

Brooklyn Law Review

Volume 63

Issue 1

SYMPOSIUM:

The Path of the Law 100 Years Later: Holme's
Influence on Modern Jurisprudence

Article 5

1-1-1997

Revisiting Substantive Due Process and Holmes's *Lochner* Dissent

G. Edward White

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/blr>

Recommended Citation

G. E. White, *Revisiting Substantive Due Process and Holmes's Lochner Dissent*, 63 Brook. L. Rev. 87 (1997).
Available at: <https://brooklynworks.brooklaw.edu/blr/vol63/iss1/5>

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Law Review by an authorized editor of BrooklynWorks.

REVISITING SUBSTANTIVE DUE PROCESS AND HOLMES'S *LOCHNER* DISSENT*

G. Edward White[†]

INTRODUCTION

This article is about how one of Holmes's best known opinions, his dissent in *Lochner v. New York*,¹ became famous in spite of itself. If one recreates the ordinary discourse of the orthodox universe of constitutional jurisprudence in 1905, when *Lochner* was decided, it rapidly becomes apparent that Holmes's dissent was not contributing to that discourse. The framework from which Holmes approached *Lochner*, as well as other cases that have come to be called 'substantive due process' cases,² was not taken seriously in orthodox legal circles. Holmes, for his part, took the orthodox framework only partially seriously.

Holmes's dissent only became famous when two of the ideas he put forth in it began to resonate within the community of elite jurists and commentators, which helped make him a nearly mythical figure.³ The first idea was that judges were giving 'substantive' (normative) readings of the Due Process

* ©1997 G. Edward White. All Rights Reserved.

[†] University Professor and John B. Minor Professor of Law and History, University of Virginia. My thanks to Barry Cushman, John Harrison, and Charles McCurdy for their comments on earlier drafts of this article and to Dean Romhilt for research assistance. My intellectual debt to the scholarship of Professors Cushman and McCurdy goes well beyond the citations to their work in this article.

¹ 198 U.S. 45, 75 (1905).

² I will be placing single quotes around the terms "substantive" and "substantive due process" in various places throughout this article. That usage is intended to demonstrate that Holmes and the great bulk of his juristic contemporaries (he retired from the Court in 1932) never used the term "substantive due process" at all.

³ My most recent effort to assess the sudden emergence of Holmes's reputation in legal and lay circles in the period between the First and Second World Wars is G. Edward White, *The Canonization of Holmes and Brandeis: Epistemology and Judicial Reputations*, 70 N.Y.U. L. REV. 576 (1995).

Clauses. The second was that this judicial tendency was a bad thing for American constitutional jurisprudence.

In comparing the orthodox jurisprudential framework that dominated the *Lochner* court with Holmes's framework, and in seeking to explain why Holmes's framework eventually captured the attention of commentators, I have encountered two firmly established mythologies about early twentieth century constitutional jurisprudence. The first mythology is that the *Lochner* majority's reading of the Fourteenth Amendment's Due Process Clause was a wilful substitution of its own view on political economy—typically designated as an outmoded gospel of laissez faire—for the views of the New York legislature. The second mythology is that by the time newly elected President Franklin Roosevelt announced a "New Deal" for the American people in 1933, not only the laissez faire gospel but all 'substantive' judicial interpretations of open-ended constitutional language were on the defensive. The mythologies combine in a claim that the "constitutional revolution" of the late 1930s and 1940s was a vindication of both of the ideas Holmes expressed in his *Lochner* dissent.

When I turned to the relevant sources, I found that neither of the mythologies bore much resemblance to the actual relationship between *Lochner*-style 'substantive due process' cases and the Court's apparent abandonment of substantive due process in the allegedly revolutionary 1937 case of *West Coast Hotel Co. v. Parrish*,⁴ in which it sustained the constitutionality of a Washington state minimum wage statute against a Fourteenth Amendment "liberty of contract" claim. I found that prior to the 1940s, substantive due process cases were not designated by that term at all. They were designated, and conceived, as cases testing the boundary between the police powers of the states and the principle that no legislature could enact "partial" legislation, legislation that imposed burdens or conferred benefits on one class of citizens rather than the citizenry as a whole. When courts used the Due Process Clauses to strike down "social legislation"⁵ in the late nine-

⁴ 300 U.S. 379 (1937).

⁵ The term "social legislation," employed routinely by European commentators beginning in the late nineteenth century, referred to legislative measures that were specifically designed to improve the condition of "less favored classes" in society. See ERNST FREUND, STANDARDS OF AMERICAN LEGISLATION 22 (1917), *quot-*

teenth and early twentieth centuries, they were not thought of as doing so because they were giving a 'substantive' reading of those clauses. They were thought of as doing so because the legislation in question had failed to demonstrate that it was an appropriately "general" use of the police powers, as distinguished from an inappropriately "partial" one.

Holmes's reading of due process cases differed from the general approach of his contemporaries. He did not place much significance on maintaining the boundary between police powers and the obligation of legislatures to not enact "class" or "partial" legislation. For Holmes, the sovereign power of the legislature, undergirded by the principle of majority rule in a democracy, gave legislatures nearly unlimited discretion to regulate the realm of political economy. Holmes believed that nearly any piece of legislation could be shown to rest on some police power. The only limits were arbitrary "takings," where the property of one citizen was given to another.⁶ Because he identified sovereignty so strongly with the legislature in a democracy, Holmes was skeptical about judicial encroachments on that sovereignty; he suspected that judges might overreact to paternalistic legislation because it offended their ideological convictions. He felt that such overreactions precipitated impermissible readings of the Due Process Clauses. Holmes's later

ed in Charles W. McCurdy, *The Liberty of Contract Regime in American Law*, in *FREEDOM OF CONTRACT AND THE STATE* (Harry Scheiber ed., forthcoming 1997). Although early twentieth century American "progressive" commentators consistently advocated such measures, courts were not typically receptive to them, and "social legislation" did not become a jurisprudential category until the 1940s. See McCurdy, *supra*, at 3. The opposition of early twentieth century courts to "social legislation" was grounded on an entrenched distinction, in nineteenth and early twentieth century constitutional jurisprudence, between "general" and "partial" legislation. The latter category of legislation, which conferred benefits on particular classes rather than all citizens, was treated as at the very core of inappropriate legislative activity. See *infra* text accompanying notes 14-25.

⁶ Since writing earlier drafts of this article I have encountered Robert Brauneis's impressive *The Foundation of Our 'Regulatory Takings' Jurisprudence: The Myth and Meaning of Justice Holmes's Opinion in Pennsylvania Coal Company v. Mahon*, 106 YALE L.J. 613 (1996). Although Brauneis and I disagree on the precise role of regulatory takings in Holmes's constitutional jurisprudence, see *id.* at 677-78, I found Brauneis's careful unpacking of the many strands of Holmes's perspective both illuminating and generally supportive of the account of the *Lochner* dissent I am advancing.

admirers came to call what he saw as judicial overreactions 'substantive' interpretations of the Due Process Clauses, using the term substantive in a pejorative fashion.

Most of Holmes's contemporaries, in contrast, approached cases in which legislatures attempted to regulate a particular area of the realm of political economy with two assumptions deeply embedded in their consciousness. One assumption was that vast, inexorable forces ruled the economy, and humans could do little to alter them. A second assumption was that, to the extent that humans sought to govern one another and thereby create a "public" sphere in life, this sphere needed to be narrowly circumscribed because of the tendency of humans toward tyranny and corruption and because of the general impotence of humans as causal agents in the universe. These two assumptions meant that most of Holmes's contemporaries persistently looked for evidence that legislation was truly "public" in nature, conferring equal benefits and burdens on all citizens and not acting as a pretext for advantaging or disadvantaging one class. If they concluded that the legislation was "partial" or "private" in its orientation, they were opposed to it on principle. Such legislation either smacked of tyranny or corruption or was a futile effort to tinker with omnipotent external forces.

I will subsequently trace the evolution of these assumptions in nineteenth century constitutional jurisprudence. At this introductory stage I merely note that Holmes did not share one of the assumptions and was not much invested in the other. He did not believe that external forces were as dominant in the universe, and human will as insignificant, as many of his contemporaries. He rejected even the mild unitarianism of his father's generation and was convinced that he, at least, was capable of mastering his environment and affecting his own destiny. He was not particularly sanguine about "social legislation"—primarily because he retained some of the deterministic theories of nineteenth century political economy—but he believed that human beings in power could do what they wanted up to the point where a majority decided to remove them. He was more fatalistic about tyranny and corruption than many other Americans who had been born in 1841, but at the same time he was fatalistic about the principle of majoritarianism. His particular consciousness made him read

police power cases in a quite different fashion from his fellow jurists and commentators. I will now proceed to trace the implications of this epistemological divide between Holmes and most other judges of his time.⁷

I. THE "CHARGE OF INEQUALITY" IN *LOCHNER*: THE ANTICLASS PRINCIPLE IN NINETEENTH CENTURY POLICE POWERS JURISPRUDENCE

A. *The Origins of the Anticlass Principle*

When Holmes dissented in *Lochner*, he posed a question that came to be celebrated by his admirers. The question had two parts. The first part was whether the Constitution's overall design embodied a theory of political economy, such as "paternalism" or "laissez faire."⁸ The next part was, if it did not, whether judges could nonetheless interpret certain open-ended provisions of the Constitution, such as "liberty" in the

⁷ I will be arguing throughout this article that Holmes's jurisprudential sensibility was essentially modernist, by which I mean that he assumed that the primary source of causal attribution in the universe was human will rather than omniscient external phenomena such as religion, nature, or inexorable "laws" of political economy. Holmes's critique of judicial glosses on constitutional phrases, such as "liberty" in the Due Process Clauses, flowed from his modernist epistemological assumptions. "Liberty" was not, for him, a prepolitical, universal concept, but one whose meaning was supplied by human actors and could change with time. Because he held this view of the role of human agency in constitutional interpretation, Holmes worried about the potential contradiction between judicial glossing and democratic theory, and sought to erect constraints on what later generations would call "substantive" judging.

Although this view of Holmes is widely shared, its association with modernism may be taken as implying that Holmes wholly affirmed the primacy of human-centered causation and thus denied any external constraints on policymaking. To draw such an inference would be to distort Holmes's views. In many areas, most predominantly that of political economy, Holmes retained a faith in the inevitability of external forces. For example, Holmes thought that most legislation that sought to redistribute economic benefits was futile: the economic universe was dominated by inexorable "laws," such as the inherent limits on any available "wage fund" imposed by population growth. Although Holmes denied the intelligibility of essentialist external principles in law, he acted as if such principles retained an intelligibility in other realms. Hence he could launch a critique of the judicial doctrine of "liberty of contract" without endorsing the efficacy of initiatives in "social legislation." In short, Holmes can be seen as a transition figure in the passage from premodernist to modernist epistemological assumptions in nineteenth and twentieth century America. See also *infra* note 64.

⁸ *Lochner*, 198 U.S. at 75.

Due Process Clauses, as surrogates for particular economic theories. Holmes answered "no" to the first question (the Constitution was "made for people of fundamentally differing views") and "no in most cases" to the second.⁹ Judges were bound to follow "the natural outcome of a dominant opinion," as illustrated by majoritarian legislative policies, even when such policies affected constitutional provisions, such as the Due Process Clauses, that were seemingly designed to safeguard the rights of individuals against governmental interference. The only instances in which judges could invalidate statutes in the realm of political economy were when "a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law."¹⁰

Holmes's answer to his two-part question in *Lochner* led inexorably to his distinctive judicial attitude toward cases involving constitutional challenges to legislation affecting issues of political economy. Since the overall constitutional design encompasses no particular theory of political economy, nearly all judicial efforts to read concepts such as "liberty" in the Due Process Clauses as surrogates for any such theory were merely statements of "convictions or prejudices" on the part of judges. Making such convictions or prejudices the basis for finding a piece of legislation constitutionally invalid was the equivalent of "pervert[ing] the meaning of a constitutional provision" to "prevent the natural outcome of a dominant opinion."¹¹

When he perceived a statute "would infringe fundamental principles as they have been understood by the traditions of our people and our law," Holmes left space for a judicial override of legislation. But the statute in *Lochner* was not a candidate for "such sweeping condemnation." Merely an effort to regulate the number of hours worked by employees in the baking industry in New York, it could have reasonably been

⁹ *Id.* at 76.

¹⁰ *Id.*

¹¹ *Id.*

conceived of as "a proper measure on the score of health," or a "first instal[ment] of a general regulation of the hours of work."¹²

Holmes's limited approval of judicial invalidation of legislation affecting issues of political economy raised the question of what statutes regulating the economy were at risk of being declared unconstitutional. His language in *Lochner* did not give much guidance on that issue, except possibly to suggest that there were none. He started his analysis by asserting that the Constitution embodied no overriding theory of political economy. How, then, could "liberty" in economic due process cases ever be read as encompassing any "fundamental" economic principles? Holmes's *Lochner* theory of constitutional review of legislation in the realm of political economy appeared to be the equivalent of judicial abdication of power to the legislature.

But Holmes, in his typically cryptic fashion, intimated at one possible exception to his *Lochner* formula of judicial deference to legislative opinions on issues of political economy. After characterizing the legislative limitation on working hours in the baking industry as a labor law, an initial "instal[ment] of a general regulation of the hours of work," he stated that "it was unnecessary to discuss" whether, if thought of in that fashion, the statute "would be open to the charge of inequality."¹³ In this allusion to "inequality" Holmes was pointing to a fundamental principle of political economy that was taken to be embodied in the Constitution at the time *Lochner* was decided. In fact, it is more accurate to say that Holmes's allusion was to a set of interlocking fundamental principles, principles that were seen as undergirding the entire enterprise of constitutional government in America. The revolutionary feature of Holmes's *Lochner* dissent was his suggestion that, in most cases involving issues of political economy, foundational constitutional principles are not implicated.

The "charge of inequality" to which Holmes alluded had been derived from the aforementioned nineteenth century assumptions about the incapacity of government to regulate the realm of political economy. Those assumptions posited that

¹² *Id.*

¹³ *Lochner*, 198 U.S. at 76.

government could only regulate individual economic activity if two conditions were satisfied. The regulation in question needed to be directed towards an activity in the "public" sphere of life, an arena in which the "inalienable" private rights of one citizen were seen as necessarily coming into contact with the rights of another, requiring state regulation to protect the welfare of all citizens. But even where an essential clash of private rights had suggested that an activity was "public" and thus presumptively regulable, regulations need to apply equally to all citizens. Otherwise, governmental regulation of even "public" economic activity amounted to "partial," "unequal," "class" legislation, favoring the interests of one legislative constituency at the expense of another.¹⁴

These interlocking assumptions about the limits of governmental regulation—I shall refer to them, respectively, as the "public/private distinction" and the "anticlass principle"—amounted to a reconciliation of two potentially contradictory tendencies in early nineteenth century constitutional jurisprudence. One was the establishment of the so-called "vested rights" principle, embodied in the maxim that a legislative taking of the property of A and giving it to B without A's consent, violated principles of free republican government.¹⁵ The archetypal "vested rights" case was one such as *Fletcher v. Peck*,¹⁶ in which one legislature granted the title to lands to one set of persons and a subsequent legislature rescinded that grant. Nineteenth century jurisprudence assumed that if legislatures could infringe on vested rights, one of the foundational principles of a republican form of government would be subverted.

¹⁴ It is important not to confuse the requirements that legislation be "general," and not "partial" or "unequal," with the modern Equal Protection Clause doctrines of under-inclusiveness and over-inclusiveness. Those doctrines, the products of vastly different assumptions about the relationship of legislative activity to individual rights, do not appear in judicial opinions and commentary until after the Second World War.

¹⁵ As Justice Samuel Chase put it in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798), a legislative act "that takes property from A and gives it to B" was prohibited by "the very nature of our free Republican governments" and "the great first principles of the social compact."

¹⁶ 10 U.S. (6 Cranch) 87 (1810). On *Fletcher* as a classic "vested rights" case, see G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE* 602-05 (1988).

But as the American economy expanded in the early nineteenth century, and legislatures began to participate in that expansion by granting commercial franchises for the purposes of building turnpikes, or bridges, or canals, a second tendency surfaced. Legislatures began to encourage competitors of original franchisors, but the vested rights principle stood in the way of this development. Nineteenth century courts sought to reconcile these contradictory tendencies, and at the same time prevent the complete eradication of the vested rights principle by establishing the public/private distinction and engrafting the anticlass principle onto it.¹⁷

The anticlass principle was thus derived from two foundational but potentially self-opposing premises of mid-nineteenth century republican political economy. One premise was that the legislature had a responsibility to promote economic improvements that would increase the prosperity and welfare of all citizens. The other was that in undertaking promotional economic development the legislature could not, given the vested rights principle, exhibit any favoritism toward individual factions, interests, or classes within the community. The first premise held out a vision of legislative sponsorship of entrepreneurial enterprise so as to further material progress; the second refined that vision by insisting that such sponsorship be administered equally and directed for the benefit of all.¹⁸

These dual premises were reflected in a jurisprudential distinction. Legislative regulations in the "public" sphere that distributed benefits and burdens equally, and were directed at promoting the general health, safety, or welfare of the public, were found within the "police power" of the state and thus con-

¹⁷ The classic case is *Charles River Bridge v. Warren Bridge Co.*, 11 Pet. 420 (1837), in which the United States Supreme Court sustained the constitutionality of a Massachusetts statute granting a second franchise for a bridge across the Charles River against a "vested rights" challenge by an existing bridge company.

¹⁸ For an accessible recent analysis of the origins and application of the anticlass principle in Jacksonian theories of political economy, citing earlier monographic studies, see HOWARD GILLMAN, *THE CONSTITUTION BESEIGED* 47-49 (1993). Among the relevant sources Gillman cites are Kent Newmyer, *Justice Joseph Story, The Charles River Bridge Case, and the Crisis of Republicanism*, 17 AM. J. LEGAL HIST. 232 (1973); Donald J. Pisani, *Promotion and Regulation: Constitutionalism and the American Economy*, 74 J. AM. HIST. 740 (1987); and Harry N. Scheiber, *Federalism and the American Economic Order, 1789-1910*, 10 L. & SOC'Y REV. 57 (1975).

stitutional.¹⁹ In contrast, legislative regulations that singled out a particular economic activity, however "public" its character, for special burdens or benefits, violated the anticlass principle and were consequently anti-republican, unconstitutional takings of property from A for the benefit of B.²⁰

For example, in the two decades before the Civil War, state courts permitted general licensing requirements imposed on entire "public" professions or industries, inspections of products for public health or safety purposes, and location restrictions on certain classes of businesses who emitted noxious fumes or odors.²¹ At the same time they struck down the use of eminent domain or taxing powers to benefit individual banks, mills, or railroads unless a legislature could demonstrate that the use of those powers conferred benefits on the community at large.²² As an 1847 Texas opinion put it, the distinction was between "general public laws, binding all the members of the community under similar circumstances," and "partial or private laws, affecting the rights of private individuals, or classes of individuals."²³

The durability of the anticlass principle, and of the distinction between permissible "police power" legislation and impermissible "partial" or "unequal" legislation, was remarkable. After the Civil War it worked its way into the Fourteenth

¹⁹ The first use of the term "police power" that I have found was in *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 443 (1827). But Chief Justice Marshall's use of the term did not have the full connotations it later acquired. Compare *Mugler v. Kansas*, 123 U.S. 623, 660-61 (1887) and the state cases cited in Scheiber, *infra* note 21, and Benedict, *infra* note 22.

²⁰ And, of course, legislative regulations that affected rights in the "private" sphere, such as landholdings, were equally anti-republican and unconstitutional, classic examples of violations of the vested rights principle. Early and mid-nineteenth century theories of political economy assumed that legislation initiating suffrage reform, in which requirements that eligible voters hold freehold land were abandoned, was consistent with republicanism. But they conceived of legislation that sought to break up feudal-style estates so as to more equally redistribute land as paradigmatically anti-republican. See McCurdy, *supra* note 5, at 9.

²¹ See Harry Scheiber, *Government and the Economy: Studies in the "Commonwealth" Policy in Nineteenth-Century America*, 3 J. INTERDISC. HIST. 135, 137 (1972).

²² See Michael Les Benedict, *Laissez Faire and Liberty: A Re-evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 L. & HIST. REV. 293, 321-23 (1985).

²³ *Janes v. Reynolds's Adm'rs*, 2 Tex. 250 (1847), quoted in GILLMAN, *supra* note 18, at 229.

Amendment's Due Process Clause and became the centerpiece of police power analysis in the Supreme Court's due process cases.²⁴ As late as the 1890s one is able to find abundant language, in both Court opinions and commentary, demonstrating that the distinction between "general" and "partial" legislation was still a central focus of analysis in Fourteenth Amendment challenges to state-sponsored promotional or regulatory legislation.²⁵

Indeed, the distinction between "general" and "partial" legislation was the focus of all the justices who decided *Lochner* except Holmes. It also informed the discussion of "liberty of contract" that featured prominently in the opinion of the majority which invalidated the New York statute. To understand more precisely the relationship between Holmes's allusion to "the charge of inequality" in *Lochner* and the majority's "liberty of contract" argument, it is necessary to take another excursus through the constitutional principles of political economy in late nineteenth century American jurisprudence.

B. "Free Labor" and the Anticlass Principle

By the time *Lochner* was decided, a refinement had been made to the Court's police powers jurisprudence. Legislation conferring benefits on a particular class of economic actors, such as that prescribing an eight-hour working day for miners, could be justified as a legitimate exercise of the police power if

²⁴ See *Mugler v. Kansas*, 123 U.S. 623 (1887). See also *Dent v. West Virginia*, 129 U.S. 114, 124 (1889), where Justice Field, for a unanimous Court, declared that "[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 upon the subjects to which it relates"

²⁵ See, e.g., *Lawton v. Steele*, 152 U.S. 133, 137 (1894) ("To justify the State in . . . interposing its authority in behalf of the public, it must appear . . . that the interests of the public generally, as distinguished from those of a particular class, require such interference"); John F. Dillon, *Property—Its Rights and Duties in Our Legal and Social Systems*, 29 AM. L. REV. 161, 173-74 (1895) ("The State . . . exists for the general good, for rich and poor alike. It knows or ought to know no classes. . . . The blessings and benefits of the State are intended to diffuse themselves over all. . . . The one thing to be feared in our democratic republic, and therefore to be guarded against with sleepless vigilance, is class power and class legislation. . . . Class legislation of all and every kind is anti-republican and must be repressed.").

the class of actors was engaged in a dangerous or unhealthy occupation. The legislation became a public health measure, rather than one furthering "class" interests, because the health and safety of members of the public was a concern of all citizens. An eight-hour day for miners was upheld by the Supreme Court as an appropriate public health measure;²⁶ the statute challenged in *Lochner* sought to do the same for employees in the bakery trade.

The context of *Lochner* suggests that the case was perceived as something of a crossroads for due process-police powers jurisprudence. The Court's opinion in the miners case revealed the surfacing, in late nineteenth century police powers cases, of arguments that burdensome working hours in certain occupations were a product of the unequal bargaining position of employees.²⁷ These arguments were controversial in two respects. First, they suggested that every labor case in which the unequal bargaining power of workers could be said to have produced deleterious effects on their health was capable of being conceptualized as a police power case. The arguments threatened, in the labor context, the distinction between "general" health legislation and legislation that simply conferred benefits on the "partial" class of workers.²⁸

²⁶ See, e.g., *Holden v. Hardy*, 169 U.S. 366 (1898).

²⁷ In *Holden v. Hardy*, for example, Justice Henry Brown stated that where employees "are . . . induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength," the state might intervene "where the public health demands that one party to the contract shall be protected against himself." *Id.* at 397. The employer in *Holden* had argued that a statute establishing an eight-hour day for miners infringed upon the employees' freedom to work as long as they pleased. Brown responded that "[t]he argument would certainly come with better grace and greater cogency from the [employees]." *Id.*

²⁸ As previously noted, contemporary readers may be inclined to confuse the distinction between "general" and "partial" legislation with modern equal protection analysis. The "charge of inequality" to which Holmes alluded in *Lochner* was not meant as a reference to the Equal Protection Clause. *Lochner* was conceptualized as a due process case, rather than an equal protection case, because the state was seeking to burden the baking industry with regulations that were allegedly "general," intended as health measures. The rationale of the statute in *Lochner* did not rest on a classification of the baking industry as a candidate for labor regulation where, say, the candle making industry was not, but on a judgment that deleterious working conditions in the baking industry imposed burdens not just on one class of actors, but on the general public.

Peckham's majority opinion in *Lochner* found the legislative judgment about "general" burdens following from labor conditions in the baking industry to be

The other controversial dimension of arguments associating "eight-hour day" legislation with the unequal bargaining position of workers arguably ran even deeper. The defeat of the South in the Civil War, and the eradication of slavery, had given momentum to yet another antebellum principle of political economy: the principle of "free labor," in which the position of the worker in an expanding capitalist society was conceived as unencumbered either by actual slavery or by its status equivalents. With an abundant supply of free land, opportunities for geographic mobility, and a growing commercial economy that had abandoned the apprentice system, nineteenth century American workers were deemed capable of selling their services for hire on the terms they chose. That those terms were actually affected by a number of social and economic constraints on the market for nineteenth century American laborers did not lessen the attractiveness of the "free labor" principle.²⁹

Resurrections of the free labor principle in the late nineteenth century were thus more than cynical efforts to delegitimize legislation restricting hours of work. Even those who supported eight-hour day legislation recognized the potential contradiction between mandated hours and the right of a worker to offer his services on unencumbered terms. In fact, the earliest eight-hour day statutes were not compulsory. They gave workers the option to contract out of the very limitations they imposed. One reason for the opt-out provisions may have been a concern that a compulsory reduction in hours would likely result in a reduction in wages. But there is evidence that supporters of the eight-hour day movement also believed that mandatory limitations on employers and employees offended the free labor principle.³⁰ Thus the conceptualization of a

either unfounded or pretextual. He therefore concluded that the statute was "partial" and violated the anticlass principle. If one were to employ contemporary terminology, one might say that the central question for Peckham in *Lochner* was not why bakers were being treated differently from other economic actors, but why bakers should not be afforded fundamental private rights, as embodied in the baseline entitlement of "liberty of contract."

²⁹ On the emergence of the "free labor" principle see generally, ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* (1970); DAVID MONTGOMERY, *CITIZEN WORKER: THE EXPERIENCE OF WORKERS IN THE UNITED STATES WITH DEMOCRACY AND THE FREE MARKET DURING THE NINETEENTH CENTURY* (1993).

³⁰ See McCurdy, *supra* note 5, at 13-14 (citing statutes in Wisconsin, New

piece of legislation as a "labor" rather than a "public health" measure had a number of ramifications, particularly if the legislation was associated with arguments based on the inequality of bargaining power in an industry.³¹

The question of whether the statute in *Lochner* was a "public health" or a "labor" measure was thus seen as central to the decision of its constitutionality. The statute had been passed against a backdrop of labor unrest and reformist activity in New York, and had been characterized as an effort to force non-union bakeries to adhere to the same eight-hour workdays that unions in the bakery trade demanded.³² It was included in the labor section, as distinguished from the public health regulations, of the New York statutes at large.³³ Counsel for Joseph Lochner, the bakery owner challenging the statute, argued that "[it] was never intended as a health provision but was purely a labor law."³⁴

II. "LIBERTY OF CONTRACT," THE ANTICLASS PRINCIPLE, AND THE PUBLIC/PRIVATE DISTINCTION

The Court's majority decision in *Lochner* has, of course, come to be perceived as notorious. It has been characterized as an example of judicial invocation of the doctrine of "liberty of contract," in the apparently ironic setting of early twentieth century labor relations, to prevent a state from helping out bakers who lacked the bargaining power to avoid working very lengthy hours. The irony of the liberty of contract argument was highlighted by Holmes, who attacked the doctrine as a judge-made formula that embodied a "particular economic

York, Connecticut, Illinois, Pennsylvania, California, and Missouri).

³¹ GILLMAN, *supra* note 18, at 115-19, points out the appearance of articles in law reviews in the 1890s suggesting that, given the vast inequalities in bargaining power between employers and employees in many sectors of the market in the last decade of the nineteenth century, the state had a responsibility to intervene to alleviate the condition of wage earners. For examples, see GILLMAN, *supra* note 18, at 248 nn. 27-35.

³² See George G. Groat, *The Eight Hour and Prevailing Rate Movement in New York State*, 21 POL. SCI. Q. 414 (1906); Sidney G. Tarrow, *Lochner Versus New York: A Political Analysis*, 5 LAB. HIST. 277 (1964).

³³ See GILLMAN, *supra* note 18, at 126.

³⁴ See Argument and Brief for Plaintiff in Error, quoted in GILLMAN, *supra* note 18, at 127.

theory" and thus had no constitutional legitimacy. The widespread endorsement of Holmes's attack has been the principal source of *Lochner*'s notoriety. But a closer look at the other opinions in *Lochner*, and at the contemporary reaction to the case, suggests that the analytical linchpin of the decision, for all the justices save Holmes, was not the "liberty of contract" doctrine. It was the anticlass principle informed by the heritage of "free labor" theory. The anticlass principle was thought of as embedded in a constitutional regime in which judges were expected *not* to defer to legislatures except where legislation was obviously encompassed within the police powers.

A. *The Role of Due Process Liberties in Police Power Cases: Orthodox Analysis*

The conceptual framework in which all the justices save Holmes placed *Lochner* was that of conventional police power analysis. That analysis juxtaposed due process "liberties," along with their appropriate theoretical baggage, against the powers of the state to protect the health, safety, and morals of the public at large. The judiciary was asked to determine, as Justice Peckham put it for the majority in *Lochner*, whether a statute allegedly infringing upon due process liberties was "a fair, reasonable, and appropriate exercise of the police power of the State."³⁵ Given the context of *Lochner*, such a judicial inquiry into the "reasonableness" of the legislation would be informed by two propositions: first, the "free labor" theory of labor relations and, second, the set of late nineteenth and early twentieth century cases where the Court had concluded that legislative restrictions on the hours of work were appropriate public health measures.

So Peckham began his majority opinion in *Lochner* by postulating, on the one hand, that "the statute necessarily

³⁵ It is important to realize that conventional police power analysis was not "balancing" in the modern sense of the term. It was categorical reasoning: an activity was placed in one category ("private") or another ("affected with a public interest"), and the resolution of the issue of constitutionality followed. If the activity was "private," legislation restricting it was "arbitrary"; if the legislation had a "public purpose" or the activity was "affected with a public interest," the legislation was "reasonable." Cf. T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987).

interferes with the right of contract between the employer and the employe[els],” and, on the other, that “property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State in the exercise of . . . police powers, [which] relate to the safety, health, morals and general welfare of the public.” The central inquiry, for Peckham, reduced itself to

[W]hen the State . . . in the assumed exercise of its police powers, has passed an act which seriously limits the right to labor or the right of contract in regard to their means of livelihood between persons . . . which shall prevail,—the right of the individual to labor for such time as he may choose, or the right of the State to prevent the individual from laboring . . . beyond a certain time prescribed by the State.³⁶

For Peckham the answer to that question depended on the central purpose of the challenged legislation: whether it was the preservation of the health or safety of the general public, or the preservation of the health and safety of a particular class of persons. 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, a “labor” statute.

Once those distinctions in police power jurisprudence were taken to be controlling, the conclusion that the *Lochner* statute was unconstitutional quickly followed. The law challenged in *Lochner* was directed at bakers, a trade that was “not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor.” The public interest in “clean and wholesome bread” did “not depend upon whether the baker works but ten hours per day or only sixty hours a week.” The legislation could thus not fairly be termed a public health measure. And “[v]iewed in the light of a purely labor law, with no reference whatever to the question of health,” it violated the anticlass principle and the free labor principle. Its “real object and purpose” were “simply to regulate the hours of

³⁶ *Lochner*, 198 U.S. at 54.

labor between the master and his employees . . . in a private business." It amounted to a "mere meddlesome interference[,] . . . with the rights of the individual" in a context in which freedom to sell one's services was as important as freedom to buy them.³⁷

Chief Justice Melville Fuller and Justices David Brewer, Henry Brown, and Joseph McKenna joined Peckham's opinion. Justice John Harlan's dissent in *Lochner*, joined by Justices Edward White and William Day, adopted the same conceptual apparatus. The difference between the two opinions centered on the characterization of the New York statute. Because Harlan, White, and Day were convinced that in baking establishments "labor in excess of sixty hours during a week . . . may endanger the health of those who thus labor," they were inclined to treat the legislation as a public health measure. They were also inclined to believe, more controversially, that "[s]horter hours of work, by allowing higher standards of comfort and purer family life, promise to enhance the industrial efficiency of the wage-working class."³⁸ That belief suggested that even "class" legislation might not offend the anticlass principle if some general public good (industrial efficiency) followed from it.

B. *The Role of Due Process Liberties in Police Power Cases: Holmesian Analysis*

Holmes's dissent posited a radically different conception of the role of the judiciary in police power cases and indeed in the entire constitutional regime of political economy. That conception was framed by two starting assumptions: "state consti-

³⁷ *Id.* at 61.

³⁸ *Id.* at 71. Harlan's dissent also appealed to federalism and separation of powers principles, which he invoked in support of the constitutionality of police regulations enacted in good faith. *Id.* at 73-74. Arguments that the federal judiciary should not treat the Fourteenth Amendment as a charter to redefine the balance of federalism were familiar ones in post-Civil War constitutional jurisprudence, dating back to *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873). Those arguments were not directed toward the sanctity of private rights in the context of legislative regulation. The disagreements between the justices who joined Harlan's opinion in *Lochner* and those who joined Peckham's opinion can thus be seen as different in kind from the disagreements between Holmes and all of his *Lochner* colleagues.

tutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as [the statute in *Lochner*]," and "the word 'liberty' in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion."³⁹ The Constitution did not embody a particular economic theory, so judges could not use its provisions to implement one. The free labor principle, as embodied in the liberty of contract doctrine, was subject to "the right of a majority to embody their opinions in law." Not being members of that majority—being unelected officials who were distinct from legislators—judges needed to defer to legislative judgments in most cases. "Police power" was simply a fiction that made such deference palatable.

Between 1905 and 1909 not a single analysis of the *Lochner* case in a legal periodical felt compelled to allude to the conception of judicial review articulated in Holmes's dissent.⁴⁰ And between 1909 and the 1920s the recognition that Holmes had, as Edward Corwin put it, "cut . . . through the momentary question of policy [in *Lochner*] to the deeper, though inarticulate, major premise underlying all preference for or against the popular will when it appears arrayed against private rights," was confined to a few "progressive" intellectuals.⁴¹ In that time period, commentators' prevailing conceptualization of cases such as *Lochner* was dominated by the issue Holmes had cavalierly dismissed at the close of his *Lochner* dissent: "the charge of inequality" as embodied in the anticlass

³⁹ *Lochner*, 198 U.S. at 76.

⁴⁰ Holmes's old friend Frederick Pollock did note, in a 1905 article in the *Law Quarterly Review*, that "we are much inclined to agree with Mr. Justice Holmes," but Pollock meant that he saw no reason to dispute the New York legislature's premise that hours legislation in the baking industry promoted the health of the general public. Frederick Pollock, *The New York Labour Law and the Fourteenth Amendment*, 21 L.Q. REV. 211, 213 (1905). "English lawyers," Pollock wrote, "are perhaps naturally prejudiced in favor of the competence of legislatures." *Id.* at 212.

One lay periodical, *The Outlook*, an organ of the Progressive movement, suggested that Holmes's dissent "had gone even more fundamentally into the question at issue" than that of Harlan. 79 THE OUTLOOK 1017, 1018 (1905). But *The Outlook* did not elaborate on what it meant by that comment. *Id.* at 1018.

⁴¹ See Edward S. Corwin, *The Supreme Court and the Fourteenth Amendment*, 7 MICH. L. REV. 643, 669 (1909). On the evolution of Holmes's *Lochner* dissent to "classic" status among progressive intellectuals between 1909 and the 1920s, see G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 364-65 (1993).

principle. As early as 1905, Ernst Freund, a critic of the majority decision in *Lochner*, suggested that had the New York statute "claimed to be a measure for the social and economic advancement of bakers' employees," it "would doubtless have been open to the objection of being partial or class legislation."⁴² As late as 1920, Jefferson Browne continued to assert that "legislation in favor of a class is as obnoxious as legislation against a class, . . . and there must be no special law for a particular person or a particular class."⁴³

C. "*Liberty of Contract*" and the *Public/Private Distinction*

"Liberty of contract" in due process cases was thus not simply a surrogate for an ideology of "laissez faire," as distinguished from one of "paternalism," as Holmes's dissent suggested. It was a surrogate for a more complicated set of interlocking assumptions about the way in which a republican constitutional regime functioned in the area of political economy. The reason that statutes such as the one in *Lochner* were conceived by justices such as Peckham as "mere meddlesome interferences . . . with the rights of the individual" was that the constitutional regime of political economy was predicated on the existence of certain inviolate conceptual spheres.

Most fundamental of those spheres was a sphere of prepolitical "private" rights that were presumed to be immune from governmental interference: the term "liberty" signified the domain of that sphere. But private rights collided with public powers and obligations, as embodied by government. In the course of exercising powers and responding to obligations, government became endowed with some "rights" itself, at least as trustee for the public at large. So a "public" sphere existed alongside the "private" sphere, and the term "police powers" signified the hegemony of government within that sphere.

The coexistence of the "private" and "public" spheres meant that some adjustments to their boundaries were re-

⁴² Ernst Freund, *Limitation of Hours of Labor and the Federal Supreme Court*, 17 GREEN BAG 411, 417 (1905). Freund did not distinguish between the dissents of Holmes and Harlan, treating both of them as suggesting that *Lochner* was "an issue of judgment, and the New York courts had approved of the judgment of the legislature." *Id.* at 416.

⁴³ Jefferson B. Browne, *The Super-Constitution*, 54 AM. L. REV. 321, 342 (1920).

quired. That was the task of the judiciary in a constitutional republic. In order to guide judges in the boundary disputes that police power cases signified, nineteenth century constitutional jurisprudence reemphasized the governing "first principles" of republican government that established the initial regime of spheres and boundaries in the realm of political economy. One such principle, the anticlass principle, was taken to further prepolitical "liberty" by preventing legislatures from conferring special benefits or burdens on citizens. Its invocation by judges helped clarify the "public/private" boundary.

The doctrine of "liberty of contract" in police power cases such as *Lochner* was both a surrogate for prepolitical private rights and a reassurance that a private sphere remained, presumptively incapable of being infringed upon by government, to which legislation ordinarily could not extend. The test for whether legislation could invade that sphere was twofold: whether the subject of the legislation was properly "public," potentially invoking police powers; and, if so, whether the legislation was appropriately "general," so that it benefited and burdened all citizens equally.

In *Lochner*, all of the justices save Holmes took each of the above interlocking assumptions to be valid. They simply applied the constitutional standard for police power cases differently. The majority scrutinized the New York legislation and found that it could not legitimately be directed at the public sphere of political economy because it was not a "reasonable" exercise of the police power. None of the "appropriate" rationales for police power legislation was present, rationales that would have enabled that legislation to be classified as "general" rather than "partial." Since no appropriate rationale was present, the legislation was simply a "labor law" that imposed unequal benefits and burdens on a class of persons, those engaged in the baking industry. By doing so, it took money from some employers and employees, and gave it to others. It was a violation of "free labor" in the deepest sense of the word. It was a violation of the vested rights principle.

The dissent concluded that the New York statute was a legitimate health measure because bakers were like miners and other persons engaged in dangerous or unhealthy occupations. Legislation limiting the hours of employees in bakeries was thus an appropriate and reasonable method of promot-

ing their health, thereby improving the general welfare, since lower working hours were associated with increasing industrial efficiency and decreasing the number of unhealthy members in the general population. While hours legislation in the baking industry did not distribute specific benefits and burdens equally among the entire population, it distributed equally the general benefits and burdens of living and working in an industrializing society. Although it was an interference with "liberty," it was not a violation of the anticlass principle. It was an appropriate exercise of the police power.

III. ORTHODOX POLICE POWER ANALYSIS AND 'SUBSTANTIVE DUE PROCESS'

I have set forth the approach of Holmes's colleagues to the issues raised in *Lochner* at some length, while devoting comparatively little attention to Holmes's own approach. I have done so to foreshadow the comparative insignificance of 'substantive due process' as a jurisprudential concept in the late nineteenth and early twentieth centuries. As a starting proposition, the almost nonexistent status of the phrase 'substantive due process' in the constitutional lexicon of that time period can be demonstrated by quantitative analysis.

I surveyed judicial cases and commentary over a period beginning with the *Lochner* dissent and extending through the early 1950s. The results of that survey can be summarized as follows. Commentators, from at least 1909 on, demonstrated an awareness that the Supreme Court was giving a broad reading to the Fourteenth Amendment's Due Process Clause and argued that the original meaning of "due process" had been limited to procedure in criminal cases, so that "liberty" meant only a freedom from bodily restraint.⁴⁴ They also suggested that in expanding the meaning of "due process" in cases such as *Lochner* the Court was encroaching on legislative prerogatives.⁴⁵ Finally, commentators identified the Court's

⁴⁴ See Corwin, *supra* note 41, at 664; Charles Grove Harnes, *Judicial Review of Legislation in the United States and the Doctrines of Vested Rights and of Implied Limitations on Legislatures*, 2 TEX. L. REV. 257, 272 (1924); ROBERT E. CUSHMAN, LEADING CONSTITUTIONAL DECISIONS 79 (2d ed. 1929).

⁴⁵ Corwin, *supra* note 41, at 670; Robert E. Cushman, *The Social and Economic Interpretation of the Fourteenth Amendment*, 20 MICH. L. REV. 737, 741-42

interpretive attitude toward "due process" with what they called the "principles of . . . individualism and . . . [*laissez faire* . . .]."⁴⁶ But throughout the 1930s they continued to characterize *Lochner*-type cases as police powers cases, although they began to make a distinction between 'substantive' and 'procedural' due process issues.⁴⁷

There is no evidence of language in federal court cases using the phrase "substantive due process," or even any attempts to distinguish 'substantive' from procedural readings of the Due Process Clauses, until 1935. That year, in *Schechter Poultry Corp. v. United States*,⁴⁸ counsel for the petitioner, in the course of attacking the constitutionality of the National Industrial Recovery Act ("NIRA"), asserted that the "Act attempts to override and ignore . . . the constitutional guarantees of substantive due process under the Fifth Amendment"⁴⁹ But in elaborating on that assertion, he referred to the "method or procedure" established by the NIRA, which he claimed "makes no provision for notice . . . [or] for a hearing"⁵⁰ So there does not seem to have been a clear distinction between the 'substantive' and 'procedural' dimensions of the Due Process Clauses in cases as late as the mid 1930s.

Eventually, in the 1940s, federal courts began to use the phrase "substantive due process" in their opinions.⁵¹ But as late as 1948, when the phrase appeared for the first time in a Supreme Court case,⁵² it was still being used to convey a dis-

(1922).

⁴⁶ Corwin, *supra* note 41, at 646; Cushman, *supra* note 45, at 744-46.

⁴⁷ On the continued use of the "police powers" designation for *Lochner*-style cases, see Robert E. Cushman, *Constitutional Law in 1940-1941: The Constitutional Decisions of the Supreme Court of the United States in the October Term, 1940*, 36 AM. POL. SCI. REV. 263, 280-83 (1942). For evidence of a nascent recognition, at the same time, of a distinction between 'procedural' and 'substantive' due process issues, see ROBERT E. CUSHMAN & SAMUEL P. ORTH, AMERICAN NATIONAL GOVERNMENT 141-42 (1931); EDWARD S. CORWIN, COURT OVER CONSTITUTION 107-09 (1938).

⁴⁸ 295 U.S. 495 (1935).

⁴⁹ *Id.* at 501-02.

⁵⁰ *Id.* at 503.

⁵¹ For examples, see *National Broadcasting Co. v. FCC*, 132 F.2d 545, 549-50 (D.C. Cir. 1942); *Ochikubo v. Bonesteel*, 60 F. Supp. 916, 923 (S.D. Cal. 1945); *United States v. General Petroleum of California*, 73 F. Supp. 225, 252 (S.D. Cal. 1946).

⁵² *Republic Natural Gas v. Oklahoma*, 334 U.S. 62, 90 (1948) (Rutledge, J., dissenting).

inction, as an opinion in the District of Columbia Circuit put it, between "legislation and procedure" and "judicially adopted rules of substantive law."⁵³ That is, 'substantive due process' did not refer to broad judicial readings of the Due Process Clauses, but to the kinds of rights that were affected in a due process challenge to legislation. Those rights need not originate in the realm of political economy, as a concurrence by Justice Stanley Reed in the case of *Beauharnais v. Illinois*⁵⁴ demonstrated. Reed described *Beauharnais*, a case challenging the constitutionality of an Illinois group libel statute on First and Fourteenth Amendment grounds, as a 'substantive due process' case because the petitioner's 'substantive' First Amendment rights applied against the states, having been incorporated in the Due Process Clause of the Fourteenth Amendment.⁵⁵

The designation 'substantive due process' for the line of *Lochner*-type police power cases seems therefore to have originated in a shorthand oversimplification made by commentators

⁵³ *Hund v. Hodge*, 162 F.2d 233, 240 (D.C. Cir. 1947) (Edgerton, J., dissenting).

⁵⁴ 343 U.S. 250 (1952).

⁵⁵ *Id.* at 277. A similar confluence of political economy cases and other cases in which the Due Process Clause of the Fourteenth Amendment was taken to include 'substantive' rights can be seen in the 1937 and 1950 editions of NOEL T. DOWLING, *CASES ON CONSTITUTIONAL LAW*. In the 1937 edition Dowling grouped cases involving the Due Process Clause into the categories of "Due Process As Affecting Matters of Procedure" and "Due Process As Affecting Matters of Substance." In the latter category he included political economy cases such as *Coppage v. Kansas* and *West Coast Hotel Co. v. Parrish*; he also included free speech cases, such as *Gitlow v. New York* and *De Jonge v. Oregon*. *Id.* at xiv, xv.

By his 1950 edition Dowling had come to treat cases involving the Due Process Clauses under the general heading "Preservation of Individual Rights," in contrast to his earlier general heading "Limitations on the Powers of Government." Compare DOWLING, 1937 ed., at xiv, with DOWLING, 1950 ed., at xviii. He also grouped his category of now-designated "Substantive Due Process" cases into sections, one including "Regulation of Economic Affairs" (political economy cases), and two others including "Freedom of Speech, Press, and Assembly" and "Freedom of Religion." DOWLING, 1950 ed., xviii, xix. In an introductory note to the freedom of speech, press and assembly cases Dowling wrote the following, which perfectly captures the status of 'substantive due process' as a conceptual term in the early 1950s:

The title, "substantive due process," is somewhat arbitrary, but in the present stage of the development of constitutional law . . . it comprehends most of the questions considered in the cases in this section; and it helps to emphasize the distinction, previously noted, in the judicial methods used in liberty of mind cases, on the one hand, and economic affairs cases, on the other.

Id. at 925.

after the 1950s. In that oversimplification, Holmes's critique of orthodox police power analysis in the realm of political economy, which he claimed led to inappropriately broad readings of the term "liberty," was confused with an emerging sense that "due process," especially after some Bill of Rights provisions had been judicially incorporated against the states, could refer to 'substantive' as well as 'procedural' guarantees. This confusion was itself a signal of the emergence of Holmes's critique to mainstream jurisprudential status. Those who internalized Holmes's critique eventually came to use the phrase 'substantive due process' as a pejorative term, designating cases in which courts had inappropriately injected 'individualism' and 'laissez faire' views into their readings of "liberty" in due process cases. In the process the designation of *Lochner*-style cases as police power cases, the one employed by Holmes and his contemporaries, was lost. The next question to be addressed is why this development occurred.

A. *The Jurisprudential Basis of Holmes's Critique of Orthodox Police Power Jurisprudence*

By the time Holmes wrote his dissent in *Lochner*, his philosophical views on sovereignty in a republic, as well as his jurisprudential views on the scope of judicial review in cases testing the constitutional limits of legislative regulation in the arena of political economy, had coalesced into their mature versions. He was, by 1905, a thoroughgoing positivist, a disciple of legislative supremacy in the American constitutional republic, and a persistent skeptic about the integrity of judicially created constitutional imperatives. These tendencies led him to characterize judicial searches for conceptual boundaries in police power cases as, in the main, either self-deluded or arrogant exercises. A passage from an unpublished draft of his opinion for the Court in the 1914 case of *Keokee Consolidated Coke Co. v. Taylor*⁶⁶ shows his approach toward "liberty of contract" cases in sharp relief:

Whatever freedom of contract may be deduced from the word liberty in the Amendment, it is subject to restrictions in the interest of what the legislature conceived to be the general welfare . . . It now

⁶⁶ 234 U.S. 224 (1914).

is recognized by legislatures and courts as well as by everyone outside of them, that as a fact freedom may disappear on the one side or the other through the power of aggregated money or men; . . . and to suppose that every other force may exercise its compulsion at will but that government has no authority to counteract the pressure with its own is absurd. It is said that the power of duress has changed sides and is now with [organized labor]. But if it be admitted, as it certainly is established, that the legislature may interfere with theoretic in the interest of practical freedom, it would require a very clear case before a court could declare its judgment wrong and its enactment void.⁵⁷

For Holmes "liberty of contract," itself a judge-made doctrine, was held subject to almost limitlessly broad police powers. This was because the conception of "freedom" that lay behind "liberty of contract" was itself an illusion. "Freedom" could be restricted by money, power, or politics. A legislature, responding to any or all of those forces, could decide, in cases such as *Lochner*, to protect the "practical" interests of public health or industrial efficiency at the expense of the "theoretic" freedoms embodied in the free labor ideal and the liberty of contract doctrine. Holmes did not think that the judicial role in constitutional cases such as *Lochner* should be to discern whether legislation purportedly exercising police powers was "general" or "partial." He fully expected a legislature to be furthering the "freedom" of some interests at the expense of others. The judicial role was rather to determine whether such legislation could reasonably have been thought by the legislature to have been accomplishing something other than a naked transfer of property or resources from A to B. If purported police power legislation was not patently arbitrary in that fashion, the fact that it could be conceptualized as interfering with "liberty of contract," and a judicial surmise that it might not be wise social policy, were constitutionally irrelevant. Hours legislation bore enough resemblance to public health or general welfare rationales to survive this quite relaxed standard.

⁵⁷ Draft of opinion of the Court, *Keokee Consolidated Coke Co. v. Taylor*, 234 U.S. 224 (1914), microfilmed on Oliver Wendell Holmes Papers, (University of Virginia School of Law 1985). I am indebted to Charles McCurdy for calling this draft opinion to my attention. See also ALEXANDER M. BICKEL & BENNO C. SCHMIDT, JR., *THE JUDICIARY AND RESPONSIBLE GOVERNMENT* 297-98 (1984).

In Holmes's view then, most of the 'substance' read into the term "liberty" in the Due Process Clauses was inappropriate judicial gloss. It presupposed limits on the capacity of legislatures to interfere with freedom in the realm of political economy, when in reality there were very few such limits. The responses of legislatures to infringements on freedom caused by money, power, or politics were, in most cases, appropriate responses. Legislatures were majoritarian institutions, courts were not, and in Holmes's judgment the American Constitution, by the opening of the twentieth century, was a document functioning in a society predicated on majority rule.

Several of Holmes's colleagues on the Court in 1914 were provoked by the passage from his *Taylor* opinion quoted above. Their shared concern, expressed in different ways, was that Holmes's blithe acceptance of the ability of legislatures to "interfere with theoretic in the interest of practical freedom" would encourage a spate of regulatory legislation. Holmes, who was used to his fellow justices objecting when he called a spade a spade too openly, withdrew the passage.⁵⁸ But Holmes's reading of due process cases as raising a question of the extent to which judicial glosses on constitutional language could be justified in a majoritarian democracy eventually emerged as the mainstream reading. By 1965, in *Griswold v. Connecticut*,⁵⁹ a majority of the Court had come to endorse Justice William O. Douglas's assertion that "we decline [the] invitation [to treat] *Lochner v. State of New York* [as] our guide. . . . We do not sit as a super-legislature to determine the

⁵⁸ See BICKEL & SCHMIDT, *supra* note 57, at 298. In 1919 Holmes wrote to Felix Frankfurter that "innocuous enfantallages" and "exuberances" in one of his draft opinions had been eliminated by his colleagues, and "some pap that would not hurt an infant's stomach" had been substituted. A year later he wrote Felix Frankfurter that another draft opinion "had a tiny pair of testicles . . . [a]s originally written," but "the scruples of my Brethren have caused their removal and it speaks in a very soft voice now." Holmes was well aware of his tendency to prefer stylistic "elegance and variety" to jurisprudential caution in his opinions, and typically withdrew his more pungent phrases with equanimity, retaining them for his extensive private correspondence. See Letter from Oliver Wendell Holmes to Felix Frankfurter (Oct. 24, 1920), and Letter from Oliver Wendell Holmes to Felix Frankfurter (Nov. 30, 1919), microfilmed on Oliver Wendell Holmes Papers, *supra* note 57. Both letters are quoted in BICKEL & SCHMIDT, *supra* note 57, at 237. On Holmes's letter writing practices, see G. Edward White, *Holmes As Correspondent*, 43 VAND. L. REV. 1707 (1990).

⁵⁹ 381 U.S. 479 (1965).

wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions."⁶⁰

B. *The Resonance of Holmes's Critique*

In 1913, in an essay in *The Survey*, Felix Frankfurter articulated an epistemological perspective that found Holmes's reading resonant, ultimately transforming its status from idiosyncratic to prophetic. Frankfurter said, of the context in which decisions on political economy were being made,

[t]he tremendous economic and social changes of the last fifty years have inevitably reacted upon the functions of the state. More and more government is conceived as the biggest organized social effort for dealing with social problems Growing democratic sympathies, justified by the social message of modern scientists, demand to be translated into legislation for economic betterment, based upon the conviction that laws can make men better by affecting the conditions of living. We are persuaded that evils are not inevitable, and that it is the business of statesmanship to tackle them step by step, tentatively, experimentally⁶¹

Certain evocative terms signified Frankfurter's consciousness in the passage. The most crucial of those were embedded in the sentences "laws can make men better by affecting the conditions of living," and "evils are not inevitable." The world that Frankfurter portrayed was one marked by "tremendous economic and social changes," by "growing democratic sympathies," and by "the social message of modern scientists." Taken together, Frankfurter suggested, these developments produced the conclusion that government was the appropriate "social effort" to deal with social problems.

Frankfurter's conclusion, however, was not axiomatic. Earlier generations of American legal and social theorists had reacted to perceptions of "tremendous economic and social changes" without concluding that government should be the primary mechanism to respond to those changes.⁶²

⁶⁰ *Id.* at 481-82. For an analysis of the relationship between Holmes's critique of the *Lochner* majority opinion and the Warren Court's tacit revival of substantive due process in noneconomic "fundamental rights" cases, see G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION* 406-07 (2d. ed. 1988).

⁶¹ *THE SURVEY*, Jan. 1913, at 3, reprinted in FELIX FRANKFURTER, *LAW AND POLITICS* 4 (Archibald MacLeish & Edward F. Prichard eds., 1962).

⁶² The early years of the nineteenth century were marked by a comparable be-

Frankfurter's enthusiasm for governmental solutions was less a product of the novelty of the early twentieth century American environment than of an altered consciousness about the power of human actors as causal agents.

For Frankfurter and his fellow "progressive"⁶³ intellectuals, "the social message of modern scientists" and "growing democratic sympathies" were both evidence of a new confidence in the capacity of human beings to alter their environment. Science had provided a new analytical key to the universe, one that was founded not on the mysteries of divine will but on empirical observations and deductions conducted by properly trained human beings. The "social message of modern scientists" was that the same techniques employed to explain and to predict physical phenomena could be applied to social phenomena. A mastery of such techniques gave humans the power to control their own destiny. The social and economic policies of human actors—laws—could alter external conditions and "make men better"; evils were no longer "inevitable."

The increased importance of human actors as causal agents in the universe required an increased appreciation of the worth of individual humans. Democratic theory embodied this enhanced sense of human worth, and policies designed to alleviate the rigors of early twentieth century life and to produce "economic betterment" were consistent with democratic theory. Since it was no longer necessary to regard the inequalities of condition produced by the industrial marketplace of the early twentieth century as "inevitable," legislation designed to ameliorate those inequalities was desirable. The fact that such legislation increased the presence of government was not a

lief among social commentators that the conditions of life in America were being rapidly and dramatically transformed. The response, in the realm of constitutional jurisprudence, was to advocate a shoring up of the existing "first principles" of American constitutionalism, none of which anticipated an extensive role for government as a regulatory force. See G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE* 6-8 (1988).

⁶³ The term progressive has become sufficiently ubiquitous in current scholarship to require refinement. As used in this article, Progressive refers to allegiance to the political movement known as Progressivism or to the national Progressive Party; "progressive" refers to a characterization of the attitudes of early twentieth century modernist intellectuals by those persons themselves; and 'progressive' refers to a characterization of the attitudes of early twentieth century persons by current commentators.

concern, since government was staffed by humans who had received "the social message of modern scientists" and the political message of democratic theory, and were capable of altering "the conditions of living" to "make men better." Their efforts amounted to "progress."

One might contrast the set of interlocking epistemological assumptions⁶⁴ reflected in Frankfurter's 1912 essay with the set that lay behind the establishment of the public/private distinction and the anticlass principle in nineteenth century jurisprudence. In the latter epistemology, the role of humans as causal agents was necessarily limited by the omnipotence of external forces and the incapacity of humans to transcend their own tendencies toward selfishness and corruption. Humans had comparatively little freedom to control their own destiny; given the tyrannical and arbitrary dimensions of governance, adding government to the mix only restricted that freedom further. Policing the boundary between the public and private spheres, and confining the reach of government only to those measures that benefited or burdened all citizens equally, was necessary to preserve human freedom.

In Frankfurter's epistemological outlook, freedom had been transformed from a protection from arbitrary or tyrannical governmental interference to an opportunity to have one's condition in life bettered by affirmative governmental activity.⁶⁵ Once that shift in the conception of freedom had taken place, policing the boundary between the public and private spheres became a less vital task, and legislation conferring particular benefits on one class in society became less threatening to other classes. A law such as that tested in *Lochner* might be a "first instal[l]ment in a general regulation in the hours of work," but that "general regulation" had as its purpose the "betterment" of all classes in society. Consequently,

⁶⁴ Elsewhere I have labeled this set of interlocking assumptions "modernist," and have treated them as evidence of a "modernist epistemology" or "modernist consciousness" among persons making them. See, e.g., White, *supra* note 3, at 579-82; G. Edward White, *The First Amendment Comes of Age*, 95 MICH. L. REV. 299, 303-06, 355 (1996).

⁶⁵ Compare RICHARD T. ELY, *STUDIES IN EVOLUTION OF INDUSTRIAL SOCIETY* 400-03 (1903) (arguing that "[t]rue liberty," which Ely defined as "the expression of the positive powers of the individual," required state action to regulate "nominally free contract.")

the increased encroachment of government on private affairs through paternalistic legislation was not a cause for concern, because those drafting the legislation had internalized the modern messages of science and democratic theory.

The anticlass principle, or for that matter the public/private distinction, were thus not essential tenets of those who shared Frankfurter's modernist epistemological sensibility. On the contrary, Frankfurter's fellow "progressives" regarded those tenets as potential roadblocks in the path of "positive" liberty and human improvement.⁶⁶ Nor were those tenets, we have seen, subscribed to by Holmes, who was much less sanguine than Frankfurter about the substantive worth of "progressive" legislation,⁶⁷ but equally convinced that there were few constitutional limits on the power of legislatures to enact it. The relative insignificance of both the public/private distinction and the anticlass principle in Frankfurter's and Holmes's approaches to "social legislation" cases played an important part in the eventual acceptance of Holmes's attack on the judge-made doctrine of "liberty of contract."

Holmes's critique of *Lochner* and "liberty of contract" took hold because commentators and judges, especially from the 1940s on, increasingly came to regard the task of constitutional interpretation as a purposive, human-centered exercise. One might compare the approach adopted by all of the judges in *Lochner* save Holmes. In *Lochner*, Justice Peckham, after positing that the central question in every "police power" due process case was "[i]s this a fair, reasonable, and appropriate exercise of the police power of the State, or . . . an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty," added:

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

⁶⁶ See Breck P. McAllister, *Lord Hale and Business Affected with a Public Interest*, 43 HARV. L. REV. 759 (1930); Walton Hamilton, *Affection with Public Interest*, 39 YALE L.J. 1089 (1930).

⁶⁷ For elaboration of the characterizations of Holmes's views on political economy, see WHITE, *supra* note 41, at 400-01.

Is it within the police power of the State? and that question must be answered by the court.⁶³

Peckham seemed to regard the question of whether a particular piece of legislation came within the police power as capable of answering itself. This was because he started with the proposition that unless legislation conferred equal benefits and burdens on all citizens, it constituted "mere meddlesome interference . . . with the rights of the individual." Since it was obvious which legislative enactments were "general" and which "partial," it was obvious which were "reasonable" and which were "arbitrary." In marking out the boundaries between the police power and the sphere of private autonomy, judges were merely recognizing the obvious. They were not exercising "judgment" in the modern sense of that term.

C. *The Persistence of Orthodox Police Powers in Early Twentieth Century Due Process Cases: Adkins and Parrish*

In the decades after *Lochner*, the Court gave signs of accommodating itself to "social legislation," sustaining statutes that prevented workers from contracting out of workers' compensation plans, and in the process sweeping within the police power what Justice Mahlon Pitney called "the interest of the public . . . in the prevention of pauperism, with its concomitants of vice and crime."⁶⁹ The recognition of a public interest in preventing pauperism seemed tacitly to reject the view that since individuals were autonomous economic units there were no social costs of a failure to survive in the marketplace. Pitney's recognition threatened to blur the distinction between "general" and "partial" legislation and thereby to undermine the anticlass principle. But it did not signify a methodological change in the Court's approach to police power due process cases. Until the mid-1930s, well after Holmes left the Court, that approach was still the one adopted by Holmes's eight colleagues in *Lochner*.

⁶³ *Lochner*, 198 U.S. at 56-57.

⁶⁹ *New York Cent. R.R. Co. v. White*, 243 U.S. 188, 207 (1917); *see also* *Chicago, Burlington, & Quincy R.R. Co. v. McGuire*, 219 U.S. 549 (1911); *Second Employers' Liab. Cases*, 223 U.S. 1 (1912). *See* the discussion in McCurdy, *supra* note 5, at 32-34.

Consider, for example, Justice George Sutherland's opinion in the 1923 case of *Adkins v. Children's Hospital*,⁷⁰ testing the constitutionality of a Congressional statute creating a board to impose minimum wages for women employed by enterprises in the District of Columbia. The obvious purpose of the statute was to redress the diminished market power of women. As such the legislation appeared easily swept into the category of antipauperism statutes which the Court had begun to sustain. But Sutherland, for a 5-3 majority, declined to treat the statute challenged in *Adkins* in that fashion. Instead he analyzed the statute in traditional police power terms, concluding that it infringed on "liberty of contract." Specifically,

That the right to contract about one's affairs is part of the liberty of the individual protected by [the Due Process Clauses] is settled by the decisions of this Court and is no longer open to question. . . .

. . . .

There is, of course, no such thing as absolute freedom of contract. It is subject to a great variety of restraints. But freedom of contract is, nevertheless, the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances.⁷¹

The question Sutherland chose to center upon in *Adkins* was whether a statute fixing wages for women was more than "partial" in nature; whether, for example, it was similar to an Oregon statute limiting hours for employees in mills, factories, and manufacturing establishments, which the Court had sustained in a 1917 decision.⁷² He had no difficulty in showing that the statute under consideration in *Adkins* was "partial":

[T]he authority to fix hours of labor cannot be exercised except in respect of those occupations where work of long continued duration is detrimental to health. . . .

If now . . . we examine and analyze the statute in question, . . . [i]t is not a law dealing with any business charged with a public interest or with public work It does not prescribe hours of labor

⁷⁰ 261 U.S. 525 (1923), *overruled by* *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

⁷¹ *Id.* at 545-46.

⁷² *Bunting v. Oregon*, 243 U.S. 426 (1917). Earlier the Court had sustained an Oregon statute prohibiting the employment of women in laundries and factories for longer than 10 hours per day, citing the special legislative concerns for a woman's "performance of her maternal functions." *Muller v. Oregon*, 208 U.S. 412, 421 (1908).

or conditions under which labor is to be done. It is not for the protection of persons under legal disability or for the prevention of fraud. It is simply and exclusively a price-fixing law, confined to adult women

. . . .

. . . To the extent that the sum fixed exceeds the fair value of the services rendered, it amounts to a compulsory exaction from the employer for the support of a partially indigent person, for whose condition there rests upon him no peculiar responsibility, and therefore, in effect, arbitrarily shifts to his shoulders a burden which, if it belongs to anybody, belongs to society as a whole.⁷³

Adkins is conventionally treated as a hymn to laissez faire and a testament to Sutherland's ideological conservatism.⁷⁴ But once again all members of the Court except Holmes⁷⁵ adopted orthodox police power analysis. To them "liberty of contract" functioned as a surrogate for the presumption that government could not interfere with private economic transactions to the betterment or detriment of one party to the transaction. Chief Justice William Howard Taft's dissent, joined by Justice Edward Sanford, described *Adkins* as another example of the Court's "pricking out a line" to mark "the boundary of the police power beyond which its exercise becomes an invasion of the guaranty of liberty under the Fifth and Fourteenth Amendments."⁷⁶ Only Holmes asserted that "the power of Congress . . . to remove conditions leading to ill health, immorality and deterioration of the race . . . seems absolutely free from doubt," and "the dogma, Liberty of Contract" presented no obstacle to that power. "[P]retty much all law consists in forbidding men to do some things that they want to do," he suggested, "and contract is no more exempt from law than other acts."⁷⁷ For Holmes the inviolate categories that helped fix the boundary between "public" and "private" spheres in the realm

⁷³ *Adkins*, 261 U.S. at 554-58.

⁷⁴ JOEL F. PASCHAL, MR. JUSTICE SUTHERLAND: A MAN AGAINST THE STATE 119-26 (1951). See also Joel F. Paschal, *George Sutherland*, 4 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1837, 1838 (Leonard Levy & Kenneth Karat eds., 1986) (stating that: "Once on the Court, Sutherland readily joined his conservative colleagues invoking substantive due process to strike down exertions of governmental power.").

⁷⁵ Justice Louis Brandeis took no part in the decision, and he might well have joined Holmes's dissent.

⁷⁶ *Adkins*, 261 U.S. at 562.

⁷⁷ *Id.* at 568 (Holmes, J., dissenting).

of political economy had been made by humans, and could be unmade. Each of the other justices in *Adkins* saw them as far more transcendent and immutable.

It was this sense of the immutable nature of the categories of police power analysis that led Sutherland to charge, in his dissent fourteen years after *Adkins* in *West Coast Hotel Co. v. Parrish*,⁷⁸ that the majority had adopted a revolutionary approach to constitutional interpretation. That charge was not altogether accurate. Hughes, for the majority, began by reviewing police power cases which had established, as he put it, that due process "liberties" were subject to "reasonable regulations and prohibitions imposed in the interests of the community." He cited cases sustaining statutes "limiting employment in underground mines and smelters to eight hours a day; . . . forbidding the payment of seamen's wages in advance; . . . prohibiting contracts limiting liability for injuries to employees; . . . limiting hours of work of employees in manufacturing establishments; and . . . maintaining workmen's compensation laws." "In dealing with the relation of employer and employed," Hughes concluded, "the legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety."⁷⁹ This was, of course, following the police power guidelines Pitney had identified.

Hughes also noted in his *Parrish* opinion, however, that "[t]he Constitution does not speak of freedom of contract," but of "liberty without due process of law," a phrase which "has its history and connotation." He then went on to suggest that part of the "connotation" of "liberty" in due process cases was "the economic conditions which have supervened" since the *Adkins* decision. Those conditions were relevant to the Court's inquiry into "the reasonableness of the exercise of the police power of the State." Indeed they prompted "fresh consideration" of the State's actions.⁸⁰ Here was language reminiscent of Holmes's approach to due process cases.

Sutherland bristled at this last set of statements by Hughes. "[T]he meaning of the Constitution does not change with the ebb and flow of economic events," he declared. "We

⁷⁸ 300 U.S. 379 (1937).

⁷⁹ *Id.* at 393.

⁸⁰ *Id.* at 390, 402.

frequently are told in more general words that the Constitution must be construed in the light of the present." But an important distinction needed to be kept in mind:

If by that it is meant that the Constitution is made up of living words that apply to every new condition which they include, the statement is quite true. But to say . . . that the words of the Constitution mean today what they did not mean when written—that is, that they do not apply to a situation now to which they would have applied then—is to rob that instrument of the essential element which continues it in force . . .⁸¹

Hughes, in characteristic fashion, had written an opinion using the language of established categories of constitutional jurisprudence to reach an innovative result.⁸² He could have been taken merely as suggesting that there was ample room, under the police power, for states to establish minimum wage levels for chambermaids when lower wages might have produced pauperism, physical deterioration, or other conditions affecting public health. He could also have been taken as saying, however, that confidence in the capacity of government to alleviate conditions that were a product of the industrial marketplace had changed.⁸³

D. *The Demise of the Anticlass Principle*

If Hughes intended to convey the latter message in *Parrish*, Sutherland was correct in claiming that "the words of the Constitution mean today what they did not mean when written."⁸⁴ For whatever "liberty" in the Due Process Clauses

⁸¹ *Id.* at 402-03.

⁸² See G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION* 208-09 (2d ed. 1988).

⁸³ One could argue that the Court had already gone down part of the road that Hughes took in *Parrish* in a series of cases permitting legislative price regulation of businesses "affected with a public interest." See, e.g., *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389 (1914) (fire insurance); *Block v. Hirsh*, 256 U.S. 135 (1921) (housing in the context of World War I). But those examples came within established categories of enterprises "affected with a public interest." The businesses affected in *Parrish* did not, and thus one could have taken Hughes's statement to mean that the police power could vary with economic and social conditions.

⁸⁴ That Hughes did intend to convey the latter message is suggested by his earlier opinions. For example, in *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934), Hughes said, of judicial interpretations of the Contracts Clause,

had meant for at least the balance of the nineteenth century, it had meant that the states were precluded from interfering with private contractual relations merely because they felt one party to the contract was not getting a fair shake. For the state to equalize benefits and burdens in a private contract by taking money away from one party to that contract and giving it to the other was the very sort of activity precluded by the anticlass principle. Protection from such state interference was at the very heart of "liberty" within the Due Process Clauses. This was the "charge of inequality" to which Holmes had alluded in his *Lochner* dissent.

Hughes was suggesting that when economic conditions changed, the calculus of police power due process cases could change as well. This suggestion flew in the face of two controlling assumptions of established constitutional jurisprudence. One was that the actions of legislatures, judges, or other humans could have a substantial effect on economic conditions themselves; wages, hours, and other dimensions of the economic marketplace were not fully controlled by immutable forces. The other was that the boundary between "public" and "private" power could shift with the changing social context of American life; the definition of those activities that were "public," and hence within the appropriate range of the police power, could expand and shrink with the "history and connotation" of due process.

Thus, if one adopts the categories and the assumptions of orthodox police power jurisprudence, it was Hughes's opinion in *Parrish*, not Sutherland's dissent, that was undertaking a 'substantive' reading of the constitutional concept of due process. Hughes's interpretation of the Due Process Clauses was 'substantive' in that it assumed the meaning of concepts such as "liberty" and "police power" could change with time and circumstance, and judges could look to the context in which cases appeared to supply that meaning. Sutherland, by contrast, continued to equate due process with the fundamental republican propositions of the public/private distinction and

"[w]ith a growing recognition of public needs and the relation of individual right to public security, the Court has sought to prevent the perversion of the clause through its use as an instrument to throttle the capacity of the states to protect their fundamental interests." *Id.* at 443-44.

the anticlass principle, propositions that were not seen as originating with judges or as changing with time. Hughes's reading of "liberty" in the Due Process Clauses as "necessarily subject to the restraints of due process," or to "regulation which . . . is adopted in the interests of the community," transformed "liberty" from an immutable constraint on legislative regulation to a constraint that could vary with time and circumstance. In contrast, Sutherland's reading of "liberty" assumed that the concept was "just there": an emblem of fundamental precepts of republican government, themselves derived from the nature of humankind and the omniscience of external economic forces.

IV. CONCLUSION: REVISITING HOLMES AND 'SUBSTANTIVE DUE PROCESS'

Mainstream commentary since *Parrish* has taken Sutherland's, not Hughes's, opinion to be the exemplar of a 'substantive' reading of the Due Process Clauses in political economy cases. Indeed the principal normative lesson of mainstream commentary has been that the impact of "due process" in the realm of political economy should be confined to minimal procedural requirements, a far cry from Sutherland's essentialist fundamental principles.

Meanwhile, a now conventional account of constitutional change from *Lochner* through *Adkins* to *Parrish* had been launched in the late 1930s.⁸⁵ In that account, the Court was characterized as recognizing the outmoded nature of the *Lochner* majority's approach to police power cases and eventually abandoning that approach. Critical to the account was its internalization of Holmes's reading of "liberty of contract" in police power cases as normative judicial glossing. This enabled the account to strip the "liberty of contract" doctrine from its foundationalist moorings in the anticlass principle and the public/private distinction and to associate it with the ideological assumptions of Spencerian libertarianism. Those grounding

⁸⁵ Early examples of the account are Corwin, *supra* note 41, EDWARD S. CORWIN, *CONSTITUTIONAL REVOLUTION, LTD.* (1941), and ROBERT JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* (1941). A persistent theme of the account is the illegitimacy of the "Old Court's" resistance to the New Deal legislative programs in the face of widespread popular support for those programs.

their police power opinions on the maintenance of the public/private distinction or the anticlass principle became characterized as reactionaries resisting modern social legislation designed to relieve inequalities in the industrial marketplace. Holmes, in contrast, became a heroic figure, exposing "liberty of contract" as a normative gloss in *Lochner* and wisely reconciling himself in *Adkins* to the proposition that "pretty much all law consists in forbidding men to do some things they want to do."

If one turns that account on its head, and views early twentieth century police power jurisprudence as most of its judicial practitioners did, how does one explain Holmes's role? How does one make sense of his being a lone jurisprudential voice in *Lochner*, and, eighteen years later, still a lone voice in *Adkins*? And how, at the same time, does one explain the dramatic collapse of Sutherland's interpretation of the jurisprudential change from *Adkins* to *Parrish*, and the comparably dramatic rise of Holmes's interpretation? So powerful were those changes, in fact, that an entire episode of twentieth century constitutional history has been "lost" for over fifty years, and is now only in the process of beginning to be reclaimed.⁸⁶

⁸⁶ The persistence of the view that a line of decisions resisting "social" legislation as violating the anticlass principle or inappropriately blurring the public/private distinction was an unfortunate exercise in "conservative" judicial overreaching has been remarkable. A recent set of essays on the constitutional history of the New Deal period, WILLIAM LEUCHTENBERG'S, *THE SUPREME COURT REBORN* (1995), perpetuates that view. See G. Edward White, *Cabining The Constitutional History of the New Deal in Time*, 94 MICH. L. REV. 1392 (1996).

Recently a group of commentators has sought to revise the conventional view of 'substantive due process' cases and to recapture some of the starting assumptions of late nineteenth and early twentieth century constitutional jurisprudence. Important contributions to that project are Barry Cushman, *A Stream of Legal Consciousness: The Current of Commerce Doctrine from Swift to Jones & Laughlin*, 61 FORDHAM L. REV. 105 (1992); Barry Cushman, *Doctrinal Synergies and Liberal Dilemmas: The Case of the Yellow-Dog Contract*, 1992 SUP. CT. REV. 235; Barry Cushman, *Rethinking The New Deal Court*, 80 VA. L. REV. 201 (1994); Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. PA. L. REV. 1891 (1994); HOWARD GILLMAN, *THE CONSTITUTION BESEIGED* (1993). Much of this work owes a debt to Charles W. McCurdy's germinal articles on late nineteenth century police power jurisprudence, Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations*, 61 J. AM. HIST. 970 (1975) and Charles W. McCurdy, *The Roots of 'Liberty of Contract' Reconsidered*, 1984 Y.B. SUP. CT. HIST. SOC. 20 (1984); see also McCurdy's recent overview in *The 'Liberty of Contract' Regime in American Law*, *supra* note 5.

The place to start in understanding Holmes's jurisprudential isolation in the inappropriately designated 'substantive due process' cases is the same place from which to begin an explanation of his eventual succession to jurisprudential orthodoxy and heroic status. It is with a recreation of the foundational epistemological assumptions that distanced him from his colleagues on the Fuller, White, and Taft Courts. Holmes began police power cases by assuming that "liberty of contract" was a "dogma." He made that assumption because he largely rejected a set of orthodox nineteenth century explanations for the order and meaning of the universe. He did not fully believe that property, or liberty, were prepolitical rights, invulnerable to government because they were the basis of government itself. He did not believe that the universe was solely guided by inexorable, essentialist external forces. He did not believe that there was comparatively little human beings could do to alter the course of events, whether in the guise of constitutional interpretation or elsewhere.⁸⁷

⁸⁷ As with most generalizations about Holmes, there is a danger of oversimplification here. Holmes was an epistemological modernist, unlike most of his contemporaries, in rejecting a belief in the existence of omniscient external forces in the universe that humans were largely powerless to control. Religion was the principal such force: early in his career Holmes identified himself with those who felt that "science" came far closer to unlocking the key to understanding external phenomena than religion. Holmes was prepared to press modernist logic even further, concluding that questions about the course of events were at bottom questions of sovereign power, so that social change was largely a product of the attitudes of whoever held power at the time.

Holmes added a refinement to his positivism that followed from his being an American: sovereignty in America was a product of majority will and legislatures best embodied that will. This version of positivism made Holmes a deferential judge when he was asked to interpret legislative activity. Outside that sphere of interpretation, as in common law cases, he assumed that he was the sovereign and was an activist judge. Thus the principal area of concordance between Holmes and those who lionized him as the chief critic of 'substantive due process' was a belief in granting legislatures considerable latitude to respond to social problems. Both Holmes's deference to legislatures and his acolytes' enthusiasm for legislative solutions stemmed from modernist assumptions about the primacy of human-based causation in the universe.

But, as noted, Holmes retained some particularistic attitudes and theories that had a premodernist origin. His positivism was the logical product of a belief that humans could and would control their destiny, but at the same time he assumed that there were limits on the powers of humans in the economic marketplace. A similar dialectic characterized his views on free speech, where he spoke of a "marketplace of ideas" as determining which expressions would become influential and which would be discarded, but at the same time anticipated that major-

On the contrary, Holmes believed that the course of history, and the state of human beings in society, was largely a function of human power and will. He therefore could not see any theoretical limits on the power of government, which was, after all, nothing but the aggregate policies of human powerholders. There were practical limits—humans would revolt and displace powerholders if their acts were intolerably tyrannical or arbitrary—but those limits could not be fixed dogmatically in advance. It was thus an illusion to talk of “liberty of contract,” or other “liberties,” as if they were unassailable timeless principles. They were what a current majority deemed them to be. The same could be said of the “police power,” the “public interest,” and other rubrics for governmental interference with private activity.

Since Holmes believed that the scope of the police power, or the boundary between public and private activity, was simply a question of historical circumstance and majoritarian will, he found inappropriate a reading of the Due Process Clauses that held up “liberty of contract” as a barrier to legislative regulation. Such a reading sought to erect a definition of the scope of the police power, or its limits, as if it were timeless, natural, and externally derived. The police power was not externally derived, he believed; it was just one set of inarticulate convictions. All one could say about police power cases was that the boundary between what sets of activities were public and what sets remained private would change with time and circumstance.

No one else on the *Lochner* Court, and almost no one else participating in the *Adkins* decision, held that view of police power due process cases because among the judges deciding those cases only Brandeis shared Holmes’s epistemological view of causation in the universe and the component view of the scope and limits of legislative activity. For the rest of Holmes’s judicial colleagues in *Lochner* and in *Adkins*, the public/private distinction and the anticlass principle were perma-

ities would invariably seek to repress speech that they disapproved of.

And, of course, although Holmes and those who hailed his *Lochner* dissent as an enlightened critique of inappropriately ‘substantive’ judicial interpretation started from a similar epistemological place, they differed sharply on the worth of the “progressive” legislation being challenged on due process grounds. For a fuller discussion, see WHITE, *supra* note 41, at 391-96.

nent features of republican government in America. For them to embrace the idea that all legislation was "general" because all individual transactions bore some connection to the public welfare, or the corresponding idea that all activity was "public" if it was thought to have a sufficient impact on the majority of the people, would have been to abandon a belief in the universe as being shaped, to an important extent, by forces over which humans could exert no meaningful control. To abandon that belief was to embrace the terrifying prospect of a modernist world, a world in which the only limits on human behavior stemmed from humans themselves.

Holmes had long been prepared to embrace that world. He had abandoned religion as a soldier in the Civil War. His treatise, *The Common Law*, had embraced historical change and the methods of scientific empiricism. On the Supreme Judicial Court of Massachusetts he had reconciled himself to what he called "the sovereign prerogative of choice."⁸³ His combination of skepticism and instinctive attraction to democracy had led him to reject natural law, custom, and tradition as jurisprudential principles and settle on positivism. Because he embraced modernist epistemology, he not only recognized the human, creative dimensions of judging, he worried about the contradiction between judicial "lawmaking" and democratic theory. Hence he settled into a fatalistic deference, acknowledging the primacy of legislative power even though, on many occasions, he retained a detachment from the substantive goals of legislators that bordered on contempt.

Those who elevated Holmes's reading of police power due process cases to authoritative status found it "natural" and compelling because they shared Holmes's modernism. For the most part they were not Holmes's chronological contemporaries. They had experienced some of the shock waves of an urbanizing and industrializing world: global war, depression, the increased primacy of science and technology. They did not see the universe as mysterious, nor external forces as omniscient. They were eager to control their own destiny, and they believed that law could play an important role in that process. They were by no means convinced that when conditions

⁸³ Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 461 (1899).

changed the Constitution was powerless to adopt its language to them. Instead they saw constitutional language as human-crafted and malleable.

As legislators, judges, and commentators, Holmes's acolytes transformed the public/private distinction into a virtually meaningless blur and confined the anticlass principle to the orthodoxy of another time. Then, looking back on the actions of their juristic predecessors, they wondered why it had taken them so long to grasp some simple truths, why they had invested concepts such as "liberty of contract" with so much ideological weight. Their modernist premises, in fact, dictated that they would take "liberty of contract" as nothing but a human-created ideological "dogma." So they labeled those whose invocation of "liberty of contract" revealed their belief in the foundational principles of orthodox police power jurisprudence as 'conservatives.' And they labeled foundationalist interpretations of the Due Process Clauses as 'substantive.'

They also extracted Holmes from his posture of isolation and made him into a 'progressive' visionary. To succeeding generations, their account of *Lochner* and other early twentieth century 'substantive due process' cases has proceeded from congenial epistemological assumptions and made sense of much of twentieth century constitutional history. Consequently, few have taken the trouble to ask whether the account was grounded in an understanding of the jurisprudential assumptions of most of the judges who decided the cases. Now that some commentators have begun to ask that question, the interpretation of Holmes's acolytes is unraveling. With its demise, two new sets of conclusions may emerge. The first set may center on a renewed appreciation of the epistemological isolation of Holmes from his contemporaries. The second set may center on the proposition that one can no longer think of early twentieth century police power cases as 'substantive due process' cases without distorting their meaning. Perhaps, by combining these sets of conclusions, we can begin to strip away the pejorative overtures of the term "Lochernizing" in contemporary constitutional jurisprudence.