Protective Labor Legislation in the Courts: Substantive Due Process and Fairness in the Progressive Era

CLAUDIO J. KATZ

The Supreme Court's decision in *Lochner v. New York* (1905), invalidating an act limiting working hours for bakers as a violation of contractual freedom, has come to symbolize an era in constitutional law.[1] The period covers the years from the end of the Gilded Age through the Progressive Era. Its chief characteristic, according to its critics, is the judiciary's hostility to progressive labor legislation. Statutes intended to protect vulnerable classes from the ravages of industrialization were routinely defeated in the courts. Progressives pioneered an interpretation in which *Lochner* became a leading "anticanonical" case, wrongly deploying the doctrine of substantive due process to shield inherited distributions of wealth and power. The time is long past when scholars characterized the era as a product of judges' reactionary commitments to laissez-faire or, worse, to Social Darwinism, following Justice Holmes's quip, dissenting in *Lochner*, that "the Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."[2] Contemporary scholars have reconstructed the period's jurisprudence, finding in it a principled commitment to a conception of justice grounded in the Founding. The most widely accepted explanation,

1. 198 U.S. 45 (1905).
2. Ibid., 54.

Claudio Katz is professor of political science at Loyola University Chicago <ckatz@luc.edu>. He thanks David Tannenhaus and the referees of *Law and History Review* for their insightful and constructive comments. He is particularly indebted to Barry Cushman, Robert Mayer, and Susan Mezey, whose incisive analyses and suggestions were invaluable in sharpening the article's central argument.

Law and History Review May 2013, Vol. 31, No. 2
© the American Society for Legal History, Inc. 2013
doi:10.1017/S0738248013000047

https://doi.org/10.1017/S0738248013000047 Published online by Cambridge University Press

developed by Gillman's influential study, is that substantive due process embodied a principle of neutrality requiring courts to distinguish the authentic public aims of legislation from illegitimate attempts to advantage some classes at others' expense.[3] An alternative explanation is that judges, drawing on the theory of natural rights, developed the doctrine of substantive due process to limit government's discretion to encumber prepolitical rights to private property and liberty of contract.[4]

These analyses are not mutually exclusive.[5] They share the view that an ideology of free labor, first articulated by the leading orators of the nascent Republican Party, informed judges' reluctance to authorize statutes intruding upon the employment contract.[6] The promise of free labor rested on the

3. Howard Gillman, *The Constitution Besieged, The Rise and Demise of Lochner Era Police Powers Jurisprudence* (Durham: Duke University Press, 1993), 10–15, 61–75, 86–99, 103–4. See also Morton J. Horwitz, *The Transformation of American Law, 1870–1960, the Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992), 19–20, 26–34; and Barry Cushman, "Some Varieties and Vicissitudes of Lochnerism," *Boston University Law Review* 85 (2005): 881–999.

4. David E. Bernstein, *Rehabilitating Lochner, Defending Individual Rights against Progressive Reform* (Chicago: The University of Chicago Press, 2011), 14–22; David N. Mayer, *Liberty of Contract, Rediscovering a Lost Constitutional Right* (Washington D.C.: Cato Institute, 2011), 11–24, 30–32, 63–67; and Michael J. Phillips, *The Lochner Court, Myth and Reality, Substantive Due Process from the 1890s to the 1930s* (Westport: Praeger Publishers, 2001), 105–19. In their view, the *Lochner* era's defense of fundamental rights was its principal legacy.

5. See Bernstein, *Rehabilitating Lochner*, 14–20, 121; and Mayer, *Liberty of Contract*, 31–32. Judges striking labor laws were not always careful to distinguish opposition to class legislation from protection of fundamental liberties. Cushman maintains that the principle of neutrality formed the principal strand in substantive due process jurisprudence, but nevertheless stresses "the error in attempting to identify . . . a single animating principle for a body of constitutional law composed by scores of decisions handed down over more than four decades, and involving more than two dozen Justices." "Varieties and Vicissitudes," 941. See also Barry Cushman, "Ambiguities of Free Labor Revisited: The Convict-Labor Question in Progressive-Era New York," Virginia Public Law and Legal Theory Research Paper No. 2011–16, Abstract http://ssrn.com/abstract=1807114 (April 2011).

6. Nelson was the first scholar to explore the connections between free labor ideology and turn-of- the century substantive due process. William E. Nelson, "The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America," *Harvard Law Review* 87 (1974): 537–38. See also Gillman, *Constitution Besieged*, 13, 21, 27, 39, 61–62, 159–60, 175–93, 205; Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (New York: Oxford University Press, 1998), 90; Horwitz, *Transformation of American Law*, 4, 11, 33–34, 193–95; Owen M. Fiss, *Troubled Beginnings of the Modern State, 1888–1910*, vol. 8 of *History of the Supreme Court of the United States* (New York: Macmillan Publishing Company, 1993), 47, 108, 120–21; Bernstein, *Rehabilitating Lochner*, 17; Mayer, *Liberty of Contract*, 70–88; Charles W. McCurdy, "The 'Liberty of Contract' Regime in American Law," in *The State and Freedom of Contract*, ed. Harry N. Scheiber (Stanford: Stanford University Press, 1998), 167–79; and William E. Forbath, "The Ambiguities of

https://doi.org/10.1017/S0738248013000047 Published online by Cambridge University Press

assumption that "a dynamic, expanding capitalist society, whose achievements were almost wholly the result of the dignity and opportunities which it offered the average laboring man," underwrote social mobility and protected economic independence.[7] An economy where individuals voluntarily entered into contracts ensured that they could not take unfair advantage of one another. Markets determined the just price of goods and services; the use of political power to obtain undeserved benefits was the paradigm of exploitation. The understanding that competitive markets fairly distributed opportunity buttressed judges' skepticism of protective labor legislation. Regulations encroaching on workers' right to negotiate their own employment terms faced significantly more rigorous scrutiny than other market regulations. The presumption on behalf of contractual liberty could be rebutted by a conventional list of common law incapacities. But the economic disadvantage of wage workers, argues McCurdy, "did not provide a legitimate ground for government intervention."[8] The judiciary rejected the claim, voiced with growing urgency by progressives, that bargaining inequalities between employers and laborers rendered freedom of contract illusory. "Judges tended to assume that contracts of employment were somehow special; the very 'specialness' of the labor contract inclined judges to suspend the presumption of constitutionality when legislatures intervened."[9] Policies interfering with contractual liberties to shield some groups from their competitors were legally and morally wrong precisely because the marketplace fostered growth without exploitation.

These scholars stress that the turn-of-the-century judiciary was not wedded to a policy of laissez-faire. Courts upheld a host of statutes

---

Free Labor: Labor and the Law in the Gilded Age," *Wisconsin Law Review* (1985): 768–800. Cf. Cushman, "Ambiguities of Free Labor Revisited," exploring the complex pathways whereby free labor ideology, initially operating to defeat statutes regulating convict labor, was redeployed to underwrite legislation protecting workers from its unfair competition.

7. Eric Foner, *Free Soil, Free Labor, Free Men: the Ideology of the Republican Party Before the Civil War* (New York: Oxford University Press, 1970), 11. A significant ambiguity characterized free labor ideology. In the early decades of the new republic, economic opportunity meant the prospect of rising to self-employment, establishing oneself as an independent producer. This prospect was already receding on the eve of the Civil War. "This does not mean," writes Foner, "that industrialization and mechanized agriculture ended social mobility—on the contrary, the evidence is that they expanded it. But the mobility of the age of the independent producer, whose aspiration was economic self-sufficiency, was superseded by the mobility of industrial society, in which workers could look forward to a rising standard of living." Ibid., 33. See also Eric Foner, *Politics and Ideology in the Age of the Civil War* (Oxford: Oxford University Press, 1980), 57–76.

8. McCurdy, "The 'Liberty of Contract' Regime in American Law," 167.

9. Ibid.

https://doi.org/10.1017/S0738248013000047 Published online by Cambridge University Press

promoting economic growth and regulating it in the public interest. The problem was not whether public-regarding legislation satisfied constitutional standards; it did.[10] The chief legal and moral problem was redistribution.[11] Redistributive policies did not invariably fall to due process attacks. On this view, however, successful progressive arguments and opinions were exceptions to the rule, required to overcome steep due process strictures. They bore telltale marks, painstakingly avoiding any hint that their intention was to redress disparities in bargaining power.[12] By the second decade of the twentieth century, capitalist industrialization rendered the judiciary's opposition to redistributive policies increasingly anachronistic, divorced from economic reality and from the obligations of justice. The era ended in the late 1930s, when the social costs of a maturing capitalism, especially its deepening class inequalities, overrode constitutional limitations on the government's authority to regulate the employment contract.[13]

Constitutional historians have sharply contested the thesis that the *Lochner* era's judiciary was unreceptive to progressive labor policies. Too many labor laws withstood due process challenges, in a clear if bumpy trend beginning at the end of the nineteenth century, to dismiss

10. This point was forcefully made by Charles Warren, not long after *Lochner* was decided, showing that the Supreme Court sustained virtually all state laws regulating the economy. See, in particular, "The Progressiveness of the Supreme Court," *Columbia Law Review* 13 (1913): 294–313. See also William J. Novak, *The People's Welfare, Law and Regulation in Nineteenth-Century America* (Chapel Hill: The University of North Carolina Press, 1996), 83–114; Harry N. Scheiber, "Economic Liberty and the Modern State," in *The State and Freedom of Contract*, ed. Harry N. Scheiber (Stanford: Stanford University Press, 1998), 122–60; and Howard Gillman, "The Antinomy of Public Purposes and Private Rights in the American Constitutional Tradition, or Why Communitarianism is Not Necessarily Exogenous to Liberal Constitutionalism," *Law & Social Inquiry* 21 (1996): 72.

11. See Fiss, *Troubled Beginnings*, 48–49, 104, 160–61, 169, 180–81, 186–88, 295; Gillman, *The Constitution Besieged*, 28–33, 46–47, 61–75, 89–99, 103–4; Horwitz, *Transformation of American Law*, 11; Bernstein, *Rehabilitating Lochner*, 50; Mayer, *Liberty of Contract*, 7, 54–56, 70–71; Phillips, *The Lochner Court*, 52–55; Bruce Ackerman, *We the People:Transformations* (Cambridge, MA: Harvard University Press, 1998), 362–68; McCurdy, "The 'Liberty of Contract' Regime in American Law," 161–97; Cass R. Sunstein, "*Lochner*'s Legacy," *Columbia Law Review* 87 (1987): 876–83; and Michael Les Benedict, "Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism," *Law and History Review* 3 (1985): 298.

12. See McCurdy, "The 'Liberty of Contract' Regime in American Law," 167, 178–79, 182–87; Gillman, *The Constitution Besieged*, 241–42, n. 84, 250, n. 43, 255, n 73.

13. Gillman, *The Constitution Besieged*, 123–24, 157–60, 175–93; and Horwitz, *The Transformation of American Law*, 4, 33–4, 66, 194–99. Cf. Mayer, *Liberty of Contract*, 106, 108. Mayer agrees that this era in constitutional law came to an end in the late 1930s, but he sees the liberty of contract doctrine as a lost opportunity.

https://doi.org/10.1017/S0738248013000047 Published online by Cambridge University Press

them as exceptions. Progressive legal critics themselves pointed out that turn-of-the-century courts had begun to recognize workers' economic disadvantage as the basis of favorable decisions in employment cases.[14] Roscoe Pound, one of the leading critics of the era's jurisprudence, maintained that *Lochner* was an anachronism by the time it was decided.[15] Urofsky's review of the fate of social legislation before the Supreme Court found that it "was as progressive as most reformers could desire."[16] This conclusion is now widely accepted.[17] But there is still no satisfactory account of the courts' jurisprudence that explains their support of redistributive policies. Bernstein and Phillips question Gillman's view that judges'

14. Lucius Polk McGehee, *Due Process of Law under the Federal Constitution* (Northport, N.Y.: Edward Thompson Company, 1906), 362–63; Learned Hand, "Due Process of Law and the Eight-Hour Day," *Harvard Law Review* 21 (1908): 501; Roscoe Pound, "Liberty of Contract," *Yale Law Journal* 18 (1909): 486; Ernst Freund, "Constitutional Limitations and Labor Legislation," *Illinois Law Review* 4 (1910): 618; Francis W. Bird, "The Evolution of Due Process of Law in the Decisions of the United States Supreme Court," *Columbia Law Review* 13 (1913): 49–50; and [Anon.] "Liberty of Contract and Social Legislation," *Columbia Law Review* 17 (1917): 541. See also Fowler Vincent Harper, "Due Process of Law in State Labor Legislation," *Michigan Law Review* 26 (1928): 620–25; and Fowler Vincent Harper, "Due Process of Law in State Labor Legislation. Part Two," *Michigan Law Review* 26 (1928): 770–75.

15. Pound, "Liberty of Contract," 478–79.

16. Melvin I. Urofsky, "Myth and Reality: The Supreme Court and Protective Legislation in the Progressive Era," *Yearbook of Supreme Court Historical Society* (1983): 55. Urofsky's study of state court decisions reached a similar conclusion. Melvin I. Urofsky, "State Courts and Protective Legislation," *The Journal of American History* 72 (1985): 63–91.

17. See Victoria F. Nourse, "A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights," *California Law Review* 97 (2009): 754–56, 767–74, 784–87; Cushman, "Varieties and Vicissitudes," 924–44, 982–83; Cushman, *Rethinking the New Deal Court*, 89–92, 104–5; Bernstein, *Rehabilitating Lochner*, 20–22, 48–51, 126–27; David E. Bernstein, "*Lochner*'s Legacy's Legacy," *Texas Law Review* 82 (2003): 33–43; and Phillips, *The Lochner Court*, 31–89. Nourse offers a convincing explanation of the discrepancy between the judiciary's increasing receptivity to progressive legislation and contemporary reformers' hostility to the courts. The chief source of this hostility was not the progressive legal community, where a more nuanced view of the judiciary prevailed, but rather Theodore Roosevelt's politics. Roosevelt was engaged in building a political movement, and castigated Court decisions such as *Lochner* as part of a call to arms predicated on drawing a sharp contrast between progressivism and conservative reaction. He continued to demonize the judiciary even after conceding that *Lochner* had become a dead letter. Nourse, "A Tale of Two Lochners," 751–99. See also Sidney M. Milkis and Daniel J. Tichenor, "'Direct Democracy' and Social Justice: The Progressive Party Campaign of 1912," *Studies in American Political Development* 8 (1994): 282–340. Nourse's analysis also reminds us that legal and political narratives obey distinct dynamics. This is not to say that courts operate in a political vacuum. Rather, legal discourse has its own internal logic that cannot be reduced to politics; nor can legal change be explained simply as a reflection of political pressures. See Gillman, *The Constitution Besieged*, 15–18, for an excellent statement of this view.

https://doi.org/10.1017/S0738248013000047 Published online by Cambridge University Press

substantive due process decisions were guided by a principle of neutrality, arguing instead that they reflected a general presumption in favor of liberty. They also show that the judiciary was surprisingly sympathetic to labor laws. Their studies, however, fail to reconcile the courts' concern with fundamental liberties with their willingness to sustain regulations of the employment contract.[18] Why did so many labor laws withstand due process attacks grounded in rights to private property and freedom of contract? Cushman persuasively defends the thesis that neutrality was the central norm animating *Lochner* era decisions. Unlike Gillman, Cushman underscores the courts' solicitousness to statutes precluding harsh employment contracts.[19] Left unclear is how judges redeployed the neutrality principle to sustain progressive legislation.

Why, then, was the turn-of-the century judiciary so receptive to protective labor laws? The claim that progressive opinions were anomalous, marred by reasoning that studiously avoided economic inequality as a rationale, will not do. I argue that judges reviewing due process challenges to statutes regulating employment contracts became increasingly skeptical of the idea that labor relations in the market were essentially fair, largely free from employer overreaching. The principal warrant allowing legislatures to take sides in labor disputes was the state's traditional police power to protect health, safety, and morals. But judges still needed to explain why they rejected the heightened scrutiny that had insulated the employment contract from government regulation. They reasoned that disparities in workers' bargaining power induced them to accept employment terms injurious to their well-being. Judges did not abandon the neutrality principle or contractual liberty as substantive constraints on legislative authority. They abandoned the ideology of free labor. The acknowledgement that wage workers were vulnerable to exploitation undercut the objection that protective legislation was naked class favoritism and rebutted the presumption in favor of liberty of contract. Judges were persuaded that the novel use of state power to redress bargaining inequalities was justified because it was necessary to *preserve* neutrality and liberty.

My focus is on federal and state cases reviewing the constitutionality of labor laws from the mid-1880s to 1937. Contractual freedom during the

18. Bernstein, *Rehabilitating Lochner*, 14–22; and Phillips, *The Lochner Court*, 105–19. See also Mayer, *Liberty of Contract*, 30–32, 63–67. Bernstein and Phillips do recognize that the judiciary's presumption in favor of liberty was rebuttable, by showing that legislation was genuinely intended to protect weaker parties from economic exploitation. Bernstein, *Rehabilitating Lochner*, 48–53; and Phillips, *The Lochner Court*, 57, 128–29, 137–39. They do not explain why judges concerned to protect contractual liberty routinely authorized the use of state power to redress the effects of workers' bargaining disadvantage.

19. Cushman, "Varieties and Vicissitudes," 896–907, 924–44, 982–84, 999.

https://doi.org/10.1017/S0738248013000047 Published online by Cambridge University Press

Lochner period encompassed principally economic liberty, and cases involving employment laws were among the most controversial. Three types of statutes intruded into the nucleus of the employment contract: time and manner of wage payment, maximum hours, and minimum wages.[20] The Supreme Court's decision in *West Coast v. Parrish* (1937)—sustaining the constitutionality of Washington's minimum wage statute—brought the era to an end.[21] The history of due process challenges to these statutes reveals that, beginning in the last decade of the nineteenth century, courts were increasingly willing to allow legislatures to regulate labor relations. *Parrish* was not "a revolution in constitutional law."[22] It was, instead, the culmination of a trend whereby judges concluded that interference in employment negotiations was a reasonable way of safeguarding wage workers from the effects of economic exploitation.

Substantive Due Process

Substantive due process has a venerable history in Anglo-American law.[23] Its lineages are traced to *Magna Carta*, in which rebellious barons extracted from King John, among other concessions, the promise that

20. I do not address the legal controversy over workers' compensation statutes and laws prohibiting so-called yellow dog contracts, requiring workers to disassociate themselves from unions as a condition of employment. Although conflicting views of the market's fairness play a central role in these cases, they are complicated by special considerations and merit separate treatment. The constitutionality of compensation statutes involved the evolution of tort doctrine, from traditional to probabilistic conceptions of causation pioneered by the new science of accident statistics. See John Fabian Witt, *The Accidental Republic, Crippled Workingmen, Destitute Widows, and the Remaking of American Law* (Cambridge, MA: Harvard University Press, 2004), 126–207. The validity of statutes protecting labor unions required courts to reconcile contractual liberty with liberty of association. See Cushman, *Rethinking the New Deal Court*, 107–38.

21. Historians generally agree that *West Coast v. Parrish*, 300 U.S. 379 (1937), concluded this period of constitutional jurisprudence. There is less agreement about its starting-point. I chose the mid-1880s because *Godcharles v. Wigeman*, 113 Pa. 431 (1886) and *Millett v. People*, 117 Ill. 294 (1886) were the first decisions to strike employment legislation on substantive due process grounds. See Pound, "Liberty of Contract," 455, 471.

22. Gillman, *The Constitution Besieged*, 190. See also Fiss, *Troubled Beginnings*, 7–8; Horwitz, *The Transformation of American Law*, 7. My argument parallels Cushman's fine study showing that the Court's *Parrish* decision followed its more liberal precedents rather than abruptly breaking with its past. *Rethinking the New Deal Court*, 89–92, 104–5.

23. The phrase itself—"substantive due process"—is anachronistic, but the judiciary's use of due process to establish substantive constraints on legislative power dates to the beginning of the Republic. See John V. Orth, *Due Process of Law* (Lawrence: University Press of Kansas, 2003), 8–14; James W. Ely, Jr., "The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process," *Constitutional Commentary*, 16

https://doi.org/10.1017/S0738248013000047 Published online by Cambridge University Press

"no free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgment of his peers or by the law of the land."[24] Justice Chase offered the first reported account of the legal and moral wrong substantive due process was intended to forbid. In *Calder v. Bull* (1798), he contended that "an act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority." One of the most egregious violations of the fundamental pact was "a law that takes property from A. and gives it to B."[25] This formula was used to illustrate the meaning of the Constitution's Fifth Amendment, prohibiting the federal government from depriving any person "of life, liberty, or property, without due process of law," and of its reiteration, in the Fourteenth Amendment, extending the prohibition to the states. Following the Civil War, statutes taking from A and giving to B became "every … lawyer's favorite example of an unconstitutional statute."[26] "Taking from A and giving to B," writes Orth, "had become … the shorthand to describe what substantive due process was supposed to prevent."[27]

What is wrong with taking from A and giving to B? A's property rights, including property in one's labor, were not unlimited: they could be regulated to guard against harm to others or to the public. Among the more influential doctrines informing American understandings of public authority was the maxim *sic utere tuo ut alienum non laedas* (use your own so as not to injure another) of the common law of nuisance. In Freund's view, this was the source of the state's "police power," its authority to strike "at all gross violations of health, safety, order, and morals."[28] Its classic statement is Massachusetts Chief Justice Shaw's defense of legislative authority in *Commonwealth v. Alger* (1851): "We think it is a settled principle, growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an

(1999): 315–45; Bernstein, *Rehabilitating Lochner*, 8–9; and Mayer, *Liberty of Contract*, 20–21.

24. James C. Holt, *Magna Carta* (Cambridge: Cambridge University Press, 1965), 327.

25. *Calder v. Bull*, 3 U.S. 386 (1798), 388.

26. John Harrison, "Due Process and the Constitutional Text," *Virginia Law Review* 83 (1997): 506. See also McGehee, *Due Process of Law*, 22–23.

27. McGehee, *Due Process of Law*, 11.

28. Ernst Freund, *Standards of American Legislation* (Chicago: The University of Chicago Press, 1917), 66.

https://doi.org/10.1017/S0738248013000047 Published online by Cambridge University Press

equal right to the enjoyment of their property, nor injurious to the rights of the community."[29]

A norm of fairness governed substantive due process jurisprudence. Property rights could be regulated solely for public uses and ends. Courts reviewed legislation to constrain government's reach, so that A's property rights were not abridged to advance B's private interests. To do so was to inflict an undeserved loss on A, allowing B to gain wrongfully at A's expense. "Extreme instances of laws lacking in generality," explained McGehee, "are acts which forfeit or confiscate the life, liberty, or property of a private citizen, or citizens, by the mere edict of the legislature. . . . Confiscatory legislation of a civil character is as much opposed to due process of law as judgments of the legislature imposing penalties for a crime."[30] Burdick concluded that "the conception of due process does exclude legislation which inflicts inequality of burden, which is clearly arbitrary, and without any basis in reason."[31] Courts erected three constitutional barriers to the exercise of the police power: statutes satisfied due process if their ends were public, the means they adopted were reasonably related to accomplishing these ends, thereby minimizing burdens on private conduct, and everyone advantaged or burdened by regulations was treated alike. Therefore, in *Dent v. West Virginia* (1889), Justice Field wrote that "legislation 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."[32] Legislation failing to meet these requirements is arbitrary, favoring some classes over others, who are thereby unreasonably deprived of liberty and property rights.[33] In the words of Chief Justice Fuller's unanimous opinion in *Caldwell v. Texas* (1891), due process was "secured by laws operating on all like," prohibiting statutes that were "special, partial, and arbitrary."[34]

The ideology of free labor, predicated on the view that the marketplace gave everyone an equal opportunity to rise, informed American elites late into the nineteenth century. The state, not the market, was the principal threat to fairness. Jacksonians adopted the ideal of the neutral state to serve egalitarian ends: to prevent the wealthy from capturing state power

29. *Commonwealth v. Alger*, 61 Mass. 53 (1851), 84–85. See also *Lawton v. Steele*, 152 U.S. 133 (1894), 136.

30. McGehe, *Due Process of Law*, 64, 68.

31. Charles K. Burdick, *The Law of the American Constitution, Its Origin and Development* (New York: G.P. Putnam's Sons, 1926), 418–19.

32. *Dent v. West Virginia*, 129 U.S. 114 (1889), 124.

33. Bernstein, *Rehabilitating Lochner*, 9, 14, 16; and Mayer, *Liberty of Contract*, 31–32, 66, 85.

34. *Caldwell v. Texas*, 137 U.S. 692 (1891), 697–98. See also *Lawton v. Steele* (1894), 137.

https://doi.org/10.1017/S0738248013000047 Published online by Cambridge University Press

to create legal privileges they could exploit for gain.[35] This is the meaning of Justice Field's dissent in the *Slaughter-House Cases* (1873), often used to illustrate the origins of late nineteenth century substantive due process jurisprudence. The central issue was the constitutionality of a slaughterhouse monopoly created by the Louisiana legislature. For Field, steeped in Jacksonian values, commodity prices in competitive markets served as the measure of fair exchanges.[36] Louisiana's slaughterhouse was precisely an instance of using state power for undeserved gain that the Fourteenth Amendment was intended to prevent. The underlying wrong of monopoly is coercion. Field distinguished "slavery in the strict sense of the term," which he defined as "compulsory service for the mere benefit or pleasure of others," from involuntary servitude, which put smaller producers at a disadvantage by limiting their economic alternatives. "A prohibition to … pursue certain callings … would be almost as oppressive and nearly as great an invasion of his liberty as the compulsion which would force him to labor for the benefit or pleasure of another, and would equally constitute an element of servitude."[37] This prior coercion made exploitation possible. Privileged operators used their artificial advantage to charge what modern economists call "monopoly rents," so that, wrote Field, "every man who pursues the business of preparing animal food for market must take his animals to the buildings of the favored company … and for the use of the buildings must pay a prescribed tribute to the company."[38] Independent butchers were deprived of the right to pursue lawful callings without due process; to no public end, but only to allow the privileged to gain at their expense.

35. Gillman, *The Constitution Besieged*, 33–60; Forbath, "The Ambiguities of Free Labor," 772–86; Paul Kens, "*Lochner v. New York*: Tradition or Change in Constitutional Law?" *New York University Journal of Law and Liberty* 1 (2005): 416–17; and Paul Kens, "*Lochner v. New York*: Rehabilitated and Revised, but Still Reviled," *Yearbook of Supreme Court Historical Society* (1995): 41–43.

36. *Slaughter-House Cases*, 83 U.S. 36 (1873). See Gillman, *The Constitution Besieged*, 64–68; and Forbath, "The Ambiguities of Free Labor," 773–75. Manuel Cachán offers a more nuanced interpretation of Field's jurisprudence. "Justice Stephen Field and 'Free Soil, Free Labor Constitutionalism': Reconsidering Revisionism," *Law and History Review* 20 (2002): 541–76. Cachán rightly points out that "free labor" ideology was only one ingredient in Field's *Slaughter-House* dissent; an equally important component was "its ideological corollary, laissez-faire." Ibid., 567. However, there was no tension between free labor and laissez-faire principles as long the market distributed opportunity fairly. The rift between them opened by the third quarter of the nineteenth century, when deepening economic inequalities undercut the claim that market ordering offered an equal opportunity to rise. In these changed circumstances, Field's continuing commitment to laissez-faire rendered his jurisprudence increasingly conservative.

37. *Slaughter-House Cases*, 90–91.

38. Ibid., 92.

https://doi.org/10.1017/S0738248013000047 Published online by Cambridge University Press

The rise of a dependent working class challenged the claim that markets reliably protected employment relations from coercion. "The America of 1870," writes Montgomery, "largely rural though it remained, was already predominantly a nation of employees."[39] Deepening economic inequalities transformed the relationship between social classes and the state. Large employers did not need to use the government to put workers at a disadvantage. They encountered a vulnerable population they could exploit to increase profits. Jacksonian fears that special legislation fostered artificial concentrations of wealth became less pressing. The principal threat to liberty stemmed from private sources of power, not public law. Progressives turned to the state as the chief institutional vehicle for redressing economic inequalities. Redistributive policies intended to create greater social equality became a moral and political problem. They were also a constitutional one as courts faced the question of whether the police power permitted governments to intrude upon negotiations over the terms of employment.

Critics of the turn-of-the-century judiciary contend that its continuing fidelity to the view that labor markets were fair thwarted legislative efforts to regulate the employment contract. "Whether adjudicating a private law dispute or a challenge to a statute," contends McCurdy, "judges took it for granted that alleged disparities of bargaining power could not provide a ground of the decision."[40] "Acceptance of the argument that workers working in large industries were 'helpless' and in need of special protection," explains Gillman, "would have signaled the collapse of the long-standing distinction between legitimate public-purpose legislation and illegitimate class politics, at least as applied to most labor legislation."[41] Kens concurs, adding that adherence to a formal principle of impartiality against the background of increasing economic disparities divorced the tradition from its commitment to fairness. "The *Lochner* era's doctrine's concern for class legislation remained true to the aspect of Jacksonian democracy that favored government neutrality, but not to its underlying ideals. *Lochner* era doctrine did not advocate government neutrality in order to reduce the power of wealth and privilege or to preserve democracy. It was driven by a fear that the working of democracy might undermine the economic and social system that had created that wealth. In essence, it turned the ideal of Jacksonian democracy on its head."[42]

39. David Montgomery, *Beyond Equality, Labor and the Radical Republicans, 1862–1872* (New York: Afred A. Knopf, 1967), 28.

40. McCurdy, "The 'Liberty of Contract' Regime in American Law," 178. See also Mayer, *Liberty of Contract*, 76; and Horwitz, *The Transformation of American Law*, 33–34.

41. Gillman, *The Constitution Besieged*, 89.

42. Kens, "*Lochner v. New York*: Tradition or Change in Constitutional Law?" 417.

https://doi.org/10.1017/S0738248013000047 Published online by Cambridge University Press

The fate of time and manner of payment regulations before the courts, however, tells a different story: following an initial period of hostility, state and federal courts gradually turned back due process attacks against wage regulations. Judges' growing recognition that labor relations were unfair undermined constitutional protection of the employment contract. Courts authorized the extension of the state's police power to redress the wrong of hard bargains, in which employers took unfair advantage of wage workers' economic inequality.

Time and Manner of Payment

Employers used a variety of payment strategies to erode earnings: long payment periods forced workers to seek credit between paydays; workers discharged for cause or leaving without cause forfeited unpaid wages, and workers owed wages were required to wait until the next payday; payment in store orders or scrip could only be redeemed for inflated prices at company stores; and various methods of weighing coal undercounted the amount mined for the purposes of determining wages.[43] Beginning in the last quarter of the nineteenth century, state legislatures enacted measures—for example, requiring payment at short intervals and in lawful money—to protect earnings. All of the initial regulations of the manner and time of payment were struck by state courts on substantive due process grounds. Their decisions bristled with free labor assumptions. They distinguished sharply between traditional common law incapacities, which provided legitimate grounds for constraining contractual liberty, and economic disparities, which did not. Courts repudiated the claim that bargaining inequalities allowed employers to gain unfairly at wage laborers' expense.[44] Wage regulations were seen

43. Gillman, *The Constitution Besieged*, 89–92; Forbath, "The Ambiguities of Free Labor," 796–800; Urofsky, "State Courts and Protective Legislation," 81–82; Carl E. McGowan, "The Divisibility of Employment Contracts," *Iowa Law Review* 21 (1935): 69–72; Harper, "Due Process of Law in State Labor Legislation," 767–72; [Anon.] "Constitutional Law: Police Regulations for the Protection of Laborers," *The American Law Review* 24 (1890): 328–29; and [Anon.] "Constitutionality of Statutes Requiring Corporations to Pay Employees' Wages in Money," *University of Pennsylvania Law Review* 56 (1908): 194–97.

44. The two pioneering cases are *Godcharles v. Wigeman*, 113 Pa. 431 (1886), in which Pennsylvania's Supreme Court invalidated an act regulating wage payment in the mining industry, and *Millet v. People*, 117 Ill. 294 (1886), in which the Supreme Court of Illinois struck a similar law. For state court decisions striking time and manner of wage payment regulations, see also *State v. Goodwill,* 33 W. Va. 179 (1889); *Commonwealth v. Perry*, 155 Mass. 117 (1891); *Frorer v. People*, 141 Ill. 171 (1892); *State v. Loomis*, 115 Mo. 307 (1893); *Johnson v. Goodyear Mining Co.*, 127 Cal. 4 (1899); *State of Kansas v. Haun*, 61 Kan. 146 (1899); *Republic Iron & Steel Co. v. State*, 160 Ind. 379 (1903); *State v. Missouri*

https://doi.org/10.1017/S0738248013000047 Published online by Cambridge University Press

as the product of political opportunism, distorting market outcomes and arbitrarily advantaging favored classes. The suspicion, wrote Judge Peckham in *People v. Gillson* (1888), was that legislation of this kind, "which has been so frequent of late," is enacted to "protect some class in the community against the fair, free and full competition of some other class, the members of the former class thinking it impossible to hold their own against such competition, and . . . flying to the legislature to secure some enactment which shall operate favorably to them or unfavorably to their competitors in the commercial, agricultural, manufacturing or producing fields."[45]

Beginning in the 1890s, however, progressive arguments gained traction in state courts, which demonstrated a new concern to block contracts in which A took unfair advantage of B's necessity.[46] The Supreme Court of Rhode Island, in *State v. Brown & Sharpe Manufacturing* (1892), pointedly rejected a free labor rationale in sustaining a statute requiring weekly wage-payment. The workers' negotiating disadvantage undermined consent:

> If it be said that, however rich and powerful corporations may be, and however poor and weak their employees, the latter are not obliged to work for the former, and, if they choose to work for corporations, they can . . . make such agreements as they see fit and thus protect themselves, then it may be replied that poverty and weakness can wage but an unequal contest with corporate wealth and power, and that the legislature in granting valuable corporate powers and privileges might be willing to do it . . . only on condition of minimizing corporate power to drive hard bargains with their employees, who, too often in the sharp and bitter competition for work, have to submit to such terms and conditions as their employers see fit to prescribe.[47]

Tie & Timber Co., 181 Mo. 536 (1904); *Kellyville Coal Co. v. Harrier*, 207 Ill. 624 (1904); and *State v. Potomac Valley Coal Co.*, 116 Md. 380 (1911). Not surprisingly, scholarly discussions of the judiciary's hostility to wage regulation normally begin here, but they generally neglect the line of cases, beginning at the turn of the century, in which state courts rejected due process attacks on time and manner of payment laws. These cases are largely ignored by Gillman, *The Constitution Besieged*; McCurdy, "The 'Liberty of Contract' Regime in American Law;" Horwitz, *The Transformation of American Law*; Forbath, "The Ambiguities of Free Labor;" and Sunstein, "*Lochner*'s Legacy." They are, however, an important first test of the courts' willingness to sustain government intervention in wage negotiations.

45. *People v. Gillson*, 109 N.Y. 389 (1888), 399.

46. See the dissenting opinions in *Commonwealth v. Perry*, 155 Mass. 117 (1891) and *State v. Loomis*, 115 Mo. 307 (1893), supporting labor legislation to redress bargaining inequalities. See also Judge Smith's complaint in *Kansas v. Haun*, 61 Kan. 146 (1899), 162, invalidating an anti-scrip law, that "some judges" justified "legislation of this kind upon the theory that, in the exercise of police power, a limitation necessary for the protection of one class of persons against the persecution of another class may be placed upon freedom of contract."

47. *State v. Brown & Sharpe Manufacturing*, 18 R.I. 16 (1892), 34–35.

https://doi.org/10.1017/S0738248013000047 Published online by Cambridge University Press

The purpose of the statute "is to protect the employees of corporations from what has been termed 'the greed of corporate capital'."[48] The court appealed to what had by then become "common knowledge:" "that whereas corporations, owing to this very corporate power of aggregating capital, are the richest and strongest bodies as a rule, in the State, their employees are often the weakest and least able to protect themselves, frequently being dependent upon their current wages for their daily bread."[49]

The end of the nineteenth century marked a turning point.[50] Judges rejected due process challenges to wage payment statutes with increasing frequency and confidence.[51] State courts routinely held that disproportionate bargaining power provided a valid ground for government intervention. Judges in these cases did not question the premise that the market established the measure of fairness, so that employers owed workers the competitive wage rate for their labor. But a commitment to the fairness of market relations did not entail a judicial commitment to shield contractual liberty from protective legislation. Rather, judges stressed that employers

48. Ibid., 33.

49. Ibid., 33–34. See also *State v. Peel Splint Coal Co.*, 36 W. Va. 802 (1892), 829 [Rehearing].

50. Urofsky, "State Courts and Protective Legislation," 81; Harper, "Due Process of Law in State Labor Legislation," 770–71; and Pound, "Liberty of Contract," 478. The grounds of the decisions were at first restricted to the states' authority to amend or repeal acts of incorporation in the public interest. They did not extend to natural persons. The states' authority was not unlimited, however, and courts faced the question whether changes in corporate charters satisfied substantive due process. See, for example, *Leep v. Railway Co*., 58 Ark. 407 (1894), striking an Arkansas act requiring wage payment on the day of discharge for natural persons, but sustaining the statute for corporations. By the end of the century, however, many state courts eliminated the distinction between licensed corporations and natural persons. There were successful challenges to statutes regulating time and manner of wage payment after 1900, but they became increasingly rare: see *Republic Iron & Steel Co. v. State*, 160 Ind. 379 (1903); *State v. Missouri Tie & Timber Co*., 181 Mo. 536 (1904); *Kellyville Coal Co. v. Harrier*, 207 Ill. 624 (1904); *Jordon v. State*, 103 S.W. 633 (1907); and *State v. Potomac Valley Coal Co.*, 116 Md. 380 (1911).

51. In addition to the cases discussed pp. 14–20, the following state court cases sustained time and manner of payment laws. For statutes requiring payment in legal money, see *Dayton Coal & Iron v. Barton*, 103 Tenn. 604 (1899); *Johnson Lyttle & Co. v. Spartan Mills*, 68 S.C. 339 (1904); *Regan v. Tremont Lumber Co*., 134 La. 199 (1914); and *Atkins v. Grey Eagle Coal Co.*, 76 W. Va. 27 (1915). For regular wage payment laws, see *Opinion of the Justices*, 163 Mass. 589 (1895); *Seelyville Coal Co. v. McGlosson*, 166 Ind. 561 (1906); *Lawrence v. Rutland Railroad Co*., 80 Vt. 370 (1907); *Arkansas Stave Co. v. State*, 94 Ark. 27 (1910); *New York Central and Hudson River Railroad Co. v. Williams*, 199 N.Y. 108 (1910); *State v. Missouri Pacific Railroad*, 242 Mo. 339 (1912); and *Manford v. Singh*, 40 Cal. App. 700 (1919). For statutes regulating manner of determining miners' wages, see *Kansas v. Wilson*, 61 Kan. 32 (1899); and *McLean v. State*, 81 Ark. 304 (1906). See also *International Text-Book v. Weissinger*, 160 Ind. 349 (1902), prohibiting future wage assignments.

https://doi.org/10.1017/S0738248013000047 Published online by Cambridge University Press

gained undeservedly at workers' expense, reducing actual earnings below labor's contract price, because workers' necessitous circumstances made it difficult for them to defend their interests. In *Harbison v. Knoxville Iron* (1899), the Tennessee Supreme Court upheld a law requiring wage payment in legal money. The court ruled that the statute was not class legislation in that "it is … certainly general in its terms, embracing equally every employer and employee who is or may be in like situation and circumstances."[52] Moreover, and more importantly, the court held "that the limitation placed upon the right of contract by this Act is not arbitrary and oppressive, but entirely just and reasonable."[53] The state rightfully preserved the full value of the wage contract by blocking its harsh terms. "The Legislature," explained Judge Caldwell, "evidently deemed the laborer at some disadvantage … and, by this Act, undertook to ameliorate his condition … by enabling him … at his election and at a proper time, to demand and receive his unpaid wages in money rather than in something less valuable. Its tendency, though slight it may be, is to place the employer and employee upon equal ground in the matter of wages…. This alone commends the Act and entitles it to a place on the statute book as a valid police regulation."[54] The laborer's "condition is bettered by the Act, in that it naturally enables him to get a better price for … his labor; and yet, although the [employer] may not in that transaction realize the expected profit, … it in no event pays more in dollars and cents for the labor than the contract price."[55]

Legislation regulating the manner of payment was additionally "calculated to promote the public peace and good order, and to lessen the growing tendency to strife, violence, and even bloodshed in certain departments

52. *Harbison v. Knoxville Iron*, 103 Tenn. 421 (1899), 438. *Harbison* was affirmed by the United States Supreme Court in *Knoxville Iron Co. v. Harbison*, 183 U.S. 13 (1901).

53. Ibid., 443.

54. Ibid., 440, 443.

55. Ibid., 440. Caldwell approvingly cited the language of the United States Supreme Court in *Holden v. Hardy*, 169 U.S. 366 (1898), acknowledging that workers suffered from disparities in bargaining power that made them especially susceptible to employer overreaching. Ibid., 444. He also drew on *Holden* to underscore the irony in the claim, offered by counsel for the employer, that the law "violated his right to contract as he pleased. To that contention the Court aptly replied: 'The argument would certainly come with better grace and greater cogency from the latter class.'" Ibid., 445. Two state appellate courts also cited *Holden*'s finding that workers were economically vulnerable. See *Kansas v. Wilson*, 7 Kan. App. 428 (1898), 436–37, sustaining a statute regulating the weighing of coal, and *New York Central and Hudson River Railroad Co. v. Williams*, 64 Misc. 15 (1909), 28–29, upholding a law requiring semimonthly payment in cash. Both cases were affirmed on appeal by the states' high courts: *State v. Wilson*, 61 Kan. 32 (1899); and *New York Central and Hudson River Railroad Co. v. Williams*, 199 N.Y. 108 (1910). *Holden*'s influence on rulings on labor legislation is discussed, pp. 22–26.

https://doi.org/10.1017/S0738248013000047 Published online by Cambridge University Press

of important trade and business."[56] Caldwell argued that the police power "is an important and comprehensive one, and its application must be expected and allowed to expand and take in new subjects from time to time, as trade and business advance and new conditions arise."[57] Legislation intended to maintain labor peace was well within its purview. He stressed that good order in labor relations was predicated on fair relations between the contending classes: the act "is neither prohibitory nor penal, not special but general, tending toward equality between employer and employee in the matter of wages, intended and well calculated to promote peace and good order, and to prevent strife, violence and bloodshed."[58]

Neutrality was preserved rather than impaired by legislation barring harsh agreements between unequal parties. The Indiana Supreme Court sustained a law requiring weekly wage payment, holding that "a large proportion of the persons affected by these statutes of labor are dependent upon their daily or weekly wages for the maintenance of themselves and their families. Delay of payment or loss of wages results in deprivation of the necessaries of life . . . and, in many cases, may make the wage-earner a charge upon the public. The situation of these persons renders them peculiarly liable to imposition and injustice at the hands of employers, unscrupulous tradesmen, and others who are willing to take advantage of their condition."[59] In South Carolina, the Supreme Court sustained a law blocking payment in store orders reasoning that its purpose "is to protect *all* laborers from coercion by employers to compel laborers to receive, as wages for labor, goods, wares or merchandise or supplies in lieu of lawful money." Store orders created "an opportunity for apprehension in enabling the unscrupulous employer to take advantage of the necessities of the laborer, and demand extortionate prices for the merchandise. The statute seeks to remove this inequality between the employer and employee by making such checks . . . negotiable and redeemable in cash under specified conditions and at stated times."[60] The Supreme Court of Washington sustained a statute requiring wage payment upon discharge,

56. *Harbinson v. Knoxville Iron*, 443–44.

57. Ibid., 441.

58. Ibid., 447.

59. *International Text-Book v. Weissinger*, 160 Ind. 349 (1902), 354. The Indiana statute also prohibited future wage assignments, whereby workers would guarantee small loans by promising a portion of their next paycheck. See, also, the Supreme Court's ruling in *Mutual Loan Co. v. Martell*, 222 U.S. 225 (1911), sustaining a Massachusetts law prohibiting wage assignments. Both cases stressed the need to protect wage workers from being taken advantage of by unscrupulous lenders.

60. *Johnson v. Spartan Mills*, 68 S.C. 339 (1904), 360.

https://doi.org/10.1017/S0738248013000047 Published online by Cambridge University Press

ruling that protective labor legislation, in the form of time and manner of payment statutes, was a legitimate exercise of the police power: "We think the practice, pursued by certain employers of labor, of paying the wages of their employees in orders drawn upon stores redeemable in commodities other than lawful money of the United States, and of postponing the day of payment until long after the wages were earned, was a real evil, operating to the detriment of the wage earner, and consequently to the detriment of the state. As such the practices were subject to correction by the legislature, and its act in that regard was well within the rules of sound public policy."[61]

Among the last of the state cases in this vein is *State v. Missouri Pacific* (1912), in which the Missouri Supreme Court sustained an act requiring semimonthly wage payments. Counsel for the railroad cited a number of cases, most prominently *Godcharles v. Wigeman* (1886) and *State v. Loomis* (1893), in which time and manner of payment legislation was struck as a violation of due process. The Missouri Supreme Court repudiated their authority because they failed to take economic disparities into account:

> they hold that the State and Federal Constitutions … so curtail and abridge [the police power] that no State may enact any law regulating private contracts between its citizens, even though such laws are needed to protect the weak from the strong and prevent wealthy and provident persons and corporations from making harsh, usurious or unjust contracts with their less provident neighbors…. According to the logic of those cases upon which defendant mostly relies, Constitutions were intended to serve as chains or shackles upon the people of the State, to prevent them from enacting such laws as will abridge the right of the cunning or powerful to oppress the weak.[62]

61. *Shorthall v. Puget Sound Bridge Co*., 45 Wash. 290 (1907), 294–95. "Acts of this nature," concluded the Court, "have been passed by the majority of the states of the Union, and are supported by the great weight of the decisions of the state courts and by the supreme court of the United States." The court appealed to a number of authorities, including *State v. Peel Splint Coal Co*. (1892); *State v. Brown & Sharpe Mfg. Co*. (1892); *St. Louis, Iron Mountain & Southern Railway Co. v. Paul* (1897); *Harbison v. Knoxville Iron Co*. (1899); *Opinion of the Justices* (1895); *St. Louis, Iron Mountain and St. Paul Railway Co.* (1899); and *Knoxville Iron Co. v. Harbison* (1901).

62. *State v. Missouri Pacific*, 242 Mo. 339 (1912), 360. The Missouri court's conclusion is also worth noting: "By common consent, in all civilized communities, an implied duty rests upon the State to aid those unfortunates who through sickness, old age, extreme poverty or other mischance are unable to supply themselves with those things which are necessary for their continued existence, and consequently any law which encourages people to work by holding out assurances that they shall promptly receive the wages they may earn … tends to encourage honest effort, and helps to build up an industrious, thrifty and self-respecting

https://doi.org/10.1017/S0738248013000047 Published online by Cambridge University Press

The Supreme Court was more receptive to wage regulations than state courts, sustaining every time and manner of wage payment statute it reviewed. In *St. Louis, Iron Mountain and St. Paul Railway Co. v. Paul* (1899), the Court affirmed a ruling by the Arkansas high court rejecting a due process challenge to a law requiring railroads to pay their workers all wages owed at the cessation of employment.[63] The Supreme Court drew principally on the opinion of the Arkansas court in *Leep v. Railway Co*. (1894), ruling that the legislation legitimately protected workers by preventing employers from eroding their earnings. To require railroads to disburse all "unpaid wages earned at the contract rate at the time of the discharge" secured to workers the market price of their labor without unjustly impairing the railroad's profitability.[64] Moreover, the statute served a public purpose in protecting the state's workers from exploitation: "If the legislature … seeing that their employees are and will be persons dependent on their labor for a livelihood, and unable to work on a credit, should find that better servants and service could be secured by the prompt payment of their wages on the termination of their employment … it might require them to pay for the labor of their employees … at the end of their employment."[65]

The Supreme Court decided three influential wage-payment cases in the first decade of the twentieth century. In *Knoxville Iron Co. v. Harbison* (1901) and *Dayton Coal and Iron Co. v. Barton* (1901), the Court affirmed the Tennessee Supreme Court's ruling in favor of a statute requiring payment in legal money, stating that the state court "justified its conclusions by so full and satisfactory a reference to the decisions of this court as to render it unnecessary for us to travel over the same ground" and quoting extensively from its opinion, in particular the paragraphs highlighting

---

people, who, instead of becoming paupers, will be able to pay their debts, and being protected by the State in their efforts to better their condition, will have a direct interest in maintaining their protector, and in its good order, morals and general welfare." Ibid., 376.

63. *St. Louis, Iron Mountain and St. Paul Railway v. Paul*, 173 U.S. 404. See *St. Louis, Iron Mountain & Southern Railway Co. v. Paul*, 64 Ark. 83 (1897). The Supreme Court, like the Arkansas court, sustained the law only as it affected corporations, under the state's authority to amend corporate charters; the law was held unconstitutional as it affected natural persons. Railroads were also firms clothed with a public interest, having special duties to the public. The state still faced the burden of showing that the corporate charter was amended for legitimate public aims, to correct an evil that had proven injurious to the public interest.

64. *St. Louis, Iron Mountain and St. Paul Railway Co. v. Paul*, 408. The high court quoted the Arkansas court in *Leep v. Railway Co.*, 438.

65. *St. Louis, Iron Mountain and St. Paul Railway v. Paul*, 407. The statute, explained the Arkansas court, ameliorated "that discontent produced by the non-payment of wages upon discharge which may lead to 'strikes,' and consequent injury to the public." *St. Louis, Iron Mountain*, 92.

https://doi.org/10.1017/S0738248013000047 Published online by Cambridge University Press

the legislature's legitimate concerns with redressing bargaining inequalities.[66] *McLean v. Arkansas* (1909) affirmed the ruling of the Supreme Court of Arkansas rejecting a due process claim that a coal weighing statute restricted contractual liberty. Writing for the majority, Justice Day acknowledged that the marketplace failed to order class relations in the mines harmoniously and without coercion. Particularly troublesome was the employers' use of screens to separate rock from coal before weighing it to ascertain miners' wages. An extensive study of labor relations concluded that "disputes concerning the introduction and use of screens had led to frequent and sometimes heated controversies between the operators and the miners."[67] Arkansas's law barred the use of screens and voided contracts contrary to its provisions. Laws intended "to prevent fraud and to require honest weights and measures," stated Day, serve a legitimate public purpose "although in compelling certain modes of dealing they interfere with the freedom of contract."[68] But the statute did not address dishonest practices so much as establish a fairness benchmark to ascertain the coal's weight for the purpose of determining miners' pay.[69] In effect, the legislature took clear sides in the labor dispute, blocking contracts for wages on the basis of the weight of screened coal rather than coal mined. The Court upheld the law, reasoning that use of the screens lowered the value of miners' wages below their contract rate: "the validity of this law" is "its tendency . . . to require the miner to be honestly paid for the coal actually mined and sold. . .. The miner is deprived of a portion of his just dues when paid upon the basis of screened coal."[70] Powerful employers are thus precluded from overreaching. The report, concluded Day, persuaded a majority of the Court that the law was not unreasonably related to "the protection of a large class of laborers in the receipt of their just dues and the promotion of the harmonious relations of capital and labor engaged in a great industry in the State."[71]

66. *Knoxville Iron Co. v. Harbison*, 183 U.S. 13 (1901), 20–21; and *Dayton Coal and Iron Co. v. Barton*, 183 U.S. 23 (1901). See also *Patterson v. Eudora*, 190 U.S. 169 (1903), upholding an act of Congress making it unlawful to pay seamen's wages in advance.

67. *McLean v. Arkansas*, 211 U.S. 539 (1909), 549.

68. Ibid., 550.

69. In *Rail & River Coal Co. v. Yaple*, 236 U.S. 338 (1915), 345, the high court quoted a report by the Ohio Coal Mining Commission explaining why the screen system "was regarded as objectionable to the miners:" "they were not paid for mining a considerable quantity of marketable coal, and there was dissatisfaction because of the wearing of the screens so as to increase the size of the apertures between the bars above the standard."

70. *McLean v. Arkansas*, 551.

71. Ibid., 550. These three cases were decided by a 7–2 majority, with Brewer and Peckham, the two more conservative Justices, dissenting without comment. *St. Louis, Knoxville, Dayton* and *McLean* were the main precedents for four time and manner of payment decisions, all unanimous, from the second decade of the twentieth century: *Mutual*

https://doi.org/10.1017/S0738248013000047 Published online by Cambridge University Press

Acknowledging that bargaining inequalities rendered wage workers exploitable was one aspect of the judicial calculation of unfairness. Workers did not have enough to sustain themselves if they refused employment, allowing employers to take advantage of their economic weakness to drive hard bargains. The second consideration is the standard judges used to determine what fairness required.[72] *Lochner* era judges were perhaps persuaded of the justice of time and manner of payment legislation because the market price served as the normative benchmark of a just wage. The complaint was that employers' economic power enabled them to pay workers less than the full value of wages set by competitive markets. Blocking contracts whereby employers paid in scrip or store orders, used screens in weighing coal, or required lengthy pay periods, limited the employers' profit, but did not require them to pay more than the market price for labor.[73] Would turn-of-the century courts sustain legislative efforts to void employment contracts that violated *nonmarket* benchmarks of well-being? States were permitted under the police power to intervene in the market to enforce public norms of health, safety, welfare, and morals. Courts still needed to rule, however, whether states could deploy the police power to establish public standards of what workers were owed, voiding employment contracts that failed to satisfy these standards.

The Legal Working Day

The struggle to limit the working day became one of the main efforts of wage workers and their progressive allies during the last half of the nineteenth century.[74] Their successes in winning legislative approval for

Loan Company v. Martell, 222 U.S. 225 (1911), preventing a loan company from enforcing an assignment of future wages; *Erie Railroad Company v. Williams*, 233 U.S. 685 (1914), requiring a railroad company to pay its employees every 2 weeks; *Keokee Consolidated Coke Co. v. Taylor*, 234 U.S. 224 (1914), requiring payment in lawful money; and *Rail & River Coal Co. v. Yaple*, 236 U.S. 238 (1915), denying injunctive relief to a company from an order by the Ohio industrial commission prohibiting the use of screens in weighing coal for the purpose of determining wages.

72. Two characteristics define hard bargains: a normative standard of fairness, establishing what the parties to an exchange are due, and a disadvantaged party, whose vulnerability renders it exploitable, so that the other party gains undeservedly at its expense. For excellent analyses of the concept of exploitation, see Robert Mayer, "What's Wrong with Exploitation," *Journal of Applied Philosophy* 24 (2007): 137–50; and Robert Mayer, "Sweatshops, Exploitation, and Moral Responsibility," *Journal of Social Philosophy* 38 (2007): 605–19.

73. See *Harbison v. Knoxville*, 440.

74. Daniel T. Rodgers, *The Work Ethic in Industrial America, 1850–1920* (Chicago: University of Chicago Press, 1978), 155–60; and Montgomery, *Beyond Equality*, 230–60.

https://doi.org/10.1017/S0738248013000047 Published online by Cambridge University Press

maximum hours laws were attacked in the courts as violations of substantive due process. With some notable exceptions, these challenges failed.[75] State and federal courts steadily if unevenly upheld statutes expanding the exercise of the police power to restrict working hours, beginning in the late 1890s until the ruling of the Supreme Court in *Bunting v. Oregon* (1917), sustaining an hours law for industrial employees, brought the legal controversy to an end.[76] Substantive due process jurisprudence was far more receptive to the problem of bargaining disparities than its critics contend. The hours cases were no exception: the judiciary became increasingly willing to permit states to regulate a core term of the employment contract, enforcing nonmarket standards of what constitutes a legal day's labor.

The most controversial constitutional issues in substantive due process cases involved statutes limiting the working day of adult male laborers in private firms. Laws establishing maximum working hours for women and children rarely failed in the courts on the ground that their physical frailty and incapacity justified protective legislation.[77] Employment regulations covering workers for the state, state contractors, and firms affected

---

For workers, the struggle for the shorter workday was chiefly motivated by considerations of economic fairness. See Paul Kens, *Judicial Power and Reform Politics, The Anatomy of Lochner v. New York* (Lawrence: University of Kansas Press, 1990), 14–22.

75. The most prominent was *Lochner v. New York* (1905). See also *Low v. Rees Printing Co*., 41 Neb. 127 (1894); *Wheeling Bridge and Terminal Railway Co. v. Gilmore*, 8 Ohio C. C. 658 (1894); *Re Eight Hour Law*, 21 Colo. 29 (1895); *In re Morgan*, 26 Colo. 415 (1899); *State v. Miksicek*, 225 Mo. 561 (1910); *State v. Barba*, 132 La. 768 (1913); and *Commonwealth v. Boston & M.R.R.*, 222 Mass. 206 (1915).

76. *Bunting v. Oregon*, 243 U.S. 426 (1917). See Alexander M. Bickel and Benno C. Schmidt, Jr., *The Judiciary and Responsible Government, 1910–1921*, vol. 9 *of History of the Supreme Court of the United Sates* (Cambridge: Cambridge University Press, 1984), 600; Cushman, "Varieties and Vicissitudes," 983; Gillman, *The Constitution Besieged*, 146; and Harper, "Due Process of Law in State Labor Legislation," 619–24.

77. For Supreme Court cases sustaining maximum hours statutes for women, see *Muller v. Oregon*, 208 U.S. 412 (1908); *Sturges v. Beauchamp*, 231 U.S. 320 (1913); *Riley v. Massachusetts*, 232 U.S. 671 (1914); *Hawley v. Walker*, 232 U.S. 718 (1914); *Miller v. Wilson*, 236 U.S. 373 (1915); *Bosley v. McLaughlin*, 236 U.S. 385 (1915); *Dominion Hotel v. Arizona*, 249 U.S. 265 (1919); and *Radice v. New York*, 264 U.S. 292 (1924). For state court cases, see *Commonwealth v. Hamilton Manufacturing*, 120 Mass. 383 (1876); *Commonwealth v. Beatty*, 15 Pa. Super. 5 (1900); *Wenham v. State*, 65 Neb. 394 (1902); *State v. Buchanan*, 29 Wash. 602 (1902); *State v. Muller*, 48 Ore. 252 (1906); *State v. Shorey*, 48 Ore. 396 (1906); *Ritchie & Co. v. Wayman*, 244 Ill. 509 (1910); *State v. Somerville*, 67 Wash. 638 (1912); *People v. Schweinler Press*, 214 N.Y. 395 (1915); and *State v. Collins*, 47 S.D. 325 (1924). The major exceptions, in which state courts struck statutes regulating women's working day, were *Ritchie v. People*, 155 Ill. 98 (1895); *People v. Williams*, 189 N.Y. 131 (1907); and *Burcher v. People*, 41 Colo. 495 (1907). The Illinois court reversed course in *Ritchie & Co. v. Wayman* (1910), and the New York Court of Appeals overruled *Williams* in *People v. Schweinler Press*, 214 N.Y. 395 (1915).

https://doi.org/10.1017/S0738248013000047 Published online by Cambridge University Press

with a public interest also met with general judicial approval. States had the authority to determine their own employment terms, and to legislate for firms, for example, railroads, that had undertaken special duties to the public.[78] The traditional police power rationale, however, did not extend to private firms employing legally competent workers. Could states legitimately take sides in their employment negotiations?

The Supreme Court faced this question in *Holden v. Hardy* (1898).[79] This was the first time the Justices "had the opportunity to review a state labor law and join . . . debates" about its constitutionality.[80] They sustained a statute, enacted by Utah in 1896, creating an 8 hour day for underground miners, reasoning that limiting their working hours was necessary to safeguard their health and safety. Justice Brown, writing for the majority, began by exploring the boundaries of the state's police power. Neutrality provided the principal substantive constraint on legislative interference with contractual prerogatives.[81] Courts reviewed the state's authority, so that it "cannot be put forward as an excuse for oppressive and unjust legislation."[82] Nevertheless, he wrote, "the law is a progressive science."[83] "While the cardinal principles of justice are immutable," courts must permit states to adapt their policies to new circumstances.[84] Due process is one of those "natural and inherent principles of justice" prohibiting governments from taking anyone's property for another's or the public's benefit without compensating the owner.[85] The question now was the application of this principle in the changing conditions of an industrializing America. We are no longer, wrote Brown, "purely an agricultural people," where "the occasion for any special protection of a particular class did not exist."[86] Two recent economic developments demanded legislative attention: "the new relations between employers and employees," and the "enormous increase in the number of occupations which are dangerous, or so far

78. For United States Supreme Court cases, see *U.S. v. Martin*, 94 U.S. 400 (1876); *Atkin v. United States*, 191 U.S. 207 (1903); *Ellis v. United States*, 206 U.S. 246 (1907); *United States v. Garbish*, 222 U.S. 257 (1911); and *Heim v. McCall*, 239 U.S. 175 (1915). For state courts, see *Ex Parte Kuback*, 85 Cal. 274 (1890); *State v. Atkin*, 64 Kan. 174 (1902); and *In re Broad*, 36 Wash 449 (1904).

79. My interpretation of this case is indebted to communications with Professor Barry Cushman.

80. Gillman, *The Constitution Besieged*, 120.

81. *Holden v. Hardy*, 383; see also 390–91.

82. Ibid., 392, quoting *Lawton v. Steele*, 136.

83. Ibid., 385.

84. Ibid., 387.

85. Ibid., 390.

86. Ibid., 393.

https://doi.org/10.1017/S0738248013000047 Published online by Cambridge University Press

detrimental to the health of employees as to demand special precautions for their well-being and protection."[87]

The police power provided the chief warrant for Utah's statute. The characteristic dangerousness of these occupations authorized the legislature to limit working hours. Brown drew an analogy between the hours law and the myriad regulations states enacted to improve the safety of urban accommodations, manufacturing firms, and underground mining, especially statutes mandating workplace health and safety measures.[88] These regulations, he underscored, had been uniformly sustained by the courts. Accordingly, wrote Brown, turning to the instant case, "upon the principles . . . stated, we think the act in question may be sustained as a valid exercise of the police power. . .. These employments, when too long pursued, the legislature has judged to be detrimental to the health of the employees, and, so long as there are reasonable grounds for believing that this is so, its decision upon this subject cannot be reviewed by the Federal courts."[89] He confined the law's reach "to the protection of that class of people . . . subjected by their employment to the peculiar conditions and effects attending" underground mining and smelters.[90] The state's power "legitimately exercised can neither be limited by contract nor bartered away by legislation."[91] Brown's opinion, however, did not conclude with the claim that dangerousness was a touchstone distinguishing a legitimate exercise of the police power from impermissible class legislation. He introduced an additional ground for the decision: that bargaining inequalities precluded miners from negotiating safe terms of employment.[92]

Why did Brown raise this controversial claim? His language suggests that the discussion of workers' bargaining disadvantage was intended to

87. Ibid., 387, 391–92.

88. "Within this general category are ordinances providing for fire escapes for hotels, theatres, factories and other large buildings, a municipal inspection of boilers, and appliances designed to secure passengers upon railways and steamboats. . .. In States where manufacturing is carried on . . . provision is made for the protection of dangerous machinery against accidental contact, for the cleanliness and ventilation of working rooms, for the guarding of well holes, stairways, elevator shafts and for the employment of sanitary appliances. In others, where mining is the principal industry, special provision is made for the shoring up of dangerous walls, for ventilation shafts, bore holes, escapement shafts, means of signaling the surface, for the supply of fresh air and the elimination . . . of dangerous gases, for safe means of hoisting and lowering cages, for a limitation upon the number of persons permitted to enter a cage, that cages shall be covered, and that there shall be fences and gates around the top of shafts, besides other similar precautions." *Holden v. Hardy*, 393–94.

89. Ibid., 395.

90. Ibid., 396.

91. Ibid., 392.

92. Ibid., 397.

https://doi.org/10.1017/S0738248013000047 Published online by Cambridge University Press

rebut the free labor assumptions that shielded the employment contract from the reach of the police power. The analogy between workplace safety and maximum hours was insufficient to sustain Utah's statute. Judges generally agreed that workplace safety lay at the periphery of employment negotiations, so that statutes mandating precautions did not implicate contractual liberty. The police power was alone sufficient authority. They did not require, and courts upholding them did not offer, an explanation that workers were in need of special protective legislation.[93] The hours statute, in contrast, intruded upon the core of the employment contract that Montgomery called its "sanctum sanctorum."[94] Brown's observations were therefore necessary to justify bringing the hours term of the contract within traditional police power jurisprudence, and not subject to significantly more exacting scrutiny because it chafed against the premises of free labor ideology. He had pointed to other precedents—laws regulating lotteries and intoxicating liquor, and statutes limiting the working hours of women and children—that protected vulnerable parties from harm to themselves and others.[95] Until the *Holden* Court, however, judges had repeatedly rejected the claim that adult males were economically disadvantaged in a way that justified legislation to protect their welfare.[96]

93. Ibid., 394. The constitutionality of workplace safety laws was fully accepted even by the most libertarian judges, who normally rejected regulation of the employment contract. Thus, striking a maximum hours law for women, Justice Magruder distinguished those sections of the law mandating sanitary conditions in the workshops, with which he had no quarrel, from the hours provisions, on the grounds that work in the garment industry was not particularly dangerous and that women, unlike the "necessitous borrower," do not lack the competence to make judgments about their own hours of work. *Ritchie v. People*, 155 Ill. 98 (1895), 106, 111–13. A decade later, Justice Peckham, writing the majority opinion in *Lochner* (discussed, pp. 28–31), accepted the constitutionality of the bakeshop act's provisions dealing with health and safety. He did not see those provisions as inconsistent with free labor assumptions. When it came to the statute's hours provisions, however, he distinguished the instant case from *Holden* and *Knoxville* on the grounds that baking was not particularly unhealthful and that bakers, unlike miners, were not economically disadvantaged.

94. Montgomery, *Beyond Equality*, 303.

95. *Holden v. Hardy*, 393, 395.

96. Courts distinguished laws regulating sailors, borrowers and minors, which had been upheld, from laws regulating the employment contract of adult males, which they struck, on the ground that the former suffered from traditional incapacities known to the common law, whereas adult male workers were fully capable of protecting themselves. See *Millett v. People* (1886), 302–3; *State v. Fire Creek Coal & Co*. (1889), 190; *State v. Goodwill* (1889), 186; *Frorer v. People* (1892), 185–86; *State v. Loomis* (1892), 315–16; *Braceville Coal Co. v. People* (1893), 74; *Lowe v. Rees Printing* (1894), 135; *In re Eight-Hour Law* (1895), 32; and *State v. Haun* (1899), 162–63. For an explicit criticism of free labor assumptions prior to *Holden*, see *State v. Brown & Sharpe Manufacturing* (1892), 34–35.

https://doi.org/10.1017/S0738248013000047 Published online by Cambridge University Press

Brown offered a penetrating criticism of the claim that market ordering was necessarily harmonious and safeguarded workers' economic interests. Employment relations in the mines were an instance of market failure. The miners' vulnerability rendered them exploitable: "the proprietors lay down the rules and the laborers are practically constrained to obey them." Their agreement was no indication that the contract's terms were mutually beneficial because they "do not stand upon an equality. . .. In such cases self-interest is often an unsafe guide, and the legislature may properly interpose its authority." Utah's elected representatives had determined that miners' necessitous circumstances made it difficult for them to protect their health and safety. The hours statute provided a public benchmark of a just contract, spelling out the terms that undisadvantaged workers would accept. Employers "naturally desire to obtain as much labor as possible from their employees, while the latter are often induced by fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength." Brown scornfully dismissed the employer's solicitousness for the violation of the employees' contractual liberty: "the argument would certainly come with better grace and greater cogency from the latter class. But the fact that both parties are of full age and competent to contract does not necessarily deprive the State of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself."[97] Wage workers were free to bid for jobs, but only within the limit of a legal working day. The maximum hours statute, he concluded, reflected the legislators' reasonable conclusion that employers extracting more than an 8 hour day gained too much at the expense of miners' well-being.

Brown's analysis of the workers' economic vulnerability severed the principle of neutrality from its free labor moorings. It explained why the legislature was warranted in piercing "the 'specialness' of the labor contract."[98] Just as important, his critique of free labor served two additional ends. First, it buttressed the claim that "the legislature has adopted the statute in exercise of a reasonable discretion," and not as "a mere excuse for an unjust discrimination, or the oppression, or spoliation, of a particular class."[99] Neutrality, Brown suggested, was promoted by a statute that blocked contracts in which workers "are often induced by the fear of discharge" to accept terms that posed unacceptable risks to their welfare.[100] Second, Brown's acknowledgement that economic disparities undermined voluntariness meant that protective legislation enhanced, rather than limited, freedom of contract.

97. *Holden v. Hardy*, 397.
98. McCurdy, "The 'Liberty of Contract' Regime in American Law," 167.
99. *Holden v. Hardy*, 398.
100. Ibid., 397.

https://doi.org/10.1017/S0738248013000047 Published online by Cambridge University Press

The Court's decision was profoundly influential in establishing the terms of the legal controversy. *Holden*, rather than *Lochner*, articulated the principles guiding turn-of-the century jurisprudence on employment legislation.[101] The outcome of substantive due process challenges turned on two questions: the scope of the state's authority to establish public benchmarks of workers' well-being, and whether workers' bargaining disadvantage weakened their ability to negotiate satisfactory terms on their own. Courts moved cautiously in sanctioning legislation involving disputes over the core terms of the labor contract. *Holden* brought working hours within the ambit of the police power only for hazardous occupations; it did not reach wage workers generally. But courts were not wedded to a narrow definition of the police power. In *People v. Havnor* (1896), the New York Court of Appeals rejected a due process attack on a law mandating 1 day's rest in the workweek of the state's barbers.[102] Barbering was not particularly dangerous. "The vital question," wrote Judge Vann for the majority, "is whether the real purpose of the statute . . . has a reasonable connection with the public health, welfare or safety."[103] He offered a more expansive justification of what shorter hours were for: a day of rest was essential to human flourishing and therefore to the public's prosperity and well-being. "It is to the interest of the state to have strong, robust, healthy citizens, capable of self-support, of bearing arms, and of adding to the resources of the country. Laws to effect this purpose, by protecting the citizen from overwork and requiring a general day of rest to restore his strength and preserve his health, have an obvious connection with the public welfare." The state of existing labor relations explained why protective legislation was necessary: the statute, argued Vann, "affords an opportunity, recurring at regular intervals, for rest, needed both by the employer and the employed, and the latter, at least, may not have the power to observe a day of rest without the aid of legislation."[104] The Nevada Supreme Court, in *Ex Parte Boyce* (1904), provided an additional police power justification for blocking hard bargains: the negative externalities that result from victimizing a vulnerable population.[105] It upheld an 8

101. See Bernstein, *Rehabilitating Lochner*, 21, 51; Stephen A. Siegel, "*Lochner* Era Jurisprudence and the American Constitutional Tradition," *North Carolina Law Review* (1991), 21; and Urofsky, "State Courts and Protective Legislation," 78.

102. *People v. Havnor*, 49 N.Y. 195 (1896). Federal and state judges generally sustained legislation requiring a day of rest. See Harper, "Due Process of Law in State Labor Legislation," 629–30.

103. Ibid., 201.

104. Ibid., 203–04.

105. *Ex Parte Boyce*, 27 Nev. 299 (1904). See also *State v. Peel Splint Coal Co.* (1892) and *International Text Book Co. v. Weissinger* (1902).

https://doi.org/10.1017/S0738248013000047 Published online by Cambridge University Press

hour law in underground mines, smelters, and ore reduction works in part on the ground that "to have strong, healthy men, instead of sickly and disabled ones, without earning and self-supporting capacity, and the resultant widows and orphans dependent upon public and private charity, is quite as important to the state in time of peace or war; and the health and lives of all the people, wherever endangered, should receive care and protection."[106]

The constitutional controversy over New York's bakeshop act at issue in *Lochner* was framed by judges' disagreements over the extent of the police power and the degree to which the employment market accorded with the ideals of free labor. The New York Court of Appeals narrowly upheld the statute establishing a legal working day for bakers, relying on the authority of *Holden* and *Havnor* to justify the expansion of the state's police power to reach bakers, and to explain that bakers' bargaining disadvantage assimilated the working day within its traditional purview to regulate health and safety.[107] Judge Davy, writing for a majority of an Appellate Division court, stressed the state's legitimate concern that wage workers' economic weakness eroded their ability to protect themselves. "The Legislature no doubt recognized the fact that proprietors of these establishments desire to obtain as much labor as possible from their employees, who, from fear of being discharged, are often induced to comply with the employer's request to work during both night and day." He defended the limit on their working hours by adopting a broad understanding of the human purposes served by relief from toil. "The rule laid down in *People v. Havnor* shows that courts are disposed to uphold a statutory regulation enacted for the safety of the public and to protect the health of the individual employee from the dangers threatened by excessive or exhaustive labor."[108] Chief Judge Parker, writing for a plurality of the judges in the New York Court of Appeals, called "special attention" to *Holden*, especially its recognition that legal principles must be adapted to meet "the change of

106. Ibid., 333. A series of state cases in the early years of the century sustained maximum hours acts against due process attacks. They justified protective legislation, offering broad statements of the human harms of overwork, and acknowledging that inequalities between employers and wage workers explained why workers were unable to protect themselves. These courts moved cautiously to extend the reach of hours laws; they were limited to specific occupations or to a day of rest in the workweek. See *Ex parte Kair*, 28 Nev. 127 (1905); *State v. Cantwell*, 179 Mo. 245 (1904), affirmed *per curiam* by the United States Supreme Court in *Cantwell v. Missouri*, 199 U.S. 602 (1905); *State v. Livingston Concrete Bldg. & Mfg. Co*., 34 Mont. 570 (1906); and *In re Martin*, 157 Cal. 51 (1909). See also *People v. Klinck Packing Co*., 214 N.Y. 121 (1915).

107. The case was first appealed to a New York Appellate Division court, where the judges, in *People v. Lochner*, 73 A.D. 120 (N.Y. App. Div. 1902), voted 3–2 to sustain the law. The New York Court of Appeals, in *People v. Lochner*, 177 N.Y. 145 (1904), split 4–3 to uphold.

108. *People v. Lochner* (N.Y. App. Div. 1902), 128.

https://doi.org/10.1017/S0738248013000047 Published online by Cambridge University Press

conditions," by which he meant the rise of occasions for the "special protection of a particular class," and cited the court's opinion in *Havnor* to support the conclusion that the state had a legitimate responsibility for ensuring "strong, robust, healthy citizens, capable of self-support," especially when "the latter . . . may not have the power" to do so "without the aid of legislation."[109]

Lochner (1905) invalidated the New York bakeshop act. Justice Peckham, writing for the majority, argued that "it is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives."[110] The state's police power authorized legislation necessary to ensure public welfare. He found no infirmity in those sections of the statute that were directly related to improving sanitary conditions in baking establishments, and only tangentially implicated employment negotiations: "furnishing proper wash-rooms and water-closets, apart from the bake-room, . . . providing proper drainage, plumbing and painting; the sections, in addition, [providing] for the height of the ceiling, the cementing or tiling of floors, where necessary in the opinion of the factory inspector."[111] Regulations reaching more directly into the heart of the employment contract were also legitimate when they were demonstrably necessary to safeguard public health. But "the connection" between working hours and wholesome bread, he argued, "is too shadowy and thin to build any argument for the interference of the legislature."[112]

Peckham, however, significantly qualified his strict opposition to employment laws, presumably in an effort to sway the votes of moderate justices, inadvertently laying the ground for *Lochner*'s demise.[113] The

109. *People v. Lochner* (1904), 149–51, 155.

110. *Lochner v. New York*, 64.

111. Ibid., 61–2. Bernstein maintains that the hours provision of the bakeshop act was a product of interest group conflict rather than a neutral health law. It represented a political agreement between the larger bakeries and organized workers to drive smaller proprietors employing nonunionized workers out of business. See *Rehabilitating Lochner*, 24–30. This argument fails to account for the financial burden on the smaller proprietors of implementing the sanitary provisions of the act. Would not the capital outlays required to satisfy sanitary regulations also bankrupt small bakeries? See Paul Kens, *Lochner v. New York, Economic Regulation on Trial* (Lawrence: University Press of Kansas, 1998), for an alternative account of the bakeshop act's enactment.

112. *Lochner v. New York*, 62; see also 57.

113. The Court's 5–4 ruling was a surprise. Bernstein, *Rehabilitating Lochner*, 33; Gillman, *The Constitution Besieged*, 251–52, n. 54. It was also a very close call: it seems that Justice Peckham's majority opinion was originally written in dissent, and Justice Harlan's dissent was the majority opinion. "Whether one of the justices . . . switched his

https://doi.org/10.1017/S0738248013000047 Published online by Cambridge University Press

majority's opinion was framed in terms of the analytical framework established in *Holden*. Peckham conceded that regulations prohibiting adult male workers from agreeing to employment contracts injurious to their well-being were not without due process. The New York law "must be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation of a baker."[114] Additionally, the state was required to show that workers were unable to negotiate safe terms of work on their own. Establishing the claim that they were economically "at a disadvantage" was necessary to explain why it was "reasonable and proper for the State to interfere to prevent the employees from being constrained by the rules laid down by the proprietors in regard to labor."[115] The state had the burden of proving that the act has a "direct relation, as a means to an end," and the end itself is "appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor."[116] The Court affirmed *Holden* and *Knoxville* (mandating pay in legal money) but distinguished New York's bakeshop act on the ground that the state failed to meet this burden. Unlike underground mining, baking was not particularly hazardous.[117] Peckham narrowed the reach of the police power to bodily health and safety. Employers were not requiring too much from their workers unless working hours became a direct threat to their physical well-being. He rejected more expansive claims that the public had a legitimate interest in a "strong and robust" population, fearing that any broader measure would remove all limits on the exercise of the police power.[118] Moreover, New York's bakers, in contrast to Utah's and Tennessee's miners, experienced markedly different employment relations and working conditions: "there is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State."[119]

---

vote … and if so why, remains a mystery." Bernstein, *Rehabilitating Lochner*, 146, n. 110. Scholars have also puzzled over the reasons that may have persuaded Justices Brown and McKenna, normally willing to give the police power wider latitude, to join the majority. See Bernstein, *Rehabilitating Lochner*, 33; Cushman, "Varieties and Vicissitudes," 930–33; and Siegel, "*Lochner* Era Jurisprudence," 16–18.

114. *Lochner v. New York*, 57; see also 58, 61, 64.

115. Ibid., 54–55.

116. Ibid., 57–58.

117. Ibid., 59.

118. Ibid., 59–60.

119. Ibid., 57. Peckham's concession to workers' negotiating weakness was somewhat strained. He characterized *Holden* to say that Utah's miners were constrained by "the

https://doi.org/10.1017/S0738248013000047 Published online by Cambridge University Press

Justice Harlan, dissenting for himself and Justices White and Day, parted with the majority on the question of which party shouldered the burden of proving the act's unconstitutionality: "when the validity of a statute is questioned, the burden of proof … is upon those who assert it to be unconstitutional."[120] The New York legislature had exercised a reasonable discretion in concluding that working more than 60 hours in a week was injurious to bakers' welfare. His opinion was buttressed by statistics demonstrating that the average workday in other countries and other U.S. states was not inconsistent with New York's law. Reports showed that the occupation of baking was hazardous on both a narrow definition of physical health and a broader standard of comfort and well-being: "improved health, longer life, more content and greater intelligence and inventiveness."[121] He agreed that defining the legal working day—drawing the line between the "legitimate protection" of workers and interfering in their liberty of contract—"is not a question easily solved."[122] But Harlan maintained that the legislature was not unreasonable "in the belief that employers and employees in such establishments were not upon an equal footing, and that the necessities of the latter often compelled them to submit to such exactions as unduly taxed their strength."[123]

Harlan's dissent paved the way for future courts to uphold the legal working day. The *Lochner* majority had conceded the constitutionality of protective labor policies, at least in cases of time and manner of wage payment (*Knoxville*) and maximum hours in hazardous employments (*Holden*). Harlan's opinion authorized judges to defer to legislative judgment on the two grounds that had obstructed general hours statutes.[124] An expansive definition of harm was not an unreasonable ground on which to single out industrial workers for protective legislation. Due process shielded contractual prerogatives unless legislatures determined that bargaining inequalities brought the hours term of the employment contract

---

kind of employment, mining, smelting, etc., and the character of the employees in such kinds of labor," to accept "the rules laid down by the proprietors in regard to labor." In *Knoxville*, Tennessee's miners and coal workers were said to "be at a disadvantage with the employer in matters of wages, they being miners and coal workers." Harlan's dissent made it clear that, in justifying the hours law,the Court's minority referred to workers' economic weakness.

120. Ibid., 68. See Cushman, "Varieties and Vicissitudes," 55; and Siegel "*Lochner* Era Jurisprudence," 16–19.

121. Ibid., 71.

122. Ibid., 72.

123. Ibid., 69.

124. Harlan refused to consider the consequences of shifting the burden of proof for the validity of general hours legislation: "it must be remembered that this statute does not apply to all kinds of business. It applies only to work in bakery and confectionery establishments." *Lochner v. New York*, 70.

https://doi.org/10.1017/S0738248013000047 Published online by Cambridge University Press

within the purview of the police power.[125] Maximum hours acts were not arbitrary intrusions on contractual liberty or private property because they protected the interests of workers whose economic disadvantage precluded them from negotiating contracts safeguarding their welfare.

The Mississippi (*State v. Newman*, 1912) and Oregon (*State v. Bunting*, 1914) Supreme Courts made the conceptual moves.[126] Both courts sustained maximum hours laws in private manufacturing firms, where there was no unusual or extraordinary danger, for the workers' own good. Both relied on Harlan's dissenting opinion, granting to the legislature authority to regulate "the hours of labor in certain industries, in which too many hours of service in one day would be injurious to the health and well-being of the operatives."[127] They used a broad standard of welfare to assess the statutes' reasonableness: "a certain minimum of physical well-being," ruled the Oregon court, "is necessary in order that social life may exist, the usefulness and intelligence of the citizens be increased, and the progress of civilization accelerated. ... The required minimum ... varies in different periods, but rises with advancing civilization until it includes a certain standard of comfort."[128] The Mississippi court was asked to review the constitutionality of the law a second time "upon the suggestion that the court erred in its former opinion."[129] The justices overruled, underscoring the disparities in bargaining power that prompted the legislature to act: "it was believed that there are manufactories in this state whose operatives could not work longer than ten consecutive hours without impairing

125. Holmes's dissent, normally celebrated for its progressive tenets, would have virtually abandoned judicial review. On his view, the Court must defer to legislatures "unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law." Whether a statute "would be open to the charge of inequality I think it unnecessary to discuss." *Lochner v. New York*, 76. Ironically, it was Holmes, rather than his colleagues, who held a Darwinian understanding of social conflict. See Bernstein, *Rehabilitating Lochner*, 47; Horwitz, *The Transformation of American Law*, 139–43; and Witt, *Accidental Republic*, 43.

126. *State v. Newman Lumber Co*., 102 Miss. 802 (1912); and *State v. Bunting*, 71 Ore. 259 (1914).

127. *State v. Bunting*, 263; see also *State v. Newman*, 830.

128. Ibid., 267; also 271–72. See also *State v. Newman*, 830. The Oregon court also appealed to the negative externalities of working dangerously long hours: "it was in the legislative mind that the regular employment of persons for longer hours in factories where different kinds of machinery and facilities are operated under the present day high-pressure power would tend to increase the danger of accidents, and to a greater extent jeopardize life and limb, thereby increasing the demand for compensation for such injuries, a portion of which, under certain circumstances, would ultimately be borne by the state." *State v. Bunting*, 271.

129. *State v. Newman Lumber Co.*, 103 Miss. 263 (1912), 264.

https://doi.org/10.1017/S0738248013000047 Published online by Cambridge University Press

their health, and without endangering their lives and their bodies, and yet competition forced the laborer to take the risk or starve."[130] They betrayed some annoyance in mocking the manufacturer's apparent solicitude for their employees' freedom: "we pause here to remark the notable fact that it is rare for the seller of labor to appeal to the courts for the preservation of his inalienable right to labor. This inestimable privilege is generally the object of the buyer's disinterested solicitude."[131]

The United States Supreme Court affirmed the Oregon court's decision in *Bunting v. Oregon* (1917). Felix Frankfurter, co-authoring the brief supporting the law, set out to show that *Holden*, not *Lochner*, had been correctly decided. *Lochner*'s chief defect was its reliance on the "common understanding" that the work of bakers was not injurious to their health. Frankfurter called for a more scientific jurisprudence: "particularly in the last decade science has been giving us the basis for judgment by experience to which … judgment by speculation must yield. This is precisely what *Holden v. Hardy* looked forward to.… It is now demonstrable that the considerations that were patent to miners in 1898 are to-day operative … throughout the industrial system."[132] Scientific findings, however, would hardly be persuasive unless the Court also agreed that statutes protecting workers from harm to themselves were not without due process. The legal working day served as a public measure of what workers were due, and contracts that failed to benefit them as it required were void. This is precisely what the *Bunting* Court ruled.[133] Justice McKenna, writing for the majority, summarily dismissed the employer's claim that Oregon's law was "not either necessary or useful" to safeguard workers' well-being,

130. Ibid., 267.

131. Ibid., 267–68.

132. Reproduced in *Bunting v. Oregon*. Gillman rightly argues that the new realism of the sociological jurisprudence articulated in legal circles during the first two decades of the century did not challenge the traditional distinction between illegitimate class legislation and legitimate promotion of public ends. *The Constitution Besieged*, 104, 144–45. See also Horwitz, *Transformation of American Law*, 169–70, 188–89.

133. "McKenna simply assumed that maximum-hour laws were as valid in their general application to male workers, regardless of whether a particular occupation was especially hazardous or wearing, as to female workers. That might have seemed a considerable leap some years earlier, but it was not by now." Bickel and Schmidt, *The Judiciary and Responsible Government,* 601. Four members of the *Lochner* majority—Justices Peckham, Brewer, Fuller, and Brown—had left the Court by the time *Bunting* was decided. Justice McKenna remained on the Court, voting with the majority in *Lochner* and writing the majority opinion in *Bunting*. Cushman suggests that McKenna opposed New York's law as class legislation because it applied only to bakers, an infirmity that did not affect Oregon's law, covering industrial workers. "Varieties and Vicissitudes," 937. Bickel and Schmidt, *The Judiciary and Responsible Government*, 39, 285, offer a more critical view of the "erratic" McKenna.

https://doi.org/10.1017/S0738248013000047 Published online by Cambridge University Press

observing that "the record contains no facts to support the contention, and against it is the judgment of the legislature and the [Oregon] Supreme Court."[134] Without mentioning *Lochner*, McKenna quoted a passage from the Oregon court's opinion that was itself taken from Harlan's dissent, deferring to the legislature's police power unless its exercise was patently arbitrary. Little wonder that Chief Justice Taft, dissenting in *Adkins v. Children's Hospital* (1923), remarked that "the *Lochner Case*" had been "overruled *sub silentio*" in *Bunting*.[135] The legal controversy over working day was at an end. A note on "Liberty of Contract and Social Legislation" in the *Columbia Law Review* (1917) stated that "it is now well established that the passing of measures which tend to level the inequalities of fortune is a legitimate field for legislation, and … a man may, at the expense of his liberty, be prevented from making contracts which are detrimental to his own welfare."[136] *Bunting*, write Bickel and Schmidt, concluded "the course of litigation on hours-of-labor statutes … before the Court."[137]

Minimum Wages

The claim that the Supreme Court's ruling in *West Coast Hotel v. Parrish* (1937) marked a revolution in American jurisprudence rests on the assumption that wage regulation posed a direct challenge to the neutrality principle and the presumption in favor of economic liberty. On this view, alternative constitutional visions informed the legal controversy over the minimum wage. Wage standards, writes Gillman, were "unprecedented" because they were linked "to the general goal of granting to workers an 'unnatural' (non-market-based) economic advantage vis-à-vis their employers."[138] Courts had limited the legislature's reach to traditional police power ends—the protection of health and safety—and were vigilant to disallow class legislation. In *Parrish*, the Court allowed "government to intrude itself into market relations on behalf of favored classes."[139] Mayer contends that the Court in this "landmark case … abandoned its protection of liberty of contract as a fundamental right."[140]

134. *Bunting v. Oregon*, 438.
135. *Adkins v. Children's Hospital*, 564.
136. [Anon.], "Liberty of Contract and Social Legislation," 541.
137. Benno and Schmidt, *The Judiciary and Responsible Government*, 600.
138. Gillman, *The Constitution Besieged*, 158–59.
139. Ibid., 200.
140. *Liberty of Contract*, 106.

https://doi.org/10.1017/S0738248013000047 Published online by Cambridge University Press

Wage legislation, however, did not challenge traditional police power jurisprudence. Alternative understandings of the market's essential fairness informed judges' view of wage statutes. The key decisions involved laws regulating women's pay in private employment. Beginning in the 1910s, the judiciary, especially state courts, sustained minimum wage laws on the ground that they were necessary to safeguard women's health and morals. Judicial opposition was predicated on free labor assumptions that insulated the wage term from legislative reach. "The amount of wages to be paid and received," argued Justice Sutherland in *Adkins v. Children's Hospital* (1923), striking a minimum wage law, "was the heart of the contract."[141] The price of commodities, including the value of labor, was fairly determined by the market, buttressing a heightened presumption in favor of liberty of contract. "Legislative authority to abridge it," he maintained, "can be justified only by the existence of exceptional circumstances."[142] Support for minimum wage laws, in contrast, presupposed a more skeptical attitude toward market ordering of prices and wages. The market's failure to produce decent living standards undercut the special character of the wage term, relocating it within the authority of the police power. Courts reviewing minimum wage regulations moved away from the claim that women could legitimately be singled out only because they were the weaker sex, physically incapable of holding their own in competition with men, and because the state had a public interest in protecting their maternal role. They came to accept the legitimacy of an income floor for women because they were poorer and, therefore, economically vulnerable to exploitation by overreaching employers. Courts also moved away from that the idea that the market established a standard of fair wages toward the notion that women were due "a reasonable living wage."[143] A critical difference dividing the judiciary was whether the fairness benchmark for the wage contract was labor's market price or the wage adequate for "decent self-support," until, in *Parrish*, a majority of the Supreme Court

141. *Adkins v. Children's Hospital*, 554.

142. Ibid., 546.

143. Charles E. Persons, "Women's Work and Wages in the United States," *The Quarterly Journal of Economics*, 29 (1915): 207. Persons's study of women's wages covered workers in "trade and transportation . . . manufacturing, and . . . certain groups in the domestic field." The "term minimum wage," he explains, "is, in a sense, a misnomer, since our legislation has defined a reasonable living wage rather than the bare minimum necessary to eke out a comfortless existence. Of the eight states [with minimum wage laws in 1913], excluding Utah's flat rate, all are practically in line with California's statute, which declares that it should be 'not less than a wage adequate to supply to such women and minors the necessary cost of proper living and to maintain their health and welfare.'" Ibid.

https://doi.org/10.1017/S0738248013000047 Published online by Cambridge University Press

sustained an act establishing an adequate livelihood as the minimum standard for women.[144]

The Oregon Supreme Court upheld the constitutionality of a minimum wage law for women and children against due process challenges in two cases decided in 1914: *Stettler v. O'Hara* and *Simpson v. O'Hara*. The state created an Industrial Welfare Commission and authorized it to prescribe "standards of minimum wages for women in any occupation within the State of Oregon" and ascertain "what wages are inadequate to supply the necessary cost of living to any such women workers and to maintain them in good health."[145] Justice Eakin, delivering the court's opinion in *Stettler*, observed that the validity of minimum wage laws was a question that was "practically new in the courts of this country."[146] He adopted Harlan's view, in his *Lochner* dissent, that those challenging a statute's validity bore the burden of proof. The state's legislature had not unreasonably established a decent livelihood as the public standard of the minimum wages that workers were due. An income floor was warranted in prohibiting women's employment at pay "inadequate to supply the necessary cost of living to such women factory workers, and to maintain them in health."[147] Eakin drew an analogy between maximum hours and minimum wage laws as a way of "bringing [the latter] within the police power of the legislature. The state should be as zealous of the morals of its citizens as of their health. … 'Common belief' and 'common knowledge' are sufficient to make it palpable and beyond doubt that the employment of female labor as it has been conducted is highly detrimental to public morals, and has a strong tendency to corrupt them."[148] Additionally, Eakin pointed to the negative externalities of allowing the labor market to determine a woman's wage. Employers paying the market rate fail to take responsibility for the full costs of their decisions, passing them on to society. Eakin quoted the findings of the Massachusetts Commission on Minimum Wage Boards (1912): "Wherever the wages of such a woman are less than the cost of living and the reasonable provision for maintaining the worker in health, the industry employing her is in receipt of the working energy of a human being at less than its cost, and to that extent is parasitic. The balance must be made up in some way. It is

144. "Decent self-support" is taken from Felix Frankfurter's brief, submitted on behalf of the state, in the Oregon minimum wage cases—*Stettler v. O'Hara*, 69 Ore. 519 (1914) and *Simpson v. O'Hara*, 70 Ore. 261 (1914). *Oregon Minimum Wage Cases* (New York: Reprinted by National consumers' league, 1916), 356.

145. Reproduced in *Stettler v. O'Hara*, 69 Ore. 519 (1914).

146. Ibid., 524.

147. Order of the Oregon Industrial Commission, reproduced in *Stettler v. O'Hara*.

148. Ibid., 534.

https://doi.org/10.1017/S0738248013000047 Published online by Cambridge University Press

generally paid by the industry employing the father. It is sometimes paid in part by future inefficiency of the worker herself, and by her children, and perhaps in part ultimately by charity and the state."[149]

The effect of low wages on women's well-being, however, formed only the first part of Eakin's opinion. He turned to the complaint, raised by counsel for the employer, "that the law upon this question interferes with plaintiff's freedom of contract." Eakin countered by exploring in some detail the economic circumstances that made women vulnerable to hard bargains. He began by offering a brief history of substantive due process. "The Federal Constitution and the Constitutions of the various states" were originally adopted to guarantee "the larger freedom enjoyed in this country. . . in comparison with conditions in the earlier days of the common law, when it was found necessary to prevent extortion and oppression by royal proclamation or otherwise, and to establish reasonable compensation for labor." The principal threat to liberty was political; constitutional limits on the exercise of public power protected the individual's "right . . . to use his faculties in all lawful ways, to live and work where he will."[150]

Industrialization and economic concentration, however, dramatically altered the circumstances that underwrote contractual liberty. "The legislature," wrote Eakin, "seems to have acted on the idea that conditions have changed, or that private enterprises have become so crowded that their demands amount to unreasonable exactions from women and children."[151] The traditional limits imposed on public authority and guaranteed by the constitution failed to address this new threat to liberty. To the contrary, freedom of contract now sanctioned the power to exploit: employer's counsel "fails to take note that by reason of this larger freedom the tendency is to return to the earlier conditions of long hours and low wages, so that some classes in some employments seem to need protection from the same conditions for which royal proclamation was found necessary." The law must adapt to remedy this wrong: "the legislature has evidently concluded that in certain localities these conditions prevail even in Oregon; that there are many women employed at inadequate wages—employment not secured by the agreement of the worker at satisfactory compensation, but at a wage dictated by the employer. The worker in such a case has no voice in fixing the hours or wages, or choice to refuse it, but must accept it or fare worse."[152]

149. Ibid., 535.

150. Ibid., 537.

151. Ibid., 538.

152. Ibid., 537. See also Frankfurter's brief, arguing that "the 'liberty of contract' which the present legislation would destroy is only the 'liberty' of an employer to abuse and the 'liberty' of an employee to be abused. True freedom of contract is established, rather than

https://doi.org/10.1017/S0738248013000047 Published online by Cambridge University Press

Justice Eakin retained the moral vision of the neutral state. Government's intervention in the marketplace could not show unfair favoritism. In the current circumstances, however, inaction was equivalent to partiality, allowing unscrupulous employers to take undue advantage of a vulnerable population. He drew on the Supreme Court's opinion in *Muller v. Oregon* (1908), sustaining a maximum hours law for women, in which the Court justified the reasonableness of singling this class for special protection because a woman's "physical structure and her position in the economy of the race renders her incapable of competing with man either in strength or in endurance."[153] But Eakin pointed to a different argument: that women need protection not because they are the weaker sex, but because they are poorer. He endorsed the report by the Massachusetts Commission, finding that "women in general are working because of dire necessity, and in most cases the combined income of the family is not more than adequate to meet the family's cost of living. In these cases it is not optional with the woman to decline low-paid employment. Every dollar added to the family income is needed to lighten the burden which the rest are carrying."[154] This argument was made more explicitly by the Minnesota Supreme Court in *Williams v. Evans* (1917), sustaining a similar minimum wage statute for women: "There is a notion, quite general, that women in the trades are underpaid, that they are not paid so well as men are paid for the same service, and that in fact in many cases the pay they receive for working during all the working hours of the day is not enough to meet the cost of reasonable living. Public investigations by publicly appointed commissions have resulted in findings to the above effect."[155]

The Oregon law came before the U.S. Supreme Court in *Stettler v. O'Hara* (1917), where eight Justices divided equally, thereby affirming it and leaving the issue open. Justice Brandeis, recently appointed to the Court, would have supplied the fifth supporting vote, but recused himself because he had earlier participated in the litigation as counsel for the state.[156] Several state courts followed the Oregon court's lead in rejecting

impaired, by such restrictions. Their very purpose is to assure the parties an equal basis for bargaining, so that they may be free to bargain on the merits, and not under the compulsion of a crippling necessity. With no margin or the margin of but a single meal between starvation there can be no true liberty of contract." *Oregon Minimum Wage Cases*, A47–48.

153. Ibid., 525.

154. Ibid., 534–35.

155. *Williams v. Evans*, 139 Minn. 32 (1917), 40.

156. *Stettler v. O'Hara*, 243 U.S. 629 (1917). The Court was closely divided over the constitutionality of the minimum wage. The justices first heard this case in the October term of 1914, and the decision went against the statute, but it was never delivered, perhaps because

https://doi.org/10.1017/S0738248013000047 Published online by Cambridge University Press

due process attacks on laws establishing minimum wages for women.[157] These progressive legal victories were interrupted in 1923, when the Supreme Court, in *Adkins v. Children's Hospital*, struck the District of Columbia's minimum wage law.

The District's statute, like Oregon's, created a minimum wage board, authorizing it to investigate women's pay and prescribe minimum standards "to supply the necessary cost of living … to maintain them in good health and to protect their morals."[158] Frankfurter's brief defended the act as a legitimate exercise of Congress's power to safeguard public welfare in the District.[159] He argued that labor legislation was consistent with freedom of contract. Substantive due process was the chief "obstruction" to the act. "And the only point for consideration is whether the deprivation of 'liberty' or 'property' which is involved is 'without due process of law'." Due process bars exploitation: it embodies "a standard of fair dealing to be applied to the myriad variety of facts that are involved in modern legislation…. In the application of the varying facts to the test of fair dealing the ultimate question in this Court is, does legislation, or its actual operation, 'shock the sense of fairness the Fourteenth Amendment was intended to satisfy in respect to state legislation'?" Government intervention was neither wanton nor arbitrary when it served a public end or protected vulnerable classes from harm. This was the logic of laws regulating the employment contract, both the time and manner statutes sustained by the high court, and the minimum wage laws upheld by several state courts. Women were at an economic disadvantage in the labor

---

the majority was fragile. The case was reargued in 1916. By this time, Justice Lamar had died and Justice Hughes had retired, replaced by Justices Clarke and Brandeis. Clarke voted to affirm the law; therefore, it would have been sustained had Wilson appointed a Justice other than Brandeis, who was sympathetic to minimum wage laws. See Bickel and Schmidt, *The Judiciary and Responsible Government*, 593–603. The validity of the minimum wage remained a close call throughout this period. Cushman maintains that its constitutionality was "a position that had been taken by five justices in 1917 and again in 1923 by four justices of the Taft Court, including the chief justice himself. After Justice Stone replaced Justice McKenna in 1925, it was probably consistently the view of a majority of the justices on the Court." "Varieties and Vicissitudes," 997.

157. *Williams v. Evans*, 139 Minn. 32 (1917); *State v. Crowe*, 130 Ark. 272 (1917); *Larsen v. Rice*, 100 Wash. 642 (1918); *Holcombe v. Creamer*, 231 Mass. 99 (1918); *Miller Telephone Co. v. Minimum Wage Commission*, 145 Minn. 262 (1920); and *Spokane Hotel Co. v. Younger*, 113 Wash. 359 (1920). See also *Wagner v. Milwaukee*, 177 Wis. 410 (1922), upholding the authority of the city of Milwaukee to establish a minimum wage for its own and its contractors' employees.

158. Reproduced in *Adkins v. Children's Hospital*.

159. Frankfurter's brief, from which the quotes in this and the following paragraph are taken, is reproduced in *Adkins v. Children's Hospital*. For an account of his role, see Bickel and Schmidt, *The Judiciary and Responsible Government*, 599–603.

https://doi.org/10.1017/S0738248013000047 Published online by Cambridge University Press

market: minimum wage statutes "rest upon a realization of the fact that the mass of women workers cannot secure terms of employment needful from the point of view of public welfare without the weight of legislation being thrown into the scales." Under these circumstances, Frankfurter suggested, inequality impaired contractual liberty. "Congress legislated in the light of actual industrial conditions which denied the abstract equality of bargaining power among women. Congress found that women, in substantial numbers, were under a handicap because they were women. Therefore by legislation it sought to fill the gaps caused by the ignorance or helplessness of women workers, and the ignorance or avarice of some employers."

The measure of women's exploitation was the difference between what a public standard of well-being required—a wage sufficient for a decent livelihood—and their current wages set in the competitive market. Congress "found that alarming public evils had resulted … from the widespread existence of a deficit between the essential needs for decent life and the actual earnings of large numbers of women workers of the District." The act "involved a prohibition of the use of women's labor for less than its cost." Unscrupulous employers were thus prevented from externalizing the harms caused by inadequate living standards, taking unfair advantage of the public: "A contract for labor below its cost must inevitably rely upon a subsidy from outside or result in human deterioration. To the extent of the subsidy or the deterioration the public is necessarily concerned. The employer has no constitutional right to such an indirect subsidy or to cause such deterioration."

Justice Sutherland, writing for the majority in *Adkins*, rejected Frankfurter's argument, invalidating the statute as an unconstitutional interference with freedom of contract. Recent appointments had sharpened positions on the Court.[160] Scholars suggest that the *Lochner* era entered its most conservative phase beginning in the 1920s.[161] The Court's conservatism should not be exaggerated.[162] Sutherland affirmed decisions that sustained time and manner of payment and maximum hours legislation. He drew the line at laws regulating wage rates. Acts prohibiting scrip and establishing maximum hours "deal with incidents of … employment that have no necessary effect upon the heart of the contract."[163] The burden of Sutherland's opinion, and the core of his disagreement with Frankfurter with Chief Justice Taft's dissent, is his understanding of the

160. Ibid., 317–18.

161. Bernstein, "*Lochner* Era Revisionism," 10–11, 47–49; Siegel, "*Lochner* Era Jurisprudence," 4, n. 9.

162. See Barry Cushman, "The Secret Lives of the Four Horsemen," *Virginia Law Review* 83 (1997): 559–645.

163. *Adkins v. Children's Hospital*, 553–54.

https://doi.org/10.1017/S0738248013000047 Published online by Cambridge University Press

market's fairness. For Sutherland, buyers and sellers owe one another the competitive price for goods and services, which is what justice requires. When two parties voluntarily conclude a contract, the presumption is that they both benefitted from it. The District's statute, however, "forbids two parties having lawful capacity—under penalties as to the employer—to freely contract with one another in respect of the price for which one shall render service to the other in a purely private employment where both are willing, perhaps anxious, to agree, even though the consequence may be to oblige one to surrender a desirable engagement and the other to dispense with the services of a desirable employee."[164] Markets are flexible, adjusting wages to the conditions of the business and the value of the worker's labor. The minimum wage law provides a one-size-fits-all measure that wrongs everyone by fixing a price having no relation to the particular business, the value of a worker's service, or her own material needs.[165] Moreover, the District's statute amounts to unjust favoritism: "the law takes account of the necessities of only one party to the contract. ... Within the limits of the minimum sum, [the employer] is precluded ... from adjusting compensation to the differing merits of his employees. It compels him to pay at least the sum fixed ... because the employee needs it, but requires no service of equivalent value from the employee." By ignoring a business owner's "ability ... to sustain the burden" of the larger wage bill, the law has the perverse consequence of "generously leaving him ... the privilege of abandoning his business as an alternative for going on at a loss."[166]

Sutherland is not unsympathetic to the plight of the poor. But he contends that the injustice of poverty lies in the background circumstances of the economy, for which the employer is not responsible. He is doing business in the world as he finds it, paying the market rate for wages, which is fair and calibrated to the value of the service. There is no reason to condemn much less prevent such transactions. "Certainly the employer by paying a fair equivalent for the service rendered, though not sufficient to support the employee, has neither caused nor contributed to her poverty. On the contrary, to the extent of what he pays he has relieved it."[167] Sutherland distinguished the minimum wage from previous labor legislation. The "tendency and purpose" of time and manner of payment statutes, upheld in *McLean* and *Knoxville*, "was to prevent unfair and

164. Ibid., 554–55.
165. Ibid., 555–56.
166. Ibid., 557.
167. Ibid., 558.

https://doi.org/10.1017/S0738248013000047 Published online by Cambridge University Press

perhaps fraudulent methods in the payment of wages."[168] Their specific wrong was that the employer used means of determining miners' pay or a monopoly over the stores in which workers were required to redeem their scrip to drive the value of wages below their market price.[169] Similarly, the direct causal relation between the physical demands of the job and workers' health justified maximum hours laws for women and for men in particularly hazardous employments.[170]

This causal relation is missing in the instant case. Sutherland suggests that the employer takes advantage of the unfairness of poverty, but he does not take *unfair* advantage of it.[171] "The feature of this statute which … more than any other puts upon it the stamp of invalidity is that it exacts from the employer an arbitrary payment for a purpose and upon a basis having no causal connection with his business, or the contract or the work the employee engages to do."[172] To hold the employer responsible is unjust; he is not wrongly gaining at the worker's expense, paying her less than she is due, which is her market value. The obligation to redress poverty is collective, not individual: "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 … arbitrarily shifts to his shoulders a burden which, if it belongs to anybody, belongs to society as a whole."[173]

Chief Justice Taft's dissent retained the conceptual framework of substantive due process jurisprudence. He was unwilling to join Justice Holmes's separate dissent removing constitutional safeguards for contractual prerogatives.[174] In Taft's view, the majority's opinion "appears to … exaggerate the importance of the wage term of the contract of employment as more inviolate than its other terms."[175] Taft was prepared to assimilate

168. Ibid., 547.

169. Sutherland added that "a statute requiring an employer to pay in money, to pay at prescribed and regular intervals, to pay the value of the services rendered, even to pay with fair relation to the extent of the benefit obtained from the service, would be understandable." Ibid., 559.

170. Ibid., 552–53.

171. For a discussion of the distinction between taking advantage of unfairness, and taking *unfair* advantage of unfairness, see Alan Wertheimer, *Exploitation* (Princeton: Princeton University Press, 1996), 298. Mayer, "Sweatshops, Exploitation, and Moral Responsibility," 613–14, provides a persuasive critique of this distinction.

172. *Adkins v. Children's Hospital*, 558.

173. Ibid., 557–58. Poor relief was well established as one of the constitutionally legitimate functions of government. See Cushman, *Rethinking the New Deal Court*, 251–52, n. 6.

174. *Adkins v. Children's Hospital*, 567–71.

175. Ibid., 564.

https://doi.org/10.1017/S0738248013000047 Published online by Cambridge University Press

workers' pay within the traditional police power, subject to the government's reasonable authority to protect their health, safety, and morals. He characterized the minimum wage law as a natural extension of Court decisions sustaining statutes regulating the employment contract, citing the major landmarks upholding limits on hours (*Holden*, *Muller* and *Bunting*, overruling *Lochner* "*sub silentio*"), and regulation of time and manner of payment (*McLean* and *Knoxville*).[176] Congress established a public measure of the minimum pay workers were due, exceeding in some instances labor's market price, based on its understanding of what a decent living standard required.

Taft maintained that the Constitution protected contractual freedom; it did not sanction hard bargains. He moved to distinguish the market in commodities from the market in labor on the ground that the latter put workers at a decided disadvantage in negotiating with their employers. "Legislatures in limiting freedom of contract between employee and employer by a minimum wage proceed on the assumption that employees, in the class receiving least pay, are not upon a full level of equality of choice with their employer and in their necessitous circumstances are prone to accept pretty much anything that is offered. They are peculiarly subject to the overreaching of the harsh and greedy employer. The evils of the sweating system and of the long hours and low wages which are characteristic of it are well known."[177] Employment of women at "a sweating wage" had a "great and direct . . . tendency" to injure their "health and morals."[178] The minimum wage law did not unjustly transfer a portion of the employers' wealth to workers. Rather, "sweating employers are prevented from paying unduly low wages by positive law . . . abating that part of their profits, which were wrung from the necessities of their employees."[179] Whether the minimum wage was a reasonable remedy for poverty, or would make matters worse by driving marginal employers out of business, was properly a question for Congress and not the Court.[180]

Changes in the Court's personnel opened the way for overturning *Adkins*. President Hoover's appointments, Chief Justice Hughes and Justice Roberts, provided the deciding votes in *West Coast Hotel v. Parrish*, upholding a Washington State minimum wage law virtually identical to the act struck in *Adkins*. But changes in personnel did not mean a change in the Court's jurisprudence. Rather, it signaled the final

176. Ibid., 563–64, 565.
177. Ibid., 562.
178. Ibid., 566.
179. Ibid., 563.
180. Ibid., 562.

https://doi.org/10.1017/S0738248013000047 Published online by Cambridge University Press

demise of free labor ideology: the claim that markets, operating efficiently, generated wage levels consistent with fairness. Cushman has persuasively shown that the Court's evolving treatment of the legal category of "businesses affected with a public interest" played the critical role in paving the way for its decision in *Parrish*.[181] The Court had distinguished businesses implicating the public's concern, allowing legislatures broader latitude in regulating them, from purely private businesses, subjecting their regulation to significantly stricter scrutiny. "If, however," argues Cushman, "the category of 'business affected with a public interest' were removed as an initial obstacle to wage legislation—if, in other words, *all* businesses were affected with a public interest, these broad public interest rationales might be invoked to support the constitutionality of minimum wage legislation."[182] The critical case in this vein was *Nebbia v. New York* (1934), in which Justice Roberts, writing for the majority, eliminated the distinction between public and private businesses, opening the market more widely to legislative intervention.[183]

The cases addressing businesses affected with a public interest, however, were also noteworthy because they made significant inroads into free labor assumptions. Justice Taft, writing for a unanimous Court in *Wolff Packing* (1923), distinguished three different categories of public enterprises:

> (1)Those which are carried on under the authority of a public grant of privileges. . .. Such are the railroads, other common carriers and public utilities. (2) Certain occupations, regarded as exceptional. . .. Such are those of the keepers of inns, cabs and grist mills. . .. (3) Businesses which though not public at their inception may be fairly said to have risen to be such and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them.[184]

The third category, Taft pointed out, normally involved practical monopolies: "the thing which gave the public interest was the indispensable nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected without regulation."[185] Monopolies are instances of market failure: they are able to charge more than the equilibrium price for the good or service they control. In *Wolff Packing*, the

181. See Cushman, *Rethinking the New Deal Court*, 66–88.

182. Ibid., 78.

183. Ibid., 78–83.

184. *Chas. Wolff Packing Company v. Court of Industrial Relations of the State Kansas*, 262 U.S. 522 (1923), 535.

185. Ibid., 538. See Cushman, "Varieties and Vicissitudes," 958–81, for an excellent discussion of the Court's struggles in defining this third category.

https://doi.org/10.1017/S0738248013000047 Published online by Cambridge University Press

Court located meatpacking outside the category of a business affected with the public interest because, wrote Taft, prices "in the preparation of foods . . . are . . . fixed by competition throughout the country at large."[186]

Taft's narrow definition of a business affected with the public interest protected wages from regulation except in a small category of enterprises.[187] Eliminating the inviolable character of the wage term required a more thorough confrontation with the ideology of free labor. Employers in competitive labor markets pay the full market value for labor, which may nevertheless be inadequate to meet publically established standards of well-being. The premise underlying minimum wage laws is that dynamic capitalist economies leave too many individuals and families in desperate circumstances that they did not create and cannot solve on their own. Justice Stone, appointed to the bench in 1925, took the lead in expanding the definition of market failure beyond virtual control of an essential service to encompass more broadly any systemic disharmonies in the distribution of goods and services. Dissenting in *Ribnik v. McBride* (1928), Stone confronted the idea that monopoly exhausted the meaning of market failure. The Court struck a New Jersey law regulating the fees charged by employment agencies because their business was not affected with a public interest. Stone countered by redefining the category to include "any combination of circumstances [that] seriously curtails the regulative force of competition, so that buyers or sellers are placed at such a disadvantage in the bargaining struggle that a legislature might reasonably anticipate serious consequences to the community as a whole."[188] Stone's dissent, joined by Brandeis and Holmes, concluded that "the economic disadvantage of a class and the attempt to ameliorate its condition may alone be sufficient to give rise to the 'public interest' and to justify the regulation of contracts with its members."[189] Employment agencies gain unfairly at wage workers' expense even if

186. Ibid.

187. Taft articulated a somewhat anomalous position on the Court, simultaneously supporting the minimum wage and restricting the category of business affected with a public interest to virtual monopolies. See Cushman, "Varieties and Vicissitudes," 980–81.

188. *Ribnik v. McBride, Commissioner of Labor of the State of New Jersey*, 277 U.S. 350 (1928), 360. See also Justice Stone's dissent in *Tyson & Brother – United Theatre Ticket Offices, Inc. v. Banton*, 273 U.S. 418 (1927), 451–52: "Statutory regulation of price is commonly directed toward the prevention of exorbitant demands of buyers or sellers. An examination of the decisions of this Court in which price regulation has been upheld will disclose that the element common to all is the existence of a situation or a combination of circumstances materially restricting the regulative force of competition, so that buyers or sellers are placed at such a disadvantage in the bargaining struggle that serious economic consequences result to a very large number of members of the community."

189. *Ribnik v. McBride*, 360.

https://doi.org/10.1017/S0738248013000047 Published online by Cambridge University Press

their fee structure is driven by economic competition, because they "deal with a necessitous class, the members of which are often dependent on them for opportunity to earn a livelihood, are not free to move from place to place, and are often under exceptional economic compulsion to accept such terms as the agencies offer."[190]

The Court, in *Nebbia*, took the critical step of eliminating the distinction between public and private firms. But this case also revealed that a majority of the justices were now persuaded that malfunctions in private ordering gave legislatures far broader latitude to intervene to achieve traditional police power ends. Roberts argued that "under our form of government the use of property and the making of contracts are normally matters of private and not of public concern."[191] Legislatures were nevertheless authorized to act whenever "the normal law of supply and demand was insufficient to correct maladjustments detrimental to the community."[192] The specific breakdown of the dairy market was not primarily the exploitation of a vulnerable class, but a collective action problem caused by the unwillingness of retailers to shoulder their share of the burden of carrying surplus milk. The shopkeepers were free riders: they inflicted losses by failing to contribute to a service others provide and they enjoy.[193] "Milk is perishable and cannot be stored," explained Roberts. "The fact that the larger distributors find it necessary to carry large quantities of surplus milk, while the smaller distributors do not, leads to price-cutting and other forms of destructive competition. Smaller distributors, who take no responsibility for the surplus," force milk prices below the costs of production of larger distributors and smaller farmers, who are indeed least able to protect themselves.[194] "A satisfactory stabilization of prices for fluid milk," he argued, "requires that the burden of surplus milk be shared equally by all producers and all distributors in the milk-shed."[195] Due process, concluded Roberts, does not prevent legislatures from intervening in the private economy whenever "the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself."[196]

190. Ibid., 361.

191. *Nebbia v. New York*, 291 U.S. 502 (1934), 523.

192. Ibid., 530.

193. See Mayer, "What's Wrong with Exploitation?" 138–39, 142, 144, for a discussion of free-rider exploitation.

194. *Nebbia v. New York*, 517–18.

195. Ibid.

196. Ibid., 538.

https://doi.org/10.1017/S0738248013000047 Published online by Cambridge University Press

The understanding by a majority of the justices that market failure extended beyond monopoly control of a vital service paved the way for Stone to confront the authority of *Adkins* directly. His dissent in *Morehead v. Tiplado* (1936) elaborated his view that the wage term could properly be regulated under the police power whenever "circumstances, beyond the control of the parties, had so seriously curtailed the regulative power of competition as to place buyers or sellers at a disadvantage in the bargaining struggle."[197] "There is grim irony," argued Stone, "in speaking of the freedom of contract of those who, because of their economic necessities, give their services for less than is needful to keep body and soul together. But if this is freedom of contract no one has ever denied that it is freedom which may be restrained, notwithstanding the Fourteenth Amendment, by a statute passed in the public interest."[198] The Court overturned *Adkins* a year later.

The chief justice wrote the majority opinion in *Parrish*, and it remained firmly committed to the principles of police power jurisprudence. Hughes contended that *Parrish* was consistent with the history of rulings upholding employment legislation, culminating in the *Adkins* dissent.[199] He was not being disingenuous. Alternative understandings of the market's fairness, not inimical conceptions of due process, continued to divide the justices. Sutherland, now writing in dissent, did not disagree that "there was no such thing as absolute freedom of contract, but that it was subject to a great variety of restraints."[200] He concurred, furthermore, that "this court from time to time had upheld statutory interference with the liberty of contract," including "statutes prescribing the character, methods and time for payment of wages and … statutes fixing the hours of labor" in private industries.[201] Sutherland's dissent reiterated the opinion of the *Adkins* majority. The market determined "the fair value of the services rendered." The wage fixing law was therefore a "compulsory exaction" from A's (employers) private property, giving it to B (wage-working women),

197. *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936), 632.

198. Ibid. Justice Roberts joined the majority decision in *Tipaldo*, invalidating New York's minimum wage law. His vote in *Parrish* was the infamous "switch in time that saved nine." The controversy about Roberts's motivation does not affect my conclusion that *Parrish* represents the culmination of a trend reconciling the police power with progressive labor legislation and not a constitutional revolution. See Cushman's excellent discussion of the internal dynamics of the Court as the Justices wrestled with the complex procedural and doctrinal issues involved, concluding that Roberts's decision to join the *Parrish* majority cannot be characterized as surrender to public pressure. *Rethinking the New Deal Court*, 92–105.

199. *West Coast Hotel v. Parrish*, 395.

200. Ibid., 406.

201. Ibid., 407.

https://doi.org/10.1017/S0738248013000047 Published online by Cambridge University Press

without compensation and for purely private ends: to redress conditions of poverty employers neither contributed to nor caused.[202]

Hughes pointed to an "array of precedents and . . . principles" whereby the judiciary had established the two preconditions authorizing regulation of the employment contract.[203] First, state and federal courts upheld legislation limiting contractual prerogatives to protect classes whose economic disadvantage rendered them defenseless in the marketplace. "The point that has been strongly stressed that adult employees should be deemed competent to make their own contracts was decisively met nearly forty years ago in *Holden* v. *Hardy* . . . where we pointed out the inequality in the footing of the parties."[204] Overruling *Adkins* did not require a revolution in substantive due process. The same principle had governed time and manner of payment and maximum hours legislation. Second, Hughes rejected the measure of fairness adopted by the *Adkins* majority: the just price for labor was established not by market competition, but rather by a public conception of an adequate livelihood. "In dealing with the relation of employer and employed, the legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression."[205] Judged from the standpoint of a decent living standard, employers paying only the market price for labor are exploiters. Accordingly, "the legislature . . . was clearly entitled to consider the situation of women in employment, the fact that they are in the class receiving the least pay, that their bargaining power is relatively weak, and that they are the ready victims of those who would take advantage of their necessitous circumstances. The legislature was entitled to adopt measures to reduce the evils of the 'sweating system,' the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living, thus making their very helplessness the occasion of a most injurious competition."[206]

Hughes's claim that the state legislature had reasonably established a decent livelihood as a public standard of the minimum pay workers were due was decisive in countering Sutherland's objection that the statute unjustly held employers responsible for circumstances they had not created. Hughes adopted the argument, made by the Oregon court in *Stettler* and by Frankfurter's brief in *Adkins*, that "unscrupulous and

202. Ibid., 409–10.
203. Ibid., 395.
204. Ibid., 393.
205. Ibid.
206. Ibid., 398–99.

https://doi.org/10.1017/S0738248013000047 Published online by Cambridge University Press

overreaching employers" externalized the deficit between the market price of labor and "a minimum wage fairly fixed in order to meet the very necessities of existence." Employers who pressed their advantage gained unfairly at the expense of employers paying a living wage, of necessitous workers, and of the public, whose taxes provided succor for the poor.

> The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage is not only detrimental to their health and well-being but casts a direct burden for their support upon the community. What these workers lose in wages the taxpayers are called upon to pay. The bare cost of living must be met. We may take judicial notice of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved. . .. The community is not bound to provide what is in effect a subsidy for unconscionable employers.[207]

Conclusion

Judicial review of progressive labor legislation during the *Lochner* era was not, or not only, based on judges' commitments to preserving state neutrality and contractual liberty. What neutrality and economic liberty required, whether they barred or prescribed intervention in the marketplace, was also determined by judges' understandings of the market's fairness, involving a measure of what workers were due and a consideration of their economic circumstances. Judicial opposition to protective labor legislation presupposed that competitive markets established the just price of goods and services, including labor, and that employment relations were relatively harmonious and free from coercion. Accordingly, the first regulations of the employment contract to come before state courts, governing time and manner of payment, were struck as violations of neutrality and undue interference with contractual liberties. Courts had a long tradition of deferring to the legislative regulation of the economy under the state's police power. But employment relations were special, insulated by free labor assumptions that markets distributed opportunity fairly. Redistributive laws, in which legislatures took sides in labor disputes, were rejected as products of political favoritism, in which powerful groups and classes used state power to put competitors at an economic disadvantage.

By the end of the nineteenth century, however, state and federal court decisions began to acknowledge that relations between employers and

207. Ibid., 399.

https://doi.org/10.1017/S0738248013000047 Published online by Cambridge University Press

wage workers were marred by disparities in bargaining power, so that employment negotiations failed to produce mutually beneficial contracts. Courts sustaining progressive policies made two moves. First, they gave the state's police power, its regulatory authority over health, safety, and morals, broader latitude to establish standards of well-being covering workers' welfare, allowing legislatures to invalidate employment contracts that failed to satisfy these standards. Even acceptance of market ordering as the measure of a fair contract did not preclude protective legislation. Legislatures were authorized to void contracts establishing time and manner of payments that eroded the full market value of wages. Laws prescribing maximum working hours and minimum wages, however, established public benchmarks of what workers were due. Employers and wage-workers negotiated employment terms in the marketplace, but terms that required workers to give up more, in longer hours or lower pay, than the legally prescribed working day or minimum wages, were blocked, because they allowed employers to gain too much at the expense of workers' welfare.

Second, courts construed substantive due process, intended to ensure fairness by prohibiting the wrong of taking from A and giving to B, as also intending to prevent A from exploiting B. Concerns that bargaining disparities precluded workers from negotiating fair terms of employment pervaded the Supreme Court's and state courts' decisions upholding time and manner of payment and maximum hours statutes. These concerns explained why legislatures were permitted to block market valuations of core terms of the labor contract, treating laws regulating employment no differently than other economic regulations, particularly health and safety statutes, that were routinely sustained as legitimate exercises of their police power. Judicial sanction for laws establishing a minimum wage faced a steeper hurdle, as a majority of Supreme Court justices in *Adkins* reaffirmed the legitimacy of the market's assessment of a fair wage—the very heart of the employment contract—in private enterprises. Justice Stone assumed a leading role in undermining this last mainstay of free labor ideology, eventually persuading a majority of his colleagues that labor markets were characterized by pervasive failures that authorized the use of state power to protect vulnerable parties and the community. *Parrish* removed the final constitutional obstacle to progressive employment legislation. Chief Justice Hughes drew on a constitutional tradition of substantive due process, dating from *Holden v. Hardy*, to underscore that minimum wage laws were just. From the standpoint of fairness, neutrality permitted—indeed, required—government intervention. Nor did the Court abandon its presumption in favor of economic liberty. The minimum wage statute was a perfectly reasonable way of protecting liberty by redressing economic oppression.

https://doi.org/10.1017/S0738248013000047 Published online by Cambridge University Press