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Elevating Competition: Classical Political Economy in Justice Peckham's Jurisprudence*

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Abstract

This paper deals with the famous *Lochner v. New York* (1905) decision from the perspective of the history of economic thought. In *Lochner* the Supreme Court affirmed freedom of contract as a substantive constitutional right. It is argued that, in writing for the majority, Justice Rufus W. Peckham was heavily influenced by classical political economy. Not, however, in the trivial sense of endorsing pure laissez faire, but in the deeper sense of applying Adam Smith's recipe for building a "system of natural liberty", viz., a social order founded on justice, private property, and free competition. My interpretation is validated by looking at the economic content of Peckham's jurisprudence as a judge in the New York Court of Appeals.

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Introduction

Only a few Supreme Court cases transcend the boundaries of the legal world and become common knowledge. One of them is surely *Lochner v. New York*, the reviled epitome of so-called laissez faire constitutionalism.[1] Writing for a

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[1] Laissez faire constitutionalism is the traditional name given to a period of American constitutional history that lasted from the late 19th century (*Allgeyer v. Louisiana,* 165 US 578, 1897) well into the 20th century *(West Coast Hotel v. Parrish,* 300 U.S. 379, 1937) and had its pivotal case in *Lochner v. New York* (198 US 45, 1905) – hence the alternative name, Lochner era, given to it. During this period, the Supreme Court applied a substantive reading of the due process clauses of the Fifth and Fourteenth Amendments of the American Constitution to void those state and federal laws that infringed constitutional rights to property and freedom of contract. A consolidated revisionist literature

narrow majority of the Court, Justice Rufus Wheeler Peckham affirmed freedom of contract as a constitutional right to be safeguarded against undue regulation of economic activity. This principle remained enshrined in US constitutional law for the next three decades.

Lochner is at once one of the most famous and most discredited decisions in the Court's history. Considered a prime example of judicial malfunctioning, it "would probably win the prize, if there were one, for the most widely reviled decision of the last hundred year" (Strauss 2003, 373), its "position of infamy" being "rivaled only by *Plessy v. Ferguson* and *Dred Scott v. Sandford*" (Balkin 2005, 682), the twin archetypes of white supremacy. Lawyers and scholars from all ideological sides still invoke the ghost of *Lochner* to condemn decisions and ideas with which they disagree. Indeed, "to lochnerize" has become legal jargon to attack someone's views about constitutional theory, especially as expressed from the bench.

The literature on *Lochner* is enormous. Historians of American law, as well as of American politics and society, have dedicated thousands of pages to explaining its genesis, content and eventual demise. This paper contributes to this literature by examining *Lochner* from a perspective hitherto seldom taken: the perspective of the history of economic thought. I will focus on Justice Peckham's own political economy and argue that his 1905 opinion may be interpreted as stemming from the same approach to economic issues he had applied in other cases, both as a judge in the New York Court of Appeals and, later, as a Supreme Court Justice. The approach, that is to say, of classical political economy and, more specifically, of the classical theory of monopoly. Showing that the economic rationale of the Lochner era lay in classical economic thought has significant implications for assessing this period of American constitutional history vis-à-vis the ongoing debate about the classical liberal roots of the Constitution itself.[2]

As a theoretical proposition, classical laissez faire – the thesis that to maximize social wealth government interference in the economy should never trespass the bounds of the so-called "night watchman state" – rested upon analytical foundations, like the assumption of perfect factor mobility and the gravitational model of market prices. Yet, the limitations Lochnerian courts placed upon the regulatory power of the states were based on the idea that certain kinds of legislation violated constitutionally protected individual rights. At first glance, this

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has concluded that this conventional reading overemphasizes the actual impact of so-called substantive due process in American law. Indeed, the Supreme Court upheld in those years most of the regulatory laws that came before it, so much so that there was no such thing as a Lochner era (the latter expression being itself a 1970s invention: see Bernstein 2011, 116–8). In what follows I stick to the standard terminology as a shorthand, without endorsing it.

2 See Barnett (2004) and Epstein (2014).

was a legal and philosophical, rather than economic, concept. "The *Lochner* Court, though generally sympathetic with the market system", writes David Bernstein, "did not attempt to enforce anything remotely resembling the night watchman state usually associated with the phrase laissez-faire" (2003, 34).

The following pages will argue that Bernstein's statement is correct only if referred to the strictly analytical characterization of laissez faire, but not with respect to its broader meaning as synonymous with Adam Smith's "system of natural liberty."[3] In the latter sense, the constitutional protection of individual rights was an economic, as well as legal and philosophical, notion. Central to my reading is the traditional, but now largely forgotten, distinction between "economics" and "political economy." The former refers to the set of analytical propositions forming the theoretical core of the subject, while the latter covers a more comprehensive discourse on the relationships between individuals and society, and between the market and the state, drawing upon fields as diverse as economics, political science, law, philosophy and sociology.[4] So, for instance, laissez faire as a theoretical proposition does not coincide with laissez faire as a specific social, political and institutional arrangement – better known as the system of natural liberty – the relation between the two notions being at most that of a part to the whole.

The paper claims that classical political economy did share with Lochnerian jurisprudence a presumption in favor of the individual, a sacred respect of his economic rights, a strong commitment to justice and equality, and the ideal of a privilege-free, small-business economy. Indeed, both groups, classical economists and Lochnerian judges, had common roots in the 18th-century classical liberal tradition. Of course, these were not the only groups sharing these roots. American courts could as well have been inspired by other liberal traditions, not necessarily that of classical economists. However, only from classical economists could these judges have learned the connection between individual liberty, respect for property rights and a competitive marketplace that lay at the heart of Peckham's opinion in *Lochner.* Separating the analytical part of economic thought from the more general vision about the place of individuals and government in society and about the ethical superiority of a certain organization of economic affairs over all others – the vision most classical economists entertained – is therefore crucial for a proper understanding of the influence of classical economic ideas on the Lochner era.[5]

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[3] A meaning some leading framers of the American Constitution (above all, James Madison) were perfectly aware of, given their demonstrated first-hand knowledge of Smith's works – not just the *Wealth of Nations,* but his overall "science of a legislator." See also footnote 9 below as well as Fleischacker (2002) and McLean and Peterson (2010).

[4] For an authoritative statement of the distinction, see Schumpeter 1986 [1954], 22 and 38. Note that this age-old definition of "political economy" only partially overlaps with the modern one, as exemplified by, say, Acemoglu and Robinson 2006.

1. The Lochner Case

At issue in *Lochner* was the New York Bakeshop Act of 1895.[6] Most bakers at the time were small businesses, located in the cellars of tenement houses. With dirt floors and open sewers, the cellars made for a filthy environment in which they baked bread. The New York legislature had unanimously voted for the 1895 Act, which contained six substantive provisions, five of which addressed sanitation. These regulations, which clearly aimed at producing unadulterated bread, were not controversial. Only one section of the Act was judicially challenged, namely, the provision that made it unlawful for bakers to work more than ten hours a day or sixty hours a week.

In 1902, the owner of a small bakery, Joseph Lochner, was convicted of violating the ten-hour limitation and fined fifty dollars. Lochner appealed to the Appellate Division of the New York Supreme Court, which upheld his conviction. The state's highest court, the New York Court of Appeals, affirmed the decision. The case eventually came in front of the Supreme Court, headed by Chief Justice Melvin Weston Fuller. By a narrow 5 to 4 majority the Court reversed the lower courts' decisions and struck down the statute as an infringement of contractual freedom as protected by the Fourteenth Amendment.[7] While endorsing the other regulatory provisions contained in the statute as a legitimate use of state police power, the Court found that the New York legislators' invocation of that power to protect the health of bakers was unpersuasive, doubting that the measure was "really a health law" and considering it merely a labor law to "regulate the hours of labor between the master and his employees" *(Lochner,* at 64).

Justice Rufus Wheeler Peckham (1838–1909) wrote for the majority. He maintained: "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" (*ibid.*, at 53). Although he conceded that a state could impose "reasonable conditions" on the enjoyment of both liberty and property and further agreed that the state could inspect bakeries and enact measures to improve workplace conditions, Peckham was unconvinced that baking was an unhealthy trade and could see no relationship between hours of work and the health of bakers. Consequently, in an oft-quoted passage that contained the gist of the decision, he declared:

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5 My argument is thus complementary, rather than alternative, to the rehabilitation of *Lochner* in Bernstein (2011), in that it shows that the history of the liberty of contract doctrine must also account for classical political economy.

6 This summary of the case follows Kens (2005, 408–10).

7 The decision was so narrow that, according to several sources, the original decision was the reverse, with one or two Justices switching sides for no clear reasons at the very last moment (cf. Bernstein 2011, 33).

> It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives. […] It seems to us that the real object and purpose were merely to regulate the hours of labor between the master and his employees (all being men *sui juris),* in a private business, not dangerous in any degree to morals or in any real and substantial degree, to the health of the employees. Under such circumstances the freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution (*ibid.*, at 64).

Peckham was aware of the conflict raised by the case: on one side, the individual right to contractual freedom protected by the Fourteenth Amendment; on the other, the New York state power to prohibit contracts deemed harmful to the "safety, health, morals and general welfare of the public" (*ibid.*, at 53). A line had to be drawn: "It is a question of which of two powers or rights shall prevail", he recognized, "the power of the State to legislate or the right of the individual to liberty of person and freedom of contract" (*ibid.*, at 57). His answer was clear. The long quotation above shows that he rejected the paternalistic argument that certain classes of laborers, including bakers, had to be protected from their own imprudence in working beyond a harm-inducing limit. The state had no such power under conditions of formal bargaining equality. As individuals in full possession of their rights, bakers were perfectly capable of looking out for their own interests by contracting on equal grounds with employers. Hence, the statute was not a legitimate exercise of police power. Indeed, statutes like that under scrutiny were "mere meddlesome interferences with the rights of the individual" (*ibid.*, at 61), possibly in the effort to promote one class interest over another.

Lochner affirmed freedom of contract as a constitutional principle, protected by the due process clauses of the Fifth and Fourteenth Amendments. The majority of the Fuller Court seemingly read in the Constitution "a general presumption in favor of liberty" (Mayer 2009, 224), "a universal ideal that does not turn on content-based norms" (Epstein 2014, 338), but rather "place[s] the burden on the government to show why its interference with liberty is both necessary and proper" (Barnett 2004, 260). In the specific circumstance, the presumption of liberty showed up in the Justices' belief that a market order governed by freedom of contract is the state of affairs that best promotes individual autonomy and property rights, one that does not depend on government's policy choices, but whose existence the Constitution is called to favor and protect.[8] Such belief, the next pages claim, was grounded in classical poli-

[8] It is worth repeating that the decision was too close to safely conclude that all the five Justices in the majority subscribed to Peckham's views in their entirety. A clue in the opposite direction is the fact that Peckham's opinion favorably cited an 1886 decision by the Pennsylvania Supreme Court (*Lochner*, at 63), which was, however, in contradic-

tical economy – more exactly, in the argument classical economists used to explain why monopoly was antithetical to Adam Smith's "system of natural liberty".

2. Competition in the System of Natural Liberty

From Adam Smith onwards, classical economists understood competition as a principle of social organization in their political economy and as a process underlying the market mechanism in their economics. Freedom of contract was central to both conceptions.

As conceived by Smith, the "system of natural liberty" was a privilege-free, market-based society founded on strong property rights and free competition, whose moral justification transcended the mere maximization of wealth and was grounded on justice and equality.[9] Competition occupied a prominent place in such a system. Smith was the first author to elevate competition to the status of a general organizing principle of society, marking a real breakthrough with respect to previous accounts of the subject.[10] In a famous passage of the *Wealth of Nations* (hereafter *WN*), a few sections before evoking the invisible hand, Smith declares: "Every individual is continually exerting himself to find out the most advantageous employment for whatever capital he can command. It is his own advantage, indeed, and not that of the society, which he has in view. But the study of his own advantage naturally, or rather necessarily, leads him to prefer that employment which is most advantageous to the society" *(WN* IV.2.4). Self-interest and social interest were partners rather than enemies. This, however, only held on the condition that the market was competitive – i. e., under the system of natural liberty.[11]

Smithian competition could only work under suitable institutional arrangements. Stressing the importance of proper institutions was a common trait of Smith and his classical successors. Both government and the law should be such that competitive conditions, themselves conducive to the socially beneficial operation of self-interest, be eased, rather than hampered. But if, as Smith had argued, self-interested behavior under competitive conditions guaranteed the use of resources capable of generating the greatest advancement of national

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tion to a more recent decision by the US Supreme Court on exactly the same kind of work regulation *(Knoxville Iron Co. v. Harbison,* 183 US 13, 1901) – a decision against which he had dissented, but which had been joined by other members of the *Lochner* majority (cf. Bernstein 2011, 34 – 5).

9 Cf. Smith (1904 [1776], IV.9.51). His discourse on justice and equality as the true foundations of "the science of a legislator" dates to his earlier *Lectures on Jurisprudence* (cf. Haakonssen 1981 and Young 2005).

10 See McNulty (1967, 396 – 7) and Medema (2009, chapter 1) whom I follow here.

11 See also Medema (2009, 19).

wealth, it logically followed that any interference with such behavior would necessarily harm economic growth and public welfare.[12] Hence, the first institutional rule had to be laissez faire. The last of the great classical economists, John Stuart Mill, put it most clearly when he argued: "Laisser-faire, in short, should be the general practice: every departure from it, unless required by some great good, is a certain evil" (1909 [1848], V.11.16). In his *History of Economic Analysis,* Joseph Alois Schumpeter remarked that for the best part of the 19th century "[p]ractically all economists *believed* – no matter what they *desired* – that, as J.S. Mill put it, laissez-faire was the general rule for the administration of a nation's economic affairs and that what was significantly called state 'interference' was the exception" (1986 [1954], 548, original emphasis). Far from being society's savior from the negative effects of self-interest, the state was an obstacle hindering the full deployment of the socially beneficial force of competition.[13]

Faithful to the Smithian imprint, the classical recipe for economic policy thus transcended the analytical dimension and took a political, institutional and, possibly also, moral content. The main concern of classical political economy was neither, say, price theory nor trade policy, but rather the ideal institutional regime that would maximize general prosperity and individual liberty.[14] It is in this sense that competition became the central organizing principle of society. The ideal regime was a freely competitive one.

This conclusion explains why it is wrong to identify Smith as an ideological advocate of laissez faire. Historian of economic thought Steven Medema has observed that competition was for him just "a regulating mechanism […] a coordinating force that would keep self-interest from becoming totally destructive" (2009, 24). Smith simply believed that "self-interest, properly channeled, tended to engender positive results, rather than negative ones, and that government interference with its operation in the economic sphere would generally lead to inferior results" (*ibid.*, 25). He did not argue that private action was optimal in the modern sense of efficiency, nor that it was always superior to government intervention.[15] Moreover, he knew well that markets themselves could neither exist nor properly function without a well-defined legal and institutional framework supplied by government and the law. Laissez faire could

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12 See e.g. *WN* IV.9.50.

13 See also Medema (2009, 22).

14 See also Hovenkamp (1988, 396).

15 Beyond defense and justice, the sovereign had a third duty to perform in the Smithian system of natural liberty, namely, "the duty of erecting and maintaining certain public works and certain public institutions which it can never be for the interest of any individual, or small number of individuals, to erect and maintain; because the profit could never repay the expence to any individual or small number of individuals, though it may frequently do much more than repay it to a great society" *(WN* IV.9.51).

never be the only "institutional rule" for the system of natural liberty, nor for its true core, competition.

Accordingly, from Smith onwards, a perspective on property rights and economic freedom has always been a fundamental ingredient of classical political economy. This perspective matched and extended the premise and policy implications of classical liberalism. The general principle being that government ought to stay out of most business activity, it was up to common law to turn that principle into practice. Thus, a perfect overlap existed between the core idea of classical political economy and the leading values of 19th-century classical liberalism, as embodied by Anglo-American common law – values like individualism, freedom of contract and hostility to special privilege and coercion (i.e., forced property transfers). Both parties of a free exchange necessarily gained, or else would not have participated in it; society as a whole gained as the number of these mutually beneficial transactions multiplied; hence, neither the law nor the government should interfere with free contractual activity. The only limit to such activity was represented by the respect of other individuals' equal freedom, a principle embodied by the maxim *sic utere tuo ut alienum non laedas* that oversaw the so-called nuisance doctrine. From the common law viewpoint, the message emerging from classical political economy was clear:[16] economic decision-making – above all, the exploitation of entrepreneurial opportunities – should be left to the free determination of individuals. Freedom of contract was just a synthetic and effective way of capturing this message.

The realization of the system of natural liberty, the classical world of free and competitive production and exchange, critically depended on the security of liberty and property, as well as on the protection, and availability of exchange opportunities. Artificial interference with, or constraint upon, property, exchange and competition would necessarily be harmful to both individuals and society. Common law and, even more crucially, constitutional law therefore had an essential task to perform, namely, to guarantee that individuals always be free to choose their callings, feel safe from external expropriation of the products of their labor, and be able to fully exploit every exchange opportunity.[17] Contractual freedom, formally equal market opportunities and the absence of special privileges epitomized the legal system's mission within classical political economy. Not by accident, these three principles turn out to be the pillars of Justice Peckham's majority opinion in *Lochner*.

An implication of viewing competition as an institutional assumption, as classical economists did, is that there is no need to define it analytically − viz., in terms of economic categories − nor to explain how competition is endogen-

16 See Hovenkamp (1989, 1021).

17 See also May (1989, 274–5).

ously generated within the model. Schumpeter claimed that classical economists were "so firmly […] convinced that the competitive case was the obvious thing, familiar to all, that they did not bother to analyze its logical content. In fact, the concept was usually not even defined. It just meant the absence of monopoly − which was considered as abnormal and was vigorously condemned, but was not properly defined either − and of public price fixing" (1986 [1954], 545–6). As I just argued, this is not entirely correct, in that competition was indeed identified, albeit only indirectly, as freedom of contract. But even if we accept that classical competition "just meant the absence of monopoly," the question arises as to what happened when competition could not work, i.e., when monopoly existed.

3. Monopoly and the Non-Persistence Argument

The common view is that classical economists substantially neglected the issue of monopoly. According to Nobel laureate George Stigler, in this they followed the Smithian imprint (1982, 1). Given the long-run orientation of their economics, their neglect of entry barriers, and the still limited role played in contemporary business affairs by sunk costs and technical progress, classical economists were bound to devote little attention to the formal theory of monopoly. This was because monopoly was only a short-term phenomenon in their model that the forces of competition, if left free to operate without external interference, would quickly eliminate. The ubiquitous presence of potential competition, coupled with complete free entry, ensured that any supra-competitive profit would immediately attract new capital that, in turn, would bring profit back to its natural level. Here lies the gist of the *profit equalization theorem,* one of the core analytical principles of classical economics.

For Smith and his heirs, perfect resource mobility and entry freedom drove market prices to their natural level by equalizing the total advantages of alternative employments of labor and capital. Smith had claimed that an individual would invest a resource, be it capital, land or labor, so as to earn the highest possible return on it. It followed that all uses of the resource should yield an equal rate of return (adjusted for the relative riskiness of each enterprise), lest reallocation of the resource to alternative uses result. In Smith's words:

> The whole of the advantages and disadvantages of the different employments of labour and stock must, in the same neighbourhood, be either perfectly equal or continually tending to equality. […] This at least would be the case in a society where things were left to follow their natural course, where there was perfect liberty, and where every man was perfectly free both to chuse what occupation he thought proper, and to change it as often as he thought proper *(WN* I.10.1).

Stigler called this argument the "most substantive proposition in all of economics" (1976, 1201).[18]

Epitomized by the profit equalization theorem, the Smithian characterization of competition would be neither "amplified [nor] challenged in any significant respect for the next three-quarters of a century by any important member of the English school" of classical economics (Stigler 1982, 3). By way of example, in 1825 future UCL professor John Ramsey McCulloch declared: "The inextinguishable passion for gain − the *auri sacra fames* − will always induce capitalists to employ their stocks in those branches of industry which yield, all things considered, the *highest rate of profit* […] But the rate of profit in different employments has a natural tendency to equality; and it can never, when monopolies do not interpose, continue either permanently higher or lower in one than in the rest" (McCulloch 1825, 163, emphasis in original). Three decades later, Oxford professor Nassau William Senior could still write that the operation of competition "can be supposed to be perfect only if we suppose that there are no disturbing causes, that capital and labour can be at once transferred, and without loss, from one employment to another, and that every producer has full information of the profit to be derived from every mode of production" (1854, 102).

The theorem's implication for monopoly theory was clear. Smith, like many of his predecessors and all of his heirs, "intensely disliked monopoly in all its forms" (Viner 1960, 65), but at the same time thought permanent private monopoly impossible. This was because classical economists extended "to almost the whole range of industry and trade" Smith's argument that deemed "the establishment of an enduring monopoly *a practical impossibility"* (*ibid.*, emphasis added). In other words, free competition − actual and, above all, potential − made persistent monopoly unfeasible.

This thesis, which we may call the *non-persistence argument,* itself enjoyed persistence in the economic literature. Indeed, it long outlasted classical economics proper. So, for instance, as late as 1886 Illinois economist Julian Sturtevant proclaimed that "[t]here will never be wanting those who will be eager to produce a commodity at a price equal to the cost of production" and that this easy and rapid entry of newcomers would automatically discipline any firm, or group of firms, that attempted to charge monopoly prices (1886, 59). Faith in potential competition remained strong in many of the early neoclassical authors. The best economic mind of the Progressive Era, John Bates Clark, famously established potential competition as the most fundamental feature of the market mechanism. "The competitor who is not now in the field, but who will enter it at once if prices are unduly raised, is the protector of the purchasing public against extortion," he declared at an 1899 conference on trusts. "The competition that is now latent, but is ready to spring into activity if very high

[18] For the theorem to work, further conditions on knowledge and time are necessary: see Stigler (1982, 3). While rarely stating them explicitly, classical economists also held these conditions to be valid.

prices are exacted, is even now efficient in preventing high prices" (Clark 1900, 407). As it turns out, the non-persistence argument (along with several other classical doctrines) was alive and kicking long after the "official," textbook-style ending of the classical era around 1870.

Summing up, classical economists subscribed to the doctrine that permanent monopoly could never be a *natural,* i.e., spontaneous, outcome of the market mechanism. Their theory of free competition, and in particular their profit equalization theorem, entailed that the origin and persistence of monopoly could only be artificial. The upshot was that the modern characterization of competition as absence of market power warranted much less emphasis in their system than the notion of competition as freedom of contract. Granting the latter, the former always subsisted and, what mattered more, could always police itself, because in a truly free market no monopolistic position could arise or survive. This explains why, as Stigler noted, these economists devoted little energy to the analysis of an issue, market power, which was regarded as at most temporary and, in any case, fully within the sway of competitive forces.

The non-persistence argument fits nicely with the idea that classical competition was not a theory about price / cost relationships, as it came to be in neoclassical economics, nor a theory about the struggle for survival, as it became for the so-called Social Darwinists. Rather, classical competition was, as Herbert Hovenkamp put it, "a theory about the limits of state power to give privileges to one person or class at the expense of others" (1989, 1021). This is just a different way of saying that in the classical model government interference was the only true hindrance to competition and that, conversely, monopoly could only arise and endure *artificially.*

Monopoly was artificial because it was synonymous with, and a direct offspring of *special privilege.* The latter expression indicated any kind of legislation aimed at allocating resources in a way that denied equality of opportunity to all individuals − legislation that infringed the egalitarian premise, usually by constraining freedom of contract. In other words, monopoly meant market power achieved through the only means that escaped the leveling effect of market forces, viz., government action arbitrarily obstructing competition. It followed that monopoly was first and foremost a legal and political, rather than theoretical problem. Here lies the deepest reason why classical economists had little to say, analytically speaking, about monopoly. When they wrote about monopoly, it was mainly to attack special privileges granted by government − an institutional, rather than analytical, issue.[19]

[19] See also Hovenkamp (1989, 1025) and De Roover (1951, 523).

4. Elevating Public Interest: *Munn v Illinois*

Lochner represented the culmination of a long jurisprudential journey that had started after the Civil War and where a few justices, including Peckham, played a major role. Affirming freedom of contract as a constitutional principle met significant resistance along the way. A good starting point for our inquiry is thus a somehow antithetical decision, *Munn v. Illinois.*[20]

In that famous police power case, the post-Civil War Supreme Court affirmed state regulatory authority.[21] The case involved one of the so-called Granger laws enacted in five Midwestern states in the late 1860s and early 1870s under the pressure of an organization of small farmers, called the Granger movement, which fought monopolistic grain transport practices. In 1871 Illinois farmers had obtained from their state legislature a bill fixing the maximum rates that railroads and grain-storage facilities could charge for their services, including the use of grain elevators. Other states had passed similar regulatory legislation. Penalties applied if the rates were exceeded, so it did not take long for these laws to be challenged in court. What became known as the Granger cases eventually reached the Supreme Court, *Munn* being the most significant.

Munn & Scott Company, a Chicago facility providing grain storage and elevator services, had challenged the constitutionality of the Illinois rate regulation. Counsels for the plaintiff, the star of Chicago bar William Charles Goudy and his younger colleague John Nelson Jewett, offered an array of arguments to challenge the statute.[22] First, counsels argued that the due process clause of the Fourteenth Amendment, substantively interpreted, prohibited price regulation as an infringement of property rights and economic liberty. Hinting at an embryonic freedom of contract thesis, they even asserted that the Illinois statute was "a bald attempt to disable those engaged in the commerce of the country from making their own contracts, and to prevent prices from being regulated by the general commercial laws of the country" (quoted by Twiss 1942, 82). Moreover, counsels warned against the erection of police power into a sort of despotism of the majority. No longer a matter of promoting growth as in the pre-Civil War era, police power only served the purpose of regulating the

20 94 US 113 (1877).

21 Police power is the capacity of government to regulate behavior and enforce order for reasons of health, safety, morals, and general welfare. A classic definition depicts it as "the power vested in the legislature by the constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the Commonwealth, and of the subjects of the same" (*Commonwealth v Alger*, 61 Mass. (7 Cush) 53, 1851, at 85).

22 For a thorough analysis of the plaintiff's arguments in *Munn,* see Twiss (1942, 81–8).

economy by interfering with someone's property rights. It was, in short, a matter of sheer opposition between property and state power. Surely the latter, Goudy and Jewett argued, could not annihilate the substance of the former by destroying the value of its use, that is to say, the income that could be drawn from it.[23]

Rejected by the Court's majority, the latter argument found endorsement in Justice Stephen Johnson Field's dissenting opinion. "If the constitutional guaranty extends no further than to prevent a deprivation of title and possession, and allows a deprivation of use, and the fruits of that use", Field lamented, "it does not merit the encomiums it has received" *(Munn,* at 141). One year later, Thomas McIntyre Cooley − the author of the most famous treatise on constitutional law of the time (Cooley 1868) − would also criticize the *Munn* majority doctrine that "profits are not property, and, therefore, constitutional protection cannot be claimed for them." He would proclaim that a "constitutional protection of this sort is a mere mockery" (Cooley 1878, 270).

A 7-to-2 majority of the Court upheld the Illinois statute. In rejecting the plaintiff's arguments about the Fourteenth Amendment, the Court emphasized that property rights had always been limited by the overriding claims of the community. "When one becomes a member of society," Chief Justice Morrison Remick Waite declared, "he necessarily parts with some rights or privileges which, as an individual not affected by his relations with others, he might retain" *(Munn,* at 124). Yet the decision was far from obvious, even passing over Goudy and Jewett's objections. Many jurists believed price controls were beyond state power unless a business operated under a charter authorizing the regulation, which was not the case with Munn & Scott. The Chief Justice had therefore to define the scope of state regulatory authority. Applying the public interest doctrine developed in common law, Waite famously argued that: "Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created" (*ibid.*, at 126).

Once it had been established that Illinois legislators could regulate the rates charged for the use of grain elevators, the statute could set *any* rate, even rates that were *de facto* confiscatory of Munn & Scott's property. Courts had no legitimate right to question those rates. True, common law made express reference to the reasonableness of charges, but it was no judge's business to establish what "reasonable" meant. "[T]he practice has been otherwise," Waite underlined. "In countries where the common law prevails, it has been customary

[23] *Munn, Brief and Argument for Plaintiffs*, quoted by Kens (2005, 425).

from time immemorial for the legislature to declare what shall be a reasonable compensation under such circumstances, or, perhaps more properly speaking, to fix a maximum beyond which any charge made would be unreasonable" (*ibid.*, at 133). The regulatory power of the legislature, *Munn* held, was complete and exclusive, subject to no judicial revision. Reasonableness was not a matter for judges.

Waite's landmark doctrine of "business affected with a public interest" was a masterful solution that grounded police power upon solid foundations. Still, the decision did not completely shut the door to a substantive application of the Fourteenth Amendment. The *Munn* Court said nothing about the plaintiff's argument in the case of a wholly private business, one that did not directly affect the public interest.[24] Was such a business legitimately subject to regulation too? Later jurisprudence would make good use of the small opening left by Waite.

5. Liberty of Contract's First Breakthrough

In 1879 the state of Louisiana adopted a new Constitution that abrogated the monopoly features contained in most corporate charters. This opened the right to engage in various kinds of business to general competition. Butchering was one such business. Crescent City Company, the incumbent monopolist and the beneficiary of the historic *Slaughterhouse* decision thus filed suit, alleging that the new rules amounted to an impairment of its corporate charter, in violation of the Contract Clause of the Constitution.[25] The controversy ended in 1884, with a unanimous Supreme Court upholding Louisiana's legislation.[26] The case owes its fame to the concurring opinions of Justices Field and Joseph Philo Bradley who reiterated the gist of their vehement dissents of a decade before in *Slaughterhouse.*

Bradley's concurrence is especially relevant to our story. Writing for two other justices, Bradley insisted that conferral of a monopoly that prohibited individuals from pursuing their callings deprived them of liberty and property without due process. As he put it, "the law which created the monopoly in question […] does deprive [a citizen] of his liberty, for it takes from him the freedom of adopting and following the pursuit which he prefers, which, as already intimated, is a material part of the liberty of the citizen. And if a man's

24 See also Hall and Karsten (2009, 255).

25 In the *Slaughter-House Cases* (83 U.S. 36, 1873) the Supreme Court had affirmed a Louisiana statute granting Crescent City Company exclusivity of butchering activity in New Orleans for reasons of public health. The case was the first in which the justices were asked to interpret the post-Civil War constitutional amendments. For a concise and effective reconstruction of *Slaughterhouse,* see Barnett (2016).

26 *Butchers' Union Co. v. Crescent City Co.,* 111 U.S. 746 (1884).

right to his calling is property, as many maintain, then those who had already adopted the prohibited pursuits in New Orleans were deprived by the law in question of their property as well as their liberty without due process of law" *(Butcher's Union,* at 765). Bradley's opinion, together with Field's, would soon be read not as mere concurrences, but as *the* opinion of the *Butcher's Union* Court. As such, these opinions would become the foundations of the freedom of contract doctrine.

The end of butchering monopoly in New Orleans demonstrates that by the mid-1880s, at least four members of the Supreme Court concurred in the view that the Fourteenth Amendment guaranteed substantial protection of economic rights from state interference. Yet the *Butcher's Union* majority had stopped short of affirming this. With judicial recognition stymied at the federal level for a few more years, much of the intervening development on liberty of contract took place in state courts, as well as in legal scholarship.

A couple of years after *Butcher's Union,* treatise writer and laissez faire advocate Christopher Tiedeman proposed a narrower conception of police power along the same lines of the plaintiff's brief in *Munn.* Urging judicial protection of free market principles, Tiedeman fully developed the notion of liberty of contract that Goudy and Jewett had only sketched. He maintained that freedom to enter contracts was a property right not subject to general state regulation: "It is a part of the natural and civil liberty to form business relations, free from the dictation of the State, that a like freedom should be secured and enjoyed in determining the conditions and terms of the contract which constitutes the basis of the business relation or transaction" (Tiedeman 1886, 233). Tiedeman's treatise was popular in legal circles, so much so that his analysis became another milestone in the evolution of the liberty of contract doctrine. The breakthrough then occurred at the level of state courts.

The pivotal case came in 1885. In *Jacobs* the New York Court of Appeals proclaimed that constitutionally protected liberty includes the right to pursue all lawful callings.[27] A small cigar producer, Peter Jacobs, had been arrested for making cigars in one room of the tenement house apartment where he resided with his family. Such activity was in violation of an 1884 New York state law which made it a misdemeanor to manufacture cigars in tenement houses located in cities with a population of more than 500,000 (that is, only in New York City and Brooklyn). Jacobs sought a writ of *habeas corpus* and the case eventually reached the Court of Appeals. Writing for a unanimous court, Judge Robert Earl concluded that the statute arbitrarily deprived Jacobs of property and liberty without due process of law.

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[27] *In re Jacobs,* 98 N.Y. 98 (1885). My account of the case follows Gillman (1993, 88–9) and Ely (2006, 938–43). For a critical view, see Kens (1998, 68–9).

Prince of the New York bar, William Maxwell Evarts, was counsel for Jacobs. The former US Attorney General and Secretary of State brought to the court a score of arguments about liberty and property rights, borrowing from, among other sources, Field and Bradley's previous opinions.[28] This time, counsel was successful. Emphasizing that a law that destroyed the value of property amounted to undue deprivation even without physical taking, the court concluded that the law interfered with Jacobs's property interest, namely, the right to use his own apartment as he desired. Even more significantly, Earl defined liberty not only as freedom *from* restraint in the enjoyment of property, but also as freedom *to* pursue any economic activity. Free labor ideology pervaded his opinion: Jacobs had a right "to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation" *(Jacobs,* at 106).[29]

To buttress its views, the court quoted from Field and Bradley's concurring opinions in *Butchers' Union,* treating them as correct statements of constitutional norms. Any law infringing these "fundamental rights of liberty" was unconstitutional, unless justified as an exercise of the police power (*ibid.*, at 107). No such justification existed in the given case. Being unconnected to any valid police power interest, the prohibition was therefore arbitrary and unconstitutional. The real intent of the statute was to give an advantage to cigar makers established elsewhere by imposing special burdens on small producers in New York and Brooklyn: a manifest instance of special interest legislation.

In particular, Earl found the public health rationale unpersuasive. Was the manufacture of tobacco products really injurious to health? The court agreed that "it is for the legislature to determine what laws and regulations are needed to protect the public health and secure the public comfort and safety," but added − with words that will be echoed a decade later in Justice Peckham's *Lochner* opinion − that those laws and regulations "must have some relation to these ends." Judges had a duty to safeguard fundamental rights by verifying the validity of the means / ends relation. "Under the mere guise of police regulations," Earl wrote, "personal rights and private property cannot be arbitrarily invaded, and the determination of the legislature is not final or conclusive. If it passes an act ostensibly for the public health, and thereby destroys or takes away the property of a citizen, or interferes with his personal liberty, then it is for the courts to scrutinize the act and see whether it really relates to and is convenient and appropriate to promote the public health" (*ibid.*, 113). The court actually expressed concern that, under the excuse of public health, the legislature might

[28] For details of Evarts's brief, see Twiss (1942, 99 – 106). Among the authorities summoned by Evarts featured the passage from the *Wealth of Nations* about "the property which every man has in his own labour" being "the original foundation of all other property," and so "the most sacred and inviolable" (*WN* 1.10.67).

[29] "Free labor," i.e., the idea that each laborer had to be free, independent and equal in the eyes of the law, had been the key ideology of the pre-Civil War Republican Party: see Foner (1970, chapter 1).

"have placed under a similar ban the trade of a baker, of a tailor, of a shoemaker, of a woodcarver, or of any other of the innocuous trades carried on by artisans in their own homes" (*ibid.*,114). Peckham would reiterate these words in *Lochner.*

The *Jacobs* decision marked the turning point with respect to future laissez faire constitutionalism.[30] The New York court had applied the doctrine of occupational freedom in a different context than *Butchers' Union.* No monopoly was involved here, nor had any special privilege been directly created by the statute. With its decision, the court had clarified that what was at stake was "freedom to," not just "freedom from." Jacobs did not plead for liberty *from* monopoly or special privilege, but for the broader freedom *to* pursue any economic activity.[31] Following *Jacobs,* the right to pursue one's calling would gain judicial strength at state level over the course of the last fifteen years of the century. Even more interesting from the point of view of this study, the decision had a remarkable influence on the closely related issue of liberty of contract. State courts played a decisive role here, too. *Jacobs* was frequently quoted in their opinions, often alongside Field's and Bradley's arguments about liberty and property.

In the 1886 *Godcharles* case, the Supreme Court of Pennsylvania was asked to decide about the constitutional validity of a Pennsylvania statute that prescribed that wages be paid in cash at the end of each month.[32] The court struck down the act. Its relevant sections, it declared in a passage deserving full quotation, were

> utterly unconstitutional and void, inasmuch as by them an attempt has been made by the legislature to do what, in this country, cannot be done; that is, prevent persons who are *sui juris* from making their own contracts. The act is an infringement alike of the right of the employer and employee; more than this it is an insulting attempt to put the laborer under a legislative tutelage which is not only degrading to his manhood, but subversive of his rights as a citizen of the United States. He may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal, and any or every law that proposes to prevent him from so doing is an infringement of his constitutional privileges, and consequently vicious and void *(Godcharles,* at 437).

Apparently, the Pennsylvania Court tailored its decision out of new cloth, citing no precedents whatsoever. Still, we know that the ideas that all men *sui*

30 See also Ely (2006, 943 – 7).

31 Counsel for Jacobs had actually stressed both freedoms. In particular, Evarts lamented that the New York statute destroyed the "free competition" that home-based cigarmakers brought to big cigar producers, thereby leaving the ground open to the domination of "organized capital and combination [and] trade unions" *(*quoted in Twiss 1942, 103).

32 *Godcharles and Co. v. Wigeman,* 113 Pa. St. 431 (1886).

juris (i.e., not criminal or insane) are equal before the law in their ability to contract, that labor is a commodity in a free, contract-based market, and that there can be no legislative interference with the operation of market laws were hardly a novelty for jurists and economists alike. With respect to 19th-century constitutional law, progressive historian Benjamin Twiss noted long ago that Cooley's *Constitutional Limitations* probably represented more than a blueprint for the *Godcharles* opinion.[33] As to political economy, apart from the obvious similarity between the Pennsylvania judges' and the classical economists' general views about the role of the state in the economy, it suffices here to point out that the right of every individual to enjoy the same economic rights as anyone else was among the pillars of the Smithian system of natural liberty.[34]

Godcharles is read by friends and foes of laissez faire constitutionalism as the first decision by an American court that decisively turned upon the phrase "liberty of contract," i.e., on the idea that an individual's faculty to enter any kind of contract was both a liberty and a property right.[35] The decision soon obtained a considerable following. In 1895 the Illinois Supreme Court drew on *Godcharles* to hold unconstitutional a statute setting maximum limits on the hours worked by women in factories. This case, *Ritchie v. People,* is considered the most transparent statement of the liberty of contract doctrine of the pre-*Lochner* era.[36]

The court found that the Illinois statute exceeded the legitimate scope of state police power by abridging the freedom of both employers and employees to freely contract the hours of labor. "Labor is property", the *Ritchie* opinion famously averred, "and the laborer has the same right to sell his labor, and to contract with reference thereto, as has any other property owner. In this country the legislature has no power to prevent persons who are *sui juris* from making their own contracts, nor can it interfere with the freedom of contract between the workman and the employer" *(Ritchie,* at 455).

After these and similar decisions at the state level, the time was ripe for freedom of contract to be acknowledged as a constitutional right by the Supreme

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33 See Twiss (1942, 129). In particular, the *Godcharles* court's words are strikingly similar to those in a very famous page of Cooley's (1868, 393) treatise.

34 Even more specifically, the reference to the full contractual ability of all individuals *sui juris,* trite as it might be in legal jargon, echoed a similar passage about the undesirability of interest rate controls by John Stuart Mill: "A person of sane mind, and of the age at which persons are legally competent to conduct their own concerns, must be presumed to be a sufficient guardian of his pecuniary interests. If he may sell an estate, or grant a release, or assign away all his property, without control from the law, it seems very unnecessary that the only bargain which he cannot make without its intermeddling, should be a loan of money" (1909 [1848], V.10.19).

35 See also Pound (1909, 471).

36 *Ritchie v. People,* 40 N.E. 454 (1895). See also Pound (1909, 475–6) and Mayer (2009, 232–3).

Court. All elements were on the table. Yet, despite the efforts by the likes of Bradley and Field, what was still missing in the Court was a justice talented enough to assemble those elements and persuade a majority of his brethren. That justice was, as we know, Rufus Peckham; but, as we will discover, Peckham's talents were not restricted to the legal domain. Classical political economy was almost as important for his jurisprudence.

6. "The Master of Anglo-Saxon Monosyllabic Interjections"

Compared to the state courts, the US Supreme Court was slow to adopt the liberty of contract doctrine, which only received the justices' endorsement in 1897. In *Allgeyer* a unanimous Court gave a broad reading to the scope of liberty as protected by the due process clause of the Fourteenth Amendment, embracing for the first time freedom of contract as a constitutional principle.[37]

At issue in the case was a state law that prohibited a Louisiana citizen from entering an insurance contract with a "foreign" (i.e., out-of-state) company not qualified to do business in that state. Reversing the decision by the Louisiana Supreme Court, the justices declared: "The 'liberty' mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned" *(Allgeyer,* at 589). Following these words was an express reference to Justice Bradley's *Butchers' Union* concurrence. The viewpoint that had earlier found expression only in minority opinions was now advanced on behalf of the entire Court by its newest member, Justice Rufus Wheeler Peckham.

An active Jacksonian Democrat like his father, a judge at the New York Court of Appeals (again like his father) from 1887 to 1895, and an associate justice of the US Supreme Court from 1896 to 1909, Peckham authored other landmark opinions for the Court, including *Lochner* and some of its earliest antitrust cases.[38] This fact alone would justify a closer analysis of his jurisprudence. Surprisingly enough, Peckham has not received much attention from

[37] *Allgeyer v. Louisiana*, 165 US 578 (1897).

[38] A turning point in the early years of the Sherman Act, Justice Peckham's antitrust jurisprudence would deserve a separate analysis. Suffice it to say that even in the realm of antitrust, classical economics remained his guiding light. As to the question of where Peckham, who never went to college, could have learned his political economy, neither the Peckham Familiy Papers at the Library of Congress nor the syllaby of the Albany Academy (NY) he attended as a boy provide an answer.

historians of the Lochner era. Probably a major factor in this neglect has been played by the low opinion his arch-rival on the Court, the great Justice Oliver Wendell Holmes, had of his legal skills.[39] Still, the few studies that analyze his contribution suffice to sketch the main features of his jurisprudence.[40]

One of his rare biographers so concludes: "The central tenet of Peckham's constitutionalism was a deep attachment to liberty, a concept that he defined largely in terms of economic freedom and limited government. He therefore sought to protect the rights of property owners and the autonomous role of the states within the federal system. Conversely, Peckham was hostile to what he perceived as class legislation and schemes to redistribute wealth" (Ely 2009, 635). "In general terms", Ely continues, "he echoed the attitudes of the Framers of the Constitution, who closely linked respect for property rights with liberty. Like most of the other Justices on the Fuller Court, Peckham was not shy about invoking judicial review to safeguard economic rights. In general, he certainly did not defer to legislative judgments. Peckham's libertarian inclinations led him to reject the nascent doctrine of judicial deference promoted by Progressives of the early twentieth century in order to encourage the emerging regulatory state" (ibid.). A way to recap all this is to say, like Ely, that *liberty trumped equality* as a constitutional norm in Peckham's jurisprudence, as well as in that of those conservative jurists who, like him, perceived the interventionist policies of the Progressive era as a threat to liberty.

Ely's description is correct, but may be strengthened further. To classical economists' eyes, liberty was itself essential to formal equality, while government interventions were nearly always tantamount to inequality. And liberty was, as we know, the key ingredient of a social order that, like in the *Wealth of Nations,* had competition as its general organizing principle.

In an earlier study, William Duker had already emphasized Peckham's laissez faire side. Once again, it was a peculiar kind of laissez faire. Like classical political economists, Peckham focused on individual liberty and on the subjective moral development such liberty made possible, rather than on business interests or social welfare. For Duker, Peckham's "master idea" was "a philosophical conception of individual liberty and a supporting political conception of the role of government that placed considerable emphasis on the relationship between the judicial and legislative branches of government. In short, the best government was the least government. Trust was placed in the free individual who, if left unfettered by needless governmental regulation, would grow more intelligent and more attuned to the moral law, thereby decreasing the need for

39 Holmes famously described Peckham as the "master of Anglo-Saxon monosyllabic interjections," whose "major [jurisprudential] premise was, 'God damn it!'" (Bickel and Brandeis 1957, 164).

40 Here I follow Duker (1980); Ely (2009), (2012a); and the sections on Peckham's jurisprudence in Meese (1999).

government" (Duker 1980, 50). This description of Peckham's legal philosophy would fit any of the classical economists who may have inspired him. Above all, it captures the gist of Adam Smith's system of natural liberty.[41]

Conversely, simplistic characterizations of Peckham as the reactionary protector of Corporate America are off the mark. His work first as a judge and then as a justice does not fit what Ely calls "the cartoonist image fashioned by the Progressive historians and their progeny of a one-sided champion of large-scale business interests" (2012a, 38). His antitrust decisions reveal that Peckham's concern was rather the protection of small entrepreneurs from all kinds of coercion and exploitation. Government regulation or economic power, it made no difference. Regarding the former, he held that the legitimacy of legislation abridging marketplace rights could never be presumed. Lawmakers always had to demonstrate that regulation enacted in the exercise of police power really promoted public health, safety, or morals. At the same time, Ely explains, Peckham was no legal formalist. He did not fit the caricature of a judge mechanically adhering to a formal conception of the law regardless of policy considerations. "Even a glance at Peckham's opinions makes it evident that he was not engaged in abstract deduction from legal principles and precedents. Instead, Peckham championed what he regarded as socially desirable outcomes in defense of property rights and contractual freedom" (Ely 2009, 637). The sanctity of classical economic rights, to be verified case by case, represented the limit to police power.

Peckham's liberty of contract decisions while at the New York Court of Appeals confirm the foregoing characterization. What emerges is the portrait of a judge attempting to cope with the problems of the new regulatory state in the manner of the classical liberals and classical economists, that is to say, by strenuously defending individual rights. We already noticed that Field and Bradley's opinions, while a minority on the Supreme Court, were adopted by various state courts. Among the latter was the New York Court of Appeals, with Peckham playing a leading role. Indeed, anyone familiar with his opinions in that court could hardly be surprised on reading *Allgeyer, Lochner* or his antitrust jurisprudence.

Writing for a unanimous court in *People v. Gillson,* Peckham invalidated a provision of the state penal code prohibiting the sale of food or any offer to sell upon a representation or inducement that something else would be provided as a gift, prize, premium, or reward to the purchaser.[42] The provision had been

41 Peckham's "master idea" also included a well-defined role for the courts: "The judiciary was set up as a check on unnecessary governmental interference in the affairs of the individual," Duker (1980, 50) notes. It was above all this conception of the courts' role that distinguished Peckham from Holmes. While the latter was unwilling to single out a list of absolute public values and preferred to leave their identification to elected legislators (White 1993, 342; Ely 2012b, 28), the former believed that the task of discerning and announcing values also belonged to the judiciary.

employed by the state of New York against the Atlantic & Pacific Tea Co. for offering a free teacup and saucer (!) to purchasers of coffee. The *Gillson* opinion anticipated much of Peckham's reasoning in *Lochner.* Peckham could not accept the regulation's declared purpose at face value. In the absence of clear evidence offered by the New York legislature, it was up to the court to investigate whether the provision was "reasonably necessary for the common welfare." The *Jacobs* precedent by the same court clearly spoke in this sense, Peckham underlined *(Gillson,* at 346).

That it was within the legislative domain to determine what regulations were needed to protect public health, safety, or morals was plain to Peckham. Still, it was the judiciary's duty to make sure that the means taken by the legislature had a direct relation to a legitimate end. As he put it in words that will be repeated almost verbatim in *Lochner:* "there must be some fair and reasonable relation of means to end, which courts can see and admit the force of' (*ibid.*, at 347). Accordingly, he undertook a deep scrutiny of the regulation, weighing the facts for and against. What he searched for was a valid rationale for the law, or evidence of fundamental rights' violation.

The final result of Peckham's scrutiny was that the regulation had, in his view, no relationship to its alleged purpose: it represented an infringement of liberty and property that legislators had not been able to justify. In particular, the provision had nothing to do with unwholesome food, nor constituted a necessary safeguard for customers lured into buying a product they did not really need. In these respects too, *Gillson* clearly foreran *Lochner:* in the latter, legislation sought to protect the individual by prohibiting him from working longer hours; in *Gillson*, the state sought to protect the individual from purchasing more coffee than necessary. In both cases, Peckham found no direct relation between the exercise of police power and public health, safety or morals. "Liberty, in its broad sense, as understood in this country," wrote Peckham in 1888, quoting *Jacobs* among other precedents, "means the right not only of freedom from servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways to live and work where he will, to earn his livelihood in any lawful calling and to pursue any lawful trade or avocation" (*ibid.*, at 345). The New York regulation was clearly in conflict with the constitutional right to individual economic freedom. This conclusion would represent the cornerstone of Peckham's jurisprudence.

42 *People v. Gillson,* 17 N.E. 343 (N.Y. 1888). On this case, see Duker (1980, 51–2); Ely (2009, 594–5), (2012a, 24).

7. Elevating Competition: the *Budd* Dissent

Peckham's commitment to the protection of economic rights culminated in his dissenting opinion in a case concerning the power of the state to set maximum charges for operating grain storage and elevator services. The dissent invoked "the general rule of absolute liberty of the individual to contract regarding his own property," which would become the hallmark of his subsequent jurisprudence. Even more significantly, it contained a thorough analysis of monopoly that was entirely based upon classical foundations. These pages thus represent the best piece of evidence of Peckham's acquaintance with classical political economy.

In *People v. Budd,* the New York Court of Appeals had applied the *Munn* doctrine to uphold price regulation.[43] Peckham directly challenged the Supreme Court's rule that states could prescribe rates for businesses "clothed with a public interest." While acknowledging once again that a state could exercise its police power to protect public health, safety or morals, he emphasized that "a power to limit compensation is another and far greater and more dangerous power" *(Budd,* at 38). Following the characterization of individual liberty he had given in *Gillson,* the would-be justice disagreed with the majority's willingness to allow legislative interference with the freedom to set the price for one's own services. In particular, he denied that any special burden affected an individual only because he had devoted his property to a business in which large part of the public was interested, or because he happened to be the only provider of that service by the fortuity of his property being conveniently situated (*ibid.*, at 40).

Peckham lamented that "if the mere extent of the use of one's property by the public, in the particular business in which he is engaged, is to stamp that use as a public one, and if he is, therefore, to be held to have devoted his property to a public use, *the power of the legislature may be imposed upon a vast number of employments* which have heretofore been regarded as wholly private, although at the same time very extensive" (*ibid.*, at 56, emphasis added). "The legislation in question," he complained a few pages later, "is nothing else than an effort, not only to regulate the private business of private individuals, but to limit the amount for which they shall exact compensation for the use of their own property, in which the public has no interest whatever, in the legal meaning of that term. *If it is legal in this case, it is legal in any.* The legislature can step in and limit the prices of every article of commerce, the product of the

[43] 117 N.Y. 1 (1889). Peckham's dissent was originally written for *People ex rel Annan v. Walsh,* 22 N.E. 682 (N.Y. 1889), another case involving the same regulation. However, in that case no majority opinion was written. His opinion was therefore reproduced in a companion case, *Budd,* and endorsed by the other dissenting judge, John Clinton Gray.

field, the mine or the manufactory" (*ibid.*, at 67, emphasis added). The italicized words in both passages, cautioning as they do against undue extension of the state's power to regulate economic activity, would find a counterpart in *Lochner:* "It is unfortunately true that labor, even in any department, may possibly carry with it the seeds of unhealthiness. But are we all, on that account, at the mercy of legislative majorities? A printer, a tinsmith, a locksmith, a carpenter, a cabinetmaker, a dry goods clerk, a bank's, a lawyer's or a physician's clerk, or a clerk in almost any kind of business, would all come under the power of the legislature on this assumption. No trade, no occupation, no mode of earning one's living could escape this all-pervading power" *(Lochner,* at 59).

Peckham was evoking no abstract danger, but a very concrete threat, harming an individual in flesh and blood whose rights and liberties were arbitrarily oppressed by state regulations:

> A man may set up scales for weighing merchandise by the wholesale, upon his own lands, and announce his readiness to weigh the merchandise of all comers upon such terms as they may agree as to compensation. As soon as his business reaches proportions large enough to enable the legislature, in its discretion, to declare that he has devoted his property to a public use, that moment it is clothed with the power to limit him in his compensation for the use of his own property. […] As long as you are in the business you must submit to be regulated by the power of the state *(Budd,* at 56).

As Duker remarks: "The elevator operator in *Budd* was the paradigmatic rugged individual for Peckham. His monopoly was not acquired with the help of government or combination, but by superior individualism" (1980, 54). To uphold the New York legislation against the freedom of this individual, Peckham warned, would sanction "so plain an effort to interfere with what seems to me the most sacred rights of property and the individual liberty of contract" *(Budd,* at 69). Hence, his battle cry in favor of the "absolute liberty of the individual to contract regarding his own property" (*ibid.*, at 48).[44]

The *Budd* dissent contained more than a defense of individualism. It also featured a remarkable analysis of monopoly power and its sources. This analysis acquires special value in view of Peckham's later jurisprudence. Even more so when we recognize that in these pages he deployed a breadth of scholarly erudition, ranging from Smith to early marginalist economist William Stanley Jevons, from Cooley and Tiedeman to the history of English common law.

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[44] Peckham also believed this kind of legislation could encourage class warfare: "in addition to the ordinary competition that exists throughout all industries, a new competition will be introduced, that of competition for the possession of the government, so that legislative aid may be given to the class in possession thereof in its contests with rival classes or interests in all sections and corners of the industrial world" *(ibid.*, at 68–9). Still, the theme of class privilege and special interest legislation − central as it was in the Jacksonian tradition he had embraced as a young man − played only a complementary role in Peckham's freedom of contract jurisprudence. On this theme, see Gillman (1993, chapter 3).

Peckham's argument rejected the thesis that, in both *Munn* and *Budd,* the grain elevator service amounted to a "virtual monopoly" that by itself justified price regulation.[45] He began by carefully delimiting the meaning of the term. "Loosely speaking," he acknowledged, "a person or corporation is said to have a virtual monopoly of a business when, on account of its great extent and the facilities it has for transacting it, arising from its large proportions, the article it manufactures or sells substantially takes possession of the market" (*ibid.*, at 64). However, this meaning was not relevant for justifying price regulation: "But when the right of regulation as to compensation is spoken of because the person has a virtual monopoly, the term has heretofore been used as indicative of *some special privilege or franchise granted to the individual by the sovereign* which results in such virtual monopoly, and the right of such regulation exists by reason of such grant" (*ibid.*, at 65, emphasis added). Thus, from the viewpoint of police power, any "virtual monopoly" rested upon the state's infringement of the liberty of others to compete on an equal footing with the putative monopolist.

Two consequences followed. First, that "so long as every one is free to go into the same business, and invest his capital therein with the same rights and privileges as those who are already engaged in it, there can be no monopoly in legal acceptance of the term, virtual or otherwise" (*ibid.*, 40 – 1).[46] Second, that the state's authority to regulate prices should be confined to exceptional situations, such as common carriers or those enterprises that enjoy a privilege granted by government and so could legitimately be asked to give up in exchange some of their pricing freedom. "No monopoly of that kind exists in this case," Peckham remarked about grain elevators. "If it be said that the effect is the same, the answer is that it is not the same" (*ibid.*, at 65). No regulation was in fact necessary when the free play of market forces sufficed to eliminate monopoly − i.e., when the classical non-persistence argument held sway.

It was at this juncture that Peckam offered an illuminating account of the traditional difference between *de jure* and *de facto* monopolies. "In the one case," he wrote,

> the monopoly exists by reason of the action of the government, and no other citizen can come in and devote his capital and energy to such use. In the other the monopoly exists only as long as other citizens choose to keep out of the business, and *just as soon as it is seen that the least degree over the ordinary profit can be realized by an investment in elevator property, just that moment capital will flow into that channel,*

[45] Here I follow Meese (1999, 29 – 32).

[46] "The case of 'virtual' monopolies effected by superior industry, enterprise, skill, and thrift, it would seem, might be passed over in silence. When the person who by such means has secured special advantages has done so without the aid of any peculiar privileges, and with every other person at liberty under the law to compete with him, it is a misuse of terms to call his advantages a monopoly. Moreover, such a person is under the condemnation neither of the law nor of public sentiment" (Cooley 1878, 268).

> *and probably away from some industry where the average rate of profit has ceased to be made.* Thus in one case the result cannot be avoided or in any way altered excepting by the action of the sovereign, while in the other case it may be altered by *the action of the ordinary laws of trade* (*ibid.*, emphasis added).

The italicized sentences reveal that Peckham's distinction between state-maintained monopolies, on the one hand, and purely private monopolies, on the other, did not stem from mere legal principles, but from wholly economic categories − a.k.a. "the ordinary laws of trade."

Classical economists had taught that monopolies were generally undesirable because their conduct was not subject to the discipline of competition. Yet they had also distinguished between two kinds of monopolies.[47] *De jure* monopolies, due to their possession of a legally granted privilege, were not exposed to market forces and could maintain themselves over time. *De facto* monopolies, by contrast, lacked legal foundations: being subject to market forces, they were inevitably destined to vanish. Since market forces could rid society of *de facto* but not *de jure* monopolies, rate regulation was necessary to curb the latter but not the former. Judicially speaking, it was the presence of legal privilege that immunized enterprises from market forces and thus justified legislative control. In the absence of legal impediments to entry, the liberty of individuals to deploy their capital into any market they pleased would defeat any attempt to maintain prices above the natural level.

These classical ideas found their exact counterpart in Peckham's words above. The *Budd* dissent thus instanced a jurisprudential meeting between the defense of individual rights to liberty and property − a pillar of classical liberalism and classical political economy alike − and a key tenet of classical economic theory, namely, the anti-monopolistic effect of free entry and potential competition. A firm could well become a "big" monopolist by outcompeting its rivals on pure efficiency grounds. But size − Peckham, like Cooley and Tiedeman, maintained − was no sufficient reason for state regulation. The "ordinary laws of trade", viz., classical economics, taught that any attempt to charge prices yielding more than "an ordinary profit," even when undertaken by a business akin to a natural monopoly (like the grain elevator company), would immediately attract new entrants. Thus, while truly virtual monopolies could not be defeated except "by action of the sovereign," purely private monopolies would always be defeated by "general commercial rules" (*ibid.*, at 65).

Given so smooth and effective a working of competitive forces, the implication for price regulation was inevitable. Any legislative attempt to set prices below the market rate would distort capital allocation by preventing firms from obtaining reasonable returns. At best, Peckham concluded, regulation could replicate the price that would have occurred in an unrestrained market. At worst,

47 See Siegel (1984, 202 – 3).

it would eventually drive firms out of the market, confiscating their wealth in the process (*ibid.*, at 69). Surely, it could not be the legislators' task to help the users of elevator services to thrive at the elevator owners' expenses. In a passage expressing a *vertical* view of competition − i.e., between buyers and sellers, as typical of classical economists − Peckham underlined that if market conditions made it impossible for *both* sides of the market to earn their normal rate of profit, this "would be conclusive proof that the business of transportation of grain or other commodities where the boats were to be loaded or unloaded by elevators, could no longer be conducted with profit to all parties, and some new way would have to be discovered and put in practice, for capital will not seek investment or employment where the average rate of profit cannot be commanded" (*ibid.*, at 70).[48] This again did not justify price regulation, because "[s]uch a business cannot be maintained for any length of time, by legislation, at the expense either of capital or of the transporter. Each must earn the average profit in the same general line of business, or the business must, from economical reasons, cease" (*ibid.*, at 71).

Summing up, *Budd* offered the future associate justice the opportunity to display his thorough acquaintance with the classical analysis of the competitive market mechanism.[49] When combined with his commitment to the same philosophical underpinnings of the Smithian system of natural liberty, the picture is clear enough: classical liberalism, as well as classical political economy, were going to find a new friend in Washington. The last words of the 1889 dissent are unmistakable in this respect: "The legislation under consideration is […] an illegal effort to interfere with the lawful privilege of the individual to seek and obtain such compensation as he can for the use of his own property" (*ibid.*, at 71). In Peckham's view, sound economic theory teamed up with the Constitution to censure the New York law. Bakers or grain elevators, it made no difference.

8. Freedom of Contract Meets the Supreme Court

Not surprisingly, given its precedents, the Supreme Court affirmed the decision of the New York Court of Appeals in *Budd*.[50] In a vigorous dissent, Justice

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48 See Giocoli 2013. The distinction between vertical and horizontal competition would later become a key ingredient of Justice Peckham's antitrust jurisprudence.

49 The *Budd* dissent contains another hidden treasure. Even the court's majority had recognized that the case did not involve a single monopolist, but rather a conspiracy by several elevator companies to stabilize prices against excessive competition. Peckham dismissed this argument too, anticipating his views on two other issues − rate-fixing cartels and the so-called ruinous competition defense − which would be at the core of his antitrust decisions.

50 *Budd v. New York,* 143 U.S. 517 (1892).

David Josiah Brewer, joined by Justices Field and Henry Billings Brown, echoed some, but not all, of Peckham's critiques.

Among various reasons of complaint, Brewer paralleled Peckham and, more generally, the classical economists in distinguishing between two different origins of monopoly power. The purported presence of a monopoly, the dissent read, did not justify legislative interference in this case, because the monopoly in question was not one of *law*, but at most one of *fact*. "A monopoly of fact," Brewer remarked, "anyone can break, and there is no necessity for legislative interference. It exists where anyone, by his money and labor, furnishes facilities for business which no one else has" *(Budd,* at 550). The point was elaborated no further, though.

Another passage of Brewer's *Budd* dissent is more well-known: "The paternal theory of government is to me odious. The utmost possible liberty to the individual, and the fullest possible protection to him and his property, is both the limitation and duty of government" (*ibid.*, at 551). Less appreciated is the fact that the rest of the passage revealed again traces of Peckham's influence: "If [government] may regulate the price of one service which is not a public service, or the compensation for the use of one kind of property which is not devoted to a public use, why may it not with equal reason regulate the price of all service, and the compensation to be paid for the use of all property?" (*ibid.*). Recall Peckham's words: "If it is legal in this case, it is legal in any."

The dissent ended with a prophecy: "I believe the time is not distant when the evils resulting from this assumption of a power on the part of government to determine the compensation a man may receive for the use of his property or the performance of his personal services will become so apparent that the courts will hasten to declare that government can prescribe compensation only when it grants a special privilege, as in the creation of a corporation, or when the service which is rendered is a public service, or the property is in fact devoted to a public use" (*ibid.*, at 552). Brewer was right. Within four years, the composition of the Fuller Court would significantly change, with the addition of two new justices, Edward Douglass White (1894) and Peckham (1896). The nascent trend in the Court towards the protection of individual economic rights would receive a decisive boost by the newcomers. For the first time, a concrete opportunity existed for the views that Peckham and Brewer had expressed in *Budd* to become majoritarian. Indeed, Peckham was not to miss the earliest chance to affirm the liberty of contract doctrine.

In *Allgeyer,* Peckham, as we know, led a *unanimous* Court to declare that the Louisiana statute violated the due process clause of the Fourteenth Amendment. As he had done while sitting in the New York Court of Appeals, Peckham proclaimed that the liberty mentioned in the due process clause included "the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his

livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned" *(Allgeyer,* at 589). Still, this liberty was not unlimited. It was always a liberty constrained by law: specifically, the freedom to use one's own faculties "in all lawful ways" to earn a livelihood "by any lawful calling." Moreover, individual freedom should find embodiment in legally enforceable (i.e., "proper, necessary, and essential") contracts. States retained a role in governing contractual freedom via the police power, if properly exercised.

In short, even the first landmark case for liberty of contract fails to validate the image of a Supreme Court blindly extolling laissez faire in its narrowest sense (see the introduction) or, worse, supinely executing the will of the American business class. As a matter of fact, "[t]he distributional effect of the *[Allgeyer]* decision was hardly to protect the rich from the poor, because the measure opened to citizens of the state the opportunity to engage an effective competitor to insurance companies within the state" (Hall and Karsten 2009, 257). No surprise, again, given that neither classical liberals nor classical economists ever invoked absolute, unconstrained liberty of action.

In any event, most of Peckham's brethren in the Supreme Court did not share his devotion to liberty of contract. Indeed, the Court did not apply the doctrine again for a number of years. On the contrary, in a series of cases a majority of the justices − with Peckham always dissenting − rejected the contention that state laws regulating the terms and conditions of employment abridged contractual liberty. At the turn of the century, the potential for a full deployment of the constitutional protection of contractual freedom under the due process clause, while existent, as *Allgeyer* had demonstrated, remained largely unexpressed. The idea of a constitutional right to make contracts free of state oversight received "little more than lip service" (Ely 2012a, 28) from the Fuller Court. Peckham's dedication to liberty of contract would not bear fruit until 1905.

9. *Lochner* Reloaded

We may finally return to Peckham's opinion in *Lochner* and read it through the lens of our analysis. At the core of the constitutional doctrine of liberty of contract lay the protection of individual rights, first and foremost the right to freely earn and enjoy property and, consequently, of freely undertaking any kind of economic activity − working, bargaining, trading − related to this earning and enjoyment. The Fourteenth Amendment provided key textual support for the doctrine.

It is common in the literature on *Lochner* to emphasize liberty of contract's ideological underpinnings, namely, classical liberalism, Jacksonian opposition

to special privilege and monopoly, and republicanism old and new − chiefly, the principle (common to Jeffersonians and "free labor" supporters) that atomization and fluidity in socio-economic relationships guarantee equality of opportunities and the dispersion of power. Our analysis has showed that, before and beyond political ideology, freedom of contract found its intellectual roots in the particular branch of classical liberalism called classical political economy.

The main contribution of classical economists to the doctrine did not consist in specific postulates or theories, as Justice Holmes famously, though wrongly, argued in his oft-quoted *Lochner* dissent.[51] Of course, these were significant too. Peckham's *Budd* dissent, for instance, shows that the profit equalization theorem − with its underlying picture of a smoothly functioning market mechanism − did matter in cases involving allegations of monopoly power. But the true legacy of Smith and his heirs lay elsewhere, at a more fundamental level. Where classical economic thought was really decisive was in providing the "political economy" of the Lochner era, not just its "economics" (see introduction). Above all, this political economy – centered as it was on the Smithian system of natural liberty – contributed the fundamental idea upon which the entire constitutional doctrine of liberty of contract was erected, namely, that economic liberty was essential to a competitive order of society where justice and equality of opportunities would further the public good. Building on this central idea, classical political economy was the stitching that connected various jurisprudential threads. It explained how the constitutional and common law values of individualism, justice and equality, the pillars of a competitive society, could be made consistent with a delimitation of legitimate government intervention in economic affairs.

This interpretation is confirmed by the *Lochner* decision. The two most remarkable features of the majority opinion were, first, that it explicitly centered on the issue of individual rights, rather than of any pre-established limits of state power, and, second, that it focused on the alleged facts concerning the health risks of bakery work. In Peckham's presentation, both features took on a Smithian flavor.

[51] In one of the most famous dissenting opinion of all times, Holmes proclaimed that "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's *Social Statics.*" He continued 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*" (*Lochner,* at 75). For a critical analysis of this part of Holmes's dissent, see Ely (2012b).

9.1 Lochnerizing Individual Rights

The first feature brought contractual freedom to the fore. Peckham declared that the New York statute necessarily interfered with the employer's and employees' liberty of contract about working hours: "the right to labor or the right of contract in regard to their means of livelihood between persons who are *sui juris* (both employer and employee)." As in *Allgeyer,* that right was a manifestation of the broader constitutional right of liberty protected by the due process clause. That the right to purchase or sell labor was part of this liberty followed in turn from the assumption that labor was a commodity like all others *(Lochner,* at 53–4). The echo of Smith − whose words about "the property which every man has in his own labour" *(WN* I.10.67) had already been invoked in previous cases − could be heard loud and clear.[52] "Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living," Peckham concluded, "are mere meddlesome interferences with the rights of the individual" (*Lochner*, at 61). Economic liberty determined the limit of police power; the statute under scrutiny had overstepped it; indeed, *any* such statute would.

Progressive scholar Benjamin Twiss rightly noted that, with respect to police power limits, the *Lochner* opinion aimed at settling the issue, rather than just the case (1942, 134–5). Peckham was quite explicit about the subject's importance. "This interference on the part of the legislatures of the several States with the ordinary trades and occupations of the people," he lamented, "seems to be on the increase" *(Lochner,* at 63). He warned against the risk that if the prevalence of legislative power be taken for granted, "there would seem to be no length to which legislation of this nature might not go" (*ibid.*, at 58). Accordingly, the opinion rejected any presumption in favor of the law's validity. Statutes like these "are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with" (*ibid.*, at 61). A limit should exist "to the valid exercise of the police power by the state. There is no dispute concerning this general proposition," Peckham cautioned (*ibid.*, at 56), in that no less than the constitutional principle of limited government would be at risk under too broad a notion of the police power.

Denying the existence of a presumption in favor of state legislation marked a change with respect to recent Supreme Court precedents. Less than eighteen months before *Lochner,* the Court, *in exactly the same composition,* had upheld another eight-hour ceiling on the workday, this time enacted in favor of Kansas government employees and of employees of public contractors. Writing for a 6-to-3 majority in *Atkin v. Kansas*, Justice John Marshall Harlan had pro-

[52] Beyond *Jacobs*, see for instance Justice Field's concurrence in *Butchers' Union* (at 757).

claimed that a general presumption existed in favor of the validity of the Kansas statute.[53] "[L]egislative enactments should be recognized and enforced by the courts as embodying the will of the people," he wrote, "unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution" *(Atkin,* at 223). While the case had eventually been decided on narrower grounds (the statute only applied to government workers and projects, i.e., to situations where the state, as a party to the contract, had the right to set the employment conditions), it was nonetheless a significant precedent for the *Lochner* Court in that the health risks of the occupations subject to the statute had *not* been an issue. Indeed, Harlan had hinted at the circumstance that a state had substantial leeway in applying the traditional police power criterion of "health, safety and morals." Hence, even in the absence of direct health concerns, the Kansas legislature could well intend "to give its sanction to the view held by many that, all things considered, the *general welfare* of employees, mechanics, and workmen, upon whom rest a portion of the burdens of government, will be subserved if labor performed for eight continuous hours was taken to be a full day's work" *(ibid.,* at 222). Public welfare, Harlan seemed to suggest, was a flexible, all-encompassing notion that granted near inviolability to the presumption of legitimacy of state regulations.[54]

Peckham refused to accept any pro-government presumption. On the contrary, he emphasized the direct opposition between the statute and individual rights: "It is a question of which of two powers or rights shall prevail – the power of the State to legislate or the right of the individual to liberty of person and freedom of contract" *(Lochner,* at 57). Contrasts like these it was the courts' duty to settle. No doubt could subsist: judicial review *had* to occupy center stage. With words that sounded less than candid to later generations of progressive jurists, Peckham famously declared: "This is not a question of substituting the judgment of the court for that of the legislature. If the act be within the power of the State, it is valid although the judgment of the court might be totally opposed to the enactment of such a law. But the question would still remain: is it within the police power of the State?, and that question must be answered by the court" (*ibid.*). Hostile interpreters have countered ever since that, by answering that question in the negative, the Court, against Peckham's

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53 *Atkin v. Kansas,* 191 US 207 (1903). The three dissenters were Peckham, Brewer, and Chief Justice Fuller.

54 Note however that Harlan himself, writing for the majority years before in *Mugler v. Kansas* (123 US 623, 1887), had cautioned that courts need not accept legislative exercise of police power at face value, but could scrutinize the purpose behind state regulation as well as the means employed to achieve the declared ends. Indeed, courts were under a duty to "look at the substance of things," to judge facts as well as form, and determine whether a statute bore any real relation to its purpose, and to disallow any improper exercise of the police power. This famous *obiter dictum* was another key step in the jurisprudential path leading to *Lochner* (cf. Ely 1998, 88–9).

own claim, had in fact substituted its own judgment for that of the New York legislature. This critique however betrays Peckham's words. His was the problem of setting the boundary of lawful exercise of police power − the classical limit of encroachment of individual liberty − not that of checking whether the specific regulation belonged to any pre-defined list of legitimate interventions, and even less of determining whether its benefits exceeded its costs in utilitarian terms. It was not therefore a matter of "it is lawful what the Court declares to be lawful," as many later Progressives mocked, but rather, as John Stuart Mill would put it, of "it is lawful what leaves intact the 'inner circle' of intangible individual rights."[55]

Classical political economists did not exclude the possibility of desirable state interventions. Nevertheless, they circumscribed them to the provision of public goods, the regulation of natural monopolies and the prevention of negative externalities. The New York statute allegedly pertained to the latter category. Yet, for the likes of Smith and Mill, the state should only intervene in the case of externalities when the infringement of someone's rights was made compulsory by the necessity of protecting someone else's equal rights − including of course the equal rights of the general public. It was, in short, a matter of justice and equality, not of welfare maximization. In the absence of this condition, government intervention remained unjustified. This was exactly how Peckham viewed the issue at stake in *Lochner*.

Denying any duty of judicial restraint in the face of exercises of state power, he began to answer his central question by the very fact of asking it: "Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family" (*Lochner*, at 56)? Put this way − viz., the classical economists' way − the burden of proof had been shifted. No presumption of the validity of state acts could exist because this would by definition negate the existence of an inviolable area of individual rights *à la* Mill. It was rather up to the government to demonstrate, either that the regulation did not overstep that area's boundary, or, if it did, that reasons of justice and equality with respect to someone else's rights (synthesized by the triad of "health, safety and morals") could justify the violation.

[55] Around every individual, wrote Mill, "there is a circle" within which he should be left totally free to act (1909 [1848], V.11.4). This "inner circle," an inviolable space of complete freedom, was delimited by the absence of spillovers, i.e., of external consequences on someone else's freedom.

9.2 Lochnerizing Police Power

Counsels for Joseph Lochner focused on the same question as Peckham. They agreed that the burden of proof lay with New York legislators who had failed to meet it. The statute was not a real health regulation, but rather a "labor law," aiming at preventing the free working of the labor market for bakers. Their brief included express references to *Jacobs* (on the point that legislative determination as to the exercise of the police power was not conclusive and that, under the guise of promoting health, legislatures sometimes made laws exceeding their power), to Peckham's *Gillson* opinion (on the point that a fair and reasonable relation of means to ends must exist to preserve liberty against improper exercises of the police power) and to Justice Field's concurrence in *Butchers' Union.* But, more importantly, Lochner's attorneys corroborated their claim about the absence of real health motivations by supplying the Court with the relevant facts to examine.

Contrary to what is frequently claimed in the literature, it is untrue that the case was decided by five justices' idiosyncratic views about the health factors of baking activity. Counsels did provide the Court with a collection of facts pertaining to the case.[56] They drew parallels with labor laws in other states to support the claim that the statute belonged to that category, rather than that of health regulations. They showed that the statute was contained in a New York State publication titled *The Labor Law.* Most significantly, they cited medical opinion declaring that the law was unnecessary to promote anyone's health. Baking was not an unhealthy occupation, doctors said, and counsels' "data" purported to show that.

In the absence of any contrary evidence produced by the defendant, the New York attorney general, the facts collected by the plaintiff's team worked nicely. Apparently, government had fallen short of proving a health rationale for the law. Peckham seized the golden opportunity offered by the counsels' argument to re-affirm the *Allgeyer* doctrine of liberty of contract. This time, however, the core of his reasoning centered on the means-ends relation suggested in *Jacobs.*

First of all, Peckham dismissed the argument that the statute could be constitutionally valid as a labor law, pure and simple: "There is no reasonable ground for interfering with the liberty of person or the right of free contract by determining the hours of labor in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are able to assert their rights and care for themselves without the protecting arm of the State, interfering with their independence of judgment and of action. They are in no sense wards of the State" *(Lochner,* at 57). Classical economists would have agreed: in the system

[56] Or pseudo-facts, given that the evidence was not scientifically collected: see Bernstein (2003, 50 – 1, text and fn. 274).

of natural liberty, labor relations fell outside the realm of legitimate government interventions.

The only way to rescue the law, then, was to demonstrate that "there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health or to the health of the employees if the hours of labor are not curtailed" (*ibid.*, at 61).[57] Of the two possibilities for a health rationale, one was a non-contender. Merely asserting that the law pertained to public health could not suffice. The regulation, Peckham observed, "does not affect any other portion of the public than those who are engaged in that occupation. Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week" (*ibid.*, at 57). Thus, if the statute was to be accepted as a health law, this had to happen in relation to the bakers' own health. But restraining the law's rationale to the preservation of each individual worker's health highlighted its paternalist character. And Peckham despised paternalism no less than Brewer did: "The State in that case would assume the position of a supervisor, or *pater familias,* over every act of the individual" (*ibid.*, at 62).

The structure of Peckham's opinion reveals that the Court's majority accepted that the statute's legitimacy be checked through a test akin to that outlined by Lochner's counsels. Facing the issue of what constituted a valid police power motive, Peckham conceded that a state could impose "reasonable conditions" on the enjoyment of liberty and property. He further agreed that the state could inspect bakeries and enact measures to improve workplace conditions (*ibid.*, at 61–2). No classical economist would have objected to that. Where he drew the line, however, was at regulations governing working hours. In another famous passage, which he almost copied word for word from *Gillson,* Peckham declared what the test should be: "The mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid.[58] The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor" (*Lochner*, at 57–8).

The means-ends test distinguished valid, or "reasonable" exercises of police power from invalid, or "arbitrary" ones. The distinction referred to the tradi-

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57 The passage shows that the concept of "reasonableness" was also central to Peckham's discourse. The distance separating this notion from Justice Holmes's "rational and fair" or "reasonable" man who could, or could not, admit the legitimacy of the New York statute (cf. *Lochner,* at 76) was therefore *prima facie* less pronounced than is usually claimed.

58 As Randy Barnett pointed out to me, this passage – like the similar one in *Gillson* – also echoed Chief Justice John Marshall's early formulation of the means-ends test in *McCulloch v. Maryland* (17 U.S. 316, 1819, at 423).

tional scope of the police power as a protection of public health, safety, or morals: "reasonable" laws fit within one or more of these categories, while "arbitrary" laws did not.[59] Hence, a lawful exercise of police power was one that used adequate means to pursue a proper and legitimate goal, i.e., that either left individual rights untouched or that encroached those rights only to protect someone else's equal rights from unjust violation. In short, it had to be an intervention within the scope of the Smithian "duties of the sovereign" − like in the well-known example of compulsory firewalls.[60] Again, classical economists would applaud Peckham's approach: his means-ends test was exactly what classical political economy dictated.

Given the test, and given that the only health the statute could possibly safeguard was that of individual workers, with no "external effects" whatsoever, the implication was straightforward, at least in an era where courts were not expected to rely upon real data, but merely on (more or less informed) common sense. "To the common understanding, the trade of a baker has never been regarded as an unhealthy one," Peckham concluded (*ibid.*, at 59).

Conclusion

The means-ends test's clear-cut answer left no doubt as to the character of the New York statute. Having dismissed all possible police power arguments in its support, Peckham was free to carry on to the logical conclusion the path opened by *Jacobs*. "It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives," he observed. "We are justified in saying so when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law" *(Lochner,* at 64).

The other touchstone of the majority opinion, the danger to liberty of an excessively intrusive and undisputed legislative power, further corroborated this conclusion. "We think the limit of the police power has been reached and passed in this case," the opinion reads. "If this statute be valid, and if, therefore,

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59 As remarked by Mayer (2009, 261–2), from whom we draw our analysis of Peckham's means-ends test, the test did *not* have at its core the prohibition of class legislation, nor did the notions of "reasonable" and "arbitrary" have anything to do with that issue. See however Gillman (1993, 72–3).

60 "The obligation of building party walls, in order to prevent the communication of fire, is a violation of natural liberty", wrote Smith. Still, "those exertions of the natural liberty of a few individuals, which might endanger the security of the whole society, are, and ought to be, restrained by the laws of all governments, of the most free as well as of the most despotical" (*WN* II.2.94).

a proper case is made out in which to deny the right of an individual, *sui juris,* as employer or employee, to make contracts for the labor of the latter under the protection of the provisions of the Federal Constitution, there would seem to be no length to which legislation of this nature might not go" (*ibid.*, at 58). Here came the statement, which we quoted in full above (see §7), about "a printer, a tinsmith, a locksmith, etc", i.e., the idea that if such a law be sanctioned, then "no trade, no occupation, no mode of earning one's living" could escape the state's "all-pervading power" (*ibid.*, at 59). Again, the upshot was clear: "The act is not, within any fair meaning of the term, a health law, but is an illegal interference with the rights of individuals, both employers and employees, to make contracts regarding labor upon such terms as they may think best, or which they may agree upon with the other parties to such contracts" (*ibid.*, at 61).

Merging the means-ends test with liberty of contract was a masterful stroke. Yet, even so powerful a combination only became truly unbeatable on account of its underlying political economy. It was the Smithian system of natural liberty − by elevating competition to the status of supreme organizing principle of society and by clearly delimiting the boundaries of government action − which provided the rationale for both prongs of Peckham's argument and which glued them together into an irresistible mix. A system that, contrary to Holmes's view, went beyond a sheer list of theoretical principles or policy slogans like laissez faire. A system that − Holmes was pretty right here − Peckham and other justices read into the American Constitution.

Unpersuaded that baking was an unhealthy trade and imbued with classical ideas, Peckham somehow managed to bring a majority of the Court to endorse his conclusion: "It seems to us that the real object and purpose [of the act] were simply to regulate the hours of labor between the master and his employees (all being men *sui juris)* in a private business, not dangerous in any degree to morals or in any real and substantial degree to the health of the employees. Under such circumstances, the freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with without violating the Federal Constitution" (*ibid.*). In the name of classical political economy, a long jurisprudential journey was over. For good or for worse, *Lochner v. New York* could take centerstage in American constitutional history.

References

Acemoglu, D. and J. A. Robinson. 2006. *Economic Origins of Dictatorship and Democracy.* Cambridge, Mass.: Cambridge University Press.

Balkin, J. M. 2005. "'Wrong the Day It Was Decided:' Lochner and Constitutional Historicism." *Boston University Law Review* 85: 677–725.

Barnett, R. E. 2004. *Restoring the Lost Constitution: The Presumption of Liberty.* Princeton, NJ: Princeton University Press.

—. 2016. "The Three Narratives of the *Slaughter-House Cases.*" *Journal of Supreme Court History* 41 (3): 295–309.

Bernstein, D. E. 2003. "Lochner's Legacy's Legacy." *Texas Law Review* 82 (1): 1–64.

—. 2011. *Rehabilitating Lochner*: *Defending Individual Rights against Progressive Reform*. Chicago: University of Chicago Press.

Bickel, A. M. and L. D. Brandeis. 1957. *The Unpublished Opinions of Mr. Justice Brandeis: The Supreme Court at Work.* Cambridge, Mass.: Belknap Press of Harvard University Press.

Clark, J. B. 1900. "The Necessity of Suppressing Monopolies While Retaining Trusts." In *Chicago Confererence on Trusts*, 404–09. Chicago: Civic Federation of Chicago.

Cooley, T. M. 1868. *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union*. Boston: Little, Brown, and Co.

—. 1878. "Limits to State Control of Private Business." *The Princeton Review* 1: 233–71.

De Roover, R. 1951. "Monopoly Theory Prior to Adam Smith: A Revision." *Quarterly Journal of Economics* 65 (4): 492–524.

Duker, W. F. 1980. "Mr. Justice Rufus W. Peckham: The Police Power and the Individual in a Changing World." *Brigham Young University Law Review* 1980 (1): 47–67.

Ely, J. W. 1998. *The Guardian of Every Other Right: A Constitutional History of Property Rights*. New York: Oxford University Press.

—. 2006. "'To Pursue Any Lawful Trade or Avocation:' The Evolution of Unenumerated Economic Rights in the Nineteenth Century". *University of Pennsylvania Journal of Constitutional Law* 8 (5): 917–55.

—. 2009. "Rufus W. Peckham and Economic Liberty." *Vanderbilt Law Review* 62 (2): 591–638.

—. 2012a. "Rufus W. Peckham and the Pursuit of Economic Freedom." *Journal of Supreme Court History* 37 (1): 22–41.

—. 2012b. "The Constitution and Economic Liberty." *Harvard Journal of Law and Public Policy* 35 (1): 27–35.

Epstein, R. A. 2014. *The Classical Liberal Constitution: The Uncertain Quest for Limited Government*. Cambridge Mass.: Harvard University Press.

Fleischacker, S. 2002. "Adam Smith's Reception among the American Founders, 1776–1790." *William and Mary Quarterly* 59 (4): 897–924.

Foner, E. 1970. *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party before the Civil War*. New York: Oxford University Press.

Gillman, H. 1993. *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence.* Durham, NC: Duke University Press.

Giocoli N. 2013. "British Economists on Competition Policy (1890–1920)." *Research in the History of Economic Thought and Methodology* 31 (A): 1–57.

Haakonssen, K. 1981. *The Science of a Legislator: The Natural Jurisprudence of David Hume and Adam Smith*. Cambridge: Cambridge University Press.

Hall, K. L. and P. Karsten. 2009. *The Magic Mirror. Law in American History*. New York: Oxford University Press.

Hovenkamp, H. 1988. "The Political Economy of Substantive Due Process." *Stanford Law Review* 40 (2): 379–447.

—. 1989. "The Sherman Act and the Classical Theory of Competition." *Iowa Law Review* 74: 1019–1065.

Kens, P. 1998. Lochner v. New York: *Economic Regulation on Trial.* Lawrence: University Press of Kansas.

—. 2005. "*Lochner v. New York:* Tradition or Change in Constitutional Law?" *New York University Journal of Law and Liberty* 1 (1): 404–31.

May, J. 1989. "Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880–1918." *Ohio State Law Journal* 50: 257–395.

Mayer, D. N. 2009. "The Myth of 'Laissez-Faire Constitutionalism:' Liberty of Contract During the Lochner Era." *Hastings Constitutional Law Quarterly* 36 (2): 217–284.

McCulloch, J. R. 1825. *The Principles of Political Economy: With a Sketch of the Rise and Progress of the Science*. Edinburgh: William and Charles Tait.

McLean, I. and S. M. Peterson. 2010. "Adam Smith at the Constitutional Convention." *Loyola Law Review* 56: 95–133.

McNulty, P. J. 1967. "A Note on the History of Perfect Competition." *Journal of Political Economy* 75 (4): 395–99.

Medema, S. G. 2009. *The Hesitant Hand: Taming Self-Interest in the History of Economic Ideas*. Princeton, NJ: Princeton University Press.

Meese, A. J. 1999. "Liberty and Antitrust in the Formative Era." *Boston University Law Review* 79 (1): 1–92.

Mill, J. S. 1909 [1848]. *Principles of Political Economy with some of Their Applications to Social Philosophy*. London: Longmans, Green and Co.

Pound, R. 1909. "Liberty of Contract." *Yale Law Journal* 18 (7): 454–87.

Schumpeter, J. A. 1986 [1954]. *History of Economic Analysis.* London: Routledge.

Senior, N. W. 1854. *Political Economy*. London: Griffin and Co.

Siegel, S. A. 1984. "Understanding the Lochner Era: Lessons from the Controversy over Railroad and Utility Rate Regulation." *Virginia Law Review* 70 (2): 187–263.

Smith, A. 1904 [1776]. *An Inquiry into the Nature and Causes of the Wealth of Nations*. London: Methuen and Co.

Stigler, G. J. 1976. "The Successes and Failures of Professor Smith." *Journal of Political Economy* 84 (6): 1199–213.

—. 1982. "The Economists and the Problem of Monopoly." *American Economic Review* 72 (2): 1–11.

Strauss, D. A. 2003. "Why Was *Lochner* Wrong?" *University of Chicago Law Review* 70 (1): 373–86.

Sturtevant, J. M. 1886. *Economics: Or the Science of Wealth.* New York: Putnam's Sons.

Tiedeman, C. G. 1886. *A Treatise on the Limitations of Police Power in the United States*. St. Luis: F. H. Thomas.

Twiss, B. R. 1942. *Lawyers and the Constitution: How Laissez Faire Came to the Supreme Court*. Princeton, NJ: Princeton University Press.

Viner, J. 1960. "The Intellectual History of Laissez Faire." *Journal of Law and Economics* 3 (October): 45–69.

Young, J. T. 2005. "Unintended Order and Intervention: Adam Smith's Theory of the Role of the State." In *The Role of Government in the History of Economic Thought*, edited by S. G. Medema and P. Boettke, 91–119. Durham, NC: Duke University Press.

White, G. E. 1993. *Justice Oliver Wendell Holmes: Law and the Inner Self.* Oxford: Oxford University Press.