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1975-1976]

THE SUPREME COURT AND CONSTITUTIONAL CHANGE:  
*LOCHNER v. NEW YORK* REVISITED

D. GRIER STEPHENSON, JR.†

I. INTRODUCTION

IN THE CONTROVERSIAL CASE of *Lochner v. New York*,<sup>1</sup> the United States Supreme Court set aside a state statute<sup>2</sup> restricting bakers to a 10-hour maximum workday. Although favorable comment upon *Lochner* was not totally lacking,<sup>3</sup> the decision has probably received "more clearly unanimous criticism than any other in the twentieth century."<sup>4</sup> A socialist organ of the day referred to *Lochner* as "a new Dred Scott decision,"<sup>5</sup> and 85,000 bakers threatened a strike and a bread famine,<sup>6</sup> vowing to "fight all along the line"<sup>7</sup> if provisions for the hours restriction were dropped from their labor contracts. *Lochner* sounded the Court's call to battle against social and economic regulatory

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1. 198 U.S. 45 (1905).

2. Act of May 13, 1897, art. 8, ch. 415, § 110 [1897] N.Y. Laws 118. Section 110 provided as follows:

No employee shall be required or permitted to work in a biscuit, bread or cake bakery or confectionery establishment more than sixty hours in any one week, or more than ten hours in any one day, unless for the purpose of making a shorter work day on the last day of the week; nor more hours in any one week than will make an average of ten hours per day for the number of days during such week in which such employee shall work.

*Id.*

3. The New York Times, for example, noted the following in an editorial comment:

It is most gratifying to observe that the Supreme Court does not allow the sanctity of any contracts which may have been made between the demagogues in the Legislature and the ignoramuses among the labor leaders in bringing to naught their combined machinations.

N.Y. Times, Apr. 19, 1905, at 10, col. 3. A legal journal considered the decision "sound . . . and salutary . . . an effective check to unwarranted interference with the freedom of contract which seems to have been really needed." 67 ALB. L.J. 129 (1905). Another journal stated:

In this day, when great, complex business organizations and even the demands of socialism have served to obscure the individual and his superior rights in the community, it is a great relief to have some strong arm of the government arrest the obstructing causes and reassert, in unambiguous terms, the supremacy of the individual, the great unit of civilization.

60 CENT. L.J. 401 (1905).

4. R. McCLOSKEY, *THE MODERN SUPREME COURT* 279 (1972).

5. *The Worker*, May 22, 1905, at 1.

6. N.Y. World, Apr. 18, 1905, at 8.

7. N.Y. Times, Apr. 18, 1905, at 1, col. 3.

legislation,<sup>8</sup> and sparked further interest in reform of the courts<sup>9</sup> in those who felt that judicial power was surging unchecked.<sup>10</sup>

The intervening years have been no kinder to *Lochner*. The decision embraced a policy which subsequent events shortly rendered obsolete, and it has become the 20th century archetype of a judicial mistake.<sup>11</sup> Posterity may record the sole good resulting from Justice Peckham's opinion for the majority to have been wholly inadvertent, for it was in a dissent to the *Lochner* decision that Justice Holmes penned one of the most memorable opinions of his long legal career.<sup>12</sup> Nonetheless, even ignoble decisions have been known to possess utility, and *Lochner* especially offers a glimpse of the role of the Supreme Court in constitutional change.

Constitutional change includes more than changes in the meaning of the document itself. One commentator has stated:

[The Constitution] can only be that Aristotelian concept of the constituting idea or body of ideas which lies within the political system and, indeed, within the society generally and which by its presence qualifies the society and its political system to become a cohesive entity. To "define" the Constitution, understood in this

8. See C. PRITCHETT, *THE AMERICAN CONSTITUTION* 672 (2d ed. 1968).

9. See generally H. DAVIS, *THE JUDICIAL VETO* (1914); A. MASON, *WILLIAM HOWARD TAFT: CHIEF JUSTICE* (1964); G. MOWRY, *THE ERA OF THEODORE ROOSEVELT 1900-1912* (1958); H. PRINGLE, *THEODORE ROOSEVELT* (1956); Boudin, *Government by Judiciary*, 26 *POL. SCI. Q.* 238 (1911); Dodd, *Social Legislation and the Courts*, 28 *POL. SCI. Q.* 1 (1913); Dodd, *The Growth of Judicial Power*, 24 *POL. SCI. Q.* 193 (1909).

10. President Theodore Roosevelt was among those strongly opposed to the position assumed by the *Lochner* Court; in correspondence with Justice Day, he commented: If the spirit which lies behind [*Lochner v. New York*] obtained in all the actions of the Federal and State Courts, we should not only have a revolution, but it would be absolutely necessary to have a revolution, because the condition of the worker would become intolerable.

Letter from Theodore Roosevelt to W.R. Day, Jan. 11, 1908, in 6 *LETTERS OF THEODORE ROOSEVELT* 904 (E. Morison ed. 1951). *Lochner* may have prompted President Roosevelt's observation that American judges often "fail to understand and apply the needed remedies for the new wrongs produced by the new and highly complex social and industrial civilization which has grown up in the last half-century." 15 *T. ROOSEVELT, STATE PAPERS* 508 (1926).

11. Dissenting in *Griswold v. Connecticut*, 381 U.S. 479 (1965), Justice Black criticized the concurring opinions of Justices White and Goldberg for their "reliance upon the natural law due process philosophy found in *Lochner v. New York* . . . along with . . . other long discredited decisions . . ." *Id.* at 515 (Black, J., dissenting) (citations omitted). Similarly, Justice Rehnquist took Justice Blackmun to task upon much the same ground in *Roe v. Wade*, 410 U.S. 113, 174 (1973) (Rehnquist, J., dissenting).

12. See 198 U.S. at 74 (Holmes, J., dissenting). Justice Holmes dissented on the ground that the majority opinion had been decided upon the particular economic theory espoused by the court, without the deference traditionally accorded to legislative decisions. He asserted that "a constitution is not intended to embody a particular economic theory, whether of paternalism . . . or of *laissez faire*." *Id.* at 75.

sense, is to "perceive" it hidden in the texture and traditions, the daily practices and great documents, of the society.<sup>13</sup>

In the American system of government, the principal task of constitutional interpretation has fallen to the Supreme Court. Through its role as supreme interpreter, the Court necessarily becomes an agent of constitutional change. This role has at times been actively sought by the Court; in some cases, however, it is thrust upon the Court by political necessity.<sup>14</sup>

At its most fundamental level, constitutional interpretation occurs when the Court assigns meaning to words and phrases in the document. However, assigning such meanings requires the Court to sit in continuing accommodation between norms and public policy. Often, it must choose among competing values or norms in arriving at an interpretation of the document, and the choice of norms effectively states a policy. Provided the policy choice is sufficiently ratified by other agencies of government and by the citizenry, the Court has effected an allocation of political power. Thus, the document itself is much less central to an understanding of American constitutional law than are the cases in which the Constitution has been construed. Indeed, one commentator has noted that "Justices who look to the Constitution for more than a puzzling, if majestic, phrase might just as well turn to the comic strips for all the guidance they will find on how to decide most of the great cases that involve national policy."<sup>15</sup>

In this process of accommodation between norms and policy, the Court may adjust policy to conform with chosen norms by voiding a statute, as was done in *Lochner*, or it may modify the values contained in prior decisions to legitimize a policy which represents a departure from previously accepted practices. It often appears that the aim of opinion writing is to obscure the *fact* of modification so that new developments seem to effect little or no doctrinal change. This process, of course, results in an "amendment" of the document through interpretation.

Whether the Supreme Court rejects or approves a certain policy, it participates in constitutional change. The Court, for example, expressed constitutional norms to approve particular manifestations of racial discrimination in the 19th century,<sup>16</sup> only later to subscribe to

13. H. ROELOFS, *THE LANGUAGE OF MODERN POLITICS* 130-31 (1967).

14. See Stephenson, "*The Mild Magistracy of the Law*": *United States v. Richard Nixon*, 103 *INTELLECT* 288 (1975).

15. L. LEVY, *AMERICAN CONSTITUTIONAL LAW* 1 (1966).

16. See *Plessy v. Ferguson*, 163 U.S. 537 (1895); *Civil Rights Cases*, 109 U.S. 3 (1883); *Virginia v. Rives*, 100 U.S. 313 (1879); *Hall v. DeCuir*, 95 U.S. 485 (1877); *United States v. Reese*, 92 U.S. 214 (1875).

different norms which in turn required massive redirections of public policy in the 20th century.<sup>17</sup> Often, the norms themselves develop as the policy develops. Full elaboration of the contract clause,<sup>18</sup> for instance, did not come with *Fletcher v. Peck*,<sup>19</sup> but rather appeared gradually in response to the developing policy in the states concerning the sanctity of private contracts.<sup>20</sup> A similar process was reflected in the policy of the commerce clause.<sup>21</sup> A century later constitutional response to the "white primary" evolved coterminously with the inventiveness of the state legislatures and political parties.<sup>22</sup> Thus questions regarding the legitimacy of a policy tend to evoke the statement of a constitutional norm; this is true despite the fact that a principal ingredient of judicial power in this country has in some instances been the avoidance of such a statement.<sup>23</sup>

This process of accommodation suggests an interplay among three primary factors: economic and social developments, responses to these

17. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

18. U.S. CONST. art. I, § 10.

19. 10 U.S. (6 Cranch) 87 (1810).

20. See S. KUTLER, *PRIVILEGE AND CREATIVE DESTRUCTION* (1971).

21. U.S. CONST. art. I, § 8. See generally F. FRANKFURTER, *THE COMMERCE CLAUSE* (1937).

22. During the first half of the 20th century, the South was basically a one political party region, and hence the primary was considered to be more important than the general election. In *United States v. Newberry*, 256 U.S. 232 (1921), the Supreme Court held that primaries were not "elections" within the meaning of the Constitution, thus permitting the states total control in this area. As a result Southern States used various methods to ensure that only whites voted in the primaries. See generally *Smith v. Allwright*, 321 U.S. 649 (1944); *United States v. Classic*, 313 U.S. 299 (1941); *Grove v. Townsend*, 294 U.S. 699 (1935); *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S. 536 (1927); V. KEY, *SOUTHERN POLITICS* 625-43 (1949); Marshall, *The Rise and Collapse of the "White Democratic Primary,"* 26 J. NEGRO ED. 249 (1957); Weeks, *The White Primary: 1944-1948*, 42 AM. POL. SCI. REV. 500 (1948).

23. A classic example of judicial self-restraint through the political question doctrine is Chief Justice Taney's opinion in *Luther v. Borden*, 48 U.S. (7 Howard) 1 (1849). The mootness doctrine offers another route of escape or of delay. See, e.g., *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

The Court has also declined to hear cases on the ground that the party seeking relief lacks standing to sue. The Court requires that the plaintiff allege "a personal stake in the outcome of the controversy" in order to assure "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962). See also *Warth v. Seldon*, 422 U.S. 490 (1975); *Investment Co. Inst. v. Camp*, 401 U.S. 617 (1971); *Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150 (1970); Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970).

Still another method of judicial avoidance is the ripeness doctrine. Since federal courts do not render advisory opinions, before a constitutional issue will be adjudicated, concrete legal issues must be presented and the interest of the litigants must be such that they require protection against *actual interference* with their rights. *United Pub. Workers v. Mitchell*, 330 U.S. 75 (1947).

developments by the executive and legislative branches of government, and judicial response to the combination of the first two factors. Thus, the Supreme Court may disallow a particular policy selected by the political departments to cope with economic developments. In the *Income Tax* cases,<sup>24</sup> for example, the Court chose to block a policy agreed upon by the Congress and the President to alter the tax base of the national budget. Alternatively, the Court may choose to give a positive thrust to its decision by requiring the other branches to confront and respond to a social issue in a certain mode; for instance, as the population shifted in the first half of this century from the rural areas to the cities and suburbs, the Court found it necessary to react to a political impasse by mandating others to act where they had chosen to do nothing.<sup>25</sup> Further constitutional change may result when the political departments respond to judicial decisions, as the sequel to the *Income Tax* decisions would suggest.<sup>26</sup>

It is in viewing constitutional interpretation as an accommodation between norms and policy that *Lochner* is instructive of the role of the Supreme Court in constitutional change. This is so even though the *Lochner* majority explicitly refused to approve constitutional change of considerable magnitude. For *Lochner* in reality presented the Court with more than the question of whether the fourteenth amendment permitted a state to restrict the working hours of bakers. The *Lochner* litigation was one of the first opportunities presented for constitutional confirmation of the modern regulatory state. Debate over the constitutionality of the New York statute symbolized the broader dispute over fundamental changes in the fabric of the American polity.

Other accounts have comprehensively treated the relative merits of the opposing positions in *Lochner*, as well as the various visions of judicial duty which the Justices' opinions reveal.<sup>27</sup> The purpose

24. *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895); *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895). The statute under attack in *Pollock* imposed a 2% income tax on income derived from any type of property, rents, dividends, or salaries. Act of Aug. 27, 1894, ch. 349, §§ 27-37, 28 Stat. 509. The Supreme Court, in two hearings, held that the tax on income from real and personal property was a direct tax and was violative of the constitutional prohibition against direct federal taxes. 157 U.S. at 583; 158 U.S. at 628. The Court also found that the tax on municipal bonds was violative of the principle of separation of powers, and that without these taxes, which were a substantial component of the congressional scheme, the income tax as a whole was void. *Id.* at 630.

25. *Reynolds v. Sims*, 377 U.S. 533 (1964); *Baker v. Carr*, 369 U.S. 186 (1962).

26. Congressional response culminated in the adoption of the sixteenth amendment. U.S. CONST. amend. XVI.

27. See generally L. BETH, *THE DEVELOPMENT OF THE AMERICAN CONSTITUTION 1877-1917* (1971); E. CORWIN, *LIBERTY AGAINST GOVERNMENT* (1948); C. VOSE, *CONSTITUTIONAL CHANGE: AMENDMENT POLITICS AND SUPREME COURT LITIGATION SINCE 1900* (1972); Hamilton, *The Path of Due Process of Law*, 48 ETHICS 269 (1938); Hand, *Due Process of Law and the Eight-Hour Day*, 21 HARV. L. REV. 495

of this study of *Lochner*, however, is to determine how the membership of the Court approached the proposed change and to outline those factors which may have precipitated the decision. These factors in turn suggest some conclusions concerning the Supreme Court's participation in the process of constitutional change.

## II. THE PROCESS OF CONSTITUTIONAL CHANGE

### A. *The Traditional Theory*

In resolving a particular controversy a court is required to choose from a plethora of societal values those which will guide its policy formulation. The *Lochner* Court rendered its decision in a time of rapid social and economic change; there were no clearly developed norms to guide government in its response to social and economic problems which were essentially an outgrowth of the industrial expansion and rapid population growth of the late 19th century. In some segments of society, governmental regulation of private affairs was deemed a grave offense against citizens. Thus, one proponent of the laissez-faire philosophy remarked:

God has bestowed upon us certain powers and gifts which no one is at liberty to take from us or to interfere with. . . . All attempts to deprive [persons] of them, [would be] theft. Under the same head may be placed all purposes to deprive us of the right to earn property or to use it as we see fit.<sup>28</sup>

Concentrations of capital spawned combinations of labor, and changes in the economic order tested the validity of established laissez-faire policies.<sup>29</sup> However, even the early labor leaders in their campaigns to improve the lot of the workingman espoused the traditional view. They maintained that workers should organize to gain a larger share of profits, but should avoid excessive reliance upon the assistance of the state.<sup>30</sup> The sentiment in favor of general hours legislation within the American Federation of Labor "was by no means unanimous. . . . While the constitutionality of an inclusive eight-hour law remained somewhat in doubt, there is no ground for thinking that it was the

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(1908); Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909); Powell, *The Logic and Rhetoric of Constitutional Law*, 15 J. PHIL. PSYCH. & SCI. METH. 645 (1918); Strong, *The Economic Philosophy of Lochner: Emergence, Embrasure and Emasculation*, 15 ARIZ. L. REV. 419 (1973).

28. J. McCOSH, OUR MORAL NATURE 40 (1892), quoted in R. GABRIEL, THE COURSE OF AMERICAN DEMOCRATIC THOUGHT 156 (2d ed. 1956).

29. For a discussion of laissez-faire thought, see R. GABRIEL, *supra* note 28, at 155-85; A. MASON, FREE GOVERNMENT IN THE MAKING 574-639, 690-723 (3d ed. 1965).

30. See J. COMMONS & J. ANDREWS, PRINCIPLES OF LABOR LEGISLATION 116 (4th rev. ed. 1936); E. LEWIS, A HISTORY OF AMERICAN POLITICAL THOUGHT FROM THE CIVIL WAR TO THE WORLD WAR 261 (1937).

courts which were retarding this kind of legislation."<sup>31</sup> The public generally disapproved of active participation by government in the economic affairs of the day. Such intervention as was tolerated was justified on grounds that certain instances of government regulation would serve one of three purposes: 1) provide conditions required for economic development (tariffs and antimonopolistic legislation);<sup>32</sup> 2) protect workers in dangerous occupations;<sup>33</sup> and 3) care for those who were not *sui juris*, and could not care for themselves.<sup>34</sup> But even within those narrow categories, vast differences of opinion existed concerning the propriety of government intervention.

The theory of economic individualism, applied to burgeoning industrialization, bespoke the simplicities of an earlier day. When the practice was threatened, however, its defenders appeared.<sup>35</sup> It was not surprising, therefore, that legal doctrines such as the 14th amendment right to make a contract, which was controlling in *Lochner*,<sup>36</sup> developed in response to the expanding regulatory efforts of government. That such reactionary behavior often accompanies rapid change has been noted in another context:

Extreme orthodoxy betrays by its very frenzy that the poison of skepticism has entered the soul of the church; for men insist most vehemently upon their certainties when their hold upon them has been shaken. Frantic orthodoxy is a method for obscuring doubt.<sup>37</sup>

As an exercise in pure self-interest, the doctrines were useful for any business or profession seeking to avoid government intervention in its operations.

The advocates of economic individualism acquired support to the degree that their theories coalesced with constitutionalism. Gradually the doctrines of economic individualism were absorbed into federal law through decisions of the Supreme Court.<sup>38</sup> This constitutional develop-

31. Brandeis, *Labor Legislation*, in 3 A HISTORY OF LABOUR IN THE UNITED STATES 556, 558 (J. Commons ed. 1935).

32. See notes 49-54 and accompanying text *infra*.

33. Frankfurter, *Hours of Labor and Realism in Constitutional Law*, 29 HARV. L. REV. 353, 357-59 (1916). See also notes 59-64 and accompanying text *infra*.

34. C. JACOBS, LAW WRITERS AND THE COURTS 187 n.59 (1934); Frankfurter, *supra* note 33, at 354-57, 363. See also *Wenham v. State*, 65 Neb. 394, 91 N.W. 421 (1902).

35. See generally J. HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES (1956).

36. 198 U.S. at 64.

37. R. NIEBUHR, DOES CIVILIZATION NEED RELIGION 2-3 (1927). The federal and state cases which carried the thrust of economic individualism into American law are reviewed in C. JACOBS, *supra* note 34, at 19-167.

38. *Allgeyer v. Louisiana*, 165 U.S. 578 (1897); *Butcher's Union Slaughterhouse & Livestock Co. v. Crescent City Live-Stock & Slaughterhouse Co.*, 111 U.S. 746



ment indicated not only that the individual Justices were receptive in varying degrees to a particular conception of the state, but also that some of them were quite willing to assume the burdens of writing these conceptions into the fundamental law of the land. There was, of course, an alternative available to the Justices. A judge can embrace certain values without also choosing to implement them in a manner contrary to the determinations of the legislature. It is the availability of this option which underlies the continuing debate concerning the wisdom of judicial activism versus judicial restraint.<sup>39</sup> Justice Holmes, for example, remained skeptical of governmental incursions into the economic and social realm, yet he refrained from invalidating legislative efforts in that direction.<sup>40</sup>

### B. *Modification of the Tradition*

Social Darwinism dominated political thought at the turn of the century, and formed the basis for the negative attitude toward governmental intervention in the economic affairs of the day.<sup>41</sup> Private ownership of property, rugged individualism, and the accumulation of wealth through fierce competitive struggle in the market place formed the foundation of Social Darwinism.<sup>42</sup> The process of natural selection was thought to produce superior leaders for the capitalist society, and it was advocated by most of the influential leaders during this period. Andrew Carnegie, a product of the selection process and one of its staunchest defenders, commented :

[W]hether the law [of competition] be benign or not . . . no substitutes have been found; and while the law may sometimes be hard on the individual it is best for the race, because it ensures the survival of the fittest in every department. We accept and welcome, therefore, as conditions to which we must accommodate ourselves, great inequality of environment; the concentration of business, industrial and commercial, in the hands of a few. . . .<sup>43</sup>

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(1884). See also *Powell v. Pennsylvania*, 127 U.S. 678 (1888); *Mugler v. Kansas*, 123 U.S. 623 (1887). The most complete account of this process is contained in B. TWISS, *LAWYERS AND THE CONSTITUTION* (1942).

39. The dilemma has plagued the judiciary throughout American history. For instance, the Supreme Court's entanglement in the politics of civil liberties was probably unavoidable. "The American judge is dragged in spite of himself onto the political field." A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 93 (J. Mayer & M. Lerner eds. 1966). Nonetheless, the Court need not have assumed an activist role in defining, developing and extending those liberties.

40. Letter from Oliver W. Holmes to Harold J. Laski, March 1, 1924, in 1 *HOLMES-LASKI LETTERS* 597 (M. Howe ed. 1953).

41. R. GABRIEL, *supra* note 28, at 155-64, 167. See generally R. HOFSTADTER, *SOCIAL DARWINISM IN AMERICAN THOUGHT* (rev. ed. 1959).

42. R. GABRIEL, *supra* note 28, at 159.

43. Carnegie, *Wealth*, N. AM. REV. 661 (1889), quoted in R. GABRIEL, *supra* note 28, at 159.

The inequities inherent in the operation of Social Darwinism were evident even to its most enthusiastic advocates; they concluded, however, that its benefits outweighed the harsh results it produced. Others, who came to be known as Populists, Progressives, Socialists or radicals, sought protection for those defeated in the economic struggle, and concluded that government intervention might prove beneficial, and that the government might alter the prevailing social and economic order to produce a better day for all.

Each of these groups, despite the sharp differences amongst them, proposed a definite role for government in meeting the perceived ills of the day.<sup>44</sup> This opposition in many instances seemed to be as concerned with the concentrations of labor as with the concentrations of capital.<sup>45</sup> The central theme in Progressivism was a revolt "against the industrial discipline: the Progressive movement was the complaint of the unorganized against the consequences of organization."<sup>46</sup>

At the same time, crosscurrents and contradictions were present throughout these divisions. Those favoring the maintenance of economic individualism were themselves at odds over the question of how much government regulation was too much.<sup>47</sup> Strict logical application of principle would lead to results where politics would not follow. Few were prepared to support, for example, the British social philosopher Herbert Spencer's insistence that all government relief and assistance programs were evil.<sup>48</sup>

Complicating the picture considerably were those business groups whose practices were inconsistent with the professions of the Gilded Age. The railroads, for example, accepted — perhaps actively sought — government regulation, if it were to their advantage, in order "to establish stability and control within the . . . industry so that [they] could prosper without the fearful consequences of cut-

44. A. MASON, *supra* note 29, at 640-723.

45. This phenomenon was explained by one commentator as follows:

A few progressives, of course, hailed the rise of labor unions as an advance in democracy. But the majority, while sincerely desirous of improving the plight of the individual workingman, was perhaps basically more hostile to the union than to corporate monopoly. If the progressive attention was mostly centered on the corporation during the decade, it was largely because the sheer social power of the corporation vastly overshadowed that of the rising but still relatively weak unions.

G. MOWRY, *supra* note 9, at 103.

46. R. HOFSTADTER, *THE AGE OF REFORM* 216 (1955).

47. For a survey, see Brown, *Police Power — Legislation for Health and Personal Safety*, 42 HARV. L. REV. 866 (1929).

48. "Spencer deplored not only poor laws, but also state-supported education, sanitary supervision . . . regulation of housing conditions, and even state protection of the ignorant from medical quacks." R. HOFSTADTER, *supra* note 41, at 41.

throat competition."<sup>49</sup> Even the earlier attempts at rate regulation, such as those litigated in *Munn v. Illinois*<sup>50</sup> and companion cases,<sup>51</sup> while opposed by the railroads themselves, were supported politically by the more traditional mercantile interests of the day.<sup>52</sup> The irony was too apparent for a trade publication of 1885 to overlook:

It is noticeable that there are more advocates of Government interference than heretofore, and that the applicants no longer represent one single interest. . . .

Thus the curious spectacle is presented of friend and opponent alike pleading for redress at the hands of the Government. The mercantile community ask that violent fluctuations in rates be done away with, that drawbacks and rebates be made impossible, that no more be charged for a long haul than a short one, that discrimination be abolished, that diversion of freight be no longer permitted, and that various other grievances, real or imaginary, be attended to. The railroads too, now look to the Government to help them out of their difficulties. They want to see to it that no road does business for less than cost, that minimum rates be fixed by law, that pools and combinations be legalized, that the building of parallel and competing lines be in some way protected against the competition of bankrupt roads. Finally, there come the investors in railroad property — stockholders and bondholders — who ask for much the same thing, but in addition want a remedy against speculative directors and managers, some provision against an impairment of their investment either by parties without or within, statutes enforcing their rights and privileges, protection of the minority against the majority, a guarantee against unfair leases or leases or other arrangements made by directors without the consent of stockholders, and so on *ad infinitum*. . . . In a word, merchants want to be protected against the railroads, the railroads want to be protected against themselves, and investors against both. And they all cry for the same soothing syrup — legislative enactment.<sup>53</sup>

Thus even the faithful among the economic individualists condoned government intervention whenever it was perceived to be in their own interest. To the degree that the Supreme Court hampered the early

49. G. KOLKO, *RAILROADS AND REGULATION 1877-1916*, 238 (1965).

50. 94 U.S. 113 (1877).

51. *Chicago, Burlington & Quincy R.R. v. Iowa*, 194 U.S. 155 (1877); *Peik v. Chicago & N.W. Ry.*, 94 U.S. 164 (1877); *Chicago, Milwaukee & St. P.R.R. v. Ackley*, 94 U.S. 179 (1877); *Wiona & St. Peter R.R. v. Blake*, 94 U.S. 180 (1877); *Stone v. Wisconsin*, 94 U.S. 181 (1877).

52. See G. MILLER, *RAILROADS AND THE GRANGER LAWS 196-97* (1971). See also Scheiber, *The Road to Munn: Eminent Domain and the Concept of Public Purpose in the State Courts*, in *LAW IN AMERICAN HISTORY* 329 (D. Fleming & B. Bailyn eds. 1971).

53. *Government Control of Railroads*, 17 *COM. & FIN. CHRONICLE* 666-67 (1885).

development of regulatory bodies such as the Interstate Commerce Commission,<sup>54</sup> it can be argued that the Court was hardly pro-business in its outlook but rather that it was paying heed to an ideology discarded by those whom the constitutional norms purported to serve.

### C. *The Lochner Litigation*

As described above, the normative atmosphere in which the *Lochner* litigation was to be resolved was shifting. The New York statute met the opposition it did precisely because it moved beyond the perimeter of facile acceptability at that time.<sup>55</sup> It was surely not a matter of judicial animosity for the baking vocation or a belief that bakers ought necessarily to work long hours. The gravamen lay elsewhere. The statute simply transgressed an undefined line of propriety by proposing state regulation of the working conditions of a group that seemed little different from most others in society. Viewed in this way, the statute represented a radical departure from approved standards and suggested the advent of an altogether different kind of polity. A state-imposed limit on hours for bakers signaled a shift from laissez-faire thought to a form of capitalism where major economic interests would attempt to employ government power to regulate economic relationships which could not or would not be controlled by voluntary or non-political means.<sup>56</sup> One would seek to achieve by political decision that which previously would have been left to the ordinary workings of the market. Justice Peckham's vision in *Lochner* was only slightly imperfect:

It is unfortunately true that labor, even in any department, may possibly carry with it the seeds of unhealthiness. But are we all, on that account, at the mercy of legislative majorities? A printer, a tinsmith, a locksmith, a carpenter, a cabinetmaker, a dry goods clerk, a bank's, a lawyer's, or a physician's clerk, or a clerk in almost any kind of business, would all come under the power of the legislature, on this assumption. No trade, no occupation, no mode of earning one's living, could escape this all-pervading power, and the acts of the legislature in limiting the hours of labor in all employments would be valid, although such limitation might seriously cripple the ability of the laborer to support himself and his family. . . .

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54. *E.g.*, *ICC v. Alabama Midland Ry.*, 168 U.S. 144 (1897); *ICC v. Cincinnati, N.O. & Tex. Pac. Ry.*, 167 U.S. 479 (1897).

55. *See* notes 56-63 and accompanying text *infra*.

56. While some government involvement was deemed desirable, much of the literature of the period reflects a fear of too much government involvement. *See, e.g.*, G. BOLEN, *GETTING A LIVING* (1903); ALGER, *Some Equivocal Rights of Labor*, 97 *ATL. MONTHLY* 364 (1906).

It is also urged, pursuing the same line of argument, that it is to the interest of the State that its population should be strong and robust, and therefore any legislation which may be said to tend to make people healthy must be valid as health laws, enacted under the police power. If this be a valid argument and a justification for this kind of legislation, it follows that the protection of the Federal Constitution from undue interference with liberty of person and freedom of contract is visionary, wherever the law is sought to be justified as a valid exercise of the police power. Scarcely any law but might find shelter under such assumptions, and conduct, properly so called, as well as contract, would come under the restrictive sway of the legislature. Not only the hours of employés, but the hours of employers, could be regulated, and doctors, lawyers, scientists, all professional men, as well as athletes and artisans, could be forbidden to fatigue their brains and bodies by prolonged hours of exercise, lest the fighting strength of the State be impaired. We mention these extreme cases because the contention is extreme. We do not believe in the soundness of the views which uphold this law.<sup>57</sup>

It was as if Justice Peckham and four of his brethren had looked across the chasm and dared not proceed. For those whose thought was once largely part of a mainstream which economic events were fast driving into a backwater, the statute simply went too far. The constitutional theory of the time offered little guidance in evaluating such a controversial law. This theory embraced a firm policy — non-intervention by government in the economy — yet was subject to a variety of exceptions which had been carved out on an ad hoc basis.<sup>58</sup>

One of the exceptions to laissez-faire policy permitted government regulation of dangerous occupations. Seven years prior to *Lochner* the Supreme Court in *Holden v. Hardy*,<sup>59</sup> had upheld a state statute which provided for a limit on the workday of miners, despite arguments that it amounted to an unlawful exercise of the police power.<sup>60</sup> In argument before the Court, counsel for the State of Utah had defended the legislation on the same ground that had prevailed in the lower courts:<sup>61</sup> the health hazards of mining. Counsel stressed the “unusual danger to the health and safety of those employed therein,”<sup>62</sup> and reviewed legislative investigations of hospital records and health statistics.<sup>63</sup> Even those economic individualist die-hards who doubted the wisdom of this law

57. 198 U.S. at 59–61.

58. See text accompanying notes 32–34 *supra*.

59. 169 U.S. 366 (1898).

60. *Id.*

61. See *Holden v. Hardy*, 14 Utah 71, 46 P. 756 (1896), *aff'd*, 169 U.S. 366 (1898).

62. Brief for Defendant at 8.

63. *Id.*

conceded that regulatory legislation was necessary where an occupation was hazardous to health.<sup>64</sup>

Speaking for the *Holden* majority, Justice Henry Billings Brown agreed:

This right of contract, however, is itself subject to certain limitations which the State may lawfully impose in the exercise of its police powers. While this power is inherent in all governments, it has doubtless been greatly expanded in its application during the past century, owing to an enormous increase in the number of occupations which are dangerous, or so far detrimental to the health of employes as to demand special precaution for their well-being and protection, or the safety of adjacent property. While this court has held . . . that the police power cannot be put forward as an excuse for oppressive and unjust legislation, it may be lawfully resorted to for the purpose of preserving the public health, safety or morals, or the abatement of public nuisances . . . .

. . .

Upon the principles above stated, we think the act in question may be sustained as a valid exercise of the police power of the State. The enactment does not profess to limit the hours of all workmen, but merely those who are employed in underground mines . . . . These employments, when too long pursued, the legislature has judged to be detrimental to the health of the employes, and, so long as there are reasonable grounds for believing that this is so, its decision upon this subject cannot be reviewed by the Federal courts.<sup>65</sup>

The law as expounded by Justice Brown harmonized with the bulk of state court decisions of the day on such questions. Hours legislation had generally been approved only when some special need for it had been convincingly demonstrated.<sup>66</sup>

The failure to demonstrate such a need proved to be the undoing of the hours limitation in *Lochner*. Indeed, the burden of the state was that of making a baker's occupation appear sufficiently extraordinary to justify legal restrictions on the workday. This potential constitutional basis was so tenuous that at each of the three appellate hearings on the validity of the legislation the outcome was decided by a single vote.

In the Appellate Division of the Supreme Court of New York, the constitutionality of the statute was approved by a vote of three to

64. Record at 11.

65. 169 U.S. at 391-92, 395 (citations omitted). Justices Brewer and Peckham dissented without opinion.

66. For an excellent review of the statutes challenged during this period, see Frankfurter, *supra* note 33.

two.<sup>67</sup> Justice Davy, speaking for the majority, was impressed with the health hazards bakers were required to endure:

When we consider the intense heat of the rooms where baking is done, and the flour that floats in the air and is breathed by those who work in bakeries, there can be but little doubt that prolonged labor day and night, subject to these conditions, might produce a diseased condition of the human system so that the employees would not be capable of doing their work well and supplying the public with wholesome food.<sup>68</sup>

In the New York Court of Appeals, where the statute was sustained four votes to three,<sup>69</sup> Judge Parker's majority opinion noted that bakers were frequently classified by medical authorities with "potters, stone cutters, file grinders, and other workers whose occupation necessitates the inhalation of dust particles."<sup>70</sup> Published medical opinion, Judge Parker thought, fully justified the statutory provisions under review.<sup>71</sup>

In a concurring opinion, Judge Gray expressed his willingness to uphold the statute because the hours provision was part of a general statute setting standards of cleanliness and safety in the industry. Had the restriction of working hours stood alone however, in his view it would have violated the right of contract.<sup>72</sup>

Similar doubts were expressed in the dissenting opinions which were subsequently endorsed by five Justices of the United States Supreme Court. In dissent, Judge O'Brien maintained:

[The law had] no relation whatever to the subject of health. . . . [Its] real object was to regulate the hours of labor between master and servant in a business which is private and not dangerous to morals or to health. . . . [T]he making of bread is one of the most common employments.<sup>73</sup>

Judge Bartlett, dissenting, explicitly rejected the medical statistics upon which others had relied. He asserted that

the baker, like the cooks in hotels, restaurants and private families, has provided for him in his business flour, sugar and the other

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67. *People v. Lochner*, 73 App. Div. 120 (1902).

68. *Id.* at 128.

69. *People v. Lochner*, 177 N.Y. 145, 69 N.E. 373 (1904).

70. *Id.* at 165, 69 N.E. at 380. However, it was in Judge Vann's concurring opinion that these authorities received full mention. Judge Vann reminded the legislators that their authority to establish health regulations was limited by the court's determination "whether the act has a fair, just, and reasonable relation to the general welfare." *Id.* at 168, 69 N.E. at 382 (Vann, J., concurring). Judge Vann considered the evidence persuasive and cited data from several medical and other studies concerning the health hazards of baking. *Id.* at 170-74, 69 N.E. at 382-84.

71. *Id.* at 165, 69 N.E. at 380-81.

72. *Id.* at 166, 69 N.E. at 381 (Gray, J., concurring).

73. *Id.* at 183, 186, 69 N.E. at 387-88 (O'Brien, J., dissenting).

ingredients duly prepared for immediate use. The claim that the compounding of these constituents is an unhealthy occupation, will surprise the bakers and good housewives of the State. The grinding of steel . . . and of other similar materials and substances, causing clouds of impalpable dust, is not to be confounded with the avocation of the family baker engaged in the . . . labor of producing . . . commodities more calculated to cause dyspepsia in the consumer than consumption in the manufacturer.<sup>74</sup>

In Judge Bartlett's opinion, the statute proposed an extension of the recognized exceptions to laissez-faire policies beyond their intended limits.<sup>75</sup>

When *Lochner* reached the United States Supreme Court a year later, it appeared that the Justices' perceptions of the baker's working conditions were crucial to the outcome of the case. Counsel for the state did not reflect this concern in the quality of his argument, however, since the state's brief contained no citation to medical or other authorities regarding the hazards of the profession, and failed to demonstrate any real health justification for the legislation. In short, counsel offered no reason for concluding that the baker's calling was different, for health purposes, from any other. Rather, the state's case rested upon the assertion that the legislature had found an existing need, and that prior cases supported a finding that the regulatory enactment was a lawful exercise of the state's police power.<sup>76</sup>

In contrast, counsel for Joseph *Lochner* and, indirectly, for the other master bakers in New York, understood precisely the message from the lower courts and correspondingly seized the occasion to demonstrate that the *hours* of labor and the *health* of the employee were only remotely related at best. Appellant's counsel concluded:

[A]n extensive leisure of the employees [is] more dangerous to their health in both a physical and moral sense, than correspond-

74. *Id.* at 187-88, 69 N.E. at 389 (Bartlett, J., dissenting). Judge Bartlett was known to be unsympathetic to a claim of this sort. He was the sole dissenter in *Health Dep't v. Trinity Church*, 145 N.Y. 32, 39 N.E. 833 (1895), where the New York Court of Appeals, in an opinion by the then Judge Peckham, upheld the constitutionality of a law requiring owners of tenement houses to furnish at least one water spigot on each floor.

75. See notes 32-34 and accompanying text *supra*. Judge Bartlett felt that the statute proposed too great a change, as is indicated by the following remarks:

The country miller of fifty years ago who passed a long and happy life amid the hum of machinery and the grinding process of the upper and nether stones, little dreamed of a coming day when the legislature, in the full panoply of paternalism, would rescue his successor from the appalling dangers of the life he led until old age summoned him to retire.

177 N.Y. at 188; 69 N.E. at 389.

76. Brief for Defendant in Error.



ingly long hours of work in bake-shops properly conducted under the sanitary rules provided for by the provisions of the bakery inspection laws.<sup>77</sup>

In other words, baking under the proper conditions was not an unhealthy occupation. Therefore, reasonable exercise of the police power should look to such conditions of work and not to the hours of labor. In terms of health, the appellant contended, hours simply amounted to an insignificant variable, and therefore, to an unreasonable application of the police power.<sup>78</sup>

#### D. *Composition and Philosophy of the Court*

The ultimate resolution of the *Lochner* litigation by the Supreme Court, in all probability, had much to do with the affixing of a *laissez-faire* label to the Court during this period. To a degree the label is accurate, for most of the Justices were generally sympathetic to the tenets of economic individualism — some more so than others.<sup>79</sup> It would have been unusual had the contrary been true, for this was the dominant single body of economic thought in the last third of the 19th century.<sup>80</sup> Like so many labels, however, this one conceals some of the truth. Despite the fact that a bare majority failed to approve the hours limit for bakers, the Court was, on the whole, tolerant of state exercises

77. Brief for Plaintiff in Error at 60.

78. *Id.* The defendant's argument may have carried added weight because of the efforts of Henry Weismann, *Lochner's* counsel in the United States Supreme Court. Weismann had formerly been a journeyman baker and had become active in the labor movement in New York. In 1895, as editor of *The Baker's Journal*, he had led the drive which culminated successfully in the passage of the statute now under review. Weismann later became a master baker, studied law, and was admitted to the bar. In 1904, he was engaged by the State Association of Master Bakers to advance *Lochner's* case beyond the New York Court of Appeals; he later acknowledged that he had come to believe that the law for which he labored was a mistake. *N.Y. Times*, Apr. 19, 1905, at 1, col. 3.

It is difficult to determine whether Weismann's participation as counsel influenced the *Lochner* Court. It is quite likely, however, that his unique background was known to the Justices, since Weismann was admitted to the Supreme Court bar *pro hac vice*. C. BUTLER, *A CENTURY AT THE BAR OF THE SUPREME COURT OF THE UNITED STATES* 171 (1942).

A second factor which may have affected the outcome of *Lochner* in the Supreme Court was Justice McKenna's background. His father was a baker, and although there is no record of any reference Justice McKenna may have made to his childhood in a baker's home, it seems probable that his youth had some bearing on his attitude toward state regulation, at least in this instance. Justice McKenna later came to accept legislation of the sort he had voted to invalidate in *Lochner*. M. McDEVITT, *JOSEPH MCKENNA: ASSOCIATE JUSTICE OF THE UNITED STATES* 138 (1946). As a point of interest, Justice McKenna concurred with the five-member majority upholding the 8-hour workday for railroad employees in *Wilson v. New*, 243 U.S. 332 (1917).

79. See tables I-IV *infra*.

80. R. GABRIEL, *supra* note 28, at 151-64.

of the police power. One may argue that politically a broad indulgence was necessary to forestall successive attacks on the judicial fortress. Indeed, there were some who were persuaded that the national interest demanded a disarming of the judiciary by removing, or at least severely curtailing, the power of judicial review.<sup>81</sup> That real limits exist to the uses of judicial review cannot be doubted, but it is submitted that those limits had not been reached before *Lochner*. Rather, the pattern of Supreme Court decisions during that period reveals a widespread sufferance for most applications of the police power. To restate a major theme of this article, *Lochner* was significant because of the far-reaching nature of the change it proposed.

Membership on the Supreme Court was relatively stable in the several years preceding *Lochner*. In fact, between 1898 and 1905, only two Justices departed; Justices Gray and Shiras were replaced in 1902 and 1903 by Justices Holmes and Day respectively. In the years 1898 through 1902, when the Court consisted of Chief Justice Fuller and Justices Gray, Shiras, McKenna, Brown, White, Harlan, Peckham and Brewer, some 69 cases were decided which turned on the limits of the state police power, broadly defined.<sup>82</sup> Of this number, 49 were decided without a dissent,<sup>83</sup> and 20 were decided by a divided court.<sup>84</sup> Of the 69 cases, 14 (20%) declared the state regulations in question an unconstitutional exercise of state police power. It is within the 20 cases where a division is recorded that some interesting differences among the Justices appear.

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81. For illustrations of the arguments posed by those who would seek to limit the scope of judicial review, see materials cited in note 9 *supra*.

82. Police power is defined, for the purposes of this analysis, as the power inherent in each state to prescribe such reasonable rules for the conduct of its citizens and residents, and regulations for the use of private property, as are necessary for the welfare of the public. This power is, of course, limited by the requirement that the regulation not conflict with rights secured by the state and federal constitutions. The term "connotes the time-tested conceptual limit of public encroachment upon private interests." *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962).

At the turn of the century, individualism and the sanctity of private property dominated the social philosophy; it was thought that the state existed primarily to protect property rights. R. GABRIEL, *supra* note 28, at 157-58, 168. It is submitted that this social philosophy affected to some extent the judiciary's consideration of the scope of the police power. The tables provided herein are an attempt to measure the influence of this philosophy upon the individual members of the Court. It should be noted, however, that several of the cases cited in the tables involved issues collateral to the issue of whether the state's exercise of police power was valid. For example, the case may have involved issues of standing and ripeness, and an individual justice's vote may reflect his thoughts on one of these collateral issues. The justices did not write separate opinions with great frequency during this period, and it was common for the justices, when dissenting, to do so without opinion. Thus, it is difficult to pinpoint the exact ground for each of the justice's decisions.

83. See Appendix I.

84. See Appendix II.

TABLE 1

*Percentages of votes upholding exercise of police power in 20 cases decided by a divided Court in the years 1898-1902*

<i>Justices</i>	
Gray	100 (20)
Fuller	80 (16)
McKenna	75 (15)
Shiras	70 (14)
Harlan	70 (14)
Brown	55 (11)
White	55 (11)
Brewer	35 ( 7)
Peckham	25 ( 5) n = 20

Of the 69 such cases decided during this period, 22 involved property rights or contract rights questions. Eight of these 22 cases were decided by a divided court,<sup>85</sup> and 4 of the 22 (18%) invalidated state regulatory legislation. Among the eight cases in which the Court was divided, reactions, of individual Justices are reported in table II below.

TABLE II

*Percentages of votes upholding exercise of state police power in 8 cases involving property rights or contract rights questions decided by a divided Court in the years 1898-1902*

<i>Justices</i>	
Gray	100 (8)
Fuller	88 (7)
McKenna	75 (6)
White	75 (6)
Brown	62 (5)
Shiras	62 (5)
Harlan	62 (5)
Brewer	25 (2)
Peckham	0 (0) n = 8

In the period from 1903 through 1906, when Justices Holmes and Day had replaced Justices Gray and Shiras, the number of cases raising challenges to an exercise of state police power rose to 96, 62 of which

85. See Appendix III.

were decided by a unanimous Court.<sup>86</sup> Thirty-four of these were decided by a divided Court,<sup>87</sup> and of the 96, 33 (34%) held the particular regulations invalid. The individual voting differences appear below in table III.

TABLE III

*Percentages of votes upholding exercise of state police power in 34 cases decided by a divided Court in the years 1903-1906*

<i>Justices</i>	
Holmes	76 (26)
White	70 (23)*
Day	68 (23)
Fuller	65 (22)
Harlan	64 (21)*
McKenna	62 (21)
Brown	50 (17)
Peckham	44 (15)
Brewer	26 ( 9) n = 34

\* Voted in 33 cases only.

Of the 96, 29 raised the more particular issues of property rights and the contract clause. Of these, 14 were decided by a divided court,<sup>88</sup> and in four (12%) the legislation was held unconstitutional. Again, there were sharp differences among the Justices.

TABLE IV

*Percentages of votes upholding exercise of state police power in 14 cases involving property rights or contract rights questions decided by a divided Court in the years 1903-1906*

<i>Justices</i>	
Harlan	93 (n=13)
Holmes	93 (n=13)
White	92 (n=12)*
Day	86 (n=12)
McKenna	86 (n=12)
Brown	71 (n=10)
Fuller	64 (n= 9)
Peckham	29 (n= 4)
Brewer	14 (n= 2)

\* Voted in 13 cases only.

86. See Appendix IV.

87. See Appendix V.

88. See Appendix VI.

The tables are revealing. On the issue of state police power generally, in tables I and III, there was a substantial increase in litigation in the years 1903–1906 over the years 1898–1902. The increase is somewhat more notable since the former period is the shorter of the two. Moreover, as the volume of such litigation increased, the Court as a whole became less tolerant of the manifestations of the state police power which found their way to the High Bench, although the great majority of regulatory legislation met with judicial approval. Moreover, as tables II and IV indicate, constitutional approbation of restrictions on property rights and intrusions upon liberty of contract was actually above that for the more general police power category. The record is admittedly the product of a property-conscious Court, but hardly of an aggressively hostile one.

The tables also reveal that certain Justices tended to be far more inclined than others to uphold legislation enacted under the state police power. Justices Brewer and Peckham seemed most consistently disdainful of such statutes. Justices Holmes and White were most often at the other end of the spectrum, with Justice Day not far behind. Chief Justice Fuller became far less tolerant from the first period to the second. Justices Harlan, McKenna and Brown assumed a moderate stance.<sup>89</sup> The figures in table IV are especially interesting because the first four Justices comprised the *Lochner* minority and the remaining five the majority. While the tables do not fix exact positions, they do suggest the tendencies of the individual members of the Court to vote for or against state regulatory attempts. They also suggest that for most Justices the cases presented some very hard questions.

Henry Billings Brown bears some examination in this respect. Justice Brown wrote the opinion of the Court in the *Holden* case,<sup>90</sup> upholding the Utah mining statute, yet voted with the majority to

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89. Justice Brewer had once said, "The philosophy of Plato and Herbert Spencer is man's wisdom." Address by Justice Brewer, in Gamer, *Justice Brewer and Substantive Due Process: A Conservative Court Revisited*, 18 VAND. L. REV. 615, 632 n.70 (1965). As for Justice Peckham, a contemporary of his noted that he "seems to take an *a priori* pleasure in a reversal, and his opinions toward that direction seem to have more vim than when he sustains." Hall, *The New Supreme Court Justice*, 8 GREEN BAG 1, 2 (1896).

Justice Harlan's moderate stance has been clarified in recent literature. [Justice Harlan] combined a passionate desire to vindicate the civil rights of blacks with a reverence for private property. He often opposed economic regulation by the states, but generally tolerated it when undertaken by the federal government. He had no affinity for the reform ideologies of the late nineteenth century . . . . Yet he joined supporters of those movements in railing against and attempting to regulate the giant industrial enterprises of the period. Harlan's model of judging . . . bound a judge only to his own intuitive sense of what was right.

White, *John Marshall Harlan I: The Precursor*, 19 AM. J. LEG. HIST. 1, 5–6 (1975).

90. See notes 59–65 and accompanying text *supra*.

void the hours limit for bakers in *Lochner*. In the several tables measuring the individual propensity to validate exercises of the police power, he was ranked more or less towards the center. Justice Brown realized the need for protection of property interests, but was equally willing to acknowledge the state's role in improving the general condition of its citizenry. His address on the "Distribution of Property" to the American Bar Association in 1893 might be said to exemplify this duality of feeling which very probably was felt by most of his colleagues. On the one hand, he declared:

While enthusiasts may picture to us an ideal state of society where neither riches nor poverty shall exist, wherein all shall be comfortably housed and clad . . . such a Utopia is utterly inconsistent with human character as at present constituted . . . . Rich men are essential even to the well-being of the poor . . . . One has but to consider for a moment the immediate consequences of the abolition of large private fortunes to appreciate the danger which lurks in any radical disturbance of the present social system.<sup>91</sup>

However, in the very same address, he queried:

Does it therefore follow that legislation can do nothing to improve those [labor-capital] relations, or to palliate the evils of the present situation? I think not. [The state] may fix the number of hours of a legal day's work, provide that payment be made at certain stated periods, protect the life and health of the workingman against accidents or diseases arising from ill-constructed machinery, badly ventilated rooms, defective appliances or dangerous occupations, and may limit or prohibit altogether the labor of women and children in employments injurious to their health or beyond their strength.<sup>92</sup>

This address, predating *Lochner* by more than a dozen years, highlights the ambivalence with which the overriding legal question of the day was approached. The voting patterns of the years 1898-1906 suggest that most of Justice Brown's colleagues entertained similar feelings.<sup>93</sup>

### III. SUMMARY AND CONCLUSION

*Lochner* illustrates the dilemma of altering constitutional theory in order to accommodate an evolving public policy as well as any other case of the period. Political, economic, and judicial traditions were

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91. Brown, *The Distribution of Property*, 16 REP. AM. BAR ASSOC. 213, 218-19 (1893).

92. *Id.* at 235-36.

93. See A. PAUL, *CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895*, 84 (1960).

in the throes of transition. The transition consisted of a series of modifications which in time twisted the traditions beyond recognition. *Lochner* was a celebrated case principally because the policy embodied within the statute was perceived as effectively undercutting those traditions. It is submitted that for political and ideological reasons, more than anything else, a majority of the Justices surveyed the proposed change and found it wanting in constitutional support.

The case offers several conclusions about the role of the Supreme Court in constitutional change. First, when a case presents an issue where at least one possible resolution would effect a change in public policy, one must determine the *degree* of potential change the litigation represents. It is axiomatic that a small adjustment in policy is more easily adopted than a major overhaul. To the degree that a particular resolution of a case requires the former, the change will more probably be made.

Second, one must explore the dimensions and the depth of the varieties of constitutional interpretation present on the Court. Is the proposed change in some way antagonistic to a dominant constitutional tradition? A Supreme Court decision which amounts to a significant policy change, after all, might be relatively unencumbered with improbabilities if the change in policy does not sharply conflict with strongly held constitutional beliefs. For example, the public accommodations section of the Civil Rights Act of 1964<sup>94</sup> was itself a pronounced change in policy — a substantial intrusion into private choice. Yet, the change could be easily harmonized with the existing constitutional theory of the commerce clause<sup>95</sup> — far easier, for instance, than had the legitimization been possible solely through a redefinition of the fourteenth amendment.<sup>96</sup>

Furthermore, *Lochner* demonstrates that particular arguments presented to the Court can be critical to the outcome of litigation. The hours limit for bakers could have been accommodated within the tradition of economic individualism had the majority been prepared to view

94. 42 U.S.C. §§ 2000 *et seq.* (1970).

95. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

96. The commerce clause had been interpreted by the Court as allowing federal regulation of those intrastate activities which affect interstate commerce. *See, e.g.,* Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Darby, 312 U.S. 100 (1941); Labor Board v. Jones & Laughlin, 301 U.S. 1 (1936). The Court's utilization of the commerce clause to prohibit discrimination on the ground that such discrimination would have a harmful effect upon interstate travel and interstate sale of goods was, therefore, not a departure from precedent. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

The fourteenth amendment, however, had been interpreted as applicable only to state action. Civil Rights Cases, 109 U.S. 3 (1883). The use of the amendment as the basis of the 1964 Civil Rights Act's Public Accommodation Section would therefore have entailed a sharp change in judicial policy.

the statute as an additional safeguard for workers in hazardous occupations. This accommodation might not have been persuasive for long before it became apparent that a far greater number of vocations could resort to government intervention on their behalf on the same grounds, but it would have been an acceptable piece of patchwork for the short run. At least for the Supreme Court, the statute was never really defended in terms which could have placed it within that tradition. Rather, by inference and by assertions of counsel for Joseph *Lochner* the statute stood out in variance with that tradition.

Finally, the stake in approving a proposed change and, conversely, the interest in maintaining the status quo, as perceived by the Justices, cannot be overlooked. The majority in *Lochner* perhaps sensed a tide moving against them. They were not ignorant of the surging growth of organized labor in the country<sup>97</sup> and must have been aware of the fact that the statute represented a legislative triumph for the labor movement in New York. They could not have been unmindful of the increased support the Socialist Party was receiving,<sup>98</sup> nor were they encouraged by the symbolic defeat of the conservative Judge Parker as the Democratic presidential candidate the preceding year. Yet, the *Lochner* court could not have been expected to foresee the extent of anti-Court sentiment their decision would spur. It was rather as if they were defending a position from an attack which in their eyes would shortly pass. Prescience must be a goal not distant from any court's consciousness as it gropes for the continuing accommodation between norms and policy.

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97. Membership in the American Federation of Labor climbed from 278,000 in 1898 to 1,676,000 in 1905. H. FAULKNER, *THE QUEST FOR SOCIAL JUSTICE 1898-1914*, 53 (1931).

98. Eugene Debs' Socialist vote in presidential elections rose from 94,000 in 1900 to 402,000 in 1904. R. HOFSTADTER, *supra* note 41, at 240.



APPENDIX I

49 Unanimous Police Power Cases (1898–1902)

- Chicago, B. & Q. R.R. v. Nebraska, 170 U.S. 57 (1898)  
Houston & Texas Ry. v. Texas, 170 U.S. 243 (1898)  
Wilson v. Eureka City, 173 U.S. 32 (1899)  
St. Louis, Iron Mtn. & St. P. Ry. v. Paul, 173 U.S. 404 (1899)  
Clark v. Kansas City, 176 U.S. 114 (1900)  
Weyerhaeuser v. Minnesota, 176 U.S. 550 (1900)  
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