop teaching lessons of right and wrong, for human beings could never repress the inclination, built into their natures, to form judgments on the things that were right or wrong, just or unjust," Hadley Arkes writes. "In fact, we have discovered in our own time that judges and political men are never more rigid and moralistic in their teaching as when they are ridiculing moral judgment and professing to free people from the tyranny of moral truths," i.e., those moral truths of which they happen to disapprove.[592]

More than anyone else, Justice Oliver Wendell Holmes seems to have overcome this problem through his own judicial restraint. It came from his awareness of his own

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[590] Ibid., 275; 278-279.
[591] Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New Haven: Yale University Press, 1962), 80.
[592] Hadley Arkes, *Natural Rights and the Right to Choose* (Cambridge: Cambridge University Press, 2002), pp. 3-4.

philosophies, and how they might corrupt his interpretation of the Constitution. It was indeed a monumental feat: to *act* on his skepticism. That was perhaps the noblest feature of his character – much like facing that moral void of modernism with a manly and almost heroic spirit, he was able to whip his own moral sentiments into total subordination to his raw pragmatic legal reasoning. But in the wake of this positivism we find a vast array of judges – Douglas and Blackmun in particular – who simply could not contain themselves despite their claim to having a special kinship with Justice Holmes' approach to law. Justice George Sutherland understood the risk of lesser judges than Holmes (or even Holmes himself) doing constitutional law in that way. "The suggestion that the only check upon the exercise of the judicial power… is the judge's own faculty of self-restraint, is both ill considered and mischievous," Sutherland wrote. "Self-restraint belongs in the domain of will and not of judgment."[593] Such a passive method of judging will yield just as much to the judge's own unconscious whims and favorite philosophies as it will to the law. The problem of bad opinions was corrected by the presence of *right* opinions. The true check came not from purifying oneself of all assumptions, but by having the *best* assumptions.

> The check upon the judge is that imposed by his oath of office, by the Constitution, and by his own conscientious and informed convictions; and since he has the duty to make up his own mind and adjudge accordingly, it is hard to see how there could be any other restraint.[594]

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[593] *West Coast Hotel v. Parrish*, 300 U.S. 379, at 402 (1937) (Justice Sutherland, dissenting). He probably did not know it, but Sutherland was echoing Thomas Aquinas here. "Now a judge is so called (*judex*) because he asserts the right (*jus dicens*) and right is the object of justice." Deciding rightly, though, could only come "from the virtuous habit" – not unlike those instilled by oaths of office and "veneration" as Sutherland saw them. This creates the "disposition of the one who judges, on which depends his aptness to judge aright" (*Summa Theologica*, II, II, Q. 60, A. 1).

[594] Ibid. This offers important insights into the meaning of dissenting opinions as well: they are meant to be constructive contributions to the majority's decision. It is "the right of those in the minority to disagree, and sometimes, in matters of grave importance, their imperative duty to voice their disagreement at such length as the occasion demands-always, of course, in terms which, however forceful, do not offend the proprieties or impugn the good faith of those who think otherwise" (Ibid.). Majority opinions and minority dissents, in other words, are meant to explore their shared assumptions with the majority about the nature of

Aware of this, many judges have sought to avoid their own hegemony, or to at least soften it, by defining freedom in a way that still fits with the radical form of judicial presence in defining basic liberties. But what basic liberties could exist in the presence of this judicial supremacy? The bedrock for all rights, such as the Founders' view of the right to property, has been stripped away. But, of course, there is a new bedrock: sexual freedom.

Legitimate Lochnerizing

That new freedom finally appeared in *Planned Parenthood v. Casey* (1992). Here Justices Sandra O'Connor, Anthony Kennedy, and David Souter, in their joint opinion for the Court, acknowledged that the facts supporting the *Roe* decision were seriously undermined: where Justice Blackmun based much of his third trimester rule on the "viability" of the fetus, for instance, viability itself had been extended to earlier trimesters by maternal health and neo-natal technology. This, it would seem, should render *Roe* a "doctrinal remnant," or a standard of judicial review that no longer applied to present circumstances because of new facts that made that interpretation of law "unworkable."[595] Law divorced from reality in such a way is hopelessly flawed, and lingers in a way that invites constitutional crises. For a comparative example – one that would prove that this was *not* the case for *Roe* – the Court turned to *Lochner v. New York*.

The justices in *Casey* pointed out that *Lochner*'s doctrine, which, in their account, elevated the liberty of contract above all practical considerations, had met its end with the

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the Constitution and of the Court itself. The retreat from the idea that law always maintains some basic precepts, however, has invited the flood of modern philosophies that in turn create the multitude of fundamentally disagreeing dissents that we witness on the modern Supreme Court.

[595] *Planned Parenthood v. Casey* 505 U.S. 833, 860 (1992).

Great Depression – a glaring new fact, if ever there was one. "The facts upon which the earlier case had premised a constitutional resolution of social controversy had proven to be untrue," they wrote, "and history's demonstration of their untruth not only justified but required the new choice of constitutional principle that *West Coast Hotel* announced." This brought serious damage the Court's institutional integrity, as over-turning any previous ruling would, especially if it had been the precedent in so many subsequent cases. But the *West Coast Hotel* ruling was plainly justified according to the *Casey* opinion, given how radically the facts had changed: there was worse damage to a law that prevented the government from meeting the necessities of new times than there was to the Court's own institutional integrity; there was a "clear demonstration that the facts of economic life were different from those previously assumed warranted the repudiation of the old law."[596]

But the Court held that the change of facts that demanded a change in the interpretation of law did not apply when it came to *Roe v. Wade*. The facts in Justice Blackmun's *Roe* opinion were expendable: it was public approval of personal autonomy in reproductive decisions that really mattered; not the legal reasoning of *Roe* itself, but popular favor for the "essential holding" was the true guiding fact in this case. "While the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be

[596] Ibid., 862. As a second example, the justices looked to *Plessy v. Ferguson* (1896), which met a similar fate when its illegitimacy adequately exposed in *Brown v. Board of Education* (1954). The "separate but equal" rule was "so clearly at odds with the facts apparent to the Court in 1954 that the decision to reexamine *Plessy* was, on this ground alone, not only justified but required" (Ibid., 863). One would think reexamination of *Plessy* was required because of Justice John Marshall Harlan's dissent in that case, where he wrote that "[o]ur constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful" (*Plessy v. Ferguson*, 163 U.S. 537, 559 [1896]). That principle would spread to "the humblest," or the unborn, and would therefore serve no purpose for the majority in the present case.

dismissed," the Justices wrote. "An entire generation has come of age free to assume *Roe*'s concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions" – a fact that far surpassed in importance the condition of Justice Blackmun's understanding of fetal viability and his trimester rule.[597] Hence, it was the widespread *assumption* of *Roe*'s guarantee of the right to abortion that became the enduring and constant fact. The freedom in personal autonomy was too widely enjoyed for that freedom to be relegated to a "doctrinal remnant."

> [T]he cases before us present no such occasion, [and] it could be seen as no such response. Because neither the factual underpinnings of *Roe*'s central holding nor our understanding of it has changed (and because no other indication of weakened precedent has been shown), the Court could not pretend to be reexamining the prior law with any justification beyond a present doctrinal disposition to come out differently from the Court of 1973.[598]

Planned Parenthood v. Casey acknowledged, at long last, that the Court *really was* Lochnerizing when it handed down *Griswold*, *Roe* and all cases that build upon those precedents. Though the Justices in those cases denied it, the Court felt that it was vindicating the legal reasoning in their opinions by revealing the new principle of higher law to which they had been deferring all along. The *Casey* Court gave assurance, though, this was *good* Lochnerizing because of the nature of the conclusion; liberty of contract, by contrast, was the *bad* kind. The opinion even acknowledged the Court's reasoning in *Whitney v. California* (1927) – the only unanimous Lochner Era ruling in support of substantive Due Process – which regarded it as "settled" "that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure," Justice Louis Brandeis had written long ago. "Thus all fundamental rights

[597] Ibid., 856; 860.
[598] Ibid., 864.

comprised within the term liberty are protected by the Federal Constitution from invasion by the States."[599] That much was true, though the right of contract was not.

Moreover, the right to abortion had become as integral to national life as liberty of contract had been. But while economic liberty had been rooted in older traditions, which themselves embodied the principles of natural right, the new freedom, to which the Court deferred with such reverence, was plainly constructed by the Court itself. That construct assumed the role of natural right, playing the same part that liberty of contract had in the Lochner Era. The role was the same, but, of course, the definition of liberty was something entirely different: it involved the most "intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment," the opinion stated. It then introduced the new underpinnings of law – the very idea that positivists like Justices Holmes, Black, and Rehnquist wished to leave behind in the Lochner Era, but which had become inevitable in current times. "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."[600] Hence, Lochnerizing was reborn, and granted legitimacy.

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[599] 274 U.S. 357, at 373. Brandeis meant the freedom of speech in this case, which drew Justice Holmes' support for the ruling.

[600] Ibid., 851. It is, of course, a form of liberty that has no qualitative relationship with the form of government established over it. As John Stuart Mill admitted, "[e]ven despotism does not produce its worst effects, so long as individuality exists under it," while "whatever crushes individuality is despotism, by whatever name it may be called" – whether it be a "republic" or a "tyranny." John Stuart Mill, *On Liberty and Other Essays* (Oxford: Oxford University Press), 71. At the same time, it was a definition of freedom for "a creature who bears little resemblance to any human being that has ever lived: a free, self-determining, and self-sufficient individual," according to Mary Ann Glendon "Looking For 'Persons' In the Law," in *First Things*, December 2006.

To say, however, that the sustaining force of a Court ruling came from the public's long-time acceptance of that ruling could only be based on "generalized assertions about the national psyche," Justice Antonin Scalia wrote in the *Casey* dissent. It was, "a belief that the people of this country have grown accustomed to the *Roe* decision over the last 19 years and have 'ordered their thinking and living around' it."[601] This was hardly a sound reason for maintaining *stare decisis* on an erroneous case in his view: *Lochner*-style right of contract lasted *thirty-two* years, yet "the simple fact that a generation or more had grown used to these major decisions did not prevent the Court from correcting its errors in [*West Coast Hotel*], nor should it prevent us from correctly interpreting the Constitution here." The Court did itself no damage in overturning the *Lochner* rule; it "instead enhanced its stature by acknowledging and correcting its error," he wrote.[602]

Nor was it exclusively the Lochner Court's error according to Scalia. The principles of *laissez-faire* were the target of state regulations on wages and hours long before the Great Depression. "These statutes were indeed enacted because of a belief on the part of their sponsors that 'freedom of contract' did not protect the welfare of workers, demonstrating that that belief manifested itself more than a generation before

[601] Ibid., 957 (Scalia, dissenting).

[602] Ibid., 959. That legitimacy, or the institutional integrity of the Supreme Court as it appears in national life, is just as damaged by upholding certain rulings as it is by striking them down. But the *Casey* majority opinion could only perceive the former problem; the possibility of damaging judicial integrity by *upholding* a deeply flawed ruling was unthinkable when the outcome of that ruling was so broadly accepted. But in Scalia's view, upholding *Roe* was even *more* politically driven, and at greater expense to the integrity of the Court, than striking it down. "[J]ust as the Court should not respond to that sort of protest by retreating from the decision simply to allay the concerns of the protesters, it should likewise not respond by determining to adhere to the decision at all costs, lest it seem to be retreating under fire," Scalia wrote.[602] If the intensity of political pressure is proportionate to the Court's willingness to resist and thus maintain its own integrity, it would seem that it made entirely the wrong decision in 1937 when the Court handed down *West Coast Hotel*: it was, after all, facing Franklin Roosevelt's court-packing plan and other judicial reforms. Under the majority's principle, "the Court seemingly should have responded to this opposition by stubbornly refusing to reexamine the *Lochner* rationale, lest it lose legitimacy by appearing to 'overrule under fire'" (Ibid.).

the Great Depression," he wrote. "The crucial failing at that time was not that workers were not paid a fair wage, but that there was no work available at any wage."[603]

Most importantly, the opinion in *West Coast Hotel v. Parrish* did not look to the change of facts in public opinion or the conditions of the Depression: "it did not state that *Lochner* had been based on an economic view that had fallen into disfavor," as the *Casey* opinion believed.[604] Justice Hughes' opinion looked above all to the Constitution, and how it simply did not guarantee "freedom of contract." It was fundamentally a constitutional argument according to Scalia. Justice Hughes made precisely that declaration in *West Coast Hotel*: "The Constitution does not speak of freedom of contract," he wrote. But that was the extent of his constitutional concern. At most, the Constitution prevented 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.[605]

Hughes was far more concerned with the state's own interest in protecting women from "unscrupulous and overreaching employers" who would take advantage of their inability to bargain than with the Constitution itself.

The theory of living constitutionalism goes far beyond the idea that the document means different things in different times: it also means that the principles underlying the Constitution change. The Founders' Constitution was a "sparking vision of the supremacy of human dignity," Brennan wrote. This was not as an expression of man's ability to design an enduring government by "reflection and choice," nor the ability to enshrine natural rights within a constitutional tradition; it was found above all in the Bill

[603] Ibid., 961.
[604] Ibid.
[605] *West Coast Hotel v. Parrish*, 300 U.S. 379, at 391 (1937).

of Rights. Greater than the amendments themselves was the way they had been "transformed over time in response to both transformations of social condition and evolution of our concepts of human dignity." That transformation began, according to Brennan, with the movement away from property as the main legal principle and source of human dignity in a largely agrarian society; "property relationships formed the heart of litigation and of legal practice, and lawyers and judges tended to think stable property relationships the highest aim of the law." Plainly this view of property rights has nothing more to it than the practical experience of American life, nor is there any more reason to preserve it in light of seemingly unlimited government regulation of industry, since the "days when common law property relationships dominated litigation and legal practice are past." It is a reality we must accept if we are to avoid falling captive to "the anachronistic views of long-gone generations."[606] And it seems we have accepted it, liberals and conservatives alike, given the current treatment of the history and reasoning behind *Lochner v. New York*.

A careful reading of previous cases, though, supports Justice Scalia's point – and mine as well: the Lochner Era cases did not depend on *Lochner v. New York* with the same authoritative reverence as *Casey* opinion depended on *Roe v. Wade* – because in the rights in question came not from the *Lochner* ruling itself, but from the Constitution.

Conclusion

[606] William Brennan, "Speech on the Text and Teaching Symposium (1985)," in *American Political Rhetoric: A Reader, Fifth Edition*, ed. Peter A. Lawler and Robert Martin Schaefer (Lanham: Rowman & Littlefield, 2005), pp. 134-135.

This shift in our basic understanding of liberty "helps make us conscious of a dimension of civil liberties that has eluded the sympathy… of civil libertarians, since the New Deal," Hadley Arkes writes.

> When it became "progressive" for judges to accept a wide range of regulation of business, from rent controls to licensing, civil libertarians were willing to detach themselves quite serenely from the possibilities that these regulations could be affecting personal liberties, or at least the kinds of personal liberties that matter.[607]

In this, we see how a distinctly Lockean form of liberalism lost to a Mill-style libertarianism. It seemed to have been a normal and untroubled transition for the advocates of liberty – perhaps a natural step in the evolutionary development of modern society. Yet there is no denying that the process continued beyond Mill's own vision. "[T]he spirit of improvement is not always a spirit of liberty, for it may aim at forcing improvements on an unwilling people; and the spirit of liberty, in so far as it resists such attempts may ally itself locally and temporally with the opponents of improvement."[608] What began as a simple reason for personal liberty ended in an almost pseudo-religious ideal self-creation – that individual citizens are free to make choices that define the "self," and that the purpose of government is to empower them in that endeavor.

That is the new end of government. Determining its merits is a task for political philosophy; what is more important for this essay is the consequence for the *means* by which government secures that new end. Previously, the end, the right of property, was universally understood, and attainable by even the most basic intellect – that labor makes something into property, and that the right to pursue that property is a natural and unalienable right, meaning that any good government was one designed to protect it. Accordingly, such a government could always rightly be called the people's own.

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[607] Hadley Arkes, *The Return of George Sutherland: Restoring a Jurisprudence of Natural Right* (Princeton: Princeton University Press, 1994), 88.
[608] Mill, 78.

But the new end of government, of sexual privacy, is by its nature something that must be taught. It does not consist of premises, but of conclusions. It is an exclusive feature of an evolving society, of one that has grown to a certain point in its development and social enlightenment. One would think that such broad and all-encompassing developments would show in public opinion, and especially in public policy – and, indeed, that government would come to protect those rights by the very same checks and balances that protected the right of property. But that has hardly been the case: it is above all the Supreme Court that protects them, and only the Court.