THE ECONOMIC PHILOSOPHY OF LOCHNER: EMERGENCE, EMBRASURE AND EMASCULATION

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The New York "bakeshop case,"[1] in which the Supreme Court of the United States invalidated a 10-hour maximum workday for bakery employees, is among the best known decisions of American constitutional law. This familiarity does not stem from approbation, however; the Court's majority opinion and holding enjoy the dubious distinction of being among the most fulsomely denounced of all Supreme Court decisions. Only the classic dissent of Mr. Justice Holmes passes muster.

The great significance of *Lochner v. New York* lies in the fact that it was the focal point in a judicial move to fasten on the country by constitutional exegesis unsanctioned by the Constitution a pattern of economic organization believed by the Court to be essential to the fullest development of the nation's economy. Without appreciation of this dimension of *Lochner,* the lesson of this episode in constitutional history, however read, will be lost for evaluation of other instances where pressures build to induce the Court to discover in the Constitution what is not there but arguably ought to be in furtherance of fundamental postulates of political and social organization.

BACKGROUND

The economic philosophy that constitutes the inarticulate major premise of *Lochner v. New York* was a full century in gestation. A good half of that time span was consumed in judicial determination of whether the concept of due process incorporated any element of direct

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

substantive constitutional limitation. Although included in the original bills-of-rights of the federal and state constitutions, in the latter often as "law-of-the-land" clauses, due process was of uncertain meaning in view of its equation with Parliamentary supremacy in the final resolution of the English constitutional struggle of the seventeenth century. Its content remained obscure even after state courts satisfied themselves that, under the circumstances of the American Revolution, the concept could not carry the ultimate English meaning. Some early decisions concluded that due process defined the proper office of the judicial branch of government, some that it required the regularization of the legislative process, and still others that it served as a sort of flying buttress to the constitutionalized political principle of separation of powers. Not until the middle of the nineteenth century had it been sufficiently disengaged from these connotations to begin to reflect the earlier English meaning.

In English history from Magna Carta through Coke to the Restoration, due process acted as a direct limitation on royal prerogative. It was a dualistic concept in the sense that at times it carried procedural meaning while at other times substantive content was claimed for it.[2] The evolution of the concept in the United States was similar at this stage. Despite repeated assertions by some eminent commentators and even Supreme Court Justices that before the Civil War due process carried only procedural connotation,[3] the law books belie the contention. By then there were numerous state court decisions according the concept substantive content.[4] The few pertinent decisions of the Supreme Court of the United States look both ways, although it can be urged that the procedural determinations were the stronger.[5]

Pretermitting the scope of the substantive content of due process for life and liberty, it is essential to an understanding of later developments with respect to the last of the trilogy of "rights" to note

2. F. STRONG, AMERICAN CONSTITUTIONAL LAW 43-49 (1950).

3. R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 48 (1941); Grant, *The Natural Law Background of Due Process*, 31 COLUM. L. REV. 56 (1931); Hamilton, *The Path of Due Process of Law*, in THE CONSTITUTION RECONSIDERED 167 (C. Read rev. ed. 1968).

4. F. STRONG, *supra* note 2, at 123; Howe, *The Meaning of "Due Process of Law" Prior to the Adoption of the Fourteenth Amendment*, 18 CALIF. L. REV. 583, 596-609 (1930).

5. For procedural cases, see Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1855); Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1855). For substantive cases, see Bloomer v. McQuewan, 55 U.S. (14 How.) 539 (1852) (covert constitutional review to avoid an issue of substantive due process); Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (dictum?). In Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819), Daniel Webster included in his argument for the Trustees, for its analogical value, the invalidity of the New Hampshire legislative action under the law-of-the-land clause of the New Hampshire Constitution on procedural, substantive and separation-of-powers grounds.

the evolution in the species of property accorded constitutional protection under the due process clause. The earliest was tangible property, realty or personalty, protected against expropriation from one for the benefit of another. For example, *Bowman v. Middleton*,[6] an early South Carolina decision, found the transfer from *A* to *B* of title to certain acreage by legislative fiat contrary to Magna Carta. *Allen's Administrator v. Peden*,[7] decided under the North Carolina constitution, antedated by 40 years the *Dred Scott* assertion that property in slaves could not be taken consistently with the limitations of a due process clause. Later cases extended the constitutional safeguarding of tangible property beyond bare title and possession. *Wynehamer v. People*,[8] conceded to be the strongest pre-Civil War precedent for substantive due process, invalidated an early New York prohibition law because "[o]n the day the law took effect, it was criminal to be in possession of intoxicating liquors, however innocently acquired the day before. It was criminal to sell them, and under the law, therefore, no alternative was left to the owner but their immediate destruction."[9]

But it was a common characteristic of these original species of protected property that in every instance the right conserved had "vested."[10] While affording significant defense against governmental expropriation, this accepted meaning of property due process was clearly circumscribed by a well-defined temporal sequence that limited constitutional protection to instances of taking attempted *after* the full legal maturation of the property right. Meantime, less tangible forms of ownership were being brought within these constricted protections of the due process concept; illustrative are rights arising from contract or tort or by virtue of public office.[11]

This restricted conception continued past the Civil War period.

6. 1 Bay 252 (S.C. 1792).
7. 4 N.C. 442 (1816).
8. 13 N.Y. 378.
9. *Id.* at 388-89.
10. Analogy to the meaning accorded the contract clause is close. Although under Marshall the contract clause reached executed as well as executory, and public as well as private, contracts, the Court conceived it as a specialized form of prohibition of retrospective legislation. When litigation brought to the Court a factual situation in which the contract followed enactment of the challenged legislation, a majority of one denied the applicability of the clause. In his only constitutional dissent, Chief Justice Marshall declared that "[t]his construction would . . . convert an inhibition to pass laws impairing the obligation of contracts, into an inhibition to pass retrospective laws." Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 355-56 (1827).
11. Howe, *supra* note 4, collects some of the cases, which he views as building blocks to *Wynehamer*. Note especially Westervelt v. Gregg, 12 N.Y. 202 (1854), in which the New York court had, 2 years before *Wynehamer*, denounced an attempted legislative "transfer" of a legacy from one member of a family to another as violative of due process because the right was property "in the justest sense of that term" and "no power in the state can legally confer upon one person or class of persons the property of another person or class, without their consent, whatever motives of policy may exist in favor of such transfer." *Id.* at 211-12.

One indication is evident in the qualms concerning the constitutionality of the War-time expropriative acts and the Emancipation Act.[12] It predicated the Supreme Court decision in *Hepburn v. Griswold.*[13] And it manifested itself in that Court's observation in *Bartemeyer v. Iowa*[14] that an attempt by a state to punish as a violation of its prohibition law the later sale of liquor lawfully owned prior to the law's effective date would raise "very grave questions" under the due process clause of the fourteenth amendment.

EMERGENCE

Yet from the *Slaughter-House Cases,*[15] with which *Bartemeyer* had been argued, the Court rapidly evolved a far more embracive conception of the kinds of property rights protected by due process. John R. Commons, the eminent economist, capsuled this interpretative breakthrough as a transition in the concept of protected property from use value—the "tangible physical thing"—to exchange value, "the market-value expected to be obtained in exchange for the thing in any of the markets where the thing can be bought and sold."[16] This embrasure included "the right to choose a calling and pursue it" independent of any time relationship between private choice and legislative action. Dr. Commons found in the *Slaughter-House* opinions apt illustration of the distinction: the majority asserted that no property had been taken by the monopoly grant to the Crescent City concern because the other butchers still had their abattoirs, whereas the minority found a taking because the exchange value of the property of the complaining butchers had been destroyed.

The transition to the more encompassing scope of due process did not begin immediately, however. To the majority in the *Slaughter-House Cases* the issue was fundamentally federalistic. According broad scope to section 1 of the fourteenth amendment would automatically provide national power to vitiate the authority of the states in civil relations through the grant to Congress in section 5 of "power to enforce, by appropriate legislation, the provisions of this article." Contemporary congressional civil rights acts made it clear that tradi-

12. Franklin, *The Foundations and Meaning of the Slaughterhouse Cases,* 18 TUL. L. REV. 1, 85 (1943), cites the challenge of the Confiscation Act. The Emancipation Proclamation of 1863 stirred doubts on both federalistic and due process grounds. J. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 373 (rev. ed. 1951).

13. 75 U.S. (8 Wall.) 603 (1869), overruled by the Legal Tender Cases after "adjustment" in Court personnel, 79 U.S. (12 Wall.) 457 (1871).

14. 85 U.S. (18 Wall.) 129 (1873).

15. 83 U.S. (16 Wall.) 36 (1873).

16. J. COMMONS, LEGAL FOUNDATIONS OF CAPITALISM 19 (1924).

tional federalism was endangered.[17] Secondly, ex-Justice John Campbell argued the case against the "monopoly" primarily under the privileges or immunities clause, presumably because of the presence in article IV of a privileges and immunities clause which had enjoyed authoritative interpretation at the hand of Bushrod Washington, as Circuit Justice, in *Corfield v. Coryell*.[18] The final hurdle was that the celebrated language of Justice Washington sounded on examination more in terms of the by then established concept of property than of the novel concept essential to Campbell's argument for the disadvantaged butchers.[19]

The able former Justice was, however, equal to the task before him. For him the threat was the carpetbag enactment of the Louisiana legislature acting under Reconstruction domination, not the possible enlargement of national legislative power under the auspices of section 5 by a Reconstruction Congress. The enormous difference in ramification of the two privileges-immunities clauses was glossed over with the sleight-of-hand of the magician. And the fundamental rights adumbrated in *Corfield v. Coryell* were construed to embrace the right to engage freely in the run of ordinary callings. Precedent for such freedom Campbell deduced from the historic English struggle over monopoly grants in the time of Elizabeth I and James I. Early in the opinion for the majority Mr. Justice Miller credits Campbell with having "displayed a research into the history of monopolies in England,

17. Commentators are agreed on this analysis. See B. HENDRICK, BULWARK OF THE REPUBLIC 402 (1937); Corwin, *The Supreme Court and the Fourteenth Amendment*, 7 MICH. L. REV. 643-47 (1909); Franklin, *The Foundations and Meaning of the Slaughterhouse Cases* (pt. 2), 18 TUL. L. REV. 218, 227-37 (1943); Warsoff, *The Judicial Veto*, 27 KY. L.J. 45-60 (1938).

18. 6 F. Cas. 546 (No. 3230) (C.C.E.D. Pa. 1823).

19. That oft-quoted language is as follows:

> The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental . . . .

Id. at 551-52.

and the European continent, only equalled by the eloquence with which they are denounced."[20] In that titanic struggle, in which courts and Parliament battled the last of the Tudors and the first of the Stuarts, freedom from monopoly-grant restriction on traditionally open callings was linked with the law-of-the-land Chapter of Magna Carta.[21] Campbell seems not to have made this linkage,[22] presumably because he was relating the English cases and Parliamentary contentions to the privileges-immunities rather than to the due process clause. But yet, the latter argument gave to the asserted right a solid grounding in English precedent.

Miller's disposal of this contention constituted such a patently false analogization of English and American constitutional theory as to disclose the lengths to which the majority were forced to go to hold the line. The reasoning was that the grants had been made by the Crown, that there was no question of Parliamentary power to create monopolies. Ergo, American legislative bodies were under no constitutional limitation,[23] an assertion completely at odds with the constitutional theory of this country that all branches of government are subject to the fundamental law of the Constitution because sovereignty resides in the People and not, as in England, in Parliament.[24]

John Campbell can be included among the great figures of history who lost a battle but won a war. Repudiation of the Louisiana monopoly before term, propelling the Crescent City Company into the Supreme Court on the contention of clear violation of the contract clause, provided Field and Bradley with early opportunity to switch to due process their embrasure of Campbell's reasoning, at the same time elevating it from dissent to concurrence.[25] Before the end of the century, abetted by the appealing case of *Yick Wo v. Hopkins*,[26]

20. 83 U.S. (16 Wall.) 36, 65 (1873).
21. F. STRONG, *supra* note 2, at 45-46.
22. Even Hamilton, *Common Right, Due Process and Antitrust*, 7 LAW & CONTEMP. PROB. 24, 28-31 (1940), does not link with Magna Carta, as closely as is justified, the English struggle over Crown-granted monopolies although a central thesis was the significance of that conflict for later interpretation of due process in the fourteenth amendment.
23. 83 U.S. (16 Wall.) 36, 66 (1873).
24. R. MOTT, DUE PROCESS OF LAW § 54 (1926).
25. Butchers' Union Co. v. Crescent City Co., 111 U.S. 746 (1884).
26. 118 U.S. 356 (1886), invalidating as administered the San Francisco ordinance that in effect excluded Chinese from the occupation of laundering. Equal protection, rather than due process, was the constitutional provision offended. However, in the statement of the case by Justice Matthews, Judge Sawyer of the circuit court is quoted as follows:

> The necessary tendency, if not the specific purpose, of this ordinance, and of enforcing it in the manner indicated in the record, is to drive out of business all the numerous small laundries, especially those owned by Chinese, and give a monopoly of the business to the large institutions established and carried on by means of large associated Caucasian capital.

Id. at 361.

it had attained majority status by reason of its employment by Justice Peckham in writing the opinion of the Court in *Allgeyer v. Louisiana.*[27] Meantime, despite the promise of *Ex Parte Virginia*[28] for congressional power under section 5, Bradley and Field were prominent in its heavy dilution in the *Civil Rights Cases*[29] decided just 10 years after *Slaughter-House.*

Opening his classic article on *Liberty of Contract,*[30] written in the first decade of the twentieth century, Dean Pound noted the relative newness of the topic of his discourse.

> The phrase 'liberty of contract' is not to be found in Lieber's *Civil Liberty and Self-Government,* published in 1853. It is not to be found in Professor Burgess's *Political Science and Constitutional Law,* published in 1890. The first decision turning upon it was rendered in 1886.[31] The first extended discussion of the right of free contract as a fundamental natural right is in Spencer's *Justice,* written in 1891. The eighteenth century writers on natural law say nothing about it.[32]

Yet later in the article, turning to "the cases in which the idea of liberty of contract has been invoked to defeat legislation," he observed that

> The fountain head of this line of decisions seems to be the opinion of Mr. Justice Field in *Butchers' Union v. Crescent City Co.,* in which he restates the views of the minority in the *Slaughter House Cases.* This opinion has been one of the staple citations in causes involving liberty of contract. In it he took a vigorous stand against legislative interference with the 'right to follow lawful callings.' Although it did not represent the views of the Federal Supreme Court, this opinion had a far-reaching influence in the State Courts.[33]

That extensive influence, as Pound proceeds to show in his detailing of the state decisions,[34] was articulated largely in terms of the new idea of liberty of contract. It is reasonable to believe that this emphasis was the consequence of the enormous influence that Herbert Spencer had attained by this period. Premising justification for his sociological theories on the presumed parallel between social behavior and the laws of nature as disclosed by the revolutionary findings of Charles Darwin, Spencer contended powerfully for the freedom of the

27. 165 U.S. 578 (1897).
28. 100 U.S. 339 (1880). Field dissented even here. Franklin, *supra* note 10, includes in his biting criticism of the *Slaughter-House Cases* for their treatment of section 5 the remark that for Field "the fifth section of the [F]ourteenth [A]mendment was regarded as not written. He began where Campbell left off." *Id.* at 248.
29. 109 U.S. 3 (1883).
30. Pound, *Liberty of Contract,* 18 YALE L.J. 454 (1909).
31. The reference is to Godcharles & Co. v. Wigeman, 113 Pa. St. 431 (1886)
32. Pound, *supra* note 30, at 455 (footnotes omitted).
33. *Id.* at 470 (footnotes omitted).
34. *Id.* at 470-87.

individual to effect his worldly salvation with minimal interference from government.[35] There is here no conflict with the concept of open trades, yet the emphasis is somewhat different and the reach of the doctrine more extensive. Indeed, Walton Hamilton, in his engaging account of this fermentative period in constitutional evolution, observes that "[a] sentence from the *Wealth of Nations* which makes of a man's right to his trade both a liberty and a property was copied from [Campbell's] brief into a dissenting opinion [in *Slaughter-House*] and to this day goes resounding down the law reports."[36]

The economic philosophy that underlies *Lochner* reached incipiency in a case that belongs to the field of conflict of laws. *Allgeyer v. Louisiana*[37] concerned the validity of the out-of-state reach of a Louisiana criminal statute designed to keep the writing of marine insurance "at home."[38] But whatever the motive, Peckham for the Court managed to bring to bear on a case of territorial due process the evolving rhetoric for cases of substantive property due process. "In the privilege of pursuing an ordinary calling or trade and of acquiring, holding and selling property must be embraced the right to make all proper contracts in relation thereto . . . ."[39] Not only are freedom of contract and freedom of calling conjoined; there is sandwiched in at the same time the pre-*Slaughter-House* conception of freedom with respect to the incidents of property. To quote Walton Hamilton again, "It was a superb opportunity to bring the orthodoxy of classical economics into the higher law and he [Peckham] was not going to allow it to pass."[40] This was the immediate inheritance of *Lochner*.

On its face the majority opinion in *Lochner*, as customarily edited for casebook use, sounds in terms of an obstinate insistence upon liberty of contract as between employer and employee in an ordinary private business, "all being men, sui juris."[41] In a later portion of the

35. R. HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT ch. 2 (1955 ed.). The popularity of Herbert Spencer (1820-1903) in America between the Civil War and the end of the century is a phenomenon that has frequently been described, but remains for all that staggering. Not only village agnostics, but scientists, many theologians, and most captains of industry paid him as great homage as the Revolutionary generation paid to Locke. It would hardly be too much to say that the bulk of American 'thought' in this period, measured solely by the weight of printed paper, was not thought at all, but only a recapitulation of Spencer.

P. MILLER, AMERICAN THOUGHT: CIVIL WAR TO WORLD WAR I xxiii (1954). Lester Ward became the most effective challenger of Spencer and his Social Darwinism. LESTER WARD AND THE WELFARE STATE (H. Commager ed. 1967).

36. Hamilton, *supra* note 3, at 172.

37. 165 U.S. 578 (1897).

38. *See* Green, *The Allgeyer Case as a Constitutional Embrasure of Territoriality*, 2 ST. JOHN'S L. REV. 22 (1927).

39. 165 U.S. at 591.

40. Hamilton, *supra* note 3, at 184.

41. 198 U.S. 45, 54 (1905).

opinion, seldom heeded, Justice Peckham calls up for precedential support the *Godcharles* decision credited by Pound with getting the state courts started off on liberty of contract,[42] a Nebraska ruling invalidating a maximum hours law,[43] and three state decisions invalidating legislative restrictions on entry into the business of horseshoeing.[44] The latter are introduced by the observation that "interference on the part of legislatures of the several states with the ordinary trades and occupations of the people seems to be on the increase."[45] After the five cases have been cited, but with identification given to the facts only in the "horseshoe" dispositions, the Court concludes that "[i]n these cases the courts upheld the right of free contract and the right to purchase and sell labor upon such terms as the parties may agree to."[46] Concededly, there is here only replay of the language of *Allgeyer*, and with the rights of property left to inference rather than made explicit.

Paradoxically, it is Holmes' celebrated dissent that throws more light on *Lochner*'s underlying premises. Only Spencer is referred to by name: "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."[47] Yet twice Holmes makes reference to economic theory: "This case is decided upon an economic theory which a large part of the country does not entertain."[48] And later it is insisted that "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*."[49] These assertions sound more as though they are directed at Adam Smith's thesis that competitive capitalism is to be preferred to mercantilism than they do to Spencer's sociologically-based contentions in support of thoroughgoing individualism. Certainly the context makes it clear that Holmes is critical not alone of equating Spencer's views with the due process prohibition of the Constitution, and at the time Smith was second only to Spencer in the influence of his views. All major requirements have evolved for reading Adam Smith into due process; constitutional protection of private property, of contract and of unrestricted entry is decreed for the full panoply of the ordinary callings.

There is basis, then, for the view that liberty of contract is not the ultimate constitutional predicate in *Lochner* but one of several

42. *See* text accompanying note 31 *supra*.
43. Low v. Rees Printing Co., 41 Neb. 127 (1894).
44. Bessette v. People, 193 Ill. 334, 62 N.E. 215 (1901); People v. Beattie, 96 App. Div. 383, 89 N.Y.S. 193 (1904); *In re* Aubry, 36 Wash. 308, 78 P. 900 (1904).
45. 198 U.S. 45, 63.
46. *Id.* at 63-64.
47. *Id.* at 75.
48. *Id.*
49. *Id.*

means to a common end. That end is the enshrining of competitive capitalism as *the* one type of economic organization compatible with the Constitution. The theory fits the facts: the bakery business is highly competitive, and, therefore, market forces rather than government edict must be permitted to set hours, wages and conditions of work.

> In a word free competition is invoked to keep business going, absorb the shock of novelty, do justice between the parties. It was not privilege which Peckham, Brewer, Harlan, JJ., sought to enthrone. It was not property upon which they sought to confer the legal privilege of shaping the terms of the bargain. They professed, with little qualification, an economic creed; and the empty receptacle of 'due process' and the age-old vitality of 'the common right' enabled them to read 'free competition' into the constitution.[50]

That this is the inarticulate major premise of *Lochner v. New York* finds obverse support in a contemporaneous line of Supreme Court decisions in which governmental regulation of price was sustained. Under the classical economic theory of Adam Smith, so dominant in the late nineteenth century, price was central.[51] Accordingly, to yield the fixation of price to government represented the ultimate in abandonment of dependence upon market forces for regulation of the economy. Yet only 4 years after *Slaughter-House, Munn v. Illinois*[52]

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50. Hamilton, *supra* note 22, at 31-32.

51. The rightful charge is to emerge as the result of the exercise of the right to freedom of contract by the interested parties. But one's freedom of contract is merely the right to participation in an organized market procedure. A right of one's own freedom of contract is checked by the freedom of one's competitors to contract and balanced by the freedom of contract on the part of those with whom one must do business. In simple terms, each person must make his living by selling his property or his services; each must live upon the goods and services produced by others. Each is free to produce and consume, sell and buy, as he pleases. The only constraint is that in whatever one does—produce goods, sell labor, borrow money, or hawk wares—one must compete with others. The rivalry is a double competitive process, seller vying with seller and buyer with buyer. Because of rivalry in their ranks sellers cannot charge too much; and because of a like rivalry among buyers, they are allowed to charge enough. The result is that prices will have a basis in costs, unfair charges cannot continue to prevail, and in the long run only reasonable gains can be taken. It is not assumed that under free enterprise price is beyond public concern; rather it is presumed that the market gives adequate protection.

Hamilton, *Affectation with Public Interest*, 39 YALE L.J. 1089, 1107 (1930). This explanation of the theory of competitive capitalism is that of an able institutional economist turned law teacher. Adam Smith advanced his theory on the assumption that the technology involved would be, as it had been, handicraft. It is an irony of history that Smith wrote in the early beginnings of the Industrial Revolution, which means that his theory has always been judged in terms of its adequacy for a machine technology. In such a technology the presence of heavy fixed costs create great pressures for economies of scale, pressures that in turn impel elimination of competition through loose-knit and close-knit combinations of former competitors.

52. 94 U.S. 113 (1877).

enunciated the proposition that businesses "affected with a public interest" were subject to governmental price fixation. Adduced by the Court in support of Illinois' regulation of the rates charged by Chicago grain warehousemen were two grounds: one, the authorities cited by Sir Matthew Hale in his treatise on the ports of the sea, written two centuries earlier; the other, the factual evidence that by reason of private agreements there existed no price competition among the nine firms controlling the 14 grain elevators in Chicago.

There has been disagreement among major commentators as to which ground was the prime one,[53] as though they were conflicting. On the contrary, reliance on the two was mutually supportive. The Hale treatise supplied authority for governmental fixing of prices of businesses open to public patronage and yet not competitive; these were the public callings, dubbed by Hale as businesses affected with a public interest. The common law was otherwise with respect to private callings. An authoritative study of the cases, from the Year Books to the opening of the present century, produced the conclusion that "Upon the whole the circumstances surrounding these cases suggest this as the characterizing thing; that in the private calling the situation is that of virtual competition, while in the public calling the situation is that of virtual monopoly."[54] Expanding on this theme, the same authority observed that:

> The positive law of the public calling is the only protection that the public have in a situation such as this, where there is no competition among the sellers to operate in its favor. So much has our law been permeated with the theory of *laissez faire*, which was but lately so prominent in the policy of our state, that the admission has been made with much hestiation that state control is ever necessary.[55]

Munn's incorporation into constitutional due process of the common-law distinction between private and public callings was no sport. In two contemporaneous Supreme Court decisions respecting state reg-

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53. Supporting the monopoly ground are Hale, *The Constitution and the Price System: Some Reflections on Nebbia v. New York*, 34 COLUM. L. REV. 401, 403 (1934); Hamilton, note 51, at 1096-98 (1930). Following Lord Hale is McAllister, *Lord Hale and Business Affected with a Public Interest*, 43 HARV. L. REV. 759, 767-70 (1930).

54. Wyman, *The Law of the Public Callings as a Solution of the Trust Problem*, 17 HARV. L. REV. 156, 161 (1904).

55. *Id.* at 172. It is to be recognized that this view was challenged by Adler, *Business Jurisprudence*, 28 HARV. L. REV. 135 (1914). Reconciliation of the asserted freedom of much of the economy from government price fixing with mercantilism's call for wholesale governmental pricing can be largely achieved in terms of temporal range by use of Read, *Mercantilism: The Old English Pattern of a Controlled Economy*, in THE CONSTITUTION RECONSIDERED 63 (C. Read rev. ed. 1968).

ulation of railroad rates there is not a word of constitutional doubt,[56] surely because in those times railroads were analogized to earlier forms of transportation which had from time immemorial been deemed monopolistic by the very nature of their economic function and consequently affected with public interest. So, a decade thereafter, in *Wabash, St. Louis & Pacific Railway v. Illinois*[57] and *Dow v. Beidelman.*[58] 'Although in dissent in the *Sinking-Fund Cases,*[59] Mr. Justice Bradley had meantime reaffirmed his acceptance of *Munn* that "when an employment or business becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen; in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community, it is subject to regulation by the legislative power."[60]

On facts basically identical with those in *Munn* the same result was reached by the Court in *Budd v. New York*[61] because of the monopolistic conditions found to exist with respect to elevators located in Buffalo and Brooklyn. *Budd* was followed 2 years later in *Brass v. North Dakota ex rel. Stoeser,*[62] a decision that commentators have found difficult to reconcile because of the seeming absence of monopoly. But the absence was more apparent than real. The fact that there were 600 elevators along rail lines across the state would be of no avail to Stoeser if the elevator at Grand Harbor owned by Brass, who refused to take the former's wheat at the statutory rate, was the only one to which Stoeser could economically haul his grain.[63] A modern analogy is to be found in the taxicab business; a particular cab at hand will have a temporary monopoly for the passenger who needs intracity transportation between given points at a given time,[64] despite the availability of many cabs elsewhere.

Meantime, the *Munn* principle had been applied to a virtual mo-

56. Chicago, B. & Q. R.R. v. Iowa, 94 U.S. 155 (1877); Peik v. Chicago & Nw. Ry., 94 U.S. 164 (1877).
57. 118 U.S. 557 (1886).
58. 125 U.S. 680 (1888).
59. 99 U.S. 700 (1878).
60. *Id.* at 747.
61. 143 U.S. 517 (1892).
62. 153 U.S. 391 (1894).
63. Mr. Justice Shiras for the Court was not up to the economic sophistication required for judgment as to the presence or absence of monopoly in these circumstances. Dissenting, Mr. Justice Brewer argued the absence of any "practical monopoly" by virtue of the many grain elevators to be found within North Dakota. But his more convincing contention was that on the facts of the case enforcing Brass to take Stoeser's grain at any price in effect converted a private elevator into a public business.
64. Verkuil, *The Economic Regulation of Taxicabs,* 24 RUTGERS L. REV. 672, 684 (1970).

nopoly in the sale of potable water for a community.[65] "That question is settled by what was decided on full consideration in *Munn v. Illinois* . . . . As was said in that case, such regulations do not deprive a person of his property without due process of law."[66] *Booth v. Illinois*,[67] decided only 3 years before *Lochner*, was not a price-fixing case in the usual sense of the term, nor does it add appreciably to evidence of Court sensitivity to matters of competition and monopoly in testing for constitutionality of governmental regulation of the economy. In sustaining an Illinois law forbidding buying or selling futures in grain and other commodities, cornering or forestalling the market, or attempts at the prohibited acts, the Court's emphasis was on the state's justification in legislating against gambling. Yet, withal, an economic as well as the moral consideration shines through. Cornering the market through forestalling, engrossing or regrating is an ancient form of monopolizing.

Two events of the year 1890, one legislative and the other judicial, provided additional economic framework for the inarticulate major premise of *Lochner*. The Court's contribution was *Chicago, Milwaukee & St. Paul Railway v. Minnesota*.[68] *Munn* had left to legislative judgment the reasonableness of the rates set for enterprises so structured, naturally or artificially, as to make it unacceptable as a matter of public policy to leave price to market forces. A decade later the Court had begun to back off from this proposition.

> This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretence of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law. What would have this effect we need not now say, because no tariff has yet been fixed by the commission, and the statute of Mississippi expressly provides 'that in all trials of cases brought for a violation of any tariff of charges, as fixed by the commission, it may be shown in defence that such tariff so fixed is unjust.'[69]

In the *Minnesota* case came complete reversal of position. The vigorous criticism this decision has always received is wide of the mark as respects both constitutional and economic theory. Under separa-

65. Spring Valley Water Works v. Schottler, 110 U.S. 347 (1884).
66. *Id.* at 354.
67. 184 U.S. 425 (1902).
68. 134 U.S. 418 (1890).
69. Railroad Comm'n Cases, 116 U.S. 307, 331 (1886).

tion-of-powers doctrine, rate making has been a legislative, not a judicial function. But American constitutional law embraces direct as well as indirect limitations on governmental authority, with due process a major feature of the former.[70] By 1890 the Court had attained some realization of the differing reach of direct limitations, whether procedural or substantive in classification. Deprivation "of the power of charging reasonable rates" could now be seen as a deprivation of the lawful use of the railroad's property "and thus, in substance and effect, of the property itself without due process of law."[71] The mystery of Mr. Justice Bradley in dissent, so puzzling to Walton Hamilton,[72] is adequately explained by Bradley's difficulty in appreciating the implications of direct limitation through due process in a context wherein analysis through separation of powers yielded an opposite conclusion. Recall that Mr. Justice Bradley had had no such difficulty in his dissent in the *Slaughter-House Cases.*

When competition controls business behavior, prices must have a basis in costs.[73] It follows that when monopolistic conditions are present, justifying governmental price regulation, the price that would be set by competitive forces must be simulated. The legislature may be trusted to guard against prices above reasonable cost; due process operates to ensure protection should governmentally set prices prove to be so unreasonably low as to be confiscatory. The major elements of business cost are as easy to identify as they are difficult to ascertain. Faced with both identification and ascertainment as a consequence of the position it took in *Minnesota,* the Court in *Smyth v. Ames*[74] came up with the formula of operating costs plus fair return on "the fair value of the property being used . . . for the convenience of the public." Of these, "fair value" presented the problem. Construed to exclude inflated values representing capitalization of anticipated monopoly profits, "fair value" would yield the measure of prudent investment later advanced by Brandeis. While fraught with difficulties of ascertainment, it would have been a workable concept. Yet this measure would not, over time, yield prices equivalent to those expected under conditions of competition. Only cost of reproduction, responsive to variations in the general price level, might accomplish this; and such a measure would require constant, costly revaluation quite infeasible administratively. On the horns of this dilemma, the Court chose the

70. Strong, *Judicial Review: A Tri-Dimensional Concept of Administrative-Constitutional Law,* 69 W. VA. L. REV. 111 (1967).
71. 134 U.S. at 458.
72. *See* Hamilton, *supra* note 3, at 183.
73. *See* text of note 51 *infra.*
74. 169 U.S. 466, 546 (1898).

worst possible solution—the interpretation of "fair value" to produce a measure compromising somewhere between investment cost and cost of reproduction. But while this intolerable solution was doomed to powerful attack and eventual repudiation,[75] it cannot be gainsaid that the Court was attempting to march to the beat of a drummer by the name of Adam Smith.[76]

Certainly the Congress of the United States was marching to the beat of drummer Smith in passing the Sherman Act of 1890. By this time many of the states had adopted antitrust acts only to realize that "the monopoly problem" was, save for localized eliminations of competition, beyond their federalistic reach. Congressional exertion of national power topped off the original legislative attack on growing concentration of economic power. Although original enforcement efforts were stymied by the *United States v. E. C. Knight Co.* decision,[77] by the year in which *Lochner* was decided the Act had been basically freed of that line of threat.[78] Edward S. Corwin insisted that the Sherman Act as literally worded to prohibit "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce," raised questions of constitutionality under due process because of conflict with that clause's embrasure of freedom of contract. Citing contention of counsel in *United States v. Joint Traffic Association*,[79] Corwin reasoned that "the recently formulated doctrine of freedom of contract was at hand to lend constitutional color to an act of judicial legislation that would otherwise have been quite indefensible on con-

75. Bonbright, *The Problem of Valuation: The Economic Merits of Original Cost and Reproduction Cost*, 41 HARV. L. REV. 593 (1928).

76. Bonbright was critical of a cost-of-reproduction base on grounds beyond that of infeasibility. He did not believe that "imitation of the process of small scale competition" was adaptable to "the requirements of large scale monopoly;" and if attempted, simulation would have validity "only on the assumption that cost of reproduction is taken to mean cost of reproducing, not a similar plant but, rather a similar service. . . . A rate fixed on the basis of cost of reproducing the service is a rate fixed with no direct reference to the earnings necessary in order to pay operating expenses plus a fair return on any existing property." *Id.* at 611, 622. On the other hand, cost of reproduction had its able defenders. Brown, *Railroad Valuation and Rate Regulation*, 33 J. POL. ECON. 505 (1925); Dorety, *The Function of Reproduction Cost in Public Utility Valuation and Rate Making*, 37 HARV. L. REV. 173 (1923). In any event the Justices of 1898 could not be expected to possess the economic sophistication of a leading American economist writing nearly 30 years later.

77. 156 U.S. 1 (1895).

78. *See* Swift & Co. v. United States, 196 U.S. 375 (1905); Northern Securities Co. v. United States, 193 U.S. 197 (1904); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899). A curious feature of this development is that Holmes dissented in *Northern Securities*, voicing grave doubts concerning the constitutionality of the Sherman Act as there applied because of the scope required to be given to the commerce power to reach that combination. The effect of Holmes' dissent on President Theodore Roosevelt, who had nominated him for the Court, is described in C. BOWEN, YANKEE FROM OLYMPUS 370-71 (1944).

79. 171 U.S. 505, 532-34 (1898).

stitutional grounds."[80] The "act of judicial legislation" was of course the Court's enunciation in 1911 of the celebrated rule of reason for interpretation of the Act,[81] the motive for which, Corwin asserted, was the "achievement of a *modus vivendi* between the status at which business had arrived under the encouragement lent by the *Knight* case and the resuscitated vigor of the Sherman Act due to later decisions."[82]

With due respect to a political scientist who in his professional life tremendously influenced the development of constitutional doctrine, it must be concluded that Professor Corwin was at this point a victim of misunderstanding of complexities in the common-law background of antitrust legislation. There were two types of restraint of trade at common law, far different in their economic and social ramifications.

> An ancillary restraint refers to a covenant or a separable contract which is subordinate to the main lawful purpose of a larger transaction it is designed to effectuate. Illustrative is a covenant not to compete accompanying the sale of a business or professional practice or a contract of employment. A non-ancillary restraint refers to a transaction in which the primary purpose is to eliminate or restrict competition as such—a so-called naked covenant not to compete. Typical of this category is an agreement among competitors to fix prices or to divide markets.[83]

First in England and later in the United States, an ancillary covenant came to be judicially enforceable if reasonable on the facts of the particular case. On the other hand, "there is a diversity of views concerning the state of the common law authorities prior to the enactment of the Sherman Act with respect to non-ancillary restraints of trade"[84] with some courts insisting that the rule of reason was applicable here as well, and some taking the opposite position.[85] It being conceded that congressional purpose was to adopt the common law as federal legislative policy, with criminal and civil sanctions added to enforcement remedies available from the courts alone, the issue focused on a determination of the common-law rule as to non-ancillary restraints. This issue was resolved in the 1911 decisions of the Supreme Court wholly as a matter of outright statutory interpretation.

Careful examination of the arguments of private counsel in *Joint*

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80. Corwin, *The Anti-Trust Acts and the Constitution,* 18 VA. L. REV. 355, 365-66, 370 (1932).
81. United States v. American Tobacco Co., 221 U.S. 106 (1911); Standard Oil Co. v. United States, 221 U.S. 1 (1911).
82. Corwin, *supra* note 80, at 369.
83. S. OPPENHEIM & G. WESTON, FEDERAL ANTITRUST LAWS 4 (1968).
84. *Id.* at 8.
85. *Id.* at 8-13.

Traffic, on which Corwin relied, reveals that those able attorneys[86] were concerned with the problem of statutory interpretation; the Act could not be interpreted literally to forbid *every* contract in restraint of trade because to do so would be to outlaw agreements entirely consistent with the competitive principle, as they insisted was the arrangement under attack by the government in *Joint Traffic*. In this context they fell back on constitutionalized freedom of contract as supportive of their principal contention of historically sound statutory construction. Due process might erect a barricade to legislative condemnation of all ancillary restraints of trade, however consistent with maintenance of competition, but this question was never in issue in the determination of the Sherman Act's reach respecting combinations destructive of patterns of competitive structure and behavior.

Thus, as of the time of *Lochner*, antitrust and judicial policy interlocked; the former to compel competitive behavior on the part of private enterprise, the latter to forbid legislative tinkering with the free play of market forces absent proof that despite a policy of enforcing competition the rigor mortis of monopoly had manifested itself in the body economic. Each in its own way sought to impose on the American economy a form of economic organization that insists on the primacy of market forces in determining economic policy and tolerates the substitution of governmental programming only on proof that competition cannot serve the public interest. The difference between the two is that antitrust is a product of legislative judgment freely embraced through the process of representative government, while due process involved judicially reading into the Constitution a meaning alien to that clause's historic associations by a body supposedly created to take the fundamental instrument as written and not to usurp the amendatory function lodged elsewhere.

This grand design for an American economy cast in the likeness of Adam Smith was a shambles 35 years after *Lochner*. The Sherman Act and its attempted buttresses, the Clayton and Federal Trade Commission Acts, did remain on the statute books as did state analogues.[87] Yet the state antitrust acts, with possibly a few exceptions, had proved ineffective. Introduction of the rule of reason into Sherman Act interpretation had sapped the basic federal legislation of its potential strength, and the drive for economic recovery under the National Industrial Recovery Act had induced great pressure from industry for

86. One of the three was James C. Carter, whose great debate with David Field over codification was a *cause célèbre* of nineteenth century jurisprudence.

87. The state antitrust acts as of the late 1930's are collected in MARKETING LAWS SURVEY, WORKS PROGRESS AD., STATE ANTITRUST LAWS (1940).

leniency under, if not outright abandonment of, antitrust enforcement. Even more serious for the long run, an interrelated factor had disclosed for antitrust concepts a congenital weakness. That weakness was the inability or unwillingness to face the fact of economic life that the absence of technical monopoly does not guarantee the presence of active competition; the nature, existence and effect of oligopoly was either too much for those not trained in economic theory or was too unacceptable because of its threat to existing industrial size.[88] Constitutional enforcement of the competitive pattern by way of judicial invalidation of legislation deemed anti-competitive in its thrust was in a state of collapse by 1940. Although the intervening period in constitutional history is familiar, review is justified to demonstrate the extent to which the Court during that period did embrace the economic philosophy of *Lochner*.

EMBRASURE

Shortly after *Lochner*, invalidation of both federal[89] and state[90] prohibitions of the use of yellow dog contracts rested on the constitutional sanctity of freedom of contract as between employer and employee. Sandwiched between these two decisions was one clearly identifying the role of that freedom. Affirming a decree of dissolution of a voluntary association of retail lumber dealers as a violation of the Mississippi antitrust act, the Supreme Court went right to the heart of the matter:

> The contention is that this statute abridges unreasonably the freedom of contract which is as much within the protection of that [Fourteenth] Amendment as is liberty of the person.
>
> That any one of the persons engaged in the retail lumber business might have made a fixed rule of conduct not to buy his stock from a producer or wholesaler who should sell to consumers in competition with himself, is plain. No law which would infringe his freedom of contract in that particular would stand. But when the plaintiffs in error combine and agree that no one of them will trade with any producer or wholesaler who shall sell to a consumer within the trade range of any of them, quite another case is presented. An act harmless when done by one may become a public wrong when done by many acting in concert, for it then takes on the form of a conspiracy, and may be prohibited or punished, if the result be hurtful to the public or to the indi-

88. C. KAYSEN & D. TURNER, ANTITRUST POLICY 20 (1959) have well summarized the difficulties experienced by antitrust through roughly its first 40 years.
89. Adair v. United States, 208 U.S. 161 (1908).
90. Coppage v. Kansas, 236 U.S. 1 (1915).

vidual against whom the concerted action is directed.[91]

In sum, freedom of contract evoked constitutional protection when employed as a foundation of competitive capitalism, but not when used to attempt constriction of competitive forces in the market.

Two decisions of the Court dealing with convictions for violation of state price discrimination laws further grounded this principle. *Central Lumber Co. v. South Dakota*[92] sustained against constitutional attack on due process grounds a "one price" statute that forbade local price discrimination "intentionally, for the purpose of destroying the competition of any regular, established dealer in such commodity, or to prevent the competition of any person who in good faith intends and attempts to become such dealer." Clearly pro-competitive, the statute had no difficulty in passing muster. The same favorable result would most assuredly have attended challenge of a Minnesota law of 1921 of similar tenor. But state conviction for violation of a 1923 statute of that state, though also directed at local price discrimination, suffered reversal in the High Court. The reason given in *Fairmont Creamery Co. v. Minnesota*[93] was that:

> As the inhibition of the statute applies irrespective of motive, we have an obvious attempt to destroy plaintiff in error's liberty to enter into normal contracts long regarded not only as essential to the freedom of trade and commerce but also as beneficial to the public. Buyers in competitive markets must accommodate their bids to prices offered by others, and the payment of different prices at different places is the ordinary consequent. . . . We think the inhibition of the statute has no reasonable relation to the anticipated evil—high bidding by some with purpose to monopolize or destroy competition.[94]

Evaluating *Fairmont* an able commentator concluded:

> Evidently the due process clause does not prevent interference with the making of 'normal contracts' where the intent or effect is to destroy competition itself, or perhaps the justices would say that those are not 'normal contracts'! Justices Holmes, Brandeis and Stone dissented from this play on words, but without opinion. Surely there must be implicit in this decision a judgment by the majority as to what is and what is not a proper economic policy for the state to pursue. There is a hint of this in the statement of Mr. Justice McReynolds . . . that 'Looking through form to substance [the statute] clearly and unmistakably infringes private

91. Grenada Lumber Co. v. Mississippi, 217 U.S. 433, 440-41 (1910).
92. 226 U.S. 157 (1912).
93. 274 U.S. 1 (1927).
94. *Id.* at 8-9.

> rights, whose exercise does not ordinarily produce evil consequences, but the reverse.' The 'reverse' of the 'evil consequences' is presumably an active competitive market at the buying points.[95]

Sustainment of maximum hour legislation in *Holden v. Hardy*,[96] *Muller v. Oregon*[97] and *Bunting v. Oregon*[98] can be reconciled with *Lochner* economics on the attenuated basis that the Court would yield when faced with indisputable evidence of imbalance in economic power between the contracting parties. This imbalance the Court could see with the naked legal eye in the case of miners; it is familiar learning that Louis Brandeis, followed by Felix Frankfurter, provided the Court with great assistance in perceiving it in the Oregon cases. By the time *Radice v. New York*[99] reached the nation's top judicial level, economic insight of the Justices had so improved that there was no difficulty in sustaining New York's prohibition of night work by women in restaurants. The earlier maximum-hour decision in *Baltimore & Ohio Railroad v. Interstate Commerce Commission*[100] was compatible with *Lochner* on the basis that it dealt with employer-employee relations in transportation, a business long consigned to noncompetitive status by reason of the nature of its "product."

Judicial willingness to take account of imbalance in economic power is to be implied from the opinion in *Adkins v. Children's Hospital*.[101] There is every indication that the majority would have had no difficulty with the constitutionality of minimum-wage legislation geared to the value of the employee's service to the employer. In other words, the Court would allow legislative intervention to dictate the level of wage that market forces would set, given a balance in bargaining power between the two contracting parties, for that wage level would be consistent with classical economic theory. That at which the Court majority balked was legislative insistence upon minimum wages keyed to the subsistence levels administratively found necessary for protection of the health and morals of the women covered.

> The feature of this statute which, perhaps more than any other, puts upon it the stamp of invalidity is that it exacts from the employer an arbitrary payment for a purpose and upon a basis having no causal connection with his business, or the con-

95. McAllister, *Government and Some Problems of the Market Place*, 21 IOWA L. REV. 305, 315-16, n.22 (1936).
96. 169 U.S. 366 (1898) (decided between *Allgeyer* and *Lochner*).
97. 208 U.S. 412 (1908).
98. 243 U.S. 426 (1917). The classic, two-volume brief submitted in *Bunting* in support of regulation of maximum hours for men is found in F. FRANKFURTER & J. GOLDMARK, THE CASE FOR THE SHORTER WORK DAY (1916).
99. 264 U.S. 292 (1924).
100. 221 U.S. 612 (1911).
101. 261 U.S. 525 (1923).

> tract or the work the employee engages to do. The declared basis, as already pointed out, is not the value of the service rendered, but the extraneous circumstance that the employee needs to get a prescribed sum of money to insure her subsistence, health and morals. . . . The moral requirement implicit in every contract of employment, viz, that the amount to be paid and the service to be rendered shall bear to each other some relation of just equivalence, is completely ignored.[102]

A telling rejoinder to this reasoning was the following observation in dissent:

> This statute does not compel anybody to pay anything. It simply forbids employment at rates below those fixed as the minimum requirement of health and right living. It is safe to assume that women will not be employed at even the lowest wages allowed unless they earn them, or unless the employer's business can sustain the burden.[103]

The words were those of Mr. Justice Holmes, but the economics of the retort suggest the reasoning of Mr. Justice Brandeis, who took no official part in *Adkins*.[104]

By the time of *Adkins* the constitutionality of price fixation had been thrice before the Court since *Lochner*. The first case, *German Alliance Insurance Co. v. Kansas*,[105] has often been cited as disproving the dominance of *Lochner* economics. This thesis derives from a paragraph in the opinion in which reliance is placed upon *Brass v. North Dakota, ex rel. Stoeser*.[106] That decision is said to have "extended the principle" of *Munn* and *Budd*,[107] denuding "it of the limiting element which was supposed to beset it—that to justify regulation of a business the business must have a monopolistic character."[108] Yet a subsequent paragraph of the opinion justifies the regulation of fire insurance rates because of the non-competitive character of the fire insurance business.

> We may venture to observe that the price of insurance is not fixed over the counters of the companies by what Adam Smith calls the higgling of the market, but formed in the councils of the underwriters, promulgated in schedules of practically controlling con-

102. *Id.* at 558.
103. *Id.* at 570 (Holmes, J., dissenting).
104. Hamilton, *The Jurist's Art*, 31 COLUM. L. REV. 1073 (1931), recounts what he believed to be an earlier instance of Brandeisian instruction of Holmes in the niceties of economic reasoning.
105. 233 U.S. 389 (1914).
106. 153 U.S. 391 (1894).
107. *See* discussion accompanying notes 52-61 *supra*.
108. German Alliance Ins. Co. v. Kansas, 233 U.S. 389, 410 (1914). This interpretation of *Brass* persists although challenged in an analysis of the decision made earlier in this article.

> stancy which the applicant for insurance is powerless to oppose and which, therefore, has led to the assertion that the business of insurance is of monopolistic character and that 'it is illusory to speak of a liberty of contract.' It is in the alternative presented of accepting the rates of the companies or refraining from insurance, business necessity impelling if not compelling it, that we may discover the inducement of the Kansas statute, and the problem presented is whether the legislature could regard it of as much moment to the public that they who seek insurance should no more be constrained by arbitrary terms than they who seek transportation by railroads, steam or street, or by coaches whose itinerary may be only a few city blocks, or who seek the use of grain elevators, or be secured in a night's accommodation at a wayside inn, or in the weight of a five-cent loaf of bread. We do not say this to belittle such rights or to exaggerate the effect of insurance, but to exhibit the principle which exists in all and brings all under the same governmental power.[109]

Only the final reference, that to the weight of bread, carries beyond those businesses traditionally viewed as possessive of monopolistic characteristics validating governmental regulation of the prices charged by them.

Of the other price-fixing cases antedating *Adkins* one grew out of the incipiency of World War I and the other as an aftermath of that conflict. *Wilson v. New*[110] presented the Court with the issue of the validity of congressional reaction to the threat of a nationwide rail strike on the eve of this nation's entry into war with Germany. The congressional solution was to mandate the 8-hour day for employees of the interstate railroads and to decree that wages paid for that time span were not to be lower than theretofore received for longer hours of work. However, while the maximum-hour mandate was permanent,[111] the requirement with respect to wages was of only temporary

109. *Id.* at 416-17.

110. 243 U.S. 332 (1917).

111. By the time of the decision in *Wilson v. New*, the issue of the constitutionality of maximum hours of labor for men was on the way to favorable resolution in the contemporary case of *Bunting v. Oregon*. Charles Wolff Packing Co. v. Court of Indus. Rel., 267 U.S. 552 (1925), is not to the contrary despite the fact that the attack there included the hours-of-labor provisions of the Kansas law. Continuing to insist that state law imposed upon businesses engaged in the production of food, clothing and fuel a scheme of compulsory arbitration, the Court declared:

> The authority which the Act gives respecting the fixing of hours of labor is merely a feature of the system of compulsory arbitration and has no separate purpose. It was exerted by the state agency as a part of that system and the state court sustained its exertion as such. As a part of the system it shares the invalidity of the whole. Whether it would be valid had it been conferred independently of the system and made either general or applicable to all businesses of a particular class we need not consider, for that was not done.

Id. at 569.

duration, the consequence of the inability of the two parties to come to agreement and to terminate when within less than a year they had by private bargaining reached accord. To the judicial mind these circumstances surrounding the federal freeze on the price of railroad labor were reconcilable with the economic philosophy of *Lochner*:

> It certainly cannot be said that the act took away from the parties, employers and employees, their private right to contract on the subject of a scale of wages since the power which the act exerted was only exercised because of the failure of the parties to agree and the resulting necessity for the lawmaking will to supply the standard rendered necessary by such failure of the parties to exercise their private right.[112]

But "this was not a permanent fixing, but in the nature of things a temporary one which left the will of the employers and employees to control at the end of the period if their dispute had then ceased."[113]

Sustainment of the post-War rent control laws of New York and the District of Columbia was similarly reconciled with *Lochner* economics:

> The business of renting out apartments and houses under the existing circumstances discloses the same fundamental elements found in other cases where a public interest has been held to warrant the regulation of a business not enjoying any statutory privilege. There is in such cases a state of virtual monopoly, or, conversely stated, an absence of effective competition. The consuming public stands in a position of economic helplessness. This may result from conditions on the side of supply or on the side of demand, from limitations natural in the physical sense, *Spring Valley Water Works v. Schottler* . . . ; *Van Dyke v. Geary* . . . ; or, natural only in the sense that, under the circumstances of a given community, facilities available for the particular purpose are not susceptible of multiplication or enlargement. *Munn v. Illinois* . . . ; *Budd v. New York* . . . ; *Brass v. Stoeser* . . . .
>
> The public interest arising from the existence of an instant need naturally receives a vast extension in all periods of abnormal economic stress. *Wilson v. New* . . . . But to concede that rent regulation might exist as a war power is to concede that it exists under certain conditions of social fact, whether arising from that emergency or some other.[114]

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112. Wilson v. New, 243 U.S. 332, 357 (1917).

113. *Id.* at 356. Earlier in the majority opinion it was indicated that sustainment of the congressional act could be based on the by then accepted proposition that "the business of common carriers' generates a 'public interest' that in turn 'begets a public right of regulation to the full extent necessary to secure and protect it. . . .'" *Id.* at 347.

114. Block v. Hirsh, 256 U.S. 135, 150 (1921) (citations omitted) (argument of government counsel as amicus curiae).

The constitutional peg of temporary emergency was advanced by the state of Kansas in support of the validity of its Court of Industrial Relations. That court was empowered, when wage disputes threatened the continuity of food, clothing and fuel supply, to fix wage rates after hearing. Thereafter, covered employers were bound to adhere and involved employees were denied the right to strike; in effect, wages were set by compulsory arbitration. Reliance by the state on an emergency element was of no avail. "If that is a real factor here as in *Wilson v. New*, and in *Block v. Hirsh* . . . it is enough to say that the great temporary public exigencies recognized by all and declared by Congress, were very different from that upon which the control under this act is asserted."[115]

Nor was attempted analogization to *Wilson v. New* successful on other than claim of emergency. Explanation lay in the difference between the obligations assumed by a common carrier and the absence thereof in the case of the general run of businesses, rather than in terms of monopolistic as against competitive behavior. Yet the latter did surface earlier in the unanimous opinion when it was explained that

> The extent to which regulation may reasonably go varies with different kinds of business. The regulation of rates to avoid monopoly is one thing. The regulation of wages is another. A business may be of such character that only the first is permissible, while another may involve such a possible danger of monopoly on the one hand, and such disaster from stoppage on the other, that both come within the public concern and power of regulation.[116]

Applying this economic differentiation to the business of *Charles Wolff Packing Co.* the constitutional result was clear:

> There is no monopoly in the preparation of foods. The prices charged by plaintiff in error are, it is conceded, fixed by competition throughout the country at large. Food is now produced in greater volume and variety than ever before. Given uninterrupted interstate commerce, the sources of the food supply in Kansas are countrywide, a short supply is not likely and the danger from local monopolistic control less than ever.[117]

Within the short span of 7 years following *Wolff* the constitutionality of maximum price fixation was before the Court on five occasions. None of the resulting decisions ran counter to *Lochner*'s inar-

115. Charles Wolff Packing Co. v. Court of Indus. Rel., 262 U.S. 522, 542 (1923).
116. *Id.* at 539.
117. *Id.* at 538.

ticulate major premise. The least familiar of them, *Highland v. Russell Car & Snow Plow Co.*,[118] sustained the Lever Act of World War I in the course of resolving a dispute between private parties over the price of coal delivered during late 1917 to a concern manufacturing snowplows for the railroads. The economic situation was similar to that in the earlier-litigated rent control cases; abnormal demand in the face of constant supply had caused a doubling, even tripling, in coal prices. Present, therefore, was the economic equivalent of a monopolistic condition. A unanimous Court reasoned that the vendor

> does not claim that the amount paid by defendant was not compensatory or that it did not give him a reasonable profit or that the value of the coal was greater than the prices fixed by the President. The sole question is whether plaintiff's constitutional rights were infringed by the enforcement of the Act and orders to prevent him from selling his coal for prices in excess of the just compensation he would have been entitled to receive if it had been taken under the sovereign power of eminent domain.[119]

The answer to that question gave no difficulty.

The contrast between two of the other five cases was clean cut. Tennessee's provision for fixing the price of gasoline was invalidated;[120] the provision of the Packers and Stockyards Act authorizing the Secretary of Agriculture to set the commissions of market agencies was sustained.[121] The state law went down because

> There is nothing in the point that the act in question may be justified on the ground that the sale of gasoline in Tennessee is monopolized by appellees, or by either of them, because, objections to the materiality of the contention aside, an inspection of the pleadings and of the affidavits submitted to the lower court discloses an utter failure to show the existence of such monopoly.[122]

On the contrary the federal act survived:

> Plaintiffs perform an indispensable service in the interstate commerce in livestock. They enjoy a substantial monopoly at the Omaha Stock Yards. They had eliminated rate competition and had substituted therefor rates fixed by agreement among themselves, without consulting the shippers and others who pay the rates. They had bound themselves to maintain uniform charges regardless of the differences in experience, skill and industry.[123]

118. 279 U.S. 253 (1929).
119. *Id.* at 258.
120. Williams v. Standard Oil Co., 278 U.S. 235 (1929).
121. Tagg Bros. & Moorhead v. United States, 280 U.S. 420 (1930).
122. 278 U.S. at 240.
123. 280 U.S. at 439.

The two earlier brokerage cases, while not aberrational, were less consistent in their rationales. The New York law involved in *Tyson & Brother v. Banton*[124] was clearly directed at ticket scalping. Yet

> since the ticket broker is a mere appendage of the theatre, etc., and the *price of* or *charge for admission* is the essential element in the statutory declaration, it results that the real inquiry is whether every public exhibition, game, contest or performance, to which an admission charge is made, is clothed with a public interest, so as to authorize a law-making body to fix the maximum amount of the charge, which its patrons may be required to pay.[125]

In this way the Court majority shifted the constitutional question to price fixation by the theaters themselves, with respect to which there was no evidence of monopoly conditions. Hence by the controlling economic test the New York legislation was invalid. The monopolistic situation existed with the ticket brokers, as Mr. Justice Stone emphasized in dissent. Describing their method of operation, he observed that "A virtual monopoly of the best seats, usually the first fifteen rows, is thus acquired and the brokers are enabled to demand extortionate prices of theater goers."[126] There then follows a succinct statement by Stone of *Lochner* economics and a reconciliation of the Court's holdings in terms of that philosophy.

> The constitutional theory that prices normally may not be regulated rests upon the assumption that the public interest and private right are both adequately protected when there is 'free' competition among buyers and sellers, and that in such a state of economic society, the interference with so important an incident of the ownership of private property as price fixing is not justified and hence is a taking of property without due process of law.
>
> Statutory regulation of price is commonly directed toward the prevention of exorbitant demands of buyers or sellers. An examination of the decisions of this Court in which price regulation has been upheld will disclose that the element common to all is the existence of a situation or a combination of circumstances materially restricting the regulative force of competition, so that buyers or sellers are placed at such a disadvantage in the bargaining struggle that serious economic consequences result to a very large number of members of the community. Whether this situation arises from the monopoly conferred upon public service companies or from the circumstance that the strategical position of a group

124. 273 U.S. 418 (1927).
125. *Id.* at 429.
126. *Id.* at 450 (Stone, J., dissenting).

> is such as to enable it to impose its will in matters of price upon those who sell, buy or consume, as in *Munn v. Illinois* . . . or from the predetermination of prices in the councils of those who sell, promulgated in schedules of practically controlling constancy, as in *German Alliance Ins. Co. v. Kansas* . . . or from a housing shortage growing out of a public emegency as in *Block v. Hirsh* . . . the result is the same. Self interest is not permitted to invoke constitutional protection at the expense of the public interest and reasonable regulation of price is upheld.[127]

In *Ribnik v. McBride*,[128] which followed, the result was again the unconstitutionality of legislative price fixing, this time of the fees charged by private employment agencies. The quite unsatisfactory opinion for the majority analogizes to *Tyson* and also places reliance on *Adkins* and *Wolff*. There is no suggestion of the absence of monopoly as justification for withholding the magic label of affectation with public interest. Ribnik's counsel, however, saw to it that the Court was apprised of the competitive nature of the business of employment brokerage.[129] From this it may be surmised that this consideration was influential with the majority, as was explicitly the case at other times during the period under review.

Ribnik constituted the second time that state regulation of employment agencies had been before the Court. A decade earlier the issue had been the validity of a Washington law that by forbidding agencies to charge fees for their services would in effect have put them out of business. A majority of the Justices were of the opinion that while employment agencies could be regulated in order to curtail abuses in their operation, only "businesses inherently vicious" could be eliminated.[130] Nothing was said in the opinion regarding the competitive nature of the business at that earlier time, apart from noting that numerous agencies in Spokane had joined to bring suit,[131] but

127. *Id.* at 451-52 (citations omitted).
128. 277 U.S. 350 (1928).
129. There is no monopoly, or danger of monopoly, in the operation of employment agencies. They are numerous, and it requires no great amount of capital to start new ones. Nineteen states have established competitive free state employment agencies, and in at least seven others there are municipal agencies. . . . Business schools, trade schools, Y.M.C.A.'s, Y.W.C.A.'s, college bureaus, typewriter companies, and bar associations, maintain agencies, while the 'want' columns of newspapers contribute an entirely different kind of competition. It is also a well-known fact that the labor unions of the country frequently conduct employment offices, and that many large employers of labor secure their recruits through established employment departments. Under these conditions, it appears that the business of an employment agency is distinctly a private business of a highly competitive nature, with no tendencies toward monopoly.
Id. at 351-52.
130. Adams v. Tanner, 244 U.S. 590 (1917).
131. *Id.* at 592.

that this was the factual situation is confirmed by references made in the dissent of Mr. Justice Brandeis.[132] To the majority the issue was the right to remain in a lawful business. That issue had been resolved in the last quarter of the nineteenth century, providing underpinning for the leap to *Lochner*.

By contrast, the issue in *New State Ice Co. v. Liebmann*[133] was the right to enter a common calling. Oklahoma required for entry into the ice business what in effect was a certificate of public convenience and necessity, to be sought from the Corporation Commission of the state. Possessed of one such certificate, New State Ice Co. sought to enjoin the manufacture and sale of ice by Liebmann who had no certificate. Understandably, plaintiff placed heavy reliance for constitutionality upon *Frost v. Corporation Commission*[134] in which the Court had recently sustained similar legislation by Oklahoma for controlled entry into cotton ginning. But the usual Court majority saw a difference.

> The cotton gin bears the same relation to the cotton grower that the old grist mill did to the grower of wheat. The individual grower of the raw product is generally financially unable to set up a plant for himself; but the service is a necessary one with which, ordinarily, he cannot afford to dispense. He is compelled, therefore, to resort for such service to the establishment which operates in his locality. So dependent, generally, is he upon the neighborhood cotton gin that he faces the practical danger of being placed at the mercy of the operator in respect of exorbitant charges and arbitrary control.[135]
>
> . . . .
>
> It has been said that the manufacture of ice requires an expensive plant beyond the means of the average citizen, and that since the use of ice is indispensable, patronage of the producer by the consumer is unavoidable. The same might, however, be said in respect of other articles clearly beyond the reach of a restriction like that here under review. But, for the moment conceding the materiality of the statement, it is not now true, whatever may have been the fact in the past. We know, since it is common knowledge, that today, to say nothing of other means, wherever electricity or gas is available (and one or the other is available in practically every part of the country), anyone for a comparatively moderate outlay may have set up in his kitchen an appliance by means of which he may manufacture ice for him-

132. *Id.* at 604.
133. 285 U.S. 262 (1932).
134. 278 U.S. 515 (1929).
135. 285 U.S. at 276.

> self. Under such circumstances it hardly will do to say that people generally are at the mercy of the manufacturer, seller and distributor of ice for ordinary needs. Moreover, the practical tendency of the restriction, as the trial court suggested in the present case, is to shut out new enterprises, and thus create and foster monopoly in the hands of existing establishments, against, rather than in aid of, the interest of the consuming public.
>
> . . . .
>
> Stated succinctly, a private corporation here seeks to prevent a competitor from entering the business of making and selling ice. It claims to be endowed with state authority to achieve this exclusion. There is no question now before us of any regulation by the state to protect the consuming public either with respect to conditions of manufacture and distribution or to insure purity of product or to prevent extortion. The control here asserted does not protect against monopoly, but tends to foster it. The aim is not to encourage competition, but to prevent it; not to regulate the business, but to preclude persons from engaging in it.[136]

New State Ice and the earlier *Tyson v. Banton* constitute the most extreme applications of the *Lochner* constitutional formulation; in *Tyson* because the evidence of monopolistic behavior among the ticket brokers was so apparent, in *New State Ice* because the evidence of effective competition from home refrigeration was so flimsy, as Brandeis demonstrated in dissent.[137] For the future, however, there was greater significance in the second part of Brandeis' ice-case dissent in which he found an Achilles heel within the *Lochner* economic formula itself. Following his devastation of the majority's assertion of the presence of competition sufficient to invalidate the Oklahoma certification procedure, Brandeis went on to analyze the nature of the ice business:

> The business of supplying ice is not only a necessity, like that of supplying food or clothing or shelter, but the legislature could also consider that it is one which lends itself peculiarly to monopoly. Characteristically the business is conducted in local plants with a market narrowly limited in area, and this for the reason that ice manufactured at a distance cannot effectively compete with a plant on the ground. In small towns and rural communities the duplication of plants, and in larger communities the duplication of delivery service, is wasteful and ultimately burdensome to consumers. At the same time the relative ease and cheapness with which an ice plant may be constructed exposes the industry to destructive and frequently ruinous competition. Com-

136. *Id.* at 277-79.
137. *Id.* at 289-91.

> petition in the industry tends to be destructive because ice plants have a determinate capacity, and inflexible fixed charges and operating costs, and because in a market of limited area the volume of sales is not readily expanded. Thus, the erection of a new plant in a locality already adequately served often causes managers to go to extremes in cutting prices in order to secure business. Trade journals and reports of association meetings of ice manufacturers bear ample witness to the hostility of the industry to such competition, and to its unremitting efforts, through trade associations, informal agreements, combination of delivery systems, and in particular through the consolidation of plants, to protect markets and prices against competition of any character.[138]

In this passage Brandeis, the most knowledgeable in economics of the Justices, was particularizing upon a generalization that by this time was accepted among economists. Thus Walton Hamilton had but recently observed that

> A more intricate and better understood industrial world no longer is to be resolved by clear-cut lines into the provinces of competition and monopoly; elements of the two are combined in endless permutations in various businesses; in reference to any one of a dozen great industries it would be difficult to say whether monopoly or competition is the more appropriate word. The competitive system is no longer to be regarded as an automatic, self-regulating mechanism; like any other human institution it may work poorly, indifferently, or well; it produces very different results in different industries. In its wake may come disorder as well as order, waste as well as efficiency, unfair as well as reasonable prices. The price-structure in a competitive, as well as in a monopoly industry, may become disorderly; the maladjustment of its prices may become equally a matter of public concern. A simple device of direct price control may be an effective substitute for the indirection of preventing restraint of trade. The hazards of price regulation may well be smaller than those incident to an enforcement of the anti-trust acts. A newer and more realistic conception of competition suggests, not a new end for public policy, but another means for reaching a recognized end.[139]

Recognition that competition can at times be destructive rather than an economic blessing is to be seen in *Stephenson v. Binford*,[140] decided within months after *New State Ice* by a Court in agreement save for Mr. Justice Butler. Sustained was a Texas statute imposing upon private contract carriers a regime of restricted entry and mini-

138. *Id.* at 291-93.
139. Hamilton, *supra* note 51, at 1108-09.
140. 287 U.S. 251 (1932).

mum rates. The circumstances were special, the Court accepting the state's assertion that the legislative purpose was conservation of the public highways against excessive use by theretofore unregulated motor carriers in successful competition with regulated rail carriers. The constitutional justification for the fixing of minimum rates under these conditions was declared to be that "[w]hen the exercise of that freedom [of contract] conflicts with the power and duty of the state to safeguard its property from injury and preserve it for those uses for which it was primarily designed, such freedom may be regulated and limited to the extent which reasonably may be necessary to carry the power and duty into effect."[141] Among the four cases cited for comparison were *Highland v. Russell Car Snow Plow Co.* and *Adkins v. Children's Hospital. Frost* was distinguished. *Stephenson* was in turn followed the next year by *Public Service Commission v. Great Northern Utilities Co.*[142] in which a unanimous Court sustained minimum rates imposed by state authority on two competing local gas suppliers, one of which was attempting through rampant price cutting to destroy the other.

The counter-productiveness of competition in circumstances of excessive supply relative to existing demand was winning support for governmental price fixation in the absence of monopoly. And yet on analysis all that the Court had validated was minimum price control in the case of public utilities, the very type of private business with respect to which governmental fixation of maximum prices had been most successful in constitutional litigation. *Lochner* was still riding high in the constitutional saddle, 28 years after 1905. But despite its seeming vitality the moment of truth was near; in another year the economic philosophy of *Lochner* was to suffer a mortal blow that marked its precipitate demise.

EMASCULATION

The decision that administered the *coup de grace* was, of course, *Nebbia v. New York.*[143] Conditions peculiar to the fluid milk industry created oversupply in relation to demand, with attendant pressures toward price-cutting below cost and other practices inconsistent with normalized competitive behavior. In the words of the Court majority, "[c]lose adjustment of supply to demand is hindered by several factors difficult to control."[144] As a consequence, New York had enacted a legislative program establishing a Milk Control Board with authority

141. *Id.* at 274.
142. 289 U.S. 130 (1933).
143. 291 U.S. 502 (1934).
144. *Id.* at 517.

to fix both minimum and maximum prices in the interest of stabilization of the industry. Despite state emphasis upon the supposedly emergency character of the legislation and the attempted annointment of the milk industry with public utility status, constitutional challenge was inevitable. After parading numerous decisions of the Court designed to demonstrate that "[t]he Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases,"[145] Mr. Justice Roberts squarely faced the appellant's contention that "direct fixation of prices is a type of regulation absolutely forbidden."[146]

> We may as well say at once that the dairy industry is not, in the accepted sense of the phrase, a public utility. We think the appellant is also right in asserting that there is in this case no suggestion of any monopoly or monopolistic practice. It goes without saying that those engaged in the business are in no way dependent upon public grants or franchises for the privilege of conducting their activities. But if, as must be conceded, the industry is subject to regulation in the public interest, what constitutional principle bars the state from correcting existing maladjustments by legislation touching prices? We think there is no such principle. The due process clause makes no mention of sales or of prices any more than it speaks of business or contracts or buildings or other incidents of property.[147]

By misconstruing *Munn*,[148] denying the presence of monopoly in either *Brass* or *German Alliance*,[149] and avoiding the contrary decisions of the 1920's save for *Wolff*, which is neatly finessed, Roberts was ready for the fatal thrust. Although the following paragraph is familiar, it bears repetition in full.

> So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation

145. *Id.* at 527-28.
146. *Id.* at 531.
147. *Id.* at 531-32.
148. Concededly, the Roberts' interpretation of *Munn* has been the more accepted one, yet it does not withstand analysis as demonstrated by the textual discussion following note 53 *supra.*
149. Technically there was no monopoly in *German Alliance,* but as earlier shown, see text accompanying note 109 *supra,* the Court itself recognized monopolistic practices among the several fire insurance companies, although alternatively relying on *Brass.* Admittedly, correct interpretation of *Brass* is difficult. See text & note 63, *supra.* Even accepting Roberts' assertion in *Nebbia* "that at the very station where the defendant's elevator [i.e., Brass'] was located two others operated," the other two may have been private elevators not accepting for storage the grain produced by others, or there may have been between them and Brass some restrictive policy agreement. 291 U.S. at 535. It is reasonable to regard the decision in *Brass* as one in which the Court majority thought *Munn* and *Budd* to be applicable on the facts.

> adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio*. 'Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine.' *Northern Securities Co. v. United States* . . . And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise. With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. The course of decision in this court exhibits a firm adherence to these principles. Times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power.[150]

To emphasize the range of choice open to government with respect to economic policy, thus enunciated, this "charter of freedom" was immediately followed by the statement that "law-making bodies have in the past endeavored to promote free competition by laws aimed at trusts and monopolies. The consequent interference with private property and freedom of contract has not availed with the courts to set these enactments aside as denying due process."[151] Antitrust and governmental price fixation were now interlocked on a plane differing from that obtaining in the opening years of the twentieth century. The new constitutional position is that both are fully available as instruments of economic policy. True it is that the new freedom as respects the instrument of price fixing is specifically granted where "the law-making body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests . . . especially so where, as here, the economic maladjustment is one of price, which threatens harm to the producer at one end of the series and the consumer at the other."[152] But the die had been cast[153] and affirmative

150. 291 U.S. at 537-38 (citation omitted).
151. *Id.* at 538.
152. *Id.*
153. The Court's new posture was reconfirmed in Borden's Farm Products Co. v.

constitutionalization of maximum price fixing was not long in coming. *Sunshine Anthracite Coal Co. v. Adkins*[154] foretold it; *Olsen v. Nebraska*[155] left no doubt about it. In the latter case the Court, reversing state court reliance on *Ribnik v. McBride*, sustained a Nebraska statute fixing the maximum fees to be charged by private employment agencies.

> In final analysis, the only constitutional prohibitions or restraints which respondents have suggested for the invalidation of this legislation are those notions of public policy embedded in earlier decisions of this Court but which, as Mr. Justice Holmes long admonished, should not be read into the Constitution. . . . Since they do not find expression in the Constitution, we cannot give them continuing vitality as standards by which the constitutionality of the economic and social programs of the states is to be determined.[156]

Meantime, *Adkins v. Children's Hospital*, invalidating the District of Columbia's minimum wage law based on subsistence living costs, had been overruled in *West Coast Hotel Co. v. Parrish*.[157] *West Coast* was of especial moment because it constituted the last stand of Justices who had long carried the banner of Lochnerian economic philosophy. Mr. Justice Sutherland, the usual spokesman for this group, but now in dissent, went to the heart of the issue, presented by a minimum wage law not predicated on value of service. Quoting from *Adkins v. Children's Hospital*, he asserted:

> The law takes account of the necessities of only one party to the contract. It ignores the necessities of the employer by compelling him to pay not less than a certain sum, not only whether the employee is capable of earning it, but irrespective of the ability of his business to sustain the burden, generously leaving him, of course, the privilege of abandoning his business as an alternative for going on at a loss. . . . To the extent that the sum fixed exceeds the fair value of the services rendered, it amounts to a compulsory exaction from the employer for the support of a partially indigent person, for whose condition there rests upon him no peculiar responsibility . . . .[158]

Ten Eyck, 297 U.S. 251 (1936), although then thrown into some short-lived doubt by the decision in Carter v. Carter Coal Co., 298 U.S. 238 (1936). This period of the last gasp of the *Lochner* restriction is evaluated by Goldsmith & Winks, *Price-Fixing: From Nebbia to Guffey*, 31 ILL. L. REV. 179 (1936).

154. 310 U.S. 381 (1940).

155. 313 U.S. 236 (1941).

156. *Id.* at 246-47. Repudiation of *Tyson* in 1965, by the per curiam opinion in Gold v. DiCarlo, 380 U.S. 520 (1965), was anti-climactic.

157. 300 U.S. 379 (1937).

158. *Id.* at 409. (Sutherland, Van Devanter, McReynolds & Butler, J.J., dissenting).

Matching this vigorous denunciation of the state law, Chief Justice Hughes wrote for the majority a stinging denunciation of employers exploitative

> of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenceless against the denial of a living wage . . . What these workers lose in wages the taxpayers are called upon to pay. The bare cost of living must be met. . . . While in the instant case no factual brief has been presented, there is no reason to doubt that the State of Washington has encountered the same social problem that is present elsewhere. The community is not bound to provide what is in effect a subsidy for unconscionable employers. The community may direct its law-making power to correct the abuse which springs from their selfish disregard of the public interest.[159]

The *Smythe v. Ames* formula, for simulation of competitive prices in instances where governmental price fixation had become the legislatively chosen policy under the new emancipation, was extirpated in a paragraph in *Federal Power Commission v. Natural Gas Pipeline Co.*:

> The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas. Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances. Once a fair hearing has been given, proper findings made and other statutory requirements satisfied, the courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped. If the Commission's order, as applied to the facts before it and viewed in its entirety, produces no arbitrary result, our inquiry is at an end.[160]

Adair and *Coppage*, although their fate had clearly been sealed, technically survived until explicitly done away with in 1949 by *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*:

> This Court beginning at least as early as 1934, when the *Nebbia* case was decided, has steadily rejected the due process philosophy enunciated in the *Adair-Coppage* line of cases . . . .
>
> Appellants now ask us to return, at least in part, to the due process philosophy that has been deliberately discarded. Claiming that the Federal Constitution itself affords protection for union members against discrimination, they nevertheless assert that the

159. *Id.* at 399-400.

160. 315 U.S. 575, 586 (1942). The doctrine of *Smythe* was rejected a second time 2 years later in Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591 (1944).

> same Constitution forbids a state from providing the same protection for non-union members. Just as we have held that the due process clause erects no obstacle to block legislative protection of union members, we now hold that legislative protection can be afforded non-union workers.[161]

It was Mr. Justice Black who said last rites for the economic philosophy of *Lochner*, just as Mr. Justice Peckham for an entirely different Court had presided at its christening some 60 years earlier. The occasion was *Ferguson v. Skrupa.*[162] A Kansas law prohibiting engaging in the business of debt adjusting save as an incident to the practice of law had been invalidated by a three-judge federal court. In the opinion of reversal appears the following passage:

> In the face of our abandonment of the use of the 'vague contours' of the Due Process Clause to nullify laws which a majority of the Court believed to be economically unwise, reliance on *Adams v. Tanner* is as mistaken as would be adherence to *Adkins v. Children's Hospital*, overruled by *West Coast Hotel Co. v. Parrish* . . . Not only has the philosophy of *Adams* been abandoned, but also this Court almost 15 years ago expressly pointed to another opinion of this Court as having 'clearly undermined' *Adams.*[163] We conclude that the Kansas Legislature was free to decide for itself that legislation was needed to deal with the business of debt adjusting. Unquestionably, there are arguments showing that the business of debt adjusting has social utility, but such arguments are properly addressed to the legislature, not to us. We refuse to sit as a 'superlegislature to weigh the wisdom of legislation,' and we emphatically refuse to go back to the time when courts used the Due Process Clause 'to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.' Nor are we able or willing to draw lines by calling a law 'prohibitory' or 'regulatory.' Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours. The Kansas debt adjusting statute may be wise or unwise. But relief, if any be needed, lies not with us but with the body constituted to pass laws for the State of Kansas.[164]

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161. 335 U.S. 525, 536-37 (1949).
162. 372 U.S. 726 (1963).
163. The reference is to *Lincoln Federal*, which had referred to *Olsen*.
164. 372 U.S. at 731-32. If debt adjusting can be classified as an ordinary calling, then sustainment of the Kansas law, limiting that business to those licensed to practice law, ran counter to the decisions built on the foundation of the *Slaughter-House* dissents in which freedom to pursue the common callings was jealously protected under an expanded concept of due process. Among Court sustainments of complete closing of businesses are Daniel v. Family Sec. Life Ins. Co., 336 U.S.

CONCLUSION

Lochner, then, is no more. Yet there are growing indications that *Lochner*'s ghost is abroad in the land, masquerading under Equal Protection rather than Due Process. Its underlying philosophy is not competitive capitalism but cooperative collectivism. Its powerful and pervasive protagonists are not Adam Smith, Herbert Spencer or even John Maynard Keynes; rather the roll is headed by Robert Owen, St. Simon, Karl Marx and Friedrich Engels. One wonders whether in the present age, enamored as it is of equalitarianism as was the late nineteenth century of individualism, the Court will again be enticed into reading into the Constitution what is not there but for judicial fiat. Nearly a quarter century ago, a then relatively new member of the Court who continues to serve declared that

> From age to age the problem of constitutional adjudication is the same. It is to keep the power of government unrestrained by the social or economic theories that one set of judges may entertain. . . . If the social and economic problems of state and nation can be kept under political management of the people, there is likely to be long-run stability.[165]

These are the words of William O. Douglas, recorded extra-judicially. He of all post-*Nebbia* Justices has experienced the seductiveness of transgression of that ideal. Save for the reconstruction of the Reconstructed Court, and possibly despite it, the remainder of this century could be witness to *Lochner*'s ghost in the service of another cause.

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220 (1949), and the *Carolene Products* cases, United States v. Carolene Prod. Co., 304 U.S. 144 (1938), and Carolene Prod. Co. v. United States, 323 U.S. 18 (1944). *Compare* Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552 (1947), *with* Williamson v. Lee Optical, 348 U.S. 483 (1955). Mr. Justice Black's dissents in first Carolene and the contemporaneous case of Polk Co. v. Glover, 305 U.S. 5 (1938), indicate that as a newcomer to the Court he would have removed all protection of constitutional review from federal economic legislation through establishment of a conclusive presumption of constitutionality.

This position of Black's, and the Court's disposition of claims of unconstitutional taking of vested property rights in such cases as Wickard v. Filburn, 317 U.S. 111 (1942), and North American Co. v. SEC, 327 U.S. 686 (1946), precipitate a question as to whether, in its youthful years at least, the Reconstructed Court did not reject even the content that the due process concept had developed substantially prior to *Slaughter-House*. If so, even the original underpinnings of *Lochner* have been rejected, underpinnings accepted by Holmes and Brandeis. In his dissent in *Lochner*, Holmes found no justification for finding competitive capitalism installed in the Constitution but he did not reject the concept of substantive private property as constitutionally protected. In this he was criticized by Professor Corwin while all others were singing the praises of the celebrated dissent. "For it is to be noted that he accepts in toto the present day view of due process of law." Corwin, *The Supreme Court and the Fourteenth Amendment*, 7 MICH. L. REV. 643, 670 (1909). Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), is illustrative of Holmes' concern for the protection of accrued property through the due process clause. Brandeis disagreed with him there, yet showed his colors in Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935), and Thompson v. Consolidated Gas Util. Corp., 300 U.S. 55 (1937). With respect to the taking attempted in *Thompson*, Brandeis declared for the Court that "[o]ur law reports present no more glaring instance of the taking of one man's property and giving it to another." *Id.* at 79.

165. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 754 (1949).