THE U.S. SUPREME COURT DURING THE PROGRESSIVE ERA – UNFAIRLY MALIGNED

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ABSTRACT: *During the Progressive Era, from 1890-1930, the Supreme Court carved a path of constitutional affirmation for progressive reform. This stemmed from the Fuller and White Courts and was apparent through rulings on income taxation, labor & working conditions, and the Interstate Commerce Clause. Incorporating the opinions of many noted legal scholars, the article argues that the Fuller and White Courts generally adhered to ideas of limited government, but that their decisions were not obstructive enough of government regulation to hinder Progressive policies from becoming law.*

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I. Introduction

The Supreme Court, led by Chief Justice Melville Fuller and later by Chief Justice Edward D. White, played an important role in shaping American public policy during the Progressive Era (1890-1930) by rendering decisions that had two general effects. This paper will concentrate on the Fuller Court though some of the decisions are from the White Court. In some cases, the Court protected freedom of enterprise and endeavor by blunting the effects of Progressive legislation at the state and federal levels. James Ely, referring to the Fuller Court summarizes this aspect of the Supreme Court during this era: "Although appointed by ten different presidents, the members of the Fuller Court shared a number of core constitutional values. Foremost among these were individual liberty and the idea of limited government".[1] Nevertheless, in other cases the Court under Fuller and White affirmed the constitutionality of Progressive legislation and therefore furthered reasonable but moderate regulation by reaching "...accommodation under which they were willing to allow some modification of the common law in order to permit the increased exercise of state and federal police powers".[2]

However, on balance, commentators have pointedly indicted the Court during this period for reining in Progressive legislation. These same commentators have lauded the Justices who favored Progressive action and who dissented in the cases striking down Progressive legislation. In the typical law school

1 JAMES ELY, THE FULLER COURT 103 (2003).

2 REBECCA SHOEMAKER, THE WHITE COURT 12 (2004).

classroom in the post WWII era, the decisions rendered during this era against Progressivism—often called the "Lochner Era" (after one of the key Supreme Court cases) were regarded as illiberal and reactionary and are still often presented that way today.[3] Recently there has been some much-needed revision by constitutional historians of this one-sided view of the Supreme Court during this era.[4] This paper will argue that the members of the Court, in their decisions on matters of taxation, labor and working conditions, and interstate commerce were generally consistent with the Founders' liberty and limited government views, but not entirely obstructive of increased governmental regulation.

II. Income Taxation and the Fuller Court

The Supreme Court became involved in the Progressive Era controversy over the propriety and constitutionality of the federal income tax as a result of a provision in the Wilson-Gorman Tariff Act of 1894. There Congress imposed a tax on "gains, profits, and income...received...by every citizen of the United States...derived from any kind of property, rents, interest, dividends, or salaries or from any profession, trade, employment or vocation...".[5] The 1894 tax, obviously an income tax, was immediately challenged in the courts and eventually found its way to

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3 ANNA M. KAUPER & FRANCIS BEYTAGH JR., CONSTITUTIONAL LAW: CASES AND MATERIALS 713 (1980).

4 MICHAEL PHILIPS, THE LOCHNER COURT, MYTH AND REALITY 3 (2001).; David E. Bernstein, *The Story of Lochner v. New York: Impediment to the Growth of the Regulatory State*, *in* CONSTITUTIONAL LAW STORIES 327 (Michael G. Dorf ed., 2004).; Melvin I. Urofsky, *State Courts and Protective Legislation Driving the Protective Era: A Reevaluation* 72 JOURNAL OF AMERICAN HISTORY 63 (1985).

5 Pollock v. Farmer's Loan & Trust Company, 158 U.S. 601, 639 (1895).

the U.S. Supreme Court where the case was heard and then, on motion, reheard. The case, *Pollock v. Farmer's Loan & Trust Co.*, was decided by the Court in 1895. The 5-4 majority found the tax to be unconstitutional.

The Pollock Decision and Two Classes of Taxes

The Fuller Court had to first deal with earlier precedents that seemed to support the idea of the constitutionality of a federal income tax. The most important was *Springer v. U.S.* in which a federal income tax imposed (but now expired) during the American Civil War had been upheld in 1881 when subjected to a constitutional challenge.[6] The key to understanding both decisions is to grasp the way the Constitution creates two large categories of taxes and attaches certain limitations to their imposition.

The U.S. Constitution creates "two great classes of taxes".[7] The first of these classes is one composed of "duties, imposts and excises", usually called together, "indirect taxes." Duties and imposts are tariffs levied against goods entering a port or crossing a border into the U.S. but produced abroad. "Excises" are taxes on particular products such as tobacco and alcoholic beverages. These two kinds of taxes are called "indirect" because the seller of the goods on which the taxes are imposed collects the taxes due as part of the purchase price and pays them. The tax is only "indirectly" paid by the consumer of the products, for example, when he purchases an imported good or one on which an excise is

6 Springer v. U.S., 102 U.S. 586 (1895).

7 158 U.S. at 618.

levied. The tax is viewed as "built into" the final purchase price.

According to Fuller's reading, the Founders expected the new federal government to be financed by indirect taxes, that is, by these same duties, imposts and excises.[8] In fact that was the case until WWI. "...(C)ustoms receipts constituted between 30 per cent and 58 per cent of the federal revenue during the entire period between the Civil War and WW I ...".[9] Federal excise taxes made up most of the rest of federal revenues generated by taxation. (We are leaving land sale revenues aside because strictly speaking they are not taxes.)

Direct taxes make up the second class of taxes mentioned by the Constitution. These are called "direct" simply because they are laid "directly" on the person who must pay the tax. So, for example, if a person is the owner of a piece of real estate and there is a tax on real estate, he or she must pay it directly. In *Pollock*, Fuller points out that state and local governments were expected by the Founders to raise their revenues by such direct taxes,[10] which is historically what they did and in many cases what they still do. A local real estate tax, for example, is a direct tax.

The Constitutional Limits on Taxation

In addition to recognizing these two great classes of taxes, the Constitution places certain limits on the way they are to be imposed by the federal government. "Duties, imposts and

8 *Id.* at 621.

9 Theda Skocpol, *Did the Civil War Further Democracy, in* DEMOCRACY REVOLUTION AND HISTORY 89-90 (1998).; OWEN M. FISS, OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES 77 (1993).

10 158 U.S. at 621.

excises" (indirect taxes) must be "uniform throughout the United States," that is, they cannot be imposed on one region and not others. Direct taxes such as real estate taxes or income taxes must be "apportioned among the states" according to the number of representatives which the states have in Congress.[11]

The requirement of the apportionment of direct taxes always puzzles those who study this section. How did the Founders expect this apportionment to be accomplished if direct federal taxes were imposed? The way a direct tax would be put into effect was admittedly cumbersome and would require cooperation from the state governments. First the federal government would determine the total amount of federal revenue it wanted to raise and the kind of direct tax it wanted to use. Suppose Congress decided to raise $100 million dollars and simply passed an income tax for that purpose, that is, a tax on income earned by citizens. The total revenue goal, once set, would then have to be divided among the states based upon representation.[12] So, if state "A" had 5% of the total federal Congressional representatives and state " B" had 20%, state B would be required to raise a larger portion of the total amount of federal revenue, that is 20% of the revenue goal, while state "A" would only be required to raise 5% of the revenue goal.[13] Then it would be up to the state governments to set about collecting their apportioned amount by imposing the tax. U.S. Supreme Court Justice Fuller further maintained that the fed-

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11 U.S. CONST. art. I, § 9, cl. 9.; art. I, § 2, cl. 3.

12 158 U.S. at 623.

13 Erick M. Jensen, *The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional?*, 97 COLUM. L. REV. 2334, 2341 (1997).

eral government could collect the tax directly "if the state does not in the meantime assume and pay its quota and collect the amount according to its own system and in its own way".[14]

Direct Taxation and Apportionment—The Center of the Storm

These questions of direct taxation and apportionment were at the center of the controversy produced by the 1894 federal income tax being considered in Pollock and the earlier Civil War income tax considered in Springer. In both of the cases, if a federal income tax were viewed as a tax laid directly on U.S. citizens, then it would have to be apportioned among the states. If it were not determined to be a direct tax, then it would not require apportionment.

Fuller and the majority in *Pollock* rejected the *Springer* Court's earlier holding that had found the Civil War income tax to be an excise tax, making it an indirect tax and, therefore, not requiring apportionment among the states. The *Pollock* majority concluded that "...In this case our province is to determine whether this income tax... does or does not belong to the class of direct taxes. If it does, it is, being unapportioned, in violation of the constitution, and we must so declare".[15] That is precisely what the Pollock majority did, finding the 1894 income tax to be direct, unapportioned, and therefore, unconstitutional.

The *Pollock* decision made it necessary to either apportion any federal income tax passed or seek a constitutional

14 158 U.S. at 632.

15 *Id.* at 634.

amendment to negate the effects of *Pollock*. Beginning in 1905 and "for every session of Congress thereafter, an income tax bill was introduced".[16] Because of *Pollock*, a direct income tax statute would likely be unconstitutional which made a Constitutional Amendment necessary. It was passed by Congress and ratified in 1913 by three-quarters of state legislatures as required by the Constitution[17] and became the Sixteenth Amendment. So, the Court's efforts at restraint were eventually nullified but nullified in a way that was allowed by the amendment process in the Constitution.

Was the Court justified in striking down the income tax in *Pollock*? Was the decision constitutionally correct? Law Professor Erik M. Jensen, one of the leading experts on the apportionment-of-direct-taxes language, catalogues the reaction to the *Pollock* decision both immediately as well as over time as mostly negative, in fact, very negative.[18] For example, critics sometimes compared *Pollock* to the *Dred Scott* decision according to Jensen.[19] But, Jensen concludes: "Nevertheless, *Pollock* reached a defensible result".[20]

The first question: was the income tax of 1894 a direct tax? Though the Founders were certainly not as clear as they could have been on this issue, it is relatively clear that an income tax laid on U.S. citizens by the federal government is a direct tax. It is

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16 ALFRED H. KELLY & WINFRED A. HARBISON, THE AMERICAN CONSTITUTION 584 (1976).

17 OWEN M. FISS, OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES 100 (1993).

18 Jensen, *supra* note 13, at 2334, 2370-2372.

19 *Id.* at 2370-71.

20 *Id.* at 2372.

certainly not a duty or excise.[21]

Because it was a direct tax, the income tax had to be apportioned among the states as described above. Otherwise, its imposition would be unconstitutional. Current commentators cannot deny the existence of the apportionment language, but Jensen maintains that they have attempted to relegate it to the status of an antiquated novelty that cannot override the broad and plenary language of taxing given in Article I, § 8.[22] Nevertheless, he points out that when the Founders granted the power to tax but attached the restraining hobbles of "uniformity" and "apportionment" to that grant of power, those restraints were meant to be taken seriously. The Founders knew the potentially destructive power of taxation and yet knew that civil government could not be financed without taxes.[23] To dismiss the limitations on taxation as technical anachronisms of the 18th century or, worse yet, to regard them as essentially meaningless, is to ignore what the Founders knew and what we have forgotten (though it may be taught to us once again very soon), that the power to tax is the power to destroy.[24]

So, returning to the issues in *Pollock*, the Founders seemed to have fitted the most "inhibiting bit" upon the "horse of direct taxation" by requiring that such taxation by the federal government be done only through the medium of apportionment. Are there good and understandable reasons for their more pronounced concern about direct taxes? Jensen offers several reasons which

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21 *Id.* at 2402.

22 *Id.* at 2346, 2348-2349.

23 *Id.* at 2349.

24 *Id.* at 2335-2338.

are here reduced to two.

First, indirect taxes can be avoided more readily than direct. If one is purchasing imported goods or goods on which excises are levied, an excessive indirect tax on either will result in fewer purchases of these goods.[25] By contrast, the direct tax is laid on the taxpayer directly and must be paid and therefore has the potential to be more burdensome because it is essentially unavoidable.

Secondly, direct taxes are the primary source of revenue for state and local governments. If the federal government makes substantial use of direct taxes, this may erode the tax base of the local and state governments.[26] Therefore, to reduce the likelihood of that happening, the federal government must meet the apportionment requirements which will make the use of direct federal taxes less attractive because apportionment is admittedly a cumbersome mechanism. The Fuller Court, therefore, was reflecting the Founders' concern about taxation and its impact. Historian Owen Fiss summarizes: "They (the members of the Fuller majority) saw the direct tax provision, like the social order itself, as a mechanism for reconciling the need to create power and the need to limit it".[27] The subsequent history of the use and abuse of the income tax by the Federal government is evidence of the wisdom of the Fuller Court and its inclinations.

One final note: Assume for the moment that the Sixteenth Amendment had not been passed. The reader can grasp how the apportionment requirement would act as a restraint on direct fed-

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25 *Id.* at 2337.

26 *Id.*

27 Fiss, *supra* note 17, at 93.

eral taxation by conducting a simple experiment. Suppose the federal government were to consider passing a national income tax. Apportionment of that tax would require each state to bear the burden of the income tax according to that state's population. Based on current population figures, California would have to bear 11.95% of the burden of the tax, followed by Texas (7.8%), New York (6.3%), Florida (6%), Illinois (4.2%), Pennsylvania (4%), Ohio (3.75%), Michigan (3.3%), Georgia (3.12%) and North Carolina (3.08%). Those ten states are the ten most populous and would have to collect over fifty percent of the tax from their constituents! (U.S. Census 2000, Apportionment of Population and Representatives by State).[28] The remaining forty states would divide up the rest of the requisition. How popular would such a tax apportionment be especially among the citizens of the most populous states? Keep in mind that the ten "high paying" states together have enough votes to defeat such a tax in the Congress and would likely do it. Apportionment, were it still in effect, would make the passage of a direct federal income tax politically difficult to say the least and that is undoubtedly what the Founders intended.

III. The Commerce Clause and the Fuller Court

The Fuller Court continued to be a restraint upon the legislative actions of the Federal government during the Progressive Era when Congress passed acts that relied upon an expanded

28 U.S. Census, *Apportionment Population and Number of Representatives by States,* U.S. DEPARTMENT OF COMMERCE (2000.)

interpretation of what is usually called the "interstate commerce clause." That clause is found among the Congressional powers enumerated in Article I, section 8 of the Constitution. Constitutional students will remember that this section grants Congress a long list of powers (power to tax, raise armies, coin money, establish post offices etc.) which the Founders understood were to be the sole bases for legislative action. The idea in a nutshell was that Congress was required to find a Constitutional provision among those enumerated powers for its contemplated legislation. If it could not find such a justifying power, then its authority to act in the way it was contemplating must not have been granted to it.

The particular power with which this part of the paper is concerned is found in clause 3 of section 8, Article I which gives Congress the power: "To regulate Commerce with foreign Nation, and among the several States, and with the Indian tribes..."

The Supreme Court early in its history was called upon to consider the meaning of that grant of power in the well-known 1824 case of *Gibbons v. Ogden*. There the Court ruled that the State of New York was interfering with commerce among the states when it granted a steamboat monopoly to Ogden and refused to let Gibbons run a similar boat line from New Jersey into New York waters even though Gibbons possessed a license to do so granted under a federal statute which sanctioned what was called "coasting trade."

Two clear principles emerged from that decision. State governments cannot pass legislation which impedes commercial

activities that cross state lines (Gibbons, 200).[29] To allow such interference by state governments is to permit barriers to be thrown up to the free movement of goods and to disrupt what the founders intended to be a huge free trading area. Secondly, the Court made it clear that there was a difference between external commerce, that is, that which crossed states lines, and the internal commerce of a state where transactions were conducted within the boundaries of a single state. The Federal government could protect external, that is, interstate commerce from the ill effects of individual state interference, but when it came to internal commerce, the states retained power to set their own laws (194).[30] So, in short, the *Gibbons* case recognized the difference between inter-state commerce and intra-state commerce. The former could be "regulated," that is made regular—protected from obstruction—by the Federal government, but the latter remained under state government control.

During the early years of what historians now call the Progressive Era, Congress made attempts to deal with what it saw as economic and social evils by passing legislation. The first "evil" addressed was the growth of large business enterprises, often in the form of the business trust. The second social "evil" descried by the Progressives was the continued existence of child labor in manufacturing. In the first instance, Congress passed the Sherman Anti-trust Act of 1890 and in the second instance, it passed a Federal Child Labor Act of 1916 which purported to prohibit,

29 Gibbons v. Ogden, 22 U.S. 1, 200 (1824.)

30 Id. at 194,

nationwide, labor by any child under the age of 14 years. In both instances, the Congress relied upon its power to regulate commerce found in Article I section 8.

Both statutes produced constitutional challenges resulting in the cases in 1895 of *United States v. E.C. Knight* and in 1918 of *Hammer v. Dagenhart* at which this papers now takes a closer look.

The *E.C. Knight* case concerned the merger of several sugar refining businesses under the control of a single entity, the American Sugar Refining Company. American purchased the stock of four Philadelphia refineries with its own stock, one of them, E.C. Knight.[31] The federal government brought suit to dismantle the merger under the Sherman Act section 2 making illegal the creation any combination in restraint of trade, in this case monopolization. The new consolidated refining company did control 98% of U.S. sugar refining business.

The question which Chief Justice Fuller addressed primarily was whether the commerce clause gave Congress the power to prohibit this merger and, in effect, to undo it. Fuller begins by saying that it is unnecessary to consider whether the resulting sugar refining combination might not in fact lower prices rather than impose higher ones, or whether new entrants to the field of refining might confront the combination with new competition, or whether, in fact, the stockholders of the Philadelphia businesses which were purchased might not present themselves as new competitors, though he seems to think these possibilities are worth

31 U.S. v. E.C. Knight Co., 156 U.S. 1, 9 (1895).

mentioning.[32] After all this "monopoly" was not a state-sponsored monopoly like those created by the English crown, or created by New York state in *Gibbons*, but a combination produced by the merger of producers that had formerly been competitors.[33]

He makes a clear distinction between the power of state governments to regulate monopolies and restraint of trade under state police powers on one hand, and the right of the Federal government to regulate truly interstate trade and commerce on the other. So the question becomes whether the merger in sugar refining is really commerce. As Fuller points out: "That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police powers of the State".[34] The Fuller majority found that the "contracts and acts of the defendants related exclusively to the acquisition of the Philadelphia refineries and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the States or with foreign nations".[35] The purpose of the agreements was to aid and effect manufacturing and as Fuller put it: "Commerce succeeds to manufacture, and is not a part of it".[36] To rule otherwise, said Fuller, would be to endorse the view that "national power extends to all contracts, and combinations in manufacture, agriculture, mining and other productive industries whose ultimate result may affect external commerce, compara-

32 *Id.* at 10.
33 *Id.*
34 *Id.* at 12.
35 *Id.* at 17.
36 *Id.* at 12.

tively little of business operations and affairs would be left for state control".[37] By its unwillingness to expansively interpret the interstate commerce clause to include business contracts and combinations, the Court temporarily held back the force of Progressive legislation based on the invocation of the commerce clause. An interpretation which opened all business activity to the control of the federal government "...essentially allows the government to regulate anything that even indirectly burdens or affects interstate commerce (and) does away with the key understanding that the federal government has received only enumerated powers".[38]

Despite the ruling in the *Knight* case, the Federal legislature continued to attempt to reach social evils, as it saw them, by resorting to the interstate commerce clause. One sees that clearly in the case of *Hammer v. Dagenhart* (1916). The Federal Child Labor Act (Keating-Owen Act) maintained that goods shipped in interstate commerce which had been produced by child labor were prohibited by law. Under the Act, child labor was defined as employment of any person who was under 14 years of age. Workers who were between 14 and 16 could be employed but for no more than 8 hours per day.[39]

Mr. Dagenhart had two sons, one 13 and one 15 both of whom worked in the Fidelity Textile mill, a cotton mill in Charlotte North Carolina. Following the passage of the Act, Fidelity agreed to comply with the law's requirements. Dagenhart sued for

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37 *Id.* at 16.

38 Richard A. Epstein, *Toward a Revitalization of Contract Clause*, 73 VA. L. REV. 1387, 1987,1396 (1987).

39 Hammer v. Dagenheart, 247 U.S. 251, 268, 272 (1918).

an injunction against the enforcement of the Act.[40]

The Supreme Court majority followed the basic contours of the *E.C. Knight* case by ruling that there was a clear distinction between production and manufacturing of goods and "commerce". Epstein comments: "...the Court understood the statute [child labor law] for what it was: it was not an effort to control the goods themselves, but to prescribe the internal rules governing their manufacture within the state".[41] Justice Day, wrote: "The grant of power of Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it the authority to control the states in the exercise of their police powers over local trade and manufacture"[42] The Court regarded the evil aimed at child labor to have been completed before the goods themselves passed into the paths of commerce.[43] To allow the Federal law to insinuate itself backward into the labor contract and the manufacturing process was to allow Federal power to substitute itself for state police powers.

Justice Day went on to note that it was not that North Carolina and other states had no limitations on child labor: "...the brief of counsel states that every state in the Union has a law upon the subject, (child labor) limiting the right to thus employ children. In North Carolina, the state wherein is located the factory in which the employment was had in the present case, no child

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40 247 U.S. at 268.

41 Epstein, *supra* note 38, at 1980, 1427.

42 247 U.S. at 273-274.

43 *Id.* at 272.

under twelve years of age is permitted to work".[44] Commentators have also noted that "nascent labor unions opposed child workers because they undermined the wage structure...".[45] So all support for a single federal prohibition of child labor was not purely humanitarian.

The Court majority found the Federal Child Labor Act unconstitutional. To do otherwise,

> "would sanction an invasion by the federal power of the control of a matter purely local in its character, and over which no authority has been delegated to Congress in conferring the power to regulate commerce among the states...The court has no more important function than that which devolves upon it the obligation to preserve inviolate the constitutional limitations upon the exercise of authority federal and state to the end that each may continue to discharge, harmoniously with the other, the duties entrusted to it by the Constitution".[46]

This was the Supreme Court protecting the balance of power between the states and the federal government much as the Founders intended.

Moreover, from the perspective of economic well-being, the Court prevented a single nationwide working-age-requirement from being imposed. It recognized that the economic conditions of each state varied and that the lawful age for working was best left to the individual state legislatures. In actuality, child labor, due to

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44 *Id.* at 275.

45 Melvin I. Urofsky, *State Courts and Protective Legislation Driving the Protective Era: A Reevaluation* 72 JOURNAL OF AMERICAN HISTORY 69 (1985).

46 247 U.S. at 276.

increased wages and productivity of adult workers, was becoming less common. In 1899 3.4% of those employed in manufacturing were under 16 years old; that declined to 1.7% in 1914.[47] Admittedly, in some Southern states the percentage of young workers was higher.[48] But these regional variations required state laws that took into account state economic conditions and recognized that child labor laws could only be passed when economic conditions had improved enough to make child labor the exception rather than the rule.

IV. Employment, the Lochner case and the Court

Lastly we come to a series of cases in which the Court made rulings about Progressive legislation, produced by state legislatures, which attempted to regulate the working conditions and employment terms of workers in business enterprises. One case, in particular, has become a kind of "negative" exemplar for the Court's judicial actions in this area. The case is *Lochner v. New York* which was decided in 1905. In fact, this case, in which the Court found a state maximum hours law for bakers unconstitutional, has had its name attached to the period of time in which the Fuller Court made certain rulings against Progressive legislation—thus the term the "Lochner Era."

The facts of the case itself were relatively simple. Joseph Lochner was the owner of a small bakery in Utica New York. His operation was typical of bread bakeries at the turn of the centu-

47 GILBERT C. FITE & JIM E. REESE, AN ECONOMIC HISTORY OF THE UNITED STATES 390 (1965).

48 *Id.* at 391.

ry.[49] Although "almost three-quarters of the bread consumed in the United States was still baked at home..."[50] the number of commercial bakeries was increasing so that "the number of wage earners in the baking industry went from fewer than seven thousand in 1850 to more than sixty thousand in 1900—a rate of increase almost twice that of manufacturing in general".[51] Most bakeries were small as was the case with Lochner. "In 1899 78 percent employed four or fewer persons".[52] Lochner was in this category with four employees including himself (usually called the "boss baker").

There had been a variety of movements in the post Civil-War era to shorten the work day to eight hours.[53] The New York Bakeshop Act of 1895 was a species of this kind of legislation intended to improve working conditions in a particular trade. It passed New York's assembly (house) unanimously by a vote of 120-0 and the New York senate also unanimously 20-0.[54] It prohibited employees from working in a bakery for more than ten hours in one day or sixty hours in one week using language that made it clear that even if the workers voluntarily agreed to the extra hours, the law would be violated.[55]

Lochner was indicted by a grand jury in October, 1901 for violating the act when he employed Aman Schmitter for more

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49 Lochner v. New York, 198 U.S. 45, 52 (1905).
50 PAUL KENS, LOCHNER V. NEW YORK 6 (1998).
51 *Id.*
52 *Id.* at 7.
53 *Id.* at 15-18.
54 *Id.* at 64.
55 *Id.* at 89.

than the hours allowed by law. (Kens, the most detailed commentator on the case suspects that it was not Schmitter at all who complained but probably the state factory inspector who was responding to a complaint by the local bakers' union).[56]

Lochner and his legal counsel "offered absolutely no defense to the charges made against him...".[57] Apparently, they intended to appeal the case on the basis of the law and the constitutional issues involved which is what they did, taking the case through the New York state court system[58] and then to the U.S. Supreme Court.

The Supreme Court rendered its 5-4 decision with Justice Peckham penning the majority opinion. The central theme of the Peckham opinion is found in the second paragraph: "The statute necessarily interferes with the right of contract between the employer and employes (sic) concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution".[59] Peckham went on to point out that the Fourteenth Amendment, in section one, stated that life, liberty and property could not be taken from a person by the state without "due process of law." It was the liberty portion of the Fourteenth that was being interfered with, that is the liberty to buy labor, in the case of the employer or to sell labor, in the case of the

56 *Id.* at 90.
57 *Id.* at 91.
58 *Id.* at 92-95.
59 198 U.S. at 53.

employee. Liberty meant the freedom to make a contract for one's labor services and was a substantive right intended to be protected by the framers of the Fourteenth Amendment.

Peckham's opinion now turned from what the state could not do, that is interfere with liberty of contract, to what it could do in certain instances. As Peckham clearly indicates, state governments were allowed to properly exercise what are usually called their "police powers." These were powers, as Peckham put it that "...relate to the safety, health, morals and general welfare of the public".[60] In other words the liberty to make a contract was not a blank check allowing the citizen to make any kind of contract no matter what its purpose. For example, "a contract to let one's property for immoral purposes, or to do any other unlawful act, could obtain no protection from the Federal Constitution as coming under the liberty of person or of free contract".[61] It is these two values, freedom to contract, on one hand, and the state's interest in passing legislation protecting its citizens that the Court was called upon to consider and weigh.

Peckham next reminds the reader that the Court had "upheld the exercise of the police powers of the States in many cases which might fairly be considered as border ones...".[62] Peckham cites two cases which illustrate the Court's willingness to support states in legitimate exercise of their police powers. Peckham refers to *Holden v. Hardy* where the Court upheld a Utah statute which limited the hours to eight per day one could work

60 *Id.* at 53.
61 *Id.* at 53-54.
62 *Id.* at 54.

in underground mining. Peckham notes that the Supreme Court of Utah regarded the conditions in underground mining and smelting as "peculiar" and warranting regulation and also argues that the Utah statute did allow for emergencies, which permitted employers to require more hours in those circumstances than the statute generally allowed.[63] Peckham then cites another case, *Jacobson v. Massachusetts* where the Court had upheld a state compulsory vaccination (small pox) statute as a valid exercise of the state's policy powers despite the defendant Jacobson's claim that his liberty was being taken from him by the statute.[64]

Peckham mentions those cases but views them as not "covering the one now before the court".[65] Further, in the opinion he explains why the majority has reached that conclusion as he discusses the difference between what he calls a "labor law" on one hand and a law "pertaining to the health" of a worker on the other.[66] If the Bakeshop Act is merely a labor law which seeks to fix the hours of work, then Peckham and the majority view it as "interfering with the liberty of person or the right of free contract by determining the hours of labor…".[67] Peckham and his majority colleagues believe that bakers are capable of taking care of themselves in determining their work schedules without the protection of the state.[68] Howard Gillman makes the point that "It did not help [New York] that the law [Bakeshop Act] was inserted into New

63 *Id.* at 45, 54-55.
64 *Id.* at 55.
65 *Id.* at 56.
66 *Id.* at 57.
67 *Id.*
68 *Id.*

York's Labor Code and not into its Public Health Regulation".[69] Gillman's observation seems to be born out by Peckham's discussion of whether or not the Bakeshop Act was intended for the protection of the health of the workers or for public health in general. Peckham says that the arguments about a public health impact are too "remote" when the claim is made that clean and wholesome bread is more likely to be produced by workers who are not overworked.[70] As far as the assertion that the maximum hours law is needed because baking is an unhealthy occupation, Peckham and the majority are not convinced. The opinion says "...the trade of baker has never been regarded as an unhealthy one".[71] Therefore, the public and personal health arguments which would be necessary to make the legislation a proper exercise of the police powers are not convincing to the Court. Consequently, the Bakeshop Act was deemed unconstitutional as an interference with liberty of contract under the due process clause of the Fourteenth Amendment.

Though the Court itself did not use the term, there developed in the New Deal era a phrase to describe anti-Progressive Lochnerian jurisprudence and that term was "substantive due process".[72] The term was meant to discredit and mock the Lochner approach. To these critics due process meant only procedural regularity which if followed in taking life, liberty or property

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69 HOWARD GILLMAN, THE CONSTITUTIONAL BESIEGED 128 (1993).

70 *Id.* at 57, 62.

71 *Id.* at 59.

72 Wayne McCormack, *Economic Substantive Due Process and the Right to Livelihood*, 82 KY. L.J. 397, 404 (1993-94).

would provide sufficient protection for citizens against government excess. By assigning the phrase "substantive due process" to the Lochnerian approach, they hoped to highlight what seemed to them to be a latent incompatibility.

Lochner Considered and Reconsidered

In fact, few cases have drawn criticism such as that heaped upon the Court majority in Lochner. Professor Michael J. Phillips describes the typical professional view of Lochner this way: " ...it remains a commonplace that during the first third of the century the Supreme Court frequently used due process to strike down Progressive social legislation, that this was an illegitimate exercise of judicial power, and the Court's conservative justices exercised such power either in the conscious service of business or in simple-minded thralldom to laissez-faire ideas that had outlived their time".[73] Bernstein says Lochner qualifies as "one of the most reviled Supreme Court cases of all times".[74] Law students and the legal profession, and with them judges and commentators, hold the view referred to by Phillips and Bernstein because of text references like this one from a well-regarded 1980 law school casebook: "*Lochner v. New York,* viewed from the perspective of hindsight, rather clearly marked the high-water mark of judicial control over state legislation relating to economic and social problems. The Court's hollow solicitude for the rights of overworked

73 MICHAEL PHILIPS, THE LOCHNER COURT, MYTH AND REALITY 2 (2001).

74 David E. Bernstein, *The Story of Lochner v. New York: Impediment to the Growth of the Regulatory State*, *in* CONSTITUTIONAL LAW STORIES 327 (Michael G. Dorf ed., 2004).

bakery employees did little to mask the majority's underlying motivation. As Justice Holmes' notable dissent reflected, the majority was in no uncertain terms imposing its judgment as to 'a particular economic theory' on the state (and federal) legislatures".[75] The reader can readily see in the language of this law school casebook the elements which Phillips highlights. This characterization of *Lochner* is the favorite one of those who favor more governmental regulatory action, beginning in the Progressive era, intensifying in the New Deal, and continuing today. However, *Lochner* has also been criticized by those on the right side of the political spectrum. The most striking example is the critique of *Lochner* provided by Judge Robert Bork.

Robert Bork is known for his "originalist" approach to judicial decision-making which calls for the judge to pay careful attention to what the drafters of Constitutional language meant when they drafted it, that is, their "original intent" as best that can be determined. According to Bork, judges should resist the temptation to interpret constitutional wording in a way that they themselves would prefer. Since Bork believes that the Framers intended the phrase "due process of law" in the Fourteenth Amendment to be entirely procedural, he is opposed to the broader interpretation of that clause which maintains that it embodies substantive protections of liberty and property, that is, the very substantive protections relied upon by the *Lochner* Court. In fact it is Bork, who when he determines that a judge is engaging in creating unenumerated rights into a particular constitutional clause, calls the

75 Kauper, *supra* note 3, at 713.

process "Lochnerizing".[76]

What is the truth about Lochner? How should that decision and the Fuller Court be regarded? Let's begin by taking the claims made against the Lochner Court one by one in light of current scholarship.

The Judicial Activism Claim

First, there are the claims (both from the left and right) that the Lochner Court was engaged in unjustified and excessive judicial activism, that is, that the Court became the self-declared arbiter of social legislation and struck down an inordinate amount of it.

Legal and historical scholarship about the Fuller Court and the White Court, in the last fifteen years has called that view into serious question. The work of Professor Michael J. Phillips in particular has produced that result. Phillips, after studying carefully and exhaustively the Lochner Era cases concludes: "In my view the conventional wisdom about old-time economic substantive due process is misleading at best and a caricature at worst".[77]

All aspects of Phillips' work on this issue are too long to be included in total in this paper but a few of his key conclusions will help readers to understand why he does not see the Fuller Court in the negative way in which it is usually portrayed.

First of all, the Fuller Court and the White Court in the Lochner Era actually upheld "many ...kinds of police power

76 Hadley Arkes, *Lochner v. New York and the Cast of Our Laws, in* GREAT CASES IN CONSTITUTIONAL LAW 94 (2000).

77 Philips, *supra* note 73, at 32.

measures"[78] Though private parties challenged a variety of health and environmental regulations imposed by the states, the Lochner court upheld them. For example, in *Jacobson v. Massachusetts* already mentioned, the Court refused to strike down a compulsory vaccination law saying that liberty was not absolute when it came to such laws. It upheld a state law requiring diseased trees to be cut down when they posed a threat to fruit trees in *Miller v. Schoene*.[79] In addition the Supreme Court in the pre-New Deal era did not find state workers' compensation laws to be unconstitutional under the due process clause even though they significantly changed the liability of employers for industrial accidents.[80] In the area of maximum hours laws, like the one in Lochner, the Court sometimes supported the state regulation in question against a due process liberty of contract challenge as in *Holden v. Hardy*, *Muller v. Oregon*. Admittedly, the facts in those cases seem to place the cases in the protection of health category—in *Holden*, underground mining and in *Muller*, women working—but the nuanced consideration that the Court gave those cases shows that its decisions were not reactionary and ideological as is often contended. In fact, Phillips calculated that the due process challenges of general police powers were unsuccessful by a ratio of 9 to 1 in this pre-New Deal period.[81]

Phillips' analysis and calculations also help to negate the claim by Justice Holmes and others that the Court was inordinate-

78 *Id.* at 47.
79 *Id.*
80 *Id.* at 54.
81 *Id.* at 57.

ly pro-business/laissez faire. A Court that was that ideologically committed would not have allowed the many pieces of legislation that it did to remain in effect.

The Expansive View of Due Process Claim

The second and more problematic contention of those who indict the Fuller Court and its reliance on the due process clause of the 14th Amendment is that the Court took an unjustifiably expansive view of the due process clause making what was intended as a requirement of procedural regularity into a set of substantive rights.

Robert Bork's Views

As mentioned above, Judge Robert Bork takes this position. According to his view, since the due process clause "was designed only to require fair procedures in implementing laws, there is no original understanding of what gives it substantive content. Thus, the judge who insists upon giving the due process clause such content must make it up".[82] His opinion of Chief Justice Peckham's decision in Lochner is, therefore, highly uncomplimentary: "In 1905 he [Peckham] wrote an opinion whose name lives in the law as the symbol, indeed the quintessence of judicial usurpation of power: *Lochner v. New York*".[83] Bork's objection is not really so much to the result in Lochner but to the what Bork calls "the undefined notion of substantive due process...which is

82 ROBERT H. BORK, THE TEMPTING OF AMERICA 43 (1990).

83 *Id.* at 44.

wholly without limits, as well as without legitimacy" and which "provided a warrant for later courts to legislate at will...using the due process clause to create new rights which are neither mentioned nor implied anywhere in the Constitution or its history".[84] Bork is referring primarily to the "right to privacy" first "discovered" by the Court in *Griswold v. Connecticut* and then eventually applied to negate a Texas statute outlawing abortion in *Roe v. Wade*. Bork says, in another context, that to be consistent one must reject the substantive due process reasoning of Lochner if he wants to reject the substantive due process reasoning of *Roe v. Wade*.[85] There is truth in that assertion. *Roe's* essential holding, according to the Court in later cases, is that the "Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment. It declares that no State shall 'deprive any person of life, liberty, or property, without due process of law.' The controlling word in the case...is 'liberty'" (Casey, 846).[86] So, the reasoning in Roe and Casey sounds a great deal like the reasoning one finds in Lochner, the difference being that instead of finding a maximum hours law intruding on the substantive rights of liberty to contract, the modern Court finds that an anti-abortion law or regulations controlling abortion, is intruding on the substantive right of the liberty of the woman to terminate a pregnancy. This writer would argue that these two cases are only superficially parallel in that in the latter case, the Court ought to be considering the life of the

84 *Id.* at 49.

85 *Id.* at 225.

86 Planned Parenthood v. Casey, 505 U.S. 833 (1992)

unborn child. Ironically, the protection of unborn child's substantive right to life should be protected under the due process clause of the Fourteenth Amendment. But that discussion is beyond the purview of this paper.

Richard Epstein's Views

As a counter to Bork on this issue one should also consider the arguments of Richard Epstein. Epstein maintains that a result similar to that reached by the Lochner Court could better be reached by invoking the takings clause of the Fifth Amendment as applied to the states through the Fourteenth, or the impairment of contract clause found in Article I, section 10. Bork regards Epstein's approach as "more satisfactory" because Epstein is not relying upon undefined rights, meaning those whose contours and limits are unknown.[87] So, using the reasoning of Epstein, in a Lochner situation, the Court could still strike down the maximum hour law because it either impaired an existing contract between the employer and employee or because it imposed a burden on the employer, and, therefore, took his property without compensation.[88]

The question remains: was the "due process of law" language found in the Constitution intended to be read as entirely procedural? Was it a reference only to a process or were there substantive rights intended to be protected against encroachment contained in the language of due process?

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87 Bork, *supra* note 82, at 229.

88 Epstein, *supra* note 34, at 1984.

James Ely on Due Process

James W. Ely contends, convincingly, that "due process of law" derives from a phrase in the Magna Carta, namely the express "law of the land" and that it had a broad substantive meaning that was recognized by colonials like James Madison and later by distinguished commentators like Thomas Cooley. He further presents evidence from judicial decision in antebellum state courts. His conclusion that the position that substantive due process was not evolving before the Civil War was "untenable".[89] Bernard Siegan takes a similar position in Economics Liberties and the Constitution.

Levy and Mellor on Due Process

Another counter to Bork's procedural view of the due process clause of the Fourteenth Amendment is found in Levy and Mellor's work on key Supreme Court cases. Their contention is that the broad intent of the 14th amendment with its "due process" "privilege and immunities" and "equal protection" clauses was to protect the "newly freed slaves" and "all citizens" from state governments that would attempt to deny them certain "economic liberty: the right to contract and the right to own property." Because of the narrow and wrong interpretation of the privileges and immunities clause by the Supreme Court in the *Slaughter-House Cases* the courts, including the Supreme Court turned to other provisions of the Constitution – notably the Due Process

89 Ely, *supra* note 1, at 1999.

clauses of the Fifth and Fourteenth Amendments – to strike down state laws that took away fundamental liberties. Mellor and Levy then refer to *Lochner* as an example.[90] According to their view, the expansion of the due process clause to include more substance was in part attributable to the crabbed view of other parts of the Fourteenth Amendment, namely the Court's misinterpretation of the Privileges and Immunities clause promulgated by the *Slaughter-House Cases*.

Needless to say, the approach used in *Lochner* has been subjected to considerable scrutiny and criticism. At the time, and for our purposes, it blunted the thrust of the Progressive Era legislative agenda, and, later, its substantive due process language and approach became the judicial method used to create new and "unenumuerated rights"[91] inviting an attack from the right. Overall the Court's sensible and balanced approach to the tension between liberty and regulation should be respected not maligned.

90 Robert A. Levy & William Mellar, The Dirt Dozen: How Twelve Supreme Court Cases Radically Expanded Government and Eroded Freedom 186-88 (2008).

91 Bernstein, *supra* note 74, at 355.