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Some Varieties and Vicissitudes of Lochnerism

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INTRODUCTION

Until recently, a consensus appeared to be emerging among constitutional historians concerning how best to interpret Lochner-era decisions involving Fifth and Fourteenth Amendment challenges to state and federal economic regulation. After decades during which the Court’s jurisprudence had been characterized as the product of a reactionary judiciary’s commitments to Social Darwinism and laissez-faire economics, more recent scholars had come to see the Court’s police powers decisions as animated by what Professor Howard Gillman has called the principle of neutrality.1 On this view, the Court’s

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1 HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 10 (1993) (examining the influence of the principle of
jurisprudence is best understood as erecting a series of obstacles to "class," "special," "partial," or "unequal" legislation, "legislation that could not be regarded as public-regarding because it benefited certain interest groups or took from A to give to B."\footnote{2}

Recently, however, two articles have challenged this emerging consensus. Professor Robert Post and Professor David Bernstein each have contended that the salience of the principle of neutrality in *Lochner* era jurisprudence has been considerably overestimated, and in fact does comparatively little to explain the Court's decisions. These commentators instead prefer to characterize the neutrality on the *Lochner* Court's Fourteenth Amendment jurisprudence. Gillman's interpretation had been anticipated by the work of a number of scholars. \textit{See} Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of 'Laissez-faire' Constitutionalism, 1863-1897*, 61 J. AM. HIST. 970, 971-73 (1975) (discussing Justice Field's attempts to formulate "immutable rules" to distinguish between regulation and confiscation when examining the limits of states' police powers); Stephen A. Siegel, *Understanding the Lochner Era: Lessons from the Controversy over Railroad and Utility Rate Regulation*, 70 VA. L. REV. 187, 189-92 (1984) (discussing the distinction between privilege and property in the context of liberal and conservative reactions to the changing economic environment of the early Twentieth Century); William Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WISC. L. REV. 767, 771-72 (arguing that the development of constitutional labor regulation during the Gilded Age was the product of competing visions of republicanism); Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293, 298, 304-31 (1985) (contending that the Supreme Court's development of laissez-faire constitutionalism should be understood, in part, as an effort to protect traditional notions of liberty); Aviam Soifer, *The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888-1921*, 5 LAW & HIST. REV. 249, 252, 278 (1987) (examining the relationship between paternalism—"encouraging and applying some form of protection while excoriating and invalidating others"—and redistribution in laissez-faire constitutionalism); Cass Sunstein, "Lochner's Legacy," 87 COLUM. L. REV. 873, 878-89 (1987) (discussing the legacy of the *Lochner* Court's view of "neutrality" as a condition set by the common law); William Forbath, *Law and the Shaping of the American Labor Movement 8-9* (1991) (exploring ways in which judicial review of labor regulation in the late Eighteenth and early Nineteenth Centuries conditioned the strategies of labor movements, and the ways in which the strategies of labor movements, in turn, influenced the judiciary); Morton Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* 19-31 (1992) (analyzing *Lochner* and pre-*Lochner* police powers decisions in light of the Nineteenth Century liberal conception of "the neutral state"); Owen Fiss, *Troubled Beginnings of the Modern State, 1888-1910* 156, 160 (1993) (discussing the Court's efforts to limit legislative redistribution through the requirement that laws be "universal" or "neutral" in their application).

decisions as efforts to secure zones of individual liberty and autonomy constitutionally insulated from intrusive government supervision. In Part I of this essay, I examine the arguments of each and seek to discern what, if anything, might be salvaged of the consensus view in the face of their critiques. In Part II, I examine a series of lesser-known decisions of the New Deal era to help elucidate the multiplicity of positions that justices of the period took on questions of judicial enforcement of Fifth and Fourteenth Amendment limitations on economic regulation. This examination is designed in turn to help evaluate another widely shared view: that the \textit{Lochner} era came to an end with the Supreme Court's decision in \textit{West Coast Hotel v. Parrish}\textsuperscript{3} in the spring of 1937.

I. \textit{LOCHNER REVISIONISM BESIEGED}

A. \textit{The Bernstein Critique}

In a recently published article, Professor David Bernstein takes issue with Professor Gillman and other \textit{Lochner} revisionists. Professor Bernstein accuses Professor Gillman (and others, including, perhaps, the author of this essay) of "wildly exaggerating the importance of class legislation analysis to the \textit{Lochner} Court."\textsuperscript{4} Professor Bernstein argues instead that "[t]he Supreme Court's desire to protect fundamental liberties under the Due Process Clause primarily motivated its \textit{Lochnerian} jurisprudence."\textsuperscript{5} In the course of arguing this thesis, Professor Bernstein makes some useful observations. First, he notes that a number of the \textit{Lochner}-era decisions invalidating statutes on class legislation grounds relied upon the Equal Protection Clause, either alone or in conjunction with the Due Process Clause, rather than solely upon the Due Process Clause.\textsuperscript{6} Second, he notes that the \textit{Lochner}-era Court sustained a number of statutes that one might possibly characterize as class legislation.\textsuperscript{7} Third, he points out that some of the \textit{Lochner}-era decisions striking down statutes as violations of the Due Process Clause emphasized the doctrine of

\textsuperscript{3} 300 U.S. 379, 400 (1937) (upholding a Washington minimum wage law for women as a valid exercise of the State's police powers).

\textsuperscript{4} Bernstein, \textit{supra} note 2, at 60.

\textsuperscript{5} \textit{Id.} at 31; see also \textit{id.} at 51 ("[T]he Supreme Court's \textit{Locherian} [sic] jurisprudence had been nurtured and sustained by a belief that it was the judiciary's role to protect unenumerated fundamental constitutional rights from government invasion. Primary among those rights, but certainly not exclusive, was the right to liberty of contract.").

\textsuperscript{6} \textit{Id.} at 14 ("[T]he problem that remains with the class legislation thesis is that, whereas almost all of the Supreme Court's \textit{Lochnerian} decisions were decided solely or primarily under the Due Process Clause, class legislation was analyzed primarily under the Equal Protection Clause.").

\textsuperscript{7} \textit{Id.} at 21 ("[T]he Court upheld even laws that seemed very plausible candidates for condemnation as class legislation.").
liberty of contract rather than class legislation analysis. And fourth, Professor Bernstein points out that such civil liberties landmarks of the era as *Meyer v. Nebraska* and *Pierce v. Society of Sisters* were cut from the same fundamental rights cloth as the doctrine of liberty of contract, and were not grounded in the principle of neutrality.

Professor Bernstein concedes that 

[h]ostility to class legislation remained a subsidiary consideration of the Supreme Court during the *Lochner* era itself, with the Court occasionally invalidating under the Equal Protection Clause laws that contained apparently arbitrary classifications, especially in tax cases. Anti-class legislation nostrums also maintained a vestigial presence in due process cases with the Supreme Court’s refusal to expand the police power to accommodate blatant special interest legislation.

Yet he concludes that “[c]lass legislation analysis did not play an influential role in the *Lochner* era,” and that Professor Gillman’s “class legislation thesis . . . ultimately fails to explain the Supreme Court’s opinions invalidating regulatory legislation during the *Lochner* era.” Instead, Professor Bernstein

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8 *Id.* at 28 (“When the *Lochner* Court did invalidate regulatory legislation, it consistently relied on liberty of contract arguments under the Due Process Clause rather than on class legislation arguments under the Equal Protection Clause.”). *But see* Michael J. Phillips, *The Progressiveness of the* *Lochner* *Court*, 75 *DENV. L. Rev.* 453, 458 (1998) [hereinafter Phillips, *Progressiveness*] (“Whatever people may think, relatively few of the *Lochner* era cases using substantive due process to strike down government action explicitly proceeded on the assumption that the challenged law restricted freedom of contract.”); Michael J. Phillips, *How Many Times was Lochner-Era Substantive Due Process Effective?*, 48 *MERCER L. Rev.* 1049, 1086 n.197 (1997) [hereinafter Phillips, *Lochner-Era*] (estimating that only eleven such cases “clearly involved liberty of contract”).

9 262 U.S. 390, 403 (1923) (invalidating a Nebraska law banning the teaching of foreign languages).

10 268 U.S. 510, 534-35 (1925) (invalidating an Oregon law requiring children to attend only public schools).

11 Bernstein, *supra* note 2, at 49 (“[T]hese cases were decided as *Lochnerian* cases involving fundamental liberties protected by the Due Process Clause, with no mention of equal protection or class legislation.”).

The Supreme Court *Lochnerian* civil liberties decisions of the 1920s and early 1930s exemplify the problems with the class legislation hypothesis . . . . [T]hese were clearly *Lochnerian* decisions, yet class legislation analysis played no role in the Courts’ opinions. The class legislation thesis simply cannot account for these cases, and Gillman ignores them completely in *The Constitution Besieged*.

*Id.* at 59.

12 *Id.* at 58.

13 *Id.* at 13. Portions of Professor Bernstein’s critique of Professor Gillman were significantly anticipated by Michael Phillips, *The* *Lochner* *Court, Myth and Reality: Substantive Due Process from the 1890s to the 1930s* 105-114 (2001), though Professor Phillips appears to find more to admire in Professor Gillman’s treatment than does Professor Bernstein.
insists, “liberty of contract” was the “doctrine upon which Lochner itself and all of the famous ‘economic due process’ cases of the Lochner era relied.”

While I agree with Professor Bernstein that there are dimensions of Lochner-era Fifth and Fourteenth Amendment economic regulation jurisprudence for which the principle of neutrality alone does not adequately account, I intend to argue that his effort to relegate that principle to a position of insignificance in the period’s jurisprudence is considerably overdrawn. In doing so I shall be calling attention to a variety of decisions either overlooked or given short shrift by both Professor Bernstein and Professor Gillman.

1. The Neutrality Principle: Manifestations and Persistence

Before proceeding to an analysis of the Lochner era cases, a few general words by way of background are in order. As Professor Bernstein recognizes, “cases decided during the period just before the Court adopted the liberty of contract doctrine suggested that when the police power was asserted, due process protection included, or perhaps was even limited to, a ban on unequal legislation.” In the 1889 case of Dent v. West Virginia, for example, Justice Field wrote for a unanimous Court 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.”

Two years later, in Caldwell v. Texas, Chief Justice Fuller’s unanimous opinion asserted that due process was “secured by laws operating on all alike,” and prohibited legislation that was “special, partial, and arbitrary.” Yet Professor Bernstein contends that “post-Lochner cases . . . relied on due process as the basis for the protection of fundamental rights such as liberty of contract against arbitrary legislation

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14 Bernstein, supra note 2, at 28.
15 Id.
16 129 U.S. 114, 124 (1889).
17 137 U.S. 692, 697-98 (1891). Fuller would invoke this language again later that year in the unanimous decision of Leeper v. Texas, 139 U.S. 462, 468 (1891) (“[D]ue process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice.”), and yet again two years later in Giozza v. Tiernan, 148 U.S. 657, 662 (1893) (“[D]ue process of law within the meaning of the amendment is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government.”). As Rodney Mott would observe in his 1926 treatise Due Process of Law, “toward the end of the Nineteenth Century a number of judges declared in a series of dicta that due process guaranteed equal and impartial justice which could only be secured when laws operated on all alike.” RODNEY MOTT, DUE PROCESS OF LAW 284 (1926) (citing Dent, 129 U.S. at 124; Leeper, 139 U.S. at 468; Caldwell, 137 U.S. at 697; Giozza, 148 U.S. at 662). In 1922 Charles Burdick would cite these cases in noting that “the Supreme Court has declared that arbitrary action is forbidden by the due process clause as well as the clause guarantying equal protection, and has also treated as vital to due process as well as to equal protection the fact that a state statute operates upon all alike.” CHARLES BURDICK, THE LAW OF THE AMERICAN CONSTITUTION 417 (1922).
and suggested that the equality component of due process was minimal, if it existed at all."18 The "primary jurisprudential importance of Lochner," he argues, "was that it moved the Supreme Court away from class legislation analysis of police power legislation to an analysis that relied on the Justices' understanding of the fundamental liberties of the American people."19

Professor Bernstein thus sees Lochner and its progeny as working a radical reorientation of due process jurisprudence, transforming an area of constitutional doctrine that had been concerned primarily with equality into one that was focused principally, perhaps exclusively, on the protection of fundamental rights. Yet contemporary observers do not appear to have shared Professor Bernstein's perception that due process had been so dramatically transformed. Instead, legal commentators writing in the Lochner era continued to view due process doctrine as suffused with norms of neutrality, equality, and generality.

Professor Gillman tells us that "[i]n the language of late-nineteenth-century constitutional law, arbitrary was quite often the word of choice used to characterize factional politics."20 The notion that such "arbitrary" legislation was inconsistent with due process persisted well into the twentieth century. Writing in 1906, the year after Lochner was decided, Lucius Polk McGehee wrote in his treatise on due process that "[u]nder the American theory of constitutional government . . . [p]urely arbitrary decrees or enactments of the legislature directed against individuals or classes are held not to be 'the law of the land,' or to conform to 'due process of law.'"21 In 1917 Professor Ernst Freund of the University of Chicago wrote in his Standards of American Legislation that "[s]o far as equality means absence of arbitrary discrimination, it is almost undistinguishable [sic] from due process."22 That same year Hannis Taylor, in his treatise on due process and equal protection, asserted that "[t]he primary purpose of the founders of American constitutional law was to wipe out the entire system of legislative despotism over life, liberty and property, based in England not only upon a denial of the right to due process, but also upon the denial of the principles demanding generality and equality in the laws."23 Taylor concluded that "generality and equality of laws" was a

18 Bernstein, supra note 2, at 28-29.
19 Id. at 12.
20 GILLMAN, supra note 1, at 72-73. Professor Gillman further notes that "reasonableness was the concept that embodied the system's tolerance of class-neutral policies that advanced a public purpose." Id. In 1913 one commentator observed that the Court used the term "arbitrary" to characterize government action that was "oppressive or unjust or not based upon a sufficient reason," which "the due process provision forbids." Robert P. Reeder, Is Unreasonable Legislation Unconstitutional?, 62 U. PA. L. REV. 191, 192, 201 (1913).
21 LUCIUS POLK MCGEHEE, DUE PROCESS OF LAW UNDER THE FEDERAL CONSTITUTION 61 (1906).
22 ERNST FREUND, STANDARDS OF AMERICAN LEGISLATION 219 (1965).
23 HANNIS TAYLOR, DUE PROCESS OF LAW AND THE EQUAL PROTECTION OF THE LAWS 304
"fundamental requisite of due process," and
an element inherent in due process in its American form. As such it
existed long before the adoption of the Fourteenth Amendment, and is
therefore something entirely separate and apart from the guaranty
embodied in its provision that no state shall "deny to any person within its
jurisdiction the equal protection of the laws." 24

In 1922 Professor Charles Burdick of Cornell Law School would conclude
that "the conception of due process does exclude legislation which inflicts
inequality of burden, which is clearly arbitrary, and without any basis in
reason." 25 And in his 1926 treatise on due process, Rodney Mott would find
that "[t]he concept of equality was one of the first branches to grow from the
due process provision and it has had greater application than any of the other
principles which the court has evolved." 26

The exemplar of "arbitrary" legislation inflicting "inequality of burden" and
thus lacking in "generality and equality" was redistributive legislation that
courts and commentators of the period condemned as "confiscatory." "Extreme instances of laws lacking in generality," McGehee wrote in 1906,"are acts which forfeit or confiscate the life, liberty, or property of a private
citizen, or citizens, by the mere edict of the legislature." 27 "Confiscatory
legislation of a civil character is as much opposed to due process of law as
judgments of the legislature imposing penalties for crime." 28 Taylor would
offer a nearly identical formulation eleven years later, affirming that
"confiscatory legislation directed against private property is just as lacking in
due process as legislative decrees imposing penalties for crime." 29 And Mott
would repeat in 1926 that "[i]f the concept of public purpose has any value as a
legislative norm, it is evident that an act which takes the property of one
individual and arbitrarily transfers it to another must be void." 30

The notion that confiscatory legislation was inconsistent with the law of the

(1917).

24 Id. at 307. Taylor's investigation led him to the view that "[t]he conception . . . of the
generality and equality of laws, as a necessary part of due process, is purely an American
creation." Id. at 297.
26 MOTT, supra note 17, at 598. Mott appeared to endorse, as a matter of original
understanding, "Cooley's observation that due process includes the equal protection of the
laws and more," id. at 277, and speculated that even if the Fourteenth Amendment had not
incorporated the Equal Protection Clause as "an additional safeguard against partial
legislation," the Supreme Court would have "developed the equality side of due process." Id.
at 295. "The ultimate result," he concluded, "would probably have been much the same
whether the 'equal protection of the law' had been inserted in the constitution or not." Id.
27 McGEHEE, supra note 21, at 64.
28 Id. at 68.
29 TAYLOR, supra note 23, at 303.
30 MOTT, supra note 17, at 468.
land had a venerable pedigree. In 1798 Justice Samuel Chase had written in *Calder v. Bull* that “a law that takes *property* from A. and gives it to B.” was “contrary to the great first principles of the social compact, [and] cannot be considered a rightful exercise of legislative authority.”\(^3\) In the 1829 case of *Wilkinson v. Leland*, Justice Story had reported that “[w]e know of no case, in which a legislative act to transfer the property of A. to B. without his consent, has ever been held a constitutional exercise of legislative power in any state in the union.”\(^3\)\(^2\) In the 1878 case of *Davidson v. New Orleans*, Justice Miller explicitly linked the prohibition on confiscatory legislation to the Fourteenth Amendment’s Due Process Clause:

> [A] statute which declares in terms and without more, that the full and exclusive title of a described piece of land, which is now in A, shall be and is hereby vested in B, would, if effectual, deprive A of his property without due process of law, within the meaning of the constitutional provision.\(^3\)\(^3\)

Six years later, in the opinion of the Court in *Hurtado v. California*, Justice Matthews wrote of the Fourteenth Amendment’s due process clause as “excluding, as not due process of law . . . acts of confiscation, . . . acts directly transferring one man’s estate to another, . . . and other similar special, partial, and arbitrary exertions of power under the forms of legislation.”\(^3\)\(^4\) Such exercises of “arbitrary power” were inconsistent with the Amendment’s requirement that the law be “general.”\(^3\)\(^5\) Measures such as these, notes Professor John Harrison, supplied “[e]very nineteenth century lawyer’s favorite example of an unconstitutional statute.”\(^3\)\(^6\) As Professor John Orth has concluded, “Taking from A and giving to B had become the shorthand to describe what substantive due process was designed to prevent.”\(^3\)\(^7\) He observes that “[a]s substantive due process emerged as a new legal category, ‘taking from A and giving to B’ became the prime example of what it forbade.”\(^3\)\(^8\)

Throughout the period immediately preceding and following the Court’s decision in *Lochner*, the Justices continued to hold open the possibility that the protections of the Fifth Amendment’s Due Process Clause might be coextensive with those of the Fourteenth Amendment’s Equal Protection Clause:

\(^3\)\(^1\) 3 U.S. 386, 388 (1798).
\(^3\)\(^3\) Davidson v. New Orleans, 96 U.S. 97, 102 (1878).
\(^3\)\(^4\) 110 U.S. 516, 536 (1884).
\(^3\)\(^5\) Id. at 535-36.
\(^3\)\(^6\) John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 506 (1997); see also id. at 518 (“The A-to-B law is the archetypal legislative deprivation [of property] and always has been.”).
\(^3\)\(^8\) Id. at 344.
In a series of decisions handed down between 1904 and 1912, the Court sustained federal statutes in the face of claims that they worked an arbitrary discrimination in violation of the Fifth Amendment. In none of these cases did the Court hold that the absence of an Equal Protection Clause in the Fifth Amendment left Congress free to create arbitrary classifications. Instead, the Court held that the statutes in question would have passed muster even assuming that the protections of due process were equivalent to those of the Equal Protection Clause. By 1917, in Wilson v. New, the Court would explicitly scrutinize a federal statute for its alleged failure to afford equal protection of the laws. The political scientist Robert Cushman observed in 1922 that, notwithstanding the absence of an equal protection clause in the Fifth Amendment, "there has been a tendency upon the part of the courts to regard the due process clause and the equal protection of the law clause as

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39 Though an acontextual reading of some dicta in District of Columbia v. Brooke, 214 U.S. 138, 149 (1909) did lead one commentator to conclude that Congress was free to enact "class legislation." E. Connor Hall, Due Process of Law and Class Legislation, 43 AM. L. REV. 926, 927 (1909).

40 See Second Employers' Liability Cases, 223 U.S. 1, 52-53 (1912) ("Even if it be assumed that [the Fifth Amendment's Due Process] clause is equivalent to the 'equal protection of the laws' clause of the Fourteenth Amendment, which is the most that can be claimed for it here, it does not take from Congress the power to classify, nor does it condemn exertions of that power merely because they occasion some inequalities. On the contrary, it admits of the exercise of a wide discretion in classifying according to general, rather than minute, distinctions, and condemns what is done only when it is without any reasonable basis, and therefore is purely arbitrary"); United States v. Heinze, 218 U.S. 532, 546 (1910) ("[E]ven if the explicit clause of the Fourteenth Amendment, forbidding a State to deny to any person within its jurisdiction the equal protection of its laws, can be said to apply to the United States, it can have no broader meaning when so applied than when applied to the States. Assuming, therefore, and assuming only, not deciding that Congress may not discriminate in its legislation, it certainly has the power of classification, and the act... is well within such power"); Brooke, 214 U.S. at 150 ("[T]he question of the power of Congress, broadly considered, to discriminate in its legislation is not necessary to decide, for whether such power is expressly or impliedly prohibited, the prohibition cannot be stricter or more extensive than the Fourteenth Amendment is upon the States. . . . [T]hat Amendment . . . does not take from the States the power of classification"); McCray v. United States, 195 U.S. 27, 61-62 (1904) ("Conceding merely for the sake of argument that the due process clause of the Fifth Amendment, would avoid an exertion of the taxing power which, without any basis for classification, arbitrarily taxed one article and excluded an article of the same class, such concession would be wholly inapposite to the case in hand"). "[I]n each of these cases," observed Rodney Mott, the Court was "careful to point out that the statute complained of was not unreasonable in its classification, and so could not be said to violate due process of law even if that clause included the equal protection concept." MOTT, supra note 17, at 285-86.

41 243 U.S. 332, 354 (1917) (examining a federal labor regulation statute for "want" of equal protection of the laws).
overlapping to a large extent.”

That same year Charles Burdick would report that, though no federal legislation had yet “been declared lacking in due process because it denied the equal protection of the laws,” “the Supreme Court has entertained and given serious consideration to attacks upon federal legislation based upon the ground that, because of unreasonable classification, it denied the protection of reasonably equal laws,” and had recently opined that a federal “classification may be so grossly unreasonable as to be unconstitutional.” In 1929, W.W. Willoughby would write that the Fifth Amendment’s Due Process Clause “has been given an interpretation which brings within its scope many forms of arbitrary or unreasonable discriminatory action which might be brought, and, when the States have been concerned, have been brought within the prohibition of denial of equal protection of the laws.”

Meanwhile, the relationship between Equal Protection and Fourteenth Amendment Due Process remained unsettled. Professor Bernstein correctly points out that “[c]ourts did not always clearly distinguish between equal protection and due process issues and sometimes cited both clauses when invalidating legislation.” Contemporary commentators concurred in this assessment. Writing in 1904, for example, Ernst Freund took note of Justice Brewer’s statement in Reagan v. Farmers’ Loan & Trust Co. that:

The equal protection of the laws which, by the Fourteenth Amendment,


43 *Burdick*, *supra* note 25, at 418-20. Burdick here referred to the opinion in *La Belle Iron Works v. United States*, 256 U.S. 377 (1921), which rejected the contention that the statute challenged failed to satisfy the “general requirement of due process of law in taxation,” that it suffered from a “want of generality,” and was “so wholly arbitrary as to amount to confiscation.” *Id.* at 393. Mott interpreted the decision as an announcement that, should the Court be presented with “special” legislation in the form of a tax, “it would not hesitate to declare it void as contrary to due process of law.” *Mott*, *supra* note 17, at 287.

44 3 W.W. Willoughby, *Willoughby on the Constitution of the United States* § 1267, at 1928 (2d ed. 1929). Willoughby had anticipated this interpretation of the Fifth Amendment even before the Court had settled on it. In 1910 he had written:

The United States is not by the Constitution expressly forbidden to deny to anyone the equal protection of the laws, as are the States by the first section of the Fourteenth Amendment. It would seem, however, that the broad interpretation which the prohibition as to ‘due process of law’ has received is sufficient to cover very many of the acts which, if committed by the States, might be attacked as denying equal protection. Thus it has been repeatedly declared that enactments of a legislature directed against particular individuals or corporations, or classes of such, without any reasonable ground for selecting them out of the general mass of individuals or corporations, amount to a denial of due process of law so far as their life, liberty, or property is affected.


45 Bernstein, *supra* note 2, at 17 n.81. For some examples of such cases, see *Mott*, *supra* note 17, at 284 n.31.
no state can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public.\textsuperscript{46}

In other words, the Reagan Court suggested that confiscatory legislation lacking in equality and generality because it took from A to give to B violated the Equal Protection Clause. Freund went on to observe that in the 1898 rate regulation case of \textit{Smyth v. Ames},\textsuperscript{47} "equal protection and due process are treated almost as meaning the same thing." \textsuperscript{48} Throughout the 1890s, it remained unclear which of these two clauses constituted the proper textual prohibition against legislation that was lacking in generality and neutrality because it was confiscatory.

If in fact \textit{Lochner} signaled the sort of radical reorientation that Professor Bernstein perceives, one might have anticipated that such confiscatory legislation would thereafter have been condemned under the Equal Protection Clause rather than under the Due Process Clause. For Professor Bernstein contends that, after \textit{Lochner}, the Equal Protection Clause became the principal protection of constitutional equality, with the Due Process Clause playing only a "subsidiary" role. On his account, the principal function of the Due Process Clause was no longer to preserve legal equality, but instead to protect fundamental liberties. Yet, as I shall demonstrate, the prohibition on confiscatory rate regulation would eventually find a settled home in the Due Process rather than the Equal Protection Clause.\textsuperscript{49} The pre-\textit{Lochner} cases, such as \textit{Reagan} and \textit{Smyth}, at the very least left open the possibility that such legislation would be held to deny equal protection; it was the post-\textit{Lochner} decisions that foreclosed it. This fact alone would appear to present Professor Bernstein with a considerable difficulty, as this is precisely the opposite of what one would have anticipated given Professor Bernstein's account. Rather than thinking of \textit{Allgeyer}, \textit{Lochner}, and other such cases emphasizing fundamental liberties as radically reorienting due process jurisprudence, it may make sense to think of them instead as simply introducing a complementary

\textsuperscript{46} 154 U.S. 362, 399 (1894) \textit{discussed in ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS} 633 (1904) ("In the [\textit{Reagan}] case it was said that the equal protection of the laws is denied where property is wrested from an individual without compensation for the benefit of another or of the public . . . ").

\textsuperscript{47} 169 U.S. 466, 526 (1898) (invalidating a state regulation fixing maximum rates to be charged by railroads for freight transportation when such rates are so unreasonably low as to constitute a deprivation of property in violation of the Fourteenth Amendment).

\textsuperscript{48} FREUND, \textit{supra} note 46, at 633. Mott saw it the same way: "In \textit{Smyth v. Ames}, Justice Harlan treated the two phrases as identical." MO\textit{T}, \textit{supra} note 17, at 284-85 n.32 (citation omitted).

\textsuperscript{49} \textit{See infra} text accompanying notes 130-155. \textit{See also} BURDICK, \textit{supra} note 25, at 607 ("[T]he right to review legislative rates has been more generally upheld under the due process clause.").
This certainly appears to have been the impression of Oliver Dean, who wrote an article on “The Law of the Land” in the American Law Review in 1914, nearly ten years after Lochner had been decided. Dean asked the question: “What, then, is the protection which the Law of the Land” – a term used interchangeably with “due process of law” – “gives to life, liberty and property?”

Dean insisted that “[i]t means that it is the inherent and natural right of every man to freely labor with his head and hands.”

But the protections of due process did not stop with the protection of such fundamental rights. The Law of the Land remained, in Dean’s view, the principal protection against “[c]lass legislation, the most pernicious and dangerous of all legislation.”

Dean reported:

Our books are full of decisions which have necessarily declared laws unconstitutional, many acts of legislation which were partial, extravagant, unjust and often absolutely foolish; they represented attempts at class legislation of a most pernicious and dangerous character; many of them have represented most dangerous attempts to interfere with private rights or to fasten upon the few for the benefit of the many, all the burdens of society.

Such legislation was inconsistent with due process, Dean explained, for:

The Law of the Land means . . . . that rights which are vested under the law, cannot be destroyed by legislation . . . . It means that private property cannot be taken for private use. It means that private property cannot be taken for public use without just compensation, and that this cannot be done under any pretended exercise of the police power, and that one class cannot be taxed for the benefit of the entire public, and that under a just exercise of the police power, a discrimination against any man to freely labor, to contract with reference to that labor, or to enjoy the results of his labor, cannot be made. . . . It means that rates charged by a public utility corporation, which will prevent a fair income on capital invested, cannot be established; and that the regulations prescribed in court procedure must be uniform in their operation, and not favor one litigant as against another litigant or a class of litigants. It means that the rules of government must not in their operation, impose duties or hardships on one class which, in justice, ought to be imposed on all classes of like situation; and that there should be no classification with respect to occupations, pursuits, business, professions or property, when a general law can be made applicable to all classes.

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51 Id. at 672.
52 Id. at 654.
53 Id. at 657.
54 Id. at 672-73.
The Law of the Land thus prohibited laws that were discriminatory, confiscatory, partial, lacking in uniformity and generality, favoring one class over another.

Other post-Lochner commentators agreed with Dean in continuing to regard the Fourteenth Amendment’s Due Process Clause as a safeguard of constitutional equality. In 1906, the year after Lochner was decided, Lucius McGehee wrote:

Classification is controlled both by the clause of the Fourteenth Amendment forbidding the denial of due process of law and that requiring the equal protection of the laws. Perhaps the same effects might have been attained by the due process clause alone and it will not be possible to separate the cases under the two clauses with rigid distinctness.55

In 1926 Rodney Mott would observe that the Supreme Court had “frequently linked the two protections” of due process and equal protection.56 As late as 1929 W.W. Willoughby would contend that “the requirement as to due process includes, to a very considerable extent at least, the guarantee of equal protection of the laws.”57 “[I]t is clear,” Willoughby continued, that:

[I]n many cases, laws which have been held invalid as denying due process of law might also have been so held as denying equal protection of the laws, or vice versa, and that, in fact, in not a few cases the courts have referred to both prohibitions leaving it uncertain which prohibition was deemed the most pertinent and potent in the premises.58

Thus, Willoughby concluded, “it is still difficult to say precisely in what specific respects the prohibition of the denial of equal protection of the laws operates to impose restraints not already covered by the prohibition with regard to the depriving of persons of life, liberty or property without due process of law.”59

It was not until 1921 that the Court offered to clarify the relationship between equal protection and due process. In the 5-4 decision of Truax v. Corrigan, Chief Justice Taft remarked in dicta that while the Due Process and Equal Protection Clauses of the Fourteenth Amendment each provided constitutional assurance of equal treatment, “the spheres of protection they offer are not coterminous.”60 The Due Process Clause, Taft asserted, secured “a mere minimum” guarantee of legal equality, whereas the Equal Protection Clause “was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other.

55 McGEHEE, supra note 21, at 311-12.
56 MOTT, supra note 17, at 284.
57 3 WILLOUGHBY, supra note 44, at 1929.
58 Id. at 1929.
59 Id. at 1928.
60 257 U.S. 312, 332 (1921).
It sought an equality of treatment of all persons, even though all enjoyed the protection of due process.\textsuperscript{61} The protections afforded by the Equal Protection Clause thus supplemented those offered by the Due Process Clause.

In light of the views of the Due Process Clause expressed by three members of the \textit{Truax} majority only two years earlier, there is room to doubt that they fully concurred in Taft's formulation of the relationship between the two clauses.\textsuperscript{62} Nevertheless, Taft's opinion in \textit{Truax} does serve to underscore a point that Professor Bernstein has made, and with which I agree: Many justices evidently preferred to analyze state regulations discriminating among similarly situated persons under the Equal Protection Clause rather than under the Due Process Clause. Though this collective preference may have intensified over the first two decades of the twentieth century, it was already in evidence well before \textit{Lochner} was decided,\textsuperscript{63} and indeed even before \textit{Allgeyer} was handed

\begin{itemize}
\item \textsuperscript{61} Id. at 332-33.
\item \textsuperscript{62} Arizona Employers' Liability Cases, 250 U.S. 400, 434, 435, 438-39 (1919) (McKenna, J., dissenting) (expressing concern that the Court's validation of an Arizona no-fault employer's liability law under the Fourteenth Amendment clearly violated the principle of neutrality); \textit{id.} at 440, 450, 452-53 (McReynolds, J., dissenting) (characterizing the Arizona statute as a deprivation of property in breach of the Fourteenth Amendment's Due Process Clause). Justices McKenna and McReynolds joined one another's dissents, and Justice Van Devanter joined each of these dissents. I discuss these opinions in greater detail later. \textit{See infra} notes 287-295 and accompanying text.
\end{itemize}
Yet throughout this period concerns with equality would continue to appear in Fourteenth Amendment due process cases, even those ostensibly preoccupied with the protection of fundamental liberties. Moreover, the Justices would continue to maintain that federal legislation creating arbitrary classifications or discriminations violated the Fifth Amendment’s Due Process Clause. Similarly, the Court would adhere to the position that confiscatory state legislation lacking in generality and neutrality because it took from A and gave to B violated not the Equal Protection Clause, but instead the Due Process Clause of the Fourteenth Amendment. These persistent understandings of Fifth and Fourteenth Amendment Due Process were repeatedly manifest in cases involving wage, price, rate, and other redistributive regulation.

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2. Neutrality and Property

a. Wage and Price Regulation

With that background, let us begin our survey of the cases with a decision of which Professor Bernstein takes note, and to which Professor Gillman devotes considerable attention. In Adkins v. Children's Hospital the Supreme Court invalidated the District of Columbia minimum wage law for women as authorizing "an unconstitutional interference with the freedom of contract included within the guaranties of the due process clause of the fifth amendment." Yet the majority was not content to rest its decision on the ground of interference with the fundamental liberty of contract. Justice Sutherland went on to explain that the law compelled the employer "to pay at least the sum fixed in any event, because the employee needs it, but requires no service of equivalent value from the employee." Where the wage determined by the District's minimum wage board was greater than the fair value of the employee's services, it constituted "a compulsory exaction from the employer for the support of a partially indigent person... arbitrarily shift[ing] to his shoulders a burden which, if it belongs to anybody, belongs to society as whole." Indeed, Sutherland continued, "the feature of this statute which, perhaps more than any other, puts upon it the stamp of invalidity is that it exacts from the employer an arbitrary payment" to his employee. This was constitutionally equivalent to requiring "the butcher, the baker or grocer" to supply to his customers the quantity of food necessary for their support at a price not to exceed a prescribed maximum. Just like such a hypothetical law, the minimum wage law took the property of A and conferred it upon B.

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66 261 U.S. at 545.
67 Id. at 557.
68 Id. at 557-58.
69 Id. at 558 (emphasis added).
70 Id. at 558-59 (asserting that a store patron is morally entitled to no more than the "worth of his money").
71 Professor Bernstein suggests that it is possible that not all of the members of the Adkins majority agreed with this portion of Sutherland's analysis, though it is not clear to me which of those Justices might have taken exception to it. See David E. Bernstein, Lochner's Legacy's Legacy, 82 TEX. L. REV. 1, 56 (2003) (explaining that some Justices might have disagreed silently with the Court's rationales, "[g]iven the rarity of concurrences at the time"). Professor Phillips, following Professor Siegan, suggests that "minimum wage laws for women may have reflected the interests of male-dominated unions interested in reducing competition for their members' services." Phillips, Progressiveness, supra note 8, at 497. See also BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 147-49 (1980) (positing two economic reasons that unions advocated for women-only minimum wage laws: first, they "were not eager to spend money organizing the low-paid, unskilled trades that were dominated by women workers," and second, "many union men feared that women... posed competitive problems"). The view that such legislation disadvantaged women workers as a class finds expression in Justice Butler's opinion for the majority in...
Professor Bernstein's treatment of *Adkins* is confined to a footnote in which he characterizes the decision as "[t]he only important *Lochner* era case in which the equality component of due process played a noticeably large role." He goes on to caution the reader that "the prominence of *Adkins* should not obscure the fact that, as a *Lochner* era due process case with explicit class legislation elements, it was rather exceptional." As I intend to show, however, *Adkins* was the tip of a rather large iceberg, the bulk of which appears to have escaped Professor Bernstein's attention. Readers of the opinion may recall that Justice Sutherland characterized the minimum wage statute as "simply and exclusively a price-fixing law," and asserted that "[i]n principle, there can be no difference between the case of selling labor and the case of selling goods." Indeed, the very "class legislation elements" of the *Morehead v. New York ex rel. Tipaldo*: "[P]rescribing of minimum wages for women alone would unreasonably restrain them in competition with men and tend arbitrarily to deprive them of employment and a fair chance to find work." 298 U.S. 587, 617 (1936). Regulating the wages of women and not men was therefore "necessarily arbitrary." *Id.* at 616. *See also Adkins*, 261 U.S. at 553 (arguing that notions of "the ancient inequality of the sexes" are outmoded, and thus valid legislation cannot impinge upon a woman's liberty of contract without so limiting a similarly situated man).


*Adkins*, 261 U.S. at 554.

*Id.* at 558.

Bernstein, *supra* note 2, at 29 n.153. Here and elsewhere in his article, Professor Bernstein uses the term "class legislation" to refer not only to statutes containing arbitrary classifications, but also to legislation implicating the due process prohibition on favoritism realized through redistribution. *See*, *e.g.*, *id.* at 12 (equating "class legislation" with "legislation that could not be considered as public-regarding because it benefited certain interest groups or took from A to give to B"); *id.* at 27-28 (using the Court's decision upholding against a due process challenge the "recapture" provisions of the Transportation Act of 1920, under which the ICC "appropriated 'excess' profits from strong railroads to create a fund to aid weaker railroads" as evidence that the Court "defined 'class legislation' narrowly"); *id.* at 28 (observing that "the Court generally upheld 'rate regulation of railroads, grain elevators, gas, water and electric works, stockyards, fire insurance, taxis, attorneys, and rental housing' against due process challenges, and remarking that "[i]n each of the[se] cases, the laws in question were limited to specific industries and were intended to promote the interests of consumers at the expense of producers and thus were arguably class legislation"); *id.* at 29 n.153 (suggesting that *Adkins' holding that the minimum wage's requirement that "employers . . . subsidize their employees" violated due process was one of the "explicit class legislation elements" of the decision). Though the Justices and other legal writers of the period did characterize this latter form of legislation as favoring one "class" over another, see *infra* notes 89, 97, 105-106, 125, 142, 179 and accompanying text, there is reason to question whether the Justices would have employed the term "class legislation" to refer to such redistributive legislation. Indeed, as Professor Michael Phillips has shown, after the turn of the century the Justices rarely employed the term at all, even in cases striking down classifications under the Equal Protection Clause. *See* Phillips, *Progressiveness, supra* note 8, at 497, n.328 (citing the only six "1902-1932 substantive due process cases using the terms 'class legislation,' 'partial legislation,' or 'partial law'").
Adkins opinion that Professor Bernstein identifies— the redistributive favoritism of one class over another— were applied with regularity in cases involving price and rate regulation.\(^{76}\)

In the service of his argument Professor Bernstein observes, for example:

[T]he Court generally upheld “rate regulation of railroads, grain elevators, gas, water and electric works, stockyards, fire insurance, taxis, attorneys, and rental housing.” In each of the above cases, the laws in question were limited to specific industries and were intended to promote the interests of consumers at the expense of producers and thus were arguably class legislation.\(^{77}\)

With the exception of attorneys, each of these laws regulated a business “affected with a public interest.”\(^{78}\) Regulations of the rates of such businesses

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My point here is not to criticize Professor Bernstein’s usage of the term to include such redistributive legislation, which is hardly singular, but instead to alert the reader to the fact that I will be using the term here as Professor Bernstein has in his article. The point of Professor Bernstein’s article is not to quibble over terminology, see Bernstein, supra note 2, at 31 (discussing the “semantic difficulty over the typical meaning of the phrase ‘class legislation’”), but instead to question whether revisionists such as Professor Gillman have exaggerated the significance of what Professor Bernstein refers to as “the equality component of due process,” id. at 28-29, or what Professor Gillman has called the principle of neutrality, supra note 1.

\(^{76}\) Professor Bernstein suggests that the “class legislation aspects” of the minimum wage law “normally would have been subject to challenge primarily under the Equal Protection Clause,” but that the Court relied upon the Fifth Amendment’s Due Process Clause because the case had arisen in a federal enclave and the Fourteenth Amendment therefore did not apply. Id. at 29 n.153. As I will point out in the discussion that follows, in cases involving state regulation arising under the Fourteenth Amendment, the Justices routinely applied the prohibition on taking the property of A and giving it to B under the Due Process Clause. Indeed, when Justice Sutherland dissented on behalf of himself and Justices Van Devanter, McReynolds, and Butler in West Coast Hotel v. Parrish on the ground that the Washington minimum wage statute violated the Due Process Clause, he quoted at length from the very passages from Adkins I have quoted in the text. See 300 U.S. 379, 409-11 (1937) (Sutherland, J., dissenting) (quoting Adkins, 261 U.S. at 557-59). The same is true of Justice Butler’s majority opinion in Morehead v. New York ex rel. Tipaldo, 298 U.S. 587, 612-13 (1936) (invalidating New York’s minimum wage statute on due process grounds). Moreover, no later than 1917, six years before Adkins was decided, the Court had recognized that the Fifth Amendment prohibited the federal government from denying equal protection of the laws. See Wilson v. New, 243 U.S. 332, 354 (1917) (analyzing “the charge that unlawful inequality results because the statute deals... only with the wages of employees engaged in the movement of trains”). After holding that certain classifications made by the Adamson Act were consistent with equal protection, the Justices went on to analyze whether the statute’s wage regulation provisions deprived employers of property without due process. See id. at 355 (discussing “[w]ant of due process resulting from the improvidence with which the statute was enacted”).

\(^{77}\) Bernstein, supra note 2, at 28.

\(^{78}\) For a discussion of these cases, and an explanation of the different rationales upon
were thought not to violate the proscription against taking the private property of A and giving it to B for private purposes, for the "property" in question was "quasi-public," and thus not fully private. If, however, the business in question were not "affected with a public interest" — if the property in question were indeed "private" — then regulation of the rates charged did deprive the enterprise of its property without due process of law. So, for example, in three cases decided in the late 1920s the Taft Court struck down state statutes regulating the prices charged by theater ticket brokers, employment agencies, and gasoline retailers, each on the ground that the business in question was not affected with a public interest. Though Professor Bernstein does not discuss these cases, one assumes that he would agree that "the laws in question were limited to specific industries and were intended to promote the interests of consumers at the expense of producers and thus were arguably class legislation." Indeed, examination of these and other price regulation cases reveals that both the Justices and the lawyers arguing the cases before them discussed such statutes in precisely this idiom.

Consider, for example, Justice Lamar's dissent, joined by Chief Justice White and Justice Van Devanter, in *German Alliance Insurance Co. v. Lewis.* That decision upheld a state statute regulating the price of premiums for fire insurance on the ground that the business of writing such insurance was "affected with a public interest." The dissenters objected to the statute as taking the property of the company without due process and giving it to private consumers of their product. The power to regulate could not "override the


79 See Tyson & Brother -- United Theatre Ticket Offices, Inc. v. Banton, 273 U.S. 418, 439-40 (1927) (holding that a theatre is not affected with a public interest because "[s]ales of theatre tickets bear no relation to the commerce of the country... [and] a place of entertainment is in no legal sense a public utility").

80 See Ribnik v. McBride, 277 U.S. 350, 357 (1928) (asserting that "[a]n employment agency is essentially a private business" in which the interest of the public is not one "which the law contemplates as the basis for legislative price control").

81 See Williams v. Standard Oil Co., 278 U.S. 235, 240 (1929) (concluding that "the business of dealing in [ordinary commodities of trade such as gasoline], irrespective of its extent, does not come within the phrase 'affected with a public interest'"').

82 233 U.S. 389 (1914).

83 See id. at 433 (Lamar, J., dissenting) (arguing that the statute "not only takes property without due process of law but... unequally and arbitrarily selects those from which such property shall be taken by price fixing").

[T]he Constitution recognizes the liberty to contract and right of private property. They include not only the right to make contracts with which to acquire property, but the right to fix the price of its use while it is held, and the further right to fix the price if it is to be sold. To deprive any person of either is to take property, since there can be no liberty of contract and true private ownership if the price of its use or its sale is fixed by law.

*Id.* at 422.
constitutional principle that private property cannot be taken for private purposes." 84 The business of fire insurance was not affected with a public interest, Lamar maintained. 85 To fix premium rates in the insurance business was therefore simply to take the property of A and give it to B.

Now consider Wilson v. New, 86 which upheld the federal Adamson Act of 1916. This statute, enacted as part of an effort to avert a general railway strike, decreed that eight hours be deemed the standard length of a day's work for purposes of reckoning the compensation of certain railroad employees. 87 Section three of the Act provided that, pending the report of a commission on railway labor relations to be appointed by the President, the compensation of those employees for an eight-hour workday was not be be reduced below the standard day's wage prevailing at the time of the statute's enactment. 88 In short, employees whose daily compensation had previously been reckoned on the basis of a ten-hour day were granted a 25% hourly raise: They were now to garner the same pay for eight hours of work that they had previously received for ten.

Counsel for the railroad company insisted that the statute transgressed the principle of neutrality, depriving the company of its property without due process in violation of the Fifth Amendment. Section three, counsel

84 Id. at 424.

The fixing of the price for the use of private property is as much a taking as though the fee itself had been condemned for a lump sum—that taking, whether by fixing rates for the use or by paying a lump sum for the fee, has always heretofore been thought to be permissible only when it was for a public use.

Id. at 419.

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[T]he business is not public and not within the provision of the Constitution which only authorizes the taking of property for public purposes—whether the taking be of the fee for a lump sum assessed in condemnation proceedings, or whether the use be taken by rate-regulation, which is but another method of exercising the same power.

Id. at 429.

The list of rate-regulated occupations is not too long to be here given. It includes canals, waterways and booms; bridges and ferries; wharves, docks, elevators and stockyards; telegraph, telephone, electric, gas and oil lines; turnpikes, railroads and the various forms of common carriers, including express and cabs. To this should be added the case of the inn-keeper (as to which no American case has been found where the constitutional question as to the right to fix his rates has been considered), the confessedly close case of the irrigation ditches for distributing water (189 U. S. 439) [sic], and the toll mill acts. This of course does not include the case of condemnation for governmental purposes or for roads and ways where no question of rates is involved. There may be other instances not found, but it is believed that the foregoing numeration exhausts the list of what has heretofore been treated as a public business justifying the exercise of the price-fixing power against persons or corporations.

Id. at 425-26.

86 243 U.S. 332 (1917).

87 Id. at 342.

88 Id. at 344.
maintained, was enacted "for the direct pecuniary benefit of a particular class of a community, to wit, the persons who are actually engaged in the operation of railroad trains. It is a direct taking of the carrier's property without compensation and the transfer of the same to private individuals." The statute had the effect both of "destroying the liberty of contract of the common carrier" and of "taking its property and giving it to another without provision for compensating the carrier." Nor, argued counsel, could the object of averting a railway strike justify such redistributive legislation. "No case can be found where the property of one was transferred to another merely to appease that other and prevent him from committing an injury or doing harm to the community...." Section three was therefore merely "the deprivation of their property and its appropriation to the private use of the employees."

Chief Justice White's opinion for a narrow majority of the Court upheld the statute as a permissible regulation of a business affected with a public interest under conditions of emergency. Dissenting for himself and Justices Pitney and Van Devanter, Justice Day observed that the Act made no provision for a rate increase that would permit the railroads to pass on to the public the increase in labor costs mandated by the statute. This prompted the dissenters to condemn the statute as arbitrary and confiscatory. The Adamson Act, wrote Justice Day amounts to the taking of the property of one and giving it to another in violation of the spirit of fair play and equal right which the Constitution intended to secure in the due process clause to all coming within its protection, and is a striking illustration of that method which has always been deemed to be the plainest illustration of arbitrary action, the taking of the property of A and giving it to B by legislative fiat.

Consider next the rent control cases that came to the Court in the wake of World War I. In Block v. Hirsh, the Court upheld the 1919 District of Columbia rent control law by a vote of 5-4; Marcus Brown Holding Co. v.

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89 Id. at 337.
90 Id. at 338.
91 Id.
92 Id. at 339.
93 Id. at 370 (Day, J., dissenting). Justice McReynolds dissented alone, but one could infer from his opinion that he concurred in this portion of Justice Day's assessment. See id. at 388 (McReynolds, J., dissenting) (insisting that federal legislation requiring interstate common carriers to pay their employees ten hours' pay for eight hours' work is not "a regulation of commerce within the fair intendment of those words as used in the Constitution"). Justice Pitney dissented separately for himself and Justice Van Devanter, but Pitney's opinion associated each of them with Day's views. See id. at 383, 388 (Pitney, J., dissenting) ("Upon the ground of repugnancy to the Fifth Amendment I need not dwell, since it is dealt with fully in the dissenting opinion of Mr. Justice Day, with whose view upon that question I entirely agree. Mr. Justice Van Devanter concurs in this dissent, including that portion of Mr. Justice Day's dissenting opinion just mentioned.").
94 256 U.S. 135 (1921).
Feldman\textsuperscript{95} upheld the New York rent control statute by the same margin. Counsel for the plaintiff in error in \textit{Block} contended that "[t]he legislation is plainly unconstitutional and void, because its effect is to deprive the defendant in error of his property without due process of law, to take his property for private use and bestow it upon another..."\textsuperscript{96} Similarly, counsel for the appellant in \textit{Marcus Brown} insisted that "legislation under police power must be for the general public and not for a particular class or for the benefit of private individuals."\textsuperscript{97} And, in a brief filed by \textit{amici curiae}, counsel said of the New York statute:

Private property, devoted to purposes essentially private, is sought to be taken out of the control of the owner and to be placed in the possession and occupancy of another on terms, not in accordance with the contract between them, but such as a court or jury may fix. The legislature takes the property of A and gives it to B for an indefinite period on terms which A is unwilling to accept but which he is to be forced to accept \textit{nolens volens}.\textsuperscript{98}

Counsel accordingly concluded that "[t]his statute deprives the landlord of his liberty of contract and of his property without due process of law."\textsuperscript{99}

Justice McKenna, dissenting for himself, Chief Justice White, and Justices Van Devanter and McReynolds in \textit{Block} and \textit{Marcus Brown}, disapproved of what Justice Holmes referred to as "the preference given to the tenant in possession."\textsuperscript{100} The dissenters did not accept the claim that the statute was designed to supply homes to the homeless. "If the statute keeps a tenant in," wrote Justice McKenna, "it keeps a tenant out, indeed, this is its assumption."\textsuperscript{101} Bereft of a supporting police power rationale, the dissenters regarded the statute as a deprivation of property without due process in violation of the Fifth Amendment.\textsuperscript{102} "It is manifest," McKenna concluded, "that by the statute the Government interposes with its power to annul the covenants of a contract between two of its citizens and to transfer the uses of the property of one and vest them in the other."\textsuperscript{103} Such a taking from A to vest in B violated "the basic doctrine of American constitutional law."\textsuperscript{104} For

\textsuperscript{95} 256 U.S. 170 (1921).

\textsuperscript{96} Block, 256 U.S. at 141.

\textsuperscript{97} Marcus Brown, 256 U.S. at 175.

\textsuperscript{98} Id. at 188.

\textsuperscript{99} Id. at 191.

\textsuperscript{100} Block, 256 U.S. at 157.

\textsuperscript{101} Id. at 161 (McKenna, J., dissenting).

\textsuperscript{102} See id. at 163 (McKenna, J., dissenting) (admonishing the majority for giving short shrift to the due process requirements of the Fifth Amendment).

\textsuperscript{103} Id. at 164 (McKenna, J., dissenting).

\textsuperscript{104} See Edward S. Corwin, The Basic Doctrine of American Constitutional Law, 12 Mich. L. Rev. 247, 255 (1914) ("[T]he Doctrine of Vested Rights ... treats any law impairing vested rights ... [as] void.").
as McKenna explained, the very "conception" of the Constitution was that "[s]inister interests ... may move government to exercise; one class may become dominant over another; and, against the tyranny and injustice that will result, the framers of the Constitution believed precautions were as necessary as against any other abuse of power."¹⁰⁵ Statutes enacted for a legitimate public purpose presented no constitutional difficulty; but redistributive legislation merely favoring one class over another violated due process.¹⁰⁶

In *Tyson and Brother - United Theatre Ticket Offices, Inc. v. Banton*,¹⁰⁷ the Court invalidated a New York statute regulating the resale price of theater tickets as a deprivation of property without due process. Justice Stone, dissenting for himself and Justices Holmes and Brandeis, observed that the "constitutional theory" of the majority, "that prices normally may not be regulated rests upon the assumption that ... the interference with so important an incident of the ownership of private property ... is a taking of property without due process of law."¹⁰⁸ As the dissenters saw it, the majority’s prohibition on price regulation forbade the legislature from transferring the property of A to B. Two years later, in *Williams v. Standard Oil Co.*, the Court sustained the claim that "the legislature is without power to authorize agencies of the state to fix prices at which gasoline may be sold in the state, because the effect will be to deprive the vendors of such gasoline of their property without due process of law in violation of the Fourteenth Amendment."¹⁰⁹

The following year, in *Tagg Bros. & Moorhead v. United States*,¹¹⁰ a group of commission agencies doing business at the Union Stockyards in Omaha sought to enjoin enforcement of a rate schedule for their services promulgated


¹⁰⁶ Justice Peckham, the author of *Lochner*, had while on the New York Court of Appeals denounced rate regulation of grain warehouses in similar terms:

To uphold legislation of this character is to provide the most frequent opportunity for arraying class against class; and, in addition to the ordinary competition that exists throughout all industries, a new competition will be introduced, that of competition for the possession of the government, so that legislative aid may be given to the class in possession thereof in its contests with rival classes or interests in all sections and corners of the industrial world.

People v. Budd, 117 N.Y. 68-69 (1889) (Peckham, J., dissenting). See *James W. Ely, Jr., The Chief Justiceship of Melville W. Fuller, 1888-1910 at 78-79* (1995) ("Field and Peckham were denouncing class legislation. They were following the Jacksonian political tradition, Thomas Cooley, and the dominant constitutional theory by attacking laws that aided special interests at the expense of others").

¹⁰⁷ 273 U.S. 418 (1927).

¹⁰⁸ *Id.* at 451 (Stone, J., dissenting).


¹¹⁰ 280 U.S. 420 (1930).
by the Secretary of Agriculture under the Packers and Stockyards Act of 1921. The Court unanimously rejected the challenge on the ground that it was well established that the business of stockyards was affected with a public interest. Yet counsel for the appellants clearly viewed an effort to persuade the Justices that the regulation of commissions violated the neutrality principle as a promising line of attack. "As in all skilled labor," counsel contended, "the commission men differ between themselves in the length of their experience, their relative aptitude for the work and their individual industry. To prescribe a common maximum of earning power is to penalize the skillful for the benefit of the unskillful." "[W]e are dealing here," counsel continued, with:

[T]he rate-making power, the exercise of which does, primarily and admittedly, affect individual property rights and individual liberty to earn a living; which does (whatever its justification in the supposed public interest,) obviously and intentionally, constitute a redistribution of wealth, a "leveling of inequalities of fortune by depriving one who has property, of some part," a "compulsory exaction" from one for the support of another, a taking, directly, of some part of the property (wages, salary, income, return on investment, etc.) from A and handing it over to B. 

Coppage v. Kansas, 236 U.S. 1, 18; Adkins v. Children's Hospital, 261 U.S. 525, 557. To quote Jefferson's phrase in his first inaugural, this fixing of wages for personal services "takes from the mouth of labor the bread it has earned."[1]

In New State Ice Co. v. Liebmann,112 the Court was faced with a challenge to an Oklahoma statute requiring one wishing to enter the ice business to obtain a government-issued "certificate of necessity" before doing so. State officials were authorized to deny a license to any applicant if the area to be served was already adequately provided for by a licensed company. The statute therefore involved a barrier to entry rather than price regulation, but the Court nevertheless invalidated the act as inconsistent with due process on the ground that the business, not being affected with a public interest, was not amenable to such regulation. Though the opinion focused on the fundamental right to pursue a common calling, its language also suggested a concern with preserving impartial treatment of potential competitors.113 “[T]he practical tendency of the restriction," wrote Justice Sutherland, "is to shut out new enterprises, and thus create and foster monopoly in the hands of existing establishments . . . .”114

A private corporation here seeks to prevent a competitor from entering the business of making and selling ice . . . . The control here asserted

111 Id. at 424.
112 285 U.S. 262 (1932).
113 Contra Bernstein, supra note 2, at 30 (claiming that “the New State Ice Court ignored the class legislation paradigm”).
114 New State Ice, 285 U.S. at 278.
does not protect against monopoly, but tends to foster it. The aim is not
to encourage competition, but to prevent it; not to regulate the business,
but to preclude persons from engaging in it. There is no difference in
principle between this case and the attempt of the dairyman under state
authority to prevent another from keeping cows and selling milk on the
ground that there are enough dairymen in the business; or to prevent a
shoemaker from making or selling shoes because shoemakers already in
that occupation can make and sell all the shoes that are needed.\textsuperscript{115}

State-sponsored monopoly deprived those excluded from the trade, as
Justice Harlan had put it in \textit{Powell v. Pennsylvania}, of their Fourteenth
Amendment right to “enjoyment upon terms of equality with all others in
similar circumstances of the privilege of pursuing an ordinary calling or
trade.”\textsuperscript{116} Or as Justice Field put it in his concurring opinion in \textit{Butchers’
Union Slaughter-house and Live-stock Landing Co. v. Crescent City Live-
stock Landing and Slaughter-house Co.}, such restrictions impaired
the right to pursue any lawful business or vocation, in any manner not
consistent with the equal rights of others, which may increase their
prosperity or develop their faculties, so as to give to them their highest
enjoyment. The common business and callings of life, the ordinary trades
and pursuits, which are innocuous in themselves, and have been followed
in all communities from time immemorial, must therefore, be free in this
country to all alike upon the same conditions.\textsuperscript{117}

The right protected was thus not simply the liberty right to pursue a common
calling; it was also the right to do so on terms of equality with all others.\textsuperscript{118}
Just as the police power could not be invoked to remove those inequalities of
fortune that were “the normal and inevitable result” of the exercise of rights of
free contract and private property,\textsuperscript{119} so too it could not be employed to create

\textsuperscript{115} \textit{Id.} at 278-79.

\textsuperscript{116} 127 U.S. 678, 684 (1888) (emphasis added). \textit{See also} Hooper v. California, 155 U.S.
648, 662 (1895) (Harlan, J., dissenting) (“The enjoyment upon terms of equality with all
others in similar circumstances of the privilege of pursuing an ordinary calling or trade is an
essential part of liberty, as guaranteed by the Fourteenth Amendment”); Allgeyer v.
Louisiana, 165 U.S. 578, 590 (1897) (quoting the same passage from \textit{Powell v. Pennsylvania}).

\textsuperscript{117} 111 U.S. 746, 757 (1884) (Field, J., concurring). Eleven years earlier Field had
argued that the privileges and immunities of citizens of the United States included “the right
to pursue a lawful employment in a lawful manner, without other restraint than such as
equally affects all persons.” \textit{Slaughter-House Cases}, 83 U.S. 36, 97 (1873) (Field, J.,
dissenting).

\textsuperscript{118} \textit{See} Phillips, \textit{Progressiveness}, \textit{supra} note 8, at 495 (claiming that the Court’s
decisions striking down laws limiting entry “can be seen as promoting government
neutrality and equal competition by thwarting private interests intent on using the state for
their own purposes”).

\textsuperscript{119} Coppage v. Kansas, 236 U.S. 1, 17-18 (1915) (cautioning that, just as states may not
and perpetuate such inequalities through unequal curtailment of occupational liberty.

The appellant in *Nebbia v. New York* clearly conceived the state’s prescription of minimum resale prices for milk as favoring the producer at the expense of the consumer. His counsel complained:

"The laudable desire to see the dairy farmer happier and more prosperous has brought the New York Legislature to say that, regardless of the retail value of milk as fixed by oversupply and limited demand, the dealer must sell to his customers at a fixed minimum, or else not sell."\(^{120}\)

Requiring the consumer to pay a price higher than that dictated by the higgling of the market took the property of A for the benefit of B.

This view was shared by Justices Van Devanter, Sutherland, and Butler, each of whom joined Justice McReynolds’ dissenting opinion condemning the regulation as a deprivation of liberty and property without due process of law.\(^{121}\) "Regulation to prevent recognized evils in business has long been upheld as permissible legislative action,” the dissenters recognized. “But fixation of the price at which ‘A,’ engaged in an ordinary business, may sell, in order to enable ‘B,’ a producer, to improve his condition, has not been regarded as within legislative power.”\(^{122}\) “The Legislature cannot lawfully destroy guaranteed rights of one man with the prime purpose of enriching another, even if for the moment, this may seem advantageous to the public.”\(^{123}\) This statute, McReynolds insisted, “takes away the liberty of twelve million consumers to buy a necessity of life in an open market. It imposes direct and arbitrary burdens upon those already seriously impoverished with the alleged immediate design of affording special benefits to others.”\(^{124}\) The Constitution would not countenance such a transgression of the principle of neutrality. Indeed, McReynolds admonished the majority: “The ultimate welfare of the producer, like that of every other class, requires dominance of the

\(^{120}\) 291 U.S. 502, 506 (1934).

\(^{121}\) See id. at 545-46 (McReynolds, J., dissenting) (lamenting that, should “liberty or property be struck down because of difficult circumstances, we must expect that hereafter every right must yield to the voice of an impatient majority when stirred by distressful exigency”).

\(^{122}\) Id. at 554 (McReynolds, J., dissenting).

\(^{123}\) Id. at 558 (McReynolds, J., dissenting).

\(^{124}\) Id. at 557 (McReynolds, J., dissenting). In the same vein McReynolds inquired rhetorically: “If prices for agricultural products become high can consumers claim a crisis exists and demand that the Legislature fix less ones? Or are producers alone to be considered, consumers neglected?” id. at 548 (McReynolds, J., dissenting).
Constitution.” Just as redistribution from the class of producers to the class of consumers violated the neutrality principle, so too did redistribution from consumers to producers.

Even when expressed in dissent, these opinions provide us with important information. First, they tell us how those Justices most devoted to what Professor Bernstein calls “Lochnerian principles” – men such as White, Lamar, McKenna, Van Devanter, McReynolds, Sutherland, and Butler – conceptualized these cases, how they thought they should be decided, and why. Moreover, they offer us further insight into the way that they conceptualized those cases in which the Court invalidated price and rate regulation of the goods and services offered by private taxi service, employment agencies, and gasoline retailers. The arguments of counsel underscore the bar’s perception of the ground on which previous cases had been adjudicated, and on which pending ones might be decided. In these cases, as in Adkins, the principle of neutrality was clearly central to the justices’ understanding of due process.

125 Id. at 559 (McReynolds, J., dissenting). See also McReynolds’s dissent for himself and Justices Van Devanter, Sutherland and Butler in Borden’s Farm Products Co. v. Ten Eyck, 297 U.S. 251, 265 (1936) (McReynolds, J., dissenting). In the dissenters’ view the majority opinion rejecting a challenge to certain provisions of New York’s Milk Control Law held “that a dealer, who through merit has acquired a good reputation, can be deprived of the consequent benefit in order that another may trade successfully.” Id. at 265. The statute “destroy[ed] equality of opportunity,” putting Borden “at a disadvantage because of merit.” Id. “An act which permits dealer A to sell at less than the price fixed for dealer B obviously denies equality; and in the absence of some adequate reason for different treatment, the enactment is invalid.” Id. The legislature “undertook to handicap [Borden] and thus enable others profitably to share the trade.” The legislation thus deprived Borden of the benefit it had secured through “fair advertisement and commendable service,” “and thereby aid[ed] competitors to secure the business. This is grossly arbitrary and oppressive.” Id.

126 See Terminal Taxicab Co. v. Kutz, 241 U.S. 252, 256 (1916) (arguing that a taxicab company does not incur the legal duties of a “public utility” merely because it “has a public aspect, some bearing upon the welfare of the community”).

127 See Tyson & Brother – United Theatre Ticket Offices, Inc. v. Banton, 273 U.S. 418, 439-40 (1927) (holding that a theatre is not affected with a public interest because “[s]ales of theatre tickets bear no relation to the commerce of the country . . . [and] a place of entertainment is in no legal sense a public utility”). See also supra note 79 and accompanying text.

128 See Ribnik v. McBride, 277 U.S. 350, 357 (1928) (asserting that “[a]n employment agency is essentially a private business” in which the interest of the public is not one “which the law contemplates as the basis for legislative price control”). See also supra note 80 and accompanying text.

129 See Williams v. Standard Oil Co., 278 U.S. 235, 240 (1929) (concluding that “the business of dealing in [ordinary commodities of trade such as gasoline], irrespective of its extent, does not come within the phrase ‘affected with a public interest’”). See also supra note 81 and accompanying text.
b. Rate Regulation

Judicial review of rate and price regulation under the Due Process Clause was not exhausted by determinations of whether the business in question was affected with a public interest. A series of decisions handed down in the two decades following *Munn v. Illinois* had suggested that a rate regulation that deprived a business affected with a public interest of a reasonable rate of return on its investment constituted a deprivation of private property without due process. Even with respect to a business affected with a public interest, a confiscatory rate promoted the interests of consumers at the expense of the regulated entity, unconstitutionally transferring property from A to B. So, for example, the Court cautioned in the *Railroad Commission Cases* that the power to regulate the rates charged by businesses affected with a public interest was not unconstrained by the Due Process Clause. “Under pretence of regulating fares and freights,” wrote Chief Justice Waite, “the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to the taking of private property for public use without just compensation, or without due process of law.”

130 94 U.S. 113, 130 (1877) (upholding a state’s rate regulation of grain warehouses against a Fourteenth Amendment due process attack on grounds that “private property... devoted to a public use... is subject to public regulation”).

131 See Siegel, supra note 1, at 209, 210-23 (discussing the Court’s retreat from “Munn’s broad scope” and “the previously fundamental notion that, if a legislative power existed, its discretionary exercise was not judicially reviewable”); Edward S. Corwin, *The Supreme Court and the Fourteenth Amendment*, 7 Mich L. Rev. 643, 658-62 (1909) (discussing cases following *Munn v. Illinois*, in which the Court signaled a limitation on states’ regulatory power, viz., that rates may not be confiscatory). Robert Cushman, looking back on these developments in 1922, would observe with some regret the demise of the *Munn* majority’s position that the adequacy of the rate set for businesses affected with a public interest was a political question.

The doctrine of *Munn v. Illinois*... was by gradual steps modified and finally discarded, and in its place we have the declaration by the Supreme Court that a legislative regulation of public utility rates amounts to a deprivation of property without due process of law if it does not allow a return on the capital investment of at least six per cent.

Cushman, supra note 42, at 746.

132 116 U.S. 307, 331 (1886). See also *Spring Valley Water Works v. Schottler*, 110 U.S. 347, 354 (1884) (“What may be done if the municipal authorities... fix upon a price which is manifestly unreasonable, need not now be considered, for that proposition is not presented by this record”); *Dow v. Beidelman*, 125 U.S. 680, 689 (1888) (quoting from the *Railroad Commission Cases*: the “power to regulate is not a power to destroy; and limitation is not the equivalent of confiscation”); *Ga. R.R. and Banking Co. v. Smith*, 128 U.S. 174, 179 (1888) (reemphasizing the strictures of due process, which prohibit states from requiring railroads to carry passengers “without reward, or upon conditions amounting to the taking of private property for public use without just compensation”); *Budd v. New York*, 143 U.S. 517, 547 (1892) (stating that the “power of limitation or regulation is not without limit, and is not a power to destroy, or a power to compel the doing of the services... [Vol. 85:881
Chicago, Milwaukee, and St. Paul Railway v. Minnesota, the Court remarked:

If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law in violation of the Constitution of the United States . . . .

These declarations culminated in 1898 with the announcement of the rule in Smyth v. Ames. Here the Court held that a state regulation establishing rates for the transportation of persons or property by railroad that will not admit of the carrier earning such compensation as under all the circumstances is just to it and to the public, would deprive such carrier of its property without due process of law and deny to it the equal protection of the laws, and would therefore be repugnant to the Fourteenth Amendment of the Constitution of the United States.

The rule in Smyth v. Ames spawned a raft of litigation over whether the rates public authorities authorized for railroads and public utilities afforded the companies a reasonable rate of return or deprive them of their property for the

without reward, or to take private property for public use without just compensation or without due process of law); Covington & Lexington Tpk. Rd. Co. v. Sandford, 164 U.S. 578, 594-95 (1896) (deeming state legislation to be "obnoxious to the [U.S.] Constitution" when it compels a turnpike company to reduce rates to a level that "prevent[s] it from keeping its roads in proper repair and from earning any dividends whatever for stockholders"); Chi., Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 241 (1897) ("[A] judgment of a state court, even if it be authorized by statute, whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States.").

133 134 U.S. 418, 458 (1890). See also Chi. & Grand Trunk Ry. v. Wellman, 143 U.S. 339, 344 (1892) (stating that "[t]he legislature has power to fix rates, and the extent of judicial interference is protection against unreasonable rates"); Reagan v. Farmer's Loan & Trust Co., 154 U.S. 362, 399 (1894) (explaining that while courts do not assume "the merely administrative duty of framing a tariff of rates for carriage, it is within the scope of judicial power and a part of judicial duty to restrain anything which, in the form of regulation of rates, operates to deny to the owners of property invested in the business of transportation that equal protection of the laws . . . . [which forbids] legislation by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public"); St. Louis & S.F. Ry. v. Gill, 156 U.S. 649, 657-58 (1895) (repeating "that there is a remedy in the courts for relief against" rate regulation "which is so unreasonable as to practically destroy the value of property of companies engaged in the carrying business").

134 169 U.S. 466 (1898).

135 Id. at 526. The Court had explained in 1890 why a confiscatory rate denied the carrier equal protection of the laws: "in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws." Chi., Milwaukee, and St. Paul Ry., 134 U.S. at 458.
benefit of the consuming public.  

Professor Michael J. Phillips reports that "Smyth v. Ames included, the Court struck down state or federal rate regulations on some thirty-nine occasions between 1897 and 1937, inclusive," usually "on the theory that they impermissibly deprived the claimant of property." Though there was significant disagreement among the justices concerning the method to be employed in determining the rate base for any particular regulated entity, there was consensus on the constitutional

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136 Professor Bernstein notes in passing that "[t]he Court had used the Due Process Clause in the 1890s to supervise state regulation of railroad rates," Bernstein, supra note 2, at 44, but otherwise does not consider the body of such cases decided by the Court over the ensuing four decades.


138 Phillips, Progressiveness, supra note 8, at 498. Professor Post maintains that "by the end of the decade the Taft Court had begun to issue highly controversial decisions constricting rate regulation with respect to public utilities otherwise affected with a public interest," and that "[a]s the Court moved progressively to the right, this theme became more pronounced." Robert C. Post, Defending the Lifeworld: Substantive Due Process in the Taft Court Era, 78 B.U. L. REV. 1489, 1542 n.256 (1998). It appears instead that the Taft Court issued a steady stream of such opinions throughout the 1920s, and indeed that the practice had not only begun long before Taft assumed the Chief Justiceship but continued well after his death.

139 See Siegel, supra note 1, at 215, 215-23 (ascribing this disagreement to the theoretical and practical difficulty of "marking... the distinction between regulation and
principle involved. As Justice Clarke wrote in 1917 for a unanimous Court, if
the power of rate regulation were

exercised in such an arbitrary or unreasonable manner as to prevent the
company from obtaining a fair return upon the property invested in the
public service it passes beyond lawful bounds, and such action is void,
because repugnant to the due process of law provision of the Fourteenth
Amendment to the Constitution of the United States.140

In his 1936 concurrence in St. Joseph Stock Yards Co. v. United States,
Justice Brandeis wrote that a rate regulation order of the Secretary of
Agriculture issued under the Packers and Stockyards Act of 1921 "may, of
course, be set aside for violation of the due process clause by prescribing rates
which, on the facts found, are confiscatory."141

Similar expressions of this

140 Miss. R.R. Comm’n v. Mobile & Ohio R.R., 244 U.S. 388, 391 (1917).
141 298 U.S. 38, 74-75 (1936) (Brandeis, J., concurring). Professor Phillips asserts that
decisions striking down railroad and utility rate orders are best viewed “as incorporating the
takings clause within Fourteenth Amendment due process.” Phillips, supra note 13, at 179.
That is not, however, the way the Court viewed them. When federal wage, rate, utility, and
similar regulations were challenged under the Fifth Amendment, the Justices analyzed them
under the Due Process Clause rather than under the Takings Clause. See, e.g., United States
v. Rock-Royal Coop., 307 U.S. 533, 572-73 (1939) (finding that pooling device employed
under the federal Agricultural Marketing and Agreement Act of 1937 did not deny due
process); United States v. Rock-Royal Coop., 307 U.S. 533, 587 (1939) (Roberts, J.,
dissenting) (finding that the differential rate regulation for large and small milk handlers
permitted under an order of the Secretary of Agriculture “operates to deny the appellees due
process of law”); Denver Union Stock Yards Co. v. United States, 304 U.S. 470, 475 (1938)
(“As of right safeguarded by the due process clause of the Fifth Amendment, appellant is
entitled to rates, not per se excessive and extortionate, sufficient to yield a reasonable rate of
return upon the value of property used, at the time it is being used, to render the services”);
St. Joseph Stock Yards Co., 298 U.S. at 74 (Brandeis, J. concurring) (a rate regulation order
of the Secretary of Agriculture issued under the Packers and Stockyards Act of 1921 “may,
of course, be set aside for violation of the due process clause by prescribing rates which, on
(1935) (concluding that multiple provisions of the federal Railroad Retirement Act of 1934
denied due process of law by taking the property of one and bestowing it upon another”);
Tagg Bros. v. United States, 280 U.S. 420, 436 (1930) (“The contention that the Act, if
construed as authorizing the order assailed, is void under the due process clause, is . . .
unsound”); Chi., Rock Island, & Pac. Ry. Co. v. United States, 284 U.S. 80, 97 (1931) (“a
regulation which is so arbitrary and unreasonable as to become an infringement upon the
right of ownership constitutes a violation of the due process of law clause of the Fifth
Amendment”); Dayton-Goose Creek Ry. Co. v. United States, 263 U.S. 456, 484 (1924)
(upholding the recapture provisions of the federal Transportation Act of 1920 on the ground
that “the carrier never has such a right to the excess as to render the recapture of it by the
Government a taking without due process”); Adkins v. Children’s Hosp., 261 U.S. 525, 542
(1923) (sustaining the contention that the District of Columbia minimum wage law was “in
contravention of the Constitution, and particularly the due process clause of the Fifth
proposition appear repeatedly in the many due process decisions invalidating rate regulations, and the premise underlies every rate regulation case. 

Amendment"); Wilson v. New, 243 U.S. 332, 355-59 (1917) (considering whether the wage regulation provisions of the federal Adamson Act resulted in a “[w]ant of due process”); Wilson v. New, 243 U.S. 332, 370 (1917) (Day, J., dissenting) (insisting that the Adamson Act “amounts to the taking of the property of one and giving it to another in violation of the spirit of fair play and equal right which the Constitution intended to secure in the due process clause to all coming within its protection, and is a striking illustration of that method which has always been deemed to be the plainest illustration of arbitrary action, the taking of the property of A and giving it to B by legislative fiat”). See also St. Joseph Stock Yards Co., 298 U.S. at 51 (“But the Constitution fixes limits to the rate-making power by prohibiting the deprivation of property without due process of law or the taking of private property for public use without just compensation.”) Rate, price, wage, and other comparable regulations that took from A to give to B, for a private purpose or without just compensation, were prohibited by the due process clauses of both the Fifth and Fourteenth Amendments.

See, e.g., West v. Chesapeake & Potomac Tel. Co. of Balt., 295 U.S. 662, 671 (1935), where the court stated:

The established principle is that as the due process clauses (Amendments V and XIV) safeguard private property against a taking for public use without just compensation, neither Nation nor State may require the use of privately owned property without just compensation . . . So, where by legislation prescribing rates or charges the use of the property is taken, just compensation assured by these constitutional provisions is a reasonable rate of return upon [its] value.

Id.; Columbus Gas & Fuel Co. v. Pub. Utils. Comm'n of Ohio, 292 U.S. 398, 404-05 (1934) (method used to set rate for public utility company took “its property away from it without due process of law”); United Rys. & Elec. Co. of Balt. v. West, 280 U.S. 234, 249 (1930) (invalidating rate that permitted a return “so inadequate as to result in a deprivation of property in violation of the due process law clause of the Fourteenth Amendment”); Ohio Util. Co. v. Pub. Util. Comm'n of Ohio, 267 U.S. 359, 364 (1925) (finding that the poor rate of return allowed by a utility rate regulation was “so plainly inadequate as to result in depriving the company of its property without due process of law”); Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n, 262 U.S. 679, 690 (1923) (“Rates which are not sufficient to yield a reasonable return on the value of property used . . . are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment”); Groesbeck v. Duluth, S. Shore & Atl. Ry. Co., 250 U.S. 607, 609 (1919) (affirming judgment that a reduced rate fixed for intrastate passenger fares “would deprive plaintiff of its property without due process of law in violation of the Fourteenth Amendment”); Detroit United Ry. v. City of Detroit, 248 U.S. 429, 436 (1919) (“[T]he continued operation of the railroad system of the company upon the fares fixed in the ordinance will result in a deficit, and deny to the company due process of law within the meaning of the Federal Constitution”); City of Denver v. Denver Union Water Co., 246 U.S. 178, 194 (1918) (“We have no hesitation in holding that the return yielded by the ordinance now before us is clearly inadequate, and amounts to a taking of complainant's property without due process of law, contrary to the provision of the Fourteenth Amendment in that regard . . . .”); Norfolk & W. Ry. Co. v. Conley, 236 U.S. 605, 614 (1915) (finding no basis to uphold a reduced rate that effectively “forced [the company] to carry passengers, if not at or below cost, with merely nominal reward”)); N.
adjudicated by the \textit{Lochner}-era Court.\textsuperscript{143} Confiscatory rates took the property of \textit{A} and gave it to \textit{B}.

If the rate prescribed afforded the business a reasonable rate of return, however, any resulting compromise of the capacity the business might have enjoyed in an unregulated market to secure greater profits by charging a higher rate did not deprive the company of its property without due process. Analytically, it is useful to think of the company’s income as comprised of two components. The first component was that portion necessary to guarantee the enterprise a reasonable rate of return on its investment. This component was private property, which could not be taken from \textit{A} and given to \textit{B}. The second component was that portion of the company’s income in excess of that necessary to assure a reasonable return—what we might think of as a monopoly rent. This second component was not private property within the

\begin{center}
Pac. Ry. Co. v. North Dakota \textit{ex rel.} McCue, 236 U.S. 585, 601 (1915) ("[T]he State has no arbitrary power over the carrier’s rates and may not select a particular commodity or class of traffic for carriage without reasonable reward.").
\end{center}

\textsuperscript{143} \textit{See, e.g.,} San Diego Land & Town Co. v. City of National City, 174 U.S. 739, 754 (1899) (maintaining with respect to water utility rates that “the State cannot by any of its agencies . . . withhold from the owners of private property just compensation for its use. That would be a deprivation of property without due process of law”); Denver Union Stock Yards Co. v. United States, 304 U.S. 470, 475 (1938) ("As of right safeguarded by the due process clause of the Fifth Amendment, appellant is entitled to rates, not \textit{per se} excessive and extortionate, sufficient to yield a reasonable rate of return upon the value of property used, at the time it is being used, to render the services." (citations omitted)); Lindheimer \textit{v. Ill. Bell Tel. Co.,} 292 U.S. 151, 167 (1934) (rejecting contention that rates were confiscatory); L.A. Gas & Elec. Corp. \textit{v. R.R. Comm'n of Cal.,} 289 U.S. 287, 305 (1933) (rejecting contention that rates were confiscatory); Smith \textit{v. Ill. Bell Tel. Co.,} 282 U.S. 133, 149 (1930) (reversing decree enjoining enforcement of telephone rate regulation alleged to be confiscatory); St. Louis & O’Fallon Ry. Co. \textit{v. United States,} 279 U.S. 461, 484 (1929) (annulling recaption order of the Interstate Commerce Commission); Des Moines Gas Co. \textit{v. City of Des Moines,} 238 U.S. 153, 163-65 (1915) (evaluating claim that rate regulation deprived company of a fair return on its property); Milwaukee Elec. Ry. & Light Co. \textit{v. R.R. Comm’n of Wis.,} 238 U.S. 174, 180 (1915) (upholding street railway rate regulation); Lincoln Gas & Elec. Co. \textit{v. City of Lincoln,} 223 U.S. 349, 358 (1912) ("That the company is entitled to a fair return upon the value of the property at the time of the inquiry, is the rule."); ICC \textit{v. Union Pac. R.R. Co.,} 222 U.S. 541, 547 (1912) (rate order may be set aside if "the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law"); Willcox \textit{v. Consol. Gas Co.,} 212 U.S. 19 (1909) (rejecting contention that rates were confiscatory); City of Knoxville \textit{v. Knoxville Water Co.,} 212 U.S. 1 (1909) (rejecting contention that rates were confiscatory); Stanislaus County \textit{v. San Joaquin & King’s River Canal & Irrigation Co.,} 192 U.S. 201 (1904) (rejecting contention that rates were confiscatory); San Diego Land & Town Co. \textit{v. Jasper,} 189 U.S. 439, 442 (1903) (rejecting contention that rates were confiscatory); Minneapolis & St. Louis R.R. Co. \textit{v. Minn.,} 186 U.S. 257, 269 (1902) (holding that the rate prescribed was not "so unjust or unreasonable as to amount to a taking of property without due process of law"); Louisville & Nashville R.R. Co. \textit{v. Ky.,} 183 U.S. 503, 510-11 (1902) (rejecting contention that rates were confiscatory).
contemplation of the Constitution. A prescribed rate that denied to the company that latter portion of its potential income therefore did not take from A and give to B.

Bearing this in mind, we can understand the Court’s decision in *Dayton-Goose Creek Railway Co. v. United States*, which upheld the recapture provisions of the Transportation Act of 1920. The principal objective of the Act was to ensure an adequate national transportation service. The Act sought to achieve an efficient distribution of traffic on the national rail transportation system and to avoid congestion on the stronger railroads by propping up some of their weaker counterparts. The Act directed the Interstate Commerce Commission to establish uniform rates for rail carriage sufficient in the aggregate to allow carriers within rate groups to receive a fair net operating return on their property. Congress concluded that it was impossible to establish uniform rates for competitive traffic sufficient to sustain all of the carriers needed to meet demand without at the same time allowing some carriers to receive profits in excess of a fair return. Congress accordingly directed that any carrier receiving such an excess would hold it as trustee for the United States, with a portion of that excess dedicated to a railroad revolving fund administered by the ICC. The ICC was authorized to make loans from the revolving fund to less successful carriers to meet expenses, purchase equipment and facilities, and for other purposes.

The Court unanimously rejected the contention that the recapture provisions

144 263 U.S. at 485.
145 *Id.* at 478 ("The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country.").
146 *Id.* at 480 ("By the recapture clauses Congress is enabled to maintain uniform rates for all shippers and yet keep the net returns of railways, whether strong or weak, to the varying percentages which are fair respectively for them.").
147 *Id.* at 476 (the Act "directs the Commission to establish rates which will enable the carriers, as a whole or by rate groups or territories fixed by the Commission, to receive a fair net operating return upon the property they hold in the aggregate for use in transportation"); *id.* at 479 ("Uniform rates enjoined for all shippers will tend to divide the business in proper proportion so that, when the burden is great, the railroad of each carrier will be used to its capacity.").
148 *Id.* at 476 ("Paragraph 5 declares that, because it is impossible to establish uniform rates upon competitive traffic which will adequately sustain all the carriers needed to do the business, without giving some of them a net income in excess of a fair return, any carrier receiving such excess shall hold it in the manner thereafter prescribed as trustee for the United States.").
149 *Id.* ("Paragraph 6 distributes the excess, one-half to a reserve fund to be maintained by the carrier, and the other half to a general railroad revolving fund to be maintained by the Commission.").
150 *Id.* ("Paragraph 7 specifies the only uses to which the carrier may apply its reserve fund. They are the payment of interest on bonds and other securities, rent for leased lines, and the payment of dividends. . . . ").
of the Act took the property of the stronger carriers without due process.\textsuperscript{151} But far from rejecting the principle of neutrality, Chief Justice Taft explained in orthodox terms (on behalf of colleagues devoted to the principle) why the Act did not take the property of A and give it to B.\textsuperscript{152} "The carrier owning and

\textsuperscript{151} Id. at 484 ("The excess ... may properly be appropriated by the Government for public uses because the appropriation takes away nothing which equitably belongs either to the shipper or to the carrier.").

\textsuperscript{152} Professor Bernstein regards the decision in Dayton-Goose as evidence that the Court "defined 'class legislation' narrowly." Bernstein, supra note 2, at 27-28. In this belief he appears to follow Professor Post, who points to "[t]he relative equanimity with which the Court embraced this 'form of communism enforced by governmental fiat'" in cautioning against "any simple reduction of Lochnerism to the 'concept.... that the power of government could not legitimately be exercised to benefit one person or group at the expense of others.'" Post, supra note 138, at 1508. As I demonstrate in the accompanying text, however, Taft and his colleagues thought that the Act's recapture provisions were fully consistent with the principle prohibiting taking the private property of A and giving it to B.

In advancing his claim that Dayton-Goose impeaches the revisionist characterization of Taft Court substantive due process, Professor Post calls attention to language in Taft's opinion alluding to maintenance of "'the efficiency of [an] interstate commerce railway system' considered as 'a unit.'" Id. at 1507 (quoting Dayton-Goose Creek Ry. Co., 263 U.S. at 485). See also id. at 1544 ("in Dayton-Goose ... the Court clearly grounded its decision on the systemic interdependence of railroad property, which for this reason required administration as 'a unit.'"). The Dayton-Goose quote is taken from a portion of the opinion addressing an objection raised under the Tenth Amendment rather than the Fifth Amendment. After turning back the company's due process attack, Taft wrote:

The third question for our consideration is whether the recapture clause, by reducing the net income from intrastate rates, invades the reserved power of the States and is in conflict with the Tenth Amendment. In solving the problem of maintaining the efficiency of an interstate commerce railway system which serves both the States and the Nation, Congress is dealing with a unit in which state and interstate operations are often inextricably commingled. When the adequate maintenance of interstate commerce involves and makes necessary on this account the incidental and partial control of intrastate commerce, the power of Congress to exercise such control has been clearly established.

Dayton-Goose Creek Ry. Co., 263 U.S. at 485. Following this passage Taft cited a series of cases supporting this proposition, such as the Minnesota Rate Cases, 230 U.S. 352 (1913), The Shreveport Rate Cases, 234 U.S. 342 (1914), and Wisconsin Railroad Commission v. Chicago, Burlington & Quincy Railroad, 257 U.S. 563 (1922). Taft was thus reiterating a principle of federalism rather than one of substantive due process. The idea that the carriers might be treated as a unit for due process purposes would, however, find expression in Chief Justice Hughes' dissent in Railroad Retirement Board v. Alton Railroad Co., 295 U.S. 330, 387-87 (1935) ("The underlying principle is that Congress has the power to treat the transportation system of the country as a unit for the purpose of regulation in the public interest, so long as particular railroad properties are not subjected to confiscation .... I am unable to see that the establishment of a unitary system of retirement allowances for employees is beyond constitutional authority."). For Justice Roberts' majority perspective, invoking an understanding of Dayton-Goose seemingly more consistent with that articulated by Taft, see id. at 357-58 (asserting that the Court would not have approved the
operating a railroad, however strong financially, however economical in its facilities, or favorably situated as to traffic,” Taft pointed out,
is not entitled as of constitutional right to more than a fair net operating income upon the value of its properties which are being devoted to public transportation. By investment in a business dedicated to the public service the owner must recognize that, as compared with investment in private business, he can not expect either high or speculative dividends but that his obligation limits him to only fair or reasonable profit.153

Anything above that, Taft insisted, was simply not the carrier’s private property.
The statute declares the carrier to be only a trustee for the excess over a fair return received by it. Though in its possession, the excess never becomes its property and it accepts custody of the product of all the rates with this understanding. It is clear, therefore, that the carrier never has such a title to the excess as to render the recapture of it by the Government a taking without due process.154

Thus, because the rates prescribed were also reasonable from the standpoint of the shipper . . . . [t]he excess caused by the discrepancy between the standard of reasonableness for the shipper and that for the carrier due to the necessity of maintaining uniform rates to be charged the shippers, may properly be appropriated by the Government for public uses because the appropriation takes away nothing which equitably belongs either to the shipper or to the carrier.155

Transportation Act’s recapture provisions had they deprived the railroads of a reasonable return on property devoted to transportation and thereby “confiscate[d] the property of one carrier for the benefit of another.” The majority held that the provisions of the Act which “disregard the private and separate ownership of the several respondents, treat them all as a single employer, and pool all their assets regardless of their individual obligations and the varying conditions found in their respective enterprises, cannot be justified as consistent with due process.” Id. at 360.

154 Id. at 484.
155 Id. The appropriation of public funds for the support of railroad development had long been recognized as consistent with the “public purpose” limitation. See, e.g., Township of Pine Grove v. Talcott, 86 U.S. 666, 676 (1873) (finding that “the public character of [municipal bonds issued to a railroad company to aid in construction of the railroad] cannot be doubted”); R.R. Co. v. County of Otoe, 83 U.S. 667, 673 (1872) (holding that a municipality’s authority to “aid in the construction of a turnpike, canal, or railroad is a legitimate exercise of legislative power . . . is not only plain in reason, but . . . this court has asserted the same doctrine nearly a score of times. It is no longer open to debate.”); Olcott v. Supervisors of Fond du Lac County, 83 U.S. 678, 692 (1872) (holding that where municipalities aid the construction of railroads, “such works, although they are in general operated and controlled by private corporations, are nevertheless, by reason of the facilities which they afford for trade, commerce, and intercommunication between different
The recapture provisions were thus fully consistent with the principle of neutrality.

c. **Other Deprivations of Property without Due Process**

Decisions involving wage, price, or rate regulation comprised a substantial percentage of the cases in which the Court invalidated a state or federal law on the ground that it transgressed the principle of neutrality. The application of the principle, however, was by no means confined to such controversies. Let me offer an illustrative but by no means exhaustive set of examples. In *Missouri Pacific Railway Co. v. Nebraska,* the railroad had permitted private firms to erect two grain elevators on its right of way at a station. Acting under the authority of a state statute, the Nebraska transportation board ordered the railroad to grant permission upon the same terms to a group of private individuals to build a third grain elevator in which they might store their grain. The Court unanimously held that the board’s order was, in essence and effect, a taking of private property of one person or corporation, for the private use of the petitioners. The taking by a State of the private property of one person or corporation, without the owner’s consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States.

Similarly, in *Great Northern Railway Co. v. Minnesota ex. rel. State and distant portions of the country, indispensable to the public interests and public functions.”*). Once the contents of the revolving railroad fund had been characterized as “public” rather than private property, therefore, their use for the support of the weaker railroads was constitutionally unproblematic.

156 164 U.S. 403, 411 (1896).
157 Id. at 412.
158 Id. at 417. See, to the same effect, *Hartford Fire Insurance Co. v. Chicago, Milwaukee, & St. Paul Railway Co.,* 175 U.S. 91, 99 (1899) (“[The railroad] is not obliged, and cannot even be compelled by statute, against its will, to permit private persons or partnerships to erect and maintain elevators, warehouses or similar structures, for their own benefit, upon the land of the railroad company.” (citing *Mo. Pac. Ry. Co. v. Nebraska,* 164 U.S. at 403, for the proposition)). See also *Mo. Pac. Ry. Co. v. Nebraska,* 217 U.S. 196, 207 (1910) (invalidating statute requiring railway company to install at its expense switch connections and side tracks to service grain elevators adjacent to its right of way). “Why,” asked Justice Holmes, “should the railroads pay for what, after all, are private connections?”. *Id.* Lucius Polk McGehee’s 1906 treatise cited the first *Missouri Pacific* decision for the proposition that “[t]o take property for other than a public purpose; to take, for instance, the property of one citizen and transfer it to another, would be a deprivation thereof without due process of law.” *McGEHEE,* supra note 21, at 255. *See also* 3 *WILLOUGHBY,* supra note 44, at 1783 (under neither the police power, nor the power of taxation, nor the power of eminent domain “may private property be taken, with or without compensation, for a private use”).
Railroad & Warehouse Commission and Great Northern Railway Co. v. Cahill, the Court unanimously held that orders of state railroad commissions requiring railroad companies to install and maintain weighing scales at their stations as a convenience to traders in livestock was "arbitrary and unreasonable," and therefore a deprivation of their property without due process of law.

In Chicago, Milwaukee, & St. Paul Railroad Co. v. Wisconsin, the Court invalidated on due process grounds a statute prohibiting the lowering of an upper berth in a sleeping car in which the lower berth was occupied unless the upper berth had also been engaged. "For as the State could not authorize the occupant of the lower berth to take salable space without pay," wrote Justice Lamar for the majority, "neither can the present statute compel the Company to give that occupant the free use of that space until it is actually purchased by another passenger.

In Brooks-Scanlon Co. v. Railroad Commission of Louisiana, the Court invalidated on due process grounds an order requiring a lumber company owning a narrow gauge railroad to operate its railroad at a loss. "A carrier cannot be compelled to carry on even a branch of business at a loss, much less the whole business of carriage," wrote Justice Holmes. "The plaintiff may be making money from its sawmill and lumber business but it no more can be compelled to spend that than it can be compelled to spend any other money to maintain a railroad for the benefit of others who do not care to pay for it."

In Chicago, Rock Island, & Pacific Railway Co. v. United States, the Court invalidated an order of the ICC exempting certain "short line" railroads from the obligation to pay a reasonable daily rental fee for the use of other railroads' cars under certain circumstances. Justice Sutherland wrote:

The use of railroad property is subject to public regulation, but a regulation which is so arbitrary and unreasonable as to become an infringement upon the right of ownership constitutes a violation of the due process of law clause of the Fifth Amendment. And certainly a

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159 238 U.S. 340 (1915).
160 253 U.S. 71 (1920).
161 Great N. Ry. Co. v. Minnesota, 238 U.S. at 345-47. See also Great N. Ry. Co. v. Cahill, 253 U.S. at 77 (holding that the question presented was "decisively controlled" by the Court's decision in Great N. Ry. Co. v. Minnesota).
162 238 U.S. 491, 499 (1915) ("the Company cannot be compelled to permit a third person to have the free use of [its] property until a buyer appears").
163 Id. at 499.
164 251 U.S. 396, 399 (1920).
165 Id.
166 Id. See also Miss. R.R. Comm'n v. Mobile & Ohio R.R. Co., 244 U.S. 388, 396 (1917) (invalidating on due process grounds an order requiring railroad company to restore passenger service on unprofitable lines).
167 284 U.S. 80, 100 (1931).
regulation permitting the free use of property in the face of an express finding that the owner is entitled to compensation for such use cannot be regarded otherwise than as arbitrary and unreasonable.168

_Chicago, St. Paul, Minneapolis & Omaha Railway Co. v. Holmberg_ involved an order of the Nebraska state railway commission requiring the company to install, partly at its expense, an underground cattle-pass across its right of way.169 The commission ordered the construction of the underground pass not as a safety measure, but instead merely to spare the farmer owning land on either side of the railway the inconvenience of driving his cattle across an otherwise adequate existing grade crossing.170 In a unanimous opinion authored by Justice Stone, the Court held that the order "deprives plaintiff of property for the private use and benefit of defendant, and is a taking of property without due process of law, forbidden by the Fourteenth Amendment."171

_St. Louis, Iron Mountain, & Southern Railway Co. v. Wynne_ involved an Arkansas statute requiring that railroad companies pay claims against them for livestock killed or injured by their trains within thirty days of the demand.172 Failure to pay within the specified period subjected the companies to liability for double damages plus an attorney’s fee, even where the amount initially demanded was greater than the amount ultimately sued for.173 Thus, as Justice Van Devanter put it for a unanimous Court, "the company was subjected to this extraordinary liability for refusing to pay the excessive demand made before the suit."174 By attaching "onerous penalties to the non-payment of extravagant demands," concluded Van Devanter, the statute "takes property from one and gives it to another, not because of a breach by the former of a duty to the latter or to the public, but because of a lawful exercise of an undoubted right. Plainly this cannot be done consistently with due process of law."175

168 _Id._ at 97. _See also_ Louisville & Nashville R.R Co. v. Cent. Stock Yards Co., 212 U.S. 132, 145 (1909) (invalidating statute requiring that a railroad company deliver its cars to a connecting carrier without adequate compensation).

169 282 U.S. 162, 164 (1930).

170 _Id._ at 165.

171 _Id._ at 167.

172 224 U.S. 354, 358 (1912).

173 _Id._

174 _Id._ at 359.

175 224 U.S. 354, 360 (1912). _See also_ Chi., Milwaukee, & St. Paul Ry. v. Polt, 232 U.S. 165, 167 (1914) (following _Wynne_'s holding in a case involving a North Dakota statute requiring payment of double damages where railroad company failed to pay a claim or offer a settlement greater than or equal to ultimate jury verdict); Chi., Milwaukee, & St. Paul Ry. v. Kennedy, 232 U.S. 626, 627 (1914) (following _Polt_); Mo. Pac. Ry. Co. v. Tucker, 230 U.S. 340, 351 (1913) (invalidating a statute imposing liquidated damages "grossly out of proportion to the possible actual damages" and "so arbitrary and oppressive that its
In Myles Salt Co. v. Board of Commissioners, the board had included the company’s land within a drainage district.\textsuperscript{176} The company alleged that its land received no benefit from the construction and maintenance of the district, and that the taxes assessed by the board were solely for the benefit of other lands within the district.\textsuperscript{177} The company insisted that this was, as Justice McKenna put it, “an effort to take plaintiff’s property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.”\textsuperscript{178} The justices agreed unanimously. Where a drainage district was “so formed to include property which is not and cannot be benefited directly or indirectly, including it only that it may pay for the benefit to other property,” wrote McKenna, “there is an abuse of power and an act of confiscation.”\textsuperscript{179}

Equally revealing were decisions in which the Court held that an act of state legislation unlawfully impairing the obligation of contract between private parties also deprived one party of vested rights of property without due process.\textsuperscript{180} Consider, for example, Treigle v. Acme Homestead Assn.\textsuperscript{181} A

\textsuperscript{176} 239 U.S. 478, 480 (1916) (describing the method by which the boundaries of the drainage district were established).

\textsuperscript{177} Id.

\textsuperscript{178} Id.

\textsuperscript{179} Id. at 485. See Ga. Ry. & Elec. Co. v. Decatur, 295 U.S. 165, 170 (1935) (“if the burden imposed is without any compensating advantage . . . the assessment amounts to confiscation.”); Road Improvement Dist. No. 1 v. Mo. Pac. R.R. Co., 274 U.S. 188, 194 (1927) (holding that the assessment was, in comparison to proportional benefit received, “so excessive as to be a manifestly arbitrary exaction and in violation of the due process of law clause” of the Fourteenth Amendment); Standard Pipe Line Co. v. Miller County Highway & Bridge Dist., 277 U.S. 160, 162 (1928) (following Missouri Pacific in holding that, “while it may be that the pipe lines received some small benefit from the road improvements, we regard the assessments actually made against them as arbitrary and unreasonable in amount”); Norwood v. Baker, 172 U.S. 269, 291 (1898) (“The assessment was in itself an illegal one because it rested upon a basis that excluded any consideration of benefits.”). See also McGhee, supra note 21, at 217-18 (“[T]he fundamental principles of justice and of due process of law, as applicable under our complex system of government” dictate “that the power to tax can be exercised only for a public purpose, and not in order to enrich one person or class of persons at the expense of another.”); id. at 228 (“It is fundamental in the nature of constitutional government that its power must be exerted solely for the public use and service . . . . [A]nd when the state oversteps this limitation and without regard to benefits to the public levies a contribution, under the form of a tax, upon the property of one person for the use of another person or class, it commits an act of confiscation and deprives the individual upon whom the contributio is levied of his property without due process of law.”).

\textsuperscript{180} See, e.g., Coombes v. Getz, 285 U.S. 434, 448 (1932) (holding that the Due Process Clause of the Fourteenth Amendment prohibits impairment of the vested right to enforce a contractual obligation); Bradley v. Lightcap, 195 U.S. 1, 23-24 (1904) (holding that allowing a statute passed subsequent to a mortgage to impair the mortgagee’s right to
Louisiana statute retrospectively altered the rights of withdrawing members of building and loan associations in a manner "comparable to a statute declaring that whereas preferred stockholders heretofore have enjoyed a priority in the distribution of assets, in that respect they shall hereafter stand pari passu with common stockholders."\(^{182}\) As the appellant contended, the statute's provisions "affect[ed] merely the rights of members inter se."\(^{183}\) In a unanimous opinion authored by Justice Roberts, the Court concluded that the act's provisions dealt

only with private rights, and [were] not adapted to the legitimate end of conserving or equitably administering the assets in the interest of all members. They deprive withdrawing members of a solvent association of existing contract rights, for the benefit of those who remain. We hold the challenged provisions impair the obligation of the appellant's contract and arbitrarily deprive him of vested property rights without due process of law.\(^{184}\)

The principle of neutrality was on prominent display in Justice Roberts' majority opinion for the Court in *Railroad Retirement Board v. Alton Railroad Co.*\(^{185}\) The majority agreed with the trial court's opinion "respecting the disregard of due process exhibited by a number of provisions"\(^{186}\) of the Railroad Retirement Act of 1934. Indeed, though collected in a single decision, the Court found that no fewer than nine of the federal railway pension statute's provisions deprived the railroad companies of their property without due process of law in violation of the Fifth Amendment. For the sake of brevity, I will discuss only some of the more prominent instances.

The Court first considered the provisions of the Act concerning former employees.\(^{187}\) The Act made eligible for pensions all workers employed in carrier service within one year prior to its passage, without regard to whether they were re-employed subsequent to its enactment.\(^{188}\) Approximately 146,000 people fell within this class, including not only those who had retired, but also those who had been discharged for cause, those who had resigned to take another job, who had been discharged because their positions were abolished, and those whose employment had been temporary.\(^{189}\) Those persons had not

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\(^{181}\) 297 U.S. 189 (1936).
\(^{182}\) *Treigle*, 297 U.S. at 196.
\(^{183}\) Id. at 195.
\(^{184}\) Id. at 197-98. "The statute merely attempts, for no discernible public purpose, the abrogation of contracts between members and the association lawful when made." Id. at 196.
\(^{185}\) 295 U.S. 330 (1935).
\(^{186}\) Id. at 361.
\(^{187}\) Id. at 348.
\(^{188}\) Id.
\(^{189}\) Id.
been in carrier service as of the date of the Act, and the majority thought it certain that thousands of them never would be again.\textsuperscript{190} The Court held that it was arbitrary in the last degree to place upon the carriers the burden of gratuities to thousands who have been unfaithful and for that cause have been separated from the service, or who have elected to pursue some other calling, or who have retired from the business, or have been for other reasons lawfully dismissed.\textsuperscript{191}

An additional one million former employees had left the service of a carrier more than one year before the statute’s enactment.\textsuperscript{192} The statute provided that were any such worker to be re-employed by a carrier in any capacity, at any time and for any period, no matter how brief, his prior service with any carrier was to be taken into account in calculating the annuity payable to him at age sixty-five.\textsuperscript{193} The majority observed that this provision applied even where the worker had left carrier service years ago, choosing to enter some other line of work to which he had devoted “the best years of his life,” or where a worker’s service with a carrier had been terminated for cause.\textsuperscript{194} “[Y]et if, perchance, some carrier in a distant part of the country should accept him for work of any description, even temporarily, the Act throws the burden of his pension on all the railroads, including, it may be, the very one which for just cause dismissed him.”\textsuperscript{195} This the majority could not countenance. “Plainly,” wrote Justice Roberts:

\begin{quote}
[T]his requirement alters contractual rights; plainly it imposes for the future a burden never contemplated by either party when the earlier relation existed or when it was terminated. The statute would take from the railroads’ future earnings amounts to be paid for services fully compensated when rendered in accordance with contract, with no thought on the part of either employer or employee that further sums must be provided by the carrier.\textsuperscript{196}
\end{quote}

The provision was therefore “retroactive in that it resurrects for new burdens transactions long since past and closed.”\textsuperscript{197} Moreover, “as to some of the railroad companies it constitutes a naked appropriation of private property upon the basis of transactions with which the owners of the property were

\begin{itemize}
\item \textsuperscript{190} \textit{ld.}
\item \textsuperscript{191} \textit{ld.} at 349. The dissenting opinion agreed with this assessment. \textit{ld.} at 389 (Hughes, C.J., dissenting).
\item \textsuperscript{192} \textit{ld.} at 349.
\item \textsuperscript{193} \textit{ld.}
\item \textsuperscript{194} \textit{ld.}
\item \textsuperscript{195} \textit{ld.}
\item \textsuperscript{196} \textit{ld.}
\item \textsuperscript{197} \textit{ld.} at 350.
\end{itemize}
never connected." Therefore, Roberts concluded, "the Act denies due process of law by taking the property of one and bestowing it upon another."

With respect to the more than one million workers employed in carrier service as of the date of the Act, the statute credited their past service in determining their eligibility for pension benefits, without requiring them to make any corresponding contributions to the pension fund. Here again the Court rejected this transfer of property from A to B. "This clearly arbitrary imposition of liability to pay again for services long since rendered and fully compensated is not permissible legislation," Justice Roberts opined.

The court below held the provision deprived the railroads of their property without due process, and we agree with that conclusion. . . . [T]here can be no constitutional justification for arbitrarily imposing millions of dollars of additional liabilities upon the carriers in respect of transactions long closed on a basis of cost with reference to which their rates were made and their fiscal affairs adjusted.

The majority further found that the Act's scheme of pooling the contributions of all of the carriers and treating them as if they together constituted a single employer violated the Due Process Clause in four ways. First, the statute required the immediate retirement of all employees aged seventy or older. Fifty-six of the carriers had no employees in that category, yet the Act required that they pay to such employees of other carriers $4 million in the first year, and nearly $33 million overall. For these carriers having relatively few if any "superannuated" employees, this discrimination amounted to "the disregard of their ownership of their own assets." Second, the Act required "that solvent railroads must furnish the money necessary to meet the demands of the system upon insolvent carriers." Third, the past service of an employee of a defunct carrier was added to any service rendered to an existing carrier in computing that employee's pension, yet the entire burden of subsidizing the pension fell upon only existing carriers. Nothing could "serve to obscure this violation of due process." Fourth, the Act

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198 Id.
199 Id. The majority similarly found it objectionable that "thousands of those in the service at the date of the Act will at once become entitled to annuities, though they will have contributed nothing to the fund." Id. at 351.
200 Id. at 353.
201 Id. at 354.
202 Id. The Court also found "arbitrary and unreasonable" a provision entitling officials and representatives of employee organizations to pensions under the Act. Id. at 354-55.
203 Id. at 355.
204 Id.
205 Id. at 356.
206 Id.
207 Id.
208 Id.
required that the carriers insure repayment of every deceased employee’s contribution to his estate, less any payments received during life, with compound interest.\textsuperscript{209} This, the majority objected, was “an unnecessarily harsh and arbitrary imposition.”\textsuperscript{210} After surveying these objectionable features of the Act’s pooling arrangement, the Court concluded that:

[T]he railroads, though their property be dedicated to the public use, remain the private property of their owners, and . . . their assets may not be taken without just compensation. The carriers have not ceased to be privately owned . . . . There is no warrant for taking the property or money of one and transferring it to another without compensation . . . .\textsuperscript{211}

The Court concluded that those provisions “which disregard the private and separate ownership of the several respondents, treat them all as a single employer, and pool all their assets regardless of their individual obligations and the varying conditions found in their respective enterprises, cannot be justified as consistent with due process.”\textsuperscript{212}

3. Neutrality and Liberty

The cases discussed to this point each involve deprivations of property without due process. Yet the influence of the principle of neutrality in due process jurisprudence was by no means confined to cases involving redistribution of property. A close look at decisions involving deprivations of liberty without due process enables us to appreciate the extent to which due process jurisprudence was informed by norms of equality. To begin, a series of labor regulation cases decided between 1898 and 1920 provides a useful context in which to evaluate the comparative importance of concerns about fundamental rights of contract and illicit discrimination or redistribution in the Court’s due process jurisprudence. These cases involved what some justices might have regarded as “paternalistic” regulations of the employment relationship, seeking to protect the employee from overreaching or mistreatment by his employer. In none of them, however, did the Court suggest that the regulation in question transgressed the principle of neutrality or took the property of A and gave it to B. In other words, each of these cases involved a curtailment of contractual liberty, but without the partial, redistributive feature that so troubled the \textit{Adkins} Court.

In \textit{St. Louis, Iron Mountain, \& St. Paul Railway Co. v. Paul}, for example, the Court upheld an Arkansas statute requiring that any railroad company discharging an employee pay him any unpaid wages on the date of the

\textsuperscript{209} \textit{Id.} at 356-57.

\textsuperscript{210} \textit{Id.} at 357.

\textsuperscript{211} \textit{Id.}

\textsuperscript{212} \textit{Id.} at 360. Winding up this extended survey of the Act’s constitutional infirmities, Justice Roberts concluded: “It results from what has now been said that the Act is invalid because several of its inseparable provisions contravene the due process of law clause of the Fifth Amendment.” \textit{Id.} at 362.
213 Chief Justice Fuller explained that the statute "did not interfere with vested rights" nor "sensibly encroach upon, the right to contract." 214 Similarly, Patterson v. Bark Eudora 215 and Strathearn Steamship Co. v. Dillon 216 held that federal regulations of the timing of wage payments to sailors did not infringe the liberty of contract. In Erie Railroad Co. v. Williams, the Court rejected the contention that a New York statute requiring that railroad workers' wages be paid in cash and on a semi-monthly basis deprived the company and its employees of their liberty of contract. 217 In Keokee Consolidated Coke Co. v. Taylor, the Court rebuffed a freedom of contract challenge to a Virginia statute requiring that all store orders or other evidences of indebtedness issued by employers as payment of wages be redeemable in cash. 218 Similarly, in Rail & River Coal Co. v. Yaple, the Court declined to embrace a liberty of contract challenge to an Ohio statute directing that, where miners' wages were reckoned according to the weight of the coal that they mined, the weighing take place before the coal was passed over a screen. 219

Each of these decisions upholding the regulation in question was notable for its unanimity. Yet during the Fuller Court era in which Lochner itself was decided, decisions upholding such statutes occasionally provoked a notation of dissent without opinion. Knoxville Iron Co. v. Harbison 220 and Dayton Coal & Iron Co. v. Barton 221 upheld anti-scrip laws like the one sustained in Taylor, but by a vote of 7-2. McLean v. Arkansas sustained an anti-coal screening statute similar to the measure upheld in Yaple, but this time by a 7-2 margin. 222 In each of these cases the majority rejected the claim that the challenged regulation deprived the parties of contractual freedom secured by the due process clause. And in each instance, the two dissenting justices were those who had dissented without opinion in Holden v. Hardy. 223 One of them, Justice Brewer, had declared in his dissenting opinion in Budd v. New York that "[t]he paternal theory of government" was to him "odious,;" 224 the other,
Justice Peckham, was himself the author of *Allgeyer*\(^{225}\) and *Lochner*.\(^{226}\) Among their colleagues, these two Justices embraced the most robust conceptions of the fundamental liberty of contract. Indeed, the fact that Peckham was its author may help to account for the emphasis on liberty in the *Lochner* opinion itself. Yet in these instances in which their colleagues did not view a regulation of contractual prerogatives as also resulting in an improper legislative discrimination or redistribution of property, the Court’s strongest champions of contractual liberty faced difficulty in assembling a majority to support their positions.\(^{227}\)

Decisions in which the Court held that workplace regulations violated due process therefore tended, like Sutherland’s opinion in *Adkins*, to condemn the offending statutes not only as deprivations of liberty, but also as violations of the principle of neutrality. Consider, for example, *Adair v. United States*.\(^{228}\) Section ten of the Erdman Act of 1898 forbade any common carrier engaged in interstate transportation from unjustly discriminating against any employee or threatening any such employee with loss of employment because of the employee’s membership in a labor organization.\(^{229}\) Adair, an agent of the Louisville & Nashville Railroad Company, was indicted for violating the section by discharging a locomotive fireman because of his union membership.\(^{230}\) The Court held that section ten deprived Adair of his liberty and property without due process.\(^{231}\)

The bulk of Justice Harlan’s opinion for the majority focused on the statute’s curtailment of contractual liberty.\(^{232}\) Yet notwithstanding the fact that the constitutional provision in question was the Fifth rather than the Fourteenth Amendment, Harlan indicated at several places that the statute also raised troubling issues of constitutional equality. Counsel for Adair argued that section ten of the Act was

unconstitutional as class legislation. The classification is unreasonable.

\(^{225}\) 165 U.S. 578, 583 (1895).
\(^{226}\) 198 U.S. 45, 52 (1905).
\(^{227}\) See *Jacobson v. Massachusetts*, 197 U.S. 11, 39 (1905) (Brewer and Peckham dissenting without opinion from decision upholding statute requiring vaccination against claim that it deprived plaintiff of constitutionally protected liberty without due process); *Otis v. Parker*, 187 U.S. 606, 610-11 (1903) (Brewer and Peckham dissenting without opinion from decision rejecting liberty of contract challenge to provision of California constitution prohibiting purchase of corporate stock on margin, or for future delivery); *Booth v. Illinois*, 184 U.S. 425, 432-33 (1902) (Brewer and Peckham dissenting without opinion from decision rejecting liberty of contract challenge to state law prohibiting options contracts in grain futures).
\(^{228}\) 208 U.S. 161 (1908).
\(^{229}\) Id. at 168-69.
\(^{230}\) Id. at 170.
\(^{231}\) Id. at 180.
\(^{232}\) See id. at 172-76 (discussing whether the provision violated the Due Process Clause).
The statute attempts to confer privileges upon union labor that are not conferred upon non-union labor. No restraint whatever is imposed upon carriers with respect to discharging or discriminating against non-union laborers . . . [U]nder our form of government, which guarantees equal privileges to all before the law, it is not competent for Congress, or state legislatures, to make such an unreasonable classification as in the statute before us, whereby union labor is preferred as against non-union labor.  

Early in his opinion Justice Harlan raised the concern that section ten might constitute impermissible class legislation, as he observed in passing that while that section makes it a crime against the United States to unjustly discriminate against an employé of an interstate carrier because of his being a member of a labor organization, it does not make it a crime to unjustly discriminate against an employé of the carrier because of his not being a member of such an organization.

Harlan would return to this theme later in the opinion. Having disposed of section ten on the ground that it violated the Due Process Clause of the Fifth Amendment, Harlan took up the question of whether the section might nevertheless be justified as an exercise of the commerce power. “Will it be said,” Harlan inquired, that the provision in question had its origin in the apprehension, on the part of Congress, that if it did not show more consideration for members of labor organizations than for wage-earners who were not members of such organizations . . . members of labor organizations would, by illegal or violent measures, interrupt or impair the freedom of commerce among the States? We will not indulge in any such conjectures, nor make them, in whole or in part, the basis of our decision. We could not do so consistently with the respect due to a coordinate department of the Government. We could not do so without imputing to Congress the purpose to accord one class of wage-earners privileges withheld from another class of wage-earners engaged, it may be, in the same kind of labor and serving the same employer.

To do so would impute to Congress the intention to create a classification arbitrarily discriminating among similarly situated workers, thereby enacting class legislation in violation of the Fifth Amendment. And what Congress could not constitutionally have a purpose to accomplish, it could not accomplish inadvertently. If Congress could make it a crime to discharge an

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233 Id. at 163.
234 Id. at 169.
235 Id. at 176. For an explanation of why the Justices believed that the statute might have been sustained as an exercise of the commerce power notwithstanding its deficiencies under the Fifth Amendment, see CUSHMAN, supra note 78, at 110-11.
236 Adair, 208 U.S. at 179.
237 Id.
interstate railroad employee for union membership, Harlan observed, then it was
difficult to perceive why it might not, by absolute regulation, require
interstate carriers, under penalties, to employ in the conduct of its
interstate business only members of labor organizations, or only those
who are not members of such organizations — a power which could not be
recognized as existing under the Constitution of the United States. 238

The relation between union membership and the protection of interstate
commerce was not sufficient to support the discrimination made by the statute,
and Congress was without power to enact such legislation arbitrarily favoring
one class of workers over another. 239

The majority did not view this discrimination between union and non-union
workers as the only feature of the statute offending constitutional
requirements of equal treatment. Harlan's opinion made it clear that the majority was
troubled not only by the infringement of contractual liberty, but also by the
asymmetrical character of the statute's intervention. "The right of a person to
sell his labor upon such terms as he deems proper," Harlan explained,
is, in its essence, the same as the right of the purchaser of labor to
prescribe the conditions upon which he will accept such labor from the
person offering to sell it. So the right of the employé to quit the service
of the employer, for whatever reason, is the same as the right of the
employer, for whatever reason, to dispense with the services of such
employé. 240

An employer's right to discharge an employee for membership in a union
was merely reciprocal to the right of the employee to quit his employment

238 Id. Writing four years before Adair would be decided, Ernst Freund noted that
acts making it unlawful for employers to prevent employees from joining labor
unions, or to discharge or threaten to discharge them on account of such connection,
have been declared unconstitutional in Missouri and Illinois partly as interfering with
the free right of contract, partly because discriminating between union and non-union
men.

FREUND, supra note 46, at 752-53. Anticipating Harlan's opinion in Adair, Freund observed
that

[i]f there is a discrimination it consists in this[;:] that the employer may not threaten to
discharge a man because he is a member of a union, but may threaten to discharge a
man because he is not a member of a union. The argument therefore is in reality that if
you give one class of men some protection, you must give another class not the same
but a corresponding protection. The act to be equal in spirit would have to provide that
no employer shall threaten to discharge a laborer either because he is or because he is
not a member of a union.

Id. at 753.

239 Adair, 208 U.S. at 180 ("[T]he power to regulate interstate commerce, great and
paramount as that power is, cannot be exerted in violation of any fundamental right secured
by other provisions of the Constitution.").

240 Id. at 174-75.
because the company employed non-union workers. "In all such particulars," Harlan concluded, "the employer and the employé have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land." Thus, it was not merely the Erdman Act's interference with liberty that ran afoul of the Due Process Clause. The Court was also deeply troubled by statute's disturbance of constitutionally protected equality — in other words, by its transgression of the principle of neutrality.

This theme would again be sounded in Coppage v. Kansas, which concerned the constitutionality of a state statute prohibiting the use of "yellow dog" contracts — contracts in which an employee was required to agree as a condition of employment not to join a labor union. After quoting the passage of the Adair opinion concerning the liberties and "equality of right" enjoyed by employer and employee, Justice Pitney's majority opinion insisted that "[a]n interference with this liberty so serious as that now under consideration, and so disturbing of equality of right, must be deemed to be arbitrary, unless it be supportable as a reasonable exercise of the police power of the State." Finding no such support, the majority concluded that the Kansas statute deprived the employer of liberty and property without due process. The statute was "intended to deprive employers of a part of their liberty of contract, to the corresponding advantage of the employed and the upbuilding of labor organizations." The Court declared that there could not "be one rule of liberty for the labor organization and its members, and a different and more restrictive rule for employers." The employer could not "be foreclosed by legislation from exercising the same freedom of choice that is the right of the employé." Here again the Court's opinion evidenced concern not only for the protection of individual liberty, but also for the preservation of state neutrality.

241 Id. at 175.
242 236 U.S. 1 (1915).
243 Id. at 11.
244 Id. at 14.
245 Id. ("[W]e do not think the statute in question ... can be sustained as a legitimate exercise of [a State's police power."]).
246 Id. at 16.
247 Id. at 20. Justice Pitney, who authored the opinion, did not doubt that a labor union might legally exclude from its membership any worker who would not agree not to work in an open shop, nor that a union member might legally decline to work for an employer who would not agree to maintain a closed shop. He therefore maintained that employers must have the corresponding right legally to exclude from employment any worker who would not agree to forego union membership. Id. at 19-20.
248 Id. at 21.
249 Passages such as these appear to have prompted Ernst Freund to think of these cases as involving inadequate "correlation" of privilege and duty between employer and employee. Freund believed that it was the "failure to perform the difficult task of
Consider finally the *Lochner* decision itself. The opinion was written by Justice Peckham, one of the two most libertarian members of the Court, and it emphasized the restraint on contractual liberty imposed by the New York bakeshop law. Yet sprinkled throughout the opinion are suggestions that at least some members of the majority may have viewed the statute as class legislation. I refer here not simply to the opinion’s suggestions that the legislature may have been stimulated by “some other motive” than “the purpose to subserve the public health or welfare.” Elsewhere in the opinion adequately surveying and covering the entire aggregate of rights and obligations involved in new legislation which account[ed] for much of the alleged unreasonableness of modern statutes,” which he thought “particularly conspicuous in labor legislation.” Freund, *supra* note 22, at 240. “Reciprocal obligation,” Freund maintained, was

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

Id. at 240-41. Freund considered the statutes involved in cases such as *Adair* and *Coppage* as “unsatisfactory,” observing that “the defect of the statute may account for the decision.” Id. at 244. That defect, in Freund’s view, was not principally the interference with liberty, but the arbitrary, one-sided character of the regulation. As Freund saw it,

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

Id. at 245. The particular content of the rights of employer and employee was thus less important than the correlative relationship between those rights. It was the “equality of right” that could not be “disturb[ed].” *Coppage*, 236 U.S. at 14.

Professor Bernstein has written that “no one has adequately explained how Peckham and Brewer found three additional votes in *Lochner* instead of being outvoted as they were in every other protective legislation case in which they thought the legislation unconstitutional.” Bernstein, *supra* note 71, at 47. What follows is a preliminary effort to suggest the outlines of such an explanation.

*Lochner* v. New York, 198 U.S. 45, 63 (1904). See also id. at 64 (“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.”). Professor Bernstein suggests that the bakeshop law “was arguably special interest legislation that benefited established, unionized German-American bakers at the expense of more recent immigrants,” Bernstein, *supra* note 2, at 23-24, and that with respect to Chief Justice Fuller, Justice Brown, and Justice
Peckham referred to the workers in mines and smelters as the "class of labor" to which the eight-hour law upheld in Holden v. Hardy applied. In rejecting the validity of the bakeshop law as "a labor law, pure and simple," Peckham remarked that "[t]here is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State . . . ." And in evaluating the state's police power rationale, Peckham rejected the notion that "the trade of a baker" was a peculiarly unhealthy one. "In looking through statistics regarding all trades and occupations," wrote Peckham, "it may be true that the trade of a baker does not appear to be as healthy as some other trades, and is also vastly more healthy than still others." One might reasonably surmise that Peckham and Brewer thought that neither mining nor baking was sufficiently unhealthy to support such working-hours legislation in any event. But the comparative point raised by this last quoted sentence also suggests the perception of irrationality in singling out bakers for such regulation when other less healthy occupations were not similarly regulated. Holden v. Hardy had explained McKenna, "it is entirely possible that one or more of them was swayed by the belief, expressed by Lochner's supporters, that the law was a sop to the bakers' union, which illegitimately sought to monopolize the labor market for bakers by forcing all bakeries to abide by union work rules." Bernstein, supra note 71, at 50 n.264. See also George Gorham Groat, The Eight Hour and Prevailing Rate Movement in New York State, 21 POL. SCI. Q. 414, 425 (1906) ("Both state and national labor organizations used all their influence in support of [the bakeshop law]."); Siegan, supra note 71, at 113-21 (suggesting that the New York bakeshop law probably operated to marginalize immigrant workers in small bakeries); Sidney G. Tarrow, Lochner Versus New York: A Political Analysis, 5 LAB. HIST. 277, 280-90 (1964) (describing the origins of the statute in the journeyman bakers' union movement); Editorial, A Check to Union Tyranny, THE NATION, May 4, 1905, at 346-47 (applauding Lochner for stopping "the subterfuge by which, under pretext of conserving the public health, the unionists have sought to delimit the competition of non-unionists, and so to establish a quasi-monopoly of many important kinds of labor"); Editorial, "Fussy Legislation.", N.Y. TIMES, April 19, 1905, at 10 (saluting Lochner and condemning the bakeshop law as a contract between "the demagogues in the Legislature and the ignoramuses among the labor leaders").

Lochner, 198 U.S. at 55 (emphasis added). Peckham also quoted the decision of the Supreme Court of Utah, which observed: "The law in question is confined to the protection of that class of people engaged in labor in underground mines, and in smelters and other works wherein ores are reduced and refined. This law applies only to the classes subjected by their employment to the particular conditions and effects attending" such work. Id. (quoting Holden v. Hardy, 169 U.S. 366, 396 (1898) (quoting State v. Holden, 46 P. 1105, 1106 (Utah 1896))).

Lochner, 198 U.S. at 57 (emphasis added).

Id. at 59.

See G. Edward White, Revisiting Substantive Due Process and Holmes Lochner Dissent, 63 BROOK. L. REV. 87, 102 (1997) (contending that, for the Lochner majority, "[i]f the purpose of legislation was to promote the general welfare by protecting a particularly
why it was rational to single out miners\textsuperscript{256} for such regulation: mining was a peculiarly unsafe and unhealthy occupation.\textsuperscript{257} Muller v. Oregon and its progeny would soon explain that a “woman’s physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil.”\textsuperscript{258} “Differentiated by these matters from the other sex,” wrote Justice Brewer, “she is properly placed in a class by herself.”\textsuperscript{259} But in the opinion of the Lochner majority, New York had not offered an adequate justification for singling out “bakers as a class” for special treatment, placing them in a class by themselves.\textsuperscript{260}

vulnerable class of workers, it could come within the police power, as in the case of hours legislation for miners. But if the class of workers singled out had no special vulnerability, the legislation ceased being a ‘general’ health or welfare measure and became a ‘partial’ measure directed at a particular class”).

\textsuperscript{256} As Justice Brown put it: “The question in each case is whether the legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression, or spoliation of a particular class.” 169 U.S. at 398.

\textsuperscript{257} Id. at 396.

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

\textit{Id.} Lochner’s brief emphasized that his case was “clearly distinguishable” from Holden:

The occupation of mining has ever been held properly within the police powers; while a decision pronouncing the bakers trade subject to arbitrary regulation under the police power, would mean that all trades will eventually be held within the police power; and the 14th Amendment will become mere idle words.


\textsuperscript{258} Muller v. Oregon, 208 U.S. 412, 420 (1908).

\textsuperscript{259} Id. at 422.

\textsuperscript{260} As counsel for Joseph Lochner had contended, “Classification must be based upon some difference bearing a reasonable and just relation to the act in respect to which the classification is attempted, but no mere arbitrary selection can ever be justified by calling it classification.” \textit{Lochner}, 198 U.S. at 48. Judge O’Brien, dissenting from the opinion of the New York Court of Appeals sustaining Lochner’s conviction, had similarly objected:

The very small fraction of the community who happen to conduct bakeries or confectionery establishments are prohibited, under pain of fine and imprisonment, from regulating the conduct of their own business by contracts or mutual agreements with their employees, whereas all the rest of the community who find it necessary to employ
This sort of singling out of one group for special treatment without adequate justification was precisely what commentators of the period meant when they referred to "class legislation." Writing in 1904 on the eve of the *Lochner* decision, Ernst Freund voiced concern that "[i]f legislation is piecemeal or haphazard, the danger is inevitable that legislators may be influenced by the clamor of interests without ascertaining the existence of conditions requiring special legislation, or by a misapprehension of those conditions due to a skilful presentation of one-sided and partial views."

Yet Freund noted:

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

The result of this more stringent exercise of judicial control was that "[u]nder the operation of the Fourteenth Amendment, the legislative power is certainly not as free [to proceed piecemeal] as it used to be . . . ." On Freund's view, this was a salutary development: "[O]n the whole this restriction is a distinct gain, for it tends toward equality, and in a democracy equality is the surest, and, in the long run, the only possible guaranty of liberty." But Freund cautioned that "classification, and therefore class legislation, has not yet been abolished, it is merely placed under judicial control." Freund believed that "[t]he principles guiding such control must be developed by further adjudication," but was prepared to assert that "the trend of decisions may be summarized" as imposing the requirement that "[w]here a restraint is confined to a special class of acts or occupations, that class must present the danger dealt with in a more marked and uniform degree than the classes omitted." "The decisions of the Supreme Court of the United States," Freund concluded, "seem to be in accordance with these principles."

labor in private business may do so. Class legislation of this character, which discriminates in favor of one person and against another, is forbidden by the Constitution of the United States . . . .

People v. Lochner, 69 N.E. 373, 386 (1904) (O'Brien, J., dissenting).

FREUND, supra note 46, 754.

Id. at 755.

Id.

Id.

Id.

Id. at 755.

As Professor Gillman points out, Lochner's brief had quoted Freund's discussion of class legislation in support of his position: "It is an elementary principle of equal justice, that where the public welfare requires something to be given, or done the burden be imposed or distributed upon some rational basis, and that no individual be singled out to make a sacrifice for the community." Brief for the Plaintiff in Error at 13, Lochner v. New York,
This view, which seemed so presciently to anticipate the disposition in *Lochner*, persisted well into the *Lochner* era. In 1907, for example, Andrew C. McLaughlin cited the *Lochner* decision as Exhibit A in his case for careful scrutiny of police power legislation:

[T]here arises constant necessity for watching narrowly this [police] power of the state, for it is often invoked not for the common good, but for the supposed advantage of classes and cliques. If a law to limit the hours of work in bakeries, like that of New York, recently passed on by the courts, has for its purpose, not the uplifting and protection of the health and well-being of the community, but the giving of advantage to a certain class of workmen without regard to the rights and desires of the rest . . . it can hardly be rightly supported as an exercise of the police power.\(^{268}\)

Three years later, W.W. Willoughby would observe:

[I]t has been repeatedly declared that enactments of a legislature directed against particular individuals or corporations, or classes of such, without any reasonable ground for selecting them out of the general mass of individuals or corporations, amounts to a denial of due process of law so far as their life, liberty or property is affected.\(^{269}\)

As late as 1926, Rodney Mott's treatise *Due Process of Law* continued to link the limitation on class legislation to the due process requirement of

\(^{198}\) U.S. 45 (1904) (No. 292), reprinted in 14 LANDMARK BRIEFS, supra note 257, 666 (quoting Freund, supra note 46, at 635). The brief similarly relied on then-Judge Peckham's opinion for the New York Court of Appeals in *People v. Gillson*, 109 N.Y. 389, 399 (1888), characterizing a statute as

evidently of that kind which has been so frequent of late, a kind which is meant to protect some class in the community against the fair, free and full competition of some other class, the members of the former class thinking it impossible to hold their own against such competition, and therefore flying to the Legislature to secure some enactment which shall operate favorably to them or unfavorably to their competitors in the commercial, agricultural, manufacturing or producing fields.

Brief for the Plaintiff at 29, reprinted in 14 LANDMARK BRIEFS, supra note 257, at 682. The brief also relied upon the majority and concurring opinions in *Ex parte Westerfield*, 55 Cal. 550 (1880), which invalidated a Sunday law specifically prohibiting baking between six p.m. on Saturday and six p.m. on Sunday, on the ground that it was

special legislation. A certain class is selected. . . . [T]here is nothing so peculiar in the occupation [of baking] as that those engaged in it require—as a sanitary measure or for the protection of their morals—a period of rest not required by those engaged in many other employments. A general law must include within its sanction all who come within its purpose and scope. It must be as broad as its object.

*Id.* at 39, reprinted in 14 LANDMARK BRIEFS, supra note 257, 692. See also Gillman, supra note 1, at 126-28 (referring to and discussing the same quoted material).


\(^{269}\) 2 WILLOUGHBY, supra note 44, at 874.
equality.

In those cases where the central problem is one of classification, it is evident that, unless the actual conditions surrounding the classification are such as to disclose a reasonable justification for the class distinction, the class distinction becomes an arbitrary discrimination. The determination, therefore, of the constitutionality of the law depends upon the determination of the further question of whether there is a real distinction between the classes established, in view of the particular circumstances. 270

Mott concluded that

the classification as made must rest upon some real distinction and not on a whimsical or arbitrary basis. Unless it has some relation to the purpose in hand it can hardly be said to be based on the considerations of fairness and reasonableness which are the foundations upon which due process is built. 271

Freund himself would return to this theme in 1917. "Very often," he wrote in Standards of American Legislation,

the restriction of legislation to a particular group merely means following the line of least resistance: there is a strong demand for relief on the part of, or with reference to, one particular calling, industry, or business, and while the same measure is capable of more general application, it has not sufficient strength or support to carry as a general policy, or the general policy meets determined opposition on the part of one or more groups claiming exemption, which is granted. It is this kind of class legislation which is opposed to the spirit of constitutional equality . . . 272

And it is this particular notion of constitutional equality to which Justice Holmes had opposed himself in the closing sentences of his Lochner dissent.

270 MOTT, supra note 17, at 538-39.
271 Id. at 598.
272 FREUND, supra note 22, at 271. In the same passage Freund observed that “[w]here peculiar conditions demand specific remedies, or where the public interest is involved in various degrees, or where there are special problems of administration and enforcement, discrimination or differentiation may more nearly approximate the demands of justice than a mere mechanical equality, and class legislation may then be in perfect harmony with the equal protection of the law.” Id.

In his monumental treatise on the police power, Freund had similarly identified class legislation as an issue in rate regulation: Because “a systematic regulation of charges of all commodities and services is not within the range of practical legislative policy,” he wrote, “[a]ll such legislation will necessarily apply to particular classes of business. Under the principle of equality the classes so singled out should have some special relation to the possibility of oppression [resulting from “unreasonable charges”]. . . . There will thus be an adequate safeguard against arbitrary class legislation in the matter of regulation of charges.” FREUND, supra note 46, 389.
The Fourteenth Amendment's guarantees were not offended, Holmes maintained, unless
the statute proposed would infringe fundamental principles as they have
been understood by the traditions of our people and our law. It does not
need research to show that no such sweeping condemnation can be passed
upon the statute before us.... Men whom I certainly could not
pronounce unreasonable would uphold it as a first instalment [sic] of a
general regulation of the hours of work. Whether in the latter aspect it
would be open to the charge of equality I think it unnecessary to
discuss.273

As Freund had argued in 1904, class legislation was not invariably void. It
was unconstitutional only if arbitrary or unreasonable; and, given the political
realities that might confront efforts to enact such a general regulation of the
hours of work, proceeding piecemeal by singling out special classes did not
offend Holmes' notions of constitutional equality.

Four of the members of the Lochner majority — Peckham, Brewer, Fuller,
and Brown — had left the Court by the time Bunting v. Oregon274 was decided
in 1917. But the fifth member of the Lochner majority, Justice McKenna,
remained to hear the challenge to Oregon's maximum hours law. Unlike the
New York bakeshop law, the Oregon statute bore a much greater resemblance
to "a general regulation of the hours of work." The statute declared that "[n]o
person shall be employed in any mill, factory, or manufacturing establish-
ment in this State more than ten hours in any one
day."275 In an opinion that didn't
even mention Lochner, the Court upheld the statute by a vote of 5-3.276 The
majority opinion was written by none other than Justice McKenna.

Six years later, when McKenna joined the majority to invalidate the
minimum wage statute assailed in Adkins, Chief Justice Taft was perplexed by
the majority's reliance on Lochner. The law at issue in Bunting, Taft observed,
covered the whole field of industrial employment and certainly covered
the case of persons employed in bakeries.... No one can suggest any
constitutional distinction between employment in a bakery and one in any
other kind of a manufacturing establishment which should make a limit of
hours in the one invalid, and the same limit in the other permissible. It is
impossible for me to reconcile the Bunting Case and the Lochner Case
and I have always supposed that the Lochner Case was thus overruled sub
silentio.277

273 Lochner, 198 U.S. at 76 (Holmes, J., dissenting). See also White, supra note 255, at
104-05, 106, 111 (describing the reasoning in Holmes' dissent).
274 243 U.S. 462 (1917).
275 Id. at 433-34.
276 Id. at 439. Justice Brandeis did not participate, and Chief Justice White and Justices
Van Devanter and McReynolds dissented without opinion. Id.
277 Adkins, 261 U.S. at 563-64 (Taft, C.J., dissenting).
If one focuses on the liberty of contract dimensions of Peckham's *Lochner* opinion, Taft's confusion is readily understandable. Yet the distinction that appears to have mattered to Justice McKenna was right under Taft's nose. The New York maximum hours law applied only to bakers, whereas the Oregon law "covered the whole field of industrial employment." The former was class legislation; the latter was not. We can thus understand why, after joining *Lochner* and writing *Bunting*, McKenna might have joined *Adkins*. *Lochner* offended the principle of neutrality as class legislation, while *Bunting* did not; *Adkins* offended the principle of neutrality by taking from A and giving to B.

This pattern was replicated in McKenna's performance in cases concerning the constitutionality of workers' compensation statutes. McKenna joined the unanimous decision upholding New York's statute in *New York Central Railroad Co. v. White*. That statute, wrote Justice Pitney, "evidently is intended as a just settlement of a difficult problem," treating employer and employee in an evenhanded fashion. Pitney explained:

> If the employee is no longer able to recover as much as before in case of being injured through the employer's negligence, he is entitled to moderate compensation in all cases of injury, and has a certain and speedy remedy without the difficulty and expense of establishing negligence or proving the amount of the damages. Instead of assuming the entire consequences of all ordinary risks of the occupation, he assumes the consequences, in excess of the scheduled compensation, of risks ordinary and extraordinary.

> "On the other hand," Pitney observed, the employer received a comparable

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278 Professor Bernstein concludes that the majority invalidated the bakeshop law "not because the Court suspected a particular illicit motive, such as transferring resources from employers to employees," but "because the Court found that it violated liberty of contract with no valid police power justification." Bernstein, supra note 71, at 53. See also id. at 49 (summarizing how the Court invalidated the law because "there was no police power rationale for the law's interference with liberty of contract"). Professor Bernstein concedes in a footnote that

_if the state had attempted to justify the constitutionality of the law on the grounds that it explicitly sought to take resources from owners and give them to bakers, even though the bakers were admittedly capable of bargaining on their own, the Court would have rejected that rationale as insufficient to overcome the right of liberty of contract, and as an illicit, arbitrary classification [i.e., as class legislation].

*Id.* at 53 n.281. The argument in the text suggests that, at least with respect to McKenna, and quite possibly with respect to Fuller and Brown as well, members of the majority invalidated the law because the Court found no justification for the classification of the law limiting its application to bakers. *Id.* at 53.


281 *Id.* at 201.
quid pro quo for the modification of his common law liabilities: "[I]f the employer is left without defense respecting the question of fault, he at the same time is assured that the recovery is limited, and that it goes directly to the relief of the designated beneficiary." Such impartial legislation, Pitney concluded, could not be condemned as arbitrary.

In the 1921 decision of Lower Vein Coal Co. v. Industrial Board of Indiana, Justice McKenna wrote for a unanimous Court upholding Indiana’s workers’ compensation statute. The liability regime created by the statute was made compulsory for the coal mining industry, but elective for all other enterprises. Defending the statute from the charge that its classification of

282 Id. It was therefore not necessary, for the purposes of the present case, to say that a State might, without violence to the constitutional guaranty of "due process of law," suddenly set aside all common-law rules respecting liability as between employer and employee, without providing a reasonably just substitute. Considering the vast industrial organization of the State of New York, for instance, with hundreds of thousands of plants and millions of wage-earners, each employer on the one hand having embarked his capital, and each employee on the other having taken up his particular mode of earning a livelihood, in reliance upon the probable permanence of an established body of law governing the relation, it perhaps may be doubted whether the State could abolish all rights of action on the one hand, or all defenses on the other, without setting up something adequate in their stead. No such question is here presented, and we intimate no opinion upon it.

Id.

283 Pitney insisted that it was not unreasonable for the State, while relieving the employer from responsibility for damages measured by common-law standards and payable in cases where he or those for whose conduct he is answerable are found to be at fault, to require him to contribute a reasonable amount, and according to a reasonable and definite scale, by way of compensation for the loss of earning power incurred in the common enterprise, irrespective of the question of negligence, instead of leaving the entire loss to rest where it may chance to fall – that is, upon the injured employee or his dependents.

Id. at 203-04. Nor, Pitney maintained, could the "provision for compulsory compensation" be deemed to be... arbitrary and unreasonable... so as to amount to a deprivation of the employer’s property without due process of law... [I]t cannot be pronounced arbitrary and unreasonable for the State to impose upon the employer the absolute duty of making a moderate and definite compensation in money to every disabled employee, or in case of his death to those who were entitled to look to him for support, in lieu of the common-law liability confined to cases of negligence.

Id. at 204-05. Nor could it be deemed arbitrary and unreasonable, from the standpoint of the employee’s interest, to supplant a system under which he assumed the entire risk of injury in ordinary cases, and in others had a right to recover an amount more or less speculative upon proving facts of negligence that often were difficult to prove, and substitute a system under which in all ordinary cases of accidental injury, he is sure of a definite and easily ascertained compensation, not being obliged to assume the entire loss in any case, but in all cases assuming any loss beyond the prescribed scale.

Id. at 204.

284 255 U.S. 144 (1921).

285 Id. at 146.
industry denied due process and equal protection, McKenna observed:

That coal mining has peculiar conditions has been quite universally recognized and declared. It has been recognized and declared by this court and is manifested in the laws of the States where coal mining obtains. There is something in this universal sense and its impulse to special legislation—enough certainly to remove such legislation from the charge of being an unreasonable or arbitrary exercise of power.\(^\text{286}\)

As in *Holden v. Hardy*, the peculiar hazards of mining justified singling the industry out for special treatment.

When the Court upheld the Arizona Employers’ Liability Act in 1919, by contrast, McKenna joined with Chief Justice White and Justice Van Devanter in signing the dissenting opinion of Justice McReynolds.\(^\text{287}\) Summarizing the effect of the statute, McReynolds concluded that an injured Arizona worker’s possibilities for compensation had been dramatically enhanced.\(^\text{288}\) By contrast, “while the employer is declared subject to new, uncertain, and greatly enlarged liability, notwithstanding the utmost care, nothing has been granted him in return.”\(^\text{289}\) McReynolds conceded that “the Fourteenth Amendment was never intended to render immutable any particular rule of law nor did it by fixation immortalize prevailing doctrines concerning legal rights and liabilities. Orderly and rational progress was not forestalled.” Were this not the case, all workers’ compensation statutes would have been unconstitutional. Yet the grounds upon which the Court had sustained other workmen’s compensation statutes were “wholly lacking” in the instant case:

The employer is not exempted from any liability formerly imposed; he is given no *quid pro quo* for his new burdens; the common-law rules have been set aside without a reasonably just substitute; the employee is relieved from consequences of ordinary risks of the occupation and these are imposed upon the employer without defined limit to possible recovery.\(\ldots\)\(^\text{290}\)

Unlike the New York statute sustained in *White*, McReynolds opined, the Arizona law bore “no fair indication of a just settlement of a difficult

\(^{286}\) *Id.* at 148.


\(^{288}\) The employee could now, at his election, seek redress under any of three regimes. He could proceed under the Employers’ Liability Act, which imposed upon employers in certain hazardous occupations liability without fault; he could proceed under the new workers’ compensation statute; or he could proceed “according to the common law materially modified in his favor by exclusion of the fellow-servant rule and otherwise.” *Id.* at 450.

\(^{289}\) *Id.*

\(^{290}\) *Id.* at 452-53.
So to "deprive any person of life, liberty or property by arbitrary or oppressive action," he emphasized, "is never due process of law."\textsuperscript{292} White, Van Devanter, and McReynolds also joined a separate dissent authored by Justice McKenna, who objected to the statute's "discrimination between employer and employee."\textsuperscript{293} The statute's unilateral imposition of liability without fault on employers distinguished it from the workers' compensation statutes of which he had approved. Instead, this constituted "a clear discrimination – a class distinction with its legal circumstances and, I may say, invidious circumstances . . . . And these effects cannot be concealed under any camouflage nor given the plausible and attractive gloss of public policy, justified by the different conditions of employer and employee."\textsuperscript{294} These "different conditions" did not, in his view, justify the "class distinction" drawn by the statute's "clear discrimination." Indeed, McKenna worried aloud over where such discriminations would stop: "[I]f in supposed benefit to a particular class, and through benefit to them to the public, there may be constraint upon or the imposition of burden upon one right of a citizen, why not upon another?"\textsuperscript{295}

\textsuperscript{291} Id. at 453.
\textsuperscript{292} Id. at 450.
\textsuperscript{293} Id. at 439 (McKenna, J., dissenting).
\textsuperscript{294} Id. at 435. Elsewhere Professor Bernstein has argued that the ""class legislation' objections" of the dissenters were not confined to revulsion against the fact that "the law in question was completely one-sided . . . to the detriment of industrial employers." Bernstein, supra note 71, at 29 n.152. Professor Bernstein suggests that the dissenters also found the statute objectionable because it allowed injured workers compensation for "non-pecuniary injuries," thereby "arbitrarily favoring one group of plaintiffs, to the exclusion of other, equally worthy (or unworthy) plaintiffs, and to the detriment of industrial employers." Id. This, Professor Bernstein contends, "made the law seem arbitrary and unreasonable, because the law gave only a particular class of plaintiffs – injured workers – special legal advantages without any countervailing public policy rationale." Id. Professor Bernstein does not consider the decision in Lochner Revisionism, Revised.
\textsuperscript{295} Id. at 438. White, McKenna, Van Devanter, and McReynolds also dissented, though without opinion, in Mountain Timber Co. v. Washington, 243 U.S. 219, 246 (1917) (upholding Washington state workers' compensation statute). The reasons for their dissent are unclear, though they may well have disagreed with the following passage from Justice Pitney's opinion for the majority:

To the criticism that carefully managed plants are in effect required to contribute to make good the losses arising through the negligence of their competitors, it is sufficient to say that the act recognizes that no management, however careful, can afford immunity from personal injuries to employees in the hazardous occupations, and prescribes that negligence is not to be determinative of the question of the responsibility of the employer or the industry. Taking the fact that accidental injuries are inevitable, in connection with the impossibility of foreseeing when, or in what particular plant or industry, they will occur, we deem that the State acted within its power in declaring that no employer should conduct such an industry without making stated and fairly apportioned contributions adequate to maintain a public fund for indemnifying injured employees and the dependents of those killed, irrespective of the
Justice McKenna was the Zelig of the Lochner era, showing up to cast the critical fifth vote in some of its most celebrated and vilified decisions. In the hands of this pivotal figure, Lochnerism was concerned not only with the protection of economic liberty, but also intensely with the principle of neutrality. Indeed, it appears that only by reference to this latter concern can we account for his performance in these high-profile cases; and where, as in Lochner, he supplied the fifth vote, it is only by reference to the principle of neutrality that we can adequately account for the performance of the Court as an institution. This helps us to see the error in attempting to identify a single “sacred heart,” a single animating principle for a body of constitutional law comprised by scores of decisions handed down over more than four decades, and involving more than two dozen Justices. For if the five members of the Lochner majority were not entirely in agreement concerning the constitutional deficiencies of the New York Bakeshop law, surely the many Justices of the Lochner era were not in complete accord concerning the content of what came to be called substantive due process.

4. Taking Stock

Professor Bernstein argues that “liberty of contract” was the “doctrine upon which Lochner itself and all of the famous ‘economic due process’ cases of the Lochner era relied.” Yet in a comprehensive survey of the Fifth and Fourteenth Amendment economic regulation jurisprudence of the Lochner-era Court, Michael J. Phillips concluded that “freedom-of-contract claims were the exception rather than the rule. In fact, only fifteen Supreme Court substantive due process cases striking down government action during the years 1897 to 1937 proceeded on the theory that the challenged law limited contractual liberty.” “Furthermore, five of these decisions did not contain the words particular plant in which the accident might happen to occur. In short, it cannot be deemed arbitrary or unreasonable for the State, instead of imposing upon the particular employer entire responsibility for losses occurring in his own plant or work, to impose the burden upon the industry through a system of occupation taxes limited to the actual losses occurring in the respective classes of occupation.

Id. at 244. This is the suggestion of Alexander M. Bickel & Benno C. Schmidt, Jr., The Judiciary and Responsible Government, 1910-1921, in 9 THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES 584-85 (Paul A. Freund & Stanley N. Katz eds., 1984) (pointing out that the Washington statute differed from the New York statute in that “an employer who judged that his conduct of his own business was prudent enough to justify the risk of not insuring could not act upon his judgment; he was taxed, rather, for the imprudence of others”).

296 As I suggest above, in view of their performances in other Fuller Court decisions involving regulation of the employment relation, the same may be true of the votes of Fuller and Brown.

297 Bernstein, supra note 2, at 28.

‘freedom of contract,’ ‘liberty of contract,’ or the like; instead they merely
followed earlier freedom-of-contract cases.” 299 “Rather than being central to
Lochner-era substantive due process,” Professor Phillips concludes, “freedom
of contract was but one application of a much more general doctrine.” 300

By contrast, Professor Phillips found that “[o]f the laws struck down on
substantive due process grounds between 1902 and 1932, nearly half were rate
orders for regulated industries, minimum wage laws, or laws fixing the cost of
consumer goods to consumers. In other words, nearly half of these laws
involved the regulation of prices.” 301 We have seen how significant a role the
principle of neutrality played in the rhetoric and conceptualization of the cases
involving rate and price regulation. If, as seems likely, these additional cases I
have discussed (and others that I have not) 302 bring Professor Phillips’ total to

Collector of Internal Revenue, 275 U.S. 87, 91-92 (1927) (applying the due process
provisions of the Philippine Organic Act and remarking that the Act, like the Fourteenth
Amendment, provides the same protection from governmental interference with the liberty
to contract); Fairmont Creamery v. Minnesota, 274 U.S. 1, 8 (1927) (noting that the statute
at issue was an “obvious attempt to destroy plaintiff in error’s liberty to enter into normal
contracts”); Charles Wolff Packing Co. v. Court of Indus. Relations of Kan., 262 U.S. 522,
544 (1923) (concluding that an act permitting the fixing of wages deprived the employer “of
its property and liberty of contract without due process of law”); Adkins v. Children’s
Hosp., 261 U.S. 525, 545-62 (1923) (invalidating a statute allowing for the fixing of
minimum wage standards for adult women in part on the ground that the statute interfered
with the liberty to contract); N.Y. Life Ins. Co. v. Dodge, 246 U.S. 357, 373-77 (1918)
(holding a Missouri nonforfeiture statute to be unconstitutional because it would impair the
liberty to contract); Coppage v. Kansas, 236 U.S. 1, 6-7, 14-26 (1915) (invalidating a statute
on liberty to contract grounds which had declared it a misdemeanor for an employer to
require an employee not to be involved with a labor organization during the time of the
employment); Adair v. United States, 208 U.S. 161, 172-76 (1908) holding that section ten
of the Erdman Act deprived the employer of its liberty of contract); Lochner v. New York,
198 U.S. 45, 53-64 (1905) (finding that a statute forbidding an employee to work over ten
hours a day in the baking industry interfered with the liberty to contract); Allgeyer v.
Louisiana, 165 U.S. 578, 579, 588-93 (1897) (finding a statute designed to prevent people
from dealing with out-of-state marine insurance companies to be unconstitutional because it
restricted the freedom to enter into proper contracts).

273 U.S. 657 (1927) (per curiam) (following Adkins)); Murphy v. Sardell, 269 U.S. 530,
530 (1925) (per curiam) (following Adkins); Charles Wolff Packing Co., 267 U.S. at 559-69
(following first Wolff Packing decision); Dorchy v. Kansas, 264 U.S. 286, 289 (1924)
(following first Wolff Packing decision); St. Louis Cotton Compress Co. v. Arkansas, 260
U.S. 346, 348-49 (1922) (following Allgeyer). Professor Phillips was incorrect with respect
to the second Wolff Packing opinion – it does discuss “liberty of contract.” See 267 U.S. at
566, 569.

300 Phillips, supra note 17, at 58.

301 Phillips, Progressiveness, supra note 8, at 489 (citations omitted).

302 I have in mind other cases in which government action imposing burdens on
particular classes of property owners for the benefit of others were found to deprive the
regulated parties of property without due process of law. See, e.g., Smith v. Cahoon, 283
over 50%, Professor Bernstein might wish to re-evaluate his claim that Professor Gillman's "class legislation thesis ultimately fails to explain the bulk of the Supreme Court's Lochnerian decisions." For my own part, I doubt that such a focus on questions of counting and percentages would fully repay the effort. It does seem clear at the very least, however, that the available evidence is not readily reconciled to Professor Bernstein's contention that the principle of neutrality constituted only "a subsidiary consideration" of the Lochner-era Court, manifesting itself principally in equal protection cases involving taxation and retaining only a "vestigial presence" in due process cases. On the contrary, the principle of neutrality appears to have lain at the root of a significant body of the Court's Lochner-era Due Process jurisprudence. This is apparent in many cases in which the Court invalidated state and federal legislation, and is undoubtedly tacit in a number of decisions in which such legislation was sustained. Certainly it is problematic to assert, as Professor Bernstein has, that "[c]lass legislation analysis did not play an influential role in the Lochner era." What Professor Bernstein calls "the

U.S. 553, 563 (1931) (following Duke and Frost); Washington ex. rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 118, 123 (1928) (invalidating as repugnant to the due process clause a zoning ordinance conditioning permission to construct a home for the aged poor on the written consent of the owners of two-thirds of the property within 400 feet of the proposed building); Frost & Frost Trucking Co. v. R.R. Comm'r of Cal., 271 U.S. 583, 592 (1926) ("That, consistently with the due process clause of the Fourteenth Amendment, a private carrier cannot be converted against his will into a common carrier by mere legislative command, is a rule not open to doubt . . . ."); Michigan Pub. Util. Comm'n v. Duke, 266 U.S. 570, 577-78 (1925) (invalidating as a deprivation of property without due process an effort "by legislative fiat to convert property used exclusively in the business of a private carrier into a public utility, or to make the owner a public carrier"); Eubank v. City of Richmond, 226 U.S. 137, 141, 144 (1912) (invalidating as an unreasonable exercise of the police power an ordinance requiring authorities to establish a particular building line for all properties on a street upon the request two-thirds of the street's property owners).

303 Bernstein, supra note 2, at 58. See also id at 30 ("With the exception of a small subset of cases involving otherwise valid regulations that the Court found unconstitutional because they arbitrarily applied only to part of the class being regulated, the Lochner era Court was far more inclined to invalidate legislation as a violation of fundamental rights than as class legislation." (citation omitted)).

304 Id. at 58. In support of his contention that "[m]ost Supreme Court discussions of class legislation involved only the Equal Protection Clause, even in cases in which due process issues were raised," id. at 29, Professor Bernstein cites Rodney L. Mott's 1926 treatise DUE PROCESS OF LAW. See id. at 29 n.153. In the passage quoted by Professor Bernstein, Mott had written, "Since 1916 less than one-third of the opinions, in decisions nullifying legislations [sic] because of arbitrary classifications involved, mentioned due process at all." Id. (quoting MOTT, supra note 17, at 278). Mott was, however, describing the decisions of state courts, not those of the Supreme Court of the United States. See MOTT, supra note 17, at 276-79.

305 Bernstein, supra note 2, at 13. It is just as problematic to claim that "due process only entered the equality picture when a violation of a fundamental right such as liberty of
equality component of due process" was not a bit player in the story of the Lochner era. It was instead at the center of the action.

B. Robert Post and the Lifeworld Hypothesis

Seven years ago Professor Robert Post, who has been commissioned to prepare the Taft Court volume for the OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES, delivered the Distinguished Lecture here at the Boston University School of Law. The lecture, which he entitled Defending the Lifeworld: Substantive Due Process in the Taft Court Era, was subsequently published in the December 1998 issue of this law review. Professor Post’s extremely thoughtful and original essay argues that we should understand the Taft Court’s substantive due process jurisprudence as part and parcel of the Harding Administration’s efforts to return to normalcy following World War I. “[T]he United States Supreme Court throughout the 1920s would aspire to re-establish the domain of the normal,” he tells us. “Having glimpsed the full potential of the regulatory state during World War I, a majority of the Justices of the Taft Court urgently felt the need to establish the principles of a more normal peacetime constitutional order.” In defense of this interpretation, Professor Post promises to establish two claims: First, that “the Court’s use of substantive due process appealed to pieties of everyday, normal life in order to resist the bureaucratic interventions authorized by the War;” and second, that “the Court used the doctrine of ‘property affected with a public interest’ to distinguish domains of social life which could constitutionally be subject to pervasive forms of administrative regulation, from those domains of ‘ordinary’ life which could not.”

1. The Realm of the Normal

In making out the first claim, Professor Post turns to two illustrations. The first, which I find quite persuasive, is the rollback by 1924 of the Court’s immediate post-War support for residential rent control in the District of Columbia. As Professor Post makes clear, the Justices had come to believe by mid-decade that the housing emergency that had earlier justified such measures therefore could no longer be reconciled with the limitations imposed by the contract was involved.” Id. at 30. As is demonstrated by the discussion of cases involving protective labor legislation, see supra notes 213-296 and accompanying text, claims that such legislation violated liberty of contract were most likely to succeed where the Justices detected in the challenged statute a transgression of the principle of neutrality.

See Post, supra note 138.

Id. at 1491.

Id. at 1493.

Id. at 1494.

Id.
Fifth Amendment.\footnote{See id. at 1496-1500 (comparing Block v. Hirsh, 256 U.S. 135 (1921) with Chastleton Corp. v. Sinclair, 264 U.S. 543 (1924)).}

I am less confident, however, about the second of Professor Post's leading examples of the return to normalcy. \textit{Jay Burns Baking Co. v. Bryan}\footnote{264 U.S. 504 (1924).} involved a challenge to a Nebraska statute regulating bread weights. The statute permitted variations from standard weights of only two ounces per pound within twenty-four hours after baking.\footnote{Id. at 505.} As Professor Post relates it, the Court found that while it was proper to set minimum weights — indeed, the Court had upheld just such a measure in 1913,\footnote{Schmidinger v. Chicago, 226 U.S. 578, 589-90 (1913).} before the upheaval of the Great War — it was "essentially unreasonable and arbitrary"\footnote{\textit{Jay Burns Baking}, 264 U.S. at 517.} to set maximum weights as well. "At the core of Butler's opinion," Professor Post writes, "lies a resolutely common-sense judgment, verging on outrage, that a law seeking to prevent fraudulently short-weighted loaves should perversely set maximum weights."\footnote{Post, supra note 138, at 1500.} Butler's opinion here, as in other instances, is undoubtedly not a model of clarity, and Justice Brandeis' dissent lends some support to Professor Post's reading.\footnote{See \textit{Jay Burns Baking}, 264 U.S. at 517-34 (Brandeis, J., dissenting).} But I do not read the opinion as raising a \textit{per se} objection to maximum weight regulation, and as I shall suggest momentarily, I think subsequent events support such a reading. In fact, much of Butler's opinion appears to constitute an explanation of why this \textit{particular} weight regulation was unreasonable. Butler maintained that the record showed that under conditions of humidity and temperature often obtaining in Nebraska, it would be "impossible to comply with the law without wrapping the loaves or employing other artificial means to prevent or retard evaporation."\footnote{Id. at 515.} This would effectively prevent the sale of unwrapped bread, for which there was "a strong demand by consumers" and which bakers had "a right to furnish . . . to their customers."\footnote{Id. at 516.} To be sure, comparable weight regulations had been imposed by the U.S. Food Administration during the War.\footnote{Id. at 523-24.} But, Professor Post maintains:

\begin{quote}
\textbf{In }\textit{Jay Burns Baking Co.} the Court stood foursquare against this extension of wartime administrative control into the normal conditions of peacetime. It associated these conditions with the ordinary expectations
\end{quote}
of everyday life, which it aligned against ‘technical’ and ‘artificial’ forms of bureaucratic supervision connected to the extraordinary circumstances of the war.\footnote{Post, supra note 138, at 1502.}

In evaluating this eminently plausible claim, it may prove useful to survey the subsequent history of bread weight regulation in Nebraska. In 1931, the Nebraska legislature enacted a statute and the state secretary of agriculture promulgated implementing regulations that permitted variations from standard weights of three rather than two ounces per pound, requiring the tolerances to be maintained for only twelve rather than twenty-four hours after cooling.\footnote{See P.F. Petersen Baking Co. v. Bryan, 290 U.S. 570, 572 (1934).} Like the statute at issue in \textit{Jay Burns}, the 1931 regulation prescribed both minimum and maximum weights. The regulation was challenged on the authority of \textit{Jay Burns}, and the Court decided \textit{P.F. Petersen Baking Co. v. Bryan} in January of 1934. This time the Court sustained the regulation, explicitly rejecting the appellant’s assertion that the fixing of “[a] maximum tolerance is arbitrary and discriminatory.”\footnote{Id. at 572.} Instead the Court insisted that “[t]he fixing of a maximum weight for each size or class of loaves is not unreasonable.”\footnote{Id. at 573.} The difficulty with the regulation involved in \textit{Jay Burns} had been that “a relatively much wider spread between the required minimum and the permitted maximum weight applicable to each size or class of loaves would be equally effective to prevent deception, and... therefore the maxima complained of were unnecessary and arbitrary.”\footnote{Id.} With respect to the regulation at issue in \textit{Petersen}, by contrast, the Court concluded that “[t]he fixing of both maximum and minimum weights for each class fairly may be deemed appropriate and necessary.”\footnote{Id. at 574.}

The Court did undergo some important personnel changes between in the decade between 1924 and 1934. Hughes succeeded Taft as Chief Justice in 1930, with Roberts replacing Sanford later in the same year; Cardozo was confirmed to Holmes’ seat in 1932. Yet \textit{Petersen} was not among the many cases in which these three Hoover appointees joined with Brandeis and Stone to make a 5-4 majority vanquishing the Four Horsemen. The vote in \textit{Petersen} was unanimous. And the opinion was written by Pierce Butler.

It may be that it was just common sense that a statute requiring tolerances of three ounces per pound to be maintained for a twelve-hour period comported with “the ordinary expectations of everyday life,”\footnote{Post, supra note 138, at 1502.} while a statute requiring that tolerances of two ounces per pound be maintained for a twenty-four-hour period constituted a “‘technical’ and ‘artificial’ form[]” of bureaucratic
supervision.’’328 My own impoverished understanding of bread baking practices during the interwar period— not to mention my own lack of common sense— leaves me ill-equipped to evaluate that possibility. Yet Butler’s opinions in *Jay Burns* and *Petersen*, in which he repeatedly adverted to the evidence contained in the record,329 described the process of bread making in some detail,330 and used terms like ‘‘gluten,’’331 ‘‘diastatic and/or proteolytic ferments,’’ and ‘‘edible farinaceous substance’’332 lead one to suspect that something more than resolutely common-sense judgment may have been involved.

An examination of the briefs and record in the case tends to corroborate this suspicion. In *Jay Burns*, the baking companies challenging the law put on eleven witnesses whose testimony comprised thirty-six pages of the printed record. Several of them qualified as experts in the field of bread baking.333

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328 *Id.*


331 *Id.* at 514.

332 *Id.* at 514 n.2.

333 Dr. Harry Snyder had been employed as a chemist for over thirteen years at the Russell-Miller Milling Co. in Minneapolis, where he worked in a “well equipped laboratory and experimental bakery,” Record at 20, *Jay Burns Baking Co. v. Bryan*, 264 U.S. 515 (1924) (No. 94), conducting baking experiments with his “expert bakers.” *Id.* at 24. He had worked in the field of bread flour and food nutrition for thirty-two years, conducting various experiments “to ascertain the digestibility and nutritive value of different kinds of bread for the United States Department of Agriculture.” *Id.* at 20. A graduate of Cornell University, he had spent eighteen years heading up the Food Experimental Station at the University of Minnesota. Brief for Plaintiffs in Error at 60. Dr. Harry E. Barnard was Director of the American Institute of Baking in Minneapolis. He had previously supervised the enforcement of food laws in New Hampshire and served as Food and Drug Commissioner of the State of Indiana. Record at 36. Louis W. Haas was also “a bread baking expert,” “in charge of the manufacturing, efficiency and laboratory department of W.E. Long Co., promoters of the baking industry in Chicago, operating all over the United States.” *Id.* at 40. He testified that the company was “recognized among bakers as an authority on the business of the modern bakery,” that he had “been engaged in the baking business” since the age of ten, and that he was presently engaged in “the study of how to improve and better bread making conditions,” visiting in connection with that work “various baking plants throughout the United States.” *Id.* at 40. A graduate of the University of Heidelberg, he was a “master baker by trade, [who] has for many years specialized in the chemistry and fermentation of dough.” Brief for Plaintiffs in Error at 61. Peter G. Pirrie was “head of the baking department of the Dunwoody Institute” in Minneapolis, and “an expert baker of bread.” Record at 44. A graduate of Armour Technical Institute, he had been “for ten years a specialist in the chemistry of flour and bread.” Brief for Plaintiffs in Error at 60. Charles W. Ortman was “a retail baker in Omaha, making about 2,000 loaves of bread per day.”
Nearly all of them had participated in extensive experimentation to ascertain the average and variance in weight loss due to evaporation within twenty-four hours of the removal of bread from the oven. Their testimony tended to show that, when "bread was made in the natural and normal way,"334 "under normal conditions,"335 "under normal and average conditions in the operation of a bakery,"336 using "ordinary bread baked in the ordinary manner"337 "under the usual conditions that prevail in the bakery and made with usual ingredients used in making bread,"338 variations in temperature and humidity made it impossible to comply consistently with the requirements of the Nebraska statute.339

The testimony suggested that there were three possible steps that the bakers might have taken in order to increase the likelihood of compliance. One would
have been to wrap the bread in waxed paper after baking.\textsuperscript{340} A second would have been to use a poorer grade of flour that would suffer less weight loss through evaporation.\textsuperscript{341} The third option would have been to purchase climate-control equipment and facilities to retard evaporation.\textsuperscript{342} The bakers found each of these alternatives unattractive, but not because they were "artificial" or "technical." Instead, they objected that such measures were unreasonable because they were either undesirable or impracticable. Wrapping all of the bread was undesirable, they contended, "because of a large demand for bread that has a crisper crust."\textsuperscript{343} The bakers testified that the second option was also unattractive, as it would reduce the quality and thus the nutritional appeal of the product to consumers.\textsuperscript{344} The experts agreed that "[b]read made from good flour loses more after baking by evaporation of the moisture than bread made from poor flour."\textsuperscript{345} They testified that bakers could more nearly approximate the results mandated by the Nebraska statute were they to "use a poorer grade of flour having less moisture content and poorer quality gluten,"\textsuperscript{346} but that

\begin{footnotesize}
\begin{enumerate}
\item[340] Record at 48 (testimony of Milton Petersen).
\item[341] \textit{Id.} at 29 (testimony of Jay Burns). Burns explained that under regulations prescribed by the federal Food Administration during the War "every baker in the United States was compelled to use the same kind of flour and to make bread from the same formula, and so there was present all of the elements of control necessary in the operation of a standard weight regulation." \textit{Id.} at 31.
\item[342] \textit{Id.} at 31 (testimony of Jay Burns).
\item[343] \textit{Id.} at 48 (testimony of Milton Petersen). Petersen testified that the "[o]ne-third of our total output is not wrapped because of a large demand for bread that has a crisper crust. We sell both wrapped and unwrapped bread to the same customer." \textit{Compare} Brief for the Plaintiff in Error at 52 ("[T]he great bulk of bread is sold unwrapped. . . . [T]he wrapper is detrimental to the bread, as the latter becomes soggy because of the retention of moisture."). It appears that both wrapped and unwrapped bread were "ordinary" or "normal," with different consumers having different preferences.
\item[344] Record at at 29.
\item[345] \textit{Id.} at 44 (testimony of Peter G. Pirrie). "High absorption flour is called the best." \textit{Id.} High absorption flours, that is, the best flours, make bread that evaporates most in a given time. The better the quality of the bread, the greater the evaporation. I could come more nearly complying with the law by making bread of cheap flour having a low absorption, but even then I do not think I could comply with the Smith Bread Law, but there would be less chance of violating it because there is less moisture in the dough and the evaporation is much less after the loaf is baked. It is the dough and the bread from the best flour that has the most water.
\item[346] \textit{Id.} at 46 (testimony of Charles Ortman). \textit{See also} \textit{id.} at 53 (testimony of C.S. Jarnagin) ("[A] loaf of bread made from the best flour will evaporate more in 24 hours after baking than will bread made from poor flour, because the good bread, owing to the large amount of water required to develop the dough, makes the loaf more porous and it is more ready to evaporate than bread made from a starchy or poor flour."); \textit{id.} at 54 (testimony of P.O.L. Petersen) ("Bread made from good flour has greater evaporation of moisture than bread made from poor flour.").
\end{enumerate}
\end{footnotesize}
would defeat the very purpose of the baking enterprise. As one baker testified, "I could produce a product which would comply with the Smith Bread Law and my competitors could do likewise but the product would not be salable. It would not be wholesome bread and it would not serve the purpose of bread." On this account, bread baked in the "normal," ordinary manner was not preferable simply because it was "normal" and "ordinary"; on the contrary, it had become normal and ordinary because it was preferable.

The bakers maintained that the third option, the purchase of humidification systems to retard evaporation, was impracticable because prohibitively expensive. Of 30,000 baking plants nationwide, only about fifty owned such equipment; in Nebraska, only two of its approximately five hundred bakeries could claim a humidifier. As one expert explained, "[t]he machines are expensive to buy and the rooms for them are expensive to build and maintain. . . . To control the evaporation the bread would have to be kept in a humidified room for 24 hours after baking, and that would be neither practicable nor profitable." Another baker testified that "[t]he smaller bakeries do not have any humidifiers as it would cost a small fortune to install one, and we could not afford it." Their inability to comply with the law

Id. at 46 (testimony of Peter G. Pirrie).  
See also id. at 35 (testimony of Jay Burns) ("[I]f it were possible to change the character of the bread and comply with the law, then there would be an unmarketable product."); id. at 54 (testimony of C. S. Jarnagin) ("I wouldn't say that I could bake a quality of bread equivalent to No. 2 which would comply with the Smith Bread Law, but it will come nearer to complying with the law; but I never experimented on those lines because I never expected to reduce the food value of the bread."); Brief for Plaintiffs in Error at 15 ("[S]omething partaking of the nature of bread might be made to comply with the Smith Bread Law, but the product would not be salable, as people are accustomed to get good bread and demand same."); id. at 53 ("The experts also agree that while a substance might be baked which would be so dry when made that it would not evaporate more than two ounces to the pound loaf during the twenty-four hour period and thus the loaf would be a legal loaf during all of that time, yet that such a substance would not be bread in the sense in which that word is used today, and would not be such bread as is now being made and consumed throughout the length and breadth of the land. Such substance would not be saleable to the public as bread and would not be purchased by it as bread."); id. at 59-60 ("[T]he inevitable result of the enforcement of the law will be to drive the bakers into using the lowest grade of flours which contain the lowest moisture content, and thus reduce to a minimum the danger of making an illegal loaf; but with the consequent result of an inferior loaf, having less food value.").
without taking one of these undesirable or impracticable measures prompted
the bakers to characterize the statute as "arbitrary, unreasonable, oppressive,
and unwarranted."\textsuperscript{351}

To the majority, the case put on by the State of Nebraska must have
appeared weak by comparison. The testimony of the State's witnesses
comprised only ten printed pages in the record. As the State admitted in its
brief,\textsuperscript{352} and as the bakers emphasized in theirs,\textsuperscript{353} none of these witnesses was
an expert in bread baking.\textsuperscript{354} Five of the witnesses had participated in

\textit{Id. at 34} (testimony of Jay Burns) (citations omitted). \textit{See also id. at 38} (testimony of Dr.
Harry E. Barnard) ("Bread could be made and kept within a two ounce tolerance, maximum
and minimum for 24 hours, if made and kept in an insulated room," but it was "not possible
in commercial baking of bread" for the bread to "be kept in an air tight case the moment it
came from the oven so there would be no evaporation . . . . Bread kept sealed up would not
be edible bread in a short time -- would not be bread that we eat daily."); \textit{id. at 48} (testimony
of Milton Petersen) ("The humidity in a bakery varies with the atmosphere outside. We
have no way of regulating the temperature in the baking room."); \textit{id. at 51} (testimony of
Milton Petersen) ("All the conditions mentioned, of temperature and humidity, are beyond
the control of the bakers.").

\textsuperscript{351} Brief for Plaintiffs in Error at 9-10; \textit{see also id. at 79.}

\textsuperscript{352} Brief and Argument for Defendants in Error at 55 (referring to "the fact that the
bakers who testified for the defendants in error were not experts or scientists"). William F.
Cluett was Chief Deputy Inspector of Weights and Measures for the City of Chicago. He
testified that he was "not a practical baker and only as a layman do I know anything about
the method of making bread and of its ingredients. I know whether bread tastes good or not,
but as to the technical requirements I have no knowledge." Record at 56-57. J. W. Long
had been Inspector of Weights and Measures in Omaha for three years, and was not a baker.
\textit{Id. at 60, 63}. Thomas J. Dunn had been Assistant Inspector of Weights and Measures in
Omaha for three years, and was not a baker. \textit{Id. at 60, 63}. George J. Weiler was a
journeyman baker employed by the Lett Baking Company in Lincoln. \textit{Id. at 61}. Edward A.
Smith was "a lawyer and the author of the Smith Bread Bill" under challenge. He testified
that he was "not a practical baker." \textit{Id. at 62}. Vernon G. Zelmer was State Scale Inspector
for Nebraska. He testified, "I am not a practical baker and know nothing about conditions
of oven or atmosphere." \textit{Id. at 62}. Harley Mertz was a journeyman baker with Lett Baking
Co. in Lincoln. \textit{Id. at 63}. John Whistler had been a baker for twenty years, and was
currently employed in that capacity at Sunlight Bakery in Lincoln. \textit{Id. at 64}. \textit{See also Brief
for Plaintiffs in Error at 62-63.}

\textsuperscript{353} The bakers summarized the character of the defendants' witnesses:
None of the defendants' witnesses qualified as an expert in the matter of conditions
surrounding the baking of bread, and all of them, according to their testimony,
produced bread of some sort under conditions which lacked completely any semblance
of scientific control, or accuracy. None of them knew the character or quality or
amount of the various ingredients used in producing the dough, and none of them could
give any information relative to the temperature or humidity of the place where the
bread was kept for the twenty-four hour period after it was baked.

Brief for Plaintiffs in Error at 63.

\textsuperscript{354} \textit{See id. at 60} ("It is impossible to contrast the character of the witnesses for plaintiffs
with that of the witnesses for the defendants without exposing in a very marked degree the
experiments measuring weight loss in bread loaves baked in Nebraska. These experiments showed an average loss falling within the tolerances prescribed by the statute. As counsel for the bakers pointed out, however, each of these experiments had been conducted only once and not repeated under different atmospheric conditions. Indeed, the witnesses participating in these experiments testified that they had paid no attention to the atmospheric conditions obtaining at the times the tests were conducted. And in all but one of the experiments, the bread had been wrapped in waxed paper immediately after its removal from the oven. The majority appears to have come away from the record with the impression that the State had been overmatched on the "scientific," "expert" evidence.

Record at 61.

See id. at 61 (testimony of George J. Weiler); id. at 62 (testimony of Robert Cordell) id. at 62-63 (testimony of Vernon G. Zelmer); id. at 63-64 (testimony of Harley Mertz); id. at 64-65 (testimony of John Whistler). Counsel for the bakers made much of this contrast in his brief. He conceded,

It is true that defendants produced as witnesses some small bakers to prove that on a given day... the average loss was less than two ounces to the loaf; but in all the experiments save one, the loaves were wrapped in waxed paper... defendants' experiments or tests were made without regard to either temperature or humidity, and, therefore, are worthless as a guide to results which might be obtained during the varying conditions prevalent during the whole year or a whole season.

Brief for Plaintiffs in Error at 52.

Defendants saw fit to confine their experiments to a few small bakeries in Lincoln, each experiment being made only on one given day and only at one period in that day, and without regard to temperature or humidity prevailing in the place where the bread was kept for the period after baking.... Moreover, the experiments made for defendants were almost entirely with wrapped bread.

Id. at 58. "Plaintiffs experiments, on the contrary, were made on different days and at different hours of the day, so as to reflect as near as possible the varying temperatures and humidity during the year." Id. at 53.

All the experiments made by or for the plaintiffs produced bread such as is in general use today throughout the state and unwrapped.... The baking experiments shown in evidence by plaintiffs were made under different conditions and such as will ordinarily exist at different times in a bakery, and demonstrate indubitably the unreasonableness and unworkability of the Smith Bread Law.

Id. at 59.

Though Butler did not explicitly address the practicability of acquiring and employing climate-control equipment, the majority opinion clearly accepted the bakers' contentions with respect to the options of wrapping the bread to retard evaporation and using a lower quality flour which would lose less moisture through evaporation. See Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 516 ("The uncontradicted evidence shows that there is a strong demand by consumers for unwrapped bread. It is a wholesome article of food, and... bakers have a right to furnish it to their customers.... It would be unreasonable to prevent unwrapped bread from being furnished to those who want it."); id. at 515-16 ("[I]nredients selected to lessen evaporation after baking would make an inferior and unsalable bread. It would be unreasonable to compel the making of such a product or to prevent making of
This is tacitly conceded in Justice Brandeis' dissent, which offered an extensively documented case in favor of the law's constitutionality. Yet Brandeis did not rely upon the testimony offered by the State's witnesses. It was in fact no small understatement for Brandeis to observe, at the close of his opinion, that "[m]uch evidence referred to by me is not in the record."\(^{358}\) Indeed, it is not easy to find in the record evidence to which he did refer. Nor could the evidence to which he referred have been included in the record, Brandeis continued, for it was "the history of the experience gained under similar legislation, and the results of scientific experiments made since the entry of the judgment below."\(^{359}\) Justice Brandeis and his law clerk had apparently assembled this extensive array of data on their own initiative in preparing his dissenting opinion. As Professor Post reports, Justice Stone wrote privately in 1928 that "[v]erbal logic chopping, with no apparent consciousness of the social and economic forces which are really involved, are about all we get" from lawyers arguing before the Court. "If anything more appears in the opinion it is because some member of the court takes the time and energy to go on an exploring expedition of its [sic] own."\(^{360}\) Brandeis maintained that members of the Court had a duty to undertake such exploring expeditions. "Of such events in our history, whether occurring before or after the enactment of the statute or of the entry of the judgment, the court should acquire knowledge, and must, in my opinion, take judicial notice, whenever required to perform the delicate judicial task here involved."\(^{361}\) His dissent in \textit{Jay Burns} demonstrates clearly how seriously he took that duty.

Professor Post suggests, rightly, it seems to me, that "we might interpret good bread in order to comply with the provisions of the act fixing maximum weights."). Moreover, he and his colleagues were clearly persuaded by the bakers' evidence concerning the possibility of complying with the regulations without taking one of these steps.

The evidence clearly establishes that there are periods when evaporation under conditions of temperature and humidity prevailing in Nebraska exceeds the prescribed tolerance and makes it impossible to comply with the law without wrapping the loaves or employing other artificial means to prevent or retard evaporation. And the evidence indicates that these periods are of such frequency and duration that the enforcement of the penalties prescribed for violations would be an intolerable burden upon bakers of bread for sale.

\textit{See id.} at 515.

\(^{358}\) \textit{Id.} at 533 (Brandeis, J., dissenting).

\(^{359}\) \textit{Id.}

\(^{360}\) Letter from Harlan Fiske Stone, Justice of the United States Supreme Court, to John Bassett Moore (June 5, 1928) \textit{quoted in Post, supra} note 138, at 1527 n.182. Stone wrote later that year to Hessel Yntema that "[y]ou will search in vain in briefs and prevailing opinions for any reference to the considerable amount of material to which I referred in my dissenting opinion [in \textit{Ribnik v. McBride}]. It seems not to have occurred to any of [the lawyers] that such data had very much to do with the case." Letter from Harlan Fiske Stone, Justice of the United States Supreme Court, to Hessel Yntema (October 24, 1928), \textit{quoted in Post, supra} note 138, at 1527 n.182.

\(^{361}\) \textit{Jay Burns Baking Co.}, 264 U.S. at 533.
[Butler's] opinion as struggling to control the kind of experience that should inform adjudication under the Due Process Clause.”

Yet Professor Post sees Butler as limiting that evidence to “'ordinary' experience” in the face of Brandeis' effort to have the Court consider the fruits of “scientific experiment and expert knowledge.”

It would appear, however, that in Jay Burns Justice Butler and his colleagues in the majority were fully prepared to heed the counsel of “scientific experiment and expert knowledge,” but only that which was contained in the record presented on appeal – not of such evidence gleaned from Justice Brandeis’ “exploring expedition.” When Nebraska's revised (and more easily defended) statute was challenged before the Court in Petersen in 1934, the state mounted a significantly stronger defense than it had in Jay Burns, this time presenting extensive evidence of scientific experiment and expert knowledge in support of the statute’s reasonableness.

In his opinion upholding the revised statute, Justice Butler wrote that in Jay Burns “the evidence demonstrated that, owing to evaporation from bread under conditions of temperature and humidity that often prevail in Nebraska, it was impossible to make good bread in the regular way without exceeding the tolerances then prescribed.”

In Petersen he observed, by contrast, “[i]t is not shown that the prescribed tolerances are unreasonable.... The lower court found, and the evidence warrants the finding, that appellants and other bakers readily may comply with the prescribed weights and tolerances.... The facts plainly distinguish this case from [Jay Burns].” The juxtaposition of Jay Burns and Petersen shows us that Butler and company had no constitutional aversion to consideration of “the evidence” and “the facts” learned from “scientific experiment and expert knowledge,” but that they did appear to require that such facts be developed in the record.

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362 Post, supra note 138, at 1504.

363 Id.

364 The testimony and supporting exhibits are collected in the Record at 167-276, Petersen Baking Co. v. Bryan, 290 U.S. 570 (1934) (No. 18-203) (illustrating mass of evidence supporting the view that bakers could comply with the new statute). The evidence from the various tests is summarized and discussed in the Appellee's Brief at 36-41. The brief pointed out that evidence admitted at the Jay Burns trial and in a subsequent litigation tended to support the state’s claim that the bakers could comply with the revised statute. Id. at 36-40. That evidence is stipulated to in the Record at 63-166. This is not surprising, as one would expect that the Nebraska legislature was mindful of that evidence when revising the statute.

365 Petersen Baking Co., 290 U.S. at 573.

366 Id. at 575.

367 Professor Post appears to concede this point in another context later in the lecture, noting that “the Taft Court was willing to rely on the judgment ‘of experts’ in order to sustain” “regulation of marketplace practices that could be characterized as ‘selfish.’” Post, supra note 138, at 1540 & n.248 (citing Leonard v. Earle, 279 U.S. 392, 393 (1929)).

368 Brandeis nevertheless insisted in Jay Burns that “[t]he evidence contained in the record in this case is, however, ample to sustain the validity of the statute.” Jay Burns
In any event, the contrast between *Jay Burns* and *Petersen* highlights one of the challenges posed by the Chief Justiceship organization of the *Holmes Devise*. If Professor Post wants to use *Jay Burns* as his exemplar of Taft Court lifeworld defense, he almost certainly has to say something about the Hughes Court's decision in *Petersen*, if only to explain how his theory best accounts for the outcomes in these two cases. I might add that I do not believe that the intervention of another emergency, the Great Depression, can do much explanatory work here. First, in contrast to the World War I cases, there is no talk of emergency in the *Petersen* opinion. And second, Butler and company were more than ready throughout the 1930s to reject emergency-based justifications for regulation of matters more pressing than the weight of bread.\(^\text{369}\)

By calling attention to *Jay Burns*, Professor Post does put his finger on a distinguishing feature of the Taft Court's substantive due process jurisprudence. The majority readily accepted that the end sought by the Nebraska legislature—preventing fraudulent short weights in bread—was permissible. Nor did *Jay Burns* deny that the means selected by the Nebraska legislature—prescription of weight tolerances within a specified time period—could be constitutionally employed. Such regulation therefore was not like price regulation in businesses not affected with a public interest, which was simply forbidden no matter how "reasonable" the price set might be. As *Petersen* would make amply clear, the problem in *Jay Burns* was that the particular means selected were unreasonably restrictive in light of the circumstances. It was not that the means were unreasonable as a general matter; it was instead that the means were unreasonable in their particular details.

*Baking Co. v. Bryan*, 264 U.S. 504, 533 (1924). That view, however, was a consequence of his conception of the appropriate role of an appellate tribunal exercising judicial review. Brandeis conceded of the state's evidence that

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\text{[t]here is in the record some evidence in conflict with it . . . . But with this conflicting evidence we have no concern. It is not our province to weigh evidence. Put at its highest, our function is to determine, in the light of all facts which may enrich our knowledge and enlarge our understanding, whether the measure, enacted in the exercise of an unquestioned police power and of a character inherently unobjectionable, transcends the bounds of reason. That is, whether the provision as applied is so clearly arbitrary or capricious that legislators acting reasonably could not have believed it to be necessary or appropriate for the public welfare.}
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*Id.* at 533-34. In Brandeis' view, therefore, the majority was engaged in "an exercise of the powers of a super-legislature— not the performance of the constitutional function of judicial review." *Id.* at 534. The majority, by contrast, appears to have thought that its function was to make an independent determination of whether the statute was in fact a "reasonable" exercise of the police power. Some weighing of the evidence was an inescapable feature of this conception of judicial review.

\(^{369}\) See, e.g., *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U.S. 398, 483 (1934) (Van Devanter, McReynolds, & Butler, JJ., dissenting) (arguing that Minnesota statute granting relief to mortgage debtors during an emergency was unconstitutional).
This distinct form of substantive due process could be seen again two years later in an opinion that is frequently paired with *Jay Burns*. *Weaver v. Palmer Bros. Co.* 370 involved a challenge to a Pennsylvania statute prohibiting the use of "shoddy"371 in the manufacture of bedding. The statute permitted the use of feathers and secondhand material for such purposes, so long as they had been "sterilized and disinfected by a reasonable process approved by the Commissioner of Labor and Industry."372 No one disputed that "shoddy may be rendered harmless by disinfection or sterilization.... [A]ll dangers to health may be eliminated at low cost."373 Butler characterized shoddy-filled bedding products as "useful articles for which there is much demand.... to be distinguished from things that the state is deemed to have power to suppress as inherently dangerous."374 It was "a matter of public concern that the production and sale of things necessary or convenient for use should not be forbidden."375 These useful articles could be rendered harmless through the less restrictive means of requiring sterilization. The majority therefore concluded that the Pennsylvania statute, like the Nebraska statute effectively prohibiting the sale of unwrapped bread made with high quality flour, was "unreasonable:"376 "[T]he absolute prohibition of the use of shoddy in the manufacture of comfortables is purely arbitrary and violates the due process clause of the Fourteenth Amendment."377 The end sought by the legislature – the protection of public health – was permissible, as were the general means through which that end was to be realized – regulation of the materials used in the manufacture of bedding. Yet here again the Court held that the particular means selected for the accomplishment of that permissible end – the absolute prohibition of the use of shoddy – were overly, unnecessarily, and therefore unreasonably restrictive.378

These applications of substantive due process in *Jay Burns* and *Weaver* do not fit comfortably into the principle of neutrality paradigm. They did not purport to remedy any legislatively-imposed inequality or redistribution. They might be understood as vindicating a fundamental right to be free from

370 270 U.S. 402 (1926).
371 "Shoddy" was defined as "any material which has been spun into yarn, knit or woven into fabric, and subsequently cut up, torn up, broken up, or ground up." *Id.* at 409.
372 *Id.* at 409.
373 *Id.* at 411.
374 *Id.* at 412-13.
375 *Id.* at 412.
376 *Id.* at 414.
377 *Id.* at 415.
378 Professor Post thoughtfully suggests that decisions such as *Weaver* "have exactly the form of what today would be described as "overbreadth" analysis." Post, supra note 138, at 1529-30 & n.195 (citing, to the same effect, Thomas Reed Powell, *The Supreme Court and the State Police Power, 1922-1930-IX*, 18 VA. L. REV. 597, 615-16 (1932)).
unreasonable restrictions on the use of property, though the opinions tend to focus not on any right of the regulated party, as they do in the liberty of contract cases and in cases like Meyer and Pierce, but instead on the reasons for characterizing the regulation as unreasonable. The principle vindicated in Jay Burns and Weaver, however, was not novel in 1924. Justice Brown had articulated the precept thirty years earlier in Lawton v. Steele. In discussing the scope of the police power, Brown pointed out that it was subject to two important limitations. The first was the principle of neutrality: “To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference.” The second limitation was “that the means are reasonably necessary for the accomplishment of the purpose.” “The legislature may not,” Brown cautioned, “under the guise of protecting the public interest, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations.”

In his 1926 treatise on due process, Rodney Mott related as established the proposition that “[i]t is also necessary that the law be not unduly exacting or oppressive, if it is not to violate due process. There must be some sort of reasonable balance between the degree of interference with private rights and the public benefit which may be expected to flow from that interference.” Mott recognized that “this principle has long been impliedly accepted by the courts,” yet he maintained that Jay Burns appeared to have been the first decision in which it had been employed to invalidate a statute under the due process clause. Jay Burns was not quite, however, something new under the sun. In the little noted case of South Covington & Cincinnati Street Railway Co. v. City of Covington, decided in 1915, a unanimous Court invalidated as unreasonable a requirement that the temperature of street cars never be permitted to fall below fifty degrees Fahrenheit. Justice Day reported that “the

379 Counsel for the bakers in Jay Burns claimed that the challenged statute unreasonably curtailed a “baker’s right to sell his product,” depriving the bakers “of their property without due process of law,” and abrogating “the constitutional right of contract without any just ground therefor.” Brief for Plaintiffs in Error at 78-79, Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 533 (1924) (No. 94).
380 152 U.S. 133 (1894).
381 Id. at 137.
382 Id. The Brief for Plaintiffs in Error in Jay Burns invoked this very passage from Lawton, see Brief for Plaintiffs in Error at 40, and it was this principle upon which Justice Butler’s opinion for the majority explicitly relied. See Jay Burns Baking Co., 264 U.S. at 513.
383 MOTT, supra note 17, at 539.
384 Id. at 539.
385 Mott reported that “no question of fact seems to have arisen under [this principle] until the decision involving the validity of the Nebraska law fixing minimum and maximum weights for loaves of bread.” Id. at 539.
386 235 U.S. 537 (1915).
undisputed testimony shows that it is impossible in the operation of the cars to keep them uniformly up to this temperature, owing to the opening and closing of doors, and other interferences that make it impracticable. We therefore think, upon this showing, this feature of the ordinance is unreasonable and cannot be sustained.\(^{387}\) Just as “ordinary conditions of temperature and humidity prevailing in Nebraska\(^{388}\) made it impracticable to comply with the bread weight law at issue in \textit{Jay Burns}, the “ordinary” operation of street cars in Northern Kentucky made compliance with the temperature regulation at issue in \textit{South Covington} impracticable and therefore unreasonable. In this sense, then, one would have to agree that \textit{Jay Burns} marked not an innovation, but a “return” to “normalcy” in due process doctrine.

2. Affectation with a Public Interest

Professor Post explores the concept of the business affected with a public interest in order to disabuse us of what he sees as two fallacies. The first is the Progressive fallacy, which suggests a “coarse equation of \textit{Lochnerism} with ‘a narrow protective view of the privileges of property and business.’”\(^{389}\) The second is what he calls the revisionists’ “simple reduction of \textit{Lochnerism} to the ‘concept . . . that the power of government could not legitimately be exercised to benefit one person or group at the expense of others.’”\(^{390}\) In other words, Professor Post wants to reject the attempt to explain \textit{Lochnerism} as an effort to prevent class or special legislation, as simply a form of vigilance against legislature’s taking the property of A and giving it to B. Professor Post is right to caution us against both forms of reductionism. What we call “\textit{Lochnerism}” was a multi-faceted phenomenon, and Professor Post reminds us that it needs to be understood as such. But while Professor Post’s critique of the revisionist position is offered with characteristic rhetorical understatement, I want to suggest that it is nevertheless overstated. I believe that the principle of neutrality can do more work explaining the Taft Court’s substantive due process jurisprudence than Professor Post allows.

Professor Post points out that the Taft Court justices never succeeded in articulating much of a theory explaining why some businesses were affected with a public interest and others were not.\(^{391}\) Professor Post illustrates this point nicely in unpacking the language of several Taft Court due process cases. By the end of the decade, Professor Post tells us, the Court had “secured the line” between private businesses and those affected with a public interest, “but at the cost of stripping that line of any functional justification.”\(^{392}\) This is certainly a fair characterization of the analytic content of some of the opinions,

\(^{387}\) Id. at 548-49.  
\(^{389}\) Post, \textit{supra} note 138, at 1508.  
\(^{390}\) Id.  
\(^{391}\) \textit{See} Post, \textit{supra} note 138, at 1517-18, 1522-29.  
\(^{392}\) Post, \textit{supra} note 138, at 1528-29.
and one shares Professor Post's frustration with their periodic obscurity. Nevertheless, I am not yet prepared to give up entirely on the possibility of making some sense of the pattern of the Taft Court's decisions securing that line, even if the language employed by the justices is occasionally less than illuminating.

We might begin this effort by observing that there are points at which Professor Post's return to normalcy thesis seems to be pushing important parts of the Taft Court's due process story to the periphery. For example, Professor Post describes *Charles Wolff Packing Co. v. Court of Industrial Relations* as "[t]he first major decision of the Taft Court to address the question of how property could be classified as affected with a public interest."

393 Wolff Packing is indeed the first in what would become an unbroken string of Taft Court decisions invalidating legislation on the ground that it regulated a business not affected with a public interest, and it therefore provides a useful point of departure for his normalcy thesis. But I am not convinced that it is fair to suggest that it was the first Taft Court decision to address this question. The reader of Professor Post's lecture might emerge unaware that in two previous cases decided in 1922 and 1923, Taft himself had explained that both major stockyards and the Chicago Board of Trade *were* businesses affected with a national public interest. During the Harding administration, Taft's Court actually *expanded* the category of businesses affected with a public interest.

In *Stafford*, Chief Justice Taft explained that the goal of the Packers and Stockyards Act of 1921 was to facilitate the "unburdened flow" of livestock in interstate commerce, unencumbered by "exorbitant charges." The transactions of the commission men and the dealers at the regulated stockyards were "essential" to that interstate flow, "indispensable to its continuity." The Court therefore concluded that the great public stockyards

393 262 U.S. 522 (1923).
394 *Post, supra* note 138, at 1508.
396 *Cf.* Post, *supra* note 138, at 1506 ("[D]uring the 1922 Term Justices Sutherland, Butler and Sanford replaced, respectively, Justices Clarke, Day, and Pitney, and the Court almost immediately executed a flat reversal of direction.").
397 *Stafford*, 258 U.S. at 514.
398 *Id.* at 515.
399 *Id.* at 516.
400 *Id.* The following year Taft would similarly conclude that the Chicago Board of Trade was a business affected with a public interest, though without as much explanation: "In view of the actual interstate dealings in cash sales of grain on the exchange, and the effect of the conduct of the sales of futures upon interstate commerce, we find no difficulty under *Munn v. Illinois* and *Stafford v. Wallace* in concluding that the Chicago Board of Trade is engaged in a business affected with a national public interest and is subject to national regulation as such." Chi. Bd. of Trade v. Olsen, 262 U.S. 1, 41 (1923) (citations omitted). Ernst Freund had earlier sketched the tacit rationale: "[I]t is also possible that
of the country were "great national public utilities" servicing a great interstate movement in livestock, thus conducting "a business affected by a public use of a national character and subject to national regulation." Taft would reiterate these criteria for inclusion in the category of businesses "affected with a public interest" the following year. In Wolff Packing he emphasized the importance that the services performed by the enterprise be "indispensable," and that the business consequently have the power to exact "exorbitant charges." In his exegesis of the case law, Taft divided businesses affected with a public interest into three types. First, there were "[t]hose which are carried on under authority of a public grant of privileges .... Such are the railroads, other common carriers and public utilities." In the second class were occupations historically "regarded as exceptional," such as "keepers of inns, cabs, and grist mills." The third category was a bit of a catch-all, but Taft asserted that "[i]n nearly all the businesses included" in that category, "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." Taft then explained that the meatpacking business did not meet those criteria. "The regulation of rates to avoid monopoly," Taft conceded, was permissible. But the business of food preparation was unlike those businesses with respect to which "fear of monopoly prompted, and was held to justify, regulation of rates. There is no monopoly in the preparation of foods." Instead, food prices were "fixed by competition throughout the country at large." In fact, Taft concluded, "the danger from local monopolistic control [was] less than ever." There was no "danger of monopoly" in the meatpacking business.

The notion that such "monopolistic control" over an "indispensable" good or service was the earmark of a business affected with a public interest was not a novelty in 1923. It had its genesis in Munn v. Illinois, where Chief Justice Waite had surveyed the English authorities holding that warehouses holding "a
virtual monopoly” could not “charge arbitrary rates” for storage, but instead “must be content with a reasonable compensation.” The grain elevators in question there fell within that principle, Waite asserted, as they stood “in the very ‘gateway of commerce,’” taking “toll from all who pass.” As Dexter Merriam Keezer observed in an article published in the Michigan Law Review in 1926, it was “the fact that a virtual monopoly in an important service did exist, or was seriously threatened,” that “warranted the regulation of rates” in Munn. “Virtual monopoly was apparently the dominant consideration.”

In an important article on businesses affected with a public interest published in the March, 1930 issue of the Harvard Law Review, Breck McAllister explained how this notion shaped the doctrine in its early years. In the years immediately following Munn, McAllister observed, the Court interpreted the decision “as holding that the state might regulate the prices of businesses which enjoyed a practical monopoly, to which citizens were compelled to resort, and which might exact tribute from the community unless regulated.” The majority cited these interpretations approvingly in the 1892 case of Budd v. New York, where the Court followed Munn in upholding New York’s regulation of grain elevator rates. The majority rejected the dissenting Justices’ contention that rate regulation was justified only where

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411 Munn v. Illinois, 94 U.S. 133, 127-29 (1877).
412 Id. at 131-32.
413 Dexter Merriam Keezer, Some Questions Involved in the Application of the ‘Public Interest’ Doctrine, 25 Mich. L. Rev. 596, 599 (1926). See also Robert Hale, The Constitution and the Price System: Some Reflections on Nebbia v. New York, 34 Colum. L. Rev. 401, 403 (1934) (“In the Munn case the opinion stressed the ‘virtual’ monopoly possessed by the owner of the elevator.”); Frank R. Strong, The Economic Philosophy of Lochner: Emergence, Embrasure and Emasculation, 15 Ariz. L. Rev. 419, 429 (1973) (observing that the “public callings” subject to price regulation involved instances of virtual monopoly, and that in Munn “the factual evidence” showed that “by reason of private agreements there existed no price competition among the nine firms controlling the 14 grain elevators in Chicago”).
414 Breck P. McAllister, Lord Hale and Business Affected with a Public Interest, 43 Harv. L. Rev. 759, 770 (1930). This merely paraphrased the formulation offered by Justice Bradley in his dissenting opinion in the Sinking Fund Cases, 99 U.S. 700, 747 (1878) (Bradley, J., dissenting) in Munn, Bradley explained, the Court had held:

[When an employment or business becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen; in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community, it is subject to regulation by the legislative power.

Id. See also Spring Valley Water Works v. Schottler, 110 U.S. 347, 354 (1884) (“That it is within the power of the government to regulate the prices at which water shall be sold by one who enjoys a virtual monopoly of the sale, we do not doubt. That question is settled by what was decided on full consideration in Munn.” (citation omitted)).
exclusive privileges had been granted by government act. The power "to regulate the charges for services in connection with the use of property did not depend in every case upon the question whether there was a legal monopoly, or whether special governmental privileges or protection had been bestowed." It was sufficient that a business having "a vital relation to commerce in one of its most important aspects" enjoyed a "practical monopoly," "an actual monopoly" enabling it to exact "exorbitant charges." In Budd, as one observer put it, "the court was again able to refer to the presence of monopoly conditions in the performance of important services."

Yet as Walton Hamilton observed of the public interest doctrine in 1930, "[i]t is not easy to hold legal doctrines in the service of the causes which call them into being." The connection between the doctrine and its monopoly rationale came undone two years after Budd in Brass v. Stoeser, where a sharply divided Court upheld North Dakota’s statute regulating grain elevator rates. Four Justices dissented on the ground that the facts failed to show any "practical monopoly, to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community," but the majority

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416 It is suggested that there is a monopoly, and that that justifies legislative interference. There are two kinds of monopoly – one of law, the other of fact. The one exists when exclusive privileges are granted. Such a monopoly, the law which creates alone can break, and, being the creation of law, justifies legislative control. A monopoly of fact any one can break, and there is no necessity for legislative interference.

Id. at 550-51 (Brewer, J., dissenting).

417 Id. at 532.

418 Id. at 533.

419 Id. at 532.

420 Id. at 533.

421 Id. at 546.

422 Id. at 533. Justice Blatchford quoted with approval Justice Bradley’s formulation in his dissent in the Sinking Fund Cases: a business affected with a public interest held "a practical monopoly, to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community – it is subject to regulation by the legislative power." Id. at 537 (quoting Sinking Fund Cases, 99 U.S. 700, 747 (1878) (Bradley, J., dissenting)).

423 Keezer, supra note 413, at 602.


426 Id. at 409-10 (Brewer, J., dissenting). In Brass, "it was impossible, in view of the showing of facts, to find such conditions of monopoly as had been emphasized in" Munn and Budd.

Faced with the fact that the regulation applied to small elevators in agricultural communities, where a bountiful supply of land indicated an abundance of elevator sites
insisted that this was a matter "addressed to the legislative discretion," a matter "for those who make, not for those who interpret, the laws." Munn and Budd had established "that it is competent for the legislative power to control the business of elevating and storing grain," and those authorities were sufficient to sustain the statute at issue. This decoupling of doctrine and rationale was again confirmed by a sharply divided Court in a 1914 decision upholding the regulation of rates for fire insurance. In German Alliance Insurance Co. v. Kansas, Justice McKenna remarked that the Brass decision had "extended the principle" of Munn and Budd and denuded it of the limiting element which was supposed to beset it — that to justify regulation of a business the business must have a monopolistic character. The dissenting Justices, by contrast, continued to press the pre-Brass understanding of the doctrine, insisting that the regulation was unwarranted because the case "present[ed] no question of monopoly in a prime necessity of life.

Justice Van Devanter dissented in German Alliance; McReynolds, who joined the Court after German Alliance was decided, would join Van Devanter in dissenting in the 1921 rent control cases. In view of their subsequent performances in cases involving price regulation, it would appear that Sutherland, Butler, and Taft himself shared the restrictive views of the doctrine to which these more senior colleagues had subscribed. Price regulation was...
warranted only in cases involving a "practical monopoly, to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community," a "monopoly in a prime necessity of life." By contrast, four of Taft's colleagues in 1923—McKenna, Holmes, Brandeis, and Sanford—did not share this more restrictive view. Their conception of the category was to varying degrees broader than that of their brethren. Yet the Justices agreed that the Kansas Industrial Court Act was unconstitutional. It appears that at least five thought the business of food preparation operating under ordinary conditions of market competition was not affected with a public interest, while the remainder agreed that, even if the business were affected with a public interest, it could not be subjected to wage regulation for the purpose of securing its continuity of operation. In massing the Court behind a unanimous opinion, Taft ultimately rested the decision on this broader ground, but not before casting grave doubt on whether the business was affected with a public interest at all. The classification of the meatpacking business "as public is at best doubtful," Taft insisted. "It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker... was clothed with such a public interest that the price of his product or his wages could be fixed by State regulation."  

Resting the decision on this broader ground relieved Taft of the necessity of articulating criteria for inclusion in the third category of businesses affected with a public interest. In view of the diversity of opinion on the issue among his colleagues, he could not have done so without risking the unanimity of the Court. Moreover, as Taft conceded, it was "very difficult under the cases to lay down a working rule by which readily to determine when a business has become 'clothed with a public interest.'"  

After Brass, German Alliance, and the rent control cases, no accurate positive account of the doctrine could

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Bolshevik from getting control." Letter from William Howard Taft, Chief Justice of the United States Supreme Court, to Horace Taft (Nov. 14, 1929), quoted in 2 HENRY F. PRINGLE, THE LIFE AND TIMES OF WILLIAM HOWARD TAFT 967 (2d prtg., Archon Books 1964). "[T]he only hope we have of keeping a consistent declaration of constitutional law is to live as long as we can." Letter from William Howard Taft, Chief Justice of the United States Supreme Court, to Horace Taft (Dec. 1, 1929), quoted in PRINGLE, supra.

433 This alone was apparently the basis of decision in Taft's circulated draft opinion. See Post, supra note 138, at 1515-16.

434 Charles Wolff Packing Co. v. Court of Indus. Relations of Kan., 262 U.S. 522, 539-44 (1923) (describing the nature by which a business becomes "affected with a public interest" and ultimately stating that "[t]he power of a legislature to compel continuity in a business can only arise where the obligation of continued service by the owner and its employees is direct and is assumed when the business is entered upon.").

435 Id. at 544.

436 Id. at 537.

437 Id. at 538.

438 Though even Holmes had apparently thought it useful to gesture in the direction of the more restrictive theory in Block v. Hirsh: "The space in Washington is necessarily
insist that the doctrine was confined to instances involving a "practical monopoly" in a "prime necessity of life." Yet Taft noted that in "nearly all" of the cases including enterprises in the third class of businesses affected with a public interest, "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." This formulation offered a pretty close paraphrase of earlier definitions of such a business as a "practical monopoly, to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community," or a "monopoly in a prime necessity of life." Taft went on to point out that there was "no monopoly in the preparation of foods," where prices were "fixed by competition throughout the country at large." This left the impression that Taft was endeavoring to reassert the line that the Court had abandoned in Brass and German Alliance. When he observed that "nearly all" of the cases including businesses in the third class had involved a practical monopoly in a prime necessity of life, one suspected that he and the Four Horsemen meant, "all of the correctly decided cases." As Breck McAllister wrote after reading the Wolff Packing opinion, "we are right back to the test of monopoly, which we had thought was definitely repudiated in the Brass case, and in the insurance case."
Justice Sutherland would subsequently write three opinions—one each in 1927, 1928, and 1929—holding, respectively, that the businesses theater ticket brokerage, employment agencies, and the sale of gasoline were not affected with a public interest.\textsuperscript{442} Professor Post accurately observes that these opinions did little to clarify the underlying basis of the doctrine.\textsuperscript{443} Yet here again, if we venture beyond the tenure of Taft as Chief Justice to that of his successor, we find that subsequent decisions help to illuminate those which came before. In \textit{New State Ice Co. v. Liebmann},\textsuperscript{444} the Court considered an Oklahoma statute treating the business of manufacturing and distributing ice as affected with a public interest. The arguments of the parties took contrasting views on whether the ice business bore the monopolistic indicia characteristic of businesses affected with a public interest. The appellant argued that before the enactment of the statute "[t]here had been little or no competition in the ice industry,"\textsuperscript{445} while the appellee insisted that "[t]he proof shows that prior to the passage of the Ice Act, there was no monopoly in the ice business. The public was not compelled to use the ice sold by any particular plant or manufacturer."\textsuperscript{446} A federal circuit court had recently sustained a statute treating the business of cotton ginning as affected with a public interest,\textsuperscript{447} and

head the court went on to point out that the test to be used was two-fold: the article manufactured or sold must be of prime necessity to the people, and there must be danger of exorbitant prices and arbitrary control—monopoly, either legal or natural."); Thomas P. Hardman, \textit{Public Utilities, I: The Quest for a Concept}, 37 W. VA. L.Q. 250, 262 (1931) ("[T]he Court, as to the third 'class' of utilities, apparently purports to declare a 'principle' of public interest based on 'monopoly,' notwithstanding" the abandonment of that requirement in \textit{Brass} and \textit{German Alliance}."). Hardman noted that the requirement of monopoly was central to the definition of public utilities that had been adopted in the influential text book by Harvard Professor Bruce Wyman, \textit{WYMAN ON PUBLIC SERVICE CORPORATIONS} (1911). As Hardman put it, Wyman's definition required the presence of three facts: "first, a business monopolistic in nature," either a "monopoly due to legal privilege," a "natural monopoly," or a "virtual monopoly"; second, "a holding out to serve the public generally"; "and third, a business 'essential' to the general welfare, that is to say, something not merely useful or advantageous according to the ideas of many, such as theatres, skating rinks, 'scenic railways,' but a business which according to commonly accepted standards is reasonably 'necessary' in the interest of the public." Hardman, \textit{supra}, at 251. Public utility regulation, according to Wyman, was "confined to necessary things. The law has little concern with the monopolization of unessential things." \textit{Wyman, supra}, at 99.


\textsuperscript{443} Post, \textit{supra} note 138, at 1522-29 (describing Tyson, Ribnik, and Williams).

\textsuperscript{444} N.Y. State Ice Co. v. Liebmann, 285 U.S. 262 (1932).

\textsuperscript{445} Id. at 264.

\textsuperscript{446} Id. at 266.

\textsuperscript{447} Chickasha Cotton Oil Co. v. Cotton Gin County Gin Co., 40 F.2d 846 (10th Cir., 1930).
the appellant invoked that authority in support of the constitutionality of similar treatment of the ice business.\textsuperscript{448} Accepting that case as correctly decided, Justice Sutherland undertook to explain why Oklahoma could treat the business of cotton ginning as affected with a public interest, but could not so treat the business of manufacturing and distributing ice.

Sutherland began by asserting that cotton ginning was "an industry of vital concern to the general public."\textsuperscript{449} "The production of cotton," Sutherland observed, "is the chief industry of the state of Oklahoma, and is of such paramount importance as to justify the assertion that the general welfare and prosperity of the state in a very large and real sense depend upon its maintenance."\textsuperscript{450} Cotton ginning was an indispensable step in the production of cotton for market,\textsuperscript{451} standing in the very gateway between producer and consumer. Sutherland explained the relation, as was his wont, by way of historical analogy.

The cotton gin bears the same relation to the cotton grower that the old grist mill did to the grower of wheat. The individual grower of the raw product is generally financially unable to set up a plant for himself; but the service is a necessary one with which, ordinarily, he cannot afford to dispense.\textsuperscript{452}

For this indispensable service the grower was "compelled, therefore, to resort for such service to the establishment which operates in his locality."\textsuperscript{453} The reference to a single local establishment suggested the existence of a virtual monopoly, a suggestion which Sutherland confirmed in the following sentence. "So dependent, generally, is [the grower] upon the neighborhood cotton gin that he faces the practical danger of being placed at the mercy of the operator in respect of exorbitant charges and arbitrary control."\textsuperscript{454} This was of course the very language that Taft had used to describe the third category of businesses affected with a public interest in \textit{Wolff Packing}. The owner of the neighborhood cotton gin held a "practical monopoly, to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community."\textsuperscript{455} "These considerations," Sutherland concluded, "render it not unreasonable to conclude that the business 'has been devoted to a public use and its use thereby in effect granted to the public.'"\textsuperscript{456}

Sutherland went on to contrast the operation of cotton gins "with the

\textsuperscript{448} \textit{Liebmann}, 285 U.S. at 263.
\textsuperscript{449} \textit{Id.} at 276.
\textsuperscript{450} \textit{Id.} at 276.
\textsuperscript{451} "Cotton ginning is a process which must take place before the cotton is in a condition for the market." \textit{Id.}
\textsuperscript{452} \textit{Id.}
\textsuperscript{453} \textit{Id.} (emphasis added).
\textsuperscript{454} \textit{Id.} (emphasis added).
\textsuperscript{455} \textit{Sinking Fund Cases}, 99 U.S. 700, 747 (1878) (Bradley, J., dissenting).
\textsuperscript{456} \textit{Liebmann}, 285 U.S. at 276-77 (citing \textit{Tyson} and \textit{Wolff Packing}).
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completely unlike circumstances which attend the business of manufacturing, selling, and distributing ice."  

Sutherland rejected the contention "that the manufacture of ice requires an expensive plant beyond the means of the average citizen, and that, since the use of ice is indispensable, patronage of the producer by the consumer is unavoidable."  

This was "not now true, whatever may have been the fact in the past."  

Ice making was not a natural monopoly, and the economic barriers to entry were low.

We know, since it is common knowledge, that today, to say nothing of other means, wherever electricity or gas is available (and one or the other is available in practically every part of the country), any one for a comparatively moderate outlay may have set up in his kitchen an appliance by means of which he may manufacture ice for himself. Under such circumstances it hardly will do to say that people generally are at the mercy of the manufacturer, seller, and distributer [sic] of ice for ordinary needs.

Cotton gins held a virtual monopoly in an indispensable service; the business of ice manufacture and distribution, by contrast, was neither a "natural monopoly," nor "an enterprise in its nature dependent upon the grant of public privileges," nor a "practical monopoly" "to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community."

One measure of the saliency of this principle in distinguishing public from private enterprise is the extent to which dissenting justices felt the need to reconcile their positions to its requirements. Justice Brandeis, dissenting in Liebmann, began by insisting upon the "prime necessity" of ice, likening its production to other necessities produced by public utilities. "In Oklahoma," he wrote:

[An] regular supply of ice may reasonably be considered a necessary of life, comparable to that of water, gas, and electricity . . . . Ice has come to be regarded as a household necessity, indispensable to the preservation of food and so to economical household management and the maintenance of health.

"We cannot say that the legislature of Oklahoma acted arbitrarily in declaring that ice is an article of primary necessity, in industry and agriculture as well as in the household, partaking of the fundamental character of electricity, gas,

457 Id. at 277.
458 Id. at 277-78.
459 Id. at 278.
460 Id.
461 Id. at 279.
463 Liebmann, 285 U.S. at 287 (Brandeis, J., dissenting).
Having established that ice was an "indispensable," "prime necessity," Brandeis then went on to assert that its production was also a business "which lends itself peculiarly to monopoly." Indeed, Brandeis appears to have believed that the ice business was so peculiarly susceptible to "destructive competition" that it constituted a natural monopoly. "That these forces" of destructive competition and tendency toward monopoly "were operative in Oklahoma prior to the passage of the act under review," Brandeis maintained, "is apparent from the record."

Thus, it was testified that in only six or seven localities in the state containing, in the aggregate, not more than 235,000 of a total population of approximately 2,000,000, was there 'a semblance of competition'; and that even in those localities the prices of ice were ordinarily uniform. The balance of the population was, and still is, served by companies enjoying complete monopoly.

We see a similar effort to accommodate challenged price regulations within this principle in Justice Stone's dissents in *Tyson and Brother - United Theater Ticket Offices, Inc. v. Banton* and *Ribnik v. McBride.* In *Tyson,* Justice

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464 *Id.* at 289.

465 Brandeis began by disputing that "the means of manufacturing ice for private use are within the reach of all persons who are dependent upon it," showing that neither access to electricity nor ownership of refrigerators was as widespread in Oklahoma as the majority opinion assumed. *Id.* at 289-91.

466 Characteristically the business is conducted in local plants with a market narrowly limited in area, and this for the reason that ice manufactured at a distance cannot effectively compete with a plant on the ground. In small towns and rural communities the duplication of plants, and in larger communities the duplication of delivery service, is wasteful and ultimately burdensome to consumers. At the same time the relative ease and cheapness with which an ice plant may be constructed exposes the industry to destructive and frequently ruinous competition. Competition in the industry tends to be destructive because ice plants have a determinate capacity, and inflexible fixed charges and operating costs, and because in a market of limited area the volume of sales is not readily expanded. Thus, the erection of a new plant in a locality already adequately served often causes managers to go to extremes in cutting prices in order to secure business. Trade journals and reports of association meetings of ice manufacturers bear ample witness to the hostility of the industry to such competition, and to its unremitting efforts, through trade associations, informal agreements, combination of delivery systems, and in particular through the consolidation of plants, to protect markets and prices against competition of any character.

*Id.* at 291-92 (citations omitted).

467 *Id.* at 293.

468 *Id.* at 293.

469 See *Tyson & Brother - United Theatre Ticket Offices, Inc. v. Banton,* 273 U.S. 418, 434 (1927) (opining that New York's price regulations for theaters were constitutional).

470 See *Ribnik v. McBride,* 277 U.S. 350, 360 (1928) (arguing that regulation of
Sutherland wrote the majority opinion invalidating a New York statute regulating the resale prices of theater tickets. Stone endeavored to demonstrate that the regulation was authorized by the established precedents. "Statutory regulation of price," he maintained,

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. 471

Such conditions might arise "from the monopoly conferred upon public service companies," or, as in Munn, "from the circumstance that the strategical position of a group is such as to enable it to impose its will in matters of price upon those who sell, buy, or consume." 472 Stone contended that certain ticket brokers in New York had acquired a "virtual monopoly of the best seats, usually the first fifteen rows," and were thus "enabled to demand extortionate prices of theatre goers." 473 This, Stone insisted, brought the statute within the principle embraced in Munn. The statute involved in Munn, Stone observed, "as the statute here, was designed in part to protect a large class of consumers from exorbitant prices made possible by the strategic position of a group of intermediaries in the distribution of a product from producer to consumer." 474 Like the elevator operators in Munn, the ticket brokers in Tyson were attempting to use their strategic position "to exact exorbitant profits beyond reasonable prices." 475 Justice Sanford echoed this theme in his own separate dissenting opinion. As in Munn, Sanford argued, here

the business of the ticket brokers, who stand in 'the very gateway' between the theatres and the public... exacting toll from patrons of the

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471 See Tyson, 273 U.S. at 451-52. Stone would reassert this definition in his dissenting opinion in Ribnik v. McBride, 278 U.S. at 360 (explaining that price regulation "is within a state's power whenever any combination of circumstances 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").

472 Tyson, 273 U.S. at 452. With this much the members of the majority probably would have agreed. But Stone went on to add that such conditions might also arise, as in German Alliance, "from the predetermination of prices in the councils of those who sell, promulgated in schedules of practically controlling constancy," or, as in the rent control cases, "from a housing shortage growing out of a public emergency." Id.

473 Id. at 450.

474 Id. at 449-50.

475 Id. at 452.
theatres desiring to purchase [desirable] seats, has become clothed with a public interest and is subject to regulation by the legislature limiting their charges to reasonable exactions and protecting the public from extortion and exorbitant rates.\footnote{Id. at 455.}

The dissenter struggled, however, in the effort to persuade their colleagues that the brokers held a virtual monopoly in a "prime necessity of life." The appellant had argued that "[i]t is unreasonable to suggest that the price of theatre tickets is "affected with a public interest" when this is not true of the prices of necessaries of life."\footnote{Id. at 421.} Holmes, the urbane Bostonian, had responded simply that "to many people the superfluous is the necessary."\footnote{Id. at 447.} Stone, himself a cultured New Yorker, fulminated that the statute sought to remedy a "serious injustice to great numbers of individuals who are powerless to protect themselves."\footnote{Id. at 447.} The exercise of the police power in this instance was not "less reasonable because the interests protected are in some degree less essential to life than some others," Stone maintained, observing that "[l]aws against monopoly which aim at the same evil and accomplish their end by interference with private rights quite as much as the present law are not regarded as arbitrary or unreasonable because they are not limited in the application to dealings in the bare necessities of life."\footnote{Id. at 454.}

But this effort was half-hearted, as Stone would make clear in his dissent the following year in \textit{Ribnik.} Contending that the \textit{Tyson} precedent did not control New Jersey's regulation of the fees charged by employment agencies, Stone appeared to modulate his position. In \textit{Tyson,} he now conceded, the statute had attempted to remedy the ticket brokers' monopolistic control of a luxury, not a necessity. Those affected by the practices of the ticket brokers constituted a relatively small part of the population within a comparatively small area of the State of New York. They were not necessitous. The consequences of the fraud and extortion practiced upon them were not visited upon the community as a whole . . . \footnote{Ribnik v. McBride, 277 U.S. 350, 362 (1928).}

The ticket brokers may have held a "practical monopoly," but it was not one "to which the citizen is compelled to resort."\footnote{Budd v. New York, 143 U.S. 517, 537 (1891) (citing \textit{Sinking Fund Cases}, 99 U.S. 700, 747 (1878) (Bradley, J., dissenting)).} Prospective theater goers might readily forego patronage of the theater, substituting for it some other leisure activity. Its services were not "indispensable."

To overcharge a man for the privilege of hearing the opera is one thing; to

\footnotesize{\textit{Id.} at 455.}  
\footnotesize{\textit{Id.} at 421.}  
\footnotesize{\textit{Id.} at 447.}  
\footnotesize{\textit{Id.} at 454.}  
\footnotesize{\textit{Id.} at 453.}  
\footnotesize{Ribnik v. McBride, 277 U.S. 350, 362 (1928).}  
\footnotesize{Budd v. New York, 143 U.S. 517, 537 (1891) (citing \textit{Sinking Fund Cases}, 99 U.S. 700, 747 (1878) (Bradley, J., dissenting)).}
control the possibility of his earning a livelihood would appear to be quite another. . . . [T]he state has a larger interest in seeing that its workers find employment without being imposed upon, than in seeing that its citizens are entertained.483

The Justices in the Ribnik majority could hardly disagree with this assessment; employment was obviously a "prime necessity of life." The question for them was whether employment agencies in New Jersey held a virtual monopoly in its provision. Counsel for Ribnik insisted that they did not, contending that "[t]here is no monopoly, or danger of monopoly, in the operation of employment agencies. They are numerous, and it requires no great amount of capital to start new ones. Nineteen States have established competitive free state employment agencies, and in at least seven others there are municipal agencies." Moreover, counsel continued, "[b]usiness schools, trade schools, Y.M.C.A's, Y.W.C.A's, college bureaus, typewriter companies, and bar associations, maintain agencies," and "the labor unions of the country frequently conduct employment offices."484 "Under these conditions," counsel concluded, "it appears that the business of an employment agency is distinctly a private business of a highly competitive nature, with no known tendencies toward monopoly."485

Neither counsel for New Jersey nor the dissenting Justice Stone contended that employment agencies actually held a virtual monopoly in New Jersey, but Stone did attempt to characterize the situation in terms that suggested something closely approximating such a condition. "The nature of the service rendered, the exorbitance of the charges and the arbitrary control to which the public may be subjected without regulation, are elements to be considered in determining whether the 'public interest' exists"486 he wrote, echoing Taft's opinion in Wolff Packing. Employment agencies "deal with a necessitous

483 Ribnik, 277 U.S. at 373. See Hale, supra note 413, at 414 (suggesting that "the Tyson case can be reconciled with the test given in the Taft dictum [in Wolff Packing], because the service was not indispensable"); Maurice H. Merrill, The New Judicial Approach to Due Process and Price Fixing, 18 Ky. L.J. 1, 10 (1929) ("The objection is not so much to the result [in Tyson] as to the method by which it is reached. The actual decision is one which can be arrived at with entire propriety under the method heretofore in vogue for dealing with price fixing statutes. While a clear case of virtual monopoly and of extortionate charges against which the patron may not protect himself save by abstinence from attendance at the theater seems made out, one may agree that the service probably is not 'indispensable.'"); Note, 13 IOWA L. REV. 99, 101 (1927) ("[T]he theater does not control anything really essential to the public welfare. . . . [Nothing] as large in importance to the public . . . [as] gas, electricity, running water and telephones."); Note, 13 VA. L. REV. 554, 563 (1927) ("The entertainment afforded may be of high value to the public but it has never been considered of such a necessity that its sudden discontinuance would so operate as to obligate the government to carry it on.").

484 Ribnik, 277 U.S. at 351-52.
485 Id. at 352.
486 Id. at 360.
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.\textsuperscript{487} The result was "exorbitant fees charged"\textsuperscript{488} and "the exaction of
exorbitant fees."\textsuperscript{489} The agencies may not have held a virtual monopoly but,
Stone asserted, "unless we are to establish once and for all the rule that only
public utilities may be regulated as to price, the validity of the statute at hand
would seem to me to be beyond doubt."\textsuperscript{490}

One suspects that Sutherland and company would have been more than
happy to establish that rule once and for all. The difficulty was that the
proposed rule was not consistent with established precedents such as \textit{German
Alliance} and the rent control cases,\textsuperscript{491} from which those members of the \textit{Tyson}
and \textit{Ribnik} majorities then on the Court had dissented. Sutherland's
discomfort with decisions upholding price regulation in the absence of
monopoly was certainly palpable. In \textit{Tyson} he sought to distinguish \textit{Brass}
quickly, without confronting directly the fact that no monopoly had been
shown in that case. The \textit{Brass} decision, Sutherland tersely remarked, "while
presenting conditions of less gravity, rest[ed] upon the authority of the \textit{Munn

\textsuperscript{487} Id. at 361.
\textsuperscript{488} Id. at 373.
\textsuperscript{489} Id. at 361.
\textsuperscript{490} Id. at 372-73. Stone's position was grounded in his view that price regulation was not
essentially different from other permissible regulatory measures:

I cannot accept as valid the distinction on which the opinion of the majority seems to
me necessarily to depend, that... there is any controlling difference between
reasonable regulation of price, if appropriate to the evil to be remedied, and other forms
of appropriate regulation which curtail liberty of contract or the use and enjoyment of
property... [T]he Constitution does not require us to hold that a business, subject to
every other form of reasonable regulation, is immune from the requirement of
reasonable prices, where that requirement is the only remedy appropriate to the evils
encountered. In this respect I can see no difference between a reasonable regulation of
price and a reasonable regulation of the use of property, which affects its prices or
economic return....

To say that there is constitutional power to regulate a business or a particular use of
property because of the public interest in the welfare of a class peculiarly affected, and
to deny such power to regulate price for the accomplishment of the same end, when
that alone appears to be an appropriate and effective remedy, is to make a distinction
based on no real economic difference, and for which I can find no warrant in the
Constitution itself nor any justification in the opinions of this Court.

The price paid for property or services is only one of the terms in a bargain; the effect
on the parties is similar whether the restriction on the power to contract affects the
price, or the goods or services sold.

\textit{Id. at 373-74}.

\textsuperscript{491} \textit{See} Block v. Hirsh, 256 U.S. 135, 156 (1921) (holding that a legislature can fix rent
prices in an emergency); Marcus Brown Co. v. Feldman, 256 U.S. 170, 198 (1921)
(upholding a statute restricting the removal of holdover tenants based upon the existence of
a public emergency).
The rent control cases similarly received less than a paragraph. Moreover, as Chastleton had made clear, "the business of renting houses and apartments is not so affected with a public interest as to justify legislative fixing of prices unless some great emergency exists."

"And even with the emergency," Sutherland emphasized, "the statutes 'went to the verge of the law.'" In view of Van Devanter and McReynolds' dissents in the rent control cases, we can be confident that at the very least two members of Sutherland's five-man majority believed that those statutes had gone beyond the verge of the law. Sutherland was the most troubled by German Alliance, with which he wrestled for three printed pages of the opinion. He concluded that the decision "marks the extreme limit to which this court thus far has gone in sustaining price fixing legislation." It rested on "considerations peculiar to the insurance business" and counseled future Courts "to be cautious about invoking the decision as a precedent for the determination of cases involving other kinds of business." This was far from a ringing endorsement, as Walton Hamilton would observe in 1930. German Alliance, he wrote, "still remains in the records though today it is cited by the court only to be distinguished."

Yet if the precedents made it difficult for the majority Justices to articulate the rule that only businesses holding a virtual monopoly in a prime necessity of life were amenable to price regulation, they could nevertheless continue to apply that rule sub rosa. This they did again in 1929 in Williams v. Standard Oil Co. Williams involved a challenge raised by two oil companies to a Tennessee statute regulating the price at which gasoline might be sold within the state. Counsel for the state argued that oil companies were subject to price regulation because of their "monopolistic tendencies," but Sutherland rejected the factual claim as simply inaccurate. "There is nothing in the point that the act in question may be justified on the ground that the sale of gasoline

493 See id. at 437 (distinguishing the rent control cases summarily).
494 Id. at 437.
495 Id.
496 Id. at 437-38 (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922)).
497 See id. at 434-37 (limiting the holding in German Alliance to its specific facts).
498 Id. at 434.
499 Id. at 437.
500 Id. at 436.
501 Hamilton, supra note 424, at 1099.
502 Williams v. Standard Oil Co., 278 U.S. 235, 239 (1929) (holding that a state legislature can fix prices only if the business or property is affected with a public interest).
503 See id. at 238 (providing the procedural background).
504 Id. at 236.
in Tennessee is monopolized” by the oil companies, he wrote, because “an inspection of the pleadings and of the affidavits submitted to the lower court discloses an utter failure to show the existence of such monopoly.” Only Justice Holmes dissented, this time without opinion; Justices Brandeis and Stone simply noted their concurrence in the result without explanation. This led Breck McAllister to assume that Mr. Justice Brandeis and Mr. Justice Stone .... concluded that, while the business of distributing gasoline was a business of sufficient importance to be a matter of public concern, the state of Tennessee had not been able to show that the business was peculiarly subject to abuse in the matter of price. Consequently, there was no substantial basis for regulation.

In 1930, the Court revisited the Packers and Stockyards Act in *Tagg Bros. & Moorhead v. United States*. The case concerned the constitutionality of a rate schedule promulgated by the Secretary of Agriculture for commission agencies doing business at the Omaha Stockyards. Justice Brandeis wrote the opinion for a unanimous Court upholding the rate order, and the opinion once again emphasized the indispensable character of the service provided and the monopolistic position the agencies occupied. Whether a business was affected with a public interest, Brandeis asserted, depended “upon the character of the service which those who are conducting it engage to render.” In this case that character was clear: they performed “an indispensable service in the interstate commerce in live stock.” Moreover, the agencies had “eliminated rate competition and had substituted therefor rates fixed by agreement among themselves.” Accordingly, there was “no competition among the Omaha market agencies as to rates, since the Exchange rules require all members to make the same charges for their services.” As a result, the agencies “enjoy[ed] a substantial monopoly at the Omaha Stock Yards.” Because they performed such “monopolistic personal services,” the Secretary could “fix

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505 Id. at 240.
506 Id. at 245.
507 McAllister, supra note 414, at 786. See also Merrill, supra note 483, at 14 (“The actual decision may be justified. It appears that no showing of the monopoly was made . . . .”); Note, 38 YALE L. J. 674, 675 (1929) (“It has been suggested that the real basis for allowing legislative price fixing is the failure of the competitive system adequately to protect the public . . . . In the instant case it is not clear that the competitive system has failed to perform its regulatory function in the gasoline industry.”).
509 Id. at 439.
510 Id.
511 Id.
512 Id. at 431-32.
513 Id. at 439.
reasonable charges" for those services.\footnote{Id. at 438.}

Surveying the cases in 1930, Walton Hamilton suggested that "it has been
difficult to secure from the court an approval of measures of price-control" that
extended beyond the "province of monopolistic industry," where "buyers and
sellers are not protected by competition between those with whom they must
deal, and the state must accord the protection which in the usual case the
market is supposed to afford."\footnote{Hamilton, supra note 424, at 1108.} However, for price-fixing proposals "that lie
beyond this simple program," Hamilton lamented, "the picture of the industrial
system which prevails reveals no proper place."\footnote{Id. at 257.} Price-fixing was a remedy
limited to circumstances involving "practical monopoly, to which the citizen is
compelled to resort, and by means of which a tribute can be extracted from the
community,"\footnote{Budd v. New York, 143 U.S. 517, 537 (1891) (citing Sinking Fund Cases, 99 U.S. 700,
747 (1878) (Bradley, J., dissenting)).} a "monopoly in a prime necessity of life."\footnote{German Alliance Ins. Co. v. Kansas, 233 U.S. 389, 419 (1914) (Lamar, J., dissenting).} Price regulation
under such circumstances was not problematic for, as the utility rate regulation
cases demonstrated, no one had a property right in a monopolistic rent.\footnote{See Barbara H. Fried, The Progressive Assault on Laissez Faire: Robert Hale and the First Law and Economics Movement 173 (1998) ("The decision in Munn and elsewhere implicitly concluded that the public had a right not to pay that portion of the price that reflected excess profits attributable to monopoly status.")} But
where the business operated in a competitive market, or where, as in Tyson, it
did not provide an "indispensable" good or service for which the market
provided no substitute, the business was entitled to the price set by market

\footnote{Id. at 438. In 1930, Hughes replaced Taft and Roberts replaced Sanford, making a
new majority more receptive to price regulation. In 1931, when Brandeis wrote for this new
majority in upholding state regulation of commissions paid to agents selling fire insurance,
all talk of monopoly had disappeared. See O'Gorman & Young, Inc. v. Hartford Fire Ins.
Co., 282 U.S. 251, 258 (1931) (refusing to void the commission regulation in question).
Unlike Sutherland, Brandeis suggested no reservations about the authority of German
Alliance, which made clear that "[t]he business of insurance is so far affected with a public
interest that the State may regulate the rates." Id. at 257. "The agent's compensation, being
a percentage of the premium, bears a direct relation to the rate charged the insured. The
percentage commonly allowed is so large that it is a vital element in the rate structure and
may seriously affect the adequacy of the rate. Excessive commissions may result in an
unreasonably high rate level..." Id. By contrast, Justice Van Devanter's dissent on
behalf of the Four Horsemen reminded his colleagues of what Sutherland had written about
German Alliance in Tyson: "that decision 'marks the extreme limit to which this court has
thus far gone in sustaining price-fixing legislation.'" Id. at 266. German Alliance must be
regarded as authoritative with respect to whether the rates of fire insurance companies could
be regulated, "but not otherwise." Id.}

\footnote{Id. at 257.}
forces. Under such circumstances, for government to prescribe a price lower than that settled by the higgling of the market was to take the property of A and give it to B.

Professor Post, by contrast, characterizes the line between public and private enterprise as one separating "ordinary economic activity and managerial supervision." "The Court," Professor Post maintains, "used the doctrine of substantive due process to separate the domains of social life in which persons could routinely be objectified according to the dictates of administrative expertise, from the domains of social life in which these dictates could be subject to constitutional challenge." This way of slicing up the cases, coupled with his reluctance to attribute much weight to the principle of neutrality, would appear to present Professor Post with some explanatory difficulties.

For example, Professor Post is genuinely puzzled by the contrast between two cases the Taft Court decided concerning the regulation of theater ticket brokers. In *Weller v. New York*, decided in 1925, the Court upheld provisions of a statute requiring that ticket brokers be licensed. Yet two years later, in *Tyson and Brother – United Theatre Ticket Offices, Inc. v. Banton*, the Court invalidated provisions of the same statute regulating the prices at which licensed brokers could sell tickets. Professor Post complains that Sutherland's opinion "did not clarify why 'the status of a private business' was compatible with licensing requirements, but not with price regulation." Sutherland probably did not think such clarification necessary. Occupational licensing of "private" businesses in order to protect the public from unscrupulous or incompetent practitioners was a well-established category of police regulation by the mid-1920s. The very next year Sutherland would

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521 Cf. *Post*, *supra* note 138, at 1514 ("[T]he Taft Court's development of the doctrine of 'property affected with the public interest' [does] not reflect any distinction between public and class legislation.").

522 Id. at 1529.

523 Id. *See also id.* at 1519 ("We might interpret the function of the doctrine of 'affected with the public interest,' then, to be that of separating areas of social life in which state managerial expertise could routinely be exercised from those in which such 'will and mastery' could be subject to constitutional challenge.").

524 See *id.* at 1523 n. 164 (criticizing the lack of clarity in Justice Sutherland's analysis in *Tyson*).


526 *Tyson & Brother – United Theater Ticket Offices, Inc. v. Banton* 273 U.S. 418, 441 (1927) (holding that theaters are not "regarded as so affected with a public interest as to justify legislative regulation of their charges").

527 *Post*, *supra* note 138, at 1523 n.164.

528 *See Lawrence M. Friedman, Freedom of Contract and Occupational Licensing*
write the opinion in *Ribnik v. McBride* striking down a New Jersey statute regulating the fees charged by employment agencies on the ground that their businesses were not affected with a public interest.\(^{529}\) Yet in the 1916 case of *Brazee v. Michigan*, McReynolds had written a unanimous opinion sustaining a state statute requiring that employment agencies be licensed and bonded,\(^{530}\) and further subjecting such enterprises to what Professor Post might call "managerial supervision"\(^{531}\) at the hands of the Commissioner of Labor.\(^{532}\) It is difficult to view that decision as an effort "to protect everyday life from administrative supervision."\(^{533}\) Professor Post objects that "Sutherland made

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\(^{529}\) See *Ribnik v. McBride*, 277 U.S. 350, 359 (1928) (holding that the statute in question is unconstitutional).

\(^{530}\) See *Brazee v. Michigan*, 241 U.S. 340, 343 (1916). Hence Sutherland's remark in *Ribnik*: "That the state has power to require a license and regulate the business of an employment agent does not admit of doubt." 277 U.S. at 355.

\(^{531}\) Post, *supra* note 138, at 1524.

\(^{532}\) As Justice McReynolds described it:

The general purpose of the act is well expressed in its title -- "An Act to Provide for the Licensing, Bonding, and Regulation of Private Employment Agencies, the Limiting of the Amount of the Fee Charged by Such Agencies, the Refunding of Such Fees in Certain Cases, the Imposing of Obligations on Persons, Firms, or Corporations Which Have Induced Workmen to Travel in the Hope of Securing Employment, Charging the Commissioner of Labor with the Enforcement of This Act, and Empowering Him to Make Rules and Regulations, and Fixing Penalties for the Violation Hereof." It provides: Sec. 1. No private employment agency shall operate without a license from the commissioner of labor, the fee for which is fixed at $25 per annum except in cities over two hundred thousand population, where it is $100; this license may be revoked for cause; the commissioner is charged with enforcement of the act, and given power to make necessary rules and regulations. Sec. 2. A surety bond in the penal sum of $1,000 shall be furnished by each applicant. Sec. 3. Every agency shall keep a register of its patrons and transactions. Sec. 4. Receipts containing full information regarding the transactions shall be issued to all persons seeking employment who have paid fees. Sec. 5. "The entire fee or fees for the procuring of one situation or job and for all expenses, incidental thereto, to be received by any employment agency, from any applicant for employment at any time, whether for registration or other purposes, shall not exceed 10 per cent of the first month's wages;" no registration fee shall exceed $1 and in certain contingencies one half of this must be returned. Sec. 6. "No employment agent or agency shall send an applicant for employment to an employer who has not applied to such agent or agency for help or labor," nor fraudulently deceive any applicant for help, etc. Sec. 7. No agency shall direct any applicant to an immoral resort, or be conducted where intoxicating liquors are sold. Sec. 8. Violations of the act are declared to be misdemeanors and punishment is prescribed.

*Brazee*, 241 U.S. at 342-43.

\(^{533}\) Post, *supra* note 138, at 1525. Indeed, as Professor Post points out, "[i]n response to the Court's judgment in *Ribnik*, New Jersey enacted a strict licensing law that required, among many other things, employment agencies to post a public schedule of fees." *Id.* at 1527 n.79 (citing 1928 N.J. Laws 775-84). The New Jersey legislature apparently did not interpret the holding that employment agencies were not businesses affected with a public
no effort to explain why theaters ought to be free from managerial supervision;"534 perhaps he did not so because that was not his claim. Theaters and employment agencies, like other "private" businesses, weren't entitled to be free from managerial supervision. They were, however, entitled to set the prices at which they might offer their goods and services.535 Every business was subject to the police power, and, as Weller and Brazee showed, that might authorize more or less extensive regulation, depending on the enterprise.536 But to regulate the prices or fees charged by a business not affected with a public interest was to take private property from A and to give it to B. In other words, the principle of neutrality offers to solve the puzzle that so perplexes Professor Post.

Professor Post wants to use Wolff Packing537 not only to launch his return to normalcy thesis, but also to undermine the claim that the anti-class legislation principle can explain the Court's leading substantive due process decisions.538 He writes:

[A]t no time in Wolff Packing did the Court ever imply that the Kansas statute reflected class rather than truly public interests. Wolff Packing, and in fact the Taft Court's development of the doctrine of "property affected with a public interest" ... do not reflect any distinction between public and class legislation.539

This is a perfectly defensible reading of the Wolff Packing opinion, but we may be afforded a different vantage if we broaden the context only slightly. Taft's opinion concluded that the wage order in question deprived the company not only of its liberty of contract, but also of its property without due process,

interest as immunizing such enterprises from "administrative supervision."

534 Id. at 1524.

535 See Ribnik, 277 U.S. at 358 (distinguishing regulation of businesses and outright price fixing); Tyson & Brother - United Theater Ticket Offices, Inc. v. Banton, 273 U.S. 418, 441-42 (1927) (reasoning that private ticket brokers are free to set prices).

536 See Weller v. New York, 268 U.S. 319, 325 (1925) ("I[t] cannot seriously be urged that the State lacked power to require licenses of those engaging in the business of reselling theatre tickets."); Brazee, 241 U.S. at 342 (proclaiming that "a State, exercising its police power, may require licenses for employment agencies and prescribe reasonable regulations").


538 Professor Post does concede in passing that the anti-class legislation principle "was certainly of great importance to the Taft Court, particularly in its labor decisions." Post, supra note 138, at 1514. Here he cites one case as an example: Truax v. Corrigan, 257 U.S. 312 (1921). Id. at 1514 n.127. Professor Post does not here allude to Adkins v. Children's Hospital, 261 U.S. 525 (1923), nor does he go on to elaborate the importance of the principle in the Taft Court's labor decisions. The focus of the lecture is instead on the relative unimportance of the principle to Taft Court substantive due process jurisprudence.

539 Post, supra note 138, at 1514.
suggesting that the property in question had been transferred from A to B.\textsuperscript{540} Two months earlier the Court had said the same thing about another wage order imposed on a "private" business. Recall that Sutherland had written in \textit{Adkins v. Children's Hospital} that, to the extent that the wage fixed by the District of Columbia minimum wage board exceeded the fair value of the services rendered by the employee, "it amounts to a compulsory exaction from the employer for the support of a partially indigent person... arbitrarily shifting] to his shoulders a burden which, if it belongs to anybody, belongs to society as whole."\textsuperscript{541} "The feature of this statute which, \textit{perhaps more than any other}, puts upon it the stamp of invalidity is that it exacts from the employer an arbitrary payment" to his employee.\textsuperscript{542} The minimum wage law was thus no different from a law requiring "the butcher, the baker or the grocer" to provide the quantity of food necessary for individual support at not more than a fixed maximum price.\textsuperscript{543} Wage regulation, like price regulation in businesses not affected with a public interest, took property from A and gave it to B.

Yet \textit{Adkins} makes only fleeting cameo appearances in Professor Post's lecture.\textsuperscript{544} This reduction of \textit{Adkins} to bit player status in the story of Taft Court substantive due process jurisprudence is rather curious. \textit{Adkins} is, after all, the elephant in the room. But it is also the case in which the fundamental liberties aspect of substantive due process highlighted by Professor Post most clearly meets the principle of neutrality feature illuminated by Professor Gillman and others. \textit{Adkins} protected a fundamental liberty of contract from undue government intrusion; it also proscribed a redistributive taking of property from A and giving to B.\textsuperscript{545} By all rights it ought to be at the center of this story. I am not certain why Professor Post accords \textit{Adkins} such conspicuously limited attention, but I do think the case presents some difficulties for his argument. The statute struck down in \textit{Adkins} authorized a government board with investigatory powers to prescribe the wages paid to women engaged in various local occupations.\textsuperscript{546} This statute thus authorized administrative, "managerial supervision, regulation and control"\textsuperscript{547} of private

\textsuperscript{540} "We think the Industrial Court Act, in so far as it permits the fixing of wages in plaintiff in error's packing house, is in conflict with the Fourteenth Amendment and deprives it of its property and liberty of contract without due process of law." \textit{Chas. Wolff Packing}, 262 U.S. at 544.

\textsuperscript{541} \textit{Adkins}, 261 U.S. at 557-58.

\textsuperscript{542} \textit{Id.} at 558 (emphasis added).

\textsuperscript{543} \textit{Id.} at 558-59.

\textsuperscript{544} \textit{See, e.g.} Post, \textit{supra} note 468, at 1533 n.211, 1541 (mentioning \textit{Adkins} briefly as an "important Taft court precedent").

\textsuperscript{545} \textit{See Adkins}, 261 U.S. at 561.

\textsuperscript{546} \textit{See id.} at 540-41.

\textsuperscript{547} Post, \textit{supra} note 138, at 1519 (quoting Matthew Woll, \textit{How the Kansas Plan Defies Fundamental American Freedom}, 29 AM. FEDERATIONIST 317, 321 (May, 1922)).
business, and on Professor Post's account one would have expected the Taft Court to invalidate it. But here the vote was 5-3, and two of the dissenters were Harding appointees: Sanford, and Taft himself.548 In fact, Taft's biographer Henry Pringle suggests that Taft's dissent in *Adkins* can be attributed to his experience touring munitions factories and textile mills in the South while co-chairman of the National War Labor Board.549 Chief Justice Taft's response to the wartime experience thus may have been more complex than a return to normalcy thesis would suggest.

3. Taking Stock

This raises a final point about writing a history of the Court under a Chief Justiceship. The Court acts only through its members and majorities, and any attempt write a collective intellectual history of the institution is at root an effort to map the intersections and divergences of the individual intellectual biographies of its constituent Justices. After I read Professor Post's lecture, I sat down and prepared what might be called a lifeworld chart of the Justices. I found that only three of the Justices consistently defended the lifeworld he describes. Chief Justice Taft did not: he dissented in *Adkins*550 and joined the majority in *Euclid v. Ambler Realty Co.*551 Nor did Justice Sanford: he also joined *Euclid*,552 and he dissented in both *Adkins* and *Tyson*.553 Justice Sutherland wrote *Euclid*554 and dissented in *Meyer v. Nebraska* and *Bartels v. Iowa*.555 Of the Harding appointees, only Justice Butler consistently joined Progressive era appointees McReynolds and Van Devanter in defense of the lifeworld; and Butler was Harding's token Democratic appointment.556

Professor Post's theory that portions of the Taft Court's substantive due process jurisprudence are properly understood as part of a return to normalcy and an effort to insulate some domains of social life and some fundamental liberties from certain kinds of state control is a significant contribution to our understanding of the period. At the same time, however, I do not believe that Professor Post has found the Rosetta Stone. While the principle of neutrality

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549 See PRINGLE, supra note 432, at 916, 918.
550 261 U.S. at 562 (Taft, C.J. and Sanford, J., dissenting).
552 Id.
554 272 U.S. at 379.
556 See DAVID J. DANELSKI, A SUPREME COURT JUSTICE IS APPOINTED 86-88 (1964) (discussing President Harding's appointment of Justice Butler).
cannot account for everything, it is an essential component to any adequate understanding of the period’s constitutional law. A sophisticated appreciation of the explanatory powers and limitations of each of these two themes promises to provide us with an impressively nuanced treatment of constitutional development under Taft’s Chief Justiceship. That is an ambitious and worthy project, to which Professor Post’s challenging and provocative lecture is an auspicious beginning.

II. DATING LOCHNER’S DEATH CERTIFICATE

For all of their disagreement over the substantive content of Lochner-era due process jurisprudence, Professors Gillman and Bernstein do agree on one thing: The Lochner era came to an end on March 29, 1937, with the Court’s decision upholding the Washington state minimum-wage statute in West Coast Hotel v. Parrish. Professor Gillman has written that West Coast Hotel “ushered in a revolution in constitutional law,” “jettisoning a constitutional tradition that was a century and a half old.” “After a decades-long assault,” he maintains, “the old regime had finally collapsed.”

New social facts had finally brought down a century-old police power jurisprudence. . . . [J]udgments about whether interventions in market relations were related to a historically defined conception of the public purpose or instead were better understood as corrupt attempts by particular classes to gain unfair and unnatural advantages over their market adversaries . . . would no longer constitute the conceptual basis upon which the judiciary would determine the boundaries of legitimate legislative authority.

Professor Bernstein similarly refers in his article to “the demise of Lochner in West Coast Hotel v. Parrish in 1937,” intimating that “the Lochner era unofficially began in 1897 with Allgeyer v. Louisiana and ended in 1937 with West Coast Hotel v. Parrish.” By mentioning their positions on this question I do not mean to single out Professors Gillman and Bernstein. Their views on the subject are widely shared.

There is a sense in which a fetishistic focus on 1937, and on West Coast Hotel in particular, is understandable. The decision overruling Adkins v. Children’s Hospital was certainly a significant milestone in constitutional

\[557\] Gillman, supra note 1 at 190-93.
\[558\] Gillman, supra note 1 at 190-93.
\[559\] Bernstein, supra note 2, at 5 n.12.
\[560\] Id. at 10 (citation omitted). In another article, published contemporaneously, Professor Bernstein recognizes that this is an oversimplification, and notes: “[E]ven the West Coast Hotel majority continued to accept certain Lochnerian premises . . . and the final end of the Lochner era did not arrive until several Roosevelt appointees joined the Court and formed a majority that entirely rejected Lochnerian reasoning.” Bernstein, supra note 71, at 1, 11-12 n.50. Later in the text of that article, however, he again refers to “the abandonment of Lochner in West Coast Hotel v. Parrish.” Id. at 19.
development. Moreover, just two weeks later the Court would hand down the Labor Board Cases, in which it made clear that Adair and Coppage no longer stood as barriers to national collective bargaining legislation. These decisions were less dramatic, however: earlier decisions had held that such legislation was valid as to businesses affected with a public interest, and Nebbia v. New York had removed even that limitation in 1934. Indeed, understood in its most narrow sense as a prohibition on the regulation of working hours, Lochner was but a vague memory in 1937. Bunting v. Oregon had effectively overruled that holding sub silentio in 1917, and the only other decision in which the Court struck down a working hours measure didn’t even cite Lochner as authority.

If we take Lochner in its relatively narrow sense to signify constitutional obstacles to progressive labor legislation, then the 1937 decisions signaled the close of an era in American constitutional law.

If we understand Lochner more broadly, however, as standing for judicial

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562 Chas. Wolff Packing Co. v. Court of Indus. Relations of Kan., 267 U.S. 552, 569 (1925) (holding that fixing hours of labor as a feature of a system of compulsory arbitration was unconstitutional). Meanwhile, the Justices had upheld every other working hours statute brought before them. See Mo.-Kan.-Tex. Ry. v. United States, 231 U.S. 112, 119-20 (1913) (affirming convictions for violation of Federal Hours of Service Act); Atcheson, Topeka & Santa Fe Ry. v. United States, 244 U.S. 336, 345 (1917) (affirming conviction for violation of Federal Hours of Service Act); Chi. & A.R. Co. v. United States, 247 U.S. 197, 200 (1918) (affirming conviction for violation of the Federal Hours of Service Act); Dominion Hotel, Inc. v. Arizona, 249 U.S. 265, 269 (1919) (upholding statute limiting working hours of women in hotels); United States v. Brooklyn E. Dist. Terminal, 249 U.S. 296, 307 (1919) (holding terminal subject to Federal Hours of Service Act); Radice v. New York, 264 U.S. 292, 294-97 (1924) (upholding statute prohibiting employment of women in large-city restaurants between 10 PM and 6 AM); Wilson v. New, 243 U.S. 332, 359 (1917) (upholding maximum hours law for railway workers); Bunting v. Oregon, 243 U.S. 426, 437-38 (1917) (upholding maximum hours law for employees of mills and factories); Elk v. State, 239 U.S. 634, 634 (1915) (upholding maximum hours law for public works); Riley v. Massachusetts, 232 U.S. 671, 680-81 (1914) (upholding maximum hours law for women); Hawley v. Walker, 232 U.S. 718, 718 (1914) (upholding maximum hours law for women); Miller v. Wilson, 236 U.S. 373, 384 (1915) (upholding maximum hours law for women); Cantwell v. Missouri, 199 U.S. 602, 602 (1905) (upholding maximum hours law for miners); Bosley v. McLaughlin, 236 U.S. 385, 392-94 (1915) (upholding maximum hours law for women); Holden v. Hardy, 169 U.S. 366, 395 (1898) (upholding maximum hours law for miners); Muller v. Oregon, 208 U.S. 412, 423 (1908) (upholding maximum hours law for women); Balt. & Ohio R.R. Co. v. ICC, 221 U.S. 612, 618 (1911) (upholding the Federal Hours of Service Act); United States v. Garbish, 222 U.S. 257, 261 (1911) (strictly construing exceptions to an eight-hour workday law for public works); Ellis v. United States, 206 U.S. 246, 256 (1907) (upholding maximum hours law for those employed upon public works); Atkin v. Kansas, 191 U.S. 207, 223-24 (1903) (upholding maximum hours law for those employed upon public works).
enforcement of Fifth and Fourteenth Amendment limitations on economic regulation, the focus on 1937, and on West Coast Hotel in particular, can be misleading. As a series of lesser-known decisions handed down shortly before and after West Coast Hotel demonstrates, several members of the West Coast Hotel majority believed that the judiciary still had a significant role to play in enforcing those limitations.

Consider first a decision handed down less than two months before West Coast Hotel. In Thompson v. Consolidated Gas Utilities, Corp., two Texas gas companies sought to enjoin enforcement of a proration order of the Texas Railroad Commission. The companies had devoted substantial resources to the creation of markets for their gas in distant states through the acquisition and development of gas reserves, the drilling of wells, and the construction of compressor plants and pipelines. These investments had enabled the companies to fulfill their contractual obligations without the need to purchase gas from other wells. The challenged order limited production of sweet gas from the companies' wells to an amount below their marketing requirements under existing contracts, below their capacity and current production levels, and below the capacity of their transportation and marketing facilities. The order thus disabled the companies from performing their contractual obligations unless they purchased gas from other producers. And, indeed, the companies alleged that both the effect and the purpose of so limiting their production was not to prevent waste, nor to prevent invasion of the legal rights of co-owners in a common reservoir, but instead solely to compel them and others similarly situated to purchase gas that they did not need from other well owners who had not made the investments that would have provided them with a market for their gas and the marketing facilities, such as pipelines, to deliver it. Under existing law, such well owners without pipelines would have been obliged to cease production unless they found a marketing outlet.

The Court's opinion recognized that the State might constitutionally prorate production in order to prevent waste or "undue drainage of gas from the reserves of well owners lacking pipe line connections." Yet the Court

563 300 U.S. 55, 58 (1937).
564 Id. at 66.
565 Id.
566 Id. at 66-67.
567 Id. at 67.
568 Id. at 67-68.
569 Id. at 60-61, 68.
570 Id. at 76-77. State common law granted each landowner the right to the oil and gas in place under his land, and to any oil and gas migrating to formations under his land through drainage from other lands. The landowner therefore had the right to produce all oil and gas that would flow out of the well under his land, subject to the exercise by other landowners of the same right of capture through drilling offsetting wells, so as to capture their full share of the underlying resources. The state contended that the regulation was designed to protect
surmised that:

[T]he sole purpose of the limitation which the order imposes upon the plaintiffs' production is to compel those who may legally produce, because they have market outlets for permitted uses, to purchase gas from potential producers whom the statute prohibits from producing because they lack such a market for their possible product.571

Thus,

[t]he use of the pipe line owner's wells and reserves is curtailed solely for the benefit of other private well owners. The pipe line owner, a private person, is, in effect, ordered to pay money to another private well owner for the purchase of gas which there is no wish to buy.572

"There is here no taking for the public benefit; nor is payment of compensation provided. Plaintiffs' pipe lines are private property. So far as appears, they are constructed on private lands. There is no suggestion that any of them is a common carrier of gas."573 "[T]his Court has many times warned that one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid."574 Requiring the companies to purchase the gas necessary to fulfill existing contracts from others, the Court concluded, "results in depriving the plaintiffs of property."575 "Our law reports present no more glaring instance of the taking of one man's property and giving it to another."576

This ringing affirmation of the principle of neutrality was delivered February 1, 1937. Franklin Roosevelt's landslide re-election to the presidency, which had preceded argument of the case before the Court, lay nearly three

the correlative rights of owners in a common reservoir to their justly proportionate shares of the gas contained therein. Id. at 68-69.

571 Id. at 77.

Plaintiff's operations are neither causing nor threatening any overground or underground waste. Every well owner in the field is free to produce the gas, provided he does not do so wastefully. He is legally and, so far as appears, physically free to provide himself with a market and with transportation and marketing facilities. There is no basis for a claim that his right, or opportunity, will be interfered with by a disproportionate taking by any one of those who may legally produce.

Id. at 77.

572 Id. at 78.

Moreover, he is thus prevented from protecting himself, to the extent that he is able to market his gas, against the losses which ... are occurring and will continue to occur due to drainage from the high-pressure areas, wherein plaintiffs' wells are located, to the existing low-pressure areas, in which are located the majority of the wells not connected to pipe lines.

Id. at 78.

573 Id. at 78-79.

574 Id. at 80.

575 Id. at 79.

576 Id.
months in the past. The conference at which Justice Roberts had announced his vote to uphold the Washington minimum wage statute at issue in *West Coast Hotel v. Parrish* had occurred six weeks earlier, on December 19, 1936. Yet the decision in *Thompson* invalidating the Railroad Commission’s proration order was unanimous. And the opinion of the Court was authored by Justice Louis D. Brandeis.

Consider now another little-noted case decided in 1937, *Hartford Steam Boiler Inspection & Insurance Co. v. Harrison.*

577 *Harrison* was argued February 2, and the opinion of the Court was delivered May 24, the very day that the decisions in the *Social Security Cases* were announced. The case involved a Georgia statute forbidding any stock insurance company writing fire and casualty policies within the state to act through agents who were salaried employees of the company. The statute allowed mutual insurance companies to do what it forbade to stock companies, however, and the Hartford complained that the discrimination violated the Equal Protection Clause of the Fourteenth Amendment.

A majority of the Justices agreed. “Despite the broad range of the State’s discretion,” wrote Justice McReynolds, “it has a limit which must be maintained if the constitutional safeguard is not to be overthrown. Discriminations are not to be supported by mere fanciful conjecture. They cannot stand as reasonable if they offend the plain standards of common sense.”

Permitting mutuals to negotiate their contracts through salaried employees enabled them to reduce their expenses of operation and thereby offer insurance to policyholders at lower cost. The Court could discover no reasonable basis for excluding stock companies from the enjoyment of this privilege allowed to mutuals. The statutory discrimination simply advantaged one class of insurance company over another.

Unlike *Thompson, Harrison* was not unanimous. The decision was 5-4. Yet the crucial fifth vote joining the Four Horsemen came not from Justice Roberts, but instead from Chief Justice Hughes. In fact, Justice Roberts authored a dissent on behalf of himself and Justices Brandeis, Stone, and Cardozo:

The presumption of constitutional validity must prevail unless the terms of the statute, or what we judicially know, or facts proved by the appellants, overthrow that presumption. As it is conceivable that conditions existed in Georgia which justified the difference in treatment of the agents of the two sorts of companies, and as no circumstances are

577 301 U.S. 459 (1937).
578 *Id.*
579 *Id.* at 460.
580 *Id.*
581 *Id.* at 462 (citation omitted).
582 *Id.* at 463.
583 *Id.* at 462-63 (finding no "good reason for the discrimination").
584 *Id.* at 468 (naming those Justices who joined Roberts’s dissent).
alleged or proved or are of judicial knowledge which negative the existence of those conditions, the attack upon the statute should fail. 585

Though his dissent in Harrison indicated his disagreement with the majority over whether the statutory discrimination at issue constituted class legislation, neither Harrison nor West Coast Hotel signaled Roberts’ retreat from the view that true class legislation was constitutionally proscribed. Nor would Harrison be Hughes’ last stand for the principle of neutrality. A few examples will suffice to illustrate the point.

Consider first a decision that might be regarded as a bookend to Thompson. In 1938 the Texas Railroad Commission issued a proration order both limiting oil production in the East Texas oil field to 522,000 barrels per day and allocating authorized production among the existing wells. 586 The most productive wells were limited to 2.32% of their hourly capacity, but for fear that the lower-capacity wells would have to be abandoned were their production similarly curtailed, they were permitted to produce up to twenty barrels per day. 587 Approximately 74% of the allowable production was accordingly allocated to low-capacity wells exempted from the hourly capacity formula. 588 The Rowan & Nichols Oil Company owned wells that were capable of significant output, but the hourly capacity formula to which they were subject limited their production to twenty-two barrels per day. 589 The company contended that this limitation deprived them of the right to oil in place beneath their ground, and enabled neighboring operators to drain oil away from their reserves. 590 They contended further that the Commission’s method of allocation failed to take into account a variety of relevant factors, and was therefore unreasonable, arbitrary, and confiscatory. 591 As a consequence, they contended, the order deprived them of their property without due process of law. 592

Justice Frankfurter’s opinion sustaining the order was joined by each of Frankfurter’s fellow Roosevelt appointees: Justices Black, Reed, Douglas, and

585 Id. at 465. Roberts observed that “ordinarily such agents [of mutuals] work on salary because, in effect, they are the agents of the policyholders rather than of independent owners of a stock corporation.” Id. at 468. It was therefore plain that there is reason for classifying them differently from agents of stock companies. In the light of the facts the classification of the agents of the two sorts of company cannot be said to be arbitrary or unreasonable, and so to deny the agents of the stock companies the equal protection of the laws.

Id.

587 Id. at 577.
588 Id.
589 Id.
590 Id. at 578.
591 Id.
592 Id.
Murphy. Frankfurter's majority opinion struck a deferential posture toward decisions made by expert administrative bodies: "A controversy like this always calls for fresh reminder that courts must not substitute their notions of expediency and fairness for those which have guided the agencies to whom the formulation and execution of policy have been entrusted."593 "It is not for the federal courts to supplant the Commission's judgment even in the face of convincing proof that a different result would have been better."594

Though Justice Stone joined Frankfurter's majority opinion, the remaining members of the unanimous Thompson Court dissented. Chief Justice Hughes and Justice McReynolds concurred in Justice Roberts's assessment:

The opinion of this court, in my judgment, announces principles with respect to the review of administrative action challenged under the due process clause directly contrary to those which have been established. A recent exposition of the applicable principles is found in the opinion of Mr. Justice Brandeis, written for a unanimous court, in Thompson v. Consolidated Gas Utilities Corp., 300 U.S. 55, dealing with a proration order affecting gas, entered by the same commission which entered the order here in issue. I think that adherence to the principles there stated requires the affirmance of the [lower court's] decree [enjoining the Commission from enforcing its order].595

Rowan & Nichols was by no means an isolated instance. In the 1936 case of Colgate v. Harvey,596 Hughes and Roberts had joined Sutherland's 6-3 opinion holding that a provision of the Vermont Income and Franchise Tax Act of 1931, which treated interest income from money loaned within the state more favorably than income from money loaned outside the state, violated the Equal Protection and Privileges or Immunities Clauses of the Fourteenth Amendment.597 Sutherland wrote:

593 Id. at 580-81. "[W]hether a system of proration based upon hourly potential is as fair as one based upon estimated recoverable reserves or some other factor or combination of factors, is in itself a question for administrative and not judicial judgment." Id. at 581.

Certainly in a domain of knowledge still shifting and growing, and in a field where judgment is therefore necessarily beset by the necessity of inferences bordering on conjecture even for those learned in the art, it would be presumptuous for courts, on the basis of conflicting testimony, to deem the view of the administrative tribunal, acting under legislative authority, offensive to the Fourteenth Amendment. Id. at 581-82. "Plainly these issues are not for our arbitrament." Id. at 583. "[T]hese questions take us into that debatable territory which it is not the province of federal courts to enter." Id. at 583.

594 Id. at 584.

595 Id. at 585 (Roberts, J., dissenting). A revised Commission order challenged on similar grounds was upheld by an identically divided Court the following term. R.R. Comm'n of Tex. v. Rowan & Nichols Oil Co., 311 U.S. 570, 577 (1941).

596 296 U.S. 404 (1935).

597 Id. at 428, 436.
The test to be applied in such cases as the present one is: does the statute arbitrarily and without genuine reason impose a burden upon one group of taxpayers from which it exempts another group, both of them occupying substantially the same relation toward the subject matter of the legislation?\(^{598}\)

The majority found that the provision in question failed to pass that test. The classification was "based upon a difference having no substantial or fair relation to the object of the act,"\(^{599}\) and therefore imposed a "discrimination" that was "arbitrary."\(^{600}\)

Four years later, a reconstituted Court would explicitly overrule \textit{Colgate}. \textit{Madden v. Kentucky} \(^{601}\) involved a challenge to the constitutionality of a Kentucky statute taxing deposits in Kentucky banks at a lower rate than deposits in out-of-state banks. Justice Stanley Reed's opinion for the Court rejected the taxpayer's contentions that the statute violated the Equal Protection and Privileges or Immunities clauses.\(^{602}\) Justice Douglas' notation on his return of Reed's circulated draft opinion captured his delight in this ritual slaying of the elders. "Three cheers!," he wrote. "Let's go out and get drunk!"\(^{603}\) Yet Hughes and Roberts, neither of whom was prepared to repudiate \textit{Colgate}, would not join the party. Hughes concurred in the result "upon the ground, as stated by the Court of Appeals of Kentucky, that the classification adopted by the legislature rested upon a reasonable basis."\(^{604}\) Justice Roberts, by contrast, dissented.

Four years ago in \textit{Colgate v. Harvey}, this court held that the equal protection clause and the privileges and immunities clause of the Fourteenth Amendment prohibit such a discrimination as results from the statute now under review. I adhere to the views expressed in the opinion of the court in that case, and I think it should be followed in this.\(^{605}\)

We may draw a third example from the rich New Deal saga of milk regulation. The 1936 decision of \textit{Mayflower Farms v. Ten Eyck}\(^{606}\) involved a provision of the New York Milk Control Act discriminating in the price that could be charged by milk dealers based on the date of their entry into the market. Hughes and the Four Horsemen joined Justice Roberts' opinion for the Court invalidating the challenged provision. Roberts reported that

\(^{598}\) Id. at 423.

\(^{599}\) Id. at 424.

\(^{600}\) Id. at 425.

\(^{601}\) 309 U.S. 83 (1940).

\(^{602}\) Id. at 93.

\(^{603}\) Justice Douglas, Return of Madden v. Kentucky, Stanley Reed MSS Box 66 (available from the University of Kentucky).

\(^{604}\) Madden, 309 U.S. at 93.

\(^{605}\) Id. at 93-94 (citations omitted).

\(^{606}\) 297 U.S. 266 (1936).
examination of the record disclosed no reason supporting the discrimination, and that New York officials did "not intimate that the classification bears any relation to the public health or welfare generally; that the provision [would] discourage monopoly; or that it was aimed at any abuse, cognizable by law, in the milk business." The practical effect of the statute was that "during the life of the law no person or corporation might enter the business of a milk dealer in New York City." It was thus a legislative "attempt to give an economic advantage to those engaged in a given business at an arbitrary date as against all those who enter the industry after that date." The classification was therefore "arbitrary and unreasonable," and denied Mayflower Farms the equal protection of the laws.

Three years later the justices were faced with a cognate issue at the federal level. In United States v. Rock-Royal Co-op., Inc., the Court upheld orders issued by the Secretary of Agriculture setting minimum prices for milk sales in the metropolitan areas of Boston and New York. Justice Roberts wrote a dissenting opinion, which was joined by Chief Justice Hughes "so far as it relates to the invalidity of the order on the ground stated." That ground was that, "as drawn and administered," one of the orders deprived small handlers of milk in the New York marketing area of their property without due process of law. Through a mechanism characterized as price "blending," the order authorized larger handlers of milk, who sold milk both within and without the marketing area, to purchase milk in the production area at a price lower than the minimum price at which smaller handlers, who purchased milk for sale only in the marketing area, were permitted to pay. This permitted the larger handlers "to resell the milk in the marketing area, in which no resale price is fixed, at a cut rate which is destructive of their competitors' business." The order therefore "inevitably tend[ed] to destroy the business of smaller handlers by placing them at the mercy of their larger competitors." Such a "discrimination" against the little guy was, like a discrimination freezing out potential market entrants, inconsistent with minimal requirements of equal treatment imposed by the Due Process Clause of the Fifth Amendment. Hughes and Roberts continued to maintain that discriminations forbidden to the states by the Equal Protection Clause in cases like Mayflower were

607 Id. at 274.
608 Id. at 273.
609 Id. at 274.
610 Id.
611 307 U.S. 533 (1939).
612 Id. at 587.
613 Id.
614 Id. at 584.
615 Id. at 586-87.
616 Id. at 587.
617 Id. at 583-87.
forbidden to the federal government by the Fifth Amendment’s Due Process Clause.

Roberts would continue to adhere to such positions throughout his career on the Court: Even in the spring of his final term he could be found objecting to deprivations of property and discriminations among economic actors that his colleagues regarded as constitutionally unproblematic. As each of these instances makes clear, it is misleading characterize West Coast Hotel as signaling the demise of Lochner, broadly understood. For the notion that the Court ought to enforce Fifth and Fourteenth limitations on economic regulation continued to live on in the bosoms of a majority of the Justices who participated in that decision. The fact that their positions could no longer find expression in a majority opinion invalidating regulatory legislation was attributable not to any change of heart on their part, but instead to President Roosevelt’s replacement of retiring justices with New Dealers who did not share their views. As Max Planck wrote in his Scientific Autobiography: “A new scientific truth does not triumph by convincing its opponents and making them see the light, but rather because its opponents eventually die, and a new generation grows up that is familiar with it.”

I shall explore only one final example of this phenomenon, because it leads me to a larger point. In 1939, Justice Stone delivered the opinion of the Court in United States v. Lowden. That decision upheld an order of the Interstate Commerce Commission allowing one railroad company to lease its facilities to

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618 See United States v. Willow River Power Co., 324 U.S. 499, 511-15 (1945) (Roberts, J., and Stone, C.J., dissenting from opinion holding that government action reducing the head of water available to an electrical power plant did not constitute a taking requiring compensation under the Fifth Amendment); United States v. Commodore Park, Inc., 324 U.S. 386, 393 (Roberts, J., dissenting from opinion holding that the Fifth Amendment did not require compensation of riparian landowner whose property was reduced in market value but not invaded by government dredging operation); Charleston Fed. Savings & Loan Ass’n v. Alderson, 324 U.S. 182, 192-93 (1945) (Roberts, J. dissenting from opinion upholding tax assessments against equal protection challenge, finding that “persons and corporations whose circumstances are precisely similar to those of the complaining taxpayers, and persons competing in the investment field with them and holding similar security, have been benefited by assessments purposely intended to discriminate in their favor, and against the complainants”).

619 MAX PLANCK, SCIENTIFIC AUTOBIOGRAPHY AND OTHER PAPERS 33-34 (Frank Gaynor trans., 1949). Failure to appreciate these continuities in the thought and judicial performance of Hughes and Roberts have led some both to overestimate the significance of West Coast Hotel and to underestimate the importance of Nebbia. See Bruce Ackerman, Revolution on a Human Scale, 108 YALE L.J. 2279, 2335 (1999) (discounting the idea that Nebbia significantly changed due process doctrine); David A. Pepper, Against Legalism: Rebutting an Anachronistic Account of 1937, 82 MARQ. L. REV. 63, 150 (1998) (dismissing constitutional accounts of the New Deal that emphasize the importance of Nebbia); 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 489 n.38 (1998) (suggesting that some legal scholars mistakenly emphasize Nebbia and discount the importance of 1937).

620 308 U.S. 225 (1939).
another railway company. Because the ICC recognized that the lease would result in the discharge or transfer of several employees of the lessor railroad, the order conditioned the agency’s approval of the lease agreement on the payment of partial compensation to such employees for any losses they might suffer as a consequence. Invoking the precedent of Railroad Retirement Board v. Alton, the trustees in bankruptcy of the railroads involved asserted that the order was neither within the scope of congressional power to regulate interstate commerce nor consistent with the requirements of due process. Justice Stone brushed aside each of these objections. "[N]otwithstanding what was said" in Alton, he wrote, the order was rationally related to the protection of the public interest as defined by the statute, and that was sufficient to sustain it. Stone later wrote privately to Robert Jackson that the Lowden decision would “serve as both a footnote and a headstone” for Alton. Yet the unanimity of the opinion should not lead us to conclude that all of Stone’s colleagues shared his enthusiasm for Alton’s internment. On his return of the opinion Justice McReynolds wrote, “Sorry; but this seems to me both wrong and unfortunate.” And on his return Justice Roberts, alluding to the position he had announced at the conference, wrote, “I voted the other way, but am not disposed to say anything; and unless someone else writes, I shall acquiesce.” No one else did write – not even McReynolds, the sole remaining Horseman – and Roberts accordingly did acquiesce. But he did not agree. The decision was unanimous only because he suppressed his dissenting views.

The attorneys arguing the Lowden case in 1939 had good reason to suspect that Justice Roberts continued to adhere to the views he had expressed for the Court in Alton. His opinion had been cited favorably in an opinion the Court had handed down only the preceding year. In United States v. Carolene Products Co., the Court had upheld a federal statute prohibiting interstate shipment of “filled milk” as both within the power of Congress to regulate interstate commerce and consistent with due process. We are most familiar

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621 Id. at 238.
622 Id. at 228.
623 Id. at 239.
624 Id. at 239-40.
626 Justice McReynolds, Return of United States v. Lowden, Stone MSS, Box 65 (available from the collections of the Manuscript Division, Library of Congress).
627 Justice Roberts, Return of United States v. Lowden, Stone MSS Box 65 (available from the collections of the Manuscript Division, Library of Congress).
628 304 U.S. 144 (1938).
629 Id. at 145-46 & 146 n.1 (citing Filled Milk Act, ch. 262, 42 Stat. 1486 (1923) (codified at 21 U.S.C. §§ 61-63)).
with those portions of Justice Stone's opinion which appear under the heading "Third." This is where one finds both the famous Footnote Four and the oft-quoted passage articulating a deferential standard of review in cases involving economic regulation. "[R]egulatory legislation affecting ordinary commercial transactions," Stone wrote, "is not to be pronounced unconstitutional unless in light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators." Stone then elaborated this assertion by setting forth a series of qualifications that have been lavished with far less attention. For present purposes, I want to call to your attention only one:

[W]e recognize that the constitutionality of a statute, valid on its face, may be assailed by proof of facts tending to show that the statute as applied to a particular article is without support in reason because the article, although within the prohibited class, is so different from the others of the class as to be without the reason for the prohibition.

In support of this proposition Stone cited Roberts' majority opinion in Alton.

One might regard such a favorable citation of Alton in the opinion

630 Id. at 152-54.
631 Id. at 153 n.4.
632 Id. at 152.
633
We may assume for present purposes that no pronouncement of a legislature can forestall attack upon the constitutionality of the prohibition which it enacts by applying opprobrious epithets to the prohibited act, and that a statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis.

Id.

Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry, and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist.

Id. at 153 (citations omitted).
634 Id. at 153-54.
635 Id. at 153-54 (citing R.R. Ret. Bd. v. Alton R.R. Co., 295 U.S. 330, 349, 351, 352 (1935). I should pause here to remark upon the significance of this passage for Professor Bernstein's thesis as well. The quoted sentence demonstrates that, as late as 1938, Justice Stone continued to maintain what Justice Roberts and Chief Justice Hughes would in 1939 argue in their Rock-Royal dissents: that the Due Process Clause forbade classifications lacking a rational basis, i.e., the Due Process Clause forbade arbitrary classifications. This is particularly noteworthy because earlier in the opinion Justice Stone had insisted that "[t]he Fifth Amendment has no equal protection clause." Id. at 151. Arbitrary classifications were prohibited not only by the Equal Protection Clause; they were forbidden by the Due Process Clause as well.
announcing the triumph of deferential review with more than a little surprise. *Alton* had evoked considerable opprobrious commentary in the law review literature, and had elicited some rather tart private observations from the author of *Carolene Products* himself. In a 1935 letter to Thomas Reed Powell, Justice Stone had declared that "the decision in the Railroad Retirement Act was the worst performance of the Court in my time." To Felix Frankfurter Stone opined that *Alton* was "about the worst performance of the Court since the Bake Shop case," *Lochner v. New York*. Yet it appears that Stone must have been induced to invoke the precedent he so detested in order to accommodate Justice Roberts. For Roberts was the only member of the *Carolene Products* majority who was also in the *Alton* majority. Justice McReynolds dissented without opinion, while Justice Butler wrote a separate opinion concurring only in the result. Stone and Brandeis had joined Hughes' dissent in *Alton*, and certainly had no reason to recognize any continuing vitality in the precedent. And Justice Black, the fifth member of the *Carolene Products* majority, did not even join that portion of the opinion in which the famous "deferential standard" was articulated. Black recognized that the rational basis test adopted by the majority was not the rational basis test as we have come to understand it. He wrote to Stone:

> As I read the opinion in connection with the cases cited it approves the submission of proof to a jury or a court under certain circumstances to determine whether the legislature was justified in the policy it adopted. This is contrary to my conception of the extent of judicial power of

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637 Letter from Harlan Fiske Stone, Justice of the United States Supreme Court, to Thomas Reed Powell (May 31, 1935), quoted in Mason, supra note 625, at 397.


639 Justices Cardozo and Reed did not participate in *Carolene Products*.

640 The published report of the case noted that Black "concurs in the result and in all of the opinion except the part marked 'Third.'" United States v. Carolene Products Co., 304 U.S. 144, 155 (1938).
Stone wrote back to Black inquiring, "Would you ever hold any statute unconstitutional on grounds of substantive due process? If not, then of course you could not agree with the third [section] in the opinion in the *Carolene* case." This exchange makes clear, as Louis Lusky, Stone's clerk during the term in which *Carolene Products* was decided, later remarked: "[T]he notion that the Footnote calls for denial of strict scrutiny in all cases involving property rights or economic interests" is a "misconception."

The fragmentation of the *Carolene Products* Court helps to illustrate the difficulties inherent in trying to pin down *Lochner*-era due process jurisprudence. At one end of the spectrum lay Black, who would not join part Third of Stone's opinion because he believed that the courts simply had no business employing the doctrine to review the policy judgments of legislatures. At the other end lay the dissenting McReynolds, who thought that the courts had plenty of business doing so, and ought to more often. Justice Butler, who agreed with McReynolds in due process cases frequently but not uniformly, was prepared to concur in the result of Stone's *Carolene Products* opinion, but not in its reasoning. Stone, Hughes, and Roberts, each of whom joined the *Carolene Products* majority, also had been in agreement with respect to the issues presented in *Nebbia* and *West Coast Hotel*. Yet Stone had disagreed with Hughes and Roberts in *Mayflower* and *Colgate*, with Hughes in *Harrison*, and with Roberts in *Alton*; he would disagree with Roberts again in *Madden* and *Lowden*, and with Hughes and Roberts in *Rock-Royal* and *Rowan & Nichols*. One could continue in this vein, but the point, I

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641 See Letter from Hugo Lafayette Black, Justice of the United States Supreme Court, to Harlan Fiske Stone, Justice of the United States Supreme Court (Apr. 21, 1938) reprinted in Louis Lusky, *Footnote Redux: A Carolene Products Reminiscence*, 82 COLUM. L. REV. 1093, 1109 (1982) (emphasis added). Cf. 2 ACKERMAN, supra note 619, at 489-90 n.45 ("The real surprise was Black, who refused without any giving any reasons to join the crucial section of Stone's opinion.").

642 ROGER K. NEWMAN, HUGO BLACK 277 (1994) (quoting Letter from Hugo Lafayette Black, Justice of the United States Supreme Court, to Harlan Fiske Stone, Justice of the United States Supreme Court (Apr. 22, 1938)).

643 Lusky, supra note 641, at 1105.

644 See Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) (holding that the legislature has broad scope in dealing with economic problems).

645 The case had come to the Court on appeal from the trial court's order sustaining a demurrer to the indictment. Butler would have allowed the trial to go forward, with the defendant permitted "to show that the declaration of the act that [filled milk was] injurious to public health and that the sale of it [was] a fraud upon the public [were] without any substantial foundation." U.S. v. *Carolene Products*, 304 U.S. 144, 155 (1938) (Butler, J., concurring). Butler made clear his opinion that, if the provisions of the act were "construed to exclude from interstate commerce wholesome food products that demonstrably [were] neither injurious to health nor calculated to deceive, they [were] repugnant to the Fifth Amendment." *Id.*
hope, is clear: there were as many positions on this spectrum of opinion as there were justices to assume them. There were not only two possible positions: "aggressive" or "deferential" review. Justices Holmes and Brandeis, whom Professor Bernstein characterizes as "completely reject[ing] the mode of jurisprudence associated with Lochner," in fact frequently wrote or joined in opinions invalidating rate regulation and other exercises of the police or taxing power on the ground that they constituted deprivations of liberty or property without due process. Hughes and Roberts rejected the principal categorical

646 Bernstein, supra note 2, at 10 n.28.

647 See, e.g., Louisville & Nashville R.R. Co. v. Cent. Stock Yards Co., 212 U.S. 132, 145 (1909) (Holmes); Mo. Pac. Ry. Co. v. Nebraska, 217 U.S. 196, 208 (1910) (Holmes); Eubank v. Richmond, 226 U.S. 137, 144-45 (1912) (Holmes); San Joaquin & Kings River Canal & Irrigation Co. v. County of Stanislaus, 233 U.S. 454, 458-61 (1914) (Holmes); Chi., Milwaukee, & St. Paul Ry. v. Pott, 232 U.S. 165, 167 (1914) (Holmes); Terminal Taxicab Co. v. Kutz, 241 U.S. 252, 257 (1916) (Holmes); Myles Salt Co. v. Bd. of Comm'n's, 239 U.S. 478, 484-85 (1916) (Holmes); Brooks-Scanlon Co. v. R.R. Comm'n of La., 251 U.S. 396, 400 (1920) (Holmes and Brandeis); St. Louis Cotton Compress Co. v. Arkansas, 260 U.S. 346, 348-49 (1922) (Holmes and Brandeis); Chas. Wolff Packing Co. v. Court of Indus. Relations of Kan., 262 U.S. 522, 533 (1923) (Holmes and Brandeis); Dorchy v. Kansas, 264 U.S. 286, 287 (1924) (Holmes and Brandeis); Chas. Wolff Packing v. Court of Indus. Relations of Kan., 267 U.S. 552, 569 (1925) (Holmes and Brandeis); Mich. Pub. Util. Comm'n v. Duke, 266 U.S. 570, 577-78 (1925) (Holmes and Brandeis); Yu Cong Eng v. Trinidad, 271 U.S. 500, 526-28 (1926) (Holmes and Brandeis); Rv. Improvement Dist. v. Mo. Pac. R.R. Co., 274 U.S. 188, 194 (1927) (Holmes and Brandeis); Standard Pipe Line Co. v. Miller County Highway & Bridge Dist., 277 U.S. 160, 162 (1928) (Holmes and Brandeis); Washington v. Roberge, 278 U.S. 116, 122-23 (1928) (Holmes and Brandeis); Williams v. Standard Oil Co., 278 U.S. 235, 245 (1928) (Brandeis concurring in the result); Manley v. Georgia, 279 U.S. 1, 6-7 (1929) (Holmes and Brandeis); Western & A.R.R. v. Henderson, 279 U.S. 639, 643-44 (1929) (Holmes and Brandeis); Smith v. Cahoon, 283 U.S. 553 (1931) (Holmes and Brandeis); Louisville Joint Stock Bank Co. v. Radford, 295 U.S. 555, 601-02 (1935) (Brandeis); Thompson v. Consol. Gas Co., 300 U.S. 55, 76-81 (1937) (Brandeis). Professor Phillips reports that "Holmes joined all but five of the cases striking down the rate orders directed at businesses affected with a public interest during the years 1902-1932," and that "[o]f the decisions striking down regulatory orders directed at such businesses over those same years, Holmes dissented from only one. Indeed, he wrote for the Court in three of these cases." Phillips, supra note 13, at 60. See id. at 95 ("even Holmes joined most of the rate cases decided during his tenure on the Court"). Professor Phillips finds that in more than half of the decisions "using substantive due process to strike down government action" handed down during his tenure, Justice Holmes was in the majority. Id. at 89, n.243. Professor Phillips thus concludes that Holmes' "reputation as a foe of Lochner-era substantive due process is undeserved." His famous dissents were evidence not of "disputes about the propriety of substantive due process in general," but instead "disputes within substantive due process." Id. at 61.

For a comprehensive survey of the many instances in which Justice Holmes wrote or joined such opinions, see Phillips, supra note 8, at 1083-86. See also Ely, Jr., supra note 106, at 81 ("Notwithstanding a professed willingness to permit lawmakers great latitude in making policy, Holmes sometimes voted to strike down economic regulations under the due
restraints of economic substantive due process, such as the limitation of price regulation to businesses affected with a public interest, while continuing to require that regulatory legislation satisfy a rationality standard with some bite. They embraced broader notions of public purpose and accordingly less demanding standards of government neutrality than did the Four Horsemen. At the same time they were not prepared to join Justice Black in abandoning entirely the Court’s traditional role of enforcing state neutrality – particularly in cases involving the right to pursue a lawful calling on terms of equality with all others.

In forming the majority in *West Coast Hotel*, then, Hughes and Roberts were not announcing their conversion to the due process views of Holmes, or Brandeis, or Black, or anyone else. Nor were they tolling the death knell of the *Lochner* era. They were simply announcing that a particular form of police power regulation – a minimum wage law for women – was consistent with the requirements of due process. That 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, notwithstanding three decisions in which the authority of *Adkins* was affirmed. A decision upholding a minimum wage decision could thus plausibly have been announced at a number of junctures during the *Lochner* era, and comfortably co-existed in the minds of many of the justices with other decisions invalidating regulatory measures on due process.

process or contract clause during Fuller’s tenure.

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648 For a discussion of the manner in which Chief Justice Hughes’ opinion for the Court both operated within conventional police power categories and demonstrated how minimum wage legislation might be reconciled to the principle of neutrality, see Cushman, *supra* note 78, at 85-92.

649 Stettler v. O’Hara, 243 U.S. 629, 1930 (1917) (affirmed by an equally divided Court a decision upholding Oregon’s minimum wage law). Justice Brandeis recused himself because he had been counsel to the state on the matter before being appointed to the Court. Had he been at liberty to participate, the decision upholding the minimum wage against a due process challenge would have been 5-4. See Bickel & Schmidt, supra note 295, at 592-603 reviewing the Justices’ positions regarding maximum hours and minimum wages.

650 *Adkins* v. Children’s Hosp., 261 U.S. 525, 567-71 (1923) (Taft, C.J., dissenting from the majority’s decision to invalidate decrees based on minimum wage statutes). The vote was 5-3, with Justice Brandeis again not participating.

651 See Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587, 618 (1936) (invalidating New York minimum wage statute by a vote of 5-4); Donham v. West-Nelson Mfg. Co., 273 U.S. 657, 657 (1927) (per curiam) (Justices Taft, Holmes, Sanford, and Stone concurring silently in decision invalidating Arkansas minimum wage statute, with Justice Brandeis dissenting alone); Murphy v. Sardell, 269 U.S. 530, 530 (1925) (per curiam) (Justices Taft, Sanford, and Stone concurring silently in decision invalidating Arizona minimum wage statute, with Justice Brandeis dissenting and Justice Holmes concurring on the ground that he considered himself bound by the authority of *Adkins*). For an explanation of Justice Roberts’ vote in *Tipaldo*, see Cushman, *supra* note 78, at 92-104.
grounds. It is only by virtue of the fact that West Coast Hotel was announced in the politically-charged year of 1937, at a time quickly followed by a recomposition of the Court’s personnel, that it has come to be invested with such exaggerated significance.

Supreme Court history is of course in part an exercise in collective intellectual biography, and its component parts are the individual intellectual biographies of the members of the Court. For the 1930s, we have thick intellectual biographies of the liberal justices, and, thanks in part to Lochner revisionism, a thicker understanding of the conservative justices than we once had. But our understanding of the moderates, and particularly of Justice Roberts, has remained thin; he and the Chief have been seen as the Oaklands of the Hughes Court – there was no jurisprudential there there. But if we are to understand the various strands and flavors of Lochnerism embraced by the Justices, as well as the mechanism though which Lochnerism ceased to dominate the nation’s jurisprudence, we must not visualize the Court as an entity with two “wings,” to and from which the moderates flitted unpredictably back and forth. We must instead envision the institution as a Venn diagram with which we can map the intersections and divergences of related yet distinct jurisprudential ideologies.

CONCLUSION

Lochnerism was a phenomenon with more than one face. Some Lochnerian decisions framed the right in question as one sounding in liberty, emphasizing constitutional protection from government infringement of such fundamental rights as those
to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Other decisions, most prominently those involving price and rate regulation, emphasized a right sounding more in formally neutral treatment, prohibiting government from favoring one citizen over another by, for example, taking the

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652 One contemporary commentator surmised that there was a majority for upholding minimum wage regulation until June of 1922, and that the appeal in Adkins might have been entertained and a decision sustaining the statute issued had the Court of Appeals of the District of Columbia not ordered rehearing and reargument following its decision initially upholding the statute. Thomas Reed Powell, The Judiciality of Minimum-Wage Legislation, 37 Harv. L. Rev. 545, 547-56 (1924). Powell conducted a survey of decisions of the United States Supreme Court, the federal courts of appeal, and state supreme courts involving the constitutionality of minimum wage legislation, concluding that thirty-five of the forty-five judges and justices sitting in such cases had voted to sustain the challenged statutes. Id. at 547-53.

property of A and giving it to B. Yet still other Lochner-era opinions invalidating regulatory legislation emphasized neither fundamental liberties nor qualms about redistribution. Cases like Jay Burns Baking and Weaver v. Palmer Bros. instead focused rather narrowly on whether the particular means employed by the regulation in question were reasonable under the circumstances. None of these categories of substantive due process existed to the exclusion of the other. Indeed, we have seen that in many instances these categories of rights intersected: concern for both formally neutral treatment and the protection of fundamental liberty each found prominent expression in the opinion of the Court. Each of these categories was important, together comprising the phenomenon we have come to know as Lochnerism. Nevertheless, my own judgment continues to be that the principle of neutrality, and particularly the prohibition on taking from A and giving to B, constituted the preeminent strand of substantive due process jurisprudence—least, the counter-revisionists have yet to persuade me to the contrary.

I recognize, of course, that there is a sense in which the taxonomy I suggest is both contingent and problematic. The due process cases emphasizing fundamental rights characterized the statute as depriving the regulated entity of liberty without due process; the cases involving the A to B prohibition found that the statute deprived the entity of property. As a conceptual matter, cases falling into one category could have been characterized in terms that would have placed them in the other. Many of the cases prohibiting redistribution, for instance, might have been characterized as infringements of fundamental rights of liberty. Thus, for example, insofar as the government takes the property of A and gives it to B, the state simultaneously deprives A of the liberty to contract with respect to that property. Similarly, the Court might have characterized price and rate regulations not only as deprivations of property without due process, taking from A and giving to B, but also or alternatively as depriving the regulated entities of the liberty to contract concerning the terms upon which they would make their goods and services available to the public. By the same token, there is a sense in which the fundamental rights decisions speaking in the idiom of liberty might be recast in the idiom of neutrality, as applications of a prohibition on taking liberty from A in order to increase the liberty of B. One might take the Halean position that the state can neither increase nor decrease the amount of liberty in society—that there is a “fixed quantum” of liberty in the universe, and the law can only allocate it. On this view, for example, one might characterize a law prohibiting the teaching of German in elementary school as depriving A of the liberty to study German in school, while simultaneously endowing B with the liberty to study in a German-free school zone, thereby favoring B over A.654 All of this I recognize. But my concern here has not been with the deeper conceptual relationship among these expressions of substantive due process, nor with how

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654 See Ian Ayres, Discrediting the Free Market, 66 U. Chi. L. Rev. 273, 276 (1999), reviewing FRIED, supra note 519; at 46.
these concepts might have been translated and expressed in other terms. My concern has instead been with the manner in which the justices themselves thought and wrote about due process limitations on government regulation. And I believe that the cases make clear that the judicial conception of the nature of those limitations was not unitary in character.

Professors Gillman, Bernstein, and Post each have examined portions of the historical record, and each has found evidence to help substantiate his claim. Professor Bernstein succeeds in identifying rhetoric in *Lochner* era opinions evidencing solicitude for the protection of “natural,” “prepolitical,” “inherent,” “inalienable,” “essential,” “fundamental,” “unenumerated” rights. Both he and Professor Post show the linkage justices drew between such unenumerated economic rights as liberty of contract and the sorts of unenumerated civil liberties protected in cases like *Meyer v. Nebraska* and *Pierce v. Society of Sisters*. Professor Post thoughtfully reminds us that *Lochner*’s insistence that legislation be “reasonable” required that the means selected by regulation not offend understandings of the physical world informed by the texture of our collective experience. And Professor Gillman rightly emphasizes the central role that preoccupations with formal equality, generality, and neutrality played in the Court’s interpretation of the Due Process Clauses. Each of these scholars has contributed to our understanding of the period’s jurisprudence. Yet it appears to me that none of them—indeed, no scholar with whose work I am familiar—has held that jurisprudence in his hand, like Tennyson’s little flower in the crannied wall, and understood what it is, root and all, and all in all. It may be that the very complexity and elusiveness of *Lochner* accounts, at least in part, for its continuing capacity to fascinate a century after its public debut.

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655 Bernstein, *supra* note 2, at 31-58. This, incidentally, is a point with which many revisionists have previously expressed agreement. *See, e.g.*, White, *supra* note 255, at 88-128 (highlighting importance of “free labor” ideology in the development of liberty of contract); Charles W. McCurdy, *The “Liberty of Contract” Regime in American Law, in The State and Freedom of Contract* 161, 179-97 (Harry N. Scheiber ed., 1998) (same); Forbath, *supra* note 1, at 772-95 (same); Cushman, *supra* note 78, at 90 (same).

656 Bernstein, *supra* note 2, at 57 n.57 (“[I]t is historically inaccurate to disassociate *Lochner* from *Meyer*, as *Meyer* was a direct descendant of *Lochner.*”); Post, *supra* note 138, at 1530-41.