A Nation of States

Federalism at the Bar of the Supreme Court

Edited with introductions by

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Series Introduction

The inscription carved above the entrance to the Supreme Court of the United States is elegant in its brevity and powerful in its directness: "Equal Justice Under Law." No other words have been more regularly connected to the work of the nation's most important judicial tribunal. Because the Court is the highest tribunal for all cases and controversies arising under the Constitution, laws, and treaties of the United States, it functions as the preeminent guardian and interpreter of the nation's basic law. There was nothing, of course, in the early history of the Court that guaranteed that it would do just that. The justices in their first decade of operation disposed of only a handful of cases. During the subsequent two centuries, however, the Court's influence mushroomed as it became not only the authoritative interpreter of the Constitution but the most important institution in defining separation of powers, federalism, and the rule of law, concepts at the heart of the American constitutional order.

Chief Justice Charles Evans Hughes once declared that the Court is "distinctly American in concept and function." Few other courts in the world have the same scope of power to interpret their national constitutions; none has done so for anything approaching the more than two centuries the Court has been hearing and deciding cases. During its history, moreover, the story of the Court has been more than the sum of either the cases it has decided or the justices that have decided them. Its story has been that of the country as a whole, in war and peace, in prosperity and depression, in harmony and discord. As Alexis de Tocqueville observed in *Democracy in America*, "I am unaware that any nation on the globe has hitherto organized a judicial power in the same manner as the Americans. . . . A more imposing judicial power was never constituted by any people." That power, as Tocqueville well understood, has given the justices a unique role in American life, one that combines elements of law and politics. "Scarcely any political question," Tocqueville wrote, "arises in the United States that is not revolved, sooner or later, into a judicial question." Through the decisions of the Supreme Court, law has become an extension of political discourse and, to that end, the rule of law itself has been embellished. We appropriately think of the high court as a legal institution, but it is, in truth, a hybrid in which matters of economics, cultural values, social change, and political interests converge to produce what we call our constitutional law. The Court, as a legal entity, speaks through the law but its decisions are shaped by and at the same time shape the social order of which it is part. All of

which is to say that, in the end, the high court is a human institution, a place where justices make decisions by applying precedent, logic, empathy, and a respect for the Constitution as informed by the principle of "Equal Justice Under Law." That the Court has at times, such as the struggle over slavery in the 1850s, not fully grasped all of the implications of those words does not, in the end, diminish the importance of the Court. Instead, it reminds us that no other institution in American life takes as its goal such a lofty aspiration. Given the assumptions of our constitutional system, that there is something like justice and freedom for all, the Court's operation is unthinkable without having the concept of the rule of law embedded in it.

As these volumes attest, interest in the Court as a legal, political, and cultural entity has been prodigious. No other court in the American federal system has drawn anything approaching the scholarly attention showered on the so-called "Marble Palace" in Washington, D.C. As the volumes in this series make clear, that scholarship has divided into several categories. Biographers, for example, have plumbed the depths of the judicial mind and personality; students of small group behavior have attempted to explain the dynamics of how the justices make decisions; and scholars of the selection process have tried to understand whether the way in which a justice reaches the Court has anything to do with what he or she does once on the Court. Historians have lavished particular attention on the Court, using its history as a mirror of the tensions that have beset American society at any one time, while simultaneously viewing the Court as a great stabilizing force in American life. Scholars from other disciplines, such as political science and law, have viewed the Court as an engine of constitutional law, the principal agent through which constitutional change has been mediated in the American system, and the authoritative voice on what is constitutional and, thereby, both legally and politically acceptable. Hence, these volumes also address basic issues in the American constitutional system, such as separation of powers, federalism, individual expression, civil rights and liberties, the protection of property rights, and the development of the concept of equality. The last of these, as many of the readings show, has frequently posed the most difficult challenge for the Court, since concepts of liberty and equality, while seemingly reinforcing, have often, as in the debate over gender relations, turned out to be contradictory, even puzzling at times.

These volumes also remind us that substantial differences continue to exist, as they have since the beginning of the nation, about how to interpret the original constitutional debates in the summer of 1787 in Philadelphia and the subsequent discussions surrounding the adoption of the Bill of Rights, the Civil War amendments, and Progressive-era constitutional reforms. Since its inception, the question has always been whether the Court , in view of the changing understandings among Americans about equality and liberty, has an obligation to ensure that its decisions resonate with yesterday, today, tomorrow, or all three.

Volume Introduction

The United States is a "nation of states," the Supreme Court explained in *Monell* v. *Department of Social Services* (1976). That simple proposition has particularly great significance today in the midst of the debate about "big government" in Washington. The framers of the Constitution well knew that reconciling the ambitions of each of the individual states with the collective good of the nation would be a source of continuing but necessary tension in the constitutional system. As these essays reveal, the debate over federalism has been almost constant since the beginning of the nation, although the specific contexts for those debates has changed. Chief Justice John Marshall and his colleagues on the early nineteenth-century Court worried constantly about the relationship between the nation and the states in matters involving the contract, commerce, and supremacy clauses; today, the debate has shifted to questions of civil liberties and civil rights, especially the role played by the national government in protecting insular minorities against overweening political majorities in the states. Central to the post-Civil War debates about federalism has been the relationship among the Fourteenth Amendment's protean "state action," "due process," and "equal protection" clauses.

The Supreme Court's successive revisions of the scope of federalism have themselves been rooted in underlying shifts in the social and political perceptions of such matters as commercial and racial relations. The justices historically have taken the view that the diffusion of power within the federal system is necessary but so, too, is strong national government. In many instances, especially in the debates over slavery in the era of Chief Justice Roger B. Taney, and in the equally heated controversy surrounding the constitutional bounds of racial equality under Chief Justice Earl Warren, the Court itself has become the subject of controversy as critics have worried that its powers of review have usurped authority that properly belongs in the states rather than Washington. Today, a majority of the Court has moved toward the view that responsibility and power should devolve back to the states.

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Ideology and Counter-Ideology From *Lochner* to *Garcia*

J.M. Balkin*

In his dissent in *National League of Cities v. Usery*,[1] Justice Brennan contended that the Court's opinion was reminiscent of the now rejected jurisprudence of the *Lochner* era:[2]

> Today's [decision] can only be regarded as a transparent cover for invalidating a congressional judgment with which [the majority] disagree. The only analysis even remotely resembling that adopted today is found in a line of opinions dealing with the Commerce Clause and the Tenth Amendment that ultimately provoked a constitutional crisis for the Court in the 1930's. *E.g.*, *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *United States v. Butler*, 297 U.S. 1 (1936); *Hammer v. Dagenhart*, 247 U.S. 251 (1918). . . . We tend to forget that the Court invalidated legislation during the Great Depression, not solely under the Due Process Clause, but also and primarily under the Commerce Clause and the Tenth Amendment.[3]

In his dissent in *Garcia v. San Antonio Metropolitan Transit Authority*,[4] the case which overruled *National League of Cities*, Justice Rehnquist cryptically noted that the time would come when the Court would once again have to face the jurisprudential problems which gave rise to *National League of Cities*: "I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court."[5]

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1. 426 U.S. 833 (1976). In *National League of Cities*, the Court held that the tenth amendment prevented Congress from extending the minimum wage and overtime provisions of the Fair Labor Standards Act to state and local governmental employees.

2. Lochner v. New York, 198 U.S. 45 (1905) (striking down state maximum hour law for bakers). The *Lochner* era was characterized by reactionary decisions of the Supreme Court in matters relating to economic regulation. Although the formation of its characteristic ideology can be seen in the 1880s, the *Lochner* era is generally considered to have begun with the decision in Allgeyer v. Lousiana, 165 U.S. 578 (1897); it continued until the Supreme Court's decisions in West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), and NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). Throughout this Article, the words "*Lochner* Court" refer to the Court during this period, and not simply to the Justices who decided *Lochner v. New York*.

3. 426 U.S. at 867-68 (Brennan, J., dissenting).

4. ___ U.S. ___, 105 S.Ct. 1005 (1985). *Garcia* held that the minimum wage and overtime provisions of the Fair Labor Standards Act were constitutional as applied to employees of the San Antonio Metropolitan Transportation Authority.

5. *Id.* at 1033. There is some dispute as to what exactly Justice Rehnquist meant by his short dissent in *Garcia*. Perhaps Justice Rehnquist was merely adverting to the fact that the next ap-

Although Justice Brennan and Justice Rehnquist are poles apart on many issues, I suggest that both are right in their assessments of *National League of Cities* and *Garcia*. There is a deep connection between the jurisprudence of the *Lochner* era and Justice Rehnquist's majority opinion in *National League of Cities*, just as there is a deep connection between *Garcia* and the cases that brought the *Lochner* era to a close. To that extent Justice Brennan is certainly correct.

On the other hand, the Court has found that in the post-1937 era it is not easy to escape the implications of *Lochner*; every time the Court invokes a high level of scrutiny to protect a preferred liberty, it is subject (rightly or wrongly) to the charge of anti-majoritarian tyranny.[6] Yet at the same time the Court has often seen the need for a high level of judicial scrutiny to protect preferred liberties (or the fairness of the democratic process). Similarly, I think, the Court's recent rejection of *National League of Cities* and its abdication of any judicial role in protecting state interests mask difficult problems that will simply not go away. Those problems concern the responsibilities and limitations of federal courts in exercising judicial review, and the need to enforce and protect the proper relationships of power between the states and the federal government. The Court will have to face those problems again, even after *Garcia*, and to that extent, Justice Rehnquist is also correct.

The goal of this Article is to demonstrate that the ideological structure of cases dealing with judicial review of economic regulation (including both commerce clause and due process cases) is recapitulated at a different level in the ideology[7] which underlies *National League of Cities*. In addition, this Article

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pointment to the Supreme Court would likely be a conservative who would help to reverse the 5-4 result in *Garcia*. If so, that is hardly a proper justification of a position in a Supreme Court opinion. I choose to read Justice Rehnquist as pointing out that it was the duty of the federal judiciary to protect state interests, and that this was an idea whose time would come again. *See also id.* at 1038 (O'Connor, J., dissenting) ("Regardless of the difficulty, it is and will remain the duty of this Court to reconcile [state and federal] concerns in the final instance. . . . I share Justice Rehnquist's belief that this Court will in time again assume its constitutional responsibility."). Of course, it is possible that Justice Rehnquist was making both points.

6. *E.g.*, Griswold v. Connecticut, 381 U.S. 479, 507-27 (1965) (Black, J., dissenting).

7. By "ideology" I mean simply a world view which involves beliefs about both facts and values. An ideology often combines assertions about what is and what ought to be in an inextricable fashion. For example, people with a given ideological bent may believe both that a lot of people on welfare do not want to work and that people should sink or swim on their own without help from others. The two assertions (and their factual and normative predicates) are interdependent.

It is characteristic of an ideology that it is both partially a true reflection of the world and a distortion or falsification of it. For example, in the *Lochner* era the Court saw the freedom of persons to engage in economic transactions as an essential aspect of liberty. This ideological assertion did reflect a truth about human nature; human dignity does require that, to some extent, people have freedom to choose their own goals, freedom to choose how they will use their own property, and freedom to choose how they will earn a living. At the same time, the Court's exaltation of liberty of contract concealed the economic coercion that may result in a regime of free contract where parties have vastly different amounts of economic resources and bargaining power.

As the term is commonly used, "ideology" bears pejorative connotations, and that is no doubt due to the aspect of "false consciousness" which the term implies. However, because ideologies are

seeks to show that the decisions of the Roosevelt Court in the late 1930s and early 1940s which dismantled *Lochner* represent a counter-ideology. These decisions established a new orthodoxy about the proper scope of judicial review in economic regulation cases which is mirrored in the modern Court's abandonment of *National League of Cities* in the cases leading up to and including *Garcia*.

To put it another way, there is a common ideological bias which *National League of Cities* shares with the decisions of the *Lochner* era, decisions like *Lochner v. New York*, *Adkins v. Children's Hospital*,[8] *Hammer v. Dagenhart*,[9] and *Carter v. Carter Coal Co.*[10] Those decisions, and the ideology which spawned them, were replaced by new decisions and a counter-ideology for judicial review in economic regulation cases. This new ideology is typified by cases like *West Coast Hotel Co. v. Parrish*,[11] *United States v. Carolene Products Co.*,[12] *NLRB v. Jones & Laughlin Steel Corp.*,[13] and *United States v. Darby*.[14] *National League of Cities*, in turn, represented a counter-insurgency of the former ideas, an attempt to reestablish the old ideology in a limited sphere of doctrine. However, the ideology of that case was in direct conflict with the ideology of the post-1937 era. Ultimately, the tension between this new ideology and the old ideology could not be withstood, and in *Garcia*, the Court reaffirmed post-1937 ideology even in the limited sphere marked out by *National League of Cities*.

The structure of this Article is as follows: First, I describe the major features of *Lochner* era jurisprudence in economic due process and commerce clause cases. Second, I explain how each of these features was replaced with its opposite in the post-1937 era, which represents the growing dominance of a counter-ideology. Third, I show how each of the features of *Lochner* era jurisprudence reappear in a new form as the ideological underpinnings of the majority opinion in *National League of Cities*, and the dissenting opinions in the cases which followed it. And finally, I show how the contradictions between

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partly true as well as partly false visions of the world, and because they have an important explanatory and apologetic function, they cannot be so easily dismissed. It is to some extent impossible to exist as a social and political being without owing allegiance to some forms of ideological thinking. The history of political societies is the history of clashes of ideologies with counter-ideologies, which appear and reappear with the flow of social, political, and economic events.

8. 261 U.S. 525 (1923) (striking down minimum wage laws for women and children).

9. 247 U.S. 251 (1918) (striking down federal ban on shipment of interstate goods made by factories which used child labor).

10. 298 U.S. 238 (1936) (striking down the Bituminous Coal Conservation Act of 1935, which set maximum hours and minimum wages for coal miners).

11. 300 U.S. 379 (1937) (upholding a state minimum wage law for women).

12. 304 U.S. 144 (1938) (upholding federal prohibition of the interstate shipment of "filled milk").

13. 301 U.S. 1 (1937) (upholding the National Labor Relations Act of 1935).

14. 312 U.S. 100 (1941) (upholding the Fair Labor Standards Act of 1938, which imposed federal minimum wage and maximum hour regulations for employees engaged in the production of goods for interstate commerce).

National League of Cities and the dominant post-1937 ideology led to the overruling of the case in *Garcia*.

I. THE IDEOLOGY OF THE *LOCHNER* ERA

The Supreme Court's decisions in the *Lochner* era shared several important features: (1) a preference for economic individualism and freedom of contract; (2) a preference for state regulatory power over federal; (3) a conceptualist mode of analysis; (4) a reliance on the public/private distinction; and (5) a high level of judicial scrutiny and an assertion of judicial authority and competence in cases concerning economic regulation. Each of these aspects of *Lochner* era ideology will be discussed in turn.

A. Individualism and Freedom of Contract

The most characteristic feature of *Lochner* era jurisprudence was a preference for individualism in legal rules which concerned economic regulation. As I use the term, individualism is a mode of thought which denies the responsibility of persons for the consequences their behavior has on others, and which affirms the right of individuals to act free from governmental coercion.[15] Hence, in matters of economic regulation, individualism is associated with a policy of *laissez-faire* and freedom of contract. The late nineteenth century Supreme Court exercised a preference for a theory of economic individualism when it discovered a constitutionally protected freedom of contract in the due process clause of the fifth and fourteenth amendments. It was this clause which the *Lochner* Court used to strike down state and federal legislation which regulated terms and conditions of employment. According to the reigning jurisprudence of the time, such regulations abridged the right of both employer and employee to form contracts of employment (or to refuse to form such contracts).[16]

The Court's preference for freedom of contract is obvious in cases like *Lochner v. New York*, *Coppage v. Kansas*,[17] and *Adkins v. Children's Hospital*. The Court's general hostility to restrictions on freedom of contract is not explicitly stated in many of the same Court's commerce clause opinions, but it helps explain why members of the Court who supported a broad view of freedom of contract would support a narrow view of federal power under the commerce clause.[18]

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15. *See generally* Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Balkin, *The Crystalline Structure of Legal Thought* (Jan. 10, 1986)(unpublished manuscript).

16. *E.g.*, Adkins v. Children's Hosp., 261 U.S. 525 (1923); Coppage v. Kansas, 236 U.S. 1 (1915); Lochner v. New York, 198 U.S. 45 (1905).

17. 236 U.S. 1 (1915).

18. In fact, in Adair v. United States, 208 U.S. 161 (1908) and Carter v. Carter Coal Co., 298 U.S. 238 (1936), the Court held regulatory legislation unconstitutional on both due process and tenth amendment grounds. 208 U.S. at 180; 298 U.S. at 293, 311.

Consistent with a philosophy of individualism, a regime of free contract decentralizes economic power by shifting it from the governmental regulator to individual economic actors. Instead of the government imposing terms and conditions of employment on the parties, the parties themselves would use their economic power to achieve whatever terms and conditions they could bargain for in individual market transactions. In addition, the theory of the "invisible hand" supported decentralization of economic power by claiming that the best consequences to society would occur by permitting each individual to exercise his economic power in the way he thought fit. Thus, in the ideology of the *Lochner* Court, expansion of individual freedom was associated with decentralization of power from a central government into smaller individual economic decision making units.

Moreover, under the individualist vision, governmental regulation of the terms and conditions of contracts of employment did more than simply abridge the rights of freely contracting parties. It also redistributed power and income from one group of persons to another. This redistributive effect seems inevitable, since it was obviously the purpose of the legislature to impose terms in some contracts that the parties themselves would not have agreed upon given their respective economic power and bargaining positions. For example, a minimum wage law eliminates the opportunity that an employer in a superior bargaining position has to offer a job below a certain wage. Because this goal is denied him, he must exercise his superior economic position in other ways. In sum, the *Lochner* Court saw regulation of the marketplace not only as an inappropriate centralization of economic power in the government, but as an unjustified attempt by popularly controlled legislatures to redistribute economic power.[19]

B. State Regulatory Power Preferred to Federal

There is a subtle connection between the *Lochner* Court's economic libertarianism and its hostility to the growth of the federal power to regulate interstate commerce. In the first place, the vision of states' rights the Court found in the tenth amendment represented a decentralization of regulatory power from the federal government to the states, which was analogous to the decentralization of regulatory power from government to the individual created by a regime of free contract. In other words, if one thinks of the states as individuals bound together in a league, both the states' rights and freedom of contract positions seem very individualistic.

Second, if the Court was hostile to widespread economic regulation of the economy, which would undoubtedly infringe upon freedom of contract, it made sense to scrutinize federal regulation of interstate commerce, which almost always had this effect. Thus whenever the Court struck down a federal regulatory statute as beyond the powers of Congress, it was striking a blow not only

19. *See, e.g.*, Coppage v. Kansas, 236 U.S. 1, 17-18 (1915).

for states' rights but also for freedom of contract.[20]

C. Conceptualism

Another important feature of *Lochner* era jurisprudence was the Court's use of a conceptualist style of reasoning; that is, basing legal decisions not on empirical data, but instead upon abstract concepts, often derived from the common law. A good example of conceptualism in the due process cases involved in *Lochner* itself, in which the Court struck down a maximum hour law for bakers. The Court held the law unconstitutional because it violated the equal right of the baker and the employer to enter into a freely negotiated arm's length agreement. Simultaneously, the Court distinguished its holding of the constitutionality of a similar law for the benefit of miners[21] on the ground that mining was an inherently dangerous activity, an idea which appears to be derived from common law tort concepts of ultra-hazardous activities and nuisance.[22]

Conceptualist forms of reasoning covered the political nature of judicial choices under a veneer of scientific investigation, absolute moral principle or logical certitude. For example, the abstract notion of freedom of contract was associated with an idealized notion of the individual's assertion of will. The Court's vindication of this abstraction disguised various forms of economic coercion. A good example of this is *Coppage v. Kansas*, where the Court struck down a prohibition on "yellow dog" contracts (employment conditioned upon a promise that a prospective employee would not join a labor union), noting that the freedom to bargain was "as essential to the laborer as to the capitalist, to the poor as to the rich."[23] The inequalities of bargaining power between workers and employers were irrelevant to the vindication of the abstract right: they were "but the normal and inevitable result" of the right of free contract.[24] In this way, the abstract concepts that the Court adopted in its jurisprudence

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20. In the modern (post-1937) era increased federal power is still more likely than not to be identified with limitations on freedom of contract and a liberal social agenda. Federal Civil Rights legislation is a prime example of this. In Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964), and Katzenbach v. McClung, 379 U.S. 294 (1964), the Court rejected attacks on the Civil Rights Act of 1964, which regulated private discriminatory decisions made by owners of places of public accommodation. These regulations in effect altered the freedom of contract of the discriminators in favor of the rights of minorities. *See infra* text accompanying notes 53-57.

21. Holden v. Hardy, 169 U.S. 366 (1898).

22. *Lochner*, 198 U.S. at 54-55. A similar distinction was used to justify Congressional laws which prohibited interstate shipments of lottery tickets, Champion v. Ames (Lottery Case), 188 U.S. 321 (1903); alcohol, Clark Distilling Co. v. Western Md. Ry., 242 U.S. 311 (1917); and prostitutes, Hoke v. United States, 227 U.S. 308 (1913), while at the same time striking down a congressional ban on transportation of goods manufactured by the use of child labor, Hammer v. Dagenhart, 247 U.S. 251 (1918). The former were within Congress' power because the things prohibited were harmful in themselves, while the products of factories using child labor were not. *Hammer*, 247 U.S. at 271.

23. 236 U.S. 1, 14 (1915).

24. *Id.* at 19-21.

served to buttress and justify both its individualist penchant and a particular distribution of economic power.

A conceptualist approach was manifested in several different ways in the commerce clause cases of this era. The earliest example was the Court's identification of commerce with movement, whether water or rail traffic. As a consequence, mere manufacture, which was thought to be rooted to the place where manufacture took place (a factory), was considered essentially local in nature and hence not interstate commerce.[25] The effect of this conceptual scheme was that contracts of employment in manufacturing industries could not qualify as interstate commerce.

A similar conceptual gambit had led to the earlier holding in *Paul v. Virginia*[26] that a contract of insurance did not constitute interstate commerce, because a contract is signed and takes its legal effect according to the place where it is entered into.[27] This conclusion borrows heavily from nineteenth century ideas about choice of laws which were being formulated at this time. A contract was not viewed as a moving thing or a thing that could be placed in the stream of commerce, hence it was not subject to regulations of interstate commerce.

The connection between this decision and economic individualism is obvious. If contracts of insurance are not instrumentalities of interstate commerce, then that in and of itself guarantees that a great many possible restraints on freedom of contract by the federal government are preempted.

By far the most important conceptualist invention of the *Lochner* Court was the distinction between activities which directly affected interstate commerce, and those which indirectly affected interstate commerce. Congress could regulate activities which affected interstate commerce,[28] but the effect on interstate commerce had to be direct and logical.[29]

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25. *E.g.*, United States v. E.C. Knight Co., 156 U.S. 1 (1895); Kidd v. Pearson, 128 U.S. 1 (1888). Conversely, the Court was willing to extend the commerce power in cases where the government could show an insertion of a commodity into the "current of commerce" or "stream of commerce," once again invoking a concept of movement. *See* Stafford v. Wallace, 258 U.S. 495 (1922); Swift & Co. v. United States, 196 U.S. 375 (1905).

Where regulation of rail rates was involved, as in Houston, E. & W. Tex. Ry. v. United States (The Shreveport Rate Case), 234 U.S. 342 (1914), or Railroad Comm'n of Wis. v. Chicago, B. & Q. R.R., 257 U.S. 563 (1922), the Court was quite willing to acknowledge that intrastate transportation could have significant effects on interstate transportation; therefore Congress could justifiably regulate the former as well as the latter under the commerce clause. That favoritism for local commerce would produce an unfair impact on interstate commerce was obvious to the Court in rate cases, but not obvious to the Court in a case involving manufacturing, like *Hammer v. Dagenhart*.

26. 75 U.S. (8 Wall.) 168 (1869). Like several of the commerce clause cases, this case actually pre-dates the "official" beginning of the *Lochner* era in 1897. Looking only at the due process cases does not give an adequate picture of the intellectual building blocks which gradually developed into the *Lochner* ideology.

27. *Id.* at 183-84.

28. *E.g.*, The Shreveport Rate Case, 234 U.S. 342 (1914).

29. *E.g.*, United States v. E.C. Knight Co., 156 U.S. 1 (1895).

An excellent example of how this conceptualist approach served the ideology of economic individualism is *Carter v. Carter Coal Co.*,[30] in which the Court struck down the Bituminous Coal Conservation Act. The Act created a federal excise tax on coal and then granted a partial exemption from the tax as a financial incentive to coal producers to abide by certain wage, labor, and price-fixing regulations. The Court argued that the minimum wage and labor regulations of the Act, affecting as they did the relations between coal miners and their employers, primarily affected production and not interstate commerce.[31]

Justice Sutherland's majority opinion had to deal with the obvious argument that regardless of the local nature of coal mining operations, it was undeniable that if there were labor unrest, interstate commerce would be severely hampered by a resulting lack of a steady supply of coal. After all, coal was necessary as fuel for railroads, for the steel industry, and so forth. However, according to Sutherland, it was not the amount of the effect that coal mining had on interstate commerce that was important, but rather the nature of the effect, that is to say, whether the effect was direct or indirect.[32]

The use of concepts like direct and indirect causation were intimately related to the individualist ideological basis of *Lochner* jurisprudence. When Sutherland argued that the effect on interstate commerce was only indirect,[33] he was really saying that the problem of labor relations was a local problem between the local employer and his employees, even if it had effects which went beyond the locality of its origin. This claim is connected to the Court's preference for freedom of contract. The relations between employer and employee are their own business and nobody else's, and for the government to alter these relations based upon the effects that a private contract had on third parties would be to deny the local and autonomous character of contracts. Contracts, and especially employment contracts, were private, local relations between parties which could not be interfered with regardless of the effects that they had on others. This is what Sutherland meant when he stated that working conditions were local conditions.[34] This attitude is consistent with individualist philosophy, which denies the responsibility of actors for the effects that their actions have on others in society.

D. The Public/Private Distinction

A special case of the *Lochner* era's conceptualism was a narrow conception of permissible public purposes. While the safeguarding of health, safety, welfare, or public morals was considered a permissible public purpose, the mere shifting of economic bargaining power so as to improve distributional conse-

30. 298 U.S. 238 (1936).
31. *Id.* at 304.
32. *Id.* at 307-09.
33. *Id.* at 309.
34. *Id.* at 308.

quences in society was not considered a valid public purpose. The Court saw this type of legislation as mere redistribution, and failed to recognize that distributional effects which aid some groups over others can simultaneously advance legitimate public policies as well. In essence, the Court's ideology was based upon a rigid distinction between public purposes and private purposes.

This public/private distinction explains the Court's hostility to minimum wage and maximum hour laws in *Adkins v. Children's Hospital* and in *Lochner* itself, as well as its hostility to pro-union legislation in *Adair v. United States*[35] and *Coppage v. Kansas* (both of which involved "yellow dog" contracts); all of these laws were seen as essentially redistributive forms of legislation which served no legitimate public purpose.[36]

Along with the pinched conception of public purposes that the Court was willing to grant the states, the Court had an even narrower conception of permissible public purposes that the federal government could seek to achieve through its regulation of interstate commerce. After all, if the *Lochner* Court did not believe that redistributional goals were permissible goals of the states' police power, it is not surprising that it did not think that the federal government had *any* general police powers.

I have already noted the analogy between a states' rights position and economic individualism; both positions argue for a form of decentralization of economic power. Similarly, there is a connection between the Court's hostility to regulations of freedom of contract which have redistributive effects between individuals and the Court's hostility to regulations of interstate commerce which change the relative economic positions of different states.

This connection is most pointed in *Hammer v. Dagenhart*,[37] in which the Court struck down a ban on the shipment of goods produced within thirty days by factories which employed children under fourteen or employed children between fourteen and sixteen for more than eight hours a day.

The obvious purpose of the child labor statute was to coerce persons in states which did not have child labor laws either to stop employing children or shorten the children's hours. Congress' goal, therefore, was to achieve the same effect as would occur if all the states had individually passed child labor laws. However, the lack of child labor laws in many states was not merely due to

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35. 208 U.S. 161 (1908).

36. On the other hand, the Court was willing to permit economic regulation in businesses "affected with a public interest." New State Ice Co. v. Liebmann, 285 U.S. 262 (1932); Williams v. Standard Oil Co., 278 U.S. 235 (1929); Tyson & Brother v. Banton, 273 U.S. 418 (1927); Chas. Wolff Packing Co. v. Court of Indus. Relations, 262 U.S. 522 (1923); Munn v. Illinois, 94 U.S. 113 (1876). The distinction between business affected and not affected with a private interest simply recapitulated the public/private distinction at another level.

As the *Lochner* ideology began to fall apart in the 1930s, the Court began to realize that almost any industry could be affected with a public interest, in that control of any industry might serve the public good. Nebbia v. New York, 291 U.S. 502 (1934). The destruction of the distinction between businesses affected and not affected with a public interest was simply another feature of the characteristic decline of the public/private distinction in the post-1937 period.

37. 247 U.S. 251 (1918).