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Barry Cushman

University of Notre Dame, bcushman@nd.edu

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TEACHING THE *LOCHNER* ERA

BARRY CUSHMAN*

Over the past several years, I have taught a constitutional history seminar on the *Lochner* Era. One of the objectives of the course is to provide students with a sound understanding of the character of the Supreme Court's substantive due process jurisprudence between 1877—the year in which *Munn v. Illinois*¹ was decided—and the late 1930s. This Article sets out the taxonomy of that jurisprudence that I use in teaching the course, which I hope will be useful to those teaching courses in constitutional law.

The strand of economic substantive due process jurisprudence most familiar to teachers of constitutional law is that of “liberty of contract.” Indeed, the “*Lochner* Era” takes its name from the case most prominently associated with that right.² Most constitutional law casebooks emphasize this line of cases when teaching economic substantive due process, and for perfectly understandable pedagogical reasons.³ That line of cases, which invalidated legislation conflicting with an unenumerated constitutional right, most closely resembles the more recent cases striking down legislation infringing unenumerated “personal” rights, and thus raises similar questions concerning method in constitutional interpretation and the proper role of the judiciary in a democratic republic.

* John P. Murphy Foundation Professor of Law at the University of Notre Dame Law School.

1. 94 U.S. 113, 113 (1877). *Munn*, which is the foundational case for the “affected with a public interest” doctrine, receives Note treatment in many casebooks. See PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 477 (6th ed. 2015); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 618 (5th ed. 2017); JESSE H. CHOPER ET AL., CONSTITUTIONAL LAW: CASES, COMMENTS, AND QUESTIONS 376 (12th ed. 2015); CALVIN MASSEY, AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES 485 (5th ed. 2016); MICHAEL STOKES PAULSEN ET AL., THE CONSTITUTION OF THE UNITED STATES 1520 (3d ed. 2017); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 752 (7th ed. 2013); KATHLEEN M. SULLIVAN & NOAH FELDMAN, CONSTITUTIONAL LAW 486 (19th ed. 2016); JONATHAN D. VARAT & VIKRAM D. AMAR, CONSTITUTIONAL LAW: CASES AND MATERIALS 466 (15th ed. 2017).

2. *Lochner v. New York*, 198 U.S. 45, 64 (1905). *Lochner* is treated as a principal case in every major American constitutional law casebook.

3. For example, DAAN BRAVEMAN, WILLIAM C. BANKS & RODNEY A. SMOLLA, CONSTITUTIONAL LAW: STRUCTURE AND RIGHTS IN OUR FEDERAL SYSTEM 767–79 (6th ed. 2010) and CHARLES A. SHANOR, AMERICAN CONSTITUTIONAL LAW: STRUCTURE AND RECONSTRUCTION 485–95 (5th ed. 2013) focus on liberty of contract to the exclusion of other manifestations of economic substantive due process.

Yet the cases invoking liberty of contract as grounds for invalidation constitute a rather small slice of the period's economic substantive due process jurisprudence. Indeed, only fifteen cases invalidating legislation between 1897 and 1937 did so on the theory that the statute infringed contractual liberty.⁴ Moreover, five of these cases did not employ terms such as "liberty of contract" or "freedom of contract," but simply followed earlier cases that had expressly relied on such a rationale.⁵ Furthermore, *Lochner* itself was something of an aberrational case. Of the more than twenty working-hours cases that the Court

4. MICHAEL PHILLIPS, *THE LOCHNER COURT, MYTH AND REALITY: SUBSTANTIVE DUE PROCESS FROM THE 1890S TO THE 1930S*, at 58, 86–87 n.210 (2001) (citing *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 604–18 (1936)); *Compañía Gen. de Tabacos de Filipinas v. Collector of Internal Revenue*, 275 U.S. 87, 91–92 (1927) (applying the due process provisions of the Philippine Organic Act and remarking that the Act, like the Fourteenth Amendment, provided protection from governmental interference with the liberty to contract); *Fairmont Creamery Co. v. Minnesota*, 274 U.S. 1, 8 (1927) (noting that the statute at issue was an attempt to destroy plaintiff's "liberty to enter into normal contracts"); *Charles Wolff Packing Co. v. Court of Indus. Relations of Kan.*, 262 U.S. 522, 544 (1923) (concluding that an act permitting the fixing of wages deprived the employer of its "property and liberty of contract without due process of law"); *Adkins v. Children's Hosp.*, 261 U.S. 525, 545, 561–62 (1923) (invalidating a statute allowing for the fixing of minimum wage standards for adult women in part on the ground that the statute interfered with the liberty to contract); *N.Y. Life Ins. Co. v. Dodge*, 246 U.S. 357, 359–60, 377 (1918) (holding a Missouri nonforfeiture statute to be unconstitutional because it impaired the liberty to contract); *Coppage v. Kansas*, 236 U.S. 1, 6–7, 11, 26 (1915) (invalidating on liberty of contract grounds a statute that had declared it a misdemeanor for an employer to require an employee not to be involved with a labor organization during the time of employment); *Adair v. United States*, 208 U.S. 161, 172 (1908) (holding that section 10 of the Erdman Act deprived the employer of its liberty of contract); *Lochner*, 198 U.S. at 53–64 (finding that a statute forbidding an employee to work over ten hours a day in the baking industry interfered with the liberty to contract); *Allgeyer v. Louisiana*, 165 U.S. 578, 589, 591 (1897) (finding a statute designed to prevent people from dealing with out-of-state marine insurance companies to be unconstitutional because it restricted the freedom to enter into proper contracts).

5. PHILLIPS, *supra* note 4, at 58, 86–87 n.210 (citing *Donham v. West-Nelson Mfg. Co.*, 273 U.S. 657, 657 (1927) (per curiam) (following *Adkins*, 261 U.S. 525)); *Murphy v. Sardell*, 269 U.S. 530, 530 (1925) (per curiam) (following *Adkins*, 261 U.S. 525); *Charles Wolff Packing Co. v. Court of Indus. Relations of Kan.*, 267 U.S. 552, 555, 565–69 (1925) (following first *Wolff Packing* decision, 262 U.S. 522); *Dorchy v. Kansas*, 264 U.S. 286, 289 (1924) (following first *Wolff Packing* decision, 262 U.S. 522); *St. Louis Cotton Compress Co. v. Arkansas*, 260 U.S. 346, 348–49 (1922) (following *Allgeyer*, 165 U.S. 578).

decided between 1898 and 1937,⁶ the challenged statute was struck down in only two—and the other invalidating decision didn't even cite *Lochner* as authority.⁷

Instead, most of the period's cases invalidating legislation under the Due Process Clauses rested not on liberty of contract but upon some other theory.⁸

6. See, e.g., *Radice v. New York*, 264 U.S. 292, 294–95 (1924) (upholding statute prohibiting employment of women in large-city restaurants between 10 p.m. and 6 a.m.); *United States v. Brooklyn E. Dist. Terminal*, 249 U.S. 296, 307 (1919) (holding terminal subject to Federal Hours of Service Act); *Dominion Hotel, Inc. v. Arizona*, 249 U.S. 265, 267–69 (1919) (upholding statute limiting working hours of women in hotels); *Chi. & Alton R.R. Co. v. United States*, 247 U.S. 197, 200 (1918) (affirming conviction for violation of the Federal Hours of Service Act); *Atchison, Topeka & Santa Fe Ry. Co. v. United States*, 244 U.S. 336, 345 (1917) (affirming conviction for violation of the Federal Hours of Service Act); *Bunting v. Oregon*, 243 U.S. 426, 433–34, 438 (1917) (upholding maximum hours law for employees of mills and factories); *Wilson v. New*, 243 U.S. 332, 341, 359 (1917) (upholding maximum hours law for railway workers); *Bosley v. McLaughlin*, 236 U.S. 385, 388–89, 396 (1915) (upholding maximum hours law for women); *Miller v. Wilson*, 236 U.S. 373, 379, 384 (1915) (upholding maximum hours law for women); *Hawley v. Walker*, 232 U.S. 718, 718 (1914) (per curiam) (upholding maximum hours law for women); *Riley v. Massachusetts*, 232 U.S. 671, 679, 681 (1914) (upholding maximum hours law for women); *Mo., Kan. & Tex. Ry. Co. of Tex. v. United States*, 231 U.S. 112, 118, 120 (1913) (affirming convictions for violation of Federal Hours of Service Act); *United States v. Garbish*, 222 U.S. 257, 258, 261 (1911) (construing strictly exceptions to an eight-hour workday law for public works); *Balt. & Ohio R.R. Co. v. Interstate Commerce Comm'n*, 221 U.S. 612, 614 n.1, 623 (1911) (upholding Federal Hours of Service Act); *Muller v. Oregon*, 208 U.S. 412, 416, 423 (1908) (upholding maximum hours law for women); *Ellis v. United States*, 206 U.S. 246, 254–55 (1907) (upholding maximum hours law for public works); *Cantwell v. Missouri*, 199 U.S. 602, 602 (1905) (per curiam) (upholding maximum hours law for mine workers); *Atkin v. Kansas*, 191 U.S. 207, 224 (1903) (upholding maximum hours law for public works); *Holden v. Hardy*, 169 U.S. 366, 380, 398 (1898) (upholding maximum hours law for miners).

7. See *Wolff Packing Co.*, 267 U.S. 552.

8. In reporting the number of instances in which the Court invalidated legislation as violating substantive due process, a number of casebooks rely upon estimates, the accuracy of which has been questioned. See, e.g., GREGORY E. MAGGS & PETER J. SMITH, *CONSTITUTIONAL LAW* 560 (3d ed. 2015) (“In the three decades after *Lochner*, the Court invalidated almost 200 laws and regulations on the ground that they violated economic rights protected by the Due Process Clauses.”); BREST ET AL., *supra* note 1, at 496 (“Between 1890 and 1934, the Supreme Court struck down some 200 statutory and administrative regulations, mostly under the Due Process Clause of the Fourteenth Amendment.”); CHERMERINSKY, *supra* note 1, at 626 (“Over the next three decades, the Court followed the principles articulated in *Lochner*, finding many laws unconstitutional as interfering with freedom of contract. It is estimated that almost 200 state laws were declared unconstitutional as violating the Due Process Clause of the Fourteenth Amendment.” (citing BENJAMIN F. WRIGHT, *THE GROWTH OF AMERICAN CONSTITUTIONAL LAW* 154 (1942))); CHOPER ET AL., *supra* note 1, at 383–84 (“Between 1899 and 1937 . . . 159 Supreme Court decisions held state statutes unconstitutional under the Due Process and Equal Protection Clauses, and 25 more statutes were struck down under the Due Process Clause coupled with some other provision of the Constitution.” (citing WRIGHT, *supra*, at 154)). PAULSEN ET AL., *supra* note 1, at 1528 (between 1905 and the mid-1930s, “the Court struck down nearly two hundred laws and regulations on substantive due process grounds”); STONE ET AL., *supra* note 1, at 764 (“From the decision in *Lochner* in 1905 to the mid-1950s, the Court invalidated approximately two hundred

For many years, it was widely thought that the Court's economic regulation jurisprudence had been driven by the complementary factors of a commitment to laissez-faire economics, a devotion to the tenets of social Darwinism, and to a desire to shield businesses from legislation aimed at protecting workers and consumers. Some casebooks still present the material in that fashion.⁹ But over

economic regulations, usually under the due process clause of the fourteenth amendment.”); SULLIVAN & FELDMAN, *supra* note 1, at 494 (“From the *Lochner* decision in 1905 to the mid-1930s, the Court invalidated nearly 200 regulations on substantive due process grounds.”). *But see* Michael J. Phillips, *How Many Times Was Lochner Era Substantive Due Process Effective?*, 48 MERCER L. REV. 1049, 1089–90 (1997) (placing the number considerably lower). Moreover, many casebooks recognize what has long been understood, that the *Lochner* Era Court upheld many more challenged laws and regulations under the Due Process Clauses than it struck down. *See, e.g.*, DANIEL A. FARBER ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION’S THIRD CENTURY 30 (5th ed. 2013) (“In fact, the large majority of the business-restricting statutes survived *Lochner*.”); NORMAN REDLICH, JOHN ATTANASIO & JOEL K. GOLDSTEIN, CONSTITUTIONAL LAW 389 (5th ed. 2008) (“[L]arge numbers of regulatory laws were upheld during this period.”); ERNEST A. YOUNG, THE SUPREME COURT AND THE CONSTITUTIONAL STRUCTURE 230–31 (2012) (“Although the fact is frequently overlooked, the Court upheld at least as many regulatory statutes as it struck down between 1900 and 1937.”); *id.* at 242 (between 1905 and 1923 “*Lochner* turned out to be an aberration” because in the intervening period the Court upheld “a wide variety of social and economic legislation”); *id.* at 258 (“It is important to bear in mind that even in this period the Court upheld economic regulation more often than not.”); BREST ET AL., *supra* note 1, at 496 (“The received history tends to exaggerate the Court’s perverseness, however, just as it minimizes the facts that the Court sustained at least as many regulations as it invalidated, that it declined to review many others, and that Holmes and Brandeis – the progressive heroes of the period – did not invariably dissent from substantive due process invalidations or always agree with each other The Court let stand most laws that appeared to protect the health, safety, or morals of the general public or to prevent consumer deception.”); CHEMERINSKY, *supra* note 1, at 626 (“Yet, during this time, the Court upheld many state and federal economic regulations as sufficiently related to a valid police purpose.”); MAGGS & SMITH, *supra*, at 560 (“To be sure, the Court also upheld many such regulations during this period.”); MASSEY, *supra* note 1, at 493–94 (“Poorly informed constitutional lawyers sometimes suppose that the *Lochner* era – the six decades or so from roughly 1880-1940 – was a period of implacable hostility to economic regulation.”); PAULSEN ET AL., *supra* note 1, at 1528 (noting that the Court “upheld many” laws and regulations challenged on substantive due process grounds); STONE ET AL., *supra* note 1, at 764 (“Although the Court employed substantive due process on many occasions, it sustained at least as many regulations as it struck down.”).

9. *See, e.g.*, CHEMERINSKY, *supra* note 1, at 614 (“[T]he Court aggressively protected economic rights under the Due Process Clause . . . [the Court’s] philosophy [entailed] ‘a strong commitment to a laissez-faire economy and to protecting business from government regulations.’”); *id.* at 617 (“Beginning in the 1870s, government regulation significantly increased as industrialization changed the nature of the economy. Simultaneously, businesses turned to the courts to have the new regulatory laws declared unconstitutional. At the same time, over these decades, scholars and judges increasingly espoused a belief in a laissez-faire, unregulated economy. In part, this was based on a philosophy of social Darwinism, which professed that society would thrive with the least government regulation interference, allowing the ‘best’ to advance and prosper. Additionally, this view was based on a belief that government regulations unduly interfered with the natural rights of people to own and use their property and with a basic liberty interest in freedom

the past fifty years the work of numerous constitutional historians has combined to offer a significant revision of this account, and their explanation has gained broad acceptance among legal scholars, legal historians, and qualitative political scientists.

This explanation holds that the Court's economic substantive due process jurisprudence was animated by what Professor Howard Gillman has called the "principle of neutrality."¹⁰ On this account, the Court's jurisprudence is best

of contract. Furthermore, support for a laissez-faire philosophy simply reflected hostility by businesses to the increased government regulation designed to protect workers, unions, consumers, and competitors." (footnotes omitted); *id.* at 635 (referring to "the laissez-faire philosophy of the *Lochner* era" and the Court's "commitment to a laissez-faire philosophy"); FARBER ET AL., *supra* note 8, at 28 ("[S]tate and federal judges, like the legal profession generally, were usually allies of management . . . the Fuller Court used [substantive due process] as a sharp weapon for business interests against state regulatory legislation, especially laws protecting workers."); *id.* at 30 ("*Lochner* had more than occasional bite, especially when legislatures were perceived to be redistributing wealth or power from entrepreneurs to labor unions, which were viewed with suspicion by hidebound judges The Court's sporadic activism had little to do with due process, and much more to do with fears within the bench and bar that new forms of collective organization – bigger government, labor unions, business trusts and monopolies – threatened the traditional economic rights of individuals to get ahead."); REDLICH ET AL., *supra* note 8, at 389 ("A combination of pressures caused the Court to adopt substantive due process as a tool for judicial intervention in economic regulation. The growth of industrialization and urbanization created new socio-economic problems and prompted increased legislative responses. Proponents of current economic and social theories, such as Adam Smith's economic laissez-faire and social Darwinism, opposed these increased governmental regulations. Arguments that property and economic interests were fundamental rights entitled to judicial protection found an increasingly receptive audience among members of the Court."). The portion of the text dealing with substantive due process was prepared by Redlich and Attanasio. *Id.* at v; see also STONE ET AL., *supra* note 1, at 752 ("Armed with the laissez-faire doctrines of the eighteenth-century economist Adam Smith and the nineteenth-century social Darwinist Herbert Spencer, and supported by the leading constitutional law text of the period, Thomas M. Cooley's *Constitutional Limitations* (1868), legal representatives of the regulated industries increasingly urged the courts to invalidate the new legislation."). But see YOUNG, *supra* note 8, at 242 (asking whether "the widespread perception that the Court was simply imposing its own free market, *laissez-faire* ideology on a more progressively-minded legislature – in Archibald Cox's words, a 'willful defense of wealth and power'" is "a fair characterization").

10. HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 10, 61 (1993) (examining the influence of the principle of neutrality on the *Lochner* Court's Fourteenth Amendment jurisprudence). Professor Gillman's interpretation had been anticipated by the work of a number of scholars. See OWEN FISS, *TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910*, at 156, 160 (1993) (discussing the Court's efforts to limit legislative redistribution through the requirement that laws be "universal" or "neutral" in their application); WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 8–9 (1991) (exploring ways in which judicial review of labor regulation in the late nineteenth and early twentieth centuries conditioned the strategies of labor movements, and the ways in which the strategies of labor movements, in turn, influenced the judiciary); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 19–31 (1992) (analyzing *Lochner* and pre-*Lochner* police powers decisions in light of the nineteenth-century liberal conception of "the neutral state"); Michael Les

understood as erecting a series of obstacles to “class,” “special,” “partial,” or “unequal” legislation, “legislation that could not be considered as public-regarding because it benefited certain interest groups or took from *A* to give to *B*.”¹¹ On this reading, substantive due process was concerned principally with norms of formal equality and generality in legislation. It was rooted in the aversion to factional politics that Madison wrote about in Federalist 10, and in the revulsion against special privilege that animated Jacksonian democracy.¹²

A number of the Court’s late nineteenth-century decisions explicitly characterized due process as requiring that legislation exhibit the virtues of equality and generality,¹³ and the legal treatise and periodical literature of the

Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293, 298, 304–31 (1985) (contending that the Supreme Court’s development of laissez-faire constitutionalism should be understood, in part, as an effort to protect traditional notions of liberty); William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767, 771–72 (arguing that the development of constitutional labor regulation during the Gilded Age was the product of competing visions of republicanism); Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863–1897*, 61 J. AM. HIST. 970, 971–73 (1975) (discussing Justice Field’s attempts to formulate “immutable rules” to distinguish between regulation and confiscation when determining the limits of states’ police powers); Stephen A. Siegel, *Understanding the Lochner Era: Lessons from the Controversy over Railroad and Utility Rate Regulation*, 70 VA. L. REV. 187, 188–92 (1984) (discussing the distinction between privilege and property in the context of liberal and conservative reactions to the changing economic environment of the early twentieth century); Aviam Soifer, *The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888–1921*, 5 LAW & HIST. REV. 249, 252, 278 (1987) (examining the relationship between paternalism—“encouraging and applying some form of protection while excoriating and invalidating others”—and redistribution in laissez-faire constitutionalism); Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 878–89 (1987) (discussing the legacy of the *Lochner* Court’s view of the requirement of “neutrality” in legislation).

11. David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 12, 13 (2003) (citing GILLMAN, *supra* note 10, at 10, 46, 127).

12. Some casebooks offer a version of this interpretation of the period’s substantive due process jurisprudence. See BREST ET AL., *supra* note 1, at 489 (“[T]he Court was concerned that any limitations on individual autonomy in fact could be justified by reference to achieving legitimate public purposes, rather than simply representing ‘partial’ legislation by which those political interests possessing legislative power were attempting to use the coercive power of the state only in behalf of their own ‘special interests.’”); STONE ET AL., *supra* note 1, at 765 (“The unifying theme seemed to be the Court’s perception of the ‘real’ reason for the regulation. If the Court believed the regulation was truly designed to protect the health, safety, or morals of the general public, it was apt to uphold the law. But if the Court perceived the law to be an effort to readjust the market in favor of one party to the contract, it was more likely to hold the regulation invalid.”). Others have offered some version of this theory as an account of the *Lochner* decision itself. See sources cited *infra* note 107.

13. See, e.g., *Dent v. West Virginia*, 129 U.S. 114, 124 (1889) (“[L]egislation is not open to the charge of depriving one of his rights without due process of law, if it be general in its operation

Lochner Era is suffused with this understanding of substantive due process.¹⁴ On this view, the requirements of due process were largely coextensive with those of equal protection. As late as 1929, W.W. Willoughby would write in his treatise on constitutional law that:

[I]n many cases, laws which have been held invalid as denying due process of law might also have been so held as denying equal protection of the laws, or vice versa, and that, in fact, in not a few cases the courts have referred to both

upon the subjects to which it relates.”); *Giozza v. Tiernan*, 148 U.S. 657, 662 (1893) (“[D]ue process of law, within the meaning of the amendment, is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government.”); *Caldwell v. Texas*, 137 U.S. 692, 697–98 (1891) (due process is “secured by laws operating on all alike,” and prohibits legislation that is “special, partial, and arbitrary.”); *Leeper v. Texas*, 139 U.S. 462, 468 (1891) (“[D]ue process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice.”).

14. CHARLES K. BURDICK, *THE LAW OF THE AMERICAN CONSTITUTION: ITS ORIGIN AND DEVELOPMENT* 417 (1922) (“[T]he Supreme Court has declared that arbitrary action is forbidden by the due process clause as well as the clause guarantying equal protection, and has also treated as vital to due process as well as to equal protection the fact that a state statute operates upon all alike.”); *id.* at 418–19 (“[T]he conception of due process does exclude legislation which inflicts inequality of burden, which is clearly arbitrary, and without any basis in reason.”); ERNST FREUND, *STANDARDS OF AMERICAN LEGISLATION* 219 (2d ed. 1965) (“So far as equality means absence of arbitrary discrimination, it is almost undistinguishable from due process.”); LUCIUS POLK MCGEHEE, *DUE PROCESS OF LAW UNDER THE FEDERAL CONSTITUTION* (1906) (“Classification is controlled both by the clause of the Fourteenth Amendment forbidding the denial of due process of law and that requiring the equal protection of the laws. Perhaps the same effects might have been attained by the due process clause alone and it will not be possible to separate the cases under the two clauses with rigid distinctness.”); RODNEY L. MOTT, *DUE PROCESS OF LAW* 284 (1926) (“[T]oward the end of the Nineteenth Century a number of judges declared in a series of *dicta* that due process guaranteed equal and impartial justice which could only be secured when laws operated on all alike.”); *id.* at 598 (“The concept of equality was one of the first branches to grow from the due process provision and it has had greater application than any of the other principles which the court has evolved.”); HANNIS TAYLOR, *DUE PROCESS OF LAW AND THE EQUAL PROTECTION OF THE LAWS* 304, 307 (1917) (concluding that “generality and equality of laws” was a “fundamental requisite of due process”); 2 WESTEL WOODBURY WILLOUGHBY, *THE CONSTITUTIONAL LAW OF THE UNITED STATES* 874 (1910) (“[I]t has been repeatedly declared that enactments of a legislature directed against particular individuals or corporations, or classes of such, without any reasonable ground for selecting them out of the general mass of individuals or corporations, amounts to a denial of due process of law so far as their life, liberty or property is affected.”); 3 W.W. WILLOUGHBY, *WILLOUGHBY ON THE CONSTITUTION OF THE UNITED STATES* 1929 (2d ed. 1929) (“[T]he requirement as to due process includes, to a very considerable extent at least, the guarantee of equal protection of the laws.”); Robert E. Cushman, *Social and Economic Interpretation of the Fourteenth Amendment*, 20 MICH. L. REV. 737, 745 n.23 (1922) (noting that notwithstanding the absence of an equal protection clause in the Fifth Amendment, the courts often regarded the Due Process Clause and the Equal Protection Clause as “overlapping to a large extent”); Oliver H. Dean, *Commentary, The Law of the Land*, 48 AM. L. REV. 641, 654, 657, 672–73 (1914) (maintaining that due process prohibited “[c]lass legislation, the most pernicious and most dangerous of all legislation”).

prohibitions leaving it uncertain which prohibition was deemed the most pertinent and potent in the premises.¹⁵

Thus, he concluded, “it is still difficult to say precisely in what specific respects the prohibition of the denial of equal protection of the laws operates to impose restraints not already covered by the prohibition with regard to the depriving of persons of life, liberty or property without due process of law.”¹⁶

This prohibition on class legislation took a variety of forms in the Court’s due process jurisprudence. Moreover, decisions enforcing the prohibition on class legislation sometimes also invoked the prohibition on infringing the liberty of contract. For the sake of convenience, I divide the class legislation cases into three groups: cases involving A to B laws; cases involving unequal treatment; and cases involving the singling out a group for different treatment without an adequate justification. Let us take each of them in turn.

I. CATEGORIES OF CLASS LEGISLATION

A. *A to B Laws*

Laws that took the property of A and gave it to B were the paradigmatic instances of the deprivation of property without due process of law. As Professor John Harrison observes, such measures supplied “[e]very nineteenth century lawyer’s favorite example of an unconstitutional statute.”¹⁷ “Taking from A and giving to B,” notes Professor John Orth, became “the shorthand to describe what substantive due process was designed to prevent.”¹⁸ “As substantive due process emerged as a new legal category, ‘taking from A and giving to B’ became *the* prime example of what it forbade.”¹⁹

One might reasonably wonder how a statute that had been passed by both houses of a state legislature and signed by the governor could constitute a deprivation of property without due process of law. All of the procedural requirements for duly enacted legislation would appear to have been satisfied. John Hart Ely famously remarked that “‘substantive due process’ is a contradiction in terms — sort of like ‘green pastel redness.’”²⁰ Not surprisingly, sophisticated legal thinkers of the *Lochner* Era did not understand the doctrine

15. 3 W.W. WILLOUGHBY, WILLOUGHBY ON THE CONSTITUTION OF THE UNITED STATES 1929 (2d ed. 1929).

16. *Id.* at 1928.

17. John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 506 (1997); *see also id.* at 518 (“The A-to-B law is the archetypal legislative deprivation [of property] and always has been.”)

18. John V. Orth, *Taking from A and Giving to B: Substantive Due Process and the Case of the Shifting Paradigm*, 14 CONST. COMMENT. 337, 339 (1997).

19. *Id.* at 344.

20. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 18 (1980).

in such readily satirized terms. Indeed, they did not use the term “substantive due process,” which emerged as a descriptor only after the *Lochner* Era was over.²¹ Instead, as a number of scholars have observed, their understanding of what had come to be called “substantive due process” was rooted in a conception of the separation of powers. The power to order the transfer of A’s property to B was a judicial rather than a legislative power. A court could order such a transfer acting pursuant to a judgment entered in favor of B in an action brought against A on a contract or in tort, i.e., according to the law of the land. The process that was due in such cases was judicial process, which the legislature could not supply. Thus, a legislative act requiring the transfer of A’s property to B was lacking in due process. Legislative power was limited to the enactment of general, prospective rules for the governance of future behavior.²²

At the same time, exercises of the police power—the state’s power to protect public health, safety, and morals—did not deprive anyone of property without due process (nor did they constitute takings), because ownership of property did not include the right to use it in a way that adversely affected public health, safety, and morals. There was no deprivation, because the owner never had the right to engage in the prohibited use in the first place. The police power was thus the proactive, legislative analog to the reactive, judicial power to abate a nuisance. A judicial order to abate a nuisance did not deprive the owner of the property in question of any right, because he had no right to operate his property as a nuisance. Just as all property was held subject to the nuisance doctrine, all property was held subject to the police power.²³

21. See G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* 241–68 (2000).

22. See, e.g., JOHN V. ORTH, *DUE PROCESS OF LAW: A BRIEF HISTORY* 48–49 (2003); Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 *YALE L.J.* 1672, 1712, 1716–17, 1721, 1726–27, 1730–34, 1737–40, 1744–47, 1749–59, 1765–66, 1777–78, 1781–82, 1807 (2012); Nathan N. Frost, Rachel Beth Klein-Levine & Thomas McAfee, *Courts over Constitutions Revisited: Unwritten Constitutionalism in the States*, 2004 *UTAH L. REV.* 333, 382 (2004); Alfred Hill, *The Political Dimension of Constitutional Adjudication*, 63 *S. CAL. L. REV.* 1237, 1308 (1990); Wallace Mendelson, *A Missing Link in the Evolution of Due Process*, 10 *VAND. L. REV.* 125, 126 (1956); Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 *YALE L.J.* 408, 423–24 (2010); Benedict, *supra* note 10, at 323–24; Harrison, *supra* note 17, at 506–20, 522–23, 528 (1997). This understanding is reflected in PAULSEN ET AL., *supra* note 1, at 1519–20 (“The Due Process Clauses provide no absolute guarantee of life, liberty, or property, since it is expressly contemplated that each can be taken away as long as the requisite process is given. But each constitutional actor can act in a manner inconsistent with ‘due process of law’—including the legislature. Even when it enacts a law that complies with all the formalities of lawmaking, it can still violate due process if it is acting quasi-judicially. The classic example of such a quasi-judicial action, one that is insufficiently general and prospective, is recited in *Calder v. Bull* and scores of other cases: when a legislature takes from A to give to B.... [Such a statute is one of the] specific ways that legislatures are especially likely to overstep their bounds by enacting laws that are legislative in form but quasi-judicial in substance.”).

23. See ERNST FREUND, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* 25 (1904); Harrison, *supra* note 17, at 509.

The prohibition on A to B laws took three principal forms. The first concerned price regulation. From 1877²⁴ until 1934,²⁵ the Court held that the price at which a good could be sold or a service provided could be prescribed by the legislature only if the business in question was “affected with a public interest.” The Justices never settled on a clear definition of what placed a business in this category, and this resulted in a series of divided decisions and a body of law that is challenging to summarize. But a persistent theory, which appears to have gained ascendancy by the 1920s, was that the business must hold a de facto monopoly in the provision of an indispensable good or service.²⁶ Thus, the Court held that grain elevators,²⁷ railroads,²⁸ and various public utilities²⁹ were affected with a public interest, and their charges could be regulated. But resale of theater tickets,³⁰ operation of an employment agency,³¹ and the retail sale of gasoline were private.³² Any regulation of their prices deprived them of property without due process, by taking from them the difference between the market price for their services and the regulated price, and giving it to their customers.

The second form of the prohibition on A to B laws concerned the rates that could be prescribed for businesses that were affected with a public interest. Though the Court initially maintained that legislative rate-setting was not subject to judicial review,³³ it quickly abandoned that position,³⁴ and imposed a

24. *Munn v. Illinois*, 94 U.S. 113, 130–32 (1877) (holding that rates charged by Chicago grain elevators may be regulated because their business is affected with a public interest).

25. See *Nebbia v. New York*, 291 U.S. 502, 536–37 (1934).

26. For a discussion of this theory, see Barry Cushman, *Some Varieties and Vicissitudes of Lochnerism*, 85 B.U. L. REV. 881, 958–77 (2005).

27. See, e.g., *Budd v. New York*, 143 U.S. 517, 545 (1892); *Munn*, 94 U.S. at 132.

28. See, e.g., *Chi., Burlington & Quincy R.R. Co. v. Iowa*, 94 U.S. 155, 161 (1877).

29. See, e.g., *Chi. Bd. of Trade v. Olsen*, 262 U.S. 1, 41 (1923) (Chicago Board of Trade); *Stafford v. Wallace*, 258 U.S. 495, 516 (1922) (public stock yards); *Producers Transp. Co. v. R.R. Comm’n*, 251 U.S. 228, 231–32 (1920) (oil pipeline); *Van Dyke v. Geary*, 244 U.S. 39, 48 (1917) (water utility); *Pipe Line Cases*, 234 U.S. 548, 561 (1914) (oil pipeline); *Cotting v. Kan. City Stock Yards Co.*, 183 U.S. 79, 85 (1901) (public stock yards); *Spring Valley Water Works v. Schottler*, 110 U.S. 347, 354 (1884) (water utility).

30. *Tyson & Brothier v. Banton*, 273 U.S. 418, 439–40 (1927).

31. *Ribnik v. McBride*, 277 U.S. 350, 357 (1928).

32. *Williams v. Standard Oil Co.*, 278 U.S. 235, 240 (1929). *Tyson*, *Ribnik*, and *Williams* each receive Note treatment in BREST ET AL., *supra* note 1, at 496–97; CHEMERINSKY, *supra* note 1, at 633; CHOPER & FALLON, *supra* note 1, at 386; STONE, *supra* note 1, at 765. *Tyson* and *Williams* receive Note treatment in VARAT & AMAR, *supra* note 1, at 474.

33. *Munn v. Illinois*, 94 U.S. 113, 134 (1877) (“We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts.”).

34. See, e.g., *Chi., Milwaukee & St. Paul Ry. Co. v. Minnesota*, 134 U.S. 418, 458 (1890) (“If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without

requirement that the regulated rate must provide the business with a reasonable return on its investment.³⁵ A regulated rate that failed to provide such a reasonable return deprived the company of its property without due process. But limiting a business affected with a public interest to a reasonable return on its investment rather than what it might charge in an unregulated market did not deprive it of any property, because no one could have a property interest in a monopoly rent. It is noteworthy that the Court's early decisions in this vein indicated that such "confiscatory" rate regulations violated the Equal Protection Clause.³⁶ Before long, however, this branch of the Court's jurisprudence found a settled home in the Due Process Clause. These cases were regularly featured on the Court's docket throughout the *Lochner* Era,³⁷ and comprised a large portion of its substantive due process jurisprudence.³⁸

due process of law in violation of the Constitution of the United States."); *Railroad Commission Cases*, 116 U.S. 307, 331 (1886) ("Under pretence of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law."). *Railroad Commission Cases* and *Chicago, Milwaukee & St. Paul* receive Note treatment in BREST ET AL., *supra* note 1, at 479; CHEMERINSKY, *supra* note 1, at 618; PAULSEN ET AL., *supra* note 1, at 1520; STONE ET AL., *supra* note 1, at 752 ("Whether this [post-*Munn*] shift was due to the justices' conservative economic policies, their hostility to labor regulations, or their acceptance of the liberty-based, antigovernment, 'free labor' jurisprudence of the antislavery movement, the shift in judicial attitude was evident." (citations omitted)); SULLIVAN & FELDMAN, *supra* note 1, at 486; VARAT & AMAR, *supra* note 1, at 467.

35. *Smyth v. Ames*, 169 U.S. 466, 526 (1898) ("[E]stablishing rates for the transportation of persons or property by railroad that will not admit of the carrier earning such compensation as under all the circumstances is just to it and to the public, would deprive such carrier of its property without due process of law."). *Smyth* receives Note treatment in BREST ET AL., *supra* note 1, at 479; STONE ET AL., *supra* note 1, at 753; VARAT & AMAR, *supra* note 1, at 467.

36. *Smyth*, 169 U.S. at 526 ("[E]stablishing rates for the transportation of persons or property by railroad that will not admit of the carrier earning such compensation as under all the circumstances is just to it and to the public, would . . . deny to it the equal protection of the laws, and would therefore be repugnant to the Fourteenth Amendment of the Constitution of the United States."); *Reagan v. Farmers' Loan & Tr. Co.*, 154 U.S. 362, 399 (1894) ("The equal protection of the laws which, by the Fourteenth Amendment, no State can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public."); *Chicago, Milwaukee & St. Paul*, 134 U.S. at 458 ("[I]n so far as it is thus deprived [of a reasonable return], while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws."); see also FREUND, *supra* note 23, at 633 ("In the [*Reagan*] case it was said that the equal protection of the laws is denied where property is wrested from an individual without compensation for the benefit of another or of the public."); *id.* (in *Smyth v. Ames*, "equal protection and due process are treated almost as meaning the same thing.").

37. See Cushman, *supra* note 26, at 908–17.

38. Michael J. Phillips, *The Progressiveness of the Lochner Court*, 75 DENV. U. L. REV. 453, 489 (1998) ("Of the laws struck down on substantive due process grounds between 1902 and 1932, nearly half were rate orders for regulated industries, minimum wage laws, or laws fixing the cost

The third form of the prohibition on A to B laws appeared in cases challenging the constitutionality of minimum wage laws. The Court routinely upheld a variety of statutes regulating the time at which or the manner in which employers might pay their employees.³⁹ These were legitimate exercises of the police power “to prevent unfair and perhaps fraudulent methods in the payment of wages.”⁴⁰ But some of the Justices saw regulation of the actual price term of the labor contract as a different matter. In *Adkins v. Children’s Hospital*, the Supreme Court invalidated the District of Columbia minimum wage law for women as authorizing “an unconstitutional interference with the freedom of contract included within the guaranties of the due process clause of the Fifth Amendment.”⁴¹ Yet the majority opinion went on to explain that the law compelled the employer “to pay at least the sum fixed in any event, because the employee needs it, but requires no service of equivalent value from the employee.”⁴² Where the wage determined by the District’s minimum wage board was greater than the fair value of the employee’s services, it constituted “a compulsory exaction from the employer for the support of a partially indigent person . . . arbitrarily shift[ing] to his shoulders a burden which, if it belongs to anybody, belongs to society as whole.”⁴³ As the majority saw it, “[t]he feature of this statute which, *perhaps more than any other*, puts upon it the stamp of invalidity is that it exacts from the employer an arbitrary payment” to his

of consumer goods to consumers. In other words, nearly half of these laws involved the regulation of prices.”)

39. *Strathearn Steamship Co. v. Dillon*, 252 U.S. 348, 355–57 (1920) (holding that federal regulation of the timing of wage payments to sailors did not infringe the liberty of contract); *Rail & River Coal Co. v. Yapple*, 236 U.S. 338, 349–50 (1915) (rejecting liberty of contract challenge to statute directing that, where miners’ wages were reckoned according to the weight of the coal that they mined, the weighing must take place before the coal was passed over a screen); *Keokee Consol. Coke Co. v. Taylor*, 234 U.S. 224, 226–27 (1914) (rejecting freedom of contract challenge to statute requiring that all store orders or other evidences of indebtedness issued by employers as payment of wages be redeemable in cash); *Erie R.R. Co. v. Williams*, 233 U.S. 685, 699–700 (1914) (rejecting the contention that a statute requiring that railroad workers’ wages be paid in cash and on a semi-monthly basis deprived the company and its employees of their liberty of contract); *McLean v. Arkansas*, 211 U.S. 539, 542–43, 552 (1909) (upholding anti-coal screening statute similar to the law upheld in *Yapple*); *Patterson v. Bark Eudora*, 190 U.S. 169, 174–76 (1903) (holding that federal regulation of the timing of wage payments to sailors did not infringe the liberty of contract); *Dayton Coal & Iron Co. v. Barton*, 183 U.S. 23, 24–25 (1901) (upholding anti-scrip law similar to the law upheld in *Taylor*); *Knoxville Iron Co. v. Harbison*, 183 U.S. 13, 17, 22 (1901) (upholding anti-scrip law similar to the law upheld in *Taylor*); *St. Louis, Iron Mountain & St. Paul Ry. Co. v. Paul*, 173 U.S. 404, 406–09 (1899) (upholding statute requiring that any railroad company discharging an employee pay him any unpaid wages on the date of the discharge). *Harbison* receives Note treatment in FARBER ET AL., *supra* note 8, at 542.

40. *Adkins v. Children’s Hosp.*, 261 U.S. 525, 547 (1923).

41. *Id.* at 545.

42. *Id.* at 557.

43. *Id.* at 557–58.

employee.⁴⁴ This was constitutionally equivalent to requiring “the butcher, the baker or grocer” to supply to his customers the quantity of food necessary for their support at a price not to exceed a prescribed maximum.⁴⁵ Just like such a hypothetical law, the minimum wage law took the property of A and gave it to B.⁴⁶

Finally, the Court held a series of miscellaneous regulations, typically directed at railroads, to be deprivations of property without due process. These included ordering a railroad to allow a private company to construct a grain elevator at one of its stations;⁴⁷ requiring railroads to install and maintain weighing scales at their stations as a convenience to traders in livestock;⁴⁸ requiring a lumber company owning a narrow gauge railroad to operate its line at a loss;⁴⁹ exempting certain railroads from the obligation to pay a reasonable daily rental fee for the use of other railroads’ cars;⁵⁰ and requiring a railroad to install an underground cattle-pass across its right of way as a convenience to an adjacent landowner.⁵¹ Among other examples were including a company in an improvement district for assessment purposes though it would receive no benefit from the construction and maintenance in question;⁵² retrospectively altering the

44. *Id.* at 558 (emphasis added).

45. *Adkins*, 261 U.S. at 558–59. *Adkins* receives Note treatment in BREST ET AL., *supra* note 1, at 497; CHOPER & FALLON, *supra* note 1, at 385; FARBER ET AL., *supra* note 8, at 30; MAGGS & SMITH, *supra* note 8, at 560; MASSEY, *supra* note 1, at 493; PAULSEN ET AL., *supra* note 1, at 1529; REDLICH ET AL., *supra* note 8, at 389–90; STONE ET AL., *supra* note 1, at 765; SULLIVAN & FELDMAN, *supra* note 1, at 496; and VARAT & AMAR, *supra* note 1, at 473; and is a principal case in RANDY E. BARNETT & HOWARD E. KATZ, *CONSTITUTIONAL LAW* 878 (2d ed. 2013); CHEMERINSKY, *supra* note 1, at 630; and YOUNG, *supra* note 8, at 242.

46. *See* MASSEY, *supra* note 1, at 494 (“A minimum wage, said the Court, was simply ‘a naked, arbitrary exercise’ in political power designed to benefit some women at the expense of their employers and other women who would lose their jobs because their continued employment at the specified minimum wage was no longer economically viable.”).

47. *Mo. Pac. Ry. Co. v. Nebraska*, 164 U.S. 403, 411–13 (1896); *see also* *Mo. Pac. Ry. Co. v. Nebraska*, 217 U.S. 196, 207–08 (1910) (invalidating statute requiring railway company to install at its expense switch connections and side tracks to service grain elevators adjacent to its right of way); *Hartford Fire Ins. Co. v. Chi., Milwaukee & St. Paul Ry. Co.*, 175 U.S. 91, 99 (1899) (“[The railroad] is not obliged, and cannot even be compelled by statute, against its will, to permit private persons or partnerships to erect and maintain elevators, warehouses, or similar structures, for their own benefit, upon the land of the railroad company.”)

48. *Great N. Ry. Co. v. Cahill*, 253 U.S. 71, 76–77 (1920); *Great Northern Ry. Co. v. Minnesota ex rel. State R.R. & Warehouse Comm’n*, 238 U.S. 340, 345–46 (1915).

49. *Brooks-Scanlon Co. v. R.R. Comm’n of La.*, 251 U.S. 396, 399 (1920); *see also* *Miss. R.R. Comm’n v. Mobile & Ohio R.R. Co.*, 244 U.S. 388, 395–96 (1917) (invalidating on due process grounds an order requiring railroad company to restore passenger service on unprofitable lines).

50. *Chi., Rock Island & Pac. Ry. Co. v. United States*, 284 U.S. 80, 100 (1931).

51. *Chi., St. Paul, Minneapolis & Omaha Ry. Co. v. Holmberg*, 282 U.S. 162, 164, 167 (1930).

52. *Myles Salt Co. v. Bd. of Comm’rs*, 239 U.S. 478, 480 (1916); *see also* *Ga. Ry. & Elec. Co. v. Decatur*, 295 U.S. 165, 170 (1935) (“[If] the burden imposed is without any compensating

respective withdrawal rights of members of building and loan associations as among one another;⁵³ and establishing a pension system for the railroad industry that required railroads to pay into a pension fund for former employees who had resigned or been lawfully discharged prior to the statute's enactment, and in addition through a pooling device to subsidize the retirements of employees who had worked only for other railroads.⁵⁴ Each of these measures took the property of A and gave it to B in violation of due process of law.

It is sometimes thought that these A to B cases are best understood "as incorporating the takings clause within Fourteenth Amendment due process."⁵⁵ This is a mistake. For when federal wage, rate, utility, and similar regulations were challenged under the Fifth Amendment, the Justices analyzed them under the Due Process Clause rather than under the Takings Clause.⁵⁶ Rate, price,

advantage . . . the assessment amounts to confiscation." (citations omitted); *Standard Pipe Line Co. v. Miller Cnty. Highway & Bridge Dist.*, 277 U.S. 160, 162 (1928) ("While it may be that the pipe lines received some small benefit from the road improvements, we regard the assessments actually made against them as arbitrary and unreasonable in amount."); *Rd. Improvement Dist. No. 1 v. Mo. Pac. R.R. Co.*, 274 U.S. 188, 194 (1927) (holding that the assessment was, in comparison to the proportional benefit received, "so excessive as to be a manifestly arbitrary exaction and in violation of the due process of law clause" of the Fourteenth Amendment).

53. *Treigle v. Acme Homestead Ass'n*, 297 U.S. 189, 195-98 (1936).

54. *R.R. Ret. Bd. v. Alton R.R. Co.*, 295 U.S. 330, 348-62 (1935).

55. PHILLIPS, *supra* note 4, at 179.

56. *See, e.g., United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533, 572-73 (1939) (finding that pooling device employed under the Federal Agricultural Marketing and Agreement Act of 1937 did not deny due process); *id.* at 587 (Roberts, J., dissenting) (finding that the differential rate regulation for large and small milk handlers permitted under an order of the Secretary of Agriculture "[denies] the appellees due process of law"); *Denver Union Stock Yard Co. v. United States*, 304 U.S. 470, 475 (1938) ("As of right safeguarded by the due process clause of the Fifth Amendment, appellant is entitled to rates, not *per se* excessive and extortionate, sufficient to yield a reasonable rate of return upon the value of property used, at the time it is being used, to render the services."); *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 74 (1936) (Brandeis, J., concurring) (a rate regulation order of the Secretary of Agriculture issued under the Packers and Stockyards Act of 1921 may violate the due process clause if it prescribes confiscatory rates); *R.R. Ret. Bd.*, 295 U.S. at 350 (concluding that multiple provisions of the Federal Railroad Retirement Act of 1934 "denie[d] due process of law by taking the property of one and bestowing it upon another"); *Chi., Rock Island & Pac. Ry. Co. v. United States*, 284 U.S. 80, 97 (1931) ("[A] regulation which is so arbitrary and unreasonable as to become an infringement upon the right of ownership constitutes a violation of the due process of law clause of the Fifth Amendment."); *Tagg Bros. v. United States*, 280 U.S. 420, 436 (1930) ("The contention that the Act, if construed as authorizing the order assailed, is void under the due process clause, is . . . unsound."); *Dayton-Goose Creek Ry. Co. v. United States*, 263 U.S. 456, 484 (1924) (upholding the recapture provisions of the Federal Transportation Act of 1920 on the ground that the carrier never had "such a title to the excess" that the recapture of it by the government constituted "a taking without due process"); *Adkins v. Children's Hosp.*, 261 U.S. 525, 542, 562 (1923) (sustaining the contention that the District of Columbia minimum wage law contravened the Due Process Clause of the Fifth Amendment); *Wilson v. New*, 243 U.S. 332, 355-59 (1917) (considering whether the wage regulation provisions of the Federal Adamson Act resulted in a "[w]ant of due process"); *id.* at 370

wage, and other comparable regulations that took from A to give to B, for a private purpose or without just compensation, constituted deprivations of property prohibited by the Due Process Clauses of both the Fifth and Fourteenth Amendments.

B. Unequal Treatment

The due process prohibition on unequal treatment was principally manifest in two types of cases. The first involved statutes creating barriers to entry in the common occupations. Occupational licensing laws designed to protect public health, safety, and welfare, and to prevent fraud, constituted legitimate exercises of the police power.⁵⁷ But in the absence of such a public-regarding justification, statutes fencing groups or individuals out of the lawful callings violated the Fourteenth Amendment right to “enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade.”⁵⁸ As Justice Field put it in his concurring opinion in *Butchers’ Union Co. v. Crescent City Co.*, such restrictions impaired:

[T]he right to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others, which may increase their prosperity or develop their faculties, so as to give to them their highest enjoyment.

The common business and callings of life, the ordinary trades and pursuits, which are innocuous in themselves, and have been followed in all communities from time immemorial, must, therefore, be free in this country to all alike upon the same conditions.⁵⁹

For example, in *New State Ice Co. v. Liebmann*, the Court considered a challenge to an Oklahoma statute requiring one wishing to enter the ice business to obtain a government-issued license before doing so.⁶⁰ State officials were authorized to deny a license to any applicant if the area to be served was already adequately provided for by a licensed company. The Court invalidated the act as inconsistent with due process. Though the opinion focused on the fundamental

(Day, J., dissenting) (“[The Act] amounts to the taking of the property of one and giving it to another, in violation of the spirit of fair play and equal right which the Constitution intended to secure in the due process clause to all coming within its protection, and is a striking illustration of that method which has always been deemed to be the plainest illustration of arbitrary action, the taking of the property of A and giving it to B by legislative fiat.”); see also *St. Joseph Stock Yards Co.*, 298 U.S. at 51 (“But the Constitution fixes limits to the rate-making power by prohibiting the deprivation of property without due process of law or the taking of private property for public use without just compensation.”).

57. Lawrence M. Friedman, *Freedom of Contract and Occupational Licensing, 1890-1910: A Legal and Social Study*, 53 CALIF. L. REV. 487, 491, 518 (1965).

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

59. 111 U.S. 746, 757 (1884) (Field, J., concurring).

60. 285 U.S. 262, 271 (1932). *Liebmann* receives Note treatment in CHOPER & FALLON, *supra* note 1, at 386; STONE ET AL., *supra* note 1, at 765 SULLIVAN & FELDMAN, *supra* note 1 at 495; VARAT & AMAR, *supra* note 1, at 474.

right to pursue a common calling, it also evinced a concern with preserving impartial treatment of potential competitors. “[T]he practical tendency of the restriction,” wrote Justice Sutherland, “is to shut out new enterprises, and thus create and foster monopoly in the hands of existing establishments.”⁶¹

[A] private corporation here seeks to prevent a competitor from entering the business of making and selling ice. . . . The control here asserted does not protect against monopoly, but tends to foster it. The aim is not to encourage competition, but to prevent it; not to regulate the business, but to preclude persons from engaging in it. There is no difference in principle between this case and the attempt of the dairyman under state authority to prevent another from keeping cows and selling milk on the ground that there are enough dairymen in the business; or to prevent a shoemaker from making or selling shoes because shoemakers already in that occupation can make and sell all the shoes that are needed.⁶²

The statute thus infringed the right to pursue a lawful calling on terms of equality with all others. The Court enforced this principle in other cases as well,⁶³ and even after changes in the Court’s personnel had altered the complexion of its jurisprudence, Chief Justice Hughes and Justice Roberts continued to defend this due process principle in dissent.⁶⁴

The second type of case in which the Due Process Clause was held to prohibit unequal treatment concerned statutes designed to facilitate union organization. *Adair v. United States*⁶⁵ concerned section 10 of the Erdman Act

61. 285 U.S. at 278.

62. *Id.* at 278–79.

63. *See, e.g.,* *Louis K. Liggett Co. v. Baldridge*, 278 U.S. 105, 108–09, 114 (1928) (striking down statute limiting ownership of retail drug businesses to licensed pharmacists); *Adams v. Tanner*, 244 U.S. 590, 591, 596–97 (1917) (prohibiting employment agencies from taking fees for services). *Liggett* receives Note treatment in *CHOPER & FALLON, supra* note 1, at 386, and *STONE ET AL., supra* note 1, at 765. *Adams* receives Note treatment in *CHOPER & FALLON, supra* note 1, at 386, and *SULLIVAN & FELDMAN, supra* note 1, at 495–96. The Court occasionally invalidated such barriers to entry under the aegis of the Equal Protection Clause, *see, e.g.,* *Mayflower Farms v. Ten Eyck*, 297 U.S. 266, 274 (1936); *Truax v. Raich*, 239 U.S. 33, 41, 43 (1915) (“It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure.”); or under a combination of the Due Process and Equal Protection Clauses, *see e.g.,* *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 528 (1926); or under provisions of a treaty embracing such protections, *see e.g.,* *Jordan v. Tashiro*, 278 U.S. 123, 130 (1928); *Asakura v. Seattle*, 265 U.S. 332, 342–43 (1924).

64. *See* *United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533, 582–87 (1939) (Roberts, J., Hughes, C.J., McReynolds, J., and Butler, J., dissenting).

65. 208 U.S. 161, 166–67 (1908). *Adair* receives Note treatment in *BREST ET AL., supra* note 1, at 497; *CHEMERINSKY, supra* note 1, at 626; *CHOPER & FALLON, supra* note 1, at 384–85; *FARBER ET AL., supra* note 8, at 548; *MAGGS & SMITH, supra* note 8, at 560; *MASSEY, supra* note 1, at 493–94; *STONE ET AL., supra* note 1, at 764–65; *PAULSEN ET AL., supra* note 1, at 1529; *SULLIVAN & FELDMAN, supra* note 1, at 495; *VARAT AMAR, supra* note 1, at 473.

of 1898, which prohibited any common carrier engaged in interstate transportation from discriminating against any employee or threatening any such employee with loss of employment because of the employee's membership in a labor organization.⁶⁶ Adair, who worked as an agent of the Louisville & Nashville Railroad Company, was indicted for violating the section by discharging a locomotive fireman because of his union membership.⁶⁷ The Court held that section 10 deprived Adair of his liberty and property without due process.⁶⁸

Much of Justice Harlan's opinion for the majority focused on the statute's curtailment of contractual liberty.⁶⁹ Yet Harlan also maintained that the statute transgressed constitutional protections of equality. First, he observed that while the statute made it a federal crime to discriminate against a union employee, it did not make it a crime to discriminate against a non-union employee.⁷⁰ Congress had no more power to make such a discrimination, he insisted, than it would to require that railroads employ only union members, or only non-union workers—"a power which could not be recognized as existing under the Constitution of the United States."⁷¹

Second, Harlan objected to the Erdman Act's asymmetrical treatment of employers and employees. A worker had the right "to sell his labor upon such terms as he deems proper," Harlan explained.⁷² He had the right "to quit the service of the employer, for whatever reason."⁷³ If, for example, he preferred not to work for a company that employed non-union men, he was free not to accept employment with that company, or to resign from its employment.⁷⁴ Similarly, a "purchaser of labor" had the same right "to prescribe the conditions upon which he will accept such labor from the person offering to sell it," and to "dispense with the services" of his employee "for whatever reason."⁷⁵ Thus, the employer had a corresponding or reciprocal right to dismiss an employee for membership in a union.⁷⁶ "In all such particulars," Harlan concluded, "the

66. 208 U.S. at 168–69.

67. *Id.* at 170.

68. *Id.* at 180.

69. *Id.* at 172–76.

70. *Id.* at 169.

71. 208 U.S. at 179.

72. *Id.* at 174.

73. *Id.* at 174–75.

74. See *Coppage v. Kansas*, 236 U.S. 1, 19–20 (1915). *Coppage* receives Note treatment in BREST ET AL., *supra* note 1, at 497; CHEMERINSKY, *supra* note 1, at 627; CHOPER & FALLON, *supra* note 1, at 384–85; FARBER ET AL., *supra* note 8, at 548; MAGGS & SMITH, *supra* note 8, at 560; MASSEY, *supra* note 1, at 493; STONE ET AL., *supra* note 1, at 761, 764–65; SULLIVAN & FELDMAN, *supra* note 1, at 495; and VARAT AMAR, *supra* note 1, at 473.

75. *Adair*, 208 U.S. at 174–75.

76. See *Coppage*, 236 U.S. at 19–20 ("[I]f it be unconstitutional for Congress to deprive an employer of liberty of property for . . . discriminating against [an employee] because of his

employer and the employé have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land."⁷⁷ The *Adair* majority thus objected not only to the statute's interference with liberty of contract, but also to its abridgement of the equal treatment demanded by the Due Process Clause.

The majority opinion in *Coppage v. Kansas* invoked *Adair*'s principle of equality of right between employer and employee in striking down a state statute prohibiting the use of "yellow dog" contracts, under which employees were required to agree as a condition of employment not to join a labor union.⁷⁸ The Court maintained that "[a]n interference with this liberty so serious as that now under consideration, and so disturbing of equality of right, must be deemed to be arbitrary, unless it be supportable as a reasonable exercise of the police power of the State."⁷⁹ Finding no such support, the majority concluded that the statute violated the Due Process Clause.⁸⁰ It was "intended to deprive employers of a part of their liberty of contract, to the corresponding advantage of the employed and the upbuilding of the labor organizations."⁸¹ The Court declared that there could not "be one rule of liberty for the labor organization and its members, and a different and more restrictive rule for employers."⁸² The Justices had no doubt that labor unions could legally exclude from membership anyone who refused to agree not to work in an open shop. Thus, employers had a corresponding right to exclude from employment any worker who would not agree to forego union membership.⁸³ The employer could not "be foreclosed by legislation from exercising the same freedom of choice that is the right of the employé."⁸⁴ Here

membership in a labor organization, it is unconstitutional for a State to similarly punish an employer for requiring his employé, as a condition of securing or retaining employment, to agree not to become or remain a member of such an organization while so employed.")

77. *Adair*, 208 U.S. at 175; see also MASSEY, *supra* note 1, at 494 ("Government intervention to assure workers unfettered ability to organize for collective bargaining purposes was perceived as a form of private benefit – a skewing of common law contractual freedom to benefit one side of the bargaining duo."). For consideration of the possibility that the statute struck down in *Lochner* constituted class legislation arbitrarily favoring bakery employees over their employers, see YOUNG, *supra* note 8, at 240.

78. *Coppage*, 236 U.S. at 11.

79. *Id.* at 14.

80. *Id.*

81. *Id.* at 16.

82. *Id.* at 20.

83. 236 U.S. at 19–20.

84. *Id.* at 21. Ernst Freund conceived of *Adair* and *Coppage* as involving inadequate "correlation" of privilege and duty between employer and employee. He maintained that it was the "failure to perform the difficult task of adequately surveying and covering the entire aggregate of rights and obligations involved in new legislation which account[ed] for much of the alleged unreasonableness of modern statutes," which he thought "particularly conspicuous in labor legislation." FREUND, *supra* note 14, at 240. "Reciprocal obligation," Freund argued:

again the Justices invoked the Due Process Clause to protect both liberty and formal equality.

C. *Singling Out*

During the *Lochner* Era, the due process requirement of generality was understood to prohibit singling out a particular class for different treatment without adequate justification. In 1904, on the eve of the *Lochner* decision, Ernst Freund explained that “[i]f legislation is piecemeal or haphazard, the danger is inevitable that legislators may be influenced by the clamor of interests without ascertaining the existence of conditions requiring special legislation, or by a misapprehension of those conditions due to a skilful [sic] presentation of one-sided and partial views.”⁸⁵ Nevertheless, Freund observed that:

The stringent exercise of judicial control will tend, and is already tending, to bring about more systematic methods of legislation. . . . Systematic legislation means that the whole range of the danger or evil is presented and that the classes excepted as well as those covered are taken into consideration.⁸⁶

[Is] the essence of employment. A statute enacted at the request of labor interests generally seeks to redress some injustice or grievance, but very often the practice which employers are forbidden to continue has some element of justification in the shortcomings of labor; and a mere one-sided prohibition without corresponding readjustments leaves the relation defective, with the balance of inconvenience merely shifted from one side to the other. Under such circumstances the courts are much inclined to assent to the claim that there has been an arbitrary interference with liberty or a violation of due process.

Id. at 240–41.

Freund considered the statutes involved in cases such as *Adair* and *Coppage* “unsatisfactory,” observing that “the defect of the statute may account for the decision.” *Id.* at 244. That defect, in Freund’s view, was not principally the interference with liberty, but the one-sided character of the regulation. As Freund saw it:

The true principle of correlation requires, not that a right to quit service arbitrarily should be offset by an arbitrary right to discharge, but that the employer should not be deprived of a legitimate weapon of defense without being given some assurance that his defenselessness will not be abused. Put in other words, if some particular union is actively hostile to some employer, it is unjust to require him to retain members of that union in his employ. A statute that deals with the matter at all ought to weigh carefully the possible effects of altering common-law rights and offset privilege by obligation. It affords no solution of the problem to give legitimate protection to the employee by taking the means of legitimate protection from the employer.

Id. at 245.

The particular content of the rights of employer and employee was thus less important than the correlative relationship between those rights. It was the “equality of right” that could not be “disturb[ed].” *Coppage*, 236 U.S. at 14.

85. FREUND, *supra* note 23, at 754.

86. *Id.*

Thus, “[u]nder the operation of the Fourteenth Amendment, the legislative power is certainly not as free [to proceed piecemeal] as it used to be.”⁸⁷ And “on the whole this restriction” was “a distinct gain, for it tends toward equality, and in a democracy equality is the surest, and, in the long run, the only possible guaranty of liberty.”⁸⁸ In Freund’s view, “the trend of decisions may be summarised” as imposing the requirement that “[w]here a restraint is confined to a special class of acts or occupations, that class must present the danger dealt with in a more marked and uniform degree than the classes omitted.”⁸⁹ Freund would return to this theme in 1917, writing that:

Very often, however, the restriction of legislation to a particular group merely means the following of the line of least resistance: there is a strong demand for relief on the part of, or with reference to, one particular calling, industry, or business, and while the same measure is capable of more general application, it has not sufficient strength or support to carry as a general policy, or the general policy meets determined opposition on the part of one or more groups claiming exemption, which is granted.⁹⁰

It was “this kind of class legislation,” Freund explained, “which is opposed to the spirit of constitutional equality.”⁹¹

Other commentators of the period voiced similar views. In 1910, W. W. Willoughby reported that:

[I]t has been repeatedly declared that enactments of a legislature directed against particular individuals or corporations, or classes of such, without any reasonable ground for selecting them out of the general mass of individuals or corporations, amounts to a denial of due process of law so far as their life, liberty or property is affected.⁹²

Similarly, in 1926 Rodney Mott argued that:

In those cases where the central problem is one of classification, it is evident that, unless the actual conditions surrounding the classification are such as to disclose a reasonable justification for the class distinction, the class distinction becomes an arbitrary discrimination. The determination, therefore of the constitutionality of the law depends upon the determination of the further question of whether there is a real distinction between the classes established, in view of the particular circumstances.⁹³

87. *Id.* at 755.

88. *Id.*

89. *Id.*

90. FREUND, *supra* note 14, at 271.

91. *Id.*

92. WILLOUGHBY, *supra* note 14, at 874.

93. MOTT, *supra* note 14, at 538–39.

Mott concluded:

[T]he classification as made must rest upon some real distinction and not on a whimsical or arbitrary basis. Unless it has some relation to the purpose in hand it can hardly be said to be based on the considerations of fairness and reasonableness which are the foundations upon which due process is built.⁹⁴

Though laws regulating contractual relations were subject to this limitation, they typically survived its application. For example, in *Holden v. Hardy* the Court upheld a law limiting the working hours of miners to eight per day.⁹⁵ There the Court explained that it was rational to single out miners working below ground for special treatment because their occupation was peculiarly unsafe and unhealthy.⁹⁶ *Muller v. Oregon*⁹⁷ and the many cases following it in upholding maximum hours laws for women⁹⁸ rested on the view that a “woman’s physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil.”⁹⁹ “Differentiated by these matters from the other sex,” wrote Justice Brewer, “she is properly placed in a class by herself.”¹⁰⁰ Indeed, in the many cases in which the Court perceived no arbitrary discrimination in a regulation of the employment contract, liberty of contract challenges to such legislation were unsuccessful.¹⁰¹ The same was true of legislation prohibiting

94. *Id.* at 598.

95. 169 U.S. 366, 396 (1898). *Holden* is largely neglected by constitutional law casebooks, receiving Note treatment only in BREST ET AL., *supra* note 1, at 491; CHEMERINSKY, *supra* note 1, at 627; and FARBER ET AL., *supra* note 8, at 542.

96. As Justice Brown put it: “The question in each case is whether the legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression, or spoliation of a particular class.” *Holden*, 169 U.S. at 398.

While the general experience of mankind may justify us in believing that men may engage in ordinary employments more than eight hours per day without injury to their health, it does not follow that labor for the same length of time is innocuous when carried on beneath the surface of the earth, where the operative is deprived of fresh air and sunlight, and is frequently subjected to foul atmosphere and a very high temperature, or to the influence of noxious gases, generated by the processes of refining or smelting.

Id. at 396.

97. 208 U.S. 412 (1908). *Muller* receives Note treatment in BREST, ET AL., *supra* note 1, at 492; CHOPER & FALLON, *supra* note 1, at 384; FARBER ET AL., *supra* note 8, at 548–49; MAGGS & SMITH, *supra* note 8, at 560; MASSEY, *supra* note 1, at 494; PAULSEN ET AL., *supra* note 1, at 1529; REDLICH ET AL., *supra* note 8, at 389; STONE ET AL., *supra* note 1, at 764; SULLIVAN & FELDMAN, *supra* note 1, at 496; and VARAT & AMAR, *supra* note 1, at 472; and is a principal case in BARNETT & KATZ, *supra* note 45, at 875; and CHEMERINSKY, *supra* note 1, at 628.

98. See cases cited *supra* note 6.

99. *Muller*, 208 U.S. at 420.

100. *Id.* at 422.

101. See cases cited *supra* note 6.

options contracts in grain futures¹⁰² or the purchase of corporate stock on margin or for future delivery.¹⁰³

Yet with the exception of *Muller*, Justices Brewer and Peckham dissented without opinion in each such case in which they participated.¹⁰⁴ Their conception of liberty of contract was more robust than that of their colleagues, and the fact that Peckham authored the majority opinions in both *Lochner* and *Allgeyer v. Louisiana*¹⁰⁵ would explain the emphasis on liberty of contract in those decisions. Yet the votes of the other members of the *Lochner* majority—Chief Justice Fuller and Justices Brown and McKenna—cannot easily be accounted for in terms of a robust conception of liberty of contract. For in all of the other divided decisions referred to in the preceding paragraph, they opposed Brewer and Peckham in upholding the challenged legislation.¹⁰⁶

There are suggestions sprinkled throughout Peckham's *Lochner* opinion that some members of the majority may have viewed the challenged statute as class legislation that singled out bakers for inadequate reason.¹⁰⁷ Peckham referred to

102. *Booth v. Illinois*, 184 U.S. 425, 431 (1902).

103. *Otis v. Parker*, 187 U.S. 606, 610–11 (1903).

104. *McLean v. Arkansas*, 211 U.S. 539, 552 (1909) (Brewer and Peckham dissenting without opinion from decision upholding statute directing that, where miners' wages were reckoned according to the weight of the coal that they mined, the weighing must take place before the coal was passed over a screen); *Otis*, 187 U.S. at 610–11 (Brewer and Peckham dissenting without opinion from decision rejecting liberty of contract challenge to provision of California Constitution prohibiting purchase of corporate stock on margin, or for future delivery); *Booth*, 184 U.S. at 431–32 (Brewer and Peckham dissenting without opinion from decision rejecting liberty of contract challenge to state law prohibiting options contracts in grain futures); *Dayton Coal & Iron Co. v. Barton*, 183 U.S. 23, 25 (1901) (Brewer and Peckham dissenting without opinion from decision upholding statute requiring that all store orders or other evidences of indebtedness issued by employers as payment of wages be redeemable in cash); *Knoxville Iron Co. v. Harbison*, 183 U.S. 13, 22 (1901) (Brewer and Peckham dissenting without opinion from decision upholding a statute similar to the law upheld in *Barton*); *Holden v. Hardy*, 169 U.S. 366, 398 (1898) (Brewer and Peckham dissenting without opinion from decision upholding maximum hours law for miners).

105. 165 U.S. 578, 579, 588–93 (1897) (striking down as a violation of liberty of contract a statute designed to prevent people from dealing with out-of-state marine insurance companies). The foundational Supreme Court case for the doctrine of liberty of contract, *Allgeyer* receives Note treatment in BREST AL., *supra* note 1, at 387; CHOPER & FALLON, *supra* note 1, at 376; FARBER ET AL., *supra* note 8, at 542; MASSEY, *supra* note 1, at 485; PAULSEN ET AL., *supra* note 1, at 1520; STONE ET AL., *supra* note 1, at 753; SULLIVAN & FELDMAN, *supra* note 1, at 487; and VARAT & AMAR, *supra* note 1, at 467; and is a principal case in CHEMERINSKY, *supra* note 1, at 619.

106. *See* cases cited *supra* note 104.

107. It also has been argued that the statute violated the requirement of equal treatment by favoring one class of bakers over another. *See, e.g.*, BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 113–21 (1980) (suggesting that the New York bakeshop law probably operated to marginalize immigrant workers in small bakeries); David E. Bernstein, *Lochner's Legacy's Legacy*, 82 TEX. L. REV. 1, 50 n.264 (2003) (“[I]t is entirely possible that one or more of them [Fuller, Brown, and McKenna] was swayed by the belief, expressed by *Lochner's* supporters, that the law was a sop to the bakers' union, which illegitimately sought to monopolize the labor

the workers in mines and smelters as the “class of labor” to which the eight-hour law upheld in *Holden v. Hardy* applied.¹⁰⁸ In rejecting the validity of the bakeshop law as “a labor law, pure and simple,” Peckham observed that “[t]here is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State.”¹⁰⁹ And in evaluating the state’s police power rationale, Peckham disdained the contention that “the trade of a baker” was a peculiarly unhealthy one. “In looking through statistics regarding all trades and occupations,” Peckham wrote, “it may be true that the trade of a baker does not appear to be as healthy as some other trades, and is also vastly more healthy than still others.”¹¹⁰ This suggested that it was arbitrary to single out bakers for working-hours regulation when other

market for bakers by forcing all bakeries to abide by union work rules.”); George Gorham Groat, *The Eight Hour and Prevailing Rate Movement in New York State*, 21 POL. SCI. Q. 414, 425 (1906) (“Both state and national labor organizations used all their influence in support of [the bakeshop law].”); Sidney G. Tarrow, *Lochner Versus New York: A Political Analysis*, 5 LAB. HIST. 277, 280–90 (1964) (describing the origins of the statute in the journeyman bakers’ union movement); Editorial, *A Check to Union Tyranny*, NATION, May 4, 1905, at 346–47 (“The main effect of [*Lochner*] will be to stop the subterfuge by which, under pretext of conserving the public health, the unionists have sought to delimit the competition of non-unionists, and so to establish a quasi-monopoly of many important kinds of labor.”); Editorial, *Fussy Legislation*, N.Y. TIMES, April 19, 1905, at 10 (praising *Lochner* and condemning the bakeshop law as a contract between “the demagogues in the Legislature and the ignoramus among the labor leaders”); Bernstein, *supra* note 11, at 23–24 (“[T]he [bakeshop law] was arguably special interest legislation that benefited established, unionized German-American bakers at the expense of more recent immigrants.”).

108. *Lochner v. New York*, 198 U.S. 45, 55 (1905). Peckham also quoted the decision of the Supreme Court of Utah, which had observed: “The law in question is confined to the protection of that class of people engaged in labor in underground mines, and in smelters and other works wherein ores are reduced and refined. This law applies only to the classes subjected by their employment to the peculiar conditions and effects attending” such work. *Id.* (quoting *Holden v. Hardy*, 169 U.S. 366, 396 (1898) (quoting *State v. Holden*, 46 P. 1105, 1106 (Utah 1896)); see also PAULSEN ET AL., *supra* note 1, at 1528 (“[W]hat if the motivation behind the statute had more to do with economic competition between different groups of bakers? What if the owners of the large bakeries, the bread factories, already scheduled workers in shifts? What if they were concerned about ‘competition from small, old-fashioned bakeries, especially those that employed Italian, French, and Jewish immigrants?’”); MASSEY, *supra* note 1, at 493 (“Consider the possibility that the statute at issue in *Lochner* represented an organizational triumph of labor unions at the expense of bread consumers and unorganized immigrant laborers eager to take bakery jobs at long hours.”); YOUNG, *supra* note 8, at 242 (“Professor Bernstein points out that the bakers’ union that pushed for the maximum hours law was dominated by bakers of German descent working in the newer and larger bakeries, who sought to disadvantage their competitors in the old-fashioned bakeries. Seen in this light, does the New York law begin to look more like ‘class legislation’? Where one group is able to use the political process to disadvantage another, less powerful group, should courts step in to invalidate the laws that result?”).

109. *Lochner*, 198 U.S. at 57.

110. *Id.* at 59.

occupations that were less healthy were left unregulated.¹¹¹ It appears that Chief Justice Fuller and Justices Brown and McKenna believed that mining was sufficiently unsafe and unhealthy that its practitioners could be placed in a class by themselves for purposes of working-hours regulation.¹¹² But these Justices apparently were not persuaded that New York had offered an adequate justification for singling out “bakers as a class” for such special treatment.¹¹³

111. See G. Edward White, *Revisiting Substantive Due Process and Holmes's Lochner Dissent*, 63 BROOK. L. REV. 87, 102 (1997) (“If the purpose of legislation was to promote the general welfare by protecting a particularly vulnerable class of workers, it could come within the police power, as in the case of hours legislation for miners. But if the class of workers singled out had no special vulnerability, the legislation ceased being a ‘general’ health or welfare measure and became a ‘partial’ measure directed at a particular class.”).

112. Lochner’s brief emphasized that his case was “clearly distinguishable” from *Holden*: “The occupation of mining has ever been held properly within the police powers; while a decision pronouncing the baker’s trade subject to arbitrary regulation under the police power, would mean that all trades will eventually be held within the police power; and the 14th Amendment will become mere idle words.” Brief for Plaintiff in Error at 34, *Lochner v. New York*, 198 U.S. 45 (1905) (No. 292), reprinted in 14 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 687 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter LANDMARK BRIEFS]. “Working in underground mines has always been recognized as hazardous and unhealthful. The baker’s trade has not.” *Id.* at 45, reprinted in LANDMARK BRIEFS, *supra*, at 698.

113. This theory was argued in Lochner’s brief, which quoted Freund’s discussion of class legislation in support of its position: “[i]t is an elementary principle of equal justice, that where the public welfare requires something to be given or done, the burden be imposed or distributed upon some rational basis, and that no individual be singled out to make a sacrifice for the community.” *Id.* at 13, reprinted in LANDMARK BRIEFS, *supra* note 112, at 666 (quoting FREUND, *supra* note 23, at 635). The brief similarly relied on then-Judge Peckham’s opinion for the New York Court of Appeals in *People v. Gillson*, 109 N.Y. 389 (1888), characterizing a statute as evidently of “that kind which has been so frequent of late, a kind which is 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.” *Id.* at 29–30, reprinted in LANDMARK BRIEFS, *supra* note 112, at 682. The brief also relied upon the majority and concurring opinions in *Ex parte Westerfield*, 55 Cal. 550 (1880), which invalidated a Sunday law specifically prohibiting baking between six p.m. on Saturday and six p.m. on Sunday, on the ground that it was special legislation. “A certain class is selected. . . . [T]here is nothing so peculiar in the occupation [of baking] as that those engaged in it require—as a sanitary measure or for the protection of their morals—a period of rest not required by those engaged in many other employments. A general law must include within its sanction all who come within its purpose and scope. It must be as broad as its object.” *Id.* at 39, reprinted in LANDMARK BRIEFS, *supra* note 112, at 692; see also GILLMAN, *supra* note 10, at 126–28 (referring to and discussing the same quoted material). Lochner’s counsel also had contended that “[c]lassification must be based upon some difference bearing a reasonable and just relation to the act in respect to which the classification is attempted, but no mere arbitrary selection can ever be justified by calling it classification.” *Lochner*, 198 U.S. at 48. Judge O’Brien, dissenting from the opinion of the New York Court of Appeals sustaining Lochner’s conviction, likewise had objected that:

This is clearly the way that the case was understood by Andrew C. McLaughlin, who in 1907 cited the *Lochner* decision as Exhibit A in his argument for rigorous scrutiny of police power legislation:

[T]here has arisen constant necessity for watching narrowly this [police] power of the state, for it is often invoked not for the common good, but for the supposed advantage of classes and cliques. If a law to limit the hours of work in bakeries, like that of New York, recently passed on by the courts, has for its purpose, not the uplifting and protection of the health and well-being of the community, but the giving of advantage to a certain class of workmen without regard to the rights and desires of the rest . . . it can hardly be rightly supported as an exercise of the police power¹¹⁴

And it was this particular conception of constitutional equality that was the target of the closing passages of Justice Holmes's dissent. Holmes remarked of the statute, "[m]en whom I certainly could not pronounce unreasonable would uphold it as a first instalment [sic] of a general regulation of the hours of work. Whether in the latter aspect it would be open to the charge of inequality I think it unnecessary to discuss."¹¹⁵ Holmes simply did not share the concerns of contemporary commentators and his colleagues in the *Lochner* majority that permitting the legislature to proceed piecemeal with "special" or "partial" legislation constituted a denial of the equal treatment guaranteed by the Fourteenth Amendment.

Fuller, Brewer, Peckham, and Brown were no longer living when the Court decided *Bunting v. Oregon*¹¹⁶ in 1917. But that decision, which upheld Oregon's maximum hours law, does help to shed light on the thought of the fifth member of the *Lochner* majority, Joseph McKenna. The challenged statute provided that "[n]o person shall be employed in any mill, factory or manufacturing

[t]he very small fraction of the community who happen to conduct bakeries or confectionery establishments are prohibited, under pain of fine and imprisonment, from regulating the conduct of their own business by contracts or mutual agreements with their employees, 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.

People v. Lochner, 69 N.E. 373, 386 (1904).

114. Andrew C. McLaughlin, *A Written Constitution in Some of Its Historical Aspects*, 5 MICH. L. REV. 605, 620 (1907); see also PAULSEN ET AL., *supra* note 1, at 1528 ("Could the result in *Lochner* be justified under the Equal Protection Clause, because the statute treated bakers differently from other workers?").

115. *Lochner*, 198 U.S. at 76 (Holmes, J., dissenting); see also White, *supra* note 111, at 104–06, 111 (describing the reasoning in Holmes' dissent).

116. 243 U.S. 426 (1917). *Bunting* receives Note treatment in BREST ET AL., *supra* note 1, at 497; CHEMERINKSY, *supra* note 1, at 629; CHOPER & FALLON, *supra* note 1, at 384; FARBER ET AL., *supra* note 8, at 549; MASSEY, *supra* note 1, at 494; PAULSEN ET AL., *supra* note 1, at 1529; REDLICH ET AL., *supra* note 8, at 389; STONE ET AL., *supra* note 1, at 764; SULLIVAN & FELDMAN, *supra* note 1, at 496; and VARAT & AMAR, *supra* note 1, at 473.

establishment in this State more than ten hours in any one day.”¹¹⁷ In other words, it bore a greater resemblance to what Justice Holmes had called “a general regulation of the hours of work.”¹¹⁸ McKenna’s majority opinion upholding the statute didn’t even mention *Lochner*. Observing that the law challenged in *Bunting* “covered the whole field of industrial employment and certainly covered the case of persons employed in bakeries,” Chief Justice Taft believed that *Bunting* had tacitly overruled *Lochner*.¹¹⁹ “No one can suggest any constitutional distinction between employment in a bakery and one in any other kind of a manufacturing establishment,” Taft wrote, “which should make a limit of hours in the one invalid, and the same limit in the other permissible.”¹²⁰ For McKenna, however, it was precisely because no one could suggest any constitutional distinction between employment in a bakery and employment in many other similar manufacturing establishments that bakeries could not be singled out for special working-hours legislation. The problem in *Lochner* was not that the statute abridged liberty of contract. It was that its lack of generality worked a denial of equal treatment.¹²¹

II. OTHER STRANDS OF SUBSTANTIVE DUE PROCESS

As the liberty of contract cases make clear, the principle of neutrality alone cannot account for all of the substantive due process decisions of the *Lochner* Era. Scholars have traced this strand of substantive due process to the “free labor” ideology of the antebellum Republican Party,¹²² codified by the Civil

117. *Bunting*, 243 U.S. at 433–34.

118. *Lochner*, 198 U.S. at 76 (Holmes, J., dissenting).

119. *Adkins v. Children’s Hosp.*, 261 U.S. 525, 564 (1923) (Taft, C.J., dissenting) (“It is impossible for me to reconcile the *Bunting* Case and the *Lochner* Case and I have always supposed that the *Lochner* Case was thus overruled *sub silentio*.”).

120. *Id.* at 563–64.

121. This interpretation is reinforced by an examination of McKenna’s performance in cases involving constitutional challenges to workmen’s compensation legislation. See Cushman, *supra* note 26, at 937–40. In view of their performances in other cases involving regulation of the employment relation, I believe that this analysis also accounts for the votes of Fuller and Brown in *Lochner*.

122. See ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN* (1970).

Rights Act of 1866¹²³ and “constitutionalized” by Section 1 of the Fourteenth Amendment.¹²⁴

In some cases, the Court relied upon the Due Process Clauses to invalidate statutes that infringed upon non-economic liberties. In *Meyer v. Nebraska* and *Bartels v. Iowa*, the Court struck down statutes that prohibited the teaching of modern foreign languages to students below the high school level.¹²⁵ In *Pierce v. Society of Sisters*, the Court struck down an Oregon statute requiring children to attend only public schools.¹²⁶ And *Farrington v. Tokushige* invalidated a statute imposing burdensome and restrictive regulations on schools that conducted instruction in a language other than English or Hawaiian.¹²⁷

There also were a handful of cases in which the Court held that a statute seeking a permissible end did so through unreasonable means and thus ran afoul of the Due Process Clause. In *Jay Burns Baking Co. v. Bryan*, the Court held that a Nebraska statute seeking to prevent fraudulent short-weighting of bread sold to consumers imposed unreasonably restrictive regulations on the permissible weight ranges for loaves of bread.¹²⁸ In *Weaver v. Palmer Bros. Co.*, the Justices struck down a statute totally prohibiting the use of shoddy in the manufacture of bedding, even though it was recognized by all that shoddy could be rendered harmless through the less restrictive means of sterilization.¹²⁹ And

123. Civil Rights Act of 1866, ch. 31, sec. 1, 14 Stat. 27 (1866) (“[A]ll persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and 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, to make and enforce contracts . . . as is enjoyed by white citizens . . . any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.”).

124. See, e.g., Charles W. McCurdy, *The “Liberty of Contract” Regime in American Law*, in THE STATE AND FREEDOM OF CONTRACT 161, 179–97 (Harry N. Scheiber ed., 1998); White, *supra* note 111, at 88–89, 96–97, 109, 111; Forbath, *supra* note 10, at 772–95.

125. *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923); *Bartels v. Iowa*, 262 U.S. 404, 409–11 (1923).

126. 268 U.S. 510, 534–35 (1925). Both *Meyer* and *Pierce* receive Note treatment in BRAVEMAN ET AL., *supra* note 3, at 811–12; BREST ET AL., *supra* note 1, at 1506–07; CHOPER & FALLON, *supra* note 1, at 1069–71; MASSEY, *supra* note 1, at 496–97; STONE ET AL., *supra* note 1, at 841–42; SULLIVAN & FELDMAN, *supra* note 1, at 508–09; VARAT AMAR *passim*; and YOUNG, *supra* note 8, at 258–59. Both are principal cases in BARNETT & KATZ, *supra* note 45, at 884–88; CHERMERINKSY, *supra* note 1, at 994–96; and PAULSEN ET AL., *supra* note 1, at 1530–35. *Pierce* is a principal case and *Meyer* receives Note treatment in MAGGS & SMITH, *supra* note 8, 571–72; and SHANOR, *supra* note 3, at 483–85, 516. *Meyer* is a principal case and *Pierce* receives Note treatment in FARBER ET AL., *supra* note 8, at 609–12.

127. 273 U.S. 284, 298–99 (1927).

128. 264 U.S. 504, 517 (1924). The Court unanimously upheld a revised statute with less restrictive weight-range regulations in *P.F. Petersen Baking Co. v. Bryan*, 290 U.S. 570, 575 (1934).

129. 270 U.S. 402, 415 (1926). Both *Jay Burns* and *Weaver* are briefly discussed in BREST ET AL., *supra* note 1, at 496–97 (describing them as cases involving “extraordinarily burdensome

in *South Covington & Cincinnati Street Railway Co. v. City of Covington*, the Court unanimously invalidated as unreasonable a requirement that the temperature of street cars never be permitted to fall below fifty degrees Fahrenheit where the undisputed testimony showed that the opening and closing of the doors made compliance impracticable.¹³⁰

No introduction to *Lochner* Era substantive due process would be complete without exposure to each of these important strands of doctrine. Nevertheless, the cases enforcing the principle of neutrality, and particularly those enforcing the prohibition on A-to-B laws, comprised the bulk of the Court's substantive due process decisions, and constituted the preeminent strand of its substantive due process jurisprudence.

III. THE DEMISE OF LOCHNER

Constitutional Law casebooks generally recognize the 1934 decision in *Nebbia v. New York*¹³¹ as a milestone in the decline of substantive due process. There, the Court abandoned the doctrine that price regulation was confined to a narrow class of businesses affected with a public interest.¹³² The texts also often include other landmarks in the rise of deferential review of economic legislation, such as *United States v. Carolene Products Co.*,¹³³ *Williamson v. Lee Optical*,¹³⁴

regulations where less onerous ones would have served substantially as well"). *Weaver* receives Note treatment in VARAT & AMAR, *supra* note 1, at 474; and is a principal case in CHEMERINKSY, *supra* note 1, at 632.

130. 235 U.S. 537, 548–49 (1915).

131. 291 U.S. 502 (1934).

132. *Nebbia* receives Note treatment in BREST ET AL., *supra* note 1, at 564 (the treatment here is extensive); FARBER ET AL., *supra* note 8, at 549; MASSEY, *supra* note 1, at 494; and REDLICH ET AL., *supra* note 8, at 390; and is a principal case in BARNETT & KATZ, *supra* note 45, at 893; CHEMERINKSY, *supra* note 1, at 633; CHOPER & FALLON, *supra* note 1, at 387; MAGGS & SMITH, *supra* note 8, at 561; STONE ET AL., *supra* note 1, at 766; SULLIVAN & FELDMAN, *supra* note 1, at 498; VARAT & AMAR, *supra* note 1, at 475; and YOUNG, *supra* note 8, at 250; *see also id.* at 231 (*Nebbia* displayed a "generous view" of the legislature's power "to restrict freedom of contract"); *id.* at 242 ("[E]ven this more aggressive Court was hardly unyielding in its hostility to government regulation."); *id.* at 258 ("*Nebbia* is an important example of the fact that the Court upheld many economic regulations against due process challenges."); REDLICH ET AL., *supra* note 8, at 390 ("*Nebbia* signaled the decline in the Court's use of substantive due process and a return to giving deference to state economic and social legislation."); *id.* at 391 ("*Nebbia* turned out, however, to be a false spring.")

133. 304 U.S. 144, 145–46, 154 (1938) (upholding Federal Filled Milk Act of 1923 against due process challenge). *Carolene Products* receives Note treatment in MASSEY, *supra* note 1, at 495; PAULSEN ET AL., *supra* note 1, at 1542; and SULLIVAN & FELDMAN, *supra* note 1, at 501; and is a principal case in BARNETT & KATZ, *supra* note 45, at 902; BREST ET AL., *supra* note 1, at 577; CHEMERINKSY, *supra* note 1, at 638; CHOPER & FALLON, *supra* note 1, at 392; STONE ET AL., *supra* note 1, at 770; REDLICH ET AL., *supra* note 8, at 392; and YOUNG, *supra* note 8, at 309.

134. 348 U.S. 483 (1955). *Williamson* receives Note treatment in PAULSEN ET AL., *supra* note 1, at 1543; and REDLICH ET AL., *supra* note 8, at 393–94; and is a principal case in BARNETT &

and *Ferguson v. Skrupa*.¹³⁵ But the central case evidencing the demise of substantive due process is *West Coast Hotel v. Parrish*, which is featured in every major constitutional law casebook,¹³⁶ and is typically treated as pivotal.¹³⁷

Though *West Coast Hotel* did overrule *Adkins*, and though (with one obscure exception) the Justices ceased thereafter to invalidate economic legislation under the Due Process Clauses, one nevertheless should be cautious about exaggerating *West Coast Hotel*'s significance.¹³⁸ First, several of the principal precedents comprising *Lochner* Era substantive due process had been retired well before the spring of 1937. Constitutional restrictions on maximum-hours legislation were effectively discarded in 1917, when the Court upheld a working-hours limitation of general applicability in *Bunting*. Though *Lochner* would be cited as a live authority in *Adkins* six years later,¹³⁹ never again would it be relied upon to invalidate legislation prescribing maximum hours of work. As far as such legislation was concerned, Chief Justice Taft was accurate in his view that

KATZ, *supra* note 45, at 916; BREST ET AL., *supra* note 1, at 584; CHERMERINKSY, *supra* note 1, at 640; CHOPER & FALLON, *supra* note 1, at 396; FARBER ET AL., *supra* note 8, at 550; MAGGS & SMITH *supra* note 8, at 567; STONE ET AL., *supra* note 1, at 771; SULLIVAN & FELDMAN, *supra* note 1, at 503; VARAT & AMAR, *supra* note 1, at 480; and YOUNG, *supra* note 8, at 313.

135. 372 U.S. 726 (1963). *Ferguson* receives Note treatment in BREST ET AL., *supra* note 1, at 584; CHERMERINKSY, *supra* note 1, at 641; MASSEY, *supra* note 1, at 496; PAULSEN ET AL., *supra* note 1, at 1543; REDLICH ET AL., *supra* note 8, at 393; SULLIVAN & FELDMAN, *supra* note 1, at 504; and VARAT & AMAR, *supra* note 1, at 482; and is a principal case in CHOPER & FALLON, *supra* note 1, at 397; and STONE ET AL., *supra* note 1, at 772. Other cases occasionally mentioned in connection with the decline of substantive due process include *Olsen v. Nebraska*, 313 U.S. 236 (1941), *United States v. Darby*, 312 U.S. 100 (1941), and *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941). *Olsen* receives Note treatment in BREST ET AL., *supra* note 1, at 583; CHOPER & FALLON, *supra* note 1, at 395; REDLICH ET AL., *supra* note 8, at 393; STONE ET AL., *supra* note 1, at 769; and VARAT & AMAR, *supra* note 1, at 479. *United States v. Darby* receives Note treatment in BREST ET AL., *supra* note 1, at 583; STONE ET AL., *supra* note 1, at 769; and VARAT & AMAR, *supra* note 1, at 479. *Phelps* receives note treatment in CHOPER & FALLON, *supra* note 1, at 385; and STONE ET AL., *supra* note 1, at 769.

136. *West Coast Hotel*, 300 U.S. 379 (1937), receives Note treatment in MASSEY, *supra* note 1, at 495; PAULSEN ET AL., *supra* note 1, at 1540–42; REDLICH ET AL., *supra* note 8, at 391; SULLIVAN & FELDMAN, *supra* note 1, at 499–500; and VARAT & AMAR, *supra* note 1, at 476; and is a principal case in BARNETT & KATZ, *supra* note 45, at 898; BREST ET AL., *supra* note 1, at 575; CHERMERINKSY, *supra* note 1, at 636; CHOPER & FALLON, *supra* note 1, at 389; FARBER ET AL., *supra* note 8, at 549; MAGGS & SMITH, *supra* note 8, at 563; STONE ET AL., *supra* note 1, at 767–68; and YOUNG, *supra* note 8, at 291.

137. See, e.g., CHERMERINKSY, *supra* note 1, at 636 (“[T]he Court signaled the end of economic substantive due process.”); YOUNG, *supra* note 8, at 230 (“[T]he Due Process Clause served as an instrument for defending the free market economy, until the Court essentially abandoned constitutional review of economic legislation under pressure from President Franklin Delano Roosevelt’s ‘court-packing’ plan.”); *id.* at 258 (referring to “the ‘switch in time’ of 1937”); *id.* at 282 (referring to “The Judicial Revolution of 1937”).

138. This and the following two paragraphs draw from Barry Cushman, *Inside the “Constitutional Revolution” of 1937*, 2016 SUP. CT. REV. 367, 403–06 (2017).

139. *Adkins v. Children’s Hosp.*, 261 U.S. 525, 545, 548–50 (1923).

Bunting had overruled *Lochner* “*sub silentio*.”¹⁴⁰ Similarly, in 1930, the Court upheld provisions of the Railway Labor Act of 1926 that protected the rights of railway employees to organize and bargain collectively, and affirmed a lower court order requiring a railroad to reinstate employees it had discharged for engaging in lawful union activities.¹⁴¹ This effectively overruled *Adair*, and thereby removed due process obstacles to national collective bargaining legislation. Considering these decisions together with *Nebbia*, one can see that by the time that *West Coast Hotel* was handed down, much of the “revolution” in due process jurisprudence already had occurred.

Second, the centrality of *Adkins* to *Lochner* Era substantive due process is easily exaggerated. When Oregon’s minimum wage statute for women was challenged before the Court in 1917, there were five Justices who believed it was constitutional.¹⁴² However, one of these, Justice Brandeis, had served as counsel to the State in the lower court proceedings before his appointment to the Court, and therefore had to recuse himself from participation on appeal.¹⁴³ As a result, the Oregon Supreme Court’s judgment upholding the statute was affirmed by an equally divided Court.¹⁴⁴ This saved the statute from invalidation, but had no precedential effect. By the time *Adkins* reached the Court six years later, the tribunal had undergone significant changes in personnel, and a new, bare majority to strike down the District of Columbia’s statute was unconstrained by any prior decision on the issue.¹⁴⁵ When one member of that majority, Justice McKenna, was replaced by Harlan Fiske Stone in 1925, there were again five Justices who believed that *Adkins* had been wrongly decided. Indeed, internal Court documents reveal that the authority of *Adkins* appears to have survived challenges in 1925 and 1927 only because four of these Justices felt bound by *stare decisis* to uphold the recent precedent.¹⁴⁶ After *Nebbia* was decided in 1934, many commentators expressed the view that a majority of the Justices was poised to overrule *Adkins*.¹⁴⁷ Many Justices who were invested in other strands

140. *Id.* at 563–64 (Taft, C.J., dissenting).

141. *Tex. & New Orleans R.R. Co. v. Brotherhood of Railway & Steamship Clerks*, 281 U.S. 548, 571 (1930). The decision is noted in CHOPER & FALLON, *supra* note 1, at 385.

142. *See Stettler v. O’Hara*, 243 U.S. 629 (1917).

143. *See* ALEXANDER M. BICKEL & BENNO C. SCHMIDT, *THE JUDICIARY AND RESPONSIBLE GOVERNMENT: 1910–21*, at 592–98 (1984).

144. *Id.* at 602.

145. *See* Thomas Reed Powell, *The Judiciality of Minimum Wage Legislation*, 37 HARV. L. REV. 545, 547–52 (1924) (surmising that there was a Court majority for sustaining minimum wage legislation until June of 1922, and that the appeal in *Adkins* might have been heard and an opinion upholding the statute rendered had the Court of Appeals of the District of Columbia not ordered rehearing and reargument after its initial decision upholding the measure).

146. *See* Barry Cushman, *Inside the Taft Court: Lessons from the Docket Books*, 2015 SUP. CT. REV. 345, 381–83 (2016).

147. *See* Barry Cushman, *Lost Fidelities*, 41 WM. & MARY L. REV. 95, 121–23 (1999). At least one commentator detected such a majority in 1931, when the Court upheld a statute regulating the

of substantive due process were fully prepared to uphold minimum wage legislation. There were several occasions during the so-called *Lochner* Era when such legislation might have been sustained, and the fact that the prohibition on minimum wage laws was adopted and perpetuated was the consequence only of these fortuitous vicissitudes.¹⁴⁸

Third, and relatedly, the abandonment of that prohibition in *West Coast Hotel* did not signal a desertion of the larger enterprise of economic substantive due process. For the remainder of their judicial careers, Hughes and Roberts continued to cast votes to invalidate economic regulations on the ground that they deprived the regulated parties of property without due process of law,¹⁴⁹ denied them the equal protection of the laws¹⁵⁰ or the privileges or immunities of citizenship,¹⁵¹ or took their property without just compensation.¹⁵² Their views on these matters no longer prevailed, but only because Roosevelt's replacement of their former colleagues with Justices who rejected such doctrinal commitments had relegated them to the Court's minority. Had Hughes and Roberts had their way, however, vestiges of economic substantive due process and its allied doctrines would have remained. The Fourteenth Amendment's "*Lochner* Era" ended not with a bang, but a whimper.

commissions paid to agents selling fire insurance in *O'Gorman & Young v. Hartford Fire Ins. Co.*, 282 U.S. 251 (1931). See Norman J. Macbeth, Jr., *Present Status of the Adkins Case*, 24 KY. L.J. 59, 64–65 (1935). *O'Gorman* is a principal case in BARNETT & KATZ, *supra* note 45, at 889.

148. See Powell, *supra* note 144, at 547–50 (concluding that thirty-five of forty-five judges and Justices hearing challenges to minimum wage laws up to 1924 had voted to uphold the statutes).

149. *R.R. Comm'n v. Rowan & Nichols Oil Co.*, 310 U.S. 573, 583–85 (1940) (Roberts and Hughes dissenting from opinion holding that oil proration order of Texas Railroad Commission did not deprive the company of its property without due process); see *United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533, 583–84, 587 (1939) (Roberts and Hughes dissenting from opinion upholding against a due process challenge an order issued by the Secretary of Agriculture pursuant to the Agricultural Marketing Agreement Act of 1937); see also *Thompson v. Consol. Gas Utilities Corp.*, 300 U.S. 55, 73 (1937) (Roberts and Hughes join opinion invalidating gas proration order of Texas Railroad Commission on the ground that it deprived the company of its property without due process).

150. See *Charleston Fed. Savings & Loan Ass'n v. Alderson*, 324 U.S. 182, 192–93 (1945) (Roberts dissenting from opinion upholding tax assessments against equal protection challenge); *Hartford Steam Boiler Inspection & Ins. Co. v. Harrison*, 301 U.S. 459, 462, 467–68 (1937) (Hughes joining opinion invalidating Georgia statute imposing differing regulations on stock and mutual insurance companies).

151. See *Madden v. Kentucky*, 309 U.S. 83, 93–94 (1940) (Roberts dissenting from opinion upholding state tax against equal protection and privileges or immunities challenges).

152. See *United States v. Willow Power Co.*, 324 U.S. 499, 511–15 (1945) (Roberts and Stone dissenting from opinion holding that government action reducing the flow of water available to an electrical power plant did not constitute a taking requiring compensation under the Fifth Amendment); *United States v. Commodore Park, Inc.*, 324 U.S. 386, 393 (1945) (Roberts dissenting from opinion holding that the Fifth Amendment did not require compensation of riparian landowner whose property was reduced in market value but not invaded by government dredging operation).

