UNDERSTANDING *LOCHNER*:

TESTING THREE RIVAL THEORETICAL PERSPECTIVES

by

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To My Family

To My Friends

To My Teachers

Thank You All

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The *Lochner v. New York* case initiated a great debate among judicial scholars. Conventional wisdom surrounding *Lochner* is that Justice Holmes' dissent exposed unwarranted judicial activism by the majority, while some scholars recently have been slowly re-assessing Justice Peckham's majority opinion to determine the extent that the opinion is a product of the historical era. Rival explanations for Substantive Due Process jurisprudence during the *Lochner* era were examined and tested by reviewing lower federal court and state court decisions. The theories reviewed were a) the court guarding economic liberty, b) the court guarding against factionalism in government, and c) the court as an agent of business. My findings are that the best perspective for explaining the *Lochner* era was the court system's commitment to protecting economic liberties against government encroachment. The evidence rejects Holmes' agent of business perspective as presented in his dissent.

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CHAPTER 1

INTRODUCTION

Lochner v. New York (1905) is one of the most controversial cases in U.S. Supreme Court history. A famous Justice, Oliver Wendell Holmes Jr., accused the Court majority of enshrining their own economic views into the law instead of neutrally judging a law enacted by the majoritarian will of the people. New Deal legal scholars took up the charge insinuating that the judges were motivated by protecting business at the expense of the people. Even today, Chief Justice Roberts cites *Lochner* as an instance when the Court did not call balls and strikes or in other words, neutrally apply the law without bias. With only a cursory examination, New Deal scholarship seems to have confirmed the assessment of Justice Holmes' dissent, that the justices were inserting their own economic theory into the law. However, a more nuanced picture appears after closer examination.

New York enacted a regulation to prevent bakery workers from working for more than ten hours a day in hot, stuffy, and unhealthy conditions. These conditions would often cause the bakers to become ill with tuberculosis or other nasty diseases. The Court struck down the New York statue as violating the liberty of contract, that is, the ability for an employer and employee to privately agree on worker pay and hours without government interference. The modern day federal and state government prescribes many regulations affecting employer-employee relations. Private contracting between employer and employer without government interference is quite alien to us. Even back then, courts recognized the principle that governments needed to protect the health, safety, and morals of society. It would seem to the modern eye that health and safety regulations of bakery employees would be valid. Keeping employees safe from hazardous

workplaces surely is a government function. So the Court must have an evil agenda imposing their values on the law! Revisionist scholarship would disagree. Some scholars, like Howard Gillman, argue that the liberty of contract doctrine is an outgrowth of courts protecting society from competing factions extracting special favors from the government (Gillman 1993). Others see *Lochner* as part and parcel of a generalized protection of economic liberty against burdensome government regulations. When the Court protects our civil liberties against government abuse, society enjoys the blessings of that protection. The Court retreated from these ideas of economic liberty during and after the New Deal. This is why this thinking now seems so alien to us.

However, the proper interpretation of *Lochner* is not just an academic or historical debate. It has real implications. While the liberty of contract doctrine is likely not to be at the level seen prior to the New Deal, protecting economic liberty is being resurrected today.[1] Libertarian law professors and judges are seeing the validity of protecting the economic rights of individuals against abusive and overbearing government regulation. Scholarship needs, for these reasons, to present a clear account of this time period.

Other long rejected doctrines such as the non-delegation doctrine have recently seen renewed interest which further suggests that the application of substantive due process in economic cases cannot be far behind. *Department of Transportation v. Association of American Railroads* (2014) was a case where the obscure non-delegation doctrine was brought into the forefront. AmTrak, a government corporation, and the Federal Railroad Administration were

[1] Economic liberty is evident in recent cases such as the Texas Supreme Court case *Ashish Patel, et al. v. Texas Department of Licensing and Regulation, et al.* (2015).

given regulatory authority to prescribe standards and metrics involving on-time performance. The Association of American Railroads challenged the authority given to AmTrak, a quasi-private entity, that the Association claimed should only be exercised by fully government agencies. The U.S. Supreme Court chose to decide that for the purposes of the authority given to AmTrak, it was sufficiently a governmental entity because it has a governing board appointed by the President and confirmed by the U.S. Senate. The significance of this case is that an old doctrine of constitutional law had come back to haunt the present. Stephen Wermiel of SCOTUS Blog wrote that the non-delegation doctrine stands, "…for the general proposition that Congress cannot delegate the power to legislate to anyone else, specifically the executive branch" (Wermiel 2014). In the age of very expansive regulatory regimes guided by executive agencies with broad mandates, the non-delegation doctrine seems quaint and a historical relic of an earlier age. However, the Court seriously considered the non-delegation argument in this case. Additionally, the Court has revisited incorporation via the Privileges and Immunities Clause in *McDonald v. Chicago* (2010). *McDonald* involved a Chicago city handgun regulation. There were briefs and arguments by the litigants to incorporate the Second Amendment and other amendments via the Privilege and Immunities Clause instead of the patchwork selective incorporation through the Due Process Clause. The Court continued to incorporate the Bill of Rights through the Due Process Clause in the Fourteenth Amendment in *McDonald*, but it is astonishing that litigants would attempt to resurrect and reanimate old constitutional doctrines. Justice Thomas, in his *McDonald* concurrence, stated he thought the 2nd Amendment, and all other amendments, should be incorporated through the 14th Amendment Privileges and Immunities clause. The Court, starting with *United States v. Lopez* (1994), has been revising

Commerce Clause interpretation. *National Federation of Independent Business v. Sebelius* (2012), the case involving the interpretation of the Patient Protection and Affordable Care Act, had a Court majority declining to use expansive power under the Commerce Clause to allow the government to regulate the health insurance market. Old doctrines and restrictions on federal power are slowly seeing resurgence in modern times. Studying these old constitutional law doctrines is still relevant today not just as historical study, but as a possible future method of constitutional interpretation.

The Court has not yet revisited the liberty of contract doctrine in economic liberty. That doctrine invalidates the ability to contract between the employer and employee which the Court once believed was so fundamental as to be protected by the Fourteenth Amendment Due Process Clause. The most famous case articulating the liberty of contract doctrine, *Lochner v. New York* (1905), has been widely reviled by legal scholars as a case of judicial overreach. Yet, even today, the doctrine remains in a different form as the right to privacy. Both liberty of contract and right to privacy spring from the same well, the 14th Amendment Due Process Clause. Some scholars, recently, have been reassessing the *Lochner* era and have been trying to shed light and revise an unsympathetic picture of justices using judicial activism to arrive at a particular result. These scholars suggest that the justices were working in a historical framework different from the one we have today, a framework that lead to their reasoning in *Lochner*. This dissertation will build upon this literature to explain these historical factors surrounding the *Lochner* era and the Due Process Clause.

I. The *Lochner* Era

"This case is decided upon an economic theory which a large part of the country does not entertain…But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law" (Holmes, *Lochner v. New York* 198 U.S.45, 75). Justice Holmes pronounced this stark statement in his *Lochner* dissent. His accusing tone assumed that the justices were putting their own ideological preferences into law, in effect, becoming a super-legislature. By vetoing legislation through judicial opinions, Justice Holmes argued that the Court was overriding the will of the state legislatures and imposing their own economic beliefs. He wrote further, "But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law" (Holmes, *Lochner v. New York* 198 U.S.45, 75). Future justices, even conservative justices such as Chief Justice Roberts, and legal scholars generally agree with him today (Roberts 2008). Even as recent as in *Obergefell v. Hodges* (2015), the Chief Justice accused the majority of resurrecting the ghost of *Lochner* by upholding same-sex marriage. With the destruction of the liberty of contract doctrine with *West Coast Hotel Co. v. Parrish* (1937) and with *United States v. Darby Lumber* (1941) demolishing the old Commerce Clause precedent, today we see the effects of such old doctrines dying off with the rise of a very expansive and energetic federal and state governments. Examples of expansive Commerce Clause doctrine can be found with the Court upholding federal government preventing interstate businesses, or public accommodations, from discriminating against African-Americans in *Heart of Atlanta Motel v. United States* (1964)

and upholding of a government quota of wheat production even though the farmer was using all of the wheat for private purposes in *Wickard v. Filburn* (1942).

The legal doctrine that defines the *Lochner* era is simple. The 14th Amendment Due Process Clause requires a process before the government can deprive people of liberties, and the Court has determined that some liberties are so fundamental that they should be given protection even though the Bill of Rights is silent. While the most notable decisions in the *Lochner* era were to invalidate maximum hours and minimum wage laws, the Court also struck down other regulations such as the regulation requiring Louisiana businesses to refrain from conducting dealings with out-of-state marine insurance companies. These decisions were premised on the theory that the state governments in regulating the economic conditions within their respective states were infringing on a fundamental right of freedom between a company and individuals to conduct their economic affairs free from restraint. The Court during this era did carve out exceptions for valid health and safety regulations. States did argue successfully that such safety regulations were needed due to unique conditions imposed by certain special environments when the Court upheld a Utah regulation of miners in *Holden v. Hardy* (1898). Holden involved a Utah statute that regulated who can be employed by mines, excluding women and children under fourteen, and setting a maximum hours standard of eight hours a day. The Court upheld this regulation because it saw mining as dangerous work. States traditionally have a power called the police power which allows local governments the ability to regulate the health, safety, or morals of the community. For example, state or local governments can impose curfews during rioting to maintain and protect public order, such as seen during recent rioting in American cities. The Court, however, targeted instances when the police powers rationale was dubious or suspect.

Justice Peckham wrote, "The claim of the police power would be a mere pretext -- become another and delusive name for the supreme sovereignty of the State to be exercised free from constitutional restraint" (Peckham, *Lochner v. New York* 198 U.S.45, 56). He and other members of the *Lochner* majority feared that a state legislature would pass laws using the police powers rationale to disguise the actual intent of regulation. A state legislature could use the police powers as a cover to interfere in a contract between two parties and using the coercive power of the state to favor one party over another. The Court was utterly opposed to allowing the police power to be used to deprive a business or individual of their economic rights guaranteed by the due process clause in the 14th Amendment.

II. Modern Interpretations

In the battle between differing interpretations, Justice Holmes' dissent has become the canvas for what *Lochner* and its era means to modern legal scholars and politicians. For instance, Cass Sunstein wrote, "For many decades, the Supreme Court's 1905 decision in Lochner v. New York has ranked among the most universally despised rulings in the history of American law. In that long-repudiated case, the court struck down a maximum-hours law for bakers" (Sunstein 2015). Sunstein further wrote, "Ever since the 1930s, there has been widespread agreement that, at least in the economic sphere, Holmes was right and Lochner was wrong" (Sunstein 2015). While Sunstein noted that there are different ideological reasons for believing *Lochner* to be wrong, he added that a few modern conservatives, such as Rand Paul, are embracing the logic of the *Lochner* majority anew.

Revisionist scholarship is coming into the forefront to challenge parts of the standard interpretation. Some revisionist scholarship comes from conservative legal scholars wishing to

return to the pre-1930s constitutional understanding, but other scholars seek to put the decision and era it encompasses in proper light. These scholars do not necessarily advocate for a return to *Lochner*, but instead want people to travel back in time and understand the case with a new perspective. Key to this literature has been an examination of the reasons the justices developed the "liberty of contract" doctrine in the first place and how it was enmeshed in the constitutional understanding of the time. Important to this understanding of *Lochner* is that the Court was not radically re-designing constitutional law to serve their whims, it was acting within the bounds of understood constitutional law implementing legal principles from the founding era. A future chapter presents a fuller account of *Lochner* and the scholarship surrounding the case, but for now, two scholars are prominent among this literature. Howard Gillman, a political scientist and legal scholar, paints a specific picture of *Lochner* and how it fits into American constitutional law. His thesis is that the justices were not acting as judicial activists defiantly stamping their views into constitutional law, but as actors who understood constitutional law and judicial principles differently than we do today. Starting the story from the founding era, Gillman proposed that courts enshrined the principle of factionless government. According to this principle, state governments should not use regulatory power to favor or disfavor a faction at the behest of another faction. While the government could use its regulatory power in the interest of the people to protect the community, courts were vigilant in making sure the government did not use its immense power to favor one political group over another group. This framework broke down at the end of the 19th century and the dawn of the 20th century, according to Gillman, as significant societal changes were occurring. America became industrialized, the west was being settled, and businesses often had unequal bargaining power over people who were not the

artisans and farmers of the late 18th and 19th centuries, but often were laborers in urban factories. The Court saw the labor class in states, such as New York, as extracting special favors from the state legislature. The Court took on its traditional role to protect government from being embroiled in factional conflict and to prevent one faction from extracting special favors at the expense of other factions. It used the "liberty of contract" doctrine to strike down these laws. As the society went into depression and the very economic system seem to collapse, old constitutional law and judicial principles were abandoned and the court retreated from economic affairs.

Michael Phillips provides an alternative revisionist vision for the *Lochner* era. He identified substantive due process cases using his own research and a previous list made by earlier scholars. These cases are in many different areas of regulation, including the traditional minimum wage and maximum hour regulations to more obscure cases involving the maximum rates railroads can charge passengers and freight. He, like Gillman, rejected the traditional conventional wisdom that the Court was imposing its own free enterprise economic theory through the law. Phillips concluded that Gillman was partially right, as the factionless society explanation can explain certain types of substantive due process cases. However, not all Court cases were decided using the factionless rationale and thus Gillman could not account for every case. What Phillips ultimately concluded was that the Court was trying to protect individual and business freedoms generally through substantive due process.

III. Why Is This Important?

In the modern era, the Court has been increasingly analyzed by political scientists with tools such as the Attitudinal Model popularized by Jeffrey Segal and Harold Spaeth. This model

posits that judges have ideological preferences and seek to decide cases based on these preferences. This theory is very amenable to statistical testing using big datasets. Even more significant are extensions to the Attitudinal Model such as the Strategic Model, which argues for preferences interspersed with strategic choices by judges. Gillman and Phillips do not use these political science models for their research, so to best emulate and conduct research that approximates their methods, this dissertation will use a legal model approach. The Legal Model takes the position that legal precedent is a key factor in judicial decision-making and in general courts are bound to prior precedent. There are disputes on how precedent is used in judicial decision-making by the Court. It is appropriate, however, to use Legal Model in situations where precedents from higher courts restrict and constrain judicial decision-making by lower courts. State and federal court precedents from the *Lochner* era will shed light whether Gillman and Phillips or whether the older New Deal interpretation of *Lochner* is correct. This dissertation is important since it resolves a basic question: Was *Lochner* simply a policy-oriented Court trying to assert its own economic views on society or was *Lochner* an effort by the Court to protect economic freedom from unreasonable government interference? Research into this period of Constitutional history is important since it was a period of history where different legal doctrines were enmeshed within society. As the introduction alludes, such thinking might be coming back as a tool for present courts to resolve cases.

Some courts have used economic substantive due process in modern times. In *Saint Joseph Abbey v. Castille* (2013), the federal 5th Circuit Court of Appeals used substantive economic due process in reviewing a Louisiana statue enforced by the Louisiana State Board of Embalmers and Funeral Directors which required any intrastate casket sales to be done through a

licensed funeral director and only through a licensed funeral home. Louisiana permitted burial in personal constructed caskets or caskets bought out-of-state through the internet. Saint Joseph Abbey sued in federal court to be able to sell caskets even though it was not a state licensed funeral home. Judge Higginbotham in the majority opinion noted that while the U.S. Supreme Court has retreated from economic affairs and given states more deference to regulate, prior precedent casts doubt on whether protectionism is a legitimate state purpose. Judge Higginbotham wrote, "As we see it, neither precedent nor broader principles suggest that mere economic protection of a particular industry is a legitimate governmental purpose, but economic protection, that is favoritism" (Higginbotham, *Saint Joseph Abbey v. Castille* (2013) 712 F.3d 215, 222). Protectionism, as Judge Higginbotham explains, cannot be related to a legitimate state interest since it harms consumer's choice. Judge Higginbotham wrote that he had doubts that the board's regulations could be sustained even with a deferential rational basis test, since the rules do not give training to funeral directors regarding casket selection or standards for caskets. At the end of the opinion, the Fifth Circuit panel certified the case to the Louisiana Supreme Court in order for the state courts to determine whether the board's regulations could be shown to have a valid public use.

Another recent use of the Due Clause in a substantive context is a Texas Supreme Court decision, *Ashish Patel, et al. v. Texas Department of Licensing and Regulation, et al.* (2015), that declared the commercial eyebrow threaders statute and accompanying regulations unconstitutional under Article 1, Section 19 of the Texas Constitution. Commercial eyebrow threading is regulated as a practice of cosmology in Texas. Commercial eyebrow threaders must, according to state law and implementing regulations, secure an esthetician license, which

includes 750 hours of training and take a state mandated test. The plaintiffs argued that to require a cosmology license in order to practice commercial eyebrow threading is unrelated to public health and safety and thus has no legitimate purpose (Johnson, *Patel v. Texas Department of Licensing and Regulation (*2015), 469 S.W.3d 69). The Texas Supreme Court majority reviewed the history of Due Process during the 19th century and found evidence that Texas Courts struck down economic regulations which were burdensome or oppressive towards businesses or individuals. The articulated standard the Court used was a heightened rational basis test. As Justice Johnson wrote,

> In sum, statutes are presumed to be constitutional. To overcome that presumption, the proponent of an as-applied challenge to an economic regulation statute under Section 19's substantive due course of law requirement must demonstrate that either (1) the statute's purpose could not arguably be rationally related to a legitimate governmental interest; or (2) when considered as a whole, the statute's actual, real-world effect as applied to the challenging party could not arguably be rationally related to, or is so burdensome as to be oppressive in light of, the governmental interest**.** (Johnson, *Patel v. Texas Department of Licensing and Regulation (*2015), 469 S.W.3d 69, 87)

The Texas Supreme Court concluded that since much of the training is not related to health and safety of commercial threading, it thus burdens and delays employment opportunities of those who wish to work in the field. The state governmental actions as applied to the threaders were held to be unconstitutional (Johnson, *Patel v. Texas Department of Licensing and Regulation (*2015), 469 S.W.3d 69).

These two cases show the importance of my research. If the New Deal theory of Lochner is correct, these two cases were wrongly decided. The doctrine of substantive due process found in *Lochner*, under the New Deal theory, is completely discredited because all that substantive due process involves is judicial policy-making—the Court substituting its judgment of good economic policy for the judgment of the legislature. On the other hand, the Gillman-Phillips

theory would hold that *Lochner* stands for the protection of economic freedom and an avoidance of regulations making unreasonable choices between factions. Essentially, substantive due process is a demand by the courts that economic freedom can only be overridden with clear proof of the rationality of the government regulation. While Gillman would argue this theory is outdated, perhaps it is not. If so, the two cases would be correctly decided.

Economic substantive due process has seen some modern application in federal and state courts such as is illustrated in these two cases. While talk of a total *Lochner* resurrection has so far been confined to conservative legal circles, if this dissertation can show that *Lochner* and its substantive due process reasoning is best seen as an effort by the Court to protect economic freedom rather than simply to impose, as Oliver Wendell Holmes and later New Dealers would claim, its own economic theory on the Constitution, then *Lochner* becomes a credible precedent that could legitimately be used by today's courts. If, on the other hand, this dissertation shows the Holmes and the New Dealers are correct and that *Lochner* is nothing more that judicial economic policy making, *Lochner* and economic substantive due process deserve a thorough and complete reburial.

CHAPTER 2

LITERATURE REVIEW

As the most well-known "example" of judicial activism, the *Lochner* decision has provoked much debate among scholars since it was decided in 1905. The standard interpretation of *Lochner*, first articulated by Justice Holmes, is of a judicial majority running amok and ensuring that their own economic preferences got placed into the law. Reviled by most modern scholars and jurists, this decision is seen as an example of judicial activism and of promoting the justices' Social Darwinian views. Chief Justice Roberts, when discussing *Lochner* during his confirmation hearing, said, "You go to a case like the *Lochner* case. You can read that opinion today and it's quite clear that they're not interpreting the law, they're making the law" (Roberts 2008). Scholars also assail *Lochner* by claiming that it promotes the wealthy at the expense of the poor. Archibald Cox, writing about the *Lochner* era, wrote, "The Lochnerian decisions flowed partly from the willful defense of wealth and power in a society in which wealth and power had been achievable by anyone strong, intelligent, and sufficiently energetic…" (Cox 1987, 135). He later suggested that the Justices were unable to deal with the complex changing social conditions of an increasingly modern age (Cox, 1987, 135-136). Cox's interpretation of Lochner supports the standard interpretation: A US Supreme Court using its decision to support big business against the common worker. To sum up the standard interpretation, James W. Ely wrote, "In many constitutional histories the presentation of economic issues between 1880 and 1937 resembles a Victorian melodrama. A dastardly Supreme Court is pictured as frustrating noble reformers who sought to impose beneficent regulations on giant business enterprises" (Ely 1991, 213). New scholarship, beginning in the late 1980s, brought into question the standard

interpretation of *Lochner*.[2] This new scholarship no longer saw this decision as judicial "activism", but instead saw the decision in a more nuanced light. This new scholarship stressed that *Lochner* must be interpreted in light of historical legal doctrines and the political and economic forces existing at the time, and, according to these revisionist scholars, any interpretation of the decision must take into account these historical factors. I will first explore the historical background of this decision. The events that lead to the *Lochner* decision are important for a complete understanding of the decision. This chapter will also explore the decision itself. The final section of this chapter will discuss the new scholarship re-visiting the *Lochner* decision.

I. The Historical Ground Floor

During the late nineteenth and early twentieth centuries, societal conditions were rapidly changing. Society became increasingly urbanized as industry became widespread due to the Industrial Revolution. Beginning in the late nineteenth century, unionized bakers in New York began bargaining for shorter hours, as shorter hours gave more recreational and family time, and since the bakers were paid by the day, shorter hours would increase their hourly wage (Bernstein, Dorf ed., 2009). While larger factory bakeries provided a consistent working day of about ten hours, in smaller basement bakeries the workers were often subject to long working days and unsanitary conditions (Berstein, Dorf ed. 2009). Bakers in small basement bakeries could work up to 126 hours per week, including long stints during the night (Kens 1998, 13). These long hours led to little free time in which to enjoy a rest from unsanitary working conditions. Bakeries

[2] See Sunstein's 1987 article.

were unsanitary, as Kens writes, "…cellar bakeries were filthy and that the products that were turned out were a danger to the consuming public" (Kens 1998, 9). Cellar bakery employees were "....exposed to flour dust, gas fumes, dampness, and the extremes of hot and cold" (Kens 1998, 9). However, the bigger fear among bakery employees was of disease. The scourge of the nineteenth century was consumption. Consumption became a catchall term for many diseases affecting people during the nineteenth century, including tuberculosis. "Consumption was to the nineteenth century what cancer is to the late twentieth" (Kens 1998, 10). Given these hazards and the long hours, baker unions became increasingly insistent in their demands for a shorter working day. Movement towards a shorter working day began slowly in the nineteenth century. Most of the language in early statutes dealing with shorter workdays was declaratory, but these laws often had no regulatory schemes to enforce the statutes. New York's 1867 law declaring an eight-hour day had no enforcement mechanism. The law also allowed the employee to freely contract out their work beyond the eight-hour workday (Kens 1998). The New York Bakeshop Act was the first major attempt in New York to regulate employee workdays. It mandated a ten hours a day workday, and a sixty hours a week workweek (Kens 1998). Not only were workday hours proscribed in the bill, but also working conditions were to be regulated under the proposed act (Kens 1998). Labor, along with the press, brought attention to the conditions found within the basement bakeries. Attention from the *New York Press*, through the investigations and writing of its reporter Edward Marshall, provided enough drive for bill passage (Ken 1998; Bernstein, Dorf ed. 2008). Joseph Lochner, a bakeshop owner, broke the law when he required one of his bakery employees to work more than sixty hours a week. He was indicted and found guilty. On appeal, he raised the constitutional issue of whether or not the Bakeshop Act was constitutional. The

Bakeshop Act was upheld in the New York Court of Appeals, and Lochner sought further review by the United States Supreme Court.

II. Decision

Justice Peckham wrote the majority decision in *Lochner v. New York*. He first noted that the New York statute interfered with the right to contract between employer and employee, as he wrote, "The statute necessarily interferes with the right of contract between the employer and employees, concerning the number of hours in which the latter may labor in the bakery of the employer" (Peckham, *Lochner v. New York* 198 U.S. 45, 53). Beginning with the case *Allgeyer v. Louisiana* (1897), the United States Supreme Court recognized a liberty right to contract freely between employer and employee. This liberty right "…of the individual [is] protected by the Fourteenth Amendment of the Federal Constitution" (Peckham, *Lochner v. New York* 198 U.S. 45, 53). It is important to note that this liberty right, like many constitutional rights was not absolute. State governments can use their police powers in order to regulate or prohibit a contact made between two individuals. Police powers are government powers to regulate the safety, health, or morals of the community. Justice Peckham wrote, "Those powers, broadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals, and general welfare of the public" (Peckham, *Lochner v. New York* 198 U.S. 45, 53). In *Lochner* the Court cited *Holden v. Hardy* (1898), in which the Court ruled that the government could regulate a contract when dangerous conditions existed, such as mining underground. Justice Peckham discussed the holding in *Holden*, "It was held that the kind of employment, mining, smelting, etc., and the character of the employees in such kinds of labor, were such as to make it reasonable and proper for the state to interfere to prevent the employees from being constrained

by the rules laid down by the proprietors in regard to labor" (Peckham, *Lochner v. New York* 198 U.S. 45, 54). The liberty to contract and police powers are two important concepts to understand, as both concepts provide the framework for evaluating the Court's jurisprudence in the Fourteenth Amendment substantive due process cases in the late nineteenth and early twentieth centuries. The Court, in its jurisprudence, gave great latitude for employers and employees to contract without government interference. The New York statute in *Lochner* restricted the ability of a bakery employee from freely contracting with the employer. The main constitutional issue in this case for the majority was whether or not the government had rightfully interfered with the ability of employer and employee to contract. Remember, the basement bakeries were very unsanitary and unsafe places to work. However, this was not the determination that the Court made. The Court found that the relationship between health and the New York statute was very tenuous. Justice Peckham wrote, "We think that there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract on the part of the individual" (Peckham, *Lochner v. New York* 198 U.S. 45, 59). Given that the government can only regulate the contract if there is a valid health, safety, or moral concern, the Court could not conclude that the government established a link between the health of the workers and the New York statute. To indicate that the government could not show the link between the health of the employees and the New York statute, the Court compared bakers to other trades, "In looking through statistics regarding all trades and occupations, it may be true that the trade of a baker does not appear to be as healthy as some other trades, and is also vastly more healthy than still others" (Peckham, *Lochner v. New York* 198 U.S. 45, 59). The Court, examining statistics

concluded that bakers, as an occupation, were not an unhealthy aberration compared to other trades. Had the majority concluded that bakers as a profession were engaged in an unhealthy trade, regulation by the legislature would be more warranted. Certainly, in the Court's judgment, this industry did not have a dangerous and unhealthy environment as compared to other industries, such as the mining industry. Later in the majority opinion, the Court dismissed arguments that the Bakeshop Act would lead to cleaner conditions, since it was argued that overworking the workers leads to unclean conditions in the bakeries. Like the unhealthy environment argument, the Court dismissed this contention as well. Justice Peckham wrote to describe how nebulous this cleanliness argument was, "…it is not possible, in fact, to discover the connection between the number of hours a baker may work in the bakery and the healthful quality of the bread made by the workman. The connection, if any exists, is too shadowy and thin to build any argument for the interference of the legislature" (Peckham, *Lochner v. New York* 198 U.S. 45, 62). The Court again judged the nexus as too remote to justify intruding in the sanctity of the contract between employer and employee. Allowing the state to become a supervisor over every employee deeply concerned the Court. Examining the issues in *Lochner,* the Court made it clear that the government must articulate a clear reason for exercising their right to regulate contracts. New York did not meet this burden. Justice Peckham wrote this significant comment at the end of his opinion, "… it gives rise to at least a suspicion that there was some other motive dominating the legislature than the purpose to subserve the public health or welfare" (Peckham, *Lochner v. New York* 145 U.S. 95, 63). While this observation seems minor, one must remember the historical background of this period in history. Labor leadership was instrumental in the passage of the Bakeshop Act. The Court implied that there were other

reasons why this statute was enacted. This characterization of the Bakeshop Act was crucial as it suggested that the Justices did not believe this statute was enacted for valid health or safety reasons, but instead as a way to benefit labor. Revisionist scholars used Justice Peckham's comments as a clue into the Justice's thoughts about the New York statute. Before moving on to discuss the recent revisionist scholarship, however, it is important to briefly summarize the dissents.

Justice Holmes' dissent was famous in framing the contemporary interpretation of the *Lochner* decision. His main reason for dissent was that the majority justices were enacting their own economic attitudes, instead of making a legal judgment. He wrote, "This case is decided upon an economic theory which a large part of the country does not entertain…But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law" (Holmes, *Lochner* 198 U.S. 45, 75). He noted that a legislature often regulates the conduct of individuals and businesses. Usury laws are one such example, Justice Holmes cited, of a legislature regulating the liberty of people to contract (Holmes, *Lochner v. New York* 198 U.S. 45, 75). Justice Holmes wrote that there are numerous examples of the government interfering with the personal lives of people, "The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same…is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not" (Holmes, *Lochner v. New York* 198 U.S. 45, 75). Justice Holmes argued that attitudes and theories get read into law. His majoritarian outlook on the law showed up through his conception of "liberty" and the 14th Amendment:

> I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. (Holmes, *Lochner v. New York* 198 U.S. 45, 76)

Justice Holmes viewed the 14th Amendment Due Process Clause to bar only the most fundamental abuses of liberty. In his view, it should not be a convenient excuse to cast aside or block the legitimate majoritarian sentiment enacted through the legislature.

Justice Harlan wrote a dissent as well. Unlike Justice Holmes, who articulated a dissent based on the perceived motives of the majority, Justice Harlan focused his dissent on explaining why New York's Bakeshop Act was a valid exercise of the state's police powers. He described the working conditions for bakers to be very dangerous to workers' health. He cited reports to bolster his arguments, "Professor Hirt in his treatise on the 'Diseases of the Workers' has said: 'The labor of the bakers is among the hardest and most laborious imaginable, because it has to be performed under conditions injurious to the health of those engaged in it'" (Harlan, *Lochner v. New York* 145 U.S. 45, 70). Justice Harlan noted how workers often had to work long hours in stifling heat, and the fact that many workers lungs were inflamed by inhaling flour dust (Harlan, *Lochner v. New York* 145 U.S. 45, 70). After defining the health risks to bakery workers, he explained why he dissented. He made a judicial overreach argument. It was not the purpose for the judiciary to doubt the New York legislature and the statute they produced. There were differing opinions on how many hours the bakery workers could work without endangering their health. Justice Harlan argued that the New York legislature should make the determination. Otherwise, the 14th Amendment would be extended past its original purpose and essentially the courts would become a super-legislature pronouncing judgments on the validity of laws the

legislature made (Harlan, *Lochner v. New York* 145 U.S.45, 72-74). The US Supreme Court acting as a super-legislature was exactly what Justice Harlan did not want. He did not want the Court making judgments about the legislative motives behind a law. Given the evidence of health risks to bakery workers, he accepted that New York made a judgment in enacting this statute to regulate the bakers' workday.

To summarize the decision and the dissents, each justice brought something to the table. Justice Peckham dismissed the public health interest used by New York to justify its regulation. He alluded to other motives for driving the enactment of the law. Justice Holmes questioned the motives of the majority. He accused the majority of enacting their preferences into law and substituting their judgment for the will of the people. Both Justice Harlan and Justice Holmes made majoritarian arguments in their dissents, and both argued that the Court should not interfere in the judgment made by New York.

III. The New Scholarship

Starting in the late 1980s, scholars have been re-examining the *Lochner* decision. Seeking to shed new light on the decision, these scholars have given alternative interpretations on the decision itself and on the motives of the majority Justices. Cass Sunstein's 1987 article began this revisionist scholarship focusing on interpreting the *Lochner* decision in a different way. His interpretation describes a difference in constitutional status quo. During and before the *Lochner* era, a different baseline for judging action was in existence (Sunstein 1987). According to Sunstein's interpretation, government interference in the economic affairs of private parties affecting the existing distribution of wealth was constitutionally troublesome. The market was seen as a natural force, according to his argument. Subsidies taken from the employer and given

to the public, as was the case when the government took a benefit from the employer, such as the ability to contract employee working conditions, was constitutionally suspect under this old constitutional order. Sunstein noted that "subsidies" of this kind were permissible if they were to protect wards of the states that could be protected through pure labor laws. However, Sunstein noted, the employers and employees both had full legal status (Sunstein 1987). The government police power could "take" from the employer for the public benefit, but only if it fell within the traditional governmental role to protect the safety, health, morals, and general welfare of the people:

> The first is the sharp limitation of the category of permissible government ends. Efforts to redistribute resources and paternalistic measures were both constitutionally out of bounds. They did not fall within the 'police power'; the employer had committed no common law wrong, and regulatory power was largely limited to the redress of harms recognized at common law (Sunstein 1987, 877).

Given that the *Lochner* majority concluded that the New York Bakeshop Act was not a valid health and safety law, the statute was not valid because it called for the government to be re-distributing the traditional wealth and entitlement distribution of private actors. Sunstein explained that the majority would see this as "special interest" legislation, an interpretation that influenced future scholarship by Howard Gillman. Special interest legislation was legislation that provided a benefit to a certain group or person. Sunstein argued that the Justices were safeguarding government inaction and neutrality against excessive partisanship. Why did this old constitutional baseline become less relevant and less important? He wrote, "The common law could not be regarded as a natural or un-chosen baseline. Instead its principles amounted to a controversial regulatory system that created and did not simply reflect the social order" (Sunstein 1994, 50). With the new constitutional order, the definition of subsidy changed from the old

baseline. For instance, in terms of minimum wage laws, it was a subsidy to the public taken from the employers who were exploiting their workers (Sunstein 1994, 50). The old constitutional baseline of government inaction and neutrality disappeared. Howard Gillman articulated and expounded a similar framework to interpret *Lochner*. He argued that the common law class-neutral doctrine developed as a result of attempting to prevent factional influences from procuring special favors by lobbying the government.

In 1993, Howard Gillman wrote a book to explain how the *Lochner v. New York* decision reflects the class-neutral foundation of our nation. One of the early articulations of the dangers of factionalism, Federalist #10 provides a unique definition of factions and explains how the U.S. Constitution guards against factional influences. While Madison in Federalist #51 refers to factious majorities, his main thesis was that the new structural protections in the U.S. Constitution insulated the institutions against tyranny. Gillman argued that the courts, along with the constitutional protections embedded within the foundational document, were the guardians against factionalism. Since Federalist #10 and #51 are important elements to Gillman's thesis, a brief discussion of these foundational documents are provided. In Federalist #10, Madison defines faction as: "By a faction, I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adversed to the rights of other citizens, or to the permanent and aggregate interests of the community" (Madison, Federalist #10). These factional influences were of concern to our Founding Fathers. Our republican form of government had safeguards built-in to prevent these factional forces from gaining control of the government. One functional safeguard was a large and diverse republic. Having a large diverse republic can be a check, as to dominate

the country; a faction would need to dominate the government of many different states (Madison Federalist #10). The safeguards in the Constitution were added in order to allow the new republic to survive disparate groups who would shape the politics of the new nation. The Founding Fathers were designing a commercial republic to represent different and diverse economic and social groups. The Founders were hoping to create a well-functioning commercial republic, as Gillman writes, "The image of the self-reliant or autonomous individual was central to many different versions of republican ideology. Such independence had traditionally been considered a perquisite for civic virtue" (Gillman 1993, 24-25). This new commercial republic was predicated on the ideal that individuals could move about and ply their trades wherever it was needed. If business conditions were bad in an area, craftsmen could move around to find better conditions elsewhere. Gillman wrote about how Thomas Jefferson was eager to promote increasing access to land as a way to create this thriving commercial republic, "In promoting access to land, Jefferson believed that he would be promoting the interests of farmers and small producers or artisans. Workers in the city could escape low wages by becoming independent farmers…" (Gillman 1993, 26). This freedom of action, moving about the countryside, would prevent wages from becoming too low, as people could move elsewhere in search of higher wages. Jefferson, looking back at the European example, noted how the cultivation of land led to the dependence of workers on the rich (Gillman 1993). To promote this commercial republic and prevent an aristocracy from arising, the Framers promoted a faction neutral government. Government would have safeguards to prevent factions from gaining dominance, and the ideal of a class neutral society would embed itself in the legal jurisprudence of the developing nation. The Founders hoped these safeguards would create a wide-open commercial republic and lead to a democratic

community without an aristocracy, where the rich dominated the poor. As the country began to grow in the early nineteenth century, the country maintained the founding tradition of a class neutral society, “At the same time party leaders in the age of Jackson were maintaining the Framers’ class-neutral polity on the promise that commercial development or market opportunities were consistent with social independence and personal liberty” (Gillman 1993, 39). To better understand and appreciate the Jeffersonian ideal, it is important to explore Jeffersonian Democracy and the commercial republic in a more substantive way.

Douglas Adair's *The Intellectual Origins of Jeffersonian Democracy* explored the intellectual under-pinnings of Jeffersonian democratic ideals. Adair saw the development of Jeffersonian democratic ideals as a response to Jefferson and Madison's experiences during the founding era of the nation. Adair wrote, "They always considered themselves as political philosophers of the most traditional sort" (Adair, Yellin ed. 2000, 165). Their ideas were influenced by their training and experiences. Adair considered them to be "...solidly grounded in their own experiences as eighteenth-century Americans" (Adair Yellin ed. 2000, 165). This is key: How Jefferson and Madison thought about the new republic. Politics and the economy to them were intertwined concepts (Adair, Yellin ed. 2000). The Founders saw the development and sustainment of independent farmers as politically and economically beneficial. Adair explained the attraction of agrarianism to Jefferson and Madison, "The two Virginians were not primarily interested in agriculture as the producer of abundant crops and as the source of wealth; they were interested in the agrarian way of life as the producer of the ideal type of citizen for a republic" (Adair, Yellin ed. 2000, 18). James Madison, fearful of class struggles, hoped that the moderate tendencies of virtuous independent farmers and the structure of the government, would

temper class conflict when these struggles would undoubtedly break out (Adair, Yellin ed. 2000). Promoting the independent farmer, the frontier, and an extended republic was essential to create stability in this new republic, as Jefferson and Madison saw it. With the frontier promoting the independent and moderate agrarian class and a new governmental structure, they were hoping that class struggles would not become so disruptive and violent to destroy the new republic. Jeffersonian Democracy, as Jefferson and Madison saw it, is the creation of a stable republic moderating the problem of class struggle. Individuals during the time period were also troubled by potential factious conflict.

Individuals during the 19th century were using class language in political discussions such as editorials. William Leggett, a newspaper editor, wrote editorials in the Evening Post. In those editorials, he would use language reminiscent of the class-neutral language found in court decisions. Leggett wrote in one editorial, "Governments have no right to interfere with the pursuits of individuals, as guarantied by those general laws, by offering encouragements and granting privileges to any particular class of industry" (Leggett, White ed. 1984, 3). Like numerous courts, Leggett stated how a government should behave with respect to the different factions in society. He later wrote, "Whenever a Government assumes the power of discriminating between the different classes of community, it becomes, in effect, the arbiter of their prosperity, and exercises a power not contemplated by any intelligent people in delegating their sovereignty to their rulers" (Leggett, White ed. 1984, 3-4). Given the self-sufficient ideal of the Jeffersonian commercial republic, any government interference benefiting a particular enterprise, or essentially, engaging in class favoritism, would be seen as exceeding the powers of a proper government. Historical sources contribute to the view that class neutrality as a concept

was discussed and accepted in the 19th century. My dissertation will examine federal and state court decisions to find evidence or absence of class neutral language judicial opinions.

Howard Gillman's argument was that these founding ideals, especially the mitigation of factional influences, carried great weight in the political and legal world in the nineteenth century. It is these ideals that provide the substance for an emerging legal doctrine. Howard Gillman argued that judges were keen to protect the founding ideal of a faction-less republic as the United States took its first steps as a nation. Gillman wrote that the language of the police powers doctrine accentuated the aversion towards factional legislation, "It was a language that disdained 'factional' politics, partial laws that represented the corrupt use of public power by certain groups seeking to advance purely private interests; it celebrated the value of state 'neutrality'" (Gillman 1993, 20). The faction-less society became embedded in American law from the beginning of our nation. State judges, right after the founding, were enshrining this faction-less ideal into law. An early Massachusetts case, the Vadine's Case, as Gillman recounted, illustrated this faction-less legal reasoning early in the country's history. A Boston ordinance was at issue in the Valine's Case, where Boston was trying to license trash removal through the mayor and aldermen (Gillman 1993). As Gillman wrote, "The court agreed with the parties that the appropriate test was whether the act 'reasonably' advanced the general welfare; if a restraint of trade was 'unreasonable, it is void; if necessary for the good government of the society, it is good'" (Gillman 1993, 51). Advancing a particular interest not related to the general welfare would not be proper, but in this case, the Massachusetts Supreme Court decided that it was in the public interest for the city to control when and who carted away refuse (Gillman 1993). As Gillman noted, regulations advancing the general welfare are acceptable, while

regulations advancing a factional interest by using government legislative powers are not. Gillman wrote, "The master principle of nineteenth-century American constitutionalism was that it was illegitimate for government to single out for special treatment and attention certain groups or classes simply to improve their position in relation to competing classes" (Gillman 1993, 125). Gillman explained that two early Tennessee cases provide class legislation doctrinal foundation in the early 19th century, *Vanzant v. Waddel* (1829) and *Wally's Heirs v. Kennedy* (1831). In *Vanzant*, the Tennessee Supreme Court upheld state legislation which gave creditors of two state banks additional remedies to collect debt, since the Court upheld the law because it applied to everyone in similar circumstances. In *Wally's Heirs*, the Tennessee Supreme Court struck down a law authorizing the dismissal of Indian reservation cases if the suits were brought to benefit other parties. The Court struck down the law in the *Wally's Heirs* case because the Court could not find a legitimate reason why these suits should be separate from any other lawsuit thus seemingly providing benefits for certain parties (Gillman 1993, 53). These two cases typify early adherence to the class neutrality doctrine in state courts. After the American Civil War, the 14th Amendment and its Due Process Clause became part of the United States Constitution. The liberty to contract doctrine associated with the 14th Amendment substantive due process clause became the vehicle the US Supreme Court used to enforce a class neutral political environment in the post-civil war period.

The U.S. Supreme Court in *Barbier v. Connolly* (1885) emphasized that class legislation was unconstitutional, but faction-neutral health or safety regulation was permissible. Justice Field wrote in *Barbier*, "Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if

within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment" (Field, *Barbier v. Connolly* 113 U.S. 27 (1885), 32). The Court, in cases such as these, highlighted the police powers doctrine in their jurisprudence.

How is the *Lochner* case significant according to this class neutrality principle? The *Lochner* decision was predicated on the Court's majority rejecting the health and safety reasoning New York provided. Why did the Court reject the health and safety reasoning? Gillman argued that the Court recognized the labor class pushing for this law. According to the Court, there was a thin connection between the bakers' health and the regulation. Gillman wrote that Justice Peckham was, "…concerned about the possibility that legislatures might begin to use this pretext as an open-ended excuse to pass class legislation" (Gillman 1993, 129). The Court was worried that legislatures would use creative reasoning to justify the use of the state's traditional police powers to favor one class over another. The majority of Justices thought that New York was inventing health and safety concerns to justify its favoritism of the labor class at the expense of the employer class. As Gillman notes, the New York Bakeshop Act, "...was inserted into New York's Labor Code and not into its Public Health Regulations" (Gillman 1993, 128). Justice Peckham obviously thought that New York was trying to cover up class legislation by dressing it up as a health law, when he alluded in his opinion to other motives being behind the law. The Court saw this as a power grab by the labor class to promote themselves over the employer class. And given this factional legislation, the Court struck it down. How did this constitutional regime end? The changing societal conditions led to the destruction of the old constitutional ideal. By the end of the nineteenth century, the west was being settled and the frontier was closing. Manufacturing and urbanization were increasing. Individuals could no

longer pick themselves up as easily to move away from an area with lower wages. Gillman wrote, "These paupered laborers could no longer count on the freehold to 'naturally' inflate their wages, and so it was the responsibility of the government to 'artificially' inflate their wages through minimal wage legislation" (Gillman 1993, 150). With the frontier closing and new societal conditions coming into existence with the industrial age, government could, increasingly, no longer remain neutral. This was especially so when the new societal developments threatened to create an impoverished class that could no longer move to escape poor working conditions.

No longer could workers move about the country easily, and so the idea of the commercial republic and the principle of government neutrality were dying along with worsening conditions of the laborer class. As societal conditions continued to change after *Lochner*, legal scholars and judges began to rethink the class neutrality principles, "In response to *Lochner* and *Adair*, Judge Learned Hand insisted that, in light of contemporary industrial conditions, legislative power should be allowed to extend beyond traditionally accepted regulation to promote health and safety and prevent fraud" (Gillman 1993, 155). In the old constitutional order, laws establishing a maximum hours ceiling or setting a minimum wage would never be class neutral, as it would give benefits to a particular class, the laborers, at the expense of the employer class. Consequently, the old constitutional order died out during the Great Depression. In *West Coast Hotel v. Parrish* (1936), the Court upheld a minimum wage law as being within the police powers of the state. Under the old constitutional order, like *Adkins*, the minimum wage law would be struck down as benefiting one particular special interest. In other

economic arenas, such as interstate commerce, the Court also retreated during the New Deal allowing, for more significant government intervention into the economy.

Gillman's contribution to understanding the *Lochner* decision is immeasurable. We have an alternative context to explain why the majority decided *Lochner.* If one believes the Gillman thesis, the Court was not trying to promote its own economic preferences into law. It was, instead, upholding the long standing founding principles of class neutrality within the law. The majority saw *Lochner* as class legislation of the worse kind, as it was benefiting the laborer class over the employer class in giving them special rights to set their own work hours. This special favor given to the laborer class, as the Court saw it, was involving the legislature to promote the laborer class interest over another faction. Seeing the *Lochner* decision within this framework, the decision was not the judicial overreach as Justice Holmes has suggested.

Michael Phillips also added to the debate over interpreting the *Lochner* decision. He tested competing explanations of *Lochner* using the US Supreme Court 14th Amendment Economic Substantive Due Process cases during the *Lochner* era. The three theories he tested were: agent of business, class neutrality, and his own "protection of liberties" thesis (Phillips 2001). The agent of business explanation, according to Phillips, is that the Court was in business' pocket. He dismisses the agent of business explanation, since the Court was very active in protecting occupational freedom laws, such as striking down a North Dakota statute requiring pharmacies to be owned by pharmacists (Phillips 2001, 96). Striking down the law that allowed new applicants and competition to spring forth was not what established businesses would want. The Court also struck down a statute blocking an individual's entry into the ice selling business (Phillips 2001, 97). Phillips argued that occupational licensing schemes tended to drive up the

prices consumers paid and increased the incomes of licensees. Licensing requirements also restrict occupational entry by new entrants and protect established businesses. If the Court was really an agent of business and protecting businesses using the law, would it strike down laws good for businesses, particularly established businesses? Phillips concluded these cases would be hard to justify if the Court were an agent of business (Phillips 2001). Phillips then tested the Gillman explanation on whether it can explain the Court's substantive due process cases. He found that it can partially explain the Court's decisions. Phillips argued that the class legislation explanation works for some types of cases, such as occupational freedom (licensing, maximum wage, minimum hours) and land use cases, but it does not explain all the minimum wage decisions of the Court (Phillips 2001). Phillips took special interest in *Adkins v. Children Hospital* (1923), a case where the US Supreme Court struck down a minimum wage law on substantive due process grounds. He argued that the Court used language suggestive of class legislation doctrine to strike down the law, but that many people would benefit from the minimum wage in Washington D.C. Since many people would benefit from the regulation, Phillips thought this would be better thought of as a valid exercise of government power to protect the public health and safety of the community (Phillips 2001, 111). His main criticism of using the class legislation explanation in relation to *Adkins*, "At what point does legislation unconstitutionally benefiting a class become a law that instead promotes the health, safety, and welfare of the general public" (Phillips 2001, 111). Unlike a narrow special interest that would benefit from legislative intercession, such as seen in *Lochner,* a very large "class" benefits in *Adkins* and suggests that this is unlike the cases Gillman identified. Phillips argued that although this case should be defined as a class legislation case, it was different from the ones Gillman

wrote about in his book. The class in *Adkins* includes working women and children living in the District of Columbia, a very large class. When does the class become big enough to be upheld as a general law to protect the health and safety of the community? The class in *Adkins* is unlike a typical class legislation case where a small class extracts unfair benefits from another class (Phillips 2001, 111). Later, Phillips explored the possibility that the Court, in some class legislation cases, was concerned that some employment practices caused unfair competition and laws correcting this imbalance (Phillips 2001). Some maximum price regulations and utility rate orders were struck down without having an identifiable special interest or class (Phillips 2001, 113). His preferred theory is that the Court was protecting liberty and property during the substantive due process era. Explaining why he felt a general protection of property and liberty was a better fit, Phillips wrote, "Almost invariably, they said that the challenged measure deprived the claimant of liberty or property. By a potpourri of different means, these opinions then tried to determine whether that deprivation was substantively justified" (Phillips 2001, 115). Whatever test the Court used, the Court was determining whether the legislation deprived a person or business of their liberty or property. Some of the Court's decisions did not use the class legislation framework to resolve these cases, and so Phillips believed, in general, the best explanation was to conclude that the Court used the class legislation rationale in some circumstances, but not others. Phillips argued that the Court sought to protect the liberty or property of the claimants, no matter what test was used.

Since Phillips' case list is used to identify substantive due process cases decided by the U.S. Supreme Court, it is important to examine the types of cases he found through his research.

IV. The Phillips Study

Michael Phillips' study of the Lochner era examines the U.S. Supreme Court's economic substantive due process cases. Unlike Gillman, Phillips argued that the Justices were protecting personal freedoms against government intrusion during this era without using one exclusive doctrine. Not all cases in Phillips' study exhibited signs of class legislation doctrine as deciding factors. Phillips originally embarked on this study by examining various sources, including a list by Justice Frankfurter denoting purported cases that involved the US Supreme Court striking down government action under the 14th amendment (Phillips 2001, 33-34). As Phillips observed as he studied the period, many of these cases did not involve economic substantive due process at all, but rather the equal protection and the privileges and immunities clause. Some of these cases upheld government action instead of striking it down. After consulting prior sources and conducting his own research, Phillips identified one hundred and thirty-seven cases where the Court struck down government regulation and used some form of Substantive Due Process. Of these one hundred and thirty-seven cases, eighty-one of these were classed by Phillips as cases that were on the edges of Substantive Due Process.[3] Borderline Substantive Due Process cases had some characteristics of Substantive Due Process contained within them, Phillips notes, but these cases may be classified today as in a different category other than Substantive Due Process. Phillips identified fifty-six core Substantive Due Process cases where the Court struck down government regulations, but rejected the claims in one hundred and ninety-nine other cases.

[3] Peripheral Substantive Due Process cases were cases according to Phillips, that "…apply values that originate outside of due process" (Phillips 2001, 56-57). These Substantive Due Process cases often were co-mingled with issues such as the 5th Amendment. Borderline Substantive Due Process clause cases had features of Substantive Due Process, such as rate cases, but according to Phillips, legal scholars today might classify these cases in other categories outside of Substantive Due Process (Phillips 2001).

Rejected claims were cases where the Court upheld government regulations against attacks using Substantive Due Process grounds (Phillips 2001, 56). When the Court struck down legislative acts on Economic Substantive Due Process grounds, the Court rejected economic legislation in areas such as land use and employment (Phillips 2001). Phillips categorized these cases into very broad subject types covering general government regulations, business regulations, and other economic regulations.

Liability and damage cases comprised the first general type of cases the Court handled during the Lochner era. Phillips noted that the Court struck down some injury and damage cases, "…the old Court struck down five such measures on due process grounds" (Phillips 2001, 44). In these cases, the Court had a mixed record. While it did strike down measures imposing civil liabilities and civil damages on businesses, it also upheld government legislation imposing special civil liabilities or damages on several occasions (Phillips 2001). For example, in *Jones v. Brim* (1897), the US Supreme Court upheld a Utah state statute designed to make anyone running over herds of animals, such as horses or cattle, liable for the damage. Justice White, in upholding the law, wrote, "…as the statute clearly specifies the condition under which the presumption of neglect arises and provides for the ascertainment of liability by judicial proceedings, there is no foundation for the assertion that the enforcement of such ascertained liability constitutes a taking of property without due process of law (White, *Jones v. Brim* 165 U.S. 180 (1897), 184). Justice White's reasoning for upholding this law was that the law was not arbitrary and it was within the general police powers of the state to enact a law in the public interest.

Tax cases are the second type of due process cases Phillips identified. Phillips defined these cases as, "The tax cases considered here, by contrast, involve the basic due process requirements of nonarbitrariness" (Phillips 2001, 44). A large number of these cases involved state apportionment of tax assessments to pay for public improvements. As Phillips noted, the Supreme Court struck down a few of these cases, but upheld about three times as many as it struck down (Phillips 2001, 44-45). He wrote, "…the states may require that the cost of a local public improvement be distributed over the lands especially benefited thereby and may make the distribution according to the lands' value, their area, or the benefits they will receive" (Phillips 2001, 45). Only when the state arbitrarily made an apportionment will the US Supreme Court become involved and strike down the assessments.

The third type of due process cases that the Court dealt with during the Lochner era were land use cases. Land use cases are cases involving zoning regulations. An important zoning-regulation case is *Village of Euclid v. Ambler Reality Company* (1926). In *Village of Euclid* (1926), the Court upheld a zoning regulation enacted by the Village of Euclid. Justice Sutherland wrote about the criteria for upholding zoning regulations:

> If these reasons, thus summarized, do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. (Justice Sutherland, *Village of Euclid v. Ambler Reality Company* 272 U. S. 365 (1926), 395)

Like in other police powers cases, partial or arbitrary zoning regulations were unconstitutional, but general regulations protecting health and safety of the community were permissible. Phillips explained that the courts frequently struck down zoning use regulations in

cases where there was no public interest, "Most often, they involve arbitrary and irrational local land-use decisions that are the product of local officials' politics, economic self-interest, or simple incompetence" (Phillips 2001, 45). In some cases, the laws or ordinances struck down were predatory—in which the governing authority was allowing one group of owners the ability to determine land use of other peoples' lands, such as *Eubank v. City of Richmond* (1912). In *Eubank*, "…the ordnance required that the city set a specified building line on a street once two-thirds of the property owners on the street requested such a line." The Court struck down this regulation given the arbitrary nature, Justice McKenna wrote, "We are testing the ordinance by its extreme possibilities to show how, in its tendency and instances, it enables the convenience or purpose of one set of property owners to control the property right of others, and property determined, as the case may be, for business or residence -- even, it may be, the kind of business or character of residence" (McKenna, *Eubank v. City of Richmond* 226 U.S. 137 (1912), 144). According to the Court, this ordinance would allow property owners to control the rights of others. The Court made it clear in Euclid that it would not permit an ordinance that allowed a group of people to control others.

General police power cases are another important type of case the Court decided during the *Lochner* era. During the *Lochner* era, the US Supreme Court considered and upheld various regulations involving the government's general police powers, including laws requiring vaccinations, and conserving natural resources. The Court also upheld many public morality laws, including attacks on gambling (Phillips 2001, 47-48). While the US Supreme Court upheld many general police power laws, Phillips also noted that the Justices were fully cognizant of

peoples' liberties (Phillips 2001, 48). Like other due process cases, the Court upheld legislation where the government was seen to apply its police powers fairly.

Another due process case type the Court heard during the *Lochner* era was business and occupational entry regulation cases. One area the Court dealt with were government regulation of products. The Court upheld many consumer protection laws protecting the public from unsafe products (Phillips 2001). In other areas, such as contracts and insurance, Phillips found a more mixed record. In the famous case, *Allgeyer v. Louisiana* (1897), the Supreme Court rejected an individual claim that he be allowed to obtain out-of-state insurance that did not comply with Louisiana regulations (Phillips 2001). The Court also dealt with issues of occupational entry restrictions. The Court was mixed in its decisions striking down or upholding licensing schemes and licensing taxes. The Court viewed more harshly other entry restrictions, such as state laws requiring pharmacist ownership of pharmacies (Phillips 2001). In general, like the other types of due process cases, the Court generally did not strike down every law, but it did view certain government actions more harshly.

Employment regulation cases were another broad case type the Court decided during the *Lochner* era. Maximum hours laws were a huge source of employment due process cases. *Lochner v. New York*, the seminal case of the *Lochner* era, was a maximum hours law for bakery employees. Other US Supreme Court decisions struck down minimum wage laws and yellow-dog contracts (Phillips 2001). However, the record was mixed in terms of minimum-wage laws. In terms of worker health laws, Phillips argued that the US Supreme Court did not universally strike down worker safety laws (Phillips 2001). He wrote, "The *Lochner* Court also was willing to sustain employment regulations with some reasonable link to worker health and safety"

(Phillips 2001, 54). Phillips cited the insufficient directness shown by New York in dealing with poor working conditions as to why the Court did not sustain the New York statute in *Lochner v. New York*. The Court largely sustained worker compensation laws for hazardous and dangerous occupations during the Lochner era (Phillips 2001). Like other types of cases Phillips studied, the Court sustained some challenges to legislation, but rejected others.

Two recent books by David Mayer and David Bernstein further extend the *Lochner* era revisionist scholarship. Mayer rejected Gillman's theory that class legislation was the entire story behind the Substantive Due Process Era. Mayer's major objections of Gillman's theory are that (1) Gillman over-emphasized the class legislation explanation of economic liberty of contract decisions and (2) he ignored a large number of economic liberty of contract decisions that do not follow the class legislation explanation. Mayer argued that Gillman focused on decisions that favor class legislation analysis—those that involved labor laws, such as maximum hours or minimum wage regulations (Mayer 2011). However, Mayer suggested that the class legislation analysis applied best to state court decisions involving state constitutional law (Mayer 2011). Mayer seemed to confirm that the liberty of contract universe at least in the U.S. Supreme Court was much more expansive in scope than the class legislation theory would suggest.

The class legislation doctrine rarely was used to strike down legislation in liberty of contract cases, according to David Bernstein. His main argument was that the U.S. Supreme Court construed the prohibition on class legislation very narrowly and it upheld many laws that could have been struck down on class legislation grounds. Infrequently, according to Bernstein, the Court would strike down laws on class legislation grounds during the early *Lochner* era (Bernstein 2011). *Lochner* was a case where the Court used class legislation doctrine to strike

down legislation. He also argued that state courts were more aggressive in using class legislation doctrine to strike down labor laws (Bernstein 2011). Bernstein saw the *Lochner* era as a period where substantive due process was used, but not aggressively. The Court used substantive due process in a cautious manner and had beneficial effects on markets and civil society (Bernstein 2011). Bernstein's analysis provides a useful insight to the U.S. Supreme Court and state courts were using the class legislation doctrine during the *Lochner* era.

Mayer and Bernstein both argued that the class legislation doctrine was alive in American courts, but mostly in the state courts. The class legislation interpretation seemed to hold some merit for explaining the *Lochner* era, but it is not the entire answer. Both scholars make important observations about the *Lochner* era, but they do not propose an over-arching new theoretical perspective to explain this period of history.

V. Conclusion and Moving Forward

The new scholarship is moving away from the conventional interpretation of *Lochner*. The common interpretation of *Lochner* paints the majority Justices very badly. The majority, according to the common interpretation, pursued judicial activism of the worst kind and actively enshrined their economic preferences and attitudes into law. For much of the twentieth century, this is the lens through which the decision has been seen. The new scholarship is moving beyond the old conventional wisdom. Howard Gillman believed that we should study the *Lochner* era using the class legislation lens. The Court protected the Founding Fathers' traditional view of America as a class neutral, commercial republic. By striking down legislation benefiting one class over another, the Court protected the founding vision of a government-neutral commercial republic. Unfortunately, this old commercial republic ideal died as society, and the assumptions

on which the ideal was based, changed. The frontier was settled, and society becomes more urbanized and immobile. With the ideal dead, the old constitutional order finally died as society collapsed during the Great Depression, and a new constitutional order arose that recognized government involvement to equalize economic conditions.

The next few chapters will test the Gillman thesis. Gillman's thesis is bounded by the class-neutrality doctrine found through his historical research. Does Gillman provide a solid narrative for the *Lochner* era, or does Substantive Due Process jurisprudence extend much further than his research shows. My research question therefore is: What evidence for the various explanations can be found in lower court decisions? Indications of the theories of class neutral doctrine, protection of general economic liberties, and agent of business will be investigated. In future chapters. If evidence for these theories is present, how extensive is this evidence in the cases themselves?

Gillman's narrative will be examined incorporating Phillips' research when testing economic liberty in the lower courts. Gillman presents a historical framework with understanding the decisions within constitutional history and doctrine. Phillip's main contribution to the literature is that he found, studied, and categorized many areas of U.S. Supreme Court Substantive Due Process doctrine and then tested general explanations, such as agent of business and class legislation, to articulate a consistent theme for these cases. While Phillips did not propose a grand historical theory for the Substantive Due Process, he did provide a good counter-theory that the court was motivated to protect the general economic liberties of the people. The Gillman framework provides an appealing historical framework for examination, so this dissertation will focus on this theory. Bernstein and Mayer do provide good insight into

the *Lochner* era and their work suggests a very active use of substantive due process in state courts, but they do not provide a comprehensive theoretical treatment to explain the period.

CHAPTER 3

METHODOLOGY

My research will focus on lower federal courts and highest state courts in the United States. Gillman argued that the law in the late nineteenth and early twentieth century carries forward the ideal of a faction-free legal framework; a society which does not favor one particular special interest over another. To enforce this faction-free legal framework, the U.S. Supreme Court and other courts ensured legislation favored no particular class. For the theory to be correct, evidence of the police powers doctrine needs to be found in court decisions. Reading and examining legal opinions for faction-neutral language is the best approach for testing Gillman's thesis. Westlaw's online legal database provides me the case breadth to complete my study. Michael Phillips provides a ready list of U.S. Supreme Court decisions applying Substantive Due Process principles during the *Lochner* era. By searching for lower court cases citing one of these Supreme Court decisions, numerous lower court cases can be identified and examined through the language the lower court judge uses when rendering a decision. For a fuller appreciation of the *Lochner* era, the cases selected will be from the core and periphery of the Substantive Due Process world. To begin the search for lower level federal and state cases, the cases from Phillips' list in each category were collected using footnotes from his book. After the cases were organized into categories, a case was randomly drawn from the organized list of footnotes. One case, *Lochner v. New York,* was not randomly drawn from the list of cases. Since *Lochner* was a central case decided during the Substantive Due Process era, I included the case in the cases from which the sample was drawn. From studying lower court interpretation of *Lochner,* a better

appreciation of the case impact on lower court decision-making can be inferred. Four cases were selected to draw a sample of lower court cases. The selected Supreme Court decisions used to identify lower court cases were *Lochner v. New York* (1905), *Gundling v. Chicago* (1900), *Kansas City Southern Railway Co. v. Road Improvement District (1924), Smyth v. Ames* (1898), and *Coombes v. Getz* (1932). *Lochner* and *Gundling* were identified by Phillips as Core Substantive Due Process decisions, while *Smyth, Kansas City Southern Railway Co.,* and *Coombes* were identified as Borderline or Peripheral Substantive Due Process decisions by Phillips. From lower court decisions generated during the WestLaw search of each Supreme Court case, a subset, or sample, of these cases will be investigated to examine how these judges applied Substantive Due Process principles in their opinion. Initially the choice was made to slightly bias the sample towards lower court cases near in time to when the Supreme Court issued its decision to capture contemporary reactions of lower court judges as they reacted to decisions made at the top of the judicial hierarchy. Further out from the Supreme Court decision, the sampling of lower court cases was altered slightly to skip every other case to create a long time horizon. This was not a true random sample, but cases were drawn using the process of skipping every other case or every third case after the first few years of the Supreme Court decision. Unsuitable cases were discarded from the sample and another case was selected in its place. Examples of unsuitable cases are those cases where the Supreme Court precedent was cited within a decision, but no discernible discussion of Substantive Due Process principles were found in the decision. Another reason why a case might be excluded was if the legal issues presented seem to have no bearing on state actions or state regulation, but the precedent was cited for other reasons.

I expect with each Supreme Court case used for lower court decisions, roughly 15% to 20% of lower court cases will be sampled. With each lower court case, the focus will center on the presence or absence of class neutrality doctrine and how judges applied Substantive Due Process principles in general. Does a lower court decision use class legislation phraseology? Gillman focuses on class legislation as the main explanation for Substantive Due Process period, while Phillips disagrees countering with a more nuanced explanation emphasizing economic protection from over-burdening government regulation. The second question is how lower court interpreted Supreme Court precedent when resolving the case? Did the lower courts use and recognize Substantive Due Process principles as it decided the case? Answering these questions will provide a better lens into how lower courts tackled Substantive Due Process.

Gillman argued that legal society is immersed in this nineteenth century ideal of a faction-less society, where no one faction or class receives special protection by the government. For his theory to be correct, this police powers doctrine should be found in decisions from courts other than the U.S. Supreme Court. To be able to assess the evidence for police powers thesis, economic substantive due process decisions have to be read in light of the faction neutrality language keywords, such as "partial-legislation" or "class-legislation". He argued that the courts were using the faction neutral doctrine as applied through the due process clause to strike down legislative acts favoring special interests. When reading a case, three decision types can occur: (1) a court sustains or strikes down government action using class legislation rationale, (2) a court uses another Fourteenth Amendment Substantive Due Process rationale, or (3) a court uses an Agent of Business rationale. With decision type one cases, a court is actively using class legislation when examining suspect government action. Finding a case where class legislation

doctrine was touched upon and the U.S. Supreme Court nevertheless upheld the government action does have examples, such as *Holden v. Hardy* (1898). Courts can decide that legislation is a general regulation using valid police powers and not favoring one particular class or faction. In *Holden*, the Court upheld legislation setting an eight hour ceiling on how long Utah miners could work per day. Justice Brown wrote in *Holden* that the right of contract "..., however, is itself subject to certain limitations which the State may lawfully impose in the exercise of its police powers" (Brown, *Holden v. Hardy* 169 U.S. 366 (1898), 391). Justice Brown confirmed that class neutral doctrine can still result in upholding legislation, "…that the police power cannot be put forward as an excuse for oppressive and unjust legislation, it may be lawfully resorted to for the purpose of preserving the public health, safety or morals, or the abatement of public nuisances." (Brown, *Holden v. Hardy* 169 U.S. 366 (1898), 392). While the Court was upholding legislation in *Holden,* the justices were using class-neutrality doctrine as core to their decision. A similar case occurred in *Lawton v. Steele*. In *Lawton v. Steele* (1894), the U.S. Supreme Court upheld a New York state statute allowing destruction of fishing nets that were set out in violation of state law. Justice Brown wrote in *Lawton*, "The extent and limits of what is known as the 'police power' have been a fruitful subject of discussion in the appellate courts of nearly every state in the Union. It is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance" (Brown, *Lawton v. Steele* 152 U.S. 133 (1894), 136). The Court decided that it was within the valid police powers of a state to allow the

destruction of fishing nets as being a public nuisance.[4] However, as Phillips argued, the Court did not use class legislation as an exclusive doctrine. Any cases determined by the lower courts using legal principles other than class legislation doctrine would undercut the Gillman theory.

The third category is the traditional Agent of Business rationale. The Agent of Business rationale posits that the Court was captured by business interests and would be evident that a court was protecting businesses and bending law to protected favored class. Now, Justice Holmes did not in his dissent argue that the majority justices were protecting business necessarily, but instead enshrining an economic theory favorable to business through the law. Constitutional histories of the *Lochner* era written after the New Deal often inflate the majority justices as protecting business interests, not just pro-capitalist (Ely 1991). Given this is the conventional wisdom of the period, this perspective will also be tested as an alternative to other theoretical perspectives.

After summarizing a few cases of a specific type in order to show the usual language exhibited in these cases, such as railroad rates cases, there will be a summary statistic of the number of cases that fall within each category. A simple numerical count gives a better representation on how many cases actually use each type of rationale. With this information, I make an assessment whether or not there is evidence supporting class legislation or if another explanation is more persuasive. Not all cases are straight-forward and fit within one category, but most decisions favor one explanation over another. If Gillman is correct in his assessment of

[4] Interestingly enough, Chief Justice Fuller, Justice Field, and Justice Brewer dissented in *Lawton*. Even among judges, what constitutes valid use of state police powers is subject to disagreement.

legal history, I should see evidence of faction neutral language when reading case decisions in many different case types. Multiple cases using class/faction neutral language as the decision rationale would lend support that the police powers doctrine was active as a major force during the late nineteenth and early twentieth century. On the other hand, absence of faction neutral language in decisions would tend to discount the prevalence of police powers doctrine as a major factor in court decisions.

I. Conclusion

Gillman's police powers thesis provides an explanation for why *Lochner* was decided as it was. He argued that the *Lochner* decision was congruent with the legal doctrine in existence within the legal fabric of the late nineteenth and early twentieth century. To determine whether this extensive use of this legal doctrine actually exists, I will need to look for certain key language in federal and state decisions during the time period. By examining these cases for clues on the existence or absence of class legislation theory, we can determine what did happen during this important period of legal history. The cases explored in the next few chapters will illuminate an important question. How did the courts other than the U.S. Supreme Court handle Fourteenth Amendment Substantive Due Process cases? Gillman would argue that the lower courts, enmeshed within the class legislation doctrine, would be using this doctrine to strike down or in some cases uphold government action. In all case types, we would see cases where factional influences would be expunged by courts willing to strike down illegitimate government action. In contrast, Phillips argued that there might be a more nuanced perspective; The U.S. Supreme Court used class legislation doctrine in striking down some of the cases, but not in

others. Consistently seeing other doctrines used to strike down or occasionally uphold government action would mean that Phillips correctly noticed a trend that the courts were more in favor of economic liberty than using one specific doctrine in order to decide cases.

CHAPTER 4

DATA: ANALYSIS OF RATE, IMPROVEMENT, & CONTRACT CASES

As described in previous chapters, three major perspectives rival each other in explaining the *Lochner* era. The traditional explanation has been that the Court was an Agent of Business. This Agent of Business explanation was popularized by Justice Holmes' dissent and perpetuated by most legal scholars. *Lochner* (1905) was seen as an exemplar where the court was captured by business. With modern scholarship casting doubt with this traditional perspective, two prominent scholars suggested other explanations for the *Lochner* era. Howard Gillman's main contribution to *Lochner* scholarship was to recognize that the Court, at least in some cases, was trying to keep the government neutral in economic regulation by separating government from competing special interests trying to extract favors from government. This explanation is called the class legislation/police powers doctrine. Michael Phillips agreed with Howard Gillman that class legislation/police powers doctrine was part of the explanation for this constitutional era, but it was only part of a much broader picture. Phillips argued that the best way to understand the *Lochner* era was that the Court protected individuals and businesses against oppressive government regulation. In cases Phillip investigated for his study, he noted the absence of class legislation/police powers doctrine in many cases. If class legislation/police powers doctrine was *the* explanation of *Lochner* era cases, all substantive due process cases would be saturated with references to class legislation/police powers doctrine. In my research, non-employment cases, for example, utility rate cases, exhibit an absence of police powers doctrinal references throughout the sampled cases.

I. Railroad or Utility Rate Cases

Railroad or utility rate cases were cases where the United States Supreme Court, and other courts, afforded substantial economic protection to railroads or utilities by preventing onerous government regulation from impoverishing railroad companies. Railroad rate cases involved the power of the state legislature or government agency to set rates for railroads and other utilities. Railroads and other utilities were found to have the right to have a fair return and setting maximum rates for freight carriage must not deprive the company of a way to earn a profit and thus drive the company into bankruptcy.

The academic literature of the Economic Due Process period discussed railroad rate cases and how these cases were interpreted. For example, Professor William Cook in *The Legal Legislative and Economic Battle over Railroad Rates* discussed rate setting by different governmental institutions: United States Congress, the Interstate Commerce Commission, and State Legislatures. He wrote that the development of the U.S. Supreme Court's application of an unreasonable rates doctrine started in the late 19th century, "Finally, in 1886…the court intimated that a confiscatory rate might be unconstitutional. Four years after that, in 1890 the court set aside a reduction of rates by a state commission as a violation of the Fourteenth Amendment" (Cook 1921, 31). As he noted, the Court's use of the 14th Amendment to strike down unreasonable rates was not unanticipated. The Court developed this doctrine over time with earlier cases paving the way for later developments. Cook also described briefly the rate setting decisions of the state legislatures and other institutions. He also described the legal battle as an economic one, "The legal battle has become merged into the economic battle between railroad insolvency and trade necessity…The power of that Court to declare unconstitutional and void the

acts of states, municipalities, commissions, and even of Congress and the Executive itself - a power which has made it the greatest court that ever existed, and enables it to safeguard the rights of all" (Cook 1921, 39). Two aspects become clear when talking about the railroad-rate framework in existence during the *Lochner* era. Railroad rate court decisions were seen as a general bulwark to protect the rights of private entities, such as individuals and corporations, against the potential ruinous powers of the state. The Court allowed the state legislature or state government agency to prove that the railroad rates were not confiscating the means to do business, but courts struck down the rates if the rates were seen as unreasonable. As noted in the *Yale Law Journal,* "Thus, the burden of proof is cast upon the party alleging them not reasonable, and the judiciary should not interfere with the rates established, unless they are so plainly and palpably unreasonable, as to make their enforcement equivalent to the taking of property without such compensation as under all circumstances is both just to the owner and to the public" (Yale Law Journal 1909, 345). In normal circumstances, the legislature would be justified as setting the rates for the convenience and well-being of everyone in the state. As courts and the commentators both argued, the judicial branch only got involved if the railroads or other public-utilities proved that the regulation would bring them into ruin, as noted further in the law review article, "...or in other words, judicial interference should never occur, unless the case presents clearly and beyond all doubt such a flagrant attack upon the rights of property under the guise of regulation" (Yale Law Journal 1909, 345). To safeguard property rights, the courts only intervened if the state through setting an unreasonable railroad rate prevented a railroad company from earning a sustainable profit. Like the *Lochner* case, the legitimate use of the governmental regulation was constitutional and the government had the right to protect public health and safety

in the eyes of the courts, but using regulation to interfere with the capability for individuals and businesses to maintain their economic life was violating their liberties.

A significant United States Supreme Court case involving the setting of railroad rates is *Smyth v. Ames (1898)*. The U.S. Supreme Court issued two decisions in this case, one decision slightly modifying the decree in the other.[5] For the purposes of illustrating the articulation of the principles used by the Justices in railroad rate cases, the statements from Justice Harlan were from the second decision. Nebraska enacted a statute to fix reasonable maximum rates for railroad freight operating within state borders. The railroad companies challenged the Nebraska law claiming that it did not provide for a reasonable return to earn just compensation. Justice Harlan wrote, "The general question argued before us on the original hearing was whether the rates established by the Nebraska statute, looking at them *as an entirety,* were so unreasonably low as to prevent the railroad companies from earning such compensation as would be just, having due regard to the rights both of the public and of the companies" (Harlan, *Smyth v. Ames* 171 U.S. 361, 364). Charging the companies an unreasonable rate and thus depriving them of just compensation violated the Fourteenth Amendment. Justice Harlan wrote, "And it is further declared, adjudged, and decreed that the act above entitled is repugnant to the Constitution of the United States, forasmuch as, by the provisions of said act, the said defendant railroad companies may not exact, for the transportation of freight from one point to another within this state, charges which yield to the said companies, or either of them, reasonable compensation for such services" (Harlan, *Smyth v. Ames* 171 U.S. 361, 363). The difference between this case and other cases where class legislation/police powers rationale was used is that the Court did not state that

[5] *Smyth v Ames (1898) 166 U.S. 466 & Smyth v. Ames (1898) 171 U.S. 361.*

the legislature was captured by factional influences. The Court explicitly ruled that railroad rates must give a fair return to the railroad or utility so that did not deprive the company in question due compensation. In the state and federal cases that follow *Smyth v. Ames*, the decisions recognize and apply the doctrine of *Smyth*, even if the judges distinguished their case.

A two-part case that dealt with the ability for Alabama to set railroad rates is *Louisville & N.R. CO. v. Railroad Commission* (1912). In the first case, railroad companies challenged Alabama's statutorily set rates and then, in a subsequent case, challenged the rates issued by the state's railroad commission. The Court used the framework created by *Smyth*, that maximum freight rates that did not allow a corporation fair profits violated the Fourteenth Amendment Equal Protection and Due Process clauses. As Judge Jones wrote, "…secondly, because the rates on the proof and in view of the value of the property devoted to intrastate business and the returns allowed there from by the rate statutes were confiscatory, and deny to complainants that just compensation for the use of their properties to which the Constitution entitles them" (Jones, *Louisville & N.R. CO. v. Railroad Commission* (1912) 196 F. 800, 813). Later the opinion reiterated the points about how unreasonable rates can deprive a business of its property, "The question of confiscation— the denial of that just measure of compensation the Constitution secures— depends on the value of the property devoted to intrastate business and the return the proposed rates will yield on such value" (Jones, *Louisville & N.R. CO. v. Railroad Commission* 1912 196 F. 800, 818). Ultimately, the court found that the statutory enacted rates were confiscation and permanently enjoined the enforcement of those rates after examination of the evidence using *Smyth* reasoning as underlying the decision.

A subsequent case also filed in federal district court challenged the ability for the railroad commission to publish maximum rates after a previous court issued a preliminary injunction against the state's statutory rates. While this case involved whether the railroad commission should be held in contempt for violating the permanent injunction issued in the previous case, the district court seemed to follow and recognize the doctrine in *Smyth v. Ames.* The railroad commission was said to violate the permanent injunction by publishing rates for passengers fixing maximum rates of two and one-half cent per mile for adults and one and one-fourth cent per mile rate for children. The permanent injunction enjoined the full enforcement of the statutory defined rates, which would have been confiscatory. The case turned on the fact that while enacting the whole scheme of legislative maximum rates would be confiscatory; the commission had independent authority to prescribe freight rates for railroads. It would be a violation of the district court's prior decree, and thus in contempt of the previous order, as Judge Grubb wrote, "The question remains as to whether the action of the Commission was an attempted enforcement of the passenger rate act or whether it was an order made by it in pursuance of its independent rate-making power. If the latter, it was not a violation of an injunction which restrained only the enforcement of the passenger rate act" (Grubb*, Louisville & N.R. CO. v. Railroad Commission* (1913) 205 F. 800, 806 – 807). The court seemed to indicate that as long as the railroad rate was set by alternative means, such as diligent work done by the railroad commission and independent of the statutory rate, that it did not violate the permanent injunction put in force by the district court in another case. As such, it should be seen as a companion to the previous case where the railroads succeeded in challenging Alabama's statutory enacted rates. Given the passage of time and the fact that, according to the court, the

Alabama Railroad Commission used it is own authority to set a freight rate that seemed to follow the statute set rates, the court found it not to be in violation of the permanent injunction and the rate was implied to be legal and constitutional.

Another case decided by a federal circuit court, *Shepard v. Northern Pacific Railroad Company (1911),* involved railroad rates set by Minnesota. The Minnesota Railroad and Warehouse Commission and the state legislature proceeded to issue a series of rate reductions for general merchandise, commodities, and passenger carriage that were lower than the rates set by the railroads. The two issues in this case revolve around whether the rates burden interstate commerce and whether the rates were unfair in violation of the Fourteenth Amendment. This case was decided on both grounds, and a brief description of the interstate commerce argument is included. The railroads argued that the rates were too low, to make a profit but in fact to operate their system, it would require them to use the artificially low rates within their system, as Judge Sanborn wrote, "while the complainants argue that their enforcement is beyond the power of the state because the effect of their necessary operation is substantially to burden interstate commerce and hence to invade the exclusive domain of the nation, in violation of the commercial clause of the Constitution" (Sanborn, *Shepard v. Northern Pacific Railroad Company* (1911) 184 F. 765, 769). Ultimately, the court did decide that the artificially low rates caused a substantial burden on interstate commerce, as Judge Sanborn wrote, "Each of the acts and orders challenged has the natural and necessary effect substantially to burden and directly to regulate interstate commerce, to create undue and unjust discriminations between localities in Minnesota and those in adjoining states, and it is unconstitutional and void" (Sanborn, *Shepard v. Northern Pacific Railroad Company* (1911) 184 F. 765, 799). However, this case was very

much enmeshed with the railroad rate cases and the Fourteenth Amendment and the case turns on this ground as much as it did the interstate commerce ground. Also intermeshed within *Shepard* is the concept of takings, in that the government cannot take the property without just compensation. Judge Sanborn explained the necessity of fair and equable rates, as he wrote, "It is, however, beyond the power of a state or of its officers to establish or maintain fares and rates the effect of the enforcement of which is equivalent to the taking of the property of public service corporations for public use without compensation, unless justice to the public requires such a confiscation. Fares and rates must be just, both to the people and to the carrier" (Sanborn, *Shepard v. Northern Pacific Railroad Company* (1911) 184 F. 765, 801). While a state legislature or a commission pursuant to the state legislature can use government regulation to prescribe rates for the public good, it must be fair to corporations that are public service corporations which carry people and goods across state lines. Directly citing *Smyth v. Ames* among other cases, the circuit court concluded that the Minnesota Legislature prevented the railroad from fairly making a profit and unfairly confiscated money from them. The judge emphasized that railroads were risky businesses and subject to disasters which may cause a railroad to become unprofitable. Government unfairly regulating the railroad could lead to such a disaster. Ultimately, Judge Sanborn found that, "The fares and rates prescribed by the acts of the Legislature and the orders of the Railroad and Warehouse Commission which have been considered…as to each of these railroad companies, unreasonably low, unjust, and confiscatory. Each of those acts and orders is violative of the fourteenth amendment to the Constitution, and void, and a decree for the complainant must be rendered in each of the cases" (Sanborn, *Shepard v. Northern Pacific Railroad Company* (1911) 184 F. 765, 816). The idea that rates must be set

so that a railroad or utility could survive and make a profit are deeply enmeshed in the *Lochner* era framework.

Matthews v. Board of Corporation Commissioners of North Carolina (1901), a federal circuit court case, follows the vein of the previous cases considering freight rates for passengers and other types of freight in the state of North Carolina. Like the other railroad rate cases, this case involved a government agency, the North Carolina Corporation Commission, setting maximum freight rates pursuit to authority given by the legislature. Judge Simonton explained the principles involved with this case, "The questions made in this case are federal questions, and grow out of the fourteenth amendment. If the rates fixed are unreasonable…then the property of the company is taken and used by the public without just compensation, and it is deprived of its property without due process of law" (Simonton, *Matthews v. Board of Corporation Commissioners of North Carolina* (1901) 106 F. 7, 8). Like other railroad freight cases, the circuit court, as in this case, examined a report of a special master, which produced detailed records about the railroad business and the effects of the commission set legislative rates. In this case, the special master and then the court, found that the commission set rates were reasonable, as Judge Simonton wrote, "But, at the least, it shows that, before the rate fixed by the commission is pronounced unreasonable, the result of fixing the rate must be clearly unreasonable" (Simonton, *Matthews v. Board of Corporation Commissioners of North Carolina* (1901) 106 F. 7, 10). The important point of this case is that the *Smyth* frameworks undergirds the decision. Like other cases, there is no alternative framework used to decide this case; class legislation/police powers doctrine is absent.

Complaints by companies about unreasonable rates for telephone companies were also at issue. While the cases did not focus on the *Smyth v. Ames* framework, they do recognize that unreasonable rates are confiscatory. For example, Judge Shepards wrote in *Manning v. The Chesapeake and Potomac Telephone Company* (1901) that, "The courts will make this inquiry and will forbid enforcement when it plainly appears that the regulation violates a binding contract, or is tantamount to the deprivation of property without due process of law, or to its taking for public use without just compensation" (Shepards, *Manning v. The Chesapeake and Potomac Telephone Company* (1901) 18 App.D.C. 191, 214). Cases dealing with telephone charges for services follow the general framework that for profit utilities have a public service component and cannot be bankrupted or the government cannot unfairly deprive them of property. In public utility rate cases, like the railroad rate cases, the court used evidence and facts to decide when the government set rates unreasonably. In the *Manning* case, the telephone company could not provide enough proof in order to satisfy the court that it was being unfairly deprived of property.

Another utility rate case decided by a federal district court, *Middlesex Water Company v. Board of Public Utility Commissioners of New Jersey (1926)*, involved the setting of water-utilities rates. A New Jersey corporation owned a waterworks and distribution network. Did the commission regulating the waterworks set rates that were unreasonable? The court relied upon the fact that it considered, as part of the *Smyth v. Ames* (1898) framework, that unreasonable rates were ruinous of public businesses. Judge Rellstab wrote, "The sole question before us is whether the rates prescribed by the defendant are confiscatory" (Rellstab, *Middlesex Water Company v. Board of Public Utility Commissioners of New Jersey* (1926) 10 F.2d 519**,** 531). He

then considered using a special master's findings to determine whether the rates were depriving the corporation of its property in violation of Fourteenth Amendment. While Judge Rellstab did not devote a detailed discussion of the framework he used, he certainly implied in several places that the *Smyth* decision was the one governing the case. As Judge Rellstab wrote toward the end of his opinion, "For these reasons, we are of the opinion that the rates under consideration are confiscatory and invalid, and should be enjoined" (Rellstab, *Middlesex Water Company v. Board of Public Utility Commissioners of New Jersey* (1926) 10 F.2d 519, 534). Like the previous railroad and utility cases, the court decided that the rates set by government were unreasonable, confiscatory, and deprived the utility of their property.

These maximum railroad and utility rate cases show that Michael Phillips provides the best way to understand *Lochner* era rate cases. The United States Supreme Court and then the lower courts used language to strongly shield economic actors from ruinous government regulations. Profits and revenues could be lost if the government were able to set rates too low for businesses to survive. There was a definite concern that these companies were the life-blood of the country, and that rates were to be set in order to allow the companies to survive and prosper. As the study of cases continues, a general picture emerges; the government must regulate reasonably and prevent dire consequences from occurring when it chooses to use its power. Railroad rate cases begin to show the deficiencies of the class legislation/police powers explanation.

Table1 highlights two important implications. Michael Phillips has the best explanation for these cases. Gillman's class legislation doctrine theory does not explain these cases as there are no identifiable special classes benefiting at the expense of others in railroad or utility rate

cases. The federal or state courts did not strike down every railroad rate set by the state, but instead upheld half of them in constitutional challenges.

Table 1. Railroad and Utility Rate Cases

Theory	Upheld	Struck Down
General Economic Liberties (Phillips)	14[6]	13[7]
Class Neutral Doctrine (Gillman)	0	0
Agent of Business (Holmes)	0	0

The most startling thing about the railroad/utility rate cases are the stark differences between federal and state courts. Federal courts struck down government action while state courts largely upheld government action setting rates. The cases deriving from *Smyth* did all cite

[6] *Griffin v. Goldsboro Water Co.* (1898) 30 S.E. 319, *Carson v. Sewerage Com'rs of City of Brockton* (1900) 175 Mass. 242, *State ex rel. R.R. & Warehouse Com'n v. Minneapolis & St. L.R. Co.* (1900) 80 Minn. 191, *State v. Eskew* (1902) 90 N.W. 629, *State v. Savage* (1902) 91 N.W. 716, *Chicago Union Traction Co. v. City of Chicago* (1902) 199 Ill. 579, *Souther v. City of Gloucester* (190) 187 Mass. 52, *Tiff v. Southern Ry Co.* (1905) 138 F. 753, *McGuire v. Chicago, B. & Q.R. Co.* (1906) 108 N.W. 902, *State v. Standard Oil Co.* (1910) 111 Minn. 85, *Reno Power, Light & Water Co. v. Public Service Commission of Nevada (*1921) 300 F. 645, *Louisville & N.R. CO. v. Railroad Commission* (1913) 205 F. 800, *Manning v. The Chesapeake and Potomac Telephone Company* (1901) 18 App.D.C. 191, *Matthews v. Board of Corporation Commissioners of North Carolina* (1901) 106 F. 7.

[7] *Milwaukee Electric Railway & Light Co. v. City of Milwaukee* (1898) 87 F. 577, *Bank of Kentucky v. Stone* 88 F. 383 (1898), *Chicago, M. & St. P. Ry. Co. v. Tompkins* (1898) 90 F. 363, *State v. Jackman*(1898) 41 A. 347, *Dinsmore v. Southern Exp. Co.* (1899) 92 F. 714, *Cleveland City Ry. Co. v. City of Cleveland* (1899) 94 F. 385, *Iron Mountain R. Co. of Memphis v. City of Memphis (*1899) 96 F. 113,*Western Union Telegraph Co. v. Myatt* (1899) 98 F. 335, *Starr v. Chicago,* R.I. & P. Ry. Co. (1901) 110 F. 3, *In re Arkansas Railroad Rates* (1909) 168 F. 720, *Louisville & N.R. CO. v. Railroad Commission* 1912 196 F. 800, *Shepard v. Northern Pacific Railroad Compan*y (1911) 184 F. 765, *Middlesex Water Company v. Board of Public Utility Commissioners of New Jersey* 10 F.2d 519.

the principle that unreasonable rates were unconstitutional, but the state courts were more deferential to upholding state action than federal ones. Some federal courts issued preliminary injunctions in these cases I studied, but generally courts sustained preliminary injunctions after further trial. Michael Phillips produced the best framework to understand the railroad rate cases. While some of the courts in the cases citing *Smyth* use language familiar to the police powers (Gillman) doctrine in the sampled cases, the cases of the whole are more consistently seen as a concern for the general protection of economic liberties, much more consistent with Michael Phillips.

II. *Coombes* Cases

Coombes v. Getz (1932) is another case where the U.S. Supreme Court used Substantive Due Process to protect the liberties of the people. In this particular case, it found that the repeal of a California Constitution provision impaired the obligations of contracts as found in the United States Constitution and the Fourteenth Amendment due process clause. The California Constitution had a provision creating liability whenever the corporate directors embezzled or committed fraud. Another provision of the California Constitution allowed the people to repeal all laws related to corporations. When the section was repealed, did it impair an implied contract between the creditors and the corporate directors as created by the California Constitution? As Justice Sutherland wrote, the California Constitution had created a contract, "In substance, it was held that the right accorded to corporate creditors was created by, and dependent alone upon, the constitutional provision,…It was conceded that the liability created by the constitution was in its nature contractual and, as a matter of law, entered into and became a part of every contract between the corporation and its creditors" (Sutherland, *Coombes v. Getz 285 U.S. 434, 440).*

Since this provision created a contract when the creditor relied on the fact that they can sue, the loss of this provision can impair the obligations of the contract. Justice Sutherland explained how this can create a federal constitutional concern, "…but will determine independently thereof whether there be a contract, the obligation of which is within the protection of the contract clause, and whether that obligation has been impaired; and, likewise, will determine for itself the meaning and application of state constitutional or statutory provisions said to create the contract or by which it is asserted an impairment has been effected" (Sutherland, *Coombes v. Getz 285 U.S. 434, 441)*. The justices described previous cases where the Court held that an extended statutory or constitutional provision might become a fully-vested property right. Sutherland wrote, "When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute" (Sutherland, *Coombes v. Getz 285 U.S. 434, 445).* When the contact was impaired with the repeal of the constitutional provision, California thus violated the Fourteenth Amendment Due Process Clause.

Erickson v. Richardson (1936), a federal circuit court case, relies heavily on Coombes. This case, like *Coombes,* also hails from California. The Ninth Circuit Court of Appeals reviewed a case from the district court involving a bankruptcy dispute, in which the bankrupt estate was objecting to the assessment made against it by the state superintendent of banking. California banking law at the time made the stockholders liable for the debts contracted while a stockholder. If the obligation was contractual in nature, then the stockholder would be liable under federal bankruptcy law at the time. This case was not challenging the California law, but it

includes a discussion of the principles behind the *Coombes* decision. Judge Denman wrote in *Erickson* about how *Coombes* applies, "In the case of Coombes v. Getz, the Supreme Court held that in California the liability to creditors of the corporation for moneys lost to them by misappropriation of directors or officers, which liability the Constitution placed upon one becoming a director, was contractual in its nature" (Denman, *Erickson v. Richardson,* (1936) 86 F. 2d 963, 966). Along with the discussion with other cases, he connected this case with the ones in *Coombes*. Judge Denman wrote about the connection between *Erickson* and *Coombes*, "The analogy is complete between the constitutional provision creating the contractual liability of the stockholder to the corporation's creditors and the provision of the statute creating the stockholder's liability for the debts of a banking corporation. Under the state constitutional provision the corporation is the agent of the stockholder for the making of the debts which the stockholder is contractually bound to pay" (Denman, *Erickson v. Richardson,* (1936) 86 F. 2d 963, 968). This case did not involve the state impairing a contract, but rather the interpretation of the intersection between federal and state bankruptcy law.

In *Department of Banking v. Foe et al. (1937),* the Nebraska Supreme Court reviewed a case of a state officer, who was having his salary garnished as the result of being liable as a stockholder of a bankrupt bank. One the arguments that the appellant used was that the state law imposing the obligation of stockholder liability was repealed by the voters. Justice Messmore, writing for the court, said that the case was indistinguishable from *Coombes v. Getz.* Justice Messmore explained why the appellant's argument failed, "Defendant attempts to distinguish the case at bar from Coombes v. Getz, supra, on the ground that the court was dealing with officers…who had embezzled funds, and the action was by the plaintiff,…,while in the case at

bar the plaintiff had no direct interest in the funds and was acting for the benefit of another class of persons…. The principle of law is the same. The plaintiff was acting in a designated capacity for the benefit of the creditors of this particular bank" (Messmore, *Department of Banking v. Foe et al.* (1937) 286 N.W. 264, 266-267). In this case, the Nebraska Supreme Court recognized that the impairment of contractual rights is created when a stockholder liability provision in state law is repealed, as was the case in the repealed California Constitution provision on corporate officer responsibility for embezzlement and fraud. The contractual obligation does not disappear when the state chooses to repeal a constitutional or state law provision. This case also featured another interesting intersection involving the 14th Amendment and state law.[8]

Table 2. Contractual Obligation Cases

Theory	Upheld	Struck Down
General Economic Liberties (Phillips)	5[9]	4[10]
Class Neutral Doctrine (Gillman)	1[11]	0
Agent of Business (Holmes)	0	0

[8] The appellant made an argument in this case that the state garnishment law is arbitrary and class legislation and violates the 14th Amendment, as it applies to a broad number of state officers. The Nebraska Supreme Court, after discussing precedents from other states, decided the state garnishment law is constitutional.

[9] *Frank Kumin Co. v. Marean* (1933) 283 Mass. 332, *J. B. Preston Co. v. Funkhouser* (1933) 261 N.Y. 140, *Rowekamp v. Mercantile-Commerce Bank & Trust Co.* (1934) 72 F.2d 852, *Zalatuka v. Metropolitan Life Ins. Co.*(1937) 90 F.2d 230, *Department of Banking v. Foe et al* (1937) 286 N.W. 264.

[10] *Hoffman v. W.H. Worden Co.* (1932) 2 F Supp. 353, *Meza v. Sword* (1934) 28 P.2d 684, *Sutton v. Globe Knitting Works* (1936) 276 Mich 200, *Erickson v. Richardson,* (1936) 86 F.2d 963.

[11] In *Department of Banking v. Foe et al* (1937), Justice Messmore references some class legislation language in the opinion. While the case is most consistent with Phillips explanation, in an abundance of caution, this case is credited as adhering to both the Gillman and Phillips theories.

The *Coombes* or constitutional obligation cases in Table 2 should also be identified with the Phillips explanation. Like the railroad rate cases, these cases do not have obvious connection with class legislation doctrine, but *Coombes* and the subsequent cases definitely deal with the 14th Amendment Due Process Clause.

The *Coombes* derived cases often dealt with issues intertwined with the contractual impairment issues found objectionable by the U.S. Supreme Court, and the cases were not defined as upholding or striking down government action, unlike the other cases involving reasonable railroad rates and roadway improvement taxation. All the surveyed cases, like the cases reviewed extensively in this chapter, used *Coombes* principles to decide cases such as stockholder liability disputes.

III. *Roadway Improvement District* Cases

Railroads and other companies would attack government assessments in order to fund infrastructure improvements, especially around railroad tracks and these challenges would be on various constitutional grounds, such as the 14th Amendment Equal Protection Clause and the Due Process Clause. In *Kansas City Southern Railway. Co. v. Road Improvement District* (1924), the justices declined to sustain a challenge on a road improvement district's special tax assessment in order to repay roadway improvement bonds. The U.S. Supreme Court held that as long as the tax assessment was not arbitrary and was apportioned among those whose property was made better by the road improvement it did not violate the 14th Amendment Equal Protection or Due Process Clauses. Justice Van Devanter wrote about what the state legislature can do, "By a long line of decisions in this Court, it has been settled that, where the state constitution as construed by the state court of last resort does not provide otherwise, the Legislature of a state may require that

the cost of a local public improvement, such as the construction or reconstruction of a public road, be distributed over the lands particularly benefited and charged against them" (Van Devanter, *Kansas City Southern Rwy Co. v. Road Improvement District* (1924) 266 U.S. 379, 386). So it was well established precedent that whenever there were public improvements that the state could charge those who benefit from those improvements without offending the Fourteenth Amendment of the U.S. Constitution. Van Devanter wrote, "Only where the legislative determination is palpably arbitrary, and therefore a plain abuse of power, can it be said to offend the due process of law clause of the Fourteenth Amendment" (Van Devanter, *Kansas City Southern Rwy Co. v. Road Improvement District* (1924) 266 U.S. 379, 386). The language that the court uses in their discussion suggests a possible connection to the police powers doctrine. Justice Van Devanter's explanation uses words highlighting that the Court was protecting against unfair or arbitrary action by the state government to bankrupt or discriminate against businesses who pay assessments to pay for road improvements. Justice Van Devanter wrote further, "The evidence, as before outlined, falls short of showing that the assessment against the railway property was either palpably arbitrary or unreasonably discriminatory. The burden was on the railway companies to overcome the presumption attending the legislative determination, and this they failed to do" (Van Devanter, *Kansas City Southern Rwy Co. v. Road Improvement District* (1924) 266 U.S. 379, 387). Justice Van Devanter used the word arbitrary in his opinion, but it does not seem to imply class legislation doctrine or a connection to the Gillman framework. Since the Court upheld the assessment without naming a beneficiary of the legislation other than the government itself, it is difficult to squarely put this case in the police powers doctrine.

In *Georgia Power Company v. City of Decatur* (1930), the Georgia Supreme Court dealt with complex issues arising out of *Kansas City* (1924). This case involves a claim by the city of Decatur to seize property and sell it to pay the roadway improvement assessment. In order to improve city roads, the city enacted an ordinance, pursuant to state law, requiring the railway to pay for roadway paving between and near the track. Justice Persons wrote, "It is not contended that the authorities of the city of Decatur did not fully comply with the provisions of said charter, as amended, in the enacting of the ordinance requiring the paving of East Ponce de Leon avenue therein, and in ordering the levying against the street railway company the cost of paving that portion of the street between and for two feet on either side of its tracks" (Persons, *Georgia Power Company v. City of Decatur* (1930), 154 S.E. 268, 271). Like the *Kansas City (*1924) case, the railway was required to pay a share for roadway improvements near and in between the tracks. The railway protested the tax assessment for paving the roadway and claimed such assessment would be confiscation given that it was in a rate-fixed contract with Decatur, Georgia. While this case mostly deals with issues brought up in *Kansas City (1924),* it does have undertones of the fixed-railroad rate cases previously discussed. The railway claimed that it would become unprofitable after the tax assessment offered to surrender the franchise back to the city. For the railway to bring an attack under the 14th Amendment Due Process or Equal Protection Clauses, the railway company had to provide evidence that it was being unfairly or arbitrarily treated by the city or the assessment was disproportionate compared to others. Justice Persons wrote, "The burden is upon the appellant who attacks the exercise of such authority in ordering the improvement, to establish the fact that the same was abused. Kansas City So. R. Co. v. Road Imp. Dist., supra. Can it be said that the appellant has successfully carried this burden?

What is the proof offered in support of the attack" (Persons, *Georgia Power Company v. City of Decatur* (1930), 154 S.E. 268, 272)? Language embedding this case within the police powers framework can be found in this opinion. Persons wrote, "When the town of Decatur granted the franchise to the street railway company, authorizing the use and occupancy of its public streets for the operation of its railway tracks, it did so on the theory that its citizens would enjoy the benefits of adequate transportation facilities thereon, and that the company would continue to serve the public" (Persons, *Georgia Power Company v. City of Decatur* (1930), 154 S.E. 268, 274). Businesses enmeshed within the public interest, such as railways and smaller public utilities, were subjected to much more scrutiny since their interests lie in promoting public benefits, such as reliable transportation. After much discussion in the opinion, Justice Persons did not allow the railway to get out of its contract, as the city did not abuse its power unfairly, "The city has levied the paving assessment under the legislative authority conferred upon it; and if the railway company is unable to pay the amount thereof because it is unable to earn anything over and above its operating expenses, the record in the case does not disclose that it is because of any abuse of legislative authority by the municipal authorities, or wholly unreasonable legislative action, but solely because the company is operating under a rate–fixing contract of which it was entirely cognizant at the time it purchased the street railway system in said city" (*Georgia Power Company v. City of Decatur* (1930), 154 S.E. 268, 274). Subsequent to the initial protest, various street railroad companies merged into Georgia Power Company. Given that the previous owner of the track was liable for the roadway improvement, Georgia Power Company assumed liability for paying the assessment according to its agreement to take on all properties and liabilities of the previous companies. The Court remanded the case back to lower

courts since the case was improperly expanded from a property claims case. Yet, Justice Persons strongly indicated that the assessment itself was constitutional and within the power of the legislature and the city.

Other justices concurred specially in this case and debated whether this was a legitimate and constitutional levy by the city. [12] Justice Eve argued that the target of the assessment must be allowed to challenge it on confiscation grounds. Justice Eve wrote:

> Let it be said, in passing, that after the city has reassessed and made legal levy upon the abutting property of the company, the company may apply to the courts for a determination of this question of confiscation. To deny to any taxpayer, whether an individual or a corporation, this protection, would place him at the mercy of the whims of municipal officers, and face to face with a continuing threat of bankruptcy through extravagant or needless schemes of village development. (Eve, *Georgia Power Company v. City of Decatur* (1930), 154 S.E. 268, 278)

Justice Eve focused the special concurrence on the fact that state law authorizes cities broad authority to improve their cities and then assess special taxes to recoup the amount from companies that benefit from the improvements. To pay for these assessments, the city can claim any property to pay off its assessment, as Justice Eve wrote, "It will be noted that the city of Decatur is making claim that 'any property' (and this must mean whether located in that city or not) is subject. Should the company own a long, thin, worthless strip of land in any city, through which it may prove to be necessary or desirable to lay a street, the Georgia Power Company, or like corporation, may well apprehend the sale of its Atlanta offices and power houses to liquidate a paving assessment" (Eve, *Georgia Power Company v. City of Decatur* (1930), 154 S.E. 268, 279). The justice objected on grounds that the legislature allowed cities to claim and place a lien on any property that the company owned in order to ensure the company paid its assessment.

[12] Concurring specially is concurring in the judgment only and not the reasoning of the majority opinion.

While generally the legislature can select and direct roadway improvement projects and assess the costs against the street railways, confiscation can occur if cities can ignore adjoining property and assess against any property held by the railway. Justice Eve wrote:

> It must be noted, however, that, in the case before us, it is not a question of classification; we concede the right of the city, under the legislative sanction, to require the company to pave between its tracks and two feet on each side thereof; more than this if within reason. The question involved in this case is *the collection of assessments;* can the legislative authority, acting through its municipal subdivision, without let or hindrance pave when and where it will within the corporate limits, ignore *the abutting property of the company*, issue execution based upon a general judgment, and sell or sacrifice the property of the company wherever found? (*Georgia Power Company v. City of Decatur* (1930), 154 S.E. 268, 280)

Justice Eve focused on the fact that while the assessment was legal and subject to legitimate legislative power, it may provide the ability for cities to confiscate property and bankrupt companies to pay for their roadway projects. By being able to seize property anywhere in the state, can these actions violate the 14th Amendment? Justice Eve wrote, "Would this not be the 'arbitrary classification' contemplated by the Fourteenth Amendment, or the 'unreasonable exaction or requirement' guarded against by the 'due–process' clause of the Constitution of the United States" (Eve, *Georgia Power Company v. City of Decatur* (1930), 154 S.E. 268, 282). For Justice Eve, *Georgia Power Company* involved the city seizing property to pay for infrastructure improvements and it becomes unconstitutionally arbitrary given the wide discretion the government already had to force private entities to pay for roadway improvements.

Justice Graham, also concurring specially, made the same arguments that Justice Eve made in his opinion. Justice Graham focused on the fact that like Justice Eve, he would conclude that the statute conferred overly broad power of the city to recover assets to pay for the pavement assessment. As he wrote, "But I think the act grants greater power than is given by such

construction, and also discriminates. Therefore I join Judge EVE in his concurring opinion holding in this case the act unconstitutional. The city may collect for paving assessment, if lawfully made, out of any property of the railway company located in the city and used in the operation of its railway system in the city, but it may not lawfully go further" (Graham, *Georgia Power Company v. City of Decatur* (1930), 154 S.E. 268, 283). Both justices accepted the ability for the government to take the railroad's property within the city to pay the assessment, but argued instead that it was arbitrary for the property to be taken from assets outside the city.

The *Georgia Power Company* (1930) case does not squarely fit within the class legislation/police powers doctrine even through the justices used words like arbitrary throughout the opinion. The concurring justices were very afraid that the state, through local authorities, could confiscate property beyond the land that was being improved by infrastructure projects. There was no shadowy special interest or faction benefiting from government action in this case, but the justices were aware that the government could, under the statute, seize valuable property outside the city where the improvement took place. In effect, in the eyes of the concurring justices, the city government could become the special interest in pursuit of their own power by bankrupting companies through approving improvement projects and then ruining companies with assessments. When the company could not or would not pay, the government in effect could take valuable property from anywhere in the state and seize it to pay for the assessment.

In *Louisville & Nashville Railroad Company v. Southern Road Company* (1927), a Kentucky Court of Appeals case, the main issue involved a street improvement lien against

Louisville & Nashville Railroad Company due to an Earlington street improvement project.[13] The city of Earlington, pursuant to Kentucky statutes, after deciding that street improvement was necessary, asked for bids from various companies for the street improvement work. The Southern Road Company won the bid and proceeded to improve the streets as per the contract with the city. A street improvement lien was filed against the railroad company for their part of the assessment. The railroad company tried to attack the lien using multiple arguments including constitutional ones. The two constitutional issues brought up by the railroad company involved the Fourteenth Amendment Due Process and Equal Protection clauses because the railroad company would gain no benefit from the street improvement and the assessment was excessive compared to other like properties. As Judge Dietzman wrote, "The last and most serious contention of the appellant is that to permit this assessment to stand would be to take its property without due process of law, and would be to deny it the equal protection of the law" (Dietzman, *Louisville & Nashville Railroad Company v. Southern Road Company* (1927), 290 S.W. 320, 324). The court dismissed these objections and upheld the assessment lien against the company. Judge Dietzman wrote, "The legislative determination is conclusive that appellant's land is benefited unless appellant can show that this legislative action was wholly arbitrary, wholly unwarranted and a flagrant abuse of power. The averments of the answer fail to make out such a state of case. It is true appellant alleges that its right of way, 90 feet in width, is now being used exclusively as a right of way for its trains, and that the improvement of Railroad street does not add to the value of its land as a right of way" (Dietzman, *Louisville & Nashville Railroad Company v. Southern Road Company* (1927), 290 S.W. 320, 324). Judge Deitzman later quoting

[13] Earlington is a city in Kentucky.

Louisville & Nashville Railroad Company. v. Barber Asphalt Company (1905) dismissed the argument that the present land had no benefits from street improvement by arguing that in the future the land may indeed see increased benefits from the street improvements due to future changes and thus the assessment was fair (Dietzman, *Louisville & Nashville Railroad Company v. Southern Road Company* (1927), 290 S.W. 320, 324 – 325). Also dismissed by the court was the argument raised by the railroad company that the assessment was much bigger than the property warranted and therefore the assessment would be confiscatory.

Odgen Levee District et al. v. Kansas City Southern City Railway Company (1930), is an Eighth Circuit case arising out of taxes assessed by a levee district against the railroad company. What is interesting in this case is that the circuit court upheld the challenge and declared the taxes out of proportion of the benefits derived and therefore violated the Fourteenth Amendment. After first declaring it had jurisdiction, the court decided the issue of whether the tax assessment was unfair or arbitrary. After examining the record and the evidence of the assessment in proportion, Judge Stone who wrote for the majority found the taxation was unreasonable and arbitrary. He wrote, "We cannot look at these figures and escape the conviction that to charge railway property of that small amount and that character with that proportion of taxes for a work which primarily and principally benefits the other property in the district is palpably arbitrary and unreasonable and a taking of property without due process of law. It is confiscation under the cloak of taxation" (Stone, *Odgen Levee District et al. v. Kansas City Southern City Railway Company* (1930), 39 F.2d 884, 887). Like the railroad rate cases, the word used in this case is confiscation, as in the revenue from the company that was unfairly extracted from them. Judge Stone wrote further, "Aside from the discrimination of the comparative taxes above, it is equally

clear that the amounts levied against the railways are out of all proportion to the benefits which they receive... The conclusion is inescapable that these taxes are not only discriminatory but are unreasonably excessive and arbitrary" (Stone, *Odgen Levee District et al. v. Kansas City Southern City Railway Company* (1930), 39 F.2d 884, 887). In the other cases examined, the benefits were seen to be assessed in proportion of the present or future benefits received and the assessments were generally upheld, but in this case the taxes were seen as too large with benefits too little for it to be sustained.

While these cases used words sometimes associated with class legislation doctrine, such as "palpably arbitrary", these are not class legislation cases. There are no special classes receiving benefits at the expense of other classes. Roadway improvement cases involve cities imposing taxes or seizing property to pay for infrastructure improvements. Constitutional challenges revolve around the issue of whether the taxes were apportioned fairly. Like the railroad and utility rate cases, the parties challenging these assessments thought the city itself was over taxing them and therefore depriving them of property. These cases are best thought as cases involving courts providing economic protection against government over-reach.

The roadway improvement cases in Table 3 should be also classified as being consistent with the Phillips explanation. These cases often feature private actors challenging tax assessments to pay for roadway improvements. Like the railroad rate cases, the government is being challenged because it is accused of arbitrarily depriving businesses or other actors of their property. There is no clearly defined special faction benefiting from the pain of others here. The courts, federal and state, generally upheld the government action against constitutional challenges.

Like the *Smyth* cases, state courts citing *Kansas City,* largely upheld government assessments to pay for improvements or other government taxes. While the state courts recognized the principles of *Kansas City*, judges often distinguished it from the assessments they were reviewing. While some of the cases studied did have some language resembling class legislation, based on the cases as a whole, roadway cases are much more consistent with a general sense of protecting economic liberties. In other words, these cases are consistent with Michael Phillips' ideas about Substantive Due Process.

Table 3. Roadway Improvement Cases

Theory	Upheld	Struck Down
General Economic Liberties (Phillips)	7[14]	2[15]
Class Neutral Doctrine (Gillman)	0	0
Agent of Business (Holmes)	0	0

IV. Conclusion

A theme establishes itself as the framework to connect all these cases: judicial action protecting the rights of companies, and sometimes individuals, from government regulation. The

[14] *Browning v. Hooper* (1924) 3 F.2d 160, *Evans v. Beattie* (1926) 135 S.E. 538, *Swayne v. City of Hattiesburg* (1927) 111 So. 818, *Miller County Highway & Bridge Dist. v. Standard Pipe Line Co.* (1927) 19 F.2d 3, *Northern Pac. Terminal Co. of Oregon v. City of Portland* (1935) 80 F.2d 738, *In re Arch Hurley Conservancy Dist., Hudson Irrigation Extension* (1948) 191 P.2d 338, *Georgia Power Company v. City of Decatur* (1930), 154 S.E. 268, *Louisville & Nashville Railroad Company v. Southern Road Company* (1927) 290 S.W. 320.

[15] *Conner v. Board of Commissioners of Logan County, Ohio* (1926) 12 F.2d 789, *Odgen Levee District et al. v. Kansas City Southern City Railway Company* (1930), 39 F.2d 884.

court decisions shows general protection of economic liberties though the state courts were more deferential towards government action. The government with its mighty power was seen as able to overstep its bounds, and in the instance of railroad rate cases, providing companies with an insufficient profit. The government did not always lose, as discussed in this chapter, the lower state courts applying U.S. Supreme Court precedent upheld some government action, while the federal courts were more willing to strike down government action. Reasonable government regulation was permitted and acceptable; unreasonable government regulation causing confiscation of the property of individuals or businesses was impermissible. While there are some echoes in some of the decisions of police powers doctrine, the best overall explanation of this area of substantive due process law is a more generalized sense of protecting economic liberty.

CHAPTER 5

DATA: ANALYSIS OF EMPLOYMENT & LICENSING CASES

Lochner v. New York (1905) has defined an entire era of constitutional history. The meaning future scholars and commentators derive from the case continue to reverberate into modern times. Federal and state courts interpreting *Lochner* confronted issues such as labor laws and lawsuits brought against ship owners. In the following cases that are described and used as exemplars, many judges wrote in detail on the meaning of *Lochner* in the substantive due process era. In the previous chapter, Gillman's theory did not have a good explanation for a series of Fourteenth Amendment Substantive Due Process cases, including maximum rate and road improvement cases, and thus did not seem as a good general theory to explain the significance of these cases. However in the employment cases, *Lochner* and *Gundling*, class legislation and the police powers doctrine is heavily referenced and thus confirms that Gillman's theory has partial validity.

I. The *Lochner* Cases

The first exemplar case, *United States v. Northern Commercial Company et al.* (1918), involved a district court interpreting a maximum hour law from the Alaska territory. The Alaskan territorial legislature enacted a law allowing for a referendum to be called for the purposes of mandating an eight-hour day. District Judge Burnell was immediately suspicious of the referendum election and the law itself due to a lack of authorization from the organic charter. He wrote, "When a Legislature thus attempts to act entirely beyond the scope of the Organic Act or Constitution which gives it life, there is at least a suspicion that it was actuated by some

undisclosed motive" (Burnell, *United States v. Northern Commercial Company et al.* (1918), 6 Alaska 94, 97). Like *Lochner*, Judge Burnell was deeply suspicious of the motive of the legislature as it was enacting legislation that was beyond the powers granted by the organic charter especially since the charter provided no ability for a referendum to be called. After commenting at length on the poor drafting of the Alaskan law, he wrote that the maximum hours law had no connection to the police powers, "It is not premised, so far as I am able to discover...upon any theory that labor of all kinds is injurious to health and dangerous to life and limb, nor that employment for more than eight hours in any one calendar day is calculated to be injurious to the health of all wage and salary earners" (Burnell, *United States v. Northern Commercial Company et al.* (1918), 6 Alaska 94, 101). To be a valid exercise of state police powers, the legislative action must have a valid way of protecting the laborers' health and safety. There was no valid police powers rationale provided by the Alaskan legislature to justify their law. Judge Burnell continued, "If the Legislature acted in the legitimate exercise of its police power, its reasons for the exercise of this power are undisclosed; and a failure to set forth any reason at all, where the Legislature acts under the police power, is properly taken, if the nature of the employment itself does not suggest one, not only as an inference, but as a fact, that the reason does not exist" (Burnell, *United States v. Northern Commercial Company et al.* (1918), 6 Alaska 94, 101). Unlike *Lochner*, this case does not even involve a health reason for enacting the law. As the judge notes, the law and legislature were silent. Thus given prevailing constitutional doctrine, it was assumed that the government was interfering in the employer-employee contract without justification. In addition, the fact that the legislature seemed to stretch the organic charter of the territory made the court deeply suspicious of the motives of the legislature. Judge Burnell

at the end of his opinion wrote that this law was class legislation, "I am satisfied beyond all doubt that chapter 55 of the Session Laws of 1917 is plainly and palpably, beyond all question, in violation of the Fourteenth Amendment to the Constitution of the United States. I am also of the opinion that it is class legislation and prohibited by the Organic Act" (Burnell, *United States v. Northern Commercial Company et al.* (1918), 6 Alaska 94, 107). At the end of the opinion, he concluded by identifying this as class legislation. That is, he believed the legislature was using its power to give laborers special treatment over the employers.

As in *Lochner*, courts continued to be deeply suspicious of maximum hours laws covering specific categories of employees. In *State v. Henry* (1933), a case that arose from a New Mexico law requiring mercantile employees to only work eight hours a day or 48 hours each week. Challenging the statute on due process and equal protection grounds, the appellee argued that the law was arbitrary and class legislation. Chief Justice Aston wrote, "…in that the selection of mercantile establishments for such regulation is an arbitrary and unreasonable classification, not referable to the health, morals, or general welfare of the public or of the employers or employees thus restricted" (Aston, *State v. Henry* (1933), 25 P.2d 204, 204). Like other maximum hour cases, the opinion references class legislation concepts as arbitrary or unreasonable classifications. While the New Mexico Supreme Court ultimately upheld the lower court decision striking down the statute due to *Lochner,* Chief Justice Aston provided a discussion of the tension between police powers and liberty. Chief Justice Aston was seemingly sympathetic of the plight of the legislature in crafting laws to protect the general welfare of the people. He wrote, "As conditions and standards have changed, courts have admitted regulations as reasonably related to the general welfare which would not formerly have stood the test. Other

specific objects have been and may again be added to health and safety. By this process liberty shrinks correspondingly as the police power expands. But it remains as a controlling principle" (Aston, *State v. Henry* (1933), 25 P.2d 204, 208). This discussion came after a lengthy analysis of prior precedents, including the cases involving maximum hour laws targeting different industries, such as hazardous factories. Ultimately, the court resolved the central question, reaffirming *Lochner* in the state context and affirming the *Lochner* interpretation of liberty, but its discussion is important for fitting within the Gillman thesis. According to Gillman, the court system, thrown into new societal conditions, cannot reconcile the old constitutional doctrine with deteriorating conditions during the Great Depression. As a response to the Great Depression, courts shed constitutional doctrines, such as the police powers doctrine, to allow states more freedom to regulate economic conditions caused by a more complex society. In a discussion at the end of the opinion, the court briefly dabbled with the possibility that while the legislature may not have general police powers to interfere with the employer-employee contract, in an emergency, it may have expanded powers. Chief Justice Aston wrote, "A final question not unnaturally arises. In the minds of many the present widespread evil of unemployment is so great as to require or justify extraordinary measures by government. Revolution even is feared by some as a consequence of failure or inability to alleviate it. This suggests inquiry as to the so-called emergency powers of government" (Aston, *State v. Henry* (1933), 25 P.2d 204, 208). While affirming the central principle of liberty when the legislature does not validly use its police powers, the court laid the groundwork for future cases to further erode the *Lochner* doctrine. The *Lochner* doctrine in this case was on shifting sands. The central principle

remained, at least in New Mexico, but the court was intent in showing increasing unease with the restrictions on the state to regulate the economy for the general welfare.

An admiralty law case provided a discussion of the extent of liberty of contract in maritime cases. A seaman sued Moore-McCormack Lines for a variety of claims, including negligence, by providing inadequate sleeping quarters and causing the seaman to develop symptoms of tuberculosis. Hume, the seaman, spent time in a hospital and was given money by the company to cover costs. After hospital discharge, the company, through a claims adjuster, came to a settlement amount of $150 including the money already advanced to him. As typically would happen today, Hume was required to sign a release holding the company blameless for any future claims. The district court below held for the company since Hume had agreed to the liability release. Hume knew the document he signed would shield the company from future claims by writing, "'Release of everything" (Frank, *Hume v. Moore-McCormack Lines* (1941) 121 F.2d 336, 337). The circuit court then provided an extensive historical treatise on the relationship between employers and employees, including why seaman might be treated differently than normal laborers. Judge Frank described the relationship that went back in medieval times, "In what we call the medieval period, the common law did not apply to workers, generally, any doctrine of 'liberty of contract'; it may roughly be said— but with distinct need for qualifications" (Frank, *Hume v. Moore-McCormack Lines* (1941) 121 F.2d 336, 338). Back in the medieval period, there was a feudalistic relationship between the landholders and laborers with mutual obligations. A more mercantilist system arose in England and Europe which continued this system of status and relations. In this system, there was no real liberty of contract, but the relationship between employer and employee was seen as paternalistic, "No one in

Elizabeth's reign would have dreamed of suggesting that there was a complete right to freedom of contract between master and servant; as to such undertakings, notions of status, of non-contractual rights and duties, were still operative" (Frank, *Hume v. Moore-McCormack Lines* (1941) 121 F.2d 336, 339). He then described the rise of Adam Smith and development of individual freedom and laissez-faire after the mercantilism era. Judge Frank wrote that liberty of contract was a development that individuals were able to freely contact their labor, "Other courts, in reaching similar conclusions, said that similar legislation would be insulting, to the manhood of workers, or degrading, would put them under improper guardianship, create a class of statutory laborers, and stamp them as imbeciles" (Frank, *Hume v. Moore-McCormack Lines* (1941), 121 F.2d 336, 340). This passage directly referenced the class legislation doctrine, according to Judge Frank, that courts found the state was creating 'improper' wards and granting them power over the employers. Why does the liberty of contract principle not extend to seaman who should be able to sign rights over to the employer and have their release be enforced? According to Judge Frank, the reason was national defense, which would be a proper use of police power that would abrogate the liberty of contract. He wrote, "National defense vitally affected the nation as a whole. Such matters were not to be left, a la laissez-faire, to any mere invisible hand guiding the ways of striving individuals bent on purely personal gain. The hand that guided national defense must be visible and forceful…there was no room, when it came to sea-power, for the minimalist dogma that the best government is invariably that which governs the least" (Frank, *Hume v. Moore-McCormack Lines* (1941), 121 F.2d 336, 345). To best promote strong national defense, his argument focused on promoting the safety of the nation could best be accomplished through collective action guided through the government. Allowing

for such individual laissez-faire would sap the strength of a collective national defense and therefore the normal liberty for employers-employees to contact is detrimental to government and society. The court ultimately remanded the case for trial and dismissed the contract between employer and seaman. This case occurred after *West Coast Hotel v. Parrish* (1937) and therefore it should be seen as a transition from old constitutional doctrine into the new one. The circuit court made many disdainful comments about liberty of contract throughout the opinion. The paternalistic attitudes evident in the historical reconstruction justifying government intervention not just of seamen but of normal laborers was very prominent. While the circuit court explicitly upheld liberty contract as a valid principle, the court sought to distinguish admiralty law from *Lochner* liberty of contract. This case can be seen as best fitting within the Gillman framework. Courts, according to him, were grappling with the aftermath of the Great Depression and therefore had to deal with changing conditions that made the employee more helpless against an employer that held all the cards. The circuit court was very sympathetic to the plight of Hume against his employer.

Yee Gee v. City and County of San Francisco (1916) provided another glimpse into the world of liberty of contract through the operation of laundry businesses. *Yee Gee* arose out of a federal lawsuit that challenged the denial of licenses to operate laundry businesses and special conditions attached to operating laundries. According to the lawsuit, the board of supervisors' action violated the 14th Amendment Due Process clause by depriving laundry owners of their property rights.[16] While not explicitly claiming the liberty of contract, Judge Van Fleet wrote that the right to earn a livelihood was essential, "The right to labor or earn one's livelihood in any

[16] The plaintiffs also raised a 14th Amendment Equal Protection claim in their lawsuit.

legitimate field of industry or business is a right of property, and any unlawful or unreasonable interference with or abridgment of such right is an invasion thereof, and a restriction of the liberty of the citizen as guaranteed by the Constitution" (Van Fleet, *Yee Gee v. City and County of San Francisco* (1916), 235 F. 757, 759). Judge Van Fleet cited *Lochner* as the key precedent in determining that a person had the right to livelihood against arbitrary laws. While he did not explicitly use the phrase liberty of contract to describe this liberty to which he was referring, he later clarified that a noxious ordinance or regulations can be a significant injury. Van Fleet quoting another court, wrote, "'The threatened invasion or injury to property rights must be an injury which will naturally and necessarily follow the threatened enforcement of the obnoxious ordinance; not a loss, damage, or detriment flowing merely incidentally or consequentially therefrom, through the arrest and prosecution of the party threatened, however irksome or expensive such action may prove…'" (Van Fleet, *Yee Gee v. City and County of San Francisco* (1916), 235 F. 757, 760). There was discussion earlier in the opinion whether the venue was correct to bring a lawsuit while the injured litigants could pursue a defense against criminal prosecution. Ultimately, Judge Van Fleet decided that the ordinance had the potential effect of depriving people of their property rights and, even if a criminal case was not already filed against those operating without a license, a lawsuit was a valid way of challenging constitutionality given the potential for future prosecution. Unlike *Lochner*, the main economic impediment challenged in *Yee* Gee was a requirement that the laundries operate within specified hours. From an economic liberty standpoint, this ordinance required the businesses to close even if the laundries were willing to operate beyond the hours allowed by the board of supervisors. The ordinance provided that, "'Sec. 9. No person or persons owning or employed in the public

laundries or public wash houses provided for in section 1 of this ordinance shall wash, mangle, starch, iron, or do any other work on clothes between the hours of 6:00 o'clock p.m. and 7:00 o'clock a.m., nor upon any portion of that day known as Sunday'" (Van Fleet, *Yee Gee v. City and County of San Francisco* (1916), 235 F. 757, 761). With this ordinance, the laundries were restricted from operating their businesses and staffing laborers to operate during the night if the businesses were able to make an employment contract. On this point, the district court judge thought this was where the ordinance unconstitutionally violated the economic liberty of the laundry owners. With this ordinance being applied to all public laundries within the city limits, it did not distinguish between laundries where there may have been a special safety or health risk that would preclude operation during the night. The opinion then discussed at extended length previous cases involving the right of government entities to restrict the time period when a business may operate. One of the key points Judge Van Fleet distinguished from those previous cases was that laundries in certain locations within the city limits were prohibited from operating at night. There may have been justification for restricting laundries in certain city districts as a valid regulation that promoted the welfare and safety of the community. With the challenged regulation, there was no distinction between city districts with special concerns and other city districts without any practical reasons to restrict it. Judge Van Fleet wrote that it could be a valid restriction of liberty if, "…a municipality may impose a general limitation or restriction upon the citizen as to the hours within which he may prosecute his chosen industry—a respect as to which, independently of particular conditions, there is obviously no natural or inherent menace to the public—without trenching upon that degree of freedom and liberty of action guaranteed him by the Constitution" (Van Fleet, *Yee Gee v. City and County of San Francisco* (1916), 235

F. 757, 763). While the court did not use the term liberty of contract due to the unique circumstances of the case, *Yee Gee* has characteristics embedding it within the police powers doctrine. The court contemplated whether the ordinance could be a valid health or safety regulation. The broad reach of the ordinance in restricting the laundries from operating was the tipping point where it was declared to be invalid. And the court noted that public laundries were increasingly subject to regulation by governments imposing a much deeper burden on those businesses to operate. As the court wrote, "It is perhaps no exaggeration to say that this business has afforded a greater field for so-called police regulation than all other classes of business combined, and apparently with a progressive tendency to constantly impose increased restrictions thereon" (Van Fleet, *Yee Gee v. City and County of San Francisco* (1916), 235 F. 757, 768). The court was very distressed that the regulations of a certain class of businesses were getting more and more stringent over time. Progressively more demanding regulations threatened the ability for laundries to operate their businesses without being burdened by oppressive government regulations. Within the framework of economic substantive due process, it is odious for the government to try to deprive one's livelihood without a valid reason. Judge Van Fleet ultimately concluded, "… the regulation under consideration has no such just or reasonable relation to the ostensible purpose for which it was put forth as will sustain it, and that it must therefore be held void" (Van Fleet, *Yee Gee v. City and County of San Francisco* (1916), 235 F. 757, 768). *Yee Gee*, while not a liberty of contract case, does show that the general principles of police powers doctrine and *Lochner* had uses in striking down other regulations threatening businesses and other economic actors against government action.

The courts citing and using *Lochner* as precedent embedded their cases within the police powers doctrine. Even *Hume,* where the court was shedding itself of police powers doctrine, utilized it heavily, actually conducting a very lengthy historical treatise about employer-laborer affairs. If one was taking the *Lochner* progeny cases alone, Gillman was vindicated in his theory that substantive due process was an expression of police powers doctrine. *Lochner* was used not only in cases involving the setting of minimum wage and maximum hours regulations, but also a variety of contexts including liability contracts and business hours. A few of the courts used *Lochner* quite broadly whenever economic liberty was at stake that went beyond cases that normally would be associated with police power doctrine.

Beyond the cases summarized above, the cases I examined as part of a survey of cases citing *Lochner* exhibit the same characteristics. These cases all exhibited a deep concern for ensuring the state did not enact unreasonable or arbitrary laws. It should be noted that the lower courts were not a death machine striking down laws wholesale without regard to legislative power, but as in many cases today, the courts balanced the interests of the states' police power versus the liberty interest of the parties involved in the case. Gillman's police powers doctrine is the best explanation for the *Lochner* progeny cases. The Phillip's thesis could be an alternative interpretation for these cases as the courts expressed a desire to protect economic liberty, but the cases were so steeped in underlying police powers language that they are most consistent with the Gillman theory. The Agent of Business interpretation is also unpersuasive since in many cases the courts upheld state action, even when it went against businesses, and in some of the cases involved individuals or small businesses, and not big businesses.

Table 4. *Lochner* Derived Employment Cases

Theory	Upheld	Struck Down
General Economic Liberties (Phillips)	0	0
Class Neutral Doctrine (Gillman)	12[17]	11[18]
Agent of Business (Holmes)	0	0

As expected, *Lochner* progeny cases in Table 4 are consistent with the Gillman explanation. Given the focus of class legislation doctrine and its relationship to employment cases, it should not be shocking that the best way to explain these cases is through Gillman. Around half of the cases were upheld and half were struck down by federal or state courts.

II. Licensing Cases

The influence of the police power doctrine was also felt in licensing cases, such as the U.S. Supreme Court case *Gundling v. Chicago* (1900), where Justice Peckham wrote for a court

[17] Ex parte Kair 28 Nev. 425 (1905), Hume v. Laurel Hill Cemetery 142 F. 552 (1905), Halter v. State 74 Nebraska 757 (1905), Mumford v. Chicago R.I. & P.R. Co. 128 Iowa 685 (1905), Smith v. State 66 Tex.Crim. 383 (1911), State v. Somerville, 67 Wash. 638 (1912), Bernhardt v. Wise 23 Ohio Dec. 230 (1912), People ex rel. Hoelderlin v. Kane 29 N.Y.Crim.R. 187 (1913), State v. Suncrest Lumber Company 186 N.C. 122 (1923), Sproles v. Binford 56 F.2d 189 (1932), People v. Vitale 272 N.Y.S. 503 (1934), Wilson v. City of Zanesville 130 Ohio St. 286 (1935), Hume v. Moore-McCormack Lines 121 F.2d 336 (1941).

[18] Schnair v. Navarre Hotel & Importation Company 182 N.Y. 83 (1905), People v. Marcus 185 N.Y. 257 (1906), State v. Smith 42 Washington 237 (1906), Kansas City Gas Company v. Kansas City 198 F. 500 (1912), State v. Goldstein 18 Ala App 587 (1922), Society of the Sisters of the Holy Names of Jesus and Mary v. Pierce 296 F. 928 (1924), *State v. Henry* 37 N.M 536 (1933), Wilson v. City of Zanesville 130 Ohio St. 286 (1935), United States v. Northern Commercial Company et al. 6 Alaska 94 (1918), State v. Henry 25 P.2d 204 (1933), Yee Gee v. City and County of San Francisco 235 F. 757 (1916).

majority upholding a Chicago ordinance prohibiting the sale of cigarettes without a license. The ordinance was partly challenged on 14th Amendment Substantive Due Process grounds as being arbitrary and not validly a governmental regulation. The Court declared that the Chicago ordinance was not a violation of the 14th Amendment and was a valid regulation.[19] Justice Peckham wrote that the license did not create an unreasonable barrier and was therefore valid. Unlike other cases he distinguished in the opinion, Justice Peckham noted no evidence of unreasonable discrimination or arbitrary treatment of those applying for a license. He wrote, "There is no proof nor charge in the record that there has been any discrimination against individuals applying for a license or any abuse of discretion on the part of the mayor" (Peckham, 177 U.S. 183, 187). The Court decided that licensing was within the police power of the state and was content in the fact that other valid licensing regimes functioned without becoming arbitrary. As Peckham wrote, "Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business, or occupation they shall apply are questions for the state to determine, and their determination comes within the proper exercise of the police power by the state" (Peckham, 177 U.S. 183, 188). Justice Peckham, while finding the ordinance to be valid, couched the judgment within the existing police powers doctrine. Like *Lochner*, a business licensing case was reviewed to see if it was arbitrary and discriminatory and thus barred by the 14th Amendment. The following federal and state cases that cite *Gundling* also dealt with

[19] The U.S. Supreme Court suggested the issue may be waived due to the fact that there was no license sought by those convicted of selling cigarettes without a license.

business licensing and the courts followed the U.S. Supreme Court lead in upholding the regulations.

In *Campbell v. City of Thomasville* (1909), a Georgia Court of Appeals considered city ordinances that prohibited the sale of near beer, an imitation of beer, without acquiring a license providing a location for the facility and agreeing to certain requirements. Like *Gundling*, the case involved plaintiffs who did not obtain licenses before selling near beer and therefore were criminally convicted. The court nevertheless used the police powers framework to declare this a valid regulation. Judge Powell wrote, "The very name 'near beer' is as suggestive to the guardian of the police power of a necessity for close oversight, regulation, and control as it is to the drinking classes of possibilities which they may hope to find in the beverage. Its very name, so to speak, is a transcript of its character" (Powell, *Campbell v. City of Thomasville* (1909), 64 S.E. 815, 822-823). Judge Powell thought that any alcohol, even near beer, could cause disorder and was able to be regulated by the state. In cases of dangerous conditions, such as underground mines in *Holden v. Hardy* (1898), the United Supreme Court and other courts had been willing to uphold the valid use of the police power by states or localities. Justice Powell continued the discussion of why the near beer licensing scheme was constitutional, "The very possibility which 'near beer' and imitations and substitutes for beer and other intoxicating liquors afford toward the palming off of real beer and actual intoxicating liquors under that guise, as well as of selling beverages dangerous to the public health, places the business of dealing in them under the guardianship and control of the police power" (Powell, *Campbell v. City of Thomasville* (1909), 64 S.E. 815, 823). A drink such as tea, which has no intoxicating characteristics, might be more difficult to require a license in order to sell it, especially if the conditions are onerous. However,

given the concerns about intoxicating liquor such as public drunkenness and lewdness, the court decided that the ordinance requiring conditions before selling near beer would be valid part of the government's regulatory power. The concern is that if the businesses were not well regulated, that unsatisfactory conditions may result from the failure to regulate. The court recognized the ability for the public to work and ply a trade, but near beer was too similar to intoxicating liquors.[20] As Judge Powell concluded, "The classification of the business as being different in kind from that of selling drugs and ordinary nonintoxicating drinks, such as soda water, etc., is not arbitrary or factitious. It does not deny to the plaintiff in error, or to anyone else, the impartial and complete protection contemplated by the Constitution; nor does it deprive him of his property without due process of law" (Powell, *Campbell v. City of Thomasville* (1909), 64 S.E. 815, 827). Gillman's police powers doctrine was also in evidence of this case.

Being an agent who promoted emigration without being licensed and taxed was a crime in Hawaiian territory. Individuals running afoul of this statute challenged it on constitutional grounds in *In re Craig* (1911). According to the statute, it was required for emigrant agents to register and be subject to taxation by territorial officials. Like the previous cases, such as in *Campbell,* the petitioners failed to register as emigrant agents before being arrested, and challenged the statue on constitutional grounds. The Supreme Court of the Territory of Hawaii ultimately sustained the statute on police powers grounds. Chief Justice Robinson wrote, "Attacks upon the validity of any statute enacted by the legislature of the Territory in the

[20] An interesting fact is that the plaintiffs in the case were indigent Confederate soldiers which apparently granted a special status to them, as Judge Powell wrote, "There is involved in the contentions of the plaintiffs in error an insistence that, because they are indigent Confederate soldiers, they stand on some securer footing as to their right to engage in the business than other persons do" (Powell, *Campbell v. City of Thomasville* (1909), 64 S.E. 815, 826).

exercise of either of those powers will, therefore, fail unless it appears that some provision of the Federal Constitution or a statute of the United States has been trenched upon" (Robinson, *In Re Craig* (1911), 20 Haw. 483, 490-491). The two powers given to the Hawaiian territorial government by the federal government was a general police power and taxation power. Without breach of those powers by an unreasonable regulation, the government had enacted valid regulations. Chief Justice Robinson continued to illustrate why the statue was within the police power of the state, "The material welfare and progress of this Territory require an adequate supply of labor. Such supply can be obtained only from distant countries at heavy expense to our taxpayers. The immigrants…are peculiarly susceptible to such glittering representations…held out by irresponsible labor agents" (Robinson, *In Re Craig* (1911), 20 Haw. 483, 492). The fear was that agents inducing immigration or emigration would dupe the laborer with false promises and harm those in the community. To regulate those agents, there needed to be a way for the territorial government to guard against people who may commit fraud or misrepresentation. As Chief Robinson wrote, "The dictates of self-preservation as well as a proper regard for the welfare of unwary and easily led persons of the laboring class would suffice to impel the legislature to defensive action" (Robinson, *In Re Craig* (1911), 20 Haw. 483, 493). Instead of seeing the legislature as enacting special favors to a particular class, the court reasoned that this was a defensive reaction. People were trying to commit fraud by promising commitments they could not meet and the legislature was driven to rectify the situation. And the court concluded with the following point, "Liberty of contract is not universal, but must be understood to be subject to the exercise of the police power even though it may result occasionally in pecuniary injury to the persons affected" (Robinson, *In Re Craig* (1911), 20 Haw. 483, 495). The court

recognized that the liberty of contract was an important concept, but the valid use of the police power could intrude upon it even if it caused an injury to an individual or business. *In re Craig* fits within the police powers doctrine and it should be understood as including the requisite language that would place it within the Gillman perspective. Liberty of contract was invoked as an operative principle, extensive discussion of police powers was included within the opinion, and the court concluded it was a valid use of the police powers and therefore not violating the U.S. Constitution.

A violation of a city ordinance regulating private stables was at issue in *City of St. Louis v. Polar Wave Ice & Fuel Company* (1927). The Missouri Supreme Court determined the validity of a city ordinance banning a company from operating private stables with ten horses without informing the city. One issue relevant to this study was that the company attacked the ordinance saying that it was arbitrary and not within the police powers for the city to enact the ordinance. Another issue the company raised was essentially a delegation of powers argument, in which the legislature did not delegate power for the city to competently enact the ordinance. Judge Lindsay in discussing what he considered valid lawful delegation to cities defined through the police powers doctrine, wrote, "…police regulation and is necessary to protect the public morals, health, safety, and general welfare" (Lindsay, *City of St. Louis v. Polar Wave Ice & Fuel Company* (1927), 317 Mo. 907, 912). Like other cases, the court focused on the validity of government action in terms of regulating the safety, health, and general welfare of the community. It was evident that the court was cognizant that arbitrary and discriminatory laws were void and violated the constitution. Judge Lindsay wrote, "By the ordinance under consideration the defendant, and others falling within the class defined, must have a permit; but

whether such a one may or may not have such permit is made to rest in the discretion of the board, uncontrolled, and unmeasured by reference to any test or standard provided by the ordinance. In failure of that, and within the current of the rulings of this court heretofore made, it lacked validity" (Lindsay, *City of St. Louis v. Polar Wave Ice & Fuel Company* (1927), 317 Mo. 907, 915-916). The court in declaring the ordinance invalid suggested that the board was delegated too much power and that the city acted in an arbitrary manner violating the liberties of the people. There was no clear guide in the ordinance for city officials to enforce it or not to act in an unconstitutional and arbitrary manner. *City of St. Louis* is another case that is consistent with Gillman. The court was very observant of police powers doctrine and it intersects with another doctrine no longer present in constitutional doctrine, delegation of powers. Delegation of powers was a constitutional doctrine largely dying away at the same time as substantive due process. A major distinction between this case and the previous ones is that the court struck down government action, while the other courts found valid use of police power. Though in this case, like the previous case *in Campbell and In Re Craig*, also featured the fact that no license was obtained prior to the violation of the ordinance, the court nevertheless struck down government action.

The Montana Supreme Court in *State v. City of Billings* (1927) was confronted with a city ordinance requiring a license for a rooming house. Over a vigorous dissent, the majority sustained the ordinance against constitutional attack. The court was asked to invalidate the ordinance or, in the alternative, make it so that a license would be issued to the relator so they could operate a rooming house business after being denied a license. A major dispute was whether the ordinance that did not have fixed rules for granting a license was valid. As Justice

Stark wrote, "Counsel for the relatrix assails the validity of Ordinance No. 995 on the ground that it reserves to the city council the right to grant or refuse a license to an applicant therefor who desires to engage in the business of conducting a rooming house, at its pleasure, and does not prescribe any uniform rule or condition which is equally applicable to all persons in like situations, and therefore admits of the opportunity for the exercise of an arbitrary discrimination" (Stark, *State v. City of Billings* (1927), 255 P. 11, 14). The counsel for the relator said that the license scheme did not have enough clear grounding to be applied in an evenhanded manner, and therefore the ordinance could be used to make arbitrary decisions. If the ordinance allowed arbitrary decisions, it would fail as being unconstitutional and invalid. Ultimately, the majority validated the city ordinance and decided that it was within the police power of the city. Justice Stark wrote, "The ordinance under consideration does not contemplate the exercise of an arbitrary power by the city council according to its whim or caprice, but does impose upon it the duty to exercise consideration and care" (Stark, *State v. City of Billings* (1927), 255 P. 11, 16). The court after reviewing previous decisions decided it was within the police power of the city after being given the power by the state.

Yet, there were illuminating concurrences and dissents in this case that elaborate the issue between proper regulation and intrusive liberty. Justice Callaway wrote that some judges were apprehensive about justifying regulations in the face of liberty, "But some courts, while conceding that regulation may be necessary, apprehensive of the possibility that wrong may follow the exercise of power arbitrarily, practically nullify the effective use of the power. They fear, and what? That some one will be restricted in his liberty-or license-to do what he pleases regardless of the rights and welfare of the community in which he lives" (Callaway, *State v. City*

of Billings (1927), 255 P. 11, 16)? Justice Callaway main point was that the courts have to balance the force of regulation, especially in places where there were safety or health concerns, when facing the threat of eroding liberty. His argument sought to counter what he thought was a problem where the courts would not allow any discretion in the fear that it would lead to arbitrary decisions and trampled liberty. For Justice Galen the ordinance was too vague and destroyed liberty by conferring arbitrary power to the city council. He wrote, "It is my opinion that the city ordinance in question is unconstitutional and void, because it attempts to vest in the city council unrestrained and arbitrary authority to determine to whom a license shall be issued to conduct a generally recognized lawful business" (Galen, *State v. City of Billings* (1927), 255 P. 11, 17). According to Justice Galen, the ordinance does not go far enough to give city officials clearly defined boundaries to prevent an arbitrary decision. The specter of being denied due to any host of reasons was antithetical to liberty, as Galen wrote, "Under such authority, discrimination may be made because of nationality, religion, political adherence, and the like; and, on mere suspicion or surmise as to the use for which the place '*may be operated*,' the council is vested with authority to refuse a license. Such a delegation of unbridled power is contrary to the basic principle upon which American liberties are grounded" (Galen, *State v. City of Billings* (1927), 255 P. 11, 17). In the eyes of the justice, the unbridled power city officials could use to deny licenses could ruin any individual trying to lawfully conduct a business.

State v. City of Billings has language placing it within the framework of the Gillman thesis. The whole issue that the majority and dissenting justices debate is the arbitrary nature of the ordinance. Justice Galen evoked liberty as a major factor in dissenting from the majority opinion because he saw it as degrading the rights of individuals to make a decent living. The

court was in a major fight over the proper role of police power and whether a government action is arbitrary.

Table 5. Licensing Cases

Theory	Upheld	Struck Down
General Economic Liberties (Phillips)	0	0
Class Neutral Doctrine (Gillman)	18[21]	4[22]
Agent of Business (Holmes)	0	0

The Licensing cases in Table 5 were also consistent with liberty of contract and the Gillman explanation. Licensing cases often involve the requirement of licensing to operate businesses. While dangerous businesses, like selling of beer or other dangerous intoxicants, could be regulated, licensing could be used to bar individuals and businesses to conduct

[21] State ex rel. Monnett v. Capital City Dairy Co., 62 Ohio St. 350 (1900), People v. Niagara Fruit Co. 77 N.Y.S. 805 (1902), City of St. Louis v. Liessing, 190 Mo. 464 (1905), City of St. Louis v. Grafeman Dairy Co., 190 Mo. 492 (1905), State v. W. Union Tel. Co., 75 Kan. 609 (1907), Smith v. Wilkins, 164 N.C. 135 (1913), State v. Pitney, 79 Wash. 608 (1914), Raabe v. State, 7 Ohio App. 119 (1917), Shurman v. City of Atlanta, 148 Ga. 1 (1918), Holcombe v. Creamer, 231 Mass. 99 (1918), O'Neil v. Providence Amusement Co., 42 R.I. 479 (1920), City of Chicago v. Green Mill Gardens, 305 Ill. 87 (1922), Leach v. Daugherty, 73 Cal. App. 83 (1925), Ex parte Asotsky, 319 Mo. 810 (1928), Garford Trucking v. Hoffman, 114 N.J.L. 522 (1935), Campbell v. City of Thomasville 64 S.E. 815 (1909), In Re Craig 20 Haw. 483 (1911), *State v. City of Billings* 255 P. 11 (1927).

[22] City of St. Louis v. Polar Wave Ice & Fuel Company 317 Mo. 907 (1927), Bizzell v. Bd. of Aldermen of City of Goldsboro, *192 N.C. 348 (1926),* Hyland v. Sharp *88 Miss. 567 (1906),* Smart v. City of Albany, *260 N.Y.S. 579 (Sup. Ct. 1932).*

economic affairs. Most of the federal and state courts interpreting *Grundling* upheld the government licensing against state challenges.

The striking element to the cases citing *Gundling* is that the state action was upheld most of the time against attack by those who challenged state regulation as violating the 14th Amendment Due Process Clause. Those cases I surveyed showed a deep concern about unreasonable state action, but balanced this concern with valid safety or health considerations confronting the state. While the police powers doctrine was a significant factor in all these cases, the lower courts upheld the use of the state government power against constitutional attacks. One of the primary reasons was that *Gundling*, a United States Supreme Court case, upheld a Chicago ordinance as valid, and so many of the lower federal and state courts applying *Gundling* likewise used the case as a buttress to uphold government action. However, like the cases applying *Lochner,* these were firmly using language consistent with the police powers doctrine and these cases should be categorized as within the police powers framework.

The cases applying *Lochner* and *Gundling* are cases that use police powers doctrine extensively. The courts were very much in agreement that they were protecting society against the arbitrary use of government power, including the cases where the government acted for unexplainable reasons. In the cases applying *Lochner*, the courts generally used liberty of contract rationale, including class neutrality doctrine, to adjudicate cases. In the cases applying *Grundling*, the courts were deciding disputes involving state licensing schemes, and many of the courts found reasons to uphold licensing as a valid use of state police power. While most courts applying *Grundling* upheld state action, there were cases, like *City of St. Louis*, that courts struck down government action as not valid uses of the state's police power. All the cases in this

chapter citing *Lochner* or *Gundling* are consistent with the Gillman theory. There was a general sense of protecting the economic liberties of the parties versus the power of the state, but the courts gave expression to this liberty through applying the police powers doctrine. Even when applying the police powers doctrine, the courts were actively balancing the valid state powers versus the liberty of the parties. The parties that sought to strike down government action did not always win in the cases applying *Lochner and Gundling.* The state frequently was upheld even after the courts considered whether the state overstepped its bounds. While the liberty of contract is not explicitly referenced in every case, economic substantive due process was underpinning the decisions of these courts confronting challenges to government action based on 14th amendment grounds, and the courts balanced the competing requirements of government regulation and economic liberty. Most of the time the liberty being protected in these cases is the ability to make a living or conduct a lawful business. As Justice Galen eloquently wrote, "The very essence of American Constitutions is that the material rights of no man shall be subject to the mere will of another" (Galen, *State v. City of Billings* (1927), 255 P. 11, 17). The United States Supreme Court and other American courts believed they were ensuring that laborers could control their destinies in the working world. That the property and labor of every individual and business was to be protected through the courts from arbitrary or capricious government power was a key feature of the substantive due process era.

CHAPTER 6

CONCLUSION: FINDINGS & IMPLICATIONS

I. Summary of Findings

Research for this dissertation began as an examination of federal and state courts reactions to U.S. Supreme Court doctrine developed during the 19th and early 20th centuries. Revisionist scholarly work, over the past forty years, has sought to recast *Lochner* in a more charitable light than it had originally been viewed. According to this revisionist scholarship, substantive due process precedents were embedded within an intellectual framework of protecting economic liberties. Opposing this revisionist scholarly view for the rise of substantive due process in economic cases is the conventional wisdom that the courts, acting as an ideological agent of business, were enacting their preferences into law. According to the cases studied for this dissertation, the best explanation is that these courts were seeking to protect economic liberties. Federal and state courts used the same framework to strike down governmental action, but federal courts were more willing to strike down government regulations as compared to state courts. The conventional wisdom that the court system was an agent of business did not explain the *Lochner* era.

II. Findings

Howard Gillman provides a plausible historical theory for the Substantive Due Process era. His historical account embeds Substantive Due Process as an outgrowth of a legal doctrine to prevent a faction, such as labor unions or businesses, from extracting special favors from the government. While the government could issue regulations to protect the health or safety of the

community, the government could not become a 'special' agent of any one faction within society. According to Gillman's analysis of *Lochner*, the labor unions extracted special favors from the New York legislature allowing it to gain favorable regulations, e.g. maximum hour regulations, at the expense of other groups in society. Gillman argued that this doctrine falls apart as a result of changing societal needs during the Great Depression and beyond. This theory has problems because it focuses on traditional liberty of contract cases, primarily labor cases, and does not encompass non-labor related Substantive Due Process.

Michael Phillips, in contrast, theorized that the U.S. Supreme Court was protecting broader economic liberties during the Substantive Due Process era. Based on the lower federal and state court cases investigated for this study, Phillips has a superior explanation for Substantive Due Process era cases. Many of the cases, such as railroad rate cases, do not have language implicating liberty of contract or any connection with a faction gaining special favors at the expense of another faction. Despite judges using certain buzzwords connected with the Gillman theory, such as arbitrary or capacious, the contexts are different and do not reflect the general core issues bought up by Gillman.

The agents of business theory first articulated by Justice Holmes in the *Lochner* case became the standard explanation for the Substantive Due Process era. According to his theory, the Court's majority used judicial activism to promote their own ideological beliefs championing Social Darwinism by enshrining it in the law. Even Chief Justice Roberts has spoken out negatively about the *Lochner* case in multiple settings, during his confirmation hearing and in his *Obergefell v. Hodges* dissent, "Rejecting *Lochner* does not require disavowing the doctrine of implied fundamental rights, and this Court has not done so. But to avoid repeating *Lochner*'s

error of converting personal preferences into constitutional mandates, our modern substantive due process cases have stressed the need for 'judicial self-restraint'" (Roberts, *Obergefell v. Hodges* (2015), 576 U.S. ___, 13 (slip op.)). Today, Chief Justice Roberts' views represent the standard perspective that the Court grievously imposed its own values into constitutional law thus distorting it to their ends. Justice Holmes painted a bleak picture about the Court in *Lochner,* but does this picture portray an accurate portrait of the era? The conventional wisdom of *Lochner* era may well be incorrect, and our mental picture of Justice Holmes as a great champion of progressive economic regulation might be similarly mistaken. Michael Phillips argued that Justice Holmes himself struck down governmental action during the *Lochner* era. Phillips writes, "Of course, Holmes had his differences with the old Court's conservatives. But these were not disputes about the legitimacy of substantive due process. Instead, they were disputes *within* substantive due process: that is, conflicts over when the doctrine should be used to strike down government action" (Phillips 1999, 462). Judges, past and present, often disagree on doctrine and application of a doctrine to particular cases. In some economic liberty cases, Justice Holmes agreed with the Court conservatives in striking down government action. While Justice Holmes was influenced by progressivism, as Phillips wrote, "Earlier I remarked that, while a few poor souls still may believe that Holmes was some kind of benevolent liberal aristocrat, this view cannot survive much contact with his writings. Still, it seems that Holmes' substantive due process decisions are best explained on the assumption that he was in some sense or another influenced by progressivism" (Phillips 1999, 463). This progressivism influence seems most prominent in employment cases, but in other instances Justice Holmes was in agreement with the Court in protecting economic freedoms. Even in labor cases, such as wage-related cases, Justice

Holmes would sometimes join the court majority or even author opinions. In *Chas Wolff Packing Co. v. Court of Ind. Relations (1923)*, Chief Justice Taft, along with the full Court including Justice Holmes, voided a schedule of wages as violating the liberty of contract between employer and employee as the Court did not accept that the businesses affected operated within the public interest. The state was trying to cloak behind an argument that the public interest was affected, but the Court did not buy it and struck down the regulation (Phillips 1999). The fact that Justice Holmes joined with the majority in this case provides proof that he did not see liberty of contract as necessarily wrong, but he felt it should be applied differently than the other justices.

On a whole, the cases I explained do not cohere well with the standard conventional wisdom that Substantive Due Process was a cover for the Court to be an Agent of Business. Notwithstanding Justice Holmes' criticism of Substantive Due Process in *Lochner*, the court system, including the U.S. Supreme Court, did not seem to be overly tilted towards businesses. Granted, there were numerous business related cases during the Substantive Due Process era – such as the railroad rate cases. In these cases, the courts were ensuring that businesses did not become bankrupt due to economic regulation promoting ruinous railroad rates. Individuals challenged economic regulations as well in utility rate cases. Often courts upheld economic regulation, especially at the state level, against challenges brought by businesses. Courts often sustained government regulation in the face of business protest.

One interesting finding of the analysis is the difference between federal and state courts. All courts, in the cases examined for this study, used the standards developed by the U.S. Supreme Court to decide Substantive Due Process cases. State courts were more reluctant to strike down state economic regulations compared to federal courts. State courts were much more

likely to uphold government regulation even using the same precedents from the U.S. Supreme Court. Given this disparity between the federal and state courts, it is possible that state courts were cautious invaliding government regulation because state judges were more influenced by the state political environment. Scholars, in other contexts, have found that state supreme court judges can be influenced in their voting decisions, such as death penalty cases, due to being involved in competitive elections (Hall 1992; Hall 1995). Striking down state laws could set a state court in conflict with the state's political branches. Perceived public opinion can influence judges to think twice before striking down a decision enacted by the people's legislature. Federal court judges, not feeling the will of the people due to regular state elections, would be more willing to strike down state regulations when these judges perceived a violation of economic substantive due process. This is a tentative explanation for the empirical finding and more research is needed.

Table 6. Federal and State Breakdown of Court Decisions

Types of Cases	Federal Upheld	Federal Struck Down	State Upheld	State Struck Down
Railway and Utility Rates	5	12	9	1
Contractual Obligations	2	2	3	2
Roadway Improvements	2	2	5	0
Lochner Employment Cases	4	4	9	7
Licensing Cases	0	0	18	4

Overall breakdown of cases in Table 6 shows persuasive evidence that state courts, in particular, were more likely to uphold government economic legislation against Substantive Due Process attacks. While the evidence might not be as stark for federal courts, the increased rate of federal courts striking down economic regulation, railroad and utility cases being the most illustrative example, contrasts to the state courts in being less willing to uphold state government economic regulation overall.

Michael Phillips' overall superiority as a theoretical perspective is important to future researchers. He shows that the court system protected economic liberty in a broad way, but not in adherence to a particular doctrine. The U.S. Supreme Court drafted a particular doctrine to fit the case before it. It did not use the same doctrine in railroad cases, employment cases, and contract obligation cases. The connecting thread through all these cases has been protecting economic liberties through the Substantive Due Process clause.

III. Significance

The history of this important era of constitutional and legal history is still being investigated. One major question in the extent of use by the lower courts of standards articulated by the U.S. Supreme Court. Had the lower federal and state courts rejected the standards applied by the Court, it would give evidence that the framework was not recognized or applied by the lower courts. While the state courts gave much more deference to state legislative action as compared to federal courts, all courts applied and grappled with the framework in existence during the Substantive Due Process era. For example with railroad rate cases, the lower courts applied the general standard of examining the rates set by the legislature or the bureaucracy to ensure these rates did not bankrupt the railroads. In utility cases, the courts were careful to insure

that the utilities' rates were not so unreasonable that it would cause individuals or utility companies to be economically burdened. In labor cases, the court system upheld the liberty of contract between employers and employees. This general economic liberty framework guided American courts up until the New Deal.

Constitutional issues are different today due the death of the economic liberty as a Court concern and the courts' greater emphasis on civil liberties. The famous footnote four in *United States v. Carolene Products Co.* (1938) is evidence of this shift in focus of the Court towards protecting civil liberties as the interests of the Court changed dramatically during the New Deal. Despite the long shift away from economic liberty by courts during the 20th century, there is evidence economic liberty is being resurrected in modern form. These new economic liberty cases are not Economic Substantive Due Process cases. The bad reputation *Lochner* still has with modern legal scholars has likely killed widespread use of Substantive Due Process, but courts, such as the U.S. Supreme Court, might be using other constitutional provisions to provide some limited economic protection against the government. One example is *Horne v. Department of Agriculture* (2015), in which the Court struck down government regulations, as authorized by the Agricultural Marketing Agreement Act of 1937, as constituting an unconstitutional taking as violating the Fifth Amendment Takings Clause. The purpose for the Agricultural Marketing Agreement Act was to promote agricultural price stabilization. The case pitted raisin growers against the Department of Agriculture. Raisin growers were required to set aside a certain amount of raisins called the reserve pool. The Raisin Administrative Committee, created pursuant to the Agricultural Marketing Agreement Act and subsequent government regulations, would determine yearly reserve pool amounts and then sell the reserve raisins on secondary

markets. The Horne family, the raisin growers in this case, did not surrender the reserve pool raisins as ordered to do so by the government and therefore were fined for violating the government surrender order. While the Court sent the case down for resolution by the 9th Circuit, it noted that producers had a 5th Amendment Takings Clause claim. Through this case does not raise an issue of substantive due process, it is definitely cast as protecting the economic interests of individuals or families against the regulatory arm of the U.S. government.

The Texas Supreme Court decision in *Patel v. Texas Department of Licensing and Regulations* (2015) signals a friendlier attitude towards economic liberty. Justice Willett of the Texas Supreme Court defended *Lochner* in the majority opinion. A footnote in particular argued that the scholarship has been changing towards Substantive Due Process and, as such, the case is a rebuke of the conventional wisdom. This case, as was discussed in the introduction, involved a challenge to Texas cosmetology regulations. Eye threaders were required to obtain a cosmetology license, at great expense, to legally thread eyebrows. The Texas Supreme Court struck down the regulations on economic liberty grounds. It found that the regulations were not a valid health and safety regulation and it needlessly required great effort by eye theaders to train in techniques which had no bearing on their profession. More courts in the future could be persuaded to resurrect a gentle form of economic liberty to rein in government power. A powerful advocate of economic liberty, Justice Willett is on Donald Trump's list of potential U.S. Supreme Court nominees.

Not only are courts partly resurrecting economic liberty doctrines, it is evident in legal scholarship as well. For instance, prominent libertarian scholar David Bernstein has argued that there should be strengthened ability for doctors and patients to privately contract for services

while operating within Medicare Part B framework (Bernstein 2015). He sees the current system as promoting too much government regulation that intrudes into private contracts that have traditionally governed physician payment. According to Bernstein, government regulations make it difficult for non-Medicare participating doctors to be able to charge market rates for their services. Private contracts are those that a patient agrees to pay for a doctor's services outside of the Medicare system. These services might be normally covered through the Medicare system, but the patient decides to pay for services on their own. Bernstein focuses on government laws and regulations that require doctors who make a private contract with a patient for any services covered by Medicare to be ineligible for Medicare reimbursement for a period of two years. Given that non-participating doctors who see Medicare patients are limited by the law on how much they can charge, the laws and regulations of the Medicare system greatly restricts the ability for doctors to privately contract with patients. The two year prohibition on receiving Medicare reimbursement after privately contracting with a patient limits the ability for doctors to charge market rates for their services even if the patient agrees to pay those rates (Bernstein 2015). He recommends reforms to allow the doctor to be paid market rates, thus enhancing the viability of the Medicare system, by loosening the rules regarding private contracts. A case he discusses, *United Seniors Association, Inc. v. Shalala* (1999) illustrates how individuals are making liberty of contract based arguments in courts today. The plaintiff brought a liberty based argument to U.S. District Court arguing that the law was written precluded any private contract outside of Medicare even for services not covered by Medicare. The district judge recognized but rejected the constitutional argument in district court. The U.S. Circuit Court of Appeals for District Columbia resolved the case in the plaintiff's favor, but it interpreted the law and

accompanying regulations as permitting private contracting for services not covered by Medicare (Bernstein 2015). Bernstein would wish for a much more robust ability to privately contract within the Medicare system, but given that plaintiffs are bringing liberty of contract claims into court, it is obvious that these arguments are no longer dead letters academically or legally.

As the country sees a more active federal government, it is likely, especially if a conservative court establishes itself in the future, that federal economic legislation and regulation long upheld during the 20th Century will be curtailed by future U.S. Supreme Court majorities. These reverberations will continue down the hierarchy of the court system and possibly affect government regulation of the economy in the future.

These issues are important to political scientists today as economic liberty as a doctrine might be resurrected and also research, such as this study, sheds more light into the historical context of the Substantive Due Process era.

IV. Future Studies

This research marks an important step in resolving the puzzle of lower court interpretation of substantive due process cases. The lower courts adopting U.S. Supreme Court precedent sought to apply these precedents to disparate cases. In applying these precedents, trends develop. State courts tended to be more tolerant of upholding government regulation than striking them down, while federal courts tended to more readily strike down state regulation as offending economic liberty. Future research can expand this survey to more cases to determine if this tentative finding applies to fuller set of labor and business related cases. Do labor cases that protect workers from economic abuses cause both federal and state courts to more readily step in

and strike down government regulation? More research into how lower courts fit economic liberty into the state regime of economic regulation is an area worth investigating.

Another avenue for further research involves the entanglement of the 14th Amendment Equal Protection Clause and Substantive Due Process Clause. While Substantive Due Process marks the *Lochner* era as a distinct period of constitutional history and law, it is readily apparent that the Equal Protection Clause is intermixed with the Substantive Due Process clause in economic liberty cases. Not all the cases feature this intermixing between the two clauses, but during the examination of the surveyed cases, it was noticed enough to be worth researching this connection between the two clauses. With a greater understanding of why the Equal Protection Clause was used as an adjunct to Substantive Due Process throughout this period of constitutional history, it might lead to a better historical picture on how the 14th Amendment was used by the courts prior to the New Deal. Substantive Due Process has been a focus for research in constitutional history, but the Equal Protection clause has been neglected as it may yield greater insight into the *Lochner* era.

An additional avenue for future study involves the Gillman story. The historical story that he provides still rings true as a plausible reason for why the old economic liberty regime becomes part of constitutional law and then why it dies away. While Gillman focuses on only certain cases, police powers/liberty of contract cases but not explaining other economic liberty cases, it still provides a potentially viable historical framework for the entire era. Economic liberty was a focus of courts to protect the developing commercial republic during the 19th century allowing people to conduct mostly private economic affairs while the government could enact some regulations to protect against dangerous conditions with the courts refereeing to

prevent too much government intrusion. As society changed from a commercial republic to a more advanced industrial economy, the government required more freedom to pursue regulations to protect workers and businesses from abuses, courts therefore become more permissive during the New Deal era in tolerating regulations to fix abuses that became evident in the early 20th century. While Gillman limited his historical story to only certain Substantive Due Process cases, it does necessarily invalidate the story on the constitutional regime change from the *Lochner era* to the New Deal era. Phillips' explanation does not provide an over-arching story, and it might be possible to merge elements from Gillman and Phillips together in the future

V. Concluding Thoughts

The *Lochner* era is a complicated period of constitutional history. Lawyers and constitutional scholars today are divorced from the economic liberty focus of judges interpreting laws before the New Deal and so it is difficult to travel into the past and see constitutional issues with pre-1937 eyes. However, with the sheen of the New Deal wearing off and courts more willing to curtail government intrusions into individual economic rights once again, it is worth examining the period to construct a historical account of how courts dealt with economic liberties during the 19th and early 20th century. As with civil rights where courts routinely balance the interests of individuals and government, it can be possible to allow more economic liberties while not overthrowing all the helpful economic regulations governing our nation. Curtailment of certain avenues of government economic regulation such as regulation through the Interstate Commerce Clause, has not seen a vast overturn of the modern regulatory state, but instead modern economic liberty cases can establish certain boundaries the federal and state government cannot go beyond. Even with these boundaries, Congress and state legislatures

continue to have plenty of room to enact economic regulation to protect society against abuses of others.

This study continues the tradition of modern scholarship of partially rehabilitating the *Lochner* era that was much maligned due to the influence of Justice Holmes. Economic liberty encompassed many different areas of law during the late 19th and early 20th century that still has relevance to us today. Unfortunately, due to the conventional wisdom regarding *Lochner* case, it is still difficult for judges to examine the era objectively and decide what principles can be resurrected to allow private individuals to more freely conduct their economic affairs without massively disrupting the current regulatory state. While it may not be wise for us to return to a pre-1940 understanding of government involvement of regulating our society, the increased power of federal and state governments to regulate our economic and social affairs might make it wise for courts to return to some limited economic liberty principles. With the possibility of economic liberty doctrine being liberated from the discard bin of dead constitutional doctrines, it could once again become a tool for the courts to occasionally use to maintain a balance between economic freedom and the needs of society. Certainly, the takings clause case, *Horne* v. *Department of Agriculture* (2015), provides an instructive case where the government regulatory power was gently curtailed by the courts.

Whether or not the court rebuilds a framework to protect economic liberties of people and businesses, the legacy of substantive due process is still with us even today. With the right of privacy being a key outgrowth of the old substantive due process doctrine of the 19th and 20th centuries, the shadow of *Lochner* will continue to be with us for many years to come. While liberty of contract is likely not to be fully given life again, that we may see echoes of the *Lochner*

era for many years to come especially since the Holmesian interpretation of the doctrine has been eroded.

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