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Lochner as Literature: Weighing the Paternalism of Progressivism

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Lochner as Literature: Weighing the Paternalism of Progressivism

ABSTRACT

In order to add a depth of understanding to the Lochner v. New York *debate interpretation, this Comment utilizes an interdisciplinary approach by blending literary critique, legal analysis, and historical context to revisit Justice Peckham's opinion. The context of the Progressive Era and the application of the law as literature movement framework reveal a critical subtext of the opinion, one which relies heavily on Paternalistic aspirations to assimilate immigrants. This Comment offers a unique perspective on* Lochner v. New York *while simultaneously providing a framework for future opinion analyses to aid attorneys best harness the power of metaphor in appellate argument.*

ABSTRACT 115
INTRODUCTION 115
I. THE LEGAL FOUNDATION 119
II. THE SCHOLARLY DEBATE OF LOCHNER INTERPRETATIONS 124
III. *LOCHNER* AS LITERATURE: A METAPHORICAL ANALYSIS 126
A. The Immigrant in The Progressive Era 128
B. Popular Metaphorical Influences 131
C. Application of Law and Literature to the Lochner *Decision* .. 132
1. The Boyhood of the Immigrant 132
2. Muscular Masculinity 133
3. Father Figures 134
CONCLUSION 135

INTRODUCTION

The study of law is colored by the context which surrounds it. By using popular literature and metaphorical language in the proper context, modern scholars can add unparalleled depth to intricate, century-old debate. This is especially true in the monumentally important case of *Lochner v. New York*, a case which paints a clear picture of the Progressive Era and which loses its importance and meaning when divorced from its context.

The divide between classical capitalistic "greed" and humanitarian motivation parallels the divisiveness of the American society existing at the time the Court handed down the opinion.[1] The parties that provide the platform for debate over a piece of New York legislation reveal larger inconsistencies with the culture from which *Lochner* arose, the rampant Paternalism[2] over the booming immigrant population, and the complexities of an opinion which cannot be boiled down to a finely defined box.

The Progressive Era provides a backdrop ripe for analysis on still-pertinent issues such as political corruption, powerful robber barons, growing poverty, booms of immigration, and heightened racial issues.[3] Pointing to a single defining moment of the Progressive Era proves difficult because of the sheer number of significant events.[4] From the Spanish–American War to the annexation of the Philippines, America was beginning to gain traction as a world power.[5] Racial tensions continued to surge throughout the country as Jim Crow began to creep into Southern legislatures, and the population bought into concepts of social Darwinism.[6] Economically, the country was split between the ultra-rich titans of industry, who controlled large trusts, as well as the tenements of large cities.[7] The large wave of the Immigration Era carried in a push for cultural assimilation and uniformity amongst the population, a rhetorical myth that became ingrained in the public thought. [8]

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1. This is particularly relevant in 2020 as the debate around COVID-19 rages on with outlets arguing between dissolving the stay-at-home orders protecting public health for the larger capitalistic concerns regarding the economy. *See* Emily Bazelon, *Restarting America Means People Will Die. So When Do We Do It?*, N.Y. TIMES (Apr. 10, 2020), https://www.nytimes.com/2020/04/10/magazine/coronavirus-economy-debate.html [https://perma.cc/L89U-8Y7M] ("Many Americans have responded by rejecting as monstrous the whole idea of any trade-off between saving lives and saving the economy.").

2. The Author has made the cognizant choice to capitalize "Paternalism" to emphasize the importance of the term to the analysis in this Comment.

3. *See* Frederick R. Lynch, *Social Theory and the Progressive Era*, 4 THEORY & SOC'Y 159, 159 (1977).

4. *See* CATHERINE COCKS ET AL., THE A TO Z OF THE PROGRESSIVE ERA xi (2009).

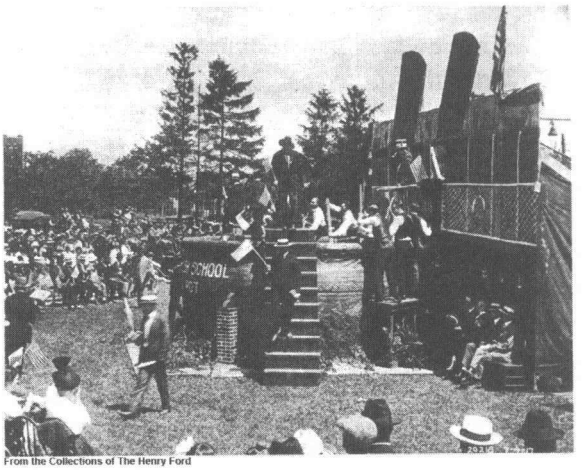
5. *See id.* at 148. ("The Progressive Era was a decisive period in foreign policy, when the United States emerged as a diplomatic, military, and economic power with enormous influence in the Americas and a presence in other parts of the world.")

6. *Id.* at xxxiv.

7. *See* Martin Kelly, *6 Robber Barons From America's Past*, THOUGHTCO. (Aug. 12, 2019), https://www.thoughtco.com/robber-barons-from-americas-past-4120060 [https://perma.cc/9GHB-FQQS].

8. COCKS, *supra* note 4, at 16–18.

The swirling contradictions of the Era can be highlighted in a number of ways, but the particularly illuminating example of the Henry Ford School, depicted below, is just one example of the collision of economic theory, forceful assimilation, and the American Dream rhetoric in practice.[9]



Automobile mogul Henry Ford hired immigrants to work in his factories, but required all workers to attend and graduate from a program specifically developed to assimilate them to the American mindset.[10] The program culminated in a graduation ceremony which included the men entering one side of the melting pot in their traditional garb and exiting the other in suits, holding American flags to mark the transition as depicted in the photograph.[11]

As Ford intentionally pushed immigrants towards assimilation, the Supreme Court considered a landmark case that would directly affect the livelihood of another group of immigrants who chose not to work for large factories and attempted instead to protect their independent choice and bodily autonomy. Of course, at this point, bodily autonomy was nowhere near society's discussion of immigrants; instead, the public discourse centered on whether immigrants should be able to contract away their quality of life.

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9. Photograph of Melting Pot Ceremony at Ford English School at Detroit, July 4, 1917, *in* THE HENRY FORD, https://www.thehenryford.org/collections-and-research/digital-collections/artifact/254569 [https://perma.cc/WC76-7SQ3].

10. Jonathan Schwartz, *Henry Ford's Melting Pot*, *in* ETHNICITY: A CONCEPTUAL APPROACH 211, 214 (Daniel E. Weinberg ed., Michael Schwartz Libr. at Cleveland State Univ., 2020).

11. *See id.* at 215.

Within the concept of contracting away life lies *Lochner v. New York*.[12] The hotly contested liberty of contract case is included in nearly every constitutional law casebook and has been extensively debated by scholars.[13] Two distinct and opposing camps of scholars drive the continued fascination with the case by supplying unique angles from which to consider its implications. The traditionalist camp included those who wrote immediately following the *Lochner* Era,[14] and their work has been continually revered by those who despise the decision. In recent years, revisionist writings have pushed the debate surrounding *Lochner* to new heights.[15] It is precisely because of the divisiveness which existed contemporaneously to *Lochner* and currently in the scholarly debate that a deeper analysis into the opinion is appropriate.

In order to best understand the motivations of *Lochner* and add to the robust discussion surrounding its legacy, this Comment will use an interdisciplinary approach of combining the methods of legal and literary analysis. This is a unique angle because, by using literary critique methods to analyze the *Lochner* opinion, this Comment will dig deeper into the metaphorical use of the language chosen by Justice Peckham[16] and add

12. Lochner v. New York, 198 U.S. 45 (1905).

13. *See, e.g.*, Paul Kens, Lochner v. New York*: Tradition or Change in Constitutional Law?*, 1 N.Y.U. J.L. & LIBERTY 404, 404–05 (2005); [hereinafter *Tradition or Change in Constitutional Law*]; Gary D. Rowe, Lochner *Revisionism Revisited*, 24 L. & SOC. INQUIRY 221, 222 (1999); Barry Friedman, *The History of Countermajoritarian Difficulty, Part Three: The Lesson of* Lochner, 76 N.Y.U. L. REV. 971, 973–76 (2001).

14. Although the time from 1905 until the mid-1930s has been traditionally understood as the *Lochner* Era for promulgating economic liberty cases, there has been recent scholarship asking for a reevaluation of the traditional moniker. *See* James W. Ely, Jr., *The Protection of Contractual Rights: A Tale of Two Constitutional Provisions*, 1 N.Y.U. J.L. & LIBERTY 370, 391–92 (2005) [hereinafter *Protection of Contractual Rights*]. Although this debate exists, for the sake of continuity and because the name does not carry any markedly negative connotations, the *Lochner* Era will be used in accordance with the traditional understanding throughout this Comment.

15. *See Tradition or Change in Constitutional Law*, *supra* note 13, at 405.

16. Despite his prominence as a Justice on the Supreme Court, a judge on the New York Court of Appeals, and a prolific legal careerist servicing prominent political figures, Justice Peckham has never received a full-length biography devoted to his life. James W. Ely, Jr., *Rufus W. Peckham and Economic Liberty*, 62 VAND. L. REV. 591, 591–93 (2019) (providing one of the only comprehensive articles focused on Peckham's life as a Justice and his judicial legacy). Despite the lack of attention from biographers, Justice Peckham provides a particularly important angle into the *Lochner* debate. For the purposes of this article, Justice Peckham holds a position of importance because of his parallels with the Progressive Era directly. *See id.* at 607. Additionally, his limited legacy has been directly connected with his championing of the liberty of contract doctrine throughout his time in the legal profession. His legacy as the major proponent of the liberty of contract doctrine, his contemporaneous reputation as an advocate of the robber barons in New York, and his

more robust discussion to both his motivations and the practical results of his opinion.

To accomplish this goal, this Comment is divided into three distinct sections. Part I will begin by discussing the legal issues, including the case, the legislation at issue, and Justice Peckham. Part II will turn to the split in scholarship regarding *Lochner*. Part III will then delve into the literary analysis of metaphorical use of language in the opinion. *Lochner* stands squarely in opposition of Paternalism[17] and in support of immigrants, as indicated by Justice Peckham's use of cleverly placed literary metaphors to indicate his motivation in penning the majority opinion. Studying metaphorical usage in Supreme Court opinions allows scholars to understand to what extent public thought affects holdings and how to implement such metaphors in legal argument.

I. THE LEGAL FOUNDATION

Lochner provides a powerful platform on which an analysis into the of the Progressive Era can stand. The case itself involves a Bavarian immigrant baker, Joseph Lochner, who challenged the work-hours limitation of the New York Bakeshop Act of 1895 (the Bakeshop Act).[18] He argued that the limitation on bakeshop workers to only work sixty hours per workweek was unreasonable. The State of New York argued that the work-hours limitation was a valid use of police power to protect public health, safety, and welfare.[19] Ultimately, the Court issued a 5–4 decision

judicial activism all intersect to inform a unique portrait of him both as an individual and as the author of a prominent work. *Id.* at 595.

17. "Paternalistic relationships are based on inequality and require varying amounts of deference on the part of 'inferiors' toward their 'superiors.' They are hierarchical and often involve people of vastly different influence . . . . [P]aternalism implies that the subordinate classes embrace the philosophy and culture of the ruling class." CHRISTOPHER J. OLSEN, *Paternalism*, *in* THE NEW ENCYCLOPEDIA OF SOUTHERN CULTURE (Vol. 13: Gender) 201, 201–04 (Nancy Bercaw et al. eds., 2009), www.jstor.org/stable/10.5149/9781469616728_bercaw.55 [https://perma.cc/7QGT-AJXF]. This is the working definition of Paternalism that will be utilized throughout this Comment to categorize Justice Peckham's critique of the New York Legislature.

18. Lochner v. New York, 198 U.S. 45, 48 (1905) (noting that the plaintiff argued that this was an invalid exercise of the police power and that legislation of this type had been declared invalid as labor laws in all other states); New York Bakeshop Act of 1895, ch. 518, §§ 1–10, 1895 N.Y. Laws 305–07 (limiting a baker's workweek to sixty hours per week or an average of ten hours per day).

19. *Lochner*, 198 U.S. at 49.

written by Justice Peckham, holding in favor of Joseph Lochner and thereby overturning the law.[20]

The opinion focused heavily on the New York legislature and the intent which inspired the passage of the Bakeshop Act.[21] The Act provides an effective case study for viewing the type of legislation commonly enacted upon minority groups. It is important to understand the intent behind the Act before fleshing out Justice Peckham's critique of the legislature's motivation. The New York legislature passed the Bakeshop Act and provided that

> "[a]lthough limited to a single trade, the act applied to all employees, including men. Its language was not merely declaratory; on the contrary, it set forth a clear regulation that 'no employee shall be required, permitted, or suffered to work' in a bakery for more than ten hours in one day or sixty hours in one week."[22]

The Bakeshop Act's purpose as officially stated was to protect the working conditions of the immigrant workers through regulations that would ultimately result in heightened cleanliness of the baked products produced by bakeshops.[23]

As was the case with most Progressive Era regulations, the Bakeshop Act was grounded in seemingly good intentions. The official legislative intent behind the legislation, namely, to regulate the health conditions of bakeries, was reasonable considering that the public perceived the baking industry to be notoriously bad for an individual's health.[24] Bakeries were often inside bottom floor tenements, described as containing "low ceilings, lack of ventilation, and poor plumbing."[25] In short, the conditions were not ideal for food production.[26] It was widely believed that because of the condition of the bakeries, bakers were more likely to develop symptoms of

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20. *Id.* at 45.

21. *See id.* at 54.

22. PAUL KENS, *LOCHNER V. NEW YORK*: ECONOMIC REGULATION ON TRIAL 27 (1998).

23. § 1, 1895 N.Y. Laws at 305.

24. Matthew S. R. Bewig, *Laboring in the "Poisonous Gases": Consumption, Public Health, and the* Lochner *Court*, 1 N.Y.U. J.L. & LIBERTY 476, 480 (2005) [hereinafter *Laboring in the Poisonous Gases*].

25. *Id.*

26. In fact, the conditions were so appalling that, "[i]n 1895, the State Bureau of Labor Statistics concurred, stating that many of the bakeries were 'nothing more nor less than cellars of the worst description and absolutely unfit for the manufacture of food products. They are damp, fetid and devoid of proper ventilation and light.' The year before, the factory inspectors had concluded of baking that 'there appears to be no other industry, not even the making of clothing in sweat-shops, which is carried on amid so much dirt and filth.'" *Id.* at 481.

consumption[27] from the flour dust, heat, fumes, and smoke trapped within the poor circulation of tenement basements.[28] These health concerns outlined above provided the foundation for the Bakeshop Act's stated legislative intent.

Nestled within the larger public health-oriented legislation was the work-hour regulation of bakery workers, which limited the hours that any one worker could work in each week.[29] This regulation made it easier for larger, factory-owned bakeries to maintain staffing, but it put pressure on independent immigrant-owned bakeries.[30] These establishments relied upon a limited staff, usually family members, to man the shop and could not abide by such a regulation.[31] Additionally, it was outside the realm of the legislature's stated intent to protect the cleanliness of the workers because there was no logical connection between hours worked and personal health.[32]

When called to support its regulation in court, New York veered from the officially stated legislative intent of the Bakeshop Act.[33] Instead, the State argued that the legislation was a valid use of the police power with a distinctly Paternalistic undercurrent by stating that "[i]n dealing with certain classes of men the State may properly say that, for the purpose of having *able-bodied men at its command when it desires*, it shall not permit these men, when engaged in dangerous or unhealthful occupations, to work."[34] The Paternalistic undercurrent is appalling when reading the argument placed in front of the Supreme Court. The ability to order the immigrants' "able bodies" to use at the State's wish is a far cry from what the Bakeshop Act originally purported to be. The State entirely moved away from any

27. Consumption is the historical term for tuberculosis. John Frith, *History of Tuberculosis*, J. MIL. & VETERANS' HEALTH 29, 29 (2014). It refers to a bacterial infection with *Mycobacterium tuberculosis*. *Id.* It is an ancient disease and one that was widespread throughout the eighteenth and nineteenth centuries in impoverished communities. *Id.* Other names include the white death and the great white plague. *Id.*

28. *Laboring in the Poisonous Gases*, *supra* note 24, at 480.

29. New York Bakeshop Act of 1895, ch. 518, § 1, 1895 N.Y. Laws 305.

30. Matthew S. Bewig, *Lochner v. The Journeymen Bakers of New York: The Journeymen Bakers, Their Hours of Labor, and The Constitution - A Case Study in the Social History of Legal Thought*, 38 AM. J. LEGAL HIST. 413, 432 (1994) [hereinafter *Lochner v. The Journeymen Bakers of New York*].

31. *Id.* at 433.

32. *Id.* at 434.

33. Lochner v. New York, 198 U.S. 45, 50 (1905).

34. Brief for Defendants in Error, Lochner v. New York, 198 U.S. 45 (1905) (No. 292), *reprinted in* 14 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 733 (Philip B. Kurland & Gerhard Casper eds., 1975) (emphasis added).

sort of sanitation argument and instead objectified the body of the immigrant worker.

Additionally, the State of New York spoke to the inspiration for so-called health law. In their brief to the Court, the State asserted that the law was meant to resolve "the fact that there have come to that State great numbers of foreigners with habits which must be changed so that in due course of time there may be that assimilation which has made so successful our previous immigrations."[35] This language reflects the rhetoric of the day as shown by the Henry Ford's Melting Pot ceremony and a larger metaphor for the way immigrants were treated during the Progressive era. This rationale left no mystery of the State's motivation for the law, despite simultaneously claiming that it was a health law.

The Court ultimately rejected the State's argument and held in favor of Mr. Lochner, holding that the Bakeshop Act was not a health law—it was a law attempting to limit the labor of bakers and their liberty to contract as they pleased.[36] This holding was largely unpopular with the Progressive politicians at the time and with a number of Justices on the Court, resulting in scathing dissents.[37] Within the decision, Justice Peckham drew on the themes of freedom and liberty of the individual, specifically that there exists a "general right to make a contract in relation to his business [which] is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution."[38] Justice Peckham focused intently on the right of bakers,[39] both employers and employees of bakeries, to choose how to live their lives or work their jobs.[40] He expressly rejected any concern for the bakers' health and instead focused on the autonomy of the bakers as individuals with the ability to decide how to treat their bodies without legislation forcing them one way or another.[41]

35. *Id.* at 729.

36. *See Lochner*, 198 U.S. at 54, 57–58.

37. *Id.* at 65 (Justices Harlan, White, Day, and Holmes dissented from the opinion.).

38. *Id.* at 53 (citing Allgeyer v. Louisiana, 165 U.S. 578, 591–93 (1897) (per curiam) (holding that the state law preventing citizens from entering into insurance contracts with out-of-state companies violated the liberty of contract inherent in due process)).

39. The *Lochner* case dealt with the Bakeshop Act, and therefore, bakers were the focus of this particular discussion.

40. *See Lochner*, 198 U.S. at 53.

41. *See id.* at 57. For a more in-depth discussion on the public health argument within this decision, *see generally Laboring in the Poisonous Gases*, *supra* note 24, at 480; Wendy E. Parmet, *From Slaughter-House to Lochner: The Rise and Fall of the Constitutionalization of Public Health*, 40 J. AM. LEGAL HIST. 476 (1996) (discussing the intersection between public health and the Constitution).

The opinion resulted in two dissenting opinions, one of which has risen to infamy. The first, written by Justice Harlan and joined by Justices White and Day, argued that the Bakeshop Act was a reasonable use of New York's Police Power.[42] This view was based on the notion that, although "[i]t may be that the statute had its origin, in part, in the belief that employers and employees in such [bakeries] were not upon an equal footing," the regulation was reasonably related to public health.[43] Further, they asserted that it was not the job of the Court to look at the reasonableness of the legislation, a central point of contention.[44] To round out the dissent, Justice Harlan quoted a treatise on the "Diseases of the Workers" to prove that the baker is, generally, at a higher risk of death than other workers.[45]

The second dissent, written by Justice Holmes, rose to prominence in the Progressive Era and beyond.[46] His dissent provides the rhetoric that became the foundation for all of the critique of the *Lochner* decision.[47] Justice Holmes's most notable line stated that "[t]his case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind."[48] Justice Holmes's line of reasoning is the most powerful critique and one quoted regularly by scholars who wish to point out issues with the *Lochner* decision.[49] The dissent's rebuke of capitalistic ideals ultimately provided a framework for scholars who would proceed to enter the discussion to critique the *Lochner* decision.

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42. *See Lochner*, 198 U.S. at 69–70 (Harlan, J., dissenting).

43. *Id.* at 69.

44. *Id.*

45. *Id.* at 70–71.

46. *Id.* at 74 (Holmes, J., dissenting).

47. The first direct critique of the opinion was the dissent written by Justice Holmes, which sparked a litany of scathing scholarship for years to follow. The first and most prominent of these critiques was a piece published in the *Yale Law Review* by, then University of Nebraska Law School Dean, Roscoe Pound in 1909. Less than four years after the *Lochner* decision, Pound ripped into the Fuller Court, and Justice Peckham in particular, for falling for the "fallacy" of the liberty of contract doctrine and economic liberties generally. Pound's argument was grounded firmly in the historic understanding of the liberties protected by the Constitution and highlights the lack of any mention of such concept. The combination of Justice Holmes's dissent and Pound's scathing review provided the groundwork for the next half decade of critique. *See generally* Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909).

48. *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

49. *See, e.g.*, Pound, *supra* note 47, at 480–81.

II. THE SCHOLARLY DEBATE OF LOCHNER INTERPRETATIONS

Just as the *Lochner* majority and dissent stood firmly in opposition, so does the current scholarly understanding of the case. There are two distinct camps of interpretation for understanding the impact and motivation of the majority: those who choose to provide a traditional capitalistic critique, closely mirroring Justice Holmes's dissent, and the revisionists, who argue that the outcome was meant to protect the individual. Neither camp accounts entirely for the complexity of the era and opinion, but instead stand in black and white squares, devoid of context.

The traditional interpretation of *Lochner* explains that the only driving force behind the Supreme Court's decision was a laissez-faire economic theory benefitting big business,[50] rather than true liberty rights for individuals, and that a state's role in policing its inhabitants should be one of passivity.[51] This is the crux of the argument employed by critics in the Progressive Era in undercutting the *Lochner* decision.[52] Although more historical in nature, this critique continues to be advocated by more modern scholars who revisit traditional critiques and find that *Lochner* does fall within the bounds of a simplistically limited promotion of laissez-faire capitalism.[53] This type of critique was prominent until the 1980s when revisionist historians entered the scene, but it is still the central focus of many constitutional law professors teaching future lawyers about the

50. *See Tradition or Change in Constitutional Law*, *supra* note 13, at 411 ("According to the Progressive historians' account of Supreme Court history, the *Lochner* era Court molded these three ideas [of substantive due process, liberty of contract, and a narrow view of states' police powers] to fuse its own view of laissez-faire economics or the neutral state into constitutional doctrine.").

51. *See* Howard Schweber, Lochner v. New York *and the Challenge of Legal Historiography*, 39 L. & SOC. INQUIRY 242, 252–53 (2014).

52. *See, e.g.*, Pound, *supra* note 47, at 457 (discussing "[t]he currency in juristic thought of an individualistic conception of justice, which exaggerates the importance of property and of contract, exaggerates private right at the expense of public right, and is hostile to legislation, taking a minimum of law-making to be the ideal"); Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366 (1911) (discussing the development of substantive due process following *Lochner*); Charles Grove Haines, *Judicial Review of Acts of Congress and the Need for Constitutional Reform*, 45 YALE L.J. 816, 821–22 (1936) ("The transformation of the balance of power in the federal system took place in the [Progressive Era] when men, fearing they could not control legislatures, turned to the courts for the discovery of principles either within our outside of the constitutions to condemn policies which the business interests of the country disapproved.").

53. *See* David N. Mayer, *The Myth of "Laissez-Faire Constitutionalism": Liberty of Contract during the* Lochner *Era*, 36 HASTINGS CONST. L.Q. 217, 217 (2009).

monumental case of *Lochner* and provides the case's larger-than-life reputation.[54]

Standing in opposition to the traditional view, critics of traditional *Lochner* scholarship assert that this one-dimensional understanding of the *Lochner* majority fails to adequately account for the social and economic undercurrents of the time.[55] In their exploration of the *Lochner* decision, many scholars focus on rejecting the idea of purely capitalistic motivations by finding inspiration devoid of any monetary mention.[56] Their articles largely focus on the historical context of the day or previous legal jurisprudence to paint a more complex picture of the *Lochner* decision. Essentially, revisionist scholars contend, from a multitude of angles, that there is significantly more to understand about *Lochner* than simple economic theory.

There is much to take away from the scholars studying the *Lochner* case, but ultimately there are two major points that prompt this study into *Lochner* as literature. First, scholars in the field almost unanimously agree that more research concerning the *Lochner* legacy is necessary.[57] Additional study will aid in our current substantive due process jurisprudence. Second, interdisciplinary study is the most effective way to color the clearly gray territory that is interpreting *Lochner*. The traditional

54. The constitutional law classroom still portrays *Lochner* alongside cases such as *Plessy v. Ferguson* for its outdated viewpoints on society; understanding why such rhetoric has accrued is helpful in introducing modern lawyers to the revisionism. *See* Rebecca L. Brown, *The Art of Reading* Lochner, 1 N.Y.U. J.L. & LIBERTY 570, 581–82 (2005).

55. *See generally* HOWARD GILLMAN, CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 20 (1993) (proposing that the *Lochner* Era Court's approach was a reflection of "long-standing features of nineteenth-century police powers jurisprudence"); KENS, *supra* note 22, at 27 (discussing the historical context surrounding the Bakeshop Act); Friedman, *supra* note 13, at 973–76 (considering the case not as a relic of judicial overreach or a sign of capitalism ruling the Supreme Court, but as logically and accurately informed by the legal jurisprudence preceding the decision); David A. Strauss, *Why Was Lochner Wrong?*, 70 UNIV. OF CHI. L. REV. 373, 375 (2003) (arguing that the *Lochner* Era Court "acted defensibly in recognizing freedom of contract but indefensibly in exalting it"); Victoria F. Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CAL. L. REV. 751 (2009); DAVID BERNSTEIN, REHABILITATING *LOCHNER*: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM (2011).

56. *Lochner v. The Journeymen Bakers of New York*, *supra* note 30, at 414–15 (viewing *Lochner* as a case of public health regulatory importance).

57. *See Protection of Contractual Rights*, *supra* note 14, at 403 ("Further investigation will be required to establish the case for my hypothesis. Hopefully other scholars will tackle the puzzle of the constitutional status of contracts at the end of the nineteenth century. Such inquiry should produce a more nuanced understanding of this pivotal era in American constitutional history.").

and revisionist camps actively attempt to remain at odds with one another, but in order to properly understand and interpret the opinion, scholarship must begin to consider the two simultaneously by weighing the capitalistic reality of the day with modern reflection on the Progressive Era's literature. For these reasons, the following critique of *Lochner v. New York* as a literary work has its place within the current scholarship.

III. *LOCHNER* AS LITERATURE: A METAPHORICAL ANALYSIS

Despite the mountain of scholarship on *Lochner*, there has been no analysis of the opinion's literary value and meaning. Literary analysis provides an excellent implement to dig deeper into a case that still evades explanation. As the scholarship has progressed, new avenues of understanding traditional concepts of law have erupted in a new interdisciplinary field.[58] James Boyd White introduced the method of using literature in order to paint a fuller picture of the law in his 1973 book, *The Legal Imagination*.[59] White proposed that in order to properly understand legal opinions, it is necessary to read "rhetoric and concepts alongside, above, below and in-between literary works and criticism,"[60] an idea which persists in the study of law and literature. The interdisciplinary field which

58. Literature has informed legal critique in several ways, allowing scholars to use literary references within legal opinion look at the ways in which law affects literature, and finally, the way in which this Comment will be applying the interdisciplinary study, looking at the legal opinion as literature. Namely, the field of law and literature has become subdivided in three ways. First, the study of law *in* literature. *See generally* JEFFREY MILLER, THE STRUCTURES OF LAW AND LITERATURE: DUTY, JUSTICE, AND EVIL IN THE CULTURAL IMAGINATION (2013); James Seaton, *Law and Literature: Works, Criticism, and Theory*, 11 YALE J.L. & HUMAN. 479, 479–508 (1999). Second, the study of the law *of* literature, such as intellectual property law, refers to the fields of law which protect literature itself. *See* Alina Ng, *Literary Property and Copyright*, NW. J. OF TECH. & INTELL. PROP. 530, 531 (2012) ("[T]his Article examines the notion of literary property as a distinct legal concept, which protects an author's natural right in a manuscript because of the innate connection between a creator and his work."). Third, the field in which this Comment enters, the study of law *as* literature. *See* Sanford Levinson, *Law as Literature*, TEX. L. REV. 373, 373–404 (1982); Patrick Colm Hogan, *On Reading Law as Literature*, 25 COLL. LITERATURE 231 (1998); RICHARD A. POSNER, LAW AND LITERATURE 329–86 (Harv. Univ. Press, 2009).

59. JAMES B. WHITE, THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION (1973). James B. White is generally credited to "having initiated the 'law and literature' movement" and his book continues to be an important resource in the field. *See* Elizabeth Mertz et al., *Forty-Five Years of Law and Literature: Reflections on James Boyd White's* The Legal Imagination *and its Impact on Law and Humanities Scholarship*, 13 L. & HUMAN. 95, 95 (2019).

60. Mertz et al., *supra* note 5959, at 96.

erupted following his groundbreaking study provides the foundation for treating *Lochner* as literature.

A number of scholars have further defined the field initially introduced by White and provided clarity in application of the field of law and literature, specifically in studying law *as* literature.[61] Many of the critical methods which exist in the literary field can be particularly persuasive in further exploring the legal opinion. By viewing the legal opinion itself as a work of art and applying analyses of popular metaphor, narrative, and rhetoric, a deeper understanding of both the motive and the impact of the opinion is revealed.

While a plethora of scholars have participated in the law and literature movement,[62] for the purposes of this Comment, the analytical framework will mirror that of prominent scholar Linda Berger.[63] In her section of an article reflecting on *The Legal Imagination*, which she entitled *The Metaphor of the Judicial Opinion as a Poem,* Berger takes up the concept of opinion as poem presented initially by White.[64] In response to White's initial proposal and following up law and literature scholarship generally, Berger provides an analytical framework for treating opinions as works of literary value. The crux of this framework suggests that scholars must view the author as a poet employing metaphors which appear in works of literature, popular rhetoric, and legal writings to "obstruct [our] imagination when we unthinkingly accept their implications as normal and inevitable."[65] By digging into the metaphors present within the legal opinion, a deeper understanding of the work is revealed.

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61. *Id.* at 95–98 (introducing a collection of essays discussing White's book and "approach to reading and teaching law").

62. *See generally* John Fischer, Note, *Reading Literature/Reading Law: Is There a Literary Jurisprudence?*, 72 TEX. L. REV. 135 (1993); Robert Weisberg, *The Law-Literature Enterprise*, 1 YALE J.L. & HUMAN. 1 (1988); Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 373 (1982); RONALD DWORKIN, A MATTER OF PRINCIPLE 146 (1985); STANLEY FISH, IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETATIVE COMMUNITIES (1982); Symposium, *Law and Literature*, 60 TEX. L. REV. 373 (1982); Symposium, *Interpretation Symposium*, 58 S. CAL. L. REV. 1 (1985).

63. Linda Berger is the Family Foundation Professor of Law at University of Nevada at Las Vegas. Her research, writing, and teaching converge on the study and practice of legal rhetoric, drawing on cognitive psychology as well as on composition, rhetoric, metaphor, analogy, and narrative theory.

64. Linda L. Berger, *The Metaphor of the Opinion as a Poem, in Forty-Five Years of Law and Literature: Reflections on James Boyd White's* The Legal Imagination *and Its Impact on Law and Humanities Scholarship*, 13 L. & HUMAN. 95, 126–34 (2019).

65. *Id.* at 127.

A prominent example is the metaphorical representations of "separate spheres,"[66] a rhetorical myth perpetuating the traditional roles of gender throughout ancient and modern history. This metaphor rears its head in Justice Miller's 1873 opinion in *Bradwell v. Illinois*[67]:

> On the contrary, the civil law, as well as nature herself, has always recognized a wide difference in the *respective spheres* and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the *domestic sphere* as that which properly belongs to the domain and functions of womanhood.[68]

This example is particularly persuasive because the literary rhetoric of "separate spheres" had fully inundated writings of the day, including the opinions of the Supreme Court.[69] Without the proper literary context, the use of this metaphor would not carry nearly the same weight in understanding how deeply rooted the *Bradwell* opinion reflected the culture.

The illuminating example in *Bradwell* helps provide a strong foundation to show the power in the critical method.[70] In order to best understand *Lochner*, it is important to treat the opinion as a work of literary quality and to evaluate the metaphors used within its text alongside other works of literary importance of the day. Ultimately, this examination will culminate in a study of *Lochner* as a work of literary quality to understand the structure, syntax, metaphor, and influences. This in turn will show that Justice Peckham meant to reveal his concerns with the Paternalism inherent in the New York legislature's Bakeshop Act.

A. The Immigrant in The Progressive Era

The metaphors of Paternalism used by Justice Peckham are directly reflective of the Progressive Era and lose value when not discussed with a proper understanding of the world in which they were used and the daily

66. Linda K. Kerber, *Separate Spheres, Female Worlds, Woman's Place: The Rhetoric of Women's History*, 75 J. AM. HIST. 9, 30–31 (1988).

67. Bradwell v. Illinois, 83 U.S. 130 (1873).

68. *Id.* at 141 (finding that women were eligible to practice law, despite not having the right to vote) (emphasis added).

69. *See id.* This is an excellent example of the discussion of "separate spheres" generally provided by Linda K. Kerber. *See* Kerber, *supra* note 66, at 22.

70. Additional examples can be found throughout law and literature critiques, including an interesting narrative analysis of *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). *See* Hogan, *supra* note 58, at 233–35.

realities of the immigrant at the turn of the century. The Progressive Era in the United States has traditionally been defined as a time of change—change of values, evolving culture, and eruption of modernity.[71] The turn of the twentieth century brought about great changes to the economy and social structures of a modernizing world.[72] Life in the United States was quickly evolving, along with what it meant to call oneself an American. The Manifest Destiny was nearly fulfilled,[73] immigration was at an all-time high,[74] and the Civil War was only a few decades in the past. The Great Migration of African Americans from the South to urbanized cities in the North had begun and would ultimately lead to the Harlem Renaissance.[75] The way of life was moving away from nineteenth-century Victorian values and the effects were shown in very personal ways through the literature of this era.[76] The remnants of the Gilded Age seeped into the erupting liberal landscape, with the money and power remaining in the pockets of the oft-disdained upper class.

The space which existed between the two walks of life surely influenced the enactment of the New York Bakeshop Act. Early progressives in the state legislature attempted to aid immigrants, exemplified by the stereotypical baker. The Bakeshop Act, while intended to help this group, was ultimately Paternalistic in application. The turn of the century was rife with Paternalistic tendencies from the metaphorical Manifest Destiny Rhetoric,[77] to the annexation of the Philippines to "help" the indigenous population.[78] The Paternalism spread widely into the larger cities, particularly New York City, which was full of newly arrived immigrants.[79]

Perception of immigrants in the city varied widely, but two main groups emerged from the discourse. First, those who opposed immigrants

71. *See* COCKS, *supra* note 4, at xxxvii–xxxix.

72. *Id.* at 122.

73. *See generally* ROBERT W. MERRY, A COUNTRY OF VAST DESIGNS: JAMES K. POLK, THE MEXICAN WAR, AND THE CONQUEST OF THE AMERICAN CONTINENT 452 (Simon & Schuster 2009).

74. Thomas C. Leonard, *Retrospectives: Eugenics and Economics in the Progressive Era*, 19 J. ECON. PERSP. 207, 209 (2005).

75. COCKS, *supra* note 4, at 482.

76. *Id.* at xxxiv.

77. *See* MERRY, *supra* note 73, at 452.

78. *See* Julian Go, *Modes of Rule in America's Overseas Empire: The Philippines, Puerto Rico, Guam, and Samoa*, *in* THE LOUISIANA PURCHASE AND AMERICAN EXPANSION, 1803–1898, 211, 214 (Sanford Levinson & Bartholomew Sparrow eds., 2005).

79. James S. Pula, *The Progressives, the Immigrant, and the Workplace: Defining Public Perceptions, 1900–1914*, 52 POLISH AM. STUD. 57, 57 (1995).

and saw them as a burden to society, infecting it with characteristics of their home.[80] The other group claimed to support the addition of immigrants to society, but were guilty of both Americanization and Paternalistic attempts to "orient" the oft-depicted naive population into our midst.[81] Some notable figures in this second group include Jane Addams[82] and Emily Greene Balch,[83] both of whom "failed to understand the complexity of the immigrants' social, communal, and organizational life and regarded them as naive, deprived pawns who required assistance because they were unable to help themselves."[84] This Paternalism was pervasive throughout the Progressive Era, specifically regarding immigrants, many of whom worked as bakers. Placing limits on immigrant-baker working hours minimized their earning potential; this reduced income ultimately caused more problems than the health issues associated with baking. This fact is evident in Joseph Lochner's challenge to the law.

The issues that arose from the Paternalistic treatment of immigrants, specifically in New York City, are obvious from both the formal literature and memoirs of the day.[85] This background presents the context of *Lochner* in a slightly different light. Instead of treating the opinion in solitude, it is important to consider the legislation to which it is responding. Further, when looking to the metaphors presented within the opinion, it remains critical to consider the legislation Justice Peckham was evaluating. Although Justice Peckham does not discuss the Paternalism inherent in limiting the immigrant-heavy business of bakers, it is obvious through the metaphors he uses to overturn the legislation.

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80. *Id.* at 58.

81. *Id.* at 59.

82. Jane Addams was an American settlement activist, reformer, social worker, sociologist, public administrator and author. She was a notable figure in the history of social work and women's suffrage in the United States and founder of Hull House in Chicago. *See generally* Erik Schneiderhan, *Pragmatism and Empirical Sociology: The Case of Jane Addams and Hull-House, 1889–1895*, 40 THEORY AND SOC'Y 589 (2011).

83. Emily Greene Balch was an American economist, sociologist, and pacifist. Balch combined an academic career at Wellesley College with a long-standing interest in social issues such as poverty, child labor, and immigration, as well as settlement work to uplift poor immigrants and reduce juvenile delinquency. *See generally* Catherine A. Faver, *Feminist Spirituality and Social Reform: Examples from the Early Twentieth Century*, 21 WOMEN STUDIES Q. 90 (1993).

84. Pula, *supra* note 79, at 59.

85. *See generally* LAURA R. FISHER, READING FOR REFORM: THE SOCIAL WORK OF LITERATURE IN THE PROGRESSIVE ERA (2019).

B. Popular Metaphorical Influences

Previous study of the metaphors prolific in the Progressive Era have proven both insightful and valuable. The Era was rife with metaphors used to describe the growing immigrant population. The names by which we still refer to the time from 1880 to 1920 are two metaphors—the Progressive Era, a nod to the Progressive politicians and reform, and the Gilded Age,[86] a reference to a day seen as decadent but only thinly veiling the poverty underneath the coating of gold. One subset of society received considerable metaphorical caricature—the immigrant. Immigrants were brought to America through the "golden door."[87] Once on its soil, they were expected to assimilate into the "melting pot"[88] of society and become Americans.

Many metaphors of the Era spoke generally to societal fear of the growing immigrant populations through so-called Digestion metaphors.[89] Digestion metaphors were a more heavily veiled, but still clear, reference to the immigration surge around the turn of the century. A potent example is the Melting Pot. The power of the digestion metaphor was two-fold, both that society could not digest such foreigners and that the immigrants could not be assimilated to the society.[90] The power of metaphor in discussing immigration without directly speaking on such a debated issue is unparalleled. Digestion tells the reader there is something not quite right with the item introduced—immigrants—and that much work is needed to successfully deal with them.[91]

The "American Dream" rests on the backs of immigrants who must find success by pulling themselves up by their "bootstraps."[92] The bootstrap image harkens back to the language of the State of New York in *Lochner*. The State claimed the legislature's intent when enacting the Bakeshop Act was to protect the bodies of the men in case they were ever needed for the

86. The metaphor "Gilded Age" was first introduced by Mark Twain and Charles Dudley Warner in a series of novels critiquing the decadence of the age. *See e.g.*, CHARLES DUDLEY WARNER, THE GILDED AGE: A TALE OF TODAY (1873).

87. Tim Prchal, *Reimagining the Melting Pot and the Golden Door: National Identity in Gilded Age and Progressive Era Literature*, 32 MELUS 29, 29 (2007).

88. *Id.* at 33.

89. *See* KC Councilor, *Feeding the Body Politic: Metaphors of Digestion in Progressive Era US Immigration Discourse*, 14 COMMC'N & CRITICAL/CULTURAL STUD. 139, 139 (2017).

90. *See id.* at 142 ("The body politic came to represent the ideal US American body, while citizens were invited to identify with the nation through the trope of the body politic; immigrants [who did not share this ideal body] were rendered undesirable through their association with indigestibility and disgust.").

91. *Id.* at 141.

92. *Id.* at 139–41.

government's use. These metaphors[93] were utilized in all corners of society and are important in understanding the meaning behind Justice Peckham's words in *Lochner*.

The American bakers most affected by the Bakeshop Act were usually the immigrant bakers, a fact true in the case of Joseph Lochner. The metaphor applied to the immigrant is synonymous with that applied to the baker.[94] It is certain that the Justices were also aware of this stereotypical truth because one of their own, Justice McKenna, was the son of an Irish immigrant who owned a bakery.[95] The societal fear of rising immigrant population, shown through use of prolific metaphor to subjugate, makes a rhetorical study of *Lochner* all the more important. It is with this understanding that we turn to the metaphorical and literary critique of *Lochner*.

C. Application of Law and Literature to the Lochner Decision

With the proper orientation to preconceived biases that were the realities of the time, it is reasonable to understand where Progressive Era scholars' traditional interpretations were rooted. Within the *Lochner* opinion lie indicative words that can be interpreted in a less-than traditional manner. This Comment's analysis relies heavily on the alarming nature of immigration within the Progressive Era culture and the mounting concerns of parenting the incoming population. The meaning is explicitly apparent when reading the opinion to see Justice Peckham as critiquing the legislature for acting Paternalistic, rather than mounting an independent attempt to propel a capitalistic agenda. The impact of the opinion, though, is not the black or white interpretation of traditionalist or revisionist, but somewhere in the gray.

1. The Boyhood of the Immigrant

A close reading of the opinion reveals that Justice Peckham clearly communicated his interpretation of the legislature's overstepping of the boundaries of due process. To begin, he establishes that "[t]here is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to

93. *See* Charles W. Calhoun, *Major Party Conflict in the Gilded Age: A Hundred Years of Interpretation*, 13 ORG. OF AM. HIST. MAG. OF HIST. 5, 6 (1999).

94. *See* John P. Enyeart, *Revolution or Evolution: The Socialist Party, Western Workers, and Law in the Progressive Era*, 2 J. GILDED AGE & PROGRESSIVE ERA 377, 393–94 (2003).

95. James O'Hara, *Joseph McKenna*, *in* THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789–1995, 281, 282 (Clare Cushman ed., 1995).

assert their rights and care for themselves without the protecting arm of the State, interfering with their independence."[96] This phrasing exhibits an understanding of adult bakers as individuals without the need for parental oversight. In controlling the bakers, it is apparent that "there would seem to be no length to which legislation of this nature might not go."[97] The nature of Progressivists was to proscribe a way of life upon the immigrant that relied heavily upon believing in the childlike naivety hallmarked in various descriptions of the population.

The metaphors commonly applied to immigrant workers were teeming with child-like, dependent qualities. As one newspaper published in 1888 put it,

> [I]nstead of the skilled mechanic, and the man of small capital, we are getting and have been for a number of years, the unskilled and ignorant laborers, the great majority of them penniless and destitute when they land, often becoming charges upon the community the moment they set foot on American soil.[98]

The rhetoric of the "burden" placed on the society by the immigrants is compounded by the dirty labor in which they participate. This emphasis on the boyhood of immigrants provides both the foundation and "necessity", for Paternalistic oversight by the legislature.

2. Muscular Masculinity

Justice Peckham continues to identify the ridiculousness of allowing the legislature to place restrictions on the immigrant population based on the long hours by pointing out the roles not traditionally attributed to immigrants, such as the occupations of "[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."[99] When the work hours regulation is extended to the traditionally "American" roles, the legislation seems arbitrary.

To follow through with his point, Justice Peckham goes so far as to use the most respected roles as examples of what would occur if their hours were limited. These highly regarded occupations include "doctors, lawyers, scientists, all professional men, as well as athletes and artisans, [which] could [all] be forbidden to fatigue their brains and bodies by prolonged

96. Lochner v. New York, 198 U.S. 45, 57 (1905).

97. *Id.* at 58.

98. E.A. Hempstead, *Shall Immigration be Restricted?* (July 1888), *reprinted in* 8 THE CHAUTAUQUAN, 610, 610 (Theodore L. Flood ed., 1888).

99. *Lochner*, 198 U.S. at 59.

hours of exercise."[100] Justice Peckham poses these examples to show the contemporary reader the ridiculousness of placing hour restrictions on the immigrant in legislation that never would have stood to regulate any other industry.

This metaphorical critique of the immigrant body speaks to a larger critique of the working-class man's body.[101] At the turn of the century, middle- and upper-class men were placing emphasis on developing their bodies to look sculpted, but they did so by gazing down upon the working class that labored physically out of necessity.[102] Gazing down upon those who had to, rather than chose to, engage in physical activities again speaks to the Paternalism inherent in this reasoning. Justice Peckham's choice to comment on the roles requiring physical labor speaks directly to the societal practice of men who used diverse, working-class, male "bodies as a type of 'social currency.'"[103] The comparison of professions is not an innocent one but speaks to a larger metaphor of the lacking masculinity of those engaged in physically challenging jobs.

3. Father Figures

Even beyond his foundational hints at the problem of the Paternalism of the legislature, Justice Peckham takes it one step further to directly accuse the State of attempting to become the *paterfamilias*[104] of the employees. The term *paterfamilias* is significant because it is the Latin term for "father or [male] head of a household" and, in Roman law, "[t]he head of a family or household having the authority belonging to that position over the persons composing it."[105] Justice Peckham uses a term that contains the root of, and shares meaning with, the essential issue plaguing the New York legislature: Paternalism. His use of the Latin synonym is a thinly veiled attack on what he perceives as the true motivations behind the Bakeshop Act because "[i]t is impossible for [the Court] to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or

100. *Id.* at 60.

101. In a foundational work of masculinity studies, historian Ava Baron discusses the significance of discussing the working-class man's body and how it inherently erodes white masculinity. Because matured masculinity is a foundational requirement for no longer requiring a father figure due to the age associated with masculinities, this perspective is helpful to consider. *See* Ava Baron, *Masculinity, the Embodied Male Worker, and the Historian's Gaze*, 69 INT'L LAB. & WORKING-CLASS HIST. 143, 146 (2006).

102. *Id.* at 148–49.

103. *Id.* at 149.

104. *Lochner*, 198 U.S. at 62.

105. *Paterfamilias*, OXFORD ENGLISH DICTIONARY (2d ed. 1989).

welfare, are, in reality, passed from other motives."[106] This motive, in Justice Peckham's view, is simple regulation of immigrants and their individual agency under the veil of progressive aid.

CONCLUSION

Despite Justice Peckham's critique of the New York Legislature and attempt to protect the individual through the metaphors used in his opinion, the outcome of *Lochner* within the jurisprudential history of the Supreme Court was far more complex. The cases that would follow the *Lochner* logic, *Meyer v. Nebraska*[107] and *Pierce v. Society of Sisters*,[108] provided liberties regarding educational choice and seem to support an outcome of individual freedoms from the government. On the other side of the coin, the rejection of the New York Bakeshop Act did little to change the economic and social realities of the immigrant bakers. Further, the later legacy of the *Lochner* decision provided ammunition to shoot down New Deal legislation that was meant to help those adversely affected by the Great Depression of the 1930s. Ultimately, the substantive due process jurisprudence jumpstarted by *Lochner* ended under intense pressure from President Franklin Roosevelt's threat to "pack the U.S. Supreme Court."[109]

The history of the Supreme Court in the days following the *Lochner* decision reveals an important reality of the decision. The opinion reveals Justice Peckham's motivation to overturn an overly Paternalistic legislative action against those who were entirely competent to make independent decisions without the oversight of the *paterfamilias* state. This important and worthy intention of Justice Peckham, embedded within the *Lochner* decision to help the small immigrant businessman, was eclipsed by larger forces of the Court. This may be why the traditional interpretation was able to gain such traction in the days following the *Lochner* decision. Despite the loss of focus on the individual, by identifying Justice Peckham's rigid opposition to the Paternalistic treatment of immigrants at the turn of the century, it is clear that the decision did not rest simply on an economic theory but instead had many roots in the realities of the Progressive Era.

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106. *Lochner*, 198 U.S. at 64.

107. Meyer v. Nebraska, 262 U.S. 390, 403 (1923) (holding that a law criminalizing foreign language instruction violates substantive due process).

108. Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 535 (1925) (overturning a compulsory education law by identifying the liberty of parents to direct the upbringing and education of children).

109. Thomas Colby & Peter J. Smith, *The Return of* Lochner, 100 CORNELL L. REV. 527, 543 (2015); Peter H. Russell, *Standing Up for Notwithstanding*, 29 ALTA. L. REV. 293, 298 (1991).

This analysis provides the modern reader a small glimpse into the societal influences that manifest as metaphor in the opinion. Examining the Supreme Court's use of Paternalism in *Lochner* illuminates how the world outside creeps into the holding. Justice Peckham allowed the societal beliefs swirling around to influence his reasoning, regardless of whether it was intentional. If modern attorneys use rhetoric similarly in drafting briefs and creating oral arguments, the practice may be helpful as a subtle, additional tool of persuasion to best represent their clients. The world of literature and rhetoric should not be dismissed as an extracurricular activity but rather implemented into legal argument to heighten persuasive value.

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