BYU Law Review

Volume 1980 | Issue 1 Article 5

3-1-1980

Mr. Justice Rufus W. Peckham: The Police Power and the Individual in a Changing World

William F. Duker

Mr. Justice Rufus W. Peckham: The Police Power and the Individual in a Changing World

*William F. Duker**

"[A]ll men, however great and however honest, are almost necessarily affected by the general belief of their times."

Rufus W. Peckham,
People v. Budd.[1]

I. INTRODUCTION

In searching out the origins and legitimacy of "liberty of contract," Roscoe Pound concluded that the concept had no legitimate foundation and was created by an act of judicial usurpation.[2] Pound posited a number of reasons for the establishment of the concept,[3] but failed to take notice of the most salient: liberty of contract was articulated in response to legislation designed to meet the conditions of the new industrial state. Individual liberty was threatened from two fronts: the new industrial entity and government's response to it.

This was the dilemma confronted by Rufus W. Peckham, associate justice of the New York Court of Appeals from 1887 to 1895 and Associate Justice of the United States Supreme Court from 1896 to 1909. Peckham's approach to this problem is the subject of this Article.

Peckham is probably best remembered for setting the occasion for Mr. Justice Holmes' often quoted critique of the Fuller Court's activist conception of the judicial role. In his dissent in *Lochner v. New York*,[4] Holmes charged that the majority opinion was founded "upon an economic theory which a large part of

---

* B.A., 1976, State University of New York at Albany; Ph.D., 1978, University of Cambridge.

1. 117 N.Y. 1, 47, 22 N.E. 670, 686, 78 N.Y.S. App. 185, 201 (1889) (Peckham, J., dissenting).

2. Pound, *Liberty of Contract*, 18 YALE L.J. 454, 454-58 (1909).

3. *Id.* at 457.

4. 198 U.S. 45 (1905) (Holmes, J., dissenting).

the country [did] not entertain."[5] Holmes argued that the term "liberty" as employed in the fourteenth amendment was not intended to "enact Mr. Herbert Spencer's Social Statics."[6] The "constitution [was] not intended to embody a particular economic theory;" rather, it was "made for people of fundamentally different views."[7] In support of his thesis, Holmes pointed to antitrust policy and traditional uses of the police power sanctioned by the Court.

Despite Peckham's adherence to the liberty of contract theory, he had little difficulty upholding traditional uses of the police power[8] and was the Court's most articulate spokesman in

---

5. *Id.* at 75.

6. *Id.*

7. *Id.* at 74-76.

8. In North Am. Cold Storage Co. v. Chicago, 211 U.S. 306 (1908), Peckham, speaking for the Court, rejected a challenge to a municipal code insofar as it allowed the city—without providing for a prior hearing—to seize, condemn, or destroy food unfit for human consumption. Such power was determined to inhere in a state's right and duty to safeguard the lives and health of its inhabitants. Whether to allow a prior hearing was in Peckham's opinion a legislative determination. Consequently, the Court had no reason to consider the economic interest involved. The state presumptively had the right and duty to seize and to destroy unwholesome food. *Id.* at 320-21.

In Gundling v. Chicago, 177 U.S. 183 (1900), which involved a city ordinance forbidding the sale of cigarettes without a license, the Court, in an opinion by Justice Peckham, held that unless such regulations were "so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with," they fell within the proper exercise of a state's police power. *Id.* at 188. *See also* Welch v. Swasey, 214 U.S. 91 (1908) (sustaining a state's zoning power); Phillips v. City of Mobile, 208 U.S. 472 (1908) (validating licensing fees charged breweries); Martin v. Trout, 199 U.S. 212 (1905) (upholding a state law suppressing gambling).

Peckham's opinions involving the power of eminent domain, a power closely related to the police power, also reflect the great deference Peckham generally accorded legislative judgments. In United States v. Gettysburg Elec. Ry., 160 U.S. 668 (1896), a railroad company whose land was being condemned for the erection of a war monument challenged the government's exercise of its eminent domain power. In upholding the government's exercise of power, Peckham, in a burst of patriotism applauded by the profession, wrote:

> Any act of Congress which plainly and directly tends to enhance the respect and love of the citizen for the institutions of his country and to quicken and strengthen his motives to defend them, and which is germane to and intimately connected with and appropriate to the exercise of some one or all of the powers granted by Congress must be valid.

Id. at 681. Again writing for the Court in Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1896), Justice Peckham upheld a California statute permitting the establishment of local irrigation districts empowered to exercise eminent domain and to assess all landowners in the district for the support of irrigation projects. The great deference shown state authorities in *Fallbrook* was also evident in Clark v. Nash, 198 U.S. 361 (1905), where Peckham and the Court, in determining whether a state statute permitting condemnation by an individual for the purpose of obtaining water for his own land could be

implementing the Sherman Anti-Trust Act. Peckham not only recognized limits to liberty of contract, he also rejected the manipulation of laissez-faire economics and "Social Darwinism" by a few articulate captains of industry.[9] Thus when the term "laissez-faire" is invoked to describe the judicial philosophy of Peckham, either the term must be reduced to its quintessential meaning, or it must be rejected as inaccurate. Peckham was not a spokesman for big business. And even though an instrumentalist's analysis of Peckham's liberty of contract decisions might discredit this claim, such an approach would later uncover a paradox when used to examine his antitrust opinions. Moreover, Peckham is of interest here as an intellectual force, not as a political, social, or psychological character. This Article attempts to identify Peckham's "master idea," or the concept giving guidance to Peckham's opinions. The focus is on the idea itself. Instrumentalism, which focuses on the effect of an idea, and motivational inquiry, which focuses on the causes for the formulation of the idea, are beyond the scope of this Article.

What was the master idea of Rufus W. Peckham? The juris-

---

construed as a condemnation for a public use, observed that "what is a public use may frequently and largely depend upon the facts surrounding the subject, and . . . the people of a State, as also its courts, must in the nature of things be more familiar with such facts." *Id.* at 369.

Peckham decreed that the exercise of the police power was illegitimate in the following circumstances: where a licensing fee or utility rate was shown to be unreasonable (to Peckham this was tantamount to taking property without just compensation), Postal Telegraph-Cable Co. v. Taylor, 192 U.S. 64 (1904) (confiscatory rates unconstitutional); where the police power ran afoul of congressional power over interstate commerce, Atlantic Coastal Line R.R. v. Wharton, 207 U.S. 328 (1907) (stoppage of interstate trains); Central of Ga. Ry. v. Murphy, 196 U.S. 195 (1905) (interstate shipment of goods); Schollenberger v. Pennsylvania, 171 U.S. 1 (1898) (sale of oleomargarine); or where the congressional power over patents had been interfered with, Allen v. Riley, 203 U.S. 347 (1906). In the commerce clause and patent cases the police power gave way to requirements of federal supremacy. In the utility rate cases the police power gave way to the just compensation clause where the party challenging the rates demonstrated the unreasonableness of the rate or fee.

Jacobson v. Massachusetts, 197 U.S. 11 (1905), involved a nontraditional application of the police power. A majority of the Court relied on the police power to sustain legislation requiring compulsory vaccination of adults. Although such regulations had been upheld when applied to children, the application to adults was novel. Because Peckham dissented without opinion, his position is impossible to explain with complete certainty. However, the case was handed down shortly before *Lochner*, and Peckham's position in *Jacobson* is consistent with the theory of *Lochner*. To Peckham, the compulsory vaccination law must have appeared to be a paternalistic and meddlesome interference with individual liberty.

9. Wyllie, *Social Darwinism and the Businessman*, 103 PROC. AM. PHILOSOPHICAL SOC'Y 629 (1959).

prudence of Peckham was rooted in a philosophical conception of individual liberty and a supporting political conception of the role of government that placed considerable emphasis on the relationship between the judicial and legislative branches of government. In short, the best government was the least government. Trust was placed in the free individual, who, if left unfettered by needless governmental regulation, would grow more intelligent and more attuned to the moral law, thereby decreasing the need for government.[10] The judiciary was set up as a check on unnecessary governmental interference in the affairs of the individual. It was this conception of the judicial role that distinguished Peckham from Holmes. While Holmes was unwilling to identify public values and preferred to leave their identification to the democratic branches, Peckham employed judicial office to discern and announce substantive values.[11]

If any economic interest was favored by Peckham, it was that of the "rugged individual." But for Peckham that preference remained neutral, since the rugged individual was favored by nature. Government should neither aid nor hinder his survival. Liberty required equal treatment, and equal opportunity was assured only in the absence of illegal combinations of economic power. Peckham's support for antitrust policy was thus consistent with his belief in limited government. Governmental intervention to check monopolies and other concentrations of economic power was designed to restore a situation in which the free individual could once again prevail without governmental intervention.

Analysis commences with an examination of Peckham's liberty of contract decisions while a member of the New York Court of Appeals and the United States Supreme Court. Juxtaposed to these cases are Peckham's antitrust opinions. What emerges is the portrait of a judge attempting to cope with the problems of a new industrial state in a classical liberal manner—a negative rather than positive approach. By this approach the majoritarian branches could eliminate dangerous concentrations of economic power, but they could not interfere on the individual's behalf to equalize the bargaining relationship.

---

10. S. FINE, LAISSEZ FAIRE AND THE GENERAL-WELFARE STATE 5 (1956).

11. There is certainly no indication that Peckham perceived constitutional law to be stagnant. *See* notes 22-24 and accompanying text *infra*.

II. Peckham on the New York Court of Appeals

In *Munn v. Illinois*,[12] the United States Supreme Court rejected an attack on a state law regulating the storage rates of grain elevators. The grain elevator owners argued that the regulation of storage prices deprived them of the use of their property without due process of law. Chief Justice Waite's majority opinion emphasized that the scope of the state's police power encompassed the regulation of private property when such regulation was necessary for the public good. Justice Field's dissent argued that the term "liberty" as used in the fourteenth amendment meant something more than freedom from physical restraint. It included the freedom to use one's property without undue governmental interference.[13]

Although Field's dissent in *Munn* remained a minority view on the Supreme Court for twenty years, an increasing number of state courts later adopted it. The position was first and foremost a statement on governmental power. It was a position that conceptualized the role of the judiciary as a check between legislative power and the individual. Its chief exponent on the New York Court of Appeals between 1887 and 1895 was Rufus W. Peckham. Peckham's more famous opinions in *Lochner*[14] and *Allgeyer v. Louisiana*[15] were no surprise to those familiar with his record on the New York Court of Appeals.

In *People v. Gillson*,[16] Peckham, speaking on behalf of the entire court, invalidated a provision of the state penal code prohibiting the sale of food or any offer to sell upon a representation or inducement that something else would be provided as a gift, prize, premium, or reward to the purchaser. The provision, allegedly part of the state's efforts to regulate lotteries, was employed by the state against the Atlantic and Pacific Tea Co. (A & P) for offering a teacup and saucer to a purchaser of coffee.

A & P attempted to distinguish its sales method from the typical lottery scheme by arguing that the statute's effect was "to oppress a certain class of citizen traders, and to improperly discriminate against them in their business, and thereby restrict, and so virtually prohibit their use of their own property."[17] The

12. 94 U.S. 113 (1876).
13. *Id.* at 142-43 (Field, J., dissenting).
14. *See* notes 53-56 and accompanying text *infra*.
15. 165 U.S. 578 (1897).
16. 109 N.Y. 389, 17 N.E. 343, 72 N.Y.S. App. at 819 (1888).
17. *Id.* at 390 (not included in parallel sources).

state responded that the law was a valid exercise of police power in that it sought to regulate trade in impure, unwholesome, and adulterated food, and to prevent fraud and deception.

Peckham's decision limiting the state's exercise of police power began with an analysis of the scope of judicial review. After paying homage to the supremacy clause, the presumption of constitutionality, and the police power, and after acknowledging the impropriety of judicial veto based merely upon natural justice and equity,[18] Peckham announced that

> a person living under our Constitution has the right to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit. The term "liberty" as used in the Constitution is not dwarfed into mere freedom from physical restraint of the person of the citizen as by incarceration, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his creator, subject only to such restraints as are necessary for the common welfare. Liberty, in its broad sense, as understood in this country, means the right not only of freedom from servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways to live and work where he will, to earn his livelihood in any lawful calling and to pursue any lawful trade or avocation.[19]

In Peckham's view the statute under review violated this liberty. He could not see that the statute had anything to do with unwholesome food. Nor could he accept the proposition that the statute was needed to safeguard the customer from buying more than he needed. Although it was within the legislative domain to determine what laws and regulations were needed to protect the public health, safety, and welfare, it was the duty of the judiciary to insure that the means taken by the legislature had a direct relation to a legitimate end.[20] Thus *Gillson* was similar to *Lochner*: in *Lochner* the state sought to protect the individual by prohibiting him from working longer than a certain number of hours, while in *Gillson* the state sought to protect people from purchasing more than they needed by denying A & P the right to merchandise its goods in certain ways. In both cases Peckham failed to detect a direct relation between the exercise of the police power and public health.

---

18. *Id.* at 397-98, 17 N.E. at 345, 72 N.Y.S. App. at 821.
19. *Id.* at 398-99, 17 N.E. at 345, 72 N.Y.S. App. at 821-22.
20. *Id.* at 401, 17 N.E. at 347, 72 N.Y.S. App. at 823.

The following year the court of appeals in *People v. Budd*[21] followed the reasoning of the Supreme Court in *Munn* and upheld a statute prescribing a maximum charge for storing grain in stationary elevators. Peckham's dissent was drawn from his earlier unpublished opinion in *People v. Walsh*.[22] In discounting the common law idea of "paternal government" expressed by the great legal commentator Sir Matthew Hale, Peckham noted that "all men, however great and however honest, are almost necessarily affected by the general belief of their times."[23] Peckham recognized "a truer conception of the proper functions of government."[24] He disagreed with the majority's willingness to allow the state to interfere with individual liberty—as he conceptualized it in *Gillson*—simply because the individual devotes his property to a business in which the public is greatly interested, or because the individual enjoys a monopoly by the fortuity that his property is conveniently situated.[25] To uphold such legislation, warned Peckham, would be to encourage class warfare:

> [I]n 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.[26]

In conclusion, Peckham observed that the legislation was not only "vicious," "communistic," and "inefficient," but illegal in that it sought

> to interfere with the lawful privileges of the *individual* to seek and obtain such compensation as he can for the use of his own property, where he neither asks nor receives from the sovereign power any special right or immunity not given to and possessed by every other citizen, and where he has not devoted his prop-

---

21. 117 N.Y. 1, 22 N.E. 670, 78 N.Y.S. App. 185 (1889).

22. 22 N.E. 682 (1889) (dissenting opinion of Judge Peckham incorporated into People v. Budd, 117 N.Y. at 34-71, 78 N.Y.S. App. at 197-210). Justice Gray concurred with the views presented by Peckham in *Walsh*. He could see no protection against such "socialistic laws" if this act were sustained. He argued that "the theory of such legislation is a startling departure from the true conception of governmental functions." Like Peckham, he expressed his disapproval for legislation favoring particular classes. 117 N.Y. at 33, 22 N.E. at 681-82, 78 N.Y.S. App. at 196 (Gray, J., dissenting).

23. 117 N.Y. at 47, 22 N.E. at 686, 78 N.Y.S. App. at 201 (Peckham, J., dissenting).

24. *Id.*, 22 N.E. at 687, 78 N.Y.S. App. at 202.

25. *Id.* at 40, 22 N.E. at 684, 78 N.Y.S. App. at 199.

26. *Id.* at 68-69, 22 N.E. at 694, 78 N.Y.S. App. at 209.

erty to any public use, within the meaning of the law.[27]

The elevator operator in *Budd* was the paradigmatic rugged individual for Peckham. His monopoly was not acquired with the help of government or combination, but by superior individualism. To enforce paternalistic legislation against such an individual would only involve government in class conflict. Peckham was therefore not blind to the class struggles of his day; he was merely denying government a role in that "normal human activity."

Consistent with his conception of the judicial role, Peckham dissented from the court's decision in *Talcott v. City of Buffalo*.[28] In *Talcott* the majority denied taxpayer standing to keep the governing authorities of Buffalo from substituting electric street lighting for gas lighting in certain sections of the city—an official action within their power and discretion—without the required allegation of fraud, collusion, corruption, or bad faith. Peckham believed that the exercise of judicial power to enjoin the "squandering of public funds" by public officials would be "exceedingly healthful."[29] He believed that the democratic election processes offered only a "slight deterrent effect" and afforded no redress for past reckless spending.[30] As Peckham recognized (and the Warren Court later demonstrated[31]), the judicial identification of fundamental values and the enforcement of those values by an injunction effectively furthers an underlying premise of constitutionalism—that government should be limited.

Peckham's final court of appeals opinion involving a conflict between the exercise of police power and individual liberty was handed down ten months before his nomination to the United States Supreme Court. Writing for the court, Peckham sustained the Consolidation Act of New York, which permitted the board of health to direct owners of substandard tenements to install adequate water supply facilities.[32] Judge Bartlett dissented, arguing that the statute placed unlimited power in the hands of the board of health and thus unconstitutionally deprived the

---

27. *Id.* at 71, 22 N.E. at 695, 78 N.Y.S. App. at 210 (emphasis added).

28. 125 N.Y. 280, 26 N.E. 263, 86 N.Y.S. App. 975 (1891).

29. *Id.* at 289, 26 N.E. at 265, 86 N.Y.S. App. at 978 (Peckham, J., dissenting).

30. *Id.* at 290, 26 N.E. at 265, 86 N.Y.S. App. at 978.

31. *See* O. FISS, THE CIVIL RIGHTS INJUNCTION (1978).

32. Health Dep't v. Rector of Trinity Church, 145 N.Y. 32, 39 N.E. 833, 106 N.Y.S. App. 994 (1895).

landlord of control over his property.[33] Unlike his colleague, Peckham had no difficulty envisioning a limit to such legislation. He judicially amended the statute to substitute the judgment of the judiciary for that of the board of health in the determination of the adequacy of the required facilities.[34] It was by this same strategy that Peckham would eventually implement his *Walsh-Budd* position and thereby limit *Munn v. Illinois*.

Upon the death of Mr. Justice Jackson in 1895, President Cleveland began the search for a replacement. Apparently ready to do battle with Senator David Bennett Hill and his colleagues, Cleveland once again offered a seat on the Court to William Butler Hornblower, whose nomination had been defeated less than two years earlier because of Senator Hill's opposition.[35] Hornblower declined the offer in early November,[36] and shortly afterward Cleveland wrote to Hill to determine whether Rufus Peckham was acceptable.[37]

New York Democrats had preferred Peckham over Hornblower to fill the earlier vacancy.[38] Senator Hill had even praised him as one who "would make a magnificent member of the Supreme Court."[39] Therefore, Hill offered no resistance to Rufus Peckham, and Cleveland's nomination of Peckham on the third of December[40] was confirmed by the Senate six days later.[41] Apparently Peckham's conception of the role of the judiciary was no obstacle to his securing a seat on the United States Supreme Court.

III. The Supreme Court and the Triumph of Liberty of Contract

Peckham's first opportunity to espouse his expanded notion of individual liberty in the Supreme Court came in *Allgeyer v. Louisiana*.[42] *Allgeyer* tested the constitutionality of a state stat-

---

33. *Id.* at 53-54, 39 N.E. at 840-41, 106 N.Y.S. App. at 1001-02 (Bartlett, J., dissenting).

34. 145 N.Y. at 49-52, 39 N.E. at 839-40, 106 N.Y.S. App. at 1000-01.

35. *See generally* Pierce, *A Vacancy on the Supreme Court: The Politics of Judicial Appointment 1893-94*, 39 Tenn. L. Rev. 555 (1972).

36. A. Nevins, Grover Cleveland 572 (1932).

37. Letters of Grover Cleveland 414-15 (A. Nevins ed. 1933).

38. Pierce, *supra* note 35, at 563.

39. N.Y. Times, Jan. 23, 1894, at 1, col. 1.

40. 28 Cong. Rec. 25 (1895).

41. *Id.* at 90.

42. 165 U.S. 578 (1897).

ute prohibiting individuals or brokers from procuring insurance on property located in the state from any foreign corporation that had not complied with state law. Though Peckham may be accused of straining in *Allgeyer* to present his views on individual liberty and the judicial role by analyzing the statute's constitutionality according to "liberty of contract" rather than commerce clause principles, dicta in Peckham's *Hopkins v. United States*[43] opinion—which acknowledged congressional power to regulate interstate transportation of a commodity but not the stock certificate that represented that commodity—indicates that more likely he did not consider an insurance policy to be an article of interstate commerce.

Peckham declared that the Louisiana statute was repugnant to the due process clause of the fourteenth amendment, explaining, as he had done in his first case of this type on the New York Court of Appeals, that the liberty mentioned in the due process clause comprehended not merely the right of the individual to be free from physical restraint, but also included

> the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.[44]

In keeping with his conception of the judicial role, Peckham refused to define the extent of this liberty vis-a-vis the police power, reserving that question for each situation in which the question arose. The view that had earlier found expression in the Supreme Court only in the minority opinions of Justices Field and Bradley was now expressed on behalf of the entire Court by its newest member, Justice Peckham.

Although the Court expressed concern for the liberty of contract doctrine in *Holden v. Hardy*,[45] it nevertheless—with Peckham and Brewer in dissent—upheld a Utah statute prohibiting the employment of men in underground mines, smelters, and ore or metal refineries for more than eight hours per day, except in cases of emergency. The majority commenced with the

---

43. 171 U.S. 578, 597-98 (1898).
44. 165 U.S. at 589.
45. 169 U.S. 366 (1898).

premise that the statute was presumptively constitutional and concluded that there were "reasonable grounds" for the legislative determination that a restriction on hours of employment in such an industry was necessary.[46] But the need for state paternalism was not apparent to Peckham. Both *Gillson* and *Lochner* demonstrate that for Peckham the presumption was against such legislation, and it was incumbent upon the state to demonstrate a direct relation between the legislation and the end sought.

In *Lake Shore & Michigan Railway v. Smith*,[47] the Court was asked to determine whether the concededly valid power of the Michigan Legislature to fix maximum rates for railroad fares included the power to establish lower rates for persons who complied with certain conditions. The state asserted that the power to lower rates in certain cases and to favor certain individuals was inherent in its right to fix maximum rates.

Peckham, speaking for six members of the Court,[48] rejected the state's argument and held that the statute unreasonably interfered with the management of the company. The legislative exercise was not simply a lesser right included in the power to establish maximum rates. In exercising the power to establish maximum rates, argued Peckham, the legislature acts for the public generally without discrimination.[49] Thus, the right of the legislature to enact rules and regulations for the general conduct of the affairs of the company—relating, for example, to the scheduling of trains and ticket office hours, and to the accommodations provided the public generally—was not at issue.[50] At issue was the legislature's power to interfere with the management of the company by providing an exception from the legislatively established general rates in favor of the wholesale buyer:

> If the general power exist, then the legislature can direct the company to charge smaller rates for clergymen or doctors, for lawyers or farmers or school teachers, for excursions, for church conventions, political conventions, or for all or any of the various bodies that might desire to ride at any particular time or to any particular place.[51]

---

46. *Id.* at 398.
47. 173 U.S. 684 (1899).
48. Chief Justice Fuller and Justices Gray and McKenna dissented.
49. 173 U.S. at 691.
50. *Id.* at 693.
51. *Id.* at 694.

Peckham again expressed his concern for legislation that could increase class conflict in the exercise of legislative power. The fact that the railroad discriminated in favor of certain classes did not trouble Peckham. Persons had the right to contract to do what no legislature could compel them to do.[52]

In Peckham's final and most famous (or infamous) liberty of contract decision, *Lochner v. New York*,[53] the Court invalidated, by the narrowest of margins, a New York statute limiting bakery employees to a ten-hour work day or sixty-hour work week. Unlike Justice Harlan in dissent, Peckham could find no "direct relation" between this exercise of police power and public health. What Peckham demanded of the state was the same information that would be presented to a legislative body:

> The mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate . . . .
>
> . . . .
>
> . . .[T]he limit of the police power has been reached and passed in this case. There is . . . no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health or the health of the individuals who are following the trade of a baker.[54]

In effect, Peckham was ordering the "Brandeis brief," and when it was presented three years later in *Muller v. Oregon*,[55] he voted to sustain a similar ordinance applying to women. Thus, it is not ironic or paradoxical that the brief submitted by Brandeis in *Muller* relied exclusively on *Lochner* for law.[56] By concentrating on factual material, the Brandeis brief was merely recognizing the judicial role defined by Peckham in *Lochner*.

This is not to deny that a significant distinction between *Lochner* and *Muller* was that the statute involved in the latter case sought to protect women rather than adult males. A *sine qua non* of the brief of the party seeking the benefit of paternal-

---

52. *Id.* at 697.

53. 198 U.S. 45 (1905).

54. *Id.* at 57-58.

55. 208 U.S. 412 (1908).

56. *See* A. MASON, BRANDEIS: A FREE MAN'S LIFE 248-49 (1946). *See also* S. WOOD, CONSTITUTIONAL POLITICS IN THE PROGRESSIVE ERA 125 (1968) (*Muller* said to discredit *Lochner*).

istic legislation in any case such as *Lochner* or *Muller* thus had to be that it present to the judiciary evidence demonstrating that the legislation involved bears a direct relation to a legitimate legislative end. It is possible that no case could have been framed in 1905 that would have persuaded Peckham of the need for legislation restricting the "liberty" of adult males. However, any successful brief in support of legislation restricting the liberty of women to contract would have to demonstrate to the Court the reasonableness of such legislation. The fact that women were involved may have made the burden of demonstrating the need for the legislation an easy task; nevertheless, the presumption was against the constitutionality of such legislation.

The liberty of which Peckham spoke was much more than a liberty to contract. It was the liberty to be free from the new forms of legislative authority that sought to restrict individual freedoms in order to deal with the problems posed by the growth of concentrated economic power. Moreover, as shown most clearly in his opinions in *Gillson, Budd,* and *Lake Shore & Michigan Railway*, Peckham conceptualized liberty as including the concept of equality before the law. Legislation that discriminated among classes was presumptively void.

Liberty would not be assured by equal treatment before the laws if equal opportunity was interfered with by combinations of economic power. Thus, although Peckham's conception of liberty demanded that the Court resist legislative efforts to solve the problems of the then rapidly changing world via paternalism, it demanded that the judiciary support legislative efforts to enjoin the growth of corporate power.

IV. The Sherman Anti-Trust Act

Peckham took his seat on the Court precisely one year after its first effort to apply the Sherman Anti-Trust Act of 1890.[57] In *United States v. E. C. Knight*[58] the Court, marking a clear line between manufacturing and commerce, refused to block the sale of four Philadelphia sugar refineries to the American Sugar Refining Co. One year after taking his seat, Peckham began breathing life into the federal government's effort to check monopolies and concentrations of economic power.

Peckham's sympathy for the government's antitrust efforts

57. Ch. 647, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1-7 (1976)).
58. 156 U.S. 1 (1895).

seems discordant with his attempts to curtail the growth of legislative power. But this discord is relieved by recognizing that judicial efforts to stem the growth of legislative power were motivated by a desire to safeguard individual liberty. Threats to individual liberty arose also from the growth of corporate power. When the legislature responded to the changing industrial world by attacking the corporate entity rather than restricting individual freedoms, it had an ally on the Court.

In *United States v. Trans-Missouri Freight Association*,[59] the Court followed Peckham's lead and voted five to four to apply the Sherman Act to dissolve a freight association formed to establish and maintain reasonable rates, rules, and regulations. Peckham rejected the argument that the Act only prohibited "unreasonable" restraints of trade and found it to prohibit all restraints of trade.[60] Writing for the dissent, Justice White argued that Peckham's reading of the Act not only violated the common law tradition, but reason as well:

> [T]he decision, substantially, is that the act of Congress is a departure from the general principles of law, and by its terms destroys the right of the individuals or corporations to enter into very many reasonable contracts. . . . [T]his proposition . . . is tantamount to an assertion that the act of Congress is itself unreasonable.[61]

The first half of the minority's opinion repeatedly confronted Peckham with the apparent inconsistency between his reading of the Act and the liberty of the citizen.[62]

Peckham's response was rooted in his belief in the value of the rugged individual and in his suspicion of concentrated economic power. He warned against permitting businesses to combine their economic power, since their ultimate purpose was

> to control the production or manufacture of any particular article in the market, and by such control dictate the price at which the article shall be sold, the effect being to drive out of business all the small dealers in the commodity and to render the public subject to the decision of the combination as to what price shall be paid for the article.[63]

---

59. 166 U.S. 290 (1897).
60. *Id.* at 328.
61. *Id.* at 344 (White, J., dissenting).
62. *See id.* at 344-45, 355-56.
63. 166 U.S. at 323-24.

In Peckham's view it was not in the interest of the country to transform "small but independent dealers who were familiar with the business and who had spent their lives in it, and who supported themselves and their families from the small profits realized therein" into "mere servant[s] or agent[s] of a corporation."[64]

Not only could Peckham find no distinction between reasonable and unreasonable restraints of trade,[65] he could find nothing in the legislative history of the Act or the nature of railroad companies to exclude them from the Act's coverage.[66] In fact, Peckham reasoned, considering the public character of such corporations—the privileges and franchises they receive from the public and the nexus between transportation rates and public concern[67]—railroad companies were the paradigmatic corporation meant to be regulated by the Act:

> [w]hile, in the absence of a statute prohibiting them, contracts of private individuals or corporations touching upon restraints in trade must be unreasonable in their nature to be held void, different considerations obtain in the case of public corporations like those of railroads where it well may be that any restraint upon a business of that character as affecting its rates of transportation must thereby be prejudicial to the public interests.[68]

Peckham's response to the dilemma outlined by White was no illuminating beacon to contemporary observers. What illumination it did provide was clouded by his earlier opinion in *Allgeyer*, handed down in the same month as *Trans-Missouri Freight*. However, Peckham was given the opportunity to clarify his position in *United States v. Joint Traffic Association*,[69] which sustained the government's use of the Sherman Act against an association of railroad companies. One argument presented by the minority in *Trans-Missouri Freight*, but not addressed by Peckham, was that all contracts restrained trade and therefore if no distinction was made between reasonable and unreasonable restraints, all such contracts were void.[70] In *Joint*

64. *Id.* at 324.
65. *Id.* at 328, 332-33.
66. *Id.* at 319-20, 324-25.
67. *Id.* at 335.
68. *Id.* at 334.
69. 171 U.S. 505 (1898).
70. 166 U.S. at 351-52 (White, J., dissenting).

Traffic Peckham stood by his earlier position, denying that the Act drew any such distinction, and added that the Act applied only "to those contracts whose direct and immediate effect is a restraint upon interstate commerce."[71]

Peckham could see no inconsistency between his decision in *Joint Traffic* and his support of the general constitutional right of the citizen to make contracts.[72] The argument based on liberty of contract had no relevance because the contract was an illegal one, and there was no right to enter into an illegal contract:

> The citizen may have the right to make a proper (that is, a lawful) contract, one which is also essential and necessary for carrying out his lawful purposes. The question which arises here is, whether the contract is a proper or lawful one, and we have not advanced a step towards its solution by saying that the citizen is protected by the Fifth, or any other amendment, in his right to make proper contracts to enable him to carry out his lawful purposes.[73]

Peckham's reasoning was, of course, circular: the contract was illegal only if the restriction on liberty of contract was legitimate. Thus the question was whether the statute was a legitimate exercise of congressional power over interstate commerce.[74] Peckham answered in the affirmative:

> [Congress' power to regulate interstate commerce] extends at least to the prohibition of contracts relating to interstate commerce, which would extinguish all competition between otherwise competing railroad corporations, and which would in that way restrain interstate trade or commerce. We do not think, when the grantees of this public franchise are competing railroads seeking the business of transportation of men and goods from one State to another, that ordinary freedom of contract in the use and management of their property requires the right to combine as one consolidated and powerful association for the purpose of stifling competition among themselves, and of thus keeping their rates and charges higher than they might otherwise be under the laws of competition. And this is so, even though the rates provided for in the agreement may for the time be not more than are reasonable. They may easily and at

71. 171 U.S. at 568.
72. *Id.* at 571.
73. *Id.* at 572.
74. *Id.* at 573.

> any time be increased. It is the combination of these large and powerful corporations, covering vast sections of territory and influencing trade throughout the whole extent thereof, and acting as one body in all the matters over which the combination extends, that constitutes the alleged evil, and in regard to which, so far as the combination operates upon and restrains interstate commerce, Congress has power to legislate and to prohibit.[75]

The notion that combinations are evil regardless of whether rates may be reasonable or even understated is quite consistent with Peckham's master idea.

Two types of business associations not interfering with interstate commerce, and therefore not within the purview of the antitrust provisions, were identified by Peckham in two other decisions delivered the same day as *Joint Traffic*. The first, *Hopkins v. United States*,[76] involved an association of merchants who sold cattle on commission. The second, *Anderson v. United States*,[77] involved a similar group of associated cattle purchasers. Not only did Peckham fail to detect a direct impact on interstate commerce from these associations, but he considered neither association a novel combination threatening the individual.[78]

In *Hopkins* the government unsuccessfully employed a unique variation of the liberty of contract argument. A section of the employment agreement prohibited the employment of any agent, solicitor, or employee except upon a stipulated salary not contingent upon the commissions earned, and further provided that no more than three solicitors could be employed at one time. The government argued that this section of the agreement was an infringement of the constitutional right of each association member to make lawful contracts in furtherance of his business.[79] The right of individuals to voluntarily contract to restrict their own actions was the essence of liberty of contract for Peckham, and was distinguishable from legislative efforts to restrict the actions of individuals. Peckham observed:

> To say that a State would not have the right to prohibit a defendant from employing as many solicitors as he might choose,

---

75. *Id.* at 570-71.
76. 171 U.S. 587 (1898).
77. 171 U.S. 604 (1898).
78. *Id.* at 616-17.
79. 171 U.S. at 600.

> proves nothing in regard to the right of individuals to agree upon that subject in a way which they may think the most conducive to their own interests.[80]

Peckham was never more explicit in his treatment of liberty of contract vis-a-vis antitrust regulation than in *Addyston Pipe & Steel Co. v. United States*.[81] Six corporations engaging in the manufacture, sale, and transportation of iron pipe were accused of violating the Sherman Act because of collusive bidding on contracts to sell and deliver pipe to out-of-state customers. The application of the Sherman Act rested on the finding that the corporations' activities had a direct and immediate impact on interstate commerce.[82] *E. C. Knight* was readily distinguished in that the instant case involved selling and delivery rather than mere manufacturing.[83] It was further held that a total monopoly was not necessary in order to find a combination to be in restraint of trade and thus violative of the Sherman Act.[84]

More important for purposes of this study is Peckham's treatment of the corporations' argument that the constitutional guarantee of liberty of contract operated as a limitation on the power of Congress to regulate commerce.[85] The implication of the circular reasoning in *Joint Traffic* was made explicit: Congress' commerce power was "more important" than each individual's liberty of contract.[86] Therefore, the congressional authority was a legitimate limitation on that individual liberty.[87] Peckham believed that the opposite holding would result in a lack of uniformity between different states, as well as an increase in the cost and a corresponding decrease in the predictability of antitrust litigation.[88]

For present purposes, Peckham's final two antitrust opinions add very little. Both cases employed the direct-indirect test. In *Bement v. National Harrow Co.*,[89] the Sherman Act was set up as a defense in a suit for breach of contract in relation to the manufacture and sale of an item patented by the plaintiff.

---

80. *Id.* at 603.
81. 175 U.S. 211 (1899).
82. *Id.* at 238, 240-41.
83. *Id.* at 242.
84. *Id.* at 244-45.
85. *See id.* at 227.
86. *See id.* at 230.
87. *See id.* at 229.
88. *Id.* at 231-33.
89. 186 U.S. 70 (1902).

Peckham rejected the defense, noting that the very object of the patent laws of the United States is monopoly.[90] Although interstate commerce was directly affected, Peckham observed that the antitrust law had no application to a situation where reasonable *and legal* conditions restricting the terms upon which the patented article could be used and the price to be demanded for it were imposed upon the assignee of a patent by the owner.

In *Montague & Co. v. Lowry*,[91] the Sherman Anti-Trust Act was successfully asserted as a defense by a private business suffering from the price-fixing of an association of tile and fireplace fixtures manufacturers and dealers. Following *Addyston Pipe*, Peckham placed the association within the ambit of the Sherman Act.

The most troubling piece of the Peckham puzzle is *Northern Securities Co. v. United States*.[92] Because Peckham gave no reasons for his refusal to join the majority in applying the Sherman Act against a holding company formed to combine two railroad lines, his position will never be understood with complete certainty. His decision to join Holmes' incredible dissenting opinion[93]—which misread Peckham's earlier opinions and conceptualized the Sherman Act as a minor criminal statute[94]—is beyond explanation. However, if one accepts the probable justification for Peckham's reliance on liberty of contract rather than on the commerce clause in *Allgeyer*,[95] it is possible to understand his decision to also join with White in his refusal to accept the view that a stock transaction involved an article of interstate commerce.[96]

---

90. *Id.* at 91.

91. 193 U.S. 38 (1904).

92. 193 U.S. 197 (1904).

93. *Id.* at 400-11 (Holmes, J., dissenting).

94. *See* D. Steward, The Fuller Court and the Sherman Act 55 (March 1978) (unpublished article in Yale Law School Library).

95. 165 U.S. 578 (1897).

96. *See* 193 U.S. at 368-69 (White, J., dissenting). Another perplexing piece of the Peckham puzzle is Peckham's voting record in the race-relations cases. Although not textually relevant here because of the focus on cases involving government regulation of the marketplace, it is reasonable to apply the thesis to other matters and wonder why the champion of individual liberty and limited government lent his support to the majority in Plessy v. Ferguson, 163 U.S. 537 (1896). If Peckham believed legislation that discriminated among classes to be presumptively void, how could he abide a state statute that required separate railway coaches for black and white passengers? One is again forced to speculate, since Peckham did not explain his position. The equality of which Peckham spoke was equality of opportunity and equality before the law, not equality of outcome. The majority opinion in *Plessy* asserted that a "statute which implies merely a

Peckham was the mirror image of the Populist.[97] The Populist uniformly reacted against monopoly. Peckham, on the other hand, had a certain tolerance for monopoly that resulted from rugged individualism. During Peckham's tenure on the Court, however, it was becoming increasingly clear that the momentum against monopoly was too great for Peckham's approach, and by 1909 the New York judge who was well known for his activist conception of the judicial role in defense of individual liberty,

---

legal distinction . . . has no tendency to destroy the legal equality of the two races." *Id.* at 543. If Peckham viewed the statute as "merely a legal distinction" rather than a breach of equality before the law, it is possible that he viewed the petitioner's request as an attempt to urge the judiciary itself to tread where government ought not go. Government was powerless to eradicate racial instincts. *Id.* at 551. Thus, although the statute in question was enacted only six years earlier, it may have been viewed as affirming the natural order, while judicial intervention may have been viewed as an unwelcome governmental interference.

However, such an explanation may not suffice to explain Peckham's vote to support the majority in Berea College v. Kentucky, 211 U.S. 45 (1908), which upheld a state statute prohibiting interracial education even where pupils with parental consent chose to sit together. Unlike the *Plessy* situation, there was no conflict of liberties between the parties directly involved. Because of the impact of integration on the larger social structure, Peckham may have perceived a clash of liberties. What was the principled distinction between the right of the individuals involved in *Berea College* to associate and the right of the employer and employee in *Lochner* to contract? Was the latter perceived as the more "basic" right?

Was government by judiciary again seen as too obtrusive by Peckham in Cummings v. Richmond County Bd. of Educ., 175 U.S. 528 (1899), which sanctioned the use of public funds to support a white high school while assistance to a black high school was suspended for economic reasons? For a unanimous Court, Harlan seems to have prophetically realized the extreme danger of federal judicial intervention in the management of a school system. *Id.* at 545.

Similar reasoning may explain how Peckham could hope to preserve individual liberty by voting with the majority in Giles v. Harris, 189 U.S. 475 (1903). In *Giles* the Court denied federal jurisdiction to compel state boards of registrars to enroll black voters who desired to vote in a forthcoming congressional election. Justice Holmes, writing for the Court, observed that unless the courts were willing to supervise the election process, the only thing the plaintiff could receive in a court of equity would be an empty promise: "Apart from damages to the individual, relief from a great political wrong, if done, as alleged, by the people of a State and the State itself, must be given by them or by the legislative and political department of the government of the United States." *Id.* at 488.

Finally, how could the great spokesman for liberty of contract join the majority in Hodges v. United States, 203 U.S. 1 (1906), which denied federal jurisdiction over conspiracies to prevent blacks from making or carrying out labor contracts and agreements. From Peckham's frame of reference, *Hodges* is easily distinguished from *Lochner*: Liberty of contract was meant to serve as a check on *government* power, and *Hodges* involved interference by private individuals.

97. See T. Powers, *United States v. E. C. Knight:* The Problem of the People's Party and the Antitrust Policy (June 1978) (unpublished article in Yale Law School Library), for a description of Populist reaction to the monopoly issue.

had become—and continues to be—the object of severe criticism by legal scholars. The progressive theory of government was in vogue, and Peckham's theory was an anachronism. His notion of liberty, one violated by legislation discriminating among classes, was gradually giving way to a notion of liberty violated by the gross inequity among classes.[98]

98. *See generally* J. POLE, THE PURSUIT OF EQUALITY IN AMERICAN HISTORY (1978).