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Pivoting to Progressivism

Justice Stephen J. Chadwick, the Washington Supreme Court, and Change in Early 20th-Century Judicial Reasoning and Rhetoric

HUGH SPITZER

Striking political changes marked the beginning of the 20th century in the United States, highlighted by the progressive movement and elections that toppled Republicans from power in the House of Representatives in 1910 and gave Democrats control of both houses of Congress and the presidency in 1912. Washington State had its share of political upheaval, reflecting key issues of the day: women gained the right to vote in 1910; voters enacted the initiative, referendum, and recall in 1912; and progressive forces from both political parties pushed for child labor laws, workplace safety legislation, food and drug regulation, municipal home rule, direct election of U.S. senators, and clean government in general.

Washington State courts were not immune from these changes. The progressive movement's leadership was educated and middle class, and Washington's elected judges shared a middle-class economic status and outlook.[1] As progressive proposals made their way into party platforms and then into law, the Washington courts moved away from issuing decisions that favored the private sector and discouraged government intervention, such as the United States Supreme Court's famous *Lochner* decision in 1905, which overturned a New York statute setting a maximum number of working hours for bakers.[2] Instead, the state's supreme court acceded to more robust governmental regulation of businesses and working conditions, showed more deference to reforms enacted by legislators, and made tort law more plaintiff friendly. In doing so, the court candidly recognized in judicial opinions that shifts in public attitudes were partly behind these doctrinal changes.

Others have documented the early 20th-century reform movement in Washington's state and federal elections and in its legislature and local governments.[3] However, little attention has been paid to the part played by the state's judges in upholding progressive legislation when courts in many other states were overturning reform measures on constitutional theories that had gained dominance since the Civil War. The Washington Supreme Court was willing to modify both its legal doctrines and its position on the judiciary's role as the public changed its perspective on the responsibility of government in addressing social and economic challenges. One can get a fascinating perspective on the Progressive Era and changes in judicial reasoning and rhetoric by focusing on a judge who served on the Washington Supreme Court during the core period of progressivism in American politics, Stephen J. Chadwick. Justice Chadwick, who sat on that bench from 1908 through 1919, was in many respects typical of his supreme court colleagues: educated, publicly involved, and politically ambitious. What was distinctive about Chadwick was the leading role he played on the court

Stephen J. Chadwick's judicial opinions illustrate how judges adjusted legal doctrines and their notions about the judiciary's role in response to social and political change during the Progressive Era. (Earl Kennell, Gallagher Law Library, University of Washington [UW] School of Law, Seattle)

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in conceptualizing and communicating that body's changing stance on the legality of progressive legislation. Chadwick's judicial opinions are striking for their cogent reasoning and clarity. They are also striking for their honesty about the forces that were causing him, as a judge, to look at things in a fresh way, anticipating the legal realist approach to legal theory and judicial decision making that gained traction nationally in the 1920s and 1930s.

During his dozen years on the bench, Chadwick authored Washington Supreme Court opinions upholding limits on working hours for women,[4] local government control of street-use franchises,[5] the state's right to regulate utility rates and to enforce quarantines for public health,[6] workers' compensation and the workplace safety system,[7] the consumer's right to directly sue food processors,[8] the public's referendum rights,[9] and an absolute ban on public funds for religious education.[10] Justice Chadwick was no radical. He was not even much of a reformer. Yet, as an author of opinions, he was a superb communicator who pulled the curtain to reveal that legal doctrine was not static and that courts were unavoidably affected by public demands, mostly for stronger exercise of government regulatory power to rein in corporate activities viewed as harmful. Although some contend that late 20th-century judges were overly activist in their civil rights and civil liberties rulings, courts are rarely very far ahead of public opinion on political and social matters. Like many other Progressive Era judicial bodies, the Washington Supreme Court was a reactive player on the state's political scene. But Justice Chadwick's candor in his decisions demonstrates how courts, and legal doctrines, do respond to significant shifts in political and economic paradigms.

Examining the progressive movement's agenda and its influence on state law is critical to understanding the pivotal role of Chadwick's opinions on the Washington Supreme Court. The goals of that early 20th-century movement were, in the words of one of its proponents, "removing corrupt, special influence from government; modifying the structure of government so as to make it easier for the people to control; and using the government so restored to the people to relieve social and economic distress."[11] Those goals were carried out nationwide by progressives—both Republicans and Democrats—who enacted reforms to protect workers and consumers, clean up government, and increase the political power of ordinary people.[12] Progressives were generally skeptical of the political parties, which they saw as fundamentally corrupt. At the national level, progressive members of both parties united to push a substantial legislative program through Congress.[13] Part of the progressive movement's platform aimed at loosening the political parties' grip on the political system, and in Washington State this led to the implementation of nonpartisan ballots for local elections and judgeships—a change that assisted Chadwick's election to the Washington Supreme Court in 1908.[14]

Washington State was at the forefront of the progressive movement, with adherents in both parties collaborating to enact many reforms:[15] a railway commission in 1905;[16] direct primaries and nonpartisan judicial elections in 1907;[17] nonpartisan judicial elections again in 1909, after the earlier measure had been rescinded by Republican legislators worried about Chadwick's 1908 election;[18] nonpartisan local elections in 1909;[19] woman suffrage in 1910;[20] the initiative, referendum, and recall,[21] workers' compensation,[22] and an eight-hour day for women[23] in 1911; and approval of a federal constitutional amendment providing for popular election of U.S. senators nationwide in 1913.[24] All of this was made possible by the 1910 election, which sent the progressive candidate Miles Poindexter to the U.S. Senate and a majority legislative coalition of progressive Republicans and Democrats to the state legislature.[25] Though the reformers' domination of the Washington State Legislature was short lived—lasting only through the 1914 election—most of the progressives' legislation remains in effect today.[26]

The progressive drive for reform is generally seen as a movement for clean government and fair play, driven by those in the skilled trades and the middle class, in an economic system that had become dominated by large corporations and trusts.[27] The core actors in the movement were mostly white, Protestant, educated professionals, small-business owners, and craftspeople whose interests and values were threatened both by the large corporations and by the low-income immigrants whom they viewed as susceptible to assorted vices and political corruption.[28] William T. Kerr, Jr., has carefully documented the political and occupational backgrounds of the progressive Democrats and Republicans who controlled the 1910 Washington State Legislature, showing them to be relatively young, well educated, native-born, and "more often than not . . . lawyers, independent business and professional men, or relatively prosperous farmers."[29] Kerr has observed that the state's progressive leaders, including the legislative majority who enacted the progressive program in Washington, "came from the element in society which is traditionally identified as the American middle class."[30] Nevertheless, in contrast with the earlier populist movement, progressivism was driven by urbanites. Kerr made two intriguing observations: First, Washington progressives in either party tended to come from five urban-industrial counties or from wealthy wheat-producing counties in eastern Washington (including Chadwick's Whitman County). In contrast, conservative candidates were elected from poorer rural areas in western and central Washington.[31] Second, although Republicans were a majority in the legislature, that party was divided

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rather evenly between progressives and conservatives, while the Democrats were "highly progressive in their views." Kerr concluded, "While the average progressive reformer was likely to be a Republican, the average Democrat was likely to be a progressive reformer."[32]

Various commentators later blamed the middle-class character of early 20th-century progressivism for what they saw as the movement's failure to bring about fundamental changes in the distribution of political power and economic wealth in the country.[33] But from a practical standpoint, the movement did bring a number of real changes to the political process and enacted legislation that made a difference to working people. Further, the fact that Washington State Democrats, urban dwellers, and eastern Washington farmers were favorably disposed to progressive proposals suggests that the people with whom Stephen Chadwick had lived and worked would have supported these approaches; he did not go very far out on a limb socially or professionally by a positive judicial handling of progressive legislation.

Early 20th-century jurists in Washington State tended to be experienced in and attuned to political life. Chadwick and 12 of the 16 individuals he served with during his years on the supreme court had held nonjudicial elective office prior to being elected to that court—acting as prosecuting attorneys, city council members, or state legislators.[34] Chadwick and 10 of his colleagues had prior experience as trial court judges.[35] When a short hiatus in partisan judicial elections gave Chadwick a good shot at a state supreme court seat in 1908, he became the only Democrat serving on that bench. He was eventually joined by five more justices who identified themselves as Democrats.[36]

Chadwick had public service in his blood. He was born in Roseburg, Oregon, the son of a politically active lawyer father and a mother whose own father had been a judge. Chadwick's father was a Democrat who served as a postmaster, judge, constitutional convention delegate, presidential elector, Oregon secretary of state, and, finally, governor.[37] When his father gained statewide office, young Stephen moved to Salem, later recalling: "My father seems to have made it a point to introduce me to men, so that it was my privilege to know all of the men who had been governor of the State of Oregon . . . and all the judges and a great many of the prominent men in professional and business life."[38] Both before and during his life in Salem, Chadwick received a thorough classical education, later remarking upon the large number of pioneers who were "well read in the classics and in good literature."[39] Chadwick attended Willamette University, worked as a journalist and editor, and studied law at the University of Oregon prior to passing the bar in 1885.[40] He then moved north, settling in Colfax in eastern Washington's Whitman County. There he opened a law office with his close boyhood friend and fellow Oregonian Mark Fullerton, a Republican who was elected to the Washington Supreme Court in 1898 and who served throughout the time that Chadwick was on the court.[41]

Chadwick was an active member of his new community, serving as mayor of Colfax from 1891 to 1893 and as a state land commissioner from 1894 to 1897. Chadwick's law practice in Colfax appears to have flourished. He was highly regarded as a young lawyer and considered the peer of respected attorneys with many more years in practice. In 1900, soon after his friend Mark Fullerton left to join the Washington Supreme Court, Chadwick was voted onto the Whitman County Superior Court bench, defeating a Populist elected four years earlier.[42] Chadwick was reelected in 1904 with broad political support.[43] Both as a lawyer and as a judge, Chadwick had many Republican friends, a fact that might have harmed his later career.[44]

In 1908, Chadwick was discussed as a gubernatorial possibility, but instead he ran for the Washington Supreme Court.[45] Despite his identification with the Democratic Party, he had a fighting chance in a predominantly Republican state because a movement for nonpartisan elections had caused the legislature to discontinue party nominations for judicial positions. Notwithstanding his experience in partisan politics, Chadwick was studiously nonpartisan and nonpolitical in his campaign, a sensible approach for a candidate known as a Democrat.[46] Chadwick received the largest number of votes, with the incumbents Herman Crow and Milo Root winning the other slots.[47] After Chadwick's election, but before his term began, Governor Albert Mead, a Republican, appointed him to the position that the recently reelected Justice Root had just resigned because of a conflict-of-interest scandal.[48] Thus, Chadwick served for several weeks on the court prior to January 1909, when he took the position to which he had been elected.

Even during his decade of service on the court, Chadwick continued to eye other elective offices and still more prestigious judgeships. In August 1910, the *Pullman Herald* reported that Chadwick was "being urged by some of his Olympia friends to file his declaration of candidacy as democratic candidate for United States senator" in the elections later that year.[49] But Chadwick stuck to his court responsibilities while looking for other ways to enhance his career. After Woodrow Wilson's election in 1912, Chadwick actively sought appointment to the Federal District Court for Eastern Washington, and in 1913 the U.S. attorney general, James Clark McReynolds, recommended him for the position to the president. But opposition arose from Democrats who did not see Chadwick as partisan enough, from progressives who saw him as too conservative, and from Miles

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After passing the bar exam in Oregon in 1885, a young, mustachioed Chadwick (front row center, first from the left) moved to Colfax, Washington, where he quickly became an active member of the community. He is pictured here in 1896 with other members of the Walla Walla and Colfax bars. (Whitman County Historical Society)

Poindexter, whose support would be necessary to get the nomination through the Senate. But there appeared to be no love lost between Chadwick and Poindexter, and the latter played a key role in blocking the appointment.[50] Two years later, the *Seattle Times* reported that Chadwick was challenging Poindexter in 1916 because he believed "that Poindexter was responsible for President Woodrow Wilson's . . . rejecting his name as a candidate for federal court judge." The paper added, "Chadwick and his friends will leave nothing undone to defeat Poindexter."[51]

In the meantime, however, Chadwick continued his work on the state supreme court. He ran successfully for another term in 1914, winning the highest number of votes statewide in both the primary and the general election despite opposition from the Left.[52] An advertisement in the left-leaning *Seattle Star*, for example, labeled Chadwick a judge for "the reactionary forces."[53] But his broader political interests continued. When he resigned from the court in 1919 after serving nearly two terms, the *Seattle Times* observed, "Judge Chadwick finally is free from the bench, something he wished to make possible years ago when ambition spurred him to be a Democratic nominee for either governor or United States senator, but which circumstances always combined to prevent." If "Chadwick could be induced to run as a Democratic nominee for senator," the article noted, "he would be an unusually strong candidate. In his judicial campaigns he has polled a majority vote," this "despite the fact that he has ignored popular clamor and handed down his decisions in accordance with his own views and often at variance with public opinion."[54]

After leaving the court, Chadwick joined the prestigious Seattle firm Hughes, McMicken, Ramsey and Rupp. Despite talk of a senatorial candidacy in 1920, and again in 1924, he focused on what turned out to be a successful practice in corporate law and probate, was president of the state bar association and state grand master of the Masons of Washington in 1924, and was active in various other legal and community groups.[55] A contemporary handbook of practicing attorneys described him as "having a complete knowledge of evidence" and as "a forceful speaker and tireless

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worker."[56] In 1928, at age 65, he finally threw his hat into the ring for governor. It was a rough campaign. Supporters of the well-funded Scott Bullitt, Chadwick's main competitor in the Democratic primary, attacked the former jurist for being too old to campaign vigorously, a weak Democrat, and a corporate lawyer and claimed that he was opposed by labor.[57] Bullitt vastly outspent his opponent and gained the nomination, only to fall in the general election to Roland Hartley, the conservative Republican incumbent.[58]

When Chadwick died suddenly three years later, he was eulogized as "a lawyer of the old school, with all of its traditions and ideals" and said to have been held "in high esteem because of [his] sterling public character of honesty, loyalty and service to his state."[59] Several commentators remarked that it was unfortunate that the state of Washington had not had the opportunity to benefit from Chadwick serving in the governor's mansion.[60] Little mention was made of his rulings during his tenure on the state supreme court. But those judicial decisions, because of their impact on the court's approach to the constitutionality of social legislation and government regulation in the state of Washington, turned out to be his lasting legacy.

When Chadwick joined the Washington Supreme Court in 1908, he entered a body that had blocked a number of statutes aimed at regulating business, protecting consumers, and improving industrial working conditions. At the federal and often the state level, legal reasoning had gradually become dominated since the Civil War by an approach that was later categorized by (mostly critical) commentators as "formalist," "legalistic," "classical," and "orthodox." Regardless of the description, this approach asserted that law, ideally, was neutral and could be applied in a more or less mechanical way.[61] Although jurists in this school of thought recognized that law reflected and responded to social and economic forces, they believed that judicial response to changing social conditions should be slow and measured.[62] For example, in *Holden v. Hardy,* a case upholding Utah's statute limiting working hours in the mining industry, Justice Henry Brown noted that "this court has not failed to recognize the fact that the law is, to a certain extent, a progressive science"[63] and that it is "forced to adapt itself to new conditions of society, and particularly to the new relations between employers and employees, as they arise."[64] Howard Gillman has carefully documented how the classical legal approach was based on an ideal of equality from an earlier and simpler America, a concept that laws should not be manipulated to favor one "class" (interest group) or another, but rather should serve the public generally and apply equally to all classes of citizens.[65] This concept of equality is implicit in many of the state privileges and immunities clauses embedded in 19th-century constitutions, including Washington's.[66] America's leading constitutional academics were idealists whose treatises built upon the classical liberal economic theories of the late 19th century. They developed equal protection and substantive due process doctrines under the Fourteenth Amendment, which courts then used to overturn regulations aimed at the business sector on the grounds that they tipped the scale on behalf of one class (such as employees) and that they interfered with personal liberty and property rights.[67]

Orthodox courts also shaped tort law to counteract what judges viewed as dangerous redistributions of wealth from rich to poor.[68] When Congress and state legislatures responded to public pressure for action against interest groups such as monopolistic trusts, sought to control rapaciously high rates charged for critical transportation or utility services, or to regulate industrial hours and wage rates, the judiciary often (though not always) came down on the side of the corporations.[69] The judge (and later, the professor) John F. Dillon, the foremost late 19th-century authority on municipal law and government police power, saw many regulatory statutes as socialist threats and many taxes as illicit efforts to redistribute wealth; he urged courts to vigilantly guard against "class legislation" that would endanger capitalism and the nation's economic development.[70] Another bête noire was social legislation that endangered individual liberties and, most important, the liberty of contract between employers and employees (that is, the freedom of individual workers and bosses to contract in any way they saw fit, free of government regulation). These views were promoted by many leading academics and judges, most notably the U.S. Supreme Court justices Stephen Field and Rufus Peckham, and gained momentum as the 19th century came to a close.[71]

Building on the legal treatises of Dillon, Thomas M. Cooley, and Christopher G. Tiedeman, many state courts, and subsequently the U.S. Supreme Court, adopted legal doctrines that constrained the ability of Congress and legislatures to regulate and tax business and to enact laws protecting workers.[72] Notable cases at the national level included *United States v. E. C. Knight Co.,* blocking the federal government from using the Sherman Antitrust Act to regulate a massive sugar monopoly on the grounds that the manufacturing of sugar did not sufficiently implicate interstate commerce;[73] *Pollock v. Farmers' Loan and Trust Company,* ruling a federal income tax unconstitutional;[74] *Allgeyer v. Louisiana,* striking down a state law regulating marine insurance companies;[75] the aforementioned *Lochner v. New York; Hammer v. Dagenhart,* ruling that a child labor law regulated industrial production, not interstate commerce, and therefore was outside Congress's authority;[76] and A*dkins v. Children's Hospital,* overturning a congressional act guaranteeing a minimum wage for women and children in the District of Columbia.[77] Notwithstanding the attempted neutrality in

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judicial decision making, the results were often, though not always, antiworker.[78] Though Supreme Court appointments by Presidents Theodore Roosevelt and Woodrow Wilson adjusted the composition of that bench and led to closer court votes in these types of cases, U.S. Supreme Court decisions continued to be shaped by the orthodox laissez-faire approach into the late 1930s. But the states by no means followed the U.S. Supreme Court in a lockstep fashion. The Supreme Court had lagged behind the states in adopting liberty of contract and related doctrines, and as the progressive movement gained strength in the early 20th century, the Supreme Court again lagged behind a number of states in moving away from the laissez-faire approach. Washington became one of the states rejecting, in the words of the scholar Claudio J. Katz, "due process challenges . . . with increasing frequency and confidence."[79]

In the first years of the 20th century, Washington's high court had followed the lead of the U.S. Supreme Court, and, like many other state courts, it was influenced by probusiness legal orthodoxy. One case in which this tendency was clear was 1904's *State ex rel. Aubrey,* in which the court overturned a state law requiring every horseshoer to obtain a license by passing a test administered by a veterinarian and experienced practitioners.[80] In its opinion, the court quoted with admiration Justice Field's classic dissent outlining substantive due process theory in the 1872 *Slaughterhouse Cases* (which involved New Orleans's regulation of the butcher trade): "All sorts of restrictions and burdens are imposed under it [the police power]. . . . But under the pretense of prescribing a police regulation the state cannot be permitted to encroach upon any of the just rights of the citizen, which the Constitution intended to secure against abridgment."[81] Washington's *Aubrey* opinion continued:

> "Liberty" in its broad sense, as understood in this country, means the right not only of freedom from actual servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work when he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation. All laws, therefore, which impair or trammel these rights—which limit him in his choice of a trade or profession—are infringements upon his fundamental rights of liberty, which are under constitutional protection.[82]

The following year, in *State v. Brown,* the Washington Supreme Court unanimously held that though the state could regulate dentistry in the interest of public health, it was beyond the scope of its police power to regulate the ownership and management of a dental office.[83] In his opinion, Justice Milo Root liberally quoted from Justice Field's opinion in *Lawton v. Steele.*[84] Root declared, "To own and manage property is a natural right, and one which may be restricted only for reasons of public policy, clearly discernible. To hold this portion of the statute valid would be to make possible conditions which were never designed to exist."[85] In 1906, the court in *State ex rel. Richey v. Smith* overturned a recent law requiring a license to work as a plumber.[86] The unanimous opinion authored by Justice Frank Rudkin quoted from the U.S. Supreme Court justice Rufus Peckham's dissent in a similar plumber licensing case:

> The trade of the practical plumber is not one of the learned professions, nor does such a tradesman hold himself out in any manner as an expert in the science of "sanitation," nor is any such knowledge expected of him, and this act, when practically enforced, may or may not exact it of him.[87]

Rudkin's opinion also mentioned the U.S. Supreme Court's recent *Lochner* decision and quoted Justice Peckham's statement that there "must be more than the mere . . . existence of some small amount of unhealthiness to warrant legislative interference with liberty."[88]

But a 1907 opinion written by Chadwick's friend Mark Fullerton hinted at changes to come. In his opinion in *Shortall v. Puget Sound Bridge and Dredging Co.,* Fullerton upheld a statute requiring that wages be paid in cash or the equivalent.[89] Justice Root concurred but declined to sign the opinion. The following year, in 1908, Root resigned in a scandal centered on his personal ties to the Great Northern Railway Company, a litigant before the court.[90] Chadwick, who had just been elected to a vacant seat, was appointed to finish Root's term. Chadwick's election to a now nonpartisan position in a year when the progressive movement was building steam signaled that a change in judicial attitude and methodology was about to occur.

Chadwick's first reported opinion on the extent of government regulatory authority did not appear to diverge from the classical approach. In *Puget Sound Warehouse Co. v. Northern Pacific Railway Co.,* he wrote on behalf of a unanimous panel that the state did not have the authority to inspect, or to charge an inspection fee for, a commodity that was not intended for immediate sale to the public.[91] "That the state has a right to pass inspection laws," wrote Chadwick, "cannot be doubted, but in all such cases the power must be referable, in some degree, at least, to some recognized subject of police control."[92] He stressed that "there must be some abuse in the suppression of which the public is interested" and pointed out that in previous cases upholding grain inspection statutes, the public "had a direct and positive interest to protect the community from frauds and impositions in food products or from false weights and measures." But in this instance, he wrote, "We cannot assume that an owner who ships and consigns his grain to himself needs any protection, or will be guilty of a fraud against himself."[93] Though his decision circumscribing governmental police power appears in line with earlier orthodox opinions, Chadwick's ready recognition of the legiti-

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In 1912, *State v. Somerville* upheld a statute mandating an eight-hour workday for women, but, to Justice Chadwick's chagrin, women working in canneries, such as these women in Wahkiakum County, had been excluded from the legislation. (Oregon Historical Society, Portland, OrHi 56468)

macy of consumer protection laws suggests that he was not altogether opposed to government regulations.

Just two years later, after the 1910 election had swept an activist progressive majority into the state legislature, Chadwick authored an important opinion upholding the Public Utilities Act of 1911 and the power of the newly created Public Service Commission to control telephone rates.[94] Speaking for a majority of seven to two, Chadwick explicitly recognized that changing social and economic conditions could affect how the judiciary approached questions of the appropriateness of governmental power.

> The police power of the state is more than an attribute of sovereignty. It, like the power of taxation, is an essential element of government, and exists in every state without express declaration and without limitation, in so far as it is made to apply to the health, peace, comfort, and morals of the people. Formerly applied strictly and directly, it has now, because of changed economic conditions, come to be more favored, and is frequently relied upon to sustain laws which but indirectly affect the common good.[95]

The last sentence encapsulates the changing view of the proper application of the state's police power. The classical doctrine had emphasized that government regulations were legitimate only if they protected the public at large, as fire safety laws did, for example. But many judges, including Chadwick and his colleagues, were coming to see that some regulations, such as those governing utilities, could broadly benefit the public and should not be regarded as class legislation shifting resources from the rich to the poor. As to the telephone companies' "freedom" to set rates as they chose, Chadwick quoted from two recent decisions, one upholding the right of local governments to control franchises for the use of public streets and the other upholding aspects of a recently enacted workers' compensation law.[96] "There is no absolute right to do as one wills, pursue any calling one desires, or contract as one chooses . . . liberty means absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community."[97] Police power, "in its broadest acceptation . . . means the general power of the state to preserve and promote the public welfare, even at the expense of private rights."[98]

Two months later, in *State v. Somerville,* a five-justice panel including Chadwick upheld a new state law that imposed an eight-hour limit on working hours for women in a broad range of industries.[99] In the lead opinion, Justice Herman Crow, a Republican popular with both parties and known for his support of reform legislation, based his ruling in part on *Muller v. Oregon,* a recent U.S. Supreme Court decision upholding an Oregon statute restricting women's working hours.[100] Justice Chadwick added a concurrence, arguing not only that the law was constitutional but that the legislature's exclusion of women cannery workers from the act's protections did not have a rational basis and could not be supported.[101]

Chadwick's most candid expression of the effect of chang-

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ing political and social dynamics on judicial decisions came the following year in *State v. Mountain Timber Co.,* the second challenge mounted against a workers' compensation law enacted by the progressive legislature.[102] The plaintiff had asserted that the statute violated, among other things, the Fourth Amendment ban on unreasonable searches and seizures, the Seventh Amendment jury trial rights, the Fifth and Fourteenth Amendment due process protections, and the Fourteenth Amendment equal protection guarantees. In his decision upholding the state's collection of industrial insurance premiums from a logging company, Chadwick quoted from several other court decisions upholding the government's strong regulatory ("police") powers. These included *Noble State Bank v. Haskell,* in which Oliver Wendell Holmes wrote "that the police power extends to all the great public needs,"[103] and *State v. Somerville,* in which Washington's Justice Crow declared,

> Circumstances and occasions calling for . . . exercise [of the police power] have multiplied with marvelous rapidity in recent years, by reason of the well-recognized fact that modern, social and economic conditions have called into existence agencies previously unknown; many of which so vitally affect the health and physical condition of laborers, and especially female laborers, that legislation of the character here involved has been sustained with greater liberality than was formerly evinced under less exacting conditions.[104]

Chadwick then expanded upon Justice Crow's statement:

> From the peace of the community and the suppression of nuisances, we have undertaken to regulate things hitherto considered private.
>
> To illustrate: We have held that the Legislature may enact laws for the promotion of health; provide for the marketing of food products; prevent fraud in the disposition and sale of goods; prevent the doing of certain work and the pursuit of certain occupations upon the Sabbath day; regulate certain trades, businesses and professions; limit the hours of labor upon public works, and fix hours of labor for women; enact drainage laws and fill lowlands where drainage is impractical. These are a part, only, of the subjects touching private affairs treated under the police power and sustained as needful and proper regulations. . . .
>
> . . . The police power is to the public what the law of necessity is to the individual. It is comprehended in the maxim, *Salus populi suprema lex.* It is not a rule; it is an evolution.[105]

Chadwick also gave a nod to the analysis of Justice Holmes in another police power case and added:

> The scope of the police power is to be measured by the legislative will of the people upon questions of public concern, not in acts passed in response to sporadic impulses or exuberant displays of emotion, but in those enacted in affirmance of established usage or of such standards of morality and expediency as have by gradual processes and accepted reason become so fixed as to fairly indicate the better will of the people in their social, industrial and political development.[106]

Justice Chadwick's language in *Mountain Timber* eloquently expresses the marked change in the judiciary's approach to regulatory actions by the legislature and the increased willingness of the court to defer to statutes passed by elected lawmakers, enactments that a half-dozen years earlier would have been struck down as they had been in *State ex rel. Aubrey, State v. Brown, and State ex rel. Richey v. Smith. Mountain Timber* was appealed all the way to the U.S. Supreme Court, which in a six-to-three decision upheld Chadwick's decision and in doing so illustrated that during this period

Workers in hazardous industries like logging were protected under the legislation upheld in *State v. Mountain Timber* in 1913. (Special Collections, UW Libraries, Pickett 1584)

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the nation's high court did not strike down every piece of progressive legislation that came before it.[107]

Still another Chadwick opinion that exemplifies the change in the Washington court's move away from the classical approach is *Mazetti v. Armour and Co.,* issued two days after *Mountain Timber.*[108] The plaintiffs, restaurateurs, had purchased a carton of cooked tongue from the defendant, Armour and Company, a meat packer. The restaurant had served the tongue to a patron, not knowing that "in the center of the carton was a foul, filthy, nauseating, and poisonous substance."[109] The court ruled that a meat packer could be held liable for injuries to a consumer despite the lack of a direct contractual relationship between the two parties. Chadwick noted the traditional doctrine, "that a manufacturer is not liable to any person other than his immediate vendee; that the action is necessarily one upon an implied or express warranty, and that without privity of contract no suit can be maintained; that each purchaser must resort to his immediate vendor."[110] That common law, or judge-made, theory had been developed and carefully articulated during the prior decades in a manner that shielded manufacturers from most consumer lawsuits and supported the expansion of American industry. Privity of contract (the doctrine providing that a contract vests rights only in the direct parties) and protection of business from runaway tort claims were at the core of late 19th-century orthodox jurisprudence.[111]

But Chadwick swept that all aside in a unanimous opinion. "The boast of the common law," wrote Chadwick, was "that it was able to adjust itself to the inevitable vicissitudes and changes that occur in the development of human affairs."[112] He then quoted from a Maine Supreme Judicial Court opinion from the year before: "The principles of the common law have adapted themselves so aptly as to render almost imperceptible the radical transitions that have taken place."[113] Chadwick ruled that because industrial processes made it impossible for a retailer to determine the quality of the products hidden within packaging, it made no sense to force the consumer to sue the storeowner rather than the manufacturer. Instead, an action against the meat packer, by either the merchant or purchaser, or both, was the proper approach.[114] Chadwick remarked that this case, "in so far as the dealer is permitted to sue the manufacturer," is "one of first impression. We think the complaint states a cause of action. If there is no authority for the remedy, it is high time for such an authority."[115]

The Washington court's ruling in *Mazetti v. Armour and Co.* predated by three years a much more famous decision by the New York State Court of Appeals justice Benjamin Cardozo in *MacPherson v. Buick,* and Chadwick's opinion in *Mazetti* was much more explicit than Cardozo's that the court was actively updating doctrine in response to modern manufacturing and distribution processes.[116] But both cases directly reflected the progressive movement's concern for consumers and, more important, the judiciary's increasing deference to legislatures and decreasing willingness to place constitutional roadblocks in the way of broadly supported reforms.[117]

Chadwick authored more of the key Washington Supreme Court opinions upholding progressive legislation than any of his colleagues. It is not clear why he was the most frequent writer of these rulings, but one likely factor is that, as a former journalist, he was a superb writer, and his colleagues respected and signed on to his concise, carefully structured, and lucid opinions that could be readily understood both by lawyers and by the general public.[118]

Chadwick and the Washington Supreme Court did not always come down on the side of industrial workers, consumers, or others favored by progressivism. For example, in *Ross v. Erickson Const. Co.,* he wrote an opinion holding that the workers' compensation system, while providing guaranteed payouts to injured workers, simultaneously placed monetary limits and procedural restrictions on recoveries by persons injured on the job. Therefore, employees lost their right to sue an employer or a physician engaged by an employer.[119] Chadwick also frequently recognized the strong rights of property owners,[120] warned of the dangers of class conflict,[121] and cautioned against both oversized government[122] and overtaxation.[123] His independence likely had an adverse effect on his later campaign for governor. But on the whole, his judicial opinions reflected a consistent support for legislation enacting progressive proposals, and he was typically joined in his opinions by a solid majority of his colleagues.

A cynic might suggest that the Washington Supreme Court justices changed their tune on regulatory and social legislation in the years 1910-13 to preserve their elective positions. Progressives swept state elections in 1910 and national elections in 1912. The recent shift to nonpartisan judicial positions removed the assurance of reelection for Republican-backed justices in a solidly Republican state because their party label was no longer on the ballot. Thus, the cynic might argue, the high court curtailed its practice of overturning popular legislation to avoid facing a hostile electorate. In the instance of Chadwick, it also could be asserted that, notwithstanding his independent spirit, his political ambitions prompted him to act in a manner calculated to increase his popularity with voters. But the motivations of appellate courts are much more subtle than that. Relatively few incumbent Washington Supreme Court justices have lost their positions, and even fewer of those turnovers have resulted from unpopular decisions in high-

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profile judicial opinions. More often, a justice's loss of office is the result of personal foibles or lackluster campaigns.[124] Chadwick's independent streak led him to take some unpopular positions, yet he was reelected to the court in 1914 with the highest number of votes among all the state judicial candidates.[125] Further, appointed state justices with permanent tenure—such as Oliver Wendell Holmes, Jr., while on the Massachusetts court—also began to approach legal issues in ways that were consistent with broad shifts in public attitudes; because these officials were not elected for office, their change in views could not have reflected a desire to curry favor with voters.

There are at least three related explanations for the Washington Supreme Court's rapid change in direction during the Progressive Era. First, the justices were sophisticated, pragmatic, and politically experienced leaders who were rooted in their communities. Chadwick was not altogether atypical of his colleagues. He was a capable careerist who continually looked for ways to improve his reputation in public service, as did the people with whom he served on the bench. Chadwick and the other justices previously had been local elected officials, and they continued to participate in social clubs, fraternal societies, and churches. Many were involved in Masonic orders, and, as mentioned before, Chadwick eventually became the state grand master. He was also an active member of the Ancient Order of United Workmen, the College Club of Seattle, the state bar association, and various other social, professional, and civic organizations. Though, as Gillman has observed, when writing legal opinions, judges "may be motivated by a set of interests and concerns that are relatively distinct from the preferences of particular social groups" or their own "social and political loyalties and sympathies," as a person entrenched in his community—first in Whitman County, and later in Olympia and Seattle—Chadwick could not have avoided being affected by the call for government to address industrial conditions, class and labor tensions, public health problems, and what many viewed as corporate exploitation of both workers and consumers.[126]

During the years 1910-13, the Washington Supreme Court was greatly influenced by the progressive movement. Chadwick is seated second from left, and his former law partner Mark Fullerton is standing at left. Herman Crow, lead author in *State v. Somerville,* is standing third from left. (Susan Parish Photograph Collection, 1889-1990, Digital Archives, Washington State Archives, Olympia)

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Second, like other middle-class Washingtonians, the state's judges were becoming increasingly comfortable with the concept of government intervention in the social and economic spheres as an antidote to the less desirable consequences of capitalism and rapid economic growth. Stephen Chadwick was not radical. As a political candidate, he consistently expressed moderate views; indeed, his appointment to the federal bench and his later attempt at the governorship were both opposed by some progressive elements. Although he was a Democrat, he counted many Republicans among his friends, including his close friend and former law partner Mark Fullerton. Both his court opinions and his public speeches on current topics reflected a strong belief in private property rights. But, in the highly politicized world of early 20th-century America, middle-class attitudes about the appropriate role of the government in regulating the economy and social conditions had rapidly changed.[127] As that basic paradigm shifted, lawyers and judges became part of that change. Specifically, many legal professionals came to reject the idea that employers and employees had anything even close to balanced bargaining power. The justices gradually recognized that judicial insistence on a "neutral" liberty of contract doctrine unavoidably would result in judgments favoring business.[128]

Even Thomas M. Cooley, a leading liberty of contract theoretician, adjusted his views. Cooley evolved into a critic of the federal courts' application of the doctrines he had espoused in his constitutional law treatise and then accepted an appointment as chair of the Interstate Commerce Commission, a key national regulatory body.[129] Gillman has suggested that the "battle between the so-called progressive movement and its conservative opponents represented an intraclass debate about the future of American politics" and that "the divisions separating participants in these debates should not be overstated."[130] Similarly, Nancy Cohen has mapped the intergenerational conflict between upper-middle-class liberal economists who came of age just after the Civil War and the next generation of economists, who espoused doctrines of governmental interventionism—all leading to a blending of ideas into the theoretical bases of progressivism.[131] Whatever the intellectual roots of the progressive movement, the real changes are undeniable. Nationwide, legislatures (including Washington's) enacted statutes that significantly increased state government protections for consumers, employees, and many others. Chadwick's opinions upholding that legislation represented a corresponding change in outlook, in outcomes, and in legal rhetoric.

Common law courts strive to maintain an appearance of solidity and continuity in doctrine. The legal scholar Roscoe Pound once remarked that when the British House of Lords used to serve as an appellate judicial body, it "purport[ed] never to overrule its decisions."[132] So, if there was anything atypical about Justice Stephen Chadwick, it was his willingness to openly admit that adjustments in judge-made law were driven by changing public attitudes and values. That openness was a sign of a developing change in legal theory, one that would ripen into the 20th-century legal realist movement that focused on how judges *really* make decisions, regardless of the formal legal doctrines they espoused.

The third reason for the Washington Supreme Court's new approach can be tied directly to the influence of the writings of Oliver Wendell Holmes, Jr., in the late 19th and early 20th centuries. In his widely read and influential academic writings such as *The Common Law* and "The Path of the Law," Holmes eloquently argued that common law was driven by history, by public values, by experience, and by policy choices.[133] In his judicial opinions, Holmes was candid, combative, and open about his views of the role of the courts and the need for the judiciary to defer to elected lawmakers on policy matters. Holmes was skeptical that the courts could be truly neutral when they weighed in to block policy choices between competing interests.[134] For example, in his famous dissenting opinion in *Lochner,* Holmes said:

> This 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. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. . . . Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire.*[135]

Notwithstanding the legal realists' argument for judicial transparency, Judge Richard Posner and two coauthors recently observed that "most judicial opinions are legalistic in style. They cite prior decisions as if those decisions really were binding, parade reasoning by analogy, appear to give great weight to statutory and constitutional language, delve into history for clues to original meaning and so forth." But those commentators also point out that the most famous and respected jurists, such as Holmes, Benjamin Cardozo, John Marshall, Louis Brandeis, and Learned Hand, were all people with experience, confidence, and a distinctive writing style.[136] What we see in Washington State's Stephen Chadwick is a judge who had precisely those qualities. In a sense he was channeling Holmes in his opinions, and probably doing so consciously. Between 1909 and 1919, Justice Holmes was quoted in 13 Washington Supreme Court opinions.[137] Of those, 5 were written by Emmett Parker, a moderate-to-liberal member of the court who was viewed as a

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scholar, and 4 written by Chadwick.[138] No one else on the court referenced Holmes more than once. Holmes also turns up in public lectures by Chadwick, both while he was on the court and afterward.[139] The fact that so eminent a jurist as Holmes was speaking openly about his judicial philosophy of deferring to the popular will as expressed through elected legislators gave a state judge such as Chadwick license to do the same thing. Further, Chadwick shared with Holmes the self-confidence to depart from classical legal rhetoric and to describe what his court was doing when it upheld, rather than overturned, emerging legislation that regulated business and working conditions. State courts are recognized as laboratories for the development of law, and during the Progressive Era the Washington Supreme Court and other state bodies were often "ahead" of a national Supreme Court (a court on which Holmes was frequently in the minority) that did not fully adjust its judicial ideology until 1937, when it upheld the Washington Supreme Court's decision in a case involving a law guaranteeing a minimum wage for women.[140]

Stephen J. Chadwick's judicial opinions vividly illustrate how judges adjust legal doctrines and their notions about the judiciary's role in response to significant social and political change. The Washington Supreme Court was not the driver of the legal changes that occurred during the Progressive Era, but neither was it a mere follower. Judges on that court were active members of the educated middle-class elite who played a leading role in the progressive movement, and those jurists shared the changing values and concerns of others in their social sphere and the community at large. In the context of a huge shift in public opinion and a massive overhaul of Washington's legislature in 1910 and 1912, justices were able to move with remarkable rapidity to alter legal doctrines so that the reform program of newly elected legislators could take effect. Justice Chadwick was distinguished among his colleagues for his thoughtful and well-written opinions and for the candor with which he explained the changes the court was engaged in. His statements about how changes in society could drive a judicial redefinition of rights and duties anticipated Benjamin Cardozo by a decade;[141] they were very much a part of the emerging legal realist approach to law that came to dominate American legal thought by the late 1930s and that turned Holmes and Cardozo into icons.[142] Realism and transparency of this sort should be seen as positive in a democracy in which we expect common-law judges not only to courageously safeguard liberties but also to creatively and flexibly adjust legal doctrines to reflect the needs and values of the community as a whole.

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1. General histories of the progressive movement include Richard Hofstadter, *The Age of Reform: From Bryan to F.D.R.* (New York, 1955); and Gabriel Kolko, *The Triumph of Conservatism: A Reinterpretation of American History, 1900-1916* (New York, 1963). For additional background on the political, social, and intellectual origins of the progressive movement and its leadership, see Nancy Cohen, *The Reconstruction of American Liberalism, 1865-1914* (Chapel Hill, N.C., 2002); Daniel T. Rodgers, *Atlantic Crossings: Social Politics in a Progressive Age* (Cambridge, Mass., 1998); Jackson Lears, *Rebirth of a Nation: The Making of Modern America, 1877-1920* (New York, 2009); Robert D. Johnston, *The Radical Middle Class: Populist Democracy and the Question of Capitalism in Progressive Era Portland, Oregon* (Princeton, N.J., 2003); and Stanley P. Caine, "The Origins of Progressivism," in *The Progressive Era,* ed. Lewis L. Gould (Syracuse, N.Y., 1974).
2. Lochner v. State of New York, 198 U.S. 45 (1905).
3. See, for example, Robert Donald Saltvig, "The Progressive Movement in Washington," Ph.D. dissertation (University of Washington, 1966); William T. Kerr, Jr., "The Progressives of Washington, 1910-12," *PNQ,* Vol. 55 (1964), 16-27; and Otis A. Pease, "Urban Reformers in the Progressive Era: A Reassessment," *PNQ,* Vol. 62 (1971), 49-58.
4. State v. Somerville, 67 Wash. 638 (1912).
5. Tacoma v. Boutelle, 61 Wash. 434 (1911).
6. State ex rel. Webster v. Superior Court, 67 Wash. 37 (1912); State ex rel. McBride v. Superior Court, 103 Wash. 409 (1918).
7. State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156 (1911); State v. Mountain Timber Co., 75 Wash. 581 (1913), *aff'd*, 243 U.S. 219 (1917).
8. Mazetti v. Armour and Co., 75 Wash. 622 (1913).
9. State ex rel. Mullen v. Howell, 107 Wash. 167 (1919).
10. State ex rel. Dearle v. Frazier, 102 Wash. 369 (1918).
11. Benjamin Parke De Witt, *The Progressive Movement: A Non-partisan, Comprehensive Discussion of Current Tendencies in American Politics* (1915; rpt. Seattle, 1968), 278.
12. Hofstadter, 238-47; Lewis L. Gould, "The Progressive Era," in Gould, *Progressive Era,* 3; Lewis L. Gould, "The Republicans under Roosevelt and Taft," in Gould, *Progressive Era,* 55-82; John J. Broesamle, "The Democrats from Bryan to Wilson," in Gould, *Progressive Era,* 83-113.
13. For a list of major federal legislation resulting from progressive efforts between 1906 and 1917, see Elizabeth Sanders, "Rediscovering the Progressive Era," *Ohio State Law Journal,* Vol. 72 (2011), 1281-94.
14. Hofstadter, 257-71; Saltvig, 156, 168-70.
15. Kerr, 17.
16. Session Laws of the State of Washington, chap. 81, § 1 (1905).
17. Session Laws of the State of Washington, chap. 209, § 10 (1907).
18. Session Laws of the State of Washington, chap. 82, § 11 (1909).
19. Ibid., § 1.
20. Washington Constitution, art. VI, § 1, amend. 5.
21. Washington Constitution, art. II, § 1, amend. 7, art. I, §§ 33, 34, amend. 8.
22. Session Laws of the State of Washington, chap. 74, § 1 (1911).
23. Ibid., chap. 37, § 1.
24. Session Laws of the State of Washington, House Joint Substitute Resolution No. 1 (1913). For a national perspective on the direct election of U.S. senators, see David Schleicher, "The Seventeenth Amendment and Federalism in an Age of National Political Parties" (George Mason Law and Economics Research Paper No. 13-33, George Mason University, Arlington, Va., May 2013), available online at Social Science Research Network, http://ssrn.com/abstract=2269077 (accessed Dec. 19, 2013).
25. Kerr, 16. See also Howard W. Allen, *Poindexter of Washington: A Study in Progressive Politics* (Carbondale, Ill., 1981).
26. Don Brazier, *History of the Washington Legislature, 1854-1963* (Olympia, Wash., 2000), 75-82; Saltvig, 331; "Collapse of Progressives in Washington Complete," *Los Angeles Times*, Nov. 5, 1914, p. 14.
27. Cohen, 4-6; Hofstadter, 131-73; R. Laurence Moore, "Directions of Thought in Progressive America," in Gould, *Progressive Era,* 35-53.
28. Hofstadter, 8-9, 134, 181-85; Johnston, 10-12.
29. Kerr, 21 (qtn.), 26.
30. Ibid., 21.
31. Ibid., 22-23.
32. Ibid., 18.
33. Kolko, 279-87; John Chamberlain, *Farewell to Reform: The Rise, Life and Decay of the Progressive Mind in America,* 2d ed. (New York, 1933), 306-24.
34. "Supreme Court Justices by Year," 175 Wash. 2d xxxvii (2012). For short biographies of each of the members of the Washington Supreme Court during the years that Chadwick served, see Charles H. Sheldon, *The Washington High Bench: A Biographical History of the State Supreme Court, 1889-1991* (Pullman, Wash., 1992), 80, 111,134, 143, 156, 171, 210, 234, 254, 258, 329, 343.
35. Sheldon, 143, 210, 234, 238, 254, 256, 258, 271, 297, 343.
36. Ibid., 80, 143, 210, 254, 329. In 1909, Republican legislators, with support from the predominantly Republican bar, expanded the size of the Washington Supreme Court from seven to nine and switched back to the partisan approach. Apparently the Republicans wanted to ensure that their compatriots would have an edge in appointments to the two new slots in the 1910 elections. In 1911, Washington switched permanently to nonpartisan judicial elections. Charles H. Sheldon, *A Century of Judging: A Political History of the Washington Supreme Court* (Seattle, 1988), 44-48.
37. Hubert Howe Bancroft, *The Works of Hubert Howe Bancroft,* Vol. 30: *History of Oregon, 1848-1888* (San Francisco, 1888), 673-74; Stephen F. Chadwick, Sr., "The Recollections of Stephen James Chadwick," *PNQ,* Vol. 55 (1964), 111.
38. Stephen James Chadwick quoted in Chadwick, 113.
39. Ibid., 115.
40. Chadwick, 118; Sheldon, *Washington High Bench*, 105; H. James Boswell, *American Blue Book (Boswell): Western Washington* (Seattle, 1922), 17.
41. Sheldon, *Washington High Bench,* 105, 156.
42. Ibid., 105; "Good Record of Judge Chadwick," *Aberdeen Herald,* Sept. 4, 1914, p. 1.
43. "Good Record," 1; "Judge Stephen J. Chadwick: Eminent Eastern Washington Jurist Visits Aberdeen—Will Be Candidate for Supreme Bench," *Aberdeen Herald*, July 6, 1908, p. 5.
44. See "Judge Chadwick to Seek Nomination: Prominent Whitman County Jurist Has Decided to Make Race for Place on State Supreme Court Bench," 1928, clipping, folder 2, box 1, Stephen James Chadwick Papers, Special Collections, University of Washington (UW) Libraries, Seattle; and "In Memory of John L. Wilson," *Seattle Republican,* Nov. 15, 1912, p. 3.
45. "Politics Warming Up: Judge Chadwick Mentioned for Office of Governor," *Colfax Gazette,* Jan. 31, 1908, p. 1.
46. "Judge Stephen J. Chadwick," 5.
47. Sheldon, *Century of Judging,* 44-45.
48. Sheldon, *Washington High Bench*, 105, 288-89; Saltvig, 135.
49. "Chadwick Boomed for Senate," *Pullman Herald,* Aug. 12, 1910, p. 1.
50. Saltvig, 326. Poindexter, a former Democratic prosecuting attorney in Walla Walla, had changed parties when he moved to Spokane, was seen by many critics as an opportunist, and later made several other sudden switches in his political positions. Chadwick was generally consistent, was slow to alter his basic positions without significant thought, and simply might not have cared much for Poindexter. Allen, 10, 21.
51. M. M. Mattison, "Senatorial Booms Opposite of Anaemic: Political Aspirations of Stephen J. Chadwick and R. B. Albertson Apparently Have Not Diminished," *Seattle Times,* Oct. 20, 1915, p. 10.
52. Election Results Search, Office of the Secretary of State, s.v. "Chadwick," http://www.sos.wa.gov/elections/results_search.aspx (accessed Dec. 20, 2013).
53. "Wasn't Good Enough for Wilson; Is He Good Enough for You?" *Seattle Star,* Oct. 21, 1914, p. 4. For the paper's political

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leanings, see "About *The Seattle Star,*" Chronicling America: Historic American Newspapers, Library of Congress, http://chroniclingamerica.loc.gov/lccn/sn87093407/ (accessed Dec. 6, 2013).

54. M. M. Mattison, "Casts Rock into Political Pool: Retirement of Judge Chadwick Starts Gossip among Politicians at Capital," *Seattle Times*, June 2, 1919, p. 18.
55. Sheldon, *Washington High Bench,* 106; Boswell, 17.
56. Boswell, 17.
57. "Chadwick's Record as Democrat Attacked by Spokane Observer," *Spokane Spokesman-Review,* April 8, 1928, p. 10.
58. In the primary, Bullitt reported campaign expenditures of $14,823, while Chadwick reported $3,174 and Hartley $2,735.50. "Hartley Nomination Cost Him $2,735.50," *Seattle Times,* Sept. 21, 1928, p. 31.
59. Charles P. Lund and William A. Huneke quoted in "Spokane Leaders Pay Tribute to Chadwick," *Spokane Daily Chronicle*, Nov. 20, 1931, final fireside edition, 3.
60. "Spokane Leaders Pay Tribute."
61. Morton J. Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (New York, 1992), 16-20; Claudio J. Katz, "Protective Labor Legislation in the Courts: Substantive Due Process and Fairness in the Progressive Era," *Law and History Review*, Vol. 31 (2013), 282-84.
62. Brian Z. Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (Princeton, N.J., 2010), 79-90.
63. Holden v. Hardy, 169 U.S. 366 (1898).
64. *Holden,* 169 U.S. at 387.
65. Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (Durham, N.C., 1993), 86-99.
66. See Washington Constitution, art. I, § 12, which was drawn from art. I, § 20, of Oregon's 1857 constitution, which in turn had its origins in art. I, § 22, of Indiana's constitution. State of Washington, "2013-2014 Legislative Manual," 400, available online at Legislative Information Center, Washington State Legislature, http://www.leg.wa.gov/LIC/Documents/SubscriptionsEndOfSessionHistorical/LegMan.pdf (accessed April 5, 2014).
67. Gillman, 20; Michael J. Phillips, *The Lochner Court, Myth and Reality: Substantive Due Process from the 1890s to the 1930s* (Westport, Conn., 2001), 114-19.
68. Horwitz, 29, 54, 114.
69. Horwitz, 19-31; Katz, 275-81; Kermit L. Hall, *The Magic Mirror: Law in American History* (New York, 1989), 226-46.
70. John Dillon, "Property—Its Rights and Duties in Our Legal and Social Systems," *American Law Review,* Vol. 29 (1895), 172-74. For more on Dillon, see Clyde E. Jacobs, *Law Writers and the Courts: The Influence of Thomas M. Cooley, Christopher G. Tiedeman, and John F. Dillon upon American Constitutional Law* (Berkeley, Calif., 1954), 111-12, 121.
71. For more on these two judges, see Paul Kens, *Justice Stephen Field: Shaping Liberty from the Gold Rush to the Gilded Age* (Lawrence, Kans., 1997); and James W. Ely, Jr., "Rufus W. Peckham and Economic Liberty," *Vanderbilt Law Review,* Vol. 62 (2009), 591-638.
72. How Dillon's, Cooley's, and Tiedeman's academic theories were translated into legal doctrines is neatly summarized in Jacobs, 26-27.
73. United States v. E. C. Knight Co., 156 U.S. 1 (1895).
74. Pollock v. Farmers' Loan and Trust Company, 157 U.S. 429 (1895).
75. Allgeyer v. Louisiana, 165 U.S. 578 (1897).
76. Hammer v. Dagenhart, 247 U.S. 321 (1918).
77. Adkins v. Children's Hospital, 261 U.S. 525 (1923).
78. The U.S. Supreme Court did not always find regulatory statutes unconstitutional. See, for example, Champion v. Ames, 188 U.S. 321 (1903), and Muller v. Oregon, 208 U.S. 412 (1908). During the past two decades, legal historians have provided a much more nuanced understanding of the classical approach and the development and application of the substantive due process and liberty of contract doctrines. See, for example, Katz, 282-84; David E. Bernstein, *Rehabilitating* Lochner: *Defending Individual Rights against Progressive Reform* (Chicago, 2011); David N. Mayer, "The Myth of 'Laissez-Faire Constitutionalism': Liberty of Contract during the Lochner Era," *Hastings Constitutional Law Quarterly*, Vol. 36 (2009), 217-84; Paul Kens, Lochner v. New York: *Economic Regulation on Trial* (Lawrence, Kans., 1998); and Phillips.
79. Jacobs, 93-97; Katz, 287-89 (288, qtn.).
80. State ex rel. Aubrey, 36 Wash. 308 (1904).
81. Slaughterhouse Cases, 83 U.S. 36, 87 (1872), quoted in *Aubrey,* 36 Wash. at 315.
82. *Aubrey,* 36 Wash. at 315.
83. State v. Brown, 37 Wash. 97 (1905).
84. Lawton v. Steele, 152 U.S. 137 (1895).
85. *Brown,* 37 Wash. at 102.
86. State ex rel. Richey v. Smith, 42 Wash. 237 (1906).
87. People v. Warden, etc., 144 N.Y. 529 (1895), quoted in *Richey,* 42 Wash. at 244.
88. *Lochner,* 198 U.S. at 59, quoted in *Richey,* 42 Wash. at 246.
89. Shortall v. Puget Sound Bridge and Dredging Co., 45 Wash. 290 (1907).
90. Sheldon, *Washington High Bench,* 288-89. After Root's resignation, a state bar association special committee found that he had been guilty of a "gross breach of judicial and professional propriety" by having allowed a litigant's lawyer to review and comment on a Washington Supreme Court opinion before it was published. Arthur S. Beardsley, "The Bench and Bar of Washington: The First Fifty Years, 1849-1900," manuscript, n.d., chap. 41, sec. "Root-Gordon Scandal," p. 2, Spec. Colls., Rare Books, Gallagher Law Library, UW School of Law.
91. Puget Sound Warehouse Co. v. Northern Pacific Railway Co., 58 Wash. 322 (1910). Between 1910 and 1969, most state supreme court cases were heard by one of two five-judge panels. The chief justice served on and chaired both divisions. Sheldon, *Washington High Bench,* 49-56.
92. *Puget Sound Warehouse Co.,* 58 Wash. at 325.
93. *Puget Sound Warehouse Co.,* 58 Wash. at 326.
94. *Webster,* 67 Wash. 37.
95. *Webster,* 67 Wash. at 40.
96. *Boutelle,* 61 Wash. 434; *Davis-Smith Co.,* 65 Wash. 156.
97. *Davis-Smith Co.*, 65 Wash. at 156, quoted in *Webster,* 67 Wash. at 40.
98. *Boutelle,* 61 Wash. at 444, quoted in *Webster,* 67 Wash. at 41.
99. *Somerville,* 67 Wash. 638.
100. *Muller,* 208 U.S. 412.
101. *Somerville,* 67 Wash. at 648-50.
102. *Mountain Timber,* 75 Wash. 581.
103. Noble State Bank v. Haskell, 219 U.S. 104, 111 (1911), quoted in *Mountain Timber,* 75 Wash. at 585.
104. *Somerville,* 67 Wash. at 643, quoted in *Mountain Timber,* 75 Wash. at 587.
105. *Mountain Timber,* 75 Wash. at 587-88.
106. *Mountain Timber,* 75 Wash. at 588-89.
107. Mountain Timber Co. v. Washington, 243 U.S. at 237-238.
108. *Mazetti,* 75 Wash. 622.
109. *Mazetti,* 75 Wash. at 623.
110. *Mazetti,* 75 Wash. at 624.
111. Horwitz, 51-63.
112. *Mazetti,* 75 Wash. at 628.
113. Bigelow v. Maine Central Ry. Co., 110 Me. 105 (1912), quoted in *Mazetti,* 75 Wash. at 628.
114. *Mazetti,* 75 Wash. at 626-29.
115. *Mazetti,* 75 Wash. at 630.
116. MacPherson v. Buick, 217 N.Y. 382 (1916).
117. Sheldon, *Washington High Bench,* 13-14.
118. On rare occasions, Chadwick's opinions could be longer and more florid—almost verbose. See, for example, *Dearle v. Frazier,* 102 Wash. 369, which reflects the philosophical and rhetorical style typical of his Masonic and Elks orations. For one such oration, see Stephen J. Chadwick, address to "Exalted Ruler, Brothers and Friends," n.d., folder 26, box 1, Chadwick Papers.
119. Ross v. Erickson Const. Co., 89 Wash. 634 (1916).
120. See, for example, Everett v. Paschall, 61 Wash. 47 (1910); and State v. Sturtevant, 76 Wash. 158 (1913).
121. See Stephen J. Chadwick, "Following WWI," typescript, n.d., 14, folder 25, and idem, untitled speech, typescript, Feb. 15, 1919, pp. 6-7, folder 27, both in box 1, Chadwick Papers.
122. See Stephen J. Chadwick, untitled speech on Thomas Jefferson, typescript, n.d., 11, folder 1, box 2, and idem, untitled speech given before Spokane Bar Association, typescript, n.d., folder 25, box 1, both in Chadwick Papers; Chadwick, "Following

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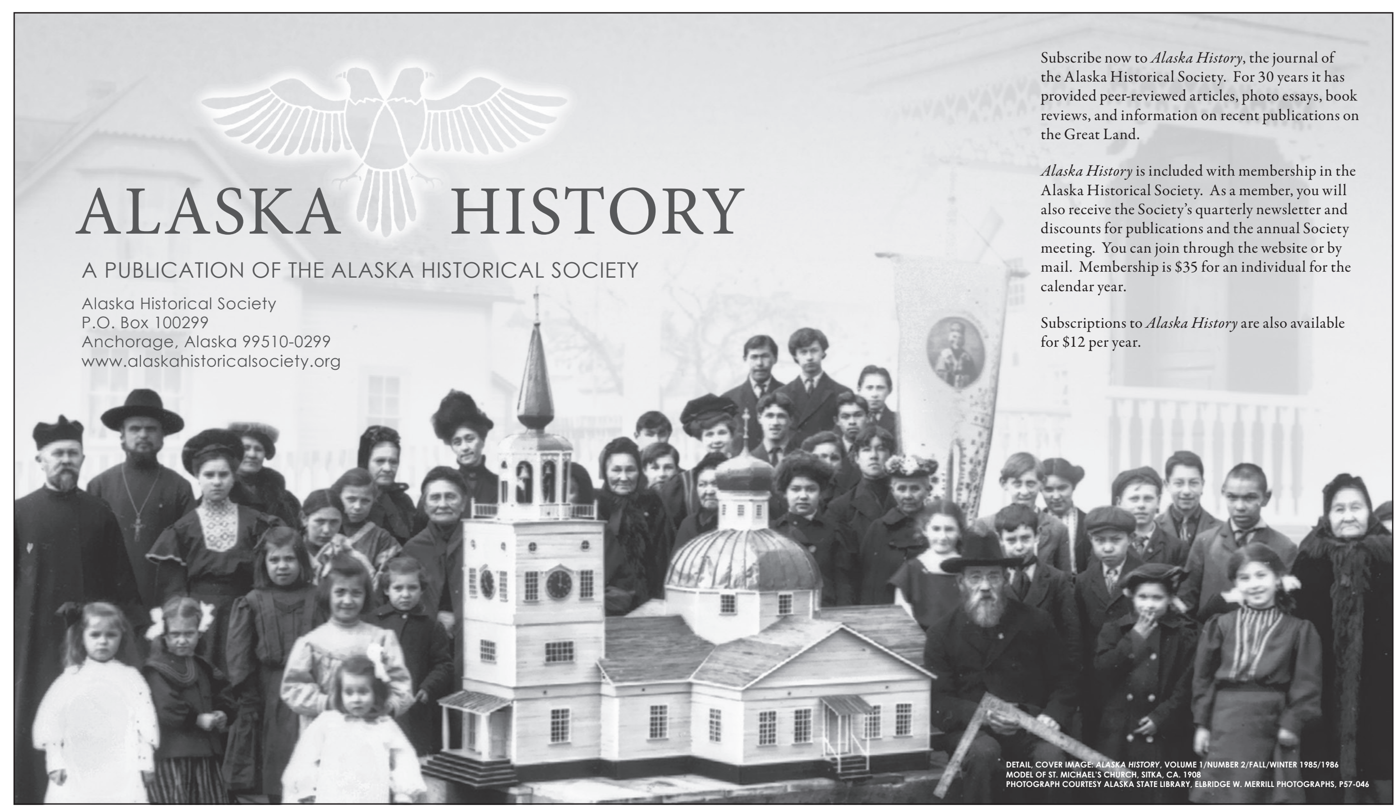
WWI," 22.

123. See Chadwick, untitled speech, Feb. 15, 1919, pp. 10-11.
124. Sheldon, *Washington High Bench*, 29-31, 38-39.
125. Election Results Search, Office of the Secretary of State, s.v. "Chadwick," http://www.sos.wa.gov/elections/results_search.aspx (accessed Dec. 20, 2013).
126. Gillman, 11.
127. Johnston, 10; Michael Les Benedict, "Constitutional Politics in the Gilded Age," *Journal of the Gilded Age and Progressive Era,* Vol. 9 (2010), 7-35.
128. Katz, 288.
129. Cohen, 194-95; Jacobs, 29.
130. Gillman, 149.
131. Cohen, 10-13.
132. Roscoe Pound, "The Theory of Judicial Decision," pt. 1: "The Materials of Judicial Decision," *Harvard Law Review,* Vol. 36 (1923), 646.
133. Oliver Wendell Holmes, Jr., *The Common* Law (Boston, 1881); Oliver Wendell Holmes, Jr., "The Path of the Law," *Harvard Law Review,* Vol. 10 (1897), 457-78; Richard A. Posner, ed., *The Essential Holmes* (Chicago, 1992), 160, 168.
134. Horwitz, 109-43. For a brief but cogent discussion of the significance of Holmes's thoughts and writings on progressive legal thinkers, see Bernstein, 40-55.
135. *Lochner,* 198 U.S. at 75.
136. Lee Epstein, William M. Landes, and Richard A. Posner, *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice* (Cambridge, Mass., 2013), 58.
137. See *Mullen v. Howell,* 107 Wash. at 176; Schulze v. Jones and Riddell, 175 P. 311, 313 (1918); Clark v. Foster, 167 P. 908, 910 (1917); Crawford v. Seattle, R. and S. Ry. Co., 165 P. 1070, 1072 (1917); Larson v. Alaska S.S. Co., 165 P. 880, 883 (1917); Ex parte Rudebeck, 163 P. 930, 931 (1917); State v. Northern Express Co., 136 P. 1160, 1163 (1913); *Mountain Timber,* 75 Wash. at 588; Farrar v. Andrew Peterson and Co., 130 P. 753, 754 (1913); Alaska S.S. Co. v. Pacific Coast Gypsum Co., 128 P. 654, 658 (1912); Makins Produce Co. v. Callison, 121 P. 837, 840 (1912); State v. Clausen, 117 P. 1101, 1110 (1911); and Ettor v. City of Tacoma, 107 P. 1061, 1062 (1910).
138. Sheldon, *Washington High Bench,* 271-72.
139. See Stephen J. Chadwick, untitled speech given before Spokane Bar Association, typescript, 1928, and untitled speech given before Spokane Bar Association, typescript, n.d., both in folder 25, box 1, Chadwick Papers.
140. West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). The concept of states as laboratories was made famous by Justice Louis Brandeis in his dissent in New State Ice Co. v. Liebman, 285 U.S. 262, 311 (1932). See G. Alan Tarr, "Laboratories of Democracy? Brandeis, Federalism, and Scientific Management," *Publius*, Vol. 31 (2001), 37.
141. See Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven, Conn., 1921), 78, in which Cardozo observed that changes in the social order "carried with them the need of a new formulation of fundamental rights and duties."
142. For a sampling of writings by legal realists, see William W. Fisher III, Morton J. Horwitz, and Thomas Reed, eds., *American Legal Realism* (New York, 1993).



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