

Dews, Dworks, and Poses Decide *Lochner*

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Lochner represents a crucial case in American constitutional law. An investigation of the decision highlights important philosophical aspects of the place of law in a democratic society. Analysis of contemporary stances on *Lochner*, the actual *Lochner* opinion (including the dissents by Harlan and Holmes) and how judges following the legal philosophies of John Dewey, Ronald Dworkin and Richard Posner (“Dews,” “Dworks,” and “Poses”) would have decided the case shows that Dewey’s theory of law and democracy emerges as the most attractive alternative.

1. Introduction

Few cases in the history of United States Supreme Court jurisprudence have been more controversial than *Lochner v. New York* (1905).¹ Members of the legal profession almost universally demonize the case. Further, both liberals and conservatives demonize it. One of the most interesting aspects of the legal reception of *Lochner*, though, is that there is no real agreement as to why *Lochner* is properly so despised. What is agreed upon is that *Lochner* represents a crucial case in American constitutional law. The issues and analysis involved in its decision highlight the question of the proper place of democracy, the common law tradition and the judicial system – especially judicial review – within United States government. An investigation of *Lochner* highlights, in a manner that few other cases in the history of American constitutional law can, important philosophical aspects of the place of law in a democratic society.

To investigate the relationship between conceptions of law and democracy this paper begins with an analysis of contemporary stances on *Lochner*. After that, Justice Rufus Peckham’s *Lochner* opinion, along with the dissents by Harlan and Holmes will be outlined. Next, and most central to this paper, *Lochner* will be viewed through the legal philosophies of John Dewey, Ronald Dworkin and Richard Posner. Using each theorist’s description of the place of law in a democratic society I will construct “Dews,” “Dworks,” and “Poses” – that is, judges exemplary of each theory. The aim is to see what judges utilizing the explicit legal and democratic theories of Dewey, Dworkin and Posner would decide. Ultimately it will be argued that Dewey’s theory of

law and democracy, as applied by a Dew to the facts of *Lochner*, emerges as the most attractive alternative among the various theories surveyed. Further, through the use of the legal philosophies of Dewey, Dworkin, and Posner, the true importance of the issues in *Lochner* can be made manifest. Indeed, from the analysis it will be seen that *Lochner* is properly controversial and, at least from the perspective offered by Dewey's philosophy, worthy of placement in the set of notorious "anticanon" Supreme Court cases.

2. The *Lochner* Legacy

The facts and legal issues of the *Lochner* case were clear and horribly mundane. *Lochner*, an owner of a bakery in New York, violated an article of New York's Bakeshop Act because he permitted his employee to work more than sixty hours in one week. The Supreme Court found that the Act's limitation on hours voluntarily worked was unconstitutional because it unlawfully interfered with freedom of contract protected under the Fourteenth Amendment's due process clause. This content does not seem to be of such nature to admit *Lochner* to the set of great anticanon cases that includes such momentous decisions as interning American citizens of Japanese descent for little reason, accepting the concept of "separate but equal" or seeing a human being as essentially property rather than citizen. So why is *Lochner* in this infamous company?

The best place to start to look for an answer is Laurence Tribe's *American Constitutional Law*.² In this monumental work, Tribe describes the Constitution as "an historically discontinuous composition."³ That is, the Constitution has had different interpretations, and different meanings, during various times in American history. One of the great examples of discontinuity from this perspective is the change from the pivotal "*Lochner* era" where the Court's use of substantive due process to strike down economic legislation was at its apex, to a very different constitutional regime after *West Coast Hotel v. Parrish* when the Court backed off of strong review of economic regulation under the due process clause, upheld minimum wage legislation, and started approving New Deal laws in a wholesale manner.⁴ The *Lochner* era substantive due process jurisprudence used, according to Tribe, a notion of "implied limits" founded upon an idea of "natural rights." The idea grounding this stance was that "regulation of economic affairs was not impermissible *per se*; it was invalid only where the state moved beyond the sphere of its inherently limited authority by using its powers to help some citizens at the expense of others, rather than to promote genuinely public purposes to benefit the citizenry as a whole."⁵

The combination of a realm of economic privacy outside of legitimate governmental regulation combined with a picture of equality that separated legitimate laws from factional grabbing created a notable resistance in Court opinions to many types of legislative acts. As to judgment of ends, the Court used natural and common law "implied limitation notions." Further, in addition to a legitimate end, the Court also required a "real and substantial" relationship

between a statute and its objectives. Often, in fact, the Court would inquire as to whether the ostensibly public minded law was better interpreted as pretense for illegitimate aims. If so, it was then deemed invalid by the Court. In short, “the Court interpreted its requirement of a substantial means-ends relationship so as to invalidate statutes which interfered with private economic transactions unless evolving common law concepts demonstrated a proper fit between the legislation and its asserted objectives.”⁶ In practice this was a quite stringent analysis. Tribe argues that *Lochner* serves as the representative case of the era because it is the best example of this type of review. Tribe argues, further, that the ultimate problem with this *Lochner*-style jurisprudence is that the common law/natural law baseline that the Court was using in order to distinguish between private and public realms was unstable.

This instability is exemplified in *Miller v. Schoene*, where cedar trees were found to be infected with a carrier of a fungus which would, if left unabated, destroy the commercial value of a nearby apple orchard.⁷ The Supreme Court upheld a statute that ordered the cedar tree owners to cut down their trees to prevent contagion. The Court found the public interest required by due process in the value of the apple orchard. As Tribe puts it, “Miller not only indicates that redistribution of property between private parties may be justified in the public interest. The decision also suggests that the state inevitably has a positive role to play, a role whose exercise in *either* direction will benefit some private actors while hurting others. For the Court opined that, of the state had done nothing and permitted disaster to strike the apple orchards, ‘it would have been none the less a choice’.”⁸ Therefore, Tribe concludes that, “If one accepted fully the central notion which contributed to *Lochner*’s decline – that even judicial enforcement of common-law rules of contract and property represents a governmental choice with discernable consequences for the social distribution of suffering, pleasure, and power – then it would be hard to avoid the realization that a judicial choice between invalidating and upholding legislation altering the ground rules of contract and property is nonetheless a positive *choice*, one guided by constitutional language and history but almost never wholly determined by it.”⁹ Ultimately, Tribe sees the result in *Lochner* as showing judicial overconfidence both in the Court’s ability to understand complicated empirical conditions and also in its own conception of the constitutional meaning of liberty.

Tribe’s analysis offers multiple reasons why *Lochner* might serve as landmark antiprecedent in American constitutional law. From those reasons probably the most popular story of *Lochner* is that it represents a clear case of judicial activism and overreaching. In other words, the majority opinion shows an activist Court finding ways to impose both its own narrow views of legitimate government activity and an aggrandizing view of the Court’s function. Perhaps the clearest defense of this position is offered in Paul Kens, *Lochner v. New York: Economic Regulation on Trial*.¹⁰ Kens finds *Lochner* to be a clear example of judicial activism based upon an unexamined attachment to

laissez faire-social Darwinism. Further, Kens argues that dogmatic attachment to laissez faire substantive due process ideology led the Court to ignore multiple reports that documented unsafe conditions in New York bakeries. The Court's strong attachment to free-market ideology made acknowledging the existence of alternate ideals of the state, and therefore other needs of the public, impossible. The blindness was exacerbated because many members of the Court majority and a large part of the legal profession (wrongly) saw the judges as "legal monks" who acted in the role of "passive oracles" identifying and applying the law as it is as opposed to constructing it. Acting on this conception of the judge's position in American government was, in turn, conceived of as showing the Court's commitment to principle and proper protection of the constitutional order. But from Ken's perspective this story was an ideological construct that could not stand up to the actual facts. Ultimately, the *Lochner* decision came to represent not only a disagreement about the legislature's legitimate role but also, and maybe more importantly, a disagreement over the Court's authority to determine the extent of acceptable state action. Kens claims that the real problem with the decision is that the Court "assumed that it had the right to reign over the legislative domain of the states."¹¹ This, in turn, shows *Lochner* to be a properly condemned "illustration of the contrademocratic nature of the Court's power of judicial review."¹² This analysis therefore concludes much the same as does William Marnell; that the Court, through a social Darwin-based interpretation of the Fourteenth Amendment, made it in to a "comprehensive Bill of Rights for corporations."¹³

A slightly more benign version of the overreaching conclusion, though without the same awareness that the Court's own certitude of its central place as protector of the Constitution is questionable, is offered by David Strauss in "Why Was *Lochner* Wrong?"¹⁴ Strauss largely repeats the Tribe analysis, but also notes that the standard argument for the case's vilification is somewhat paradoxical in light of current civil rights jurisprudence. In his reading the dominant criticism finds *Lochner* objectionable because the Court has enforced "implied" rights through strong judicial review, rights not explicitly mentioned in the text of the Constitution. Therefore the Court's problem is one of judicial activism. But this is problematic because the modern Court has recently done much the same thing in the realm of civil rights – for instance finding various implied rights of privacy through penumbras, etc. – yet in the realm of civil rights the Court has not faced the same overwhelming amount of criticism.¹⁵ Because of this, Strauss sees the implied rights/activism critique to be unconvincing. Instead, he claims that, "the *Lochner*-era Court acted defensibly in recognizing freedom of contract but indefensibly in exalting it."¹⁶ Strauss concludes that the real failure of the majority opinion was its lack of humility and inability to face the truly difficult and complicated nature of the issues. This analysis largely accepts that the Court is the proper place for decision as to whether or not such a right should be enforced.

A different line of critique argues that *Lochner* was properly decided in its time, but that in the intervening years factors have changed enough so that it is properly seen as bad law today. One example of such an argument is offered by Jack Balkin in “‘Wrong the Day it was Decided’: *Lochner* and Constitutional Historicism.”¹⁷ In his terms, *Lochner* was not wrong the day it was decided, but more plausibly became wrong because of facts in the world changed. Balkin further argues that *Lochner* is seen as important because it has come to function as the negative centerpiece of a narrative that legitimated New Deal lawmaking. Another very influential version of this “changing correctness” thesis is Bruce Ackerman’s *We the People 1: Foundations*.¹⁸ Howard Gillman in *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* agrees with Balkin that the case was decided correctly in 1905.¹⁹ Gillman, though, offers a meticulous case analysis and locates the origin of liberty of contract ideas in the antislavery movement and the Court’s Jacksonian suspicion of class or partial legislation. For Gillman, “the decisions and opinions that emerged from state and federal courts during the *Lochner* era represented a serious, principled effort to maintain one of the central distinctions in nineteenth-century constitutional law – the distinction between valid economic legislation, on the one hand, and invalid ‘class’ legislation on the other-during a period of unprecedented class conflict.”²⁰ Therefore, as opposed to a picture of the justices being willful and aggressive, the Court was actually being faithful to precedent and the framer’s intent. The problem with the Bakeshop Act for the Court majority was that labor legislation was thought to be by its very nature class-based and redistributive. Therefore the Bakeshop Act was contrary to government neutrality. For Gillman the great depression and the rise of modern corporate capitalism ended the ability to believe in the earlier conception of a neutral state. Therefore, “The story of the *Lochner* era is a story about judicial fidelity to crumbling foundations.”²¹

Another strand of *Lochner* criticism argues that the underlying common law assumptions treated as passive and neutral by the majority opinion were active and non-neutral all along. Cass Sunstein, in “*Lochner*’s Legacy,” offers perhaps the clearest version of this type of argument.²² Sunstein contrasts *Adkins*, where entitlements are taken as prepolitical given and minimum wage law is described by the Court as an unjustified subsidy to the employee, with *West Coast Hotel* where low wages paid by an employer are seen as being subsidized by society in order to sustain the employee’s necessities. Therefore, “The expansion of the police power in *West Coast Hotel* signaled a critical theoretical shift, amounting to a rejection of the *Lochner* Court’s conception of the appropriate baseline.”²³ Sunstein draws the conclusion that “Whether rights are treated as ‘negative’ or ‘positive’ turns out to depend on antecedent assumptions about baselines.”²⁴ Ultimately, the rise of the modern administrative state shows that governmental action outside of common law limits has become so necessary as to make *Lochner*-style analysis obsolete. Jennifer Nedelsky in *Private Property and the Limits of American Constitutionalism: The*

Madisonian Framework and Its Legacy, agrees that the “the *Lochner* era opinions show more than an endorsement of Herbert Spencer and his fellow Social Darwinists; they show an impressive continuity with the Federalists’ vision of constitutionalism, complete with the rights of property as the central boundary to state power, a suspicion of popular efforts to use democratic power to threaten those rights, and contract as a focus for protecting them.”²⁵ On the other hand, Nedelsky accepts Sunstein’s analysis that the common law baseline is now obsolete.

There are also some scholars who argue that the case was decided correctly and is still correct today. Blazing the trail was Richard Epstein in *Takings: Private Property and the Power of Eminent Domain*.²⁶ He advocates a return to *Lochner*-like standard of review especially in the realm of the takings clause. His analysis has recently been expanded in *Supreme Neglect: How to Revive Constitutional Protection for Private Property*.²⁷ Epstein sees the Bakeshop Act as motivated by a goal of eliminating competition and argues that Act exceeded “any rational conception of police power, for its major purpose was not safety, but to alter the competitive balance between competitive forms. The cardinal virtue, therefore, of the much-reviled *Lochner* decision was that it preserved the operation of competitive labor markets from the corrosive effects of differential state regulation. The police power was idle, because there was no market imperfection to cure.”²⁸

Offering a much more detailed version of this largely libertarian argument with a little less free-market fanaticism than Epstein is David Bernstein in, “*Lochner v. New York: A Centennial Retrospective*.”²⁹ Here once again is a scholar arguing against the “prevailing myth” that the problem with *Lochner* is that the justices imposed their own laissez-faire views on to the Constitution through overly aggressive interpretation. Bernstein sees this story as a “morality tale” and a “polemical argument with little factual basis.”³⁰ In actual fact, according to Bernstein, *Lochner* was largely ignored until it became a leading anticanon case in the 1980s. But since then, “Along with *Dred Scott v. Sanford* and *Plessy v. Ferguson*, *Lochner* has become one of the most reviled Supreme Court cases of all time.”³¹ Why? This morality tale was largely created through casebook organization – most importantly Tribe’s treatise *American Constitutional Law*. But, Bernstein claims, scholars “have thoroughly debunked the tale’s historical underpinnings.”³²

3. *Lochner v. New York*, 198 US 45 (1905)

The actual facts of *Lochner* were quite simple and not in dispute. *Lochner*, the owner of a bakery in New York, violated an article of New York’s Bakeshop Act because he “wrongfully and unlawfully required and permitted” an employee to work more than sixty hours in one week. The work *Lochner* “required” was voluntary. Therefore all that was claimed is that the employer permitted the employee to voluntarily work over sixty hours during a one-week

period. The question was as to the constitutionality of New York's maximum hours limitation on an employee's labor adopted in the Bakeshop Act.

Justice Peckham wrote the majority opinion. Therein the Court found that the language of the Bakeshop Act was the "substantial equivalent" of a law that would require that "no employee shall contract or agree to work" more than ten hours a day. Peckham notes that this keeps an employee by law from earning extra money through extra work if such is desired. Because of this,

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. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution. *Allegeyer v. Louisiana*, 165 U.S. 578. Under that provision, no State can deprive any person of life, liberty or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment unless there are circumstances which exclude the right.³³

Peckham notes that states are allowed to limit the right of contract through their "police powers," which relate to "the safety, health, morals and general welfare of the public."³⁴ Indeed, the Court explicitly accepts that property and liberty rights (and therefore contract rights) are "held on such reasonable conditions as may be imposed by the governing power of the State in the exercise of those powers."³⁵ If the state is exercising its legitimate police powers, then the Fourteenth Amendment does not prohibit such acts. Peckham allows that the Court has indeed upheld state police powers in borderline cases due to the use of interpretive rules "of a very liberal nature."³⁶ For instance a law limiting Utah underground mine workers to eight hours a day (subject to an emergency exception) was upheld in *Holden v. Hardy*.³⁷ This law was upheld under the police powers exception because the kind of employees and the type of labor at issue (its inherent danger) made it "reasonable and proper" for regulation to be allowed. Further, for the Court it was thought important that the law affected only a narrow class of laborers and had an emergency exemption. Peckham also distinguishes New York's Bakeshop Act from the issue in *Atkin v. Kansas*, where it was held that a state could control work conditions in its own municipal corporations (because this is a part of its own contractual standards), and *Knoxville Iron Co. v. Harbison*, where an act provided protection for employees when cashing "coal orders" presented to the employer (due to the specific details of the employee/employer arrangements).³⁸ Further, in *Jacobson v. Massachusetts*, 197 U.S. 11, the Court allowed for compulsory vaccination for public health reasons.³⁹

But, Peckham continues, there must be limits to the police powers, "Otherwise the Fourteenth Amendment would have no efficacy, and the legislatures of the States would have unbounded power" to regulate any activity

through citing a “mere pretext” of protecting the moral, health or safety of their citizens.⁴⁰ The Court’s question is therefore framed as: “is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family?”⁴¹ Peckham argues that by framing it in this manner the majority is not “substituting the judgment of the court for that of the legislature” but rather is deciding whether the law in question is within the legitimate police power of the state – and therefore is a question of law to be decided by the Court.⁴² In the case at hand, that of the New York Bakeshop Act, Peckham finds that under this test the Act is mere pretext because the bakers as a class are perfectly competent to make contracts, the law is not necessary to protect the safety, morals or welfare of the public, and the trade of baker is not a specifically unhealthy one. Therefore, because the law doesn’t show a direct enough relation “as a means to an end” there is “no reasonable foundation for holding this to be necessary or appropriate as a health law” and is therefore “an illegal interference with the rights of individuals, both employers and employees, to make contracts regarding labor upon such terms as they may think best, or which they may agree upon with the other parties to such contracts.”⁴³ Given the possibility of pretext, *Lochner* substantive due process analysis uses the following test: “The purpose of a statute must be determined from the natural and legal effect of the language employed, and whether or not it is repugnant to the Constitution of the United States must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose.”⁴⁴ Under this test, Peckham, writing for the Court, held that the New York Bakeshop Act is an unconstitutional infringement of contract.

Justice Harlan (joined by White and Day) wrote the first dissent. Harlan starts by stating that the State’s legitimate use of police power is universally recognized and “extends at least to the protection of the lives, the health, and the safety of the public against the injurious exercise by any citizen of his own rights.”⁴⁵ The state, though, “may not unduly interfere with the right of the citizen to enter into contracts that may be necessary and essential in the enjoyment of the inherent rights belonging to everyone.”⁴⁶ But the finding of undue interference is not simple and, because of this, large discretion is “necessarily vested in the legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests.”⁴⁷ Once again, the question at issue is what are the outer limits to proper legislative authority? Harlan states: “Upon this point there is no room for dispute, for the rule is universal that a legislative enactment, Federal or state, is never to be disregarded or held invalid unless it be, beyond question, plainly and palpably in excess of legislative power.”⁴⁸ Because of this:

If there be doubt as to the validity of the statute, that doubt must therefore be resolved in favor of its validity, and the courts must keep their hands off, leaving the legislature to meet the responsibility for unwise legislation. If the end which the legislature seeks to accomplish be one to which its power extends, and if the means employed to that end, although not the wisest or best, are yet not plainly and palpably unauthorized by law, then the court cannot interfere. In other words, when the validity of a statute is questioned, the burden of proof, so to speak, is upon those who assert it to be unconstitutional.⁴⁹

Harlan finds plenty of evidence that the New York law can be properly read so as to see the rationality of the belief that working over sixty hours a week baking bread can endanger the health of the laborer. Indeed he cites various studies to that effect. In addition, he sees the statute as a reasonable means to regulate such labor. Further, it clearly related to a health issue. Next, Harlan finds that he is unable to say that the law is beyond doubt a clear invasion of fundamental rights and because there is “room for debate and for an honest difference of opinion” and this should be enough to decide the case in favor of the state regulation.⁵⁰ Finally, voiding the statute under the Fourteenth Amendment, Harlan predicts, will have broad consequences and “cripple” the states in their police power duties. Therefore, Harlan argues that the judgment of the lower court ought to have been affirmed.

Holmes filed a separate and lone dissent in *Lochner*. In it, Holmes famously claims that the majority decided the case through allegiance to a specific economic theory. Further, he points out that the theory in question is one that many in the United States do not agree with. As to the protection of contracts, Holmes cites multiple ways in which they are legally “interfered” with, such as Sunday laws, usury laws and lottery prohibitions. Further, he notes that the broader idea of a general liberty from interference “so long as he does not interfere with the liberty of others to do the same” is refuted by the example of school laws, the Post Office, and taxes.⁵¹ In one of the most famous lines in American law he then states, “The Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social statistics” and continues:

But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.⁵²

Therefore, “General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate

major premise.”⁵³ Holmes then offers his alternate test: “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.”⁵⁴ He takes it as needing no effort to conclude that under this test the statute passes. In fact, he allows that it might be reasonable to allow further legislation in the direction of maximum allowable work hours.

4. Dews, Dworks and Poses Decide *Lochner*

Peckham, Harlan, and Holmes all disagreed as to the nature of the law and its application. Harlan and Holmes disagreed with Peckham and the majority’s decision and Peckham and Harlan agree on the Court’s ultimate role as Supreme reviewer. The disagreements between the three opinions are enlightening if one is investigating the place of legislative activity, the legal system and judicial review in a constitutional democracy. By investigating how Dews, Dworks and Poses (judicial followers of the legal philosophy of Dewey, Dworkin, and Posner) would decide *Lochner* these issues can be brought even further in to focus.

For a Dwork, a properly functioning democracy is fully reliant upon proper constitutional law. Dworks advocate a theory of rights as “trumps,” where the individual is expressly protected from the group will, even in the face of policies that are thought to be more beneficial to society as a whole.⁵⁵ This conception of rights creates the problem of antimajoritarianism, that is, the fact that an elite tribunal can overturn the popular vote. Dworks claim that despite the anti democratic appearance of antimajoritarianism, judges, and law in general, actually have a distinctly foundational role in a democracy. Dworks imagine and to the extent possible emulate an ideal judge, Hercules, who does not always defer to legislative acts because he sees himself as the ultimate protector of real democracy.

Indeed, constitutional law is central to a Dwork’s philosophy of law. For him, a strong “moral reading” of the constitution is “practically indispensable to democracy.”⁵⁶ As opposed to a democracy based upon the majoritarian or statistical premises, where democracy is conceived of as just an aggregation or market device, Dworks advocate a “communal” or “cooperative” constitutional democracy founded upon the aim of treating all members of the state with “equal concern and respect,” as well as having “inherent value” and “personal responsibility.”⁵⁷ Legal decisions, when made by Hercules, protect the democratic conditions necessary for a properly structured democracy by utilizing these concepts. Judges are, therefore, the supreme “guardians of principle.”⁵⁸ For a Dwork, “The American conception of democracy is whatever form of government the Constitution, according to the best interpretation of that document, establishes. So it begs the question to hold that the Constitution

should be amended to bring it closer to some supposedly purer form of democracy.”⁵⁹ The Constitution is “America’s moral sail,” and Hercules is the United States’ moral interpreter.⁶⁰

What exactly such a communal or cooperative constitutional democracy entails, other than judicial review and a strong moral interpretation of the Constitution, is not really fully conceptualized by a Dwork. There must be structural and relational conditions as well as the assumption of personal moral independence. These conditions include equality and respect conditions. Further, the communal conception of democracy presupposes a type of collective agency. This requires that the whole community can and must see the law as “theirs,” as being properly of “the people.”

Once again, Dworks see their theory of law, “law as integrity” as centered around the ideal judge, Hercules. The “hidden structure” of actual judicial decisions that Hercules follows is a scheme of abstract and concrete principles, which in turn provide a coherent justification for the practice of law in every realm. This, in turn is best conceived of as “law as integrity.” Integrity is a type of principled “coherence” or “consistency” in laws. Such laws are described as the opposite of “checkerboard” laws. Principled decision is thought more desirable, but this is not because checkerboard laws are by definition less fair, indeed in many cases they might bring about better results. “Principle,” though, is the central quality that justifies attachment to law as integrity. Principled legal practice requires a general style of argument that treats democratic community as distinct type of community, a corporate moral agent where people “accept that their fates are linked.”⁶¹ This, in turn, gives legal decisions moral legitimacy because principled integrity creates the reason for legal obligation.

Further, according to Dworks an understanding of law as integrity is properly informed by analogy to the project of writing a “chain novel.” In creating a chain novel, novelists write a novel as a team. After the previous writers have completed the earlier chapters in the order they are to be read, the author in question writes the next chapter so as to make the novel being constructed the best it can be. Each author is to construct the “best” novel through testing upon two dimensions. First, there is “fit.” This conceptual test entails that the next chapter should, as far as possible, “flow” and not leave “unexplained” major aspects of the text as previously constructed (for example it should not ignore already developed major subplots). Second, if after satisfying the fit requirements there are options left over, the author must construct a chapter that is best “all things considered,” or that best “justifies” the previous chapters.

Therefore, Hercules as the ideal practitioner of law as integrity practices constructive interpretation. That is, acting as a judge necessarily requires interpretation and construction of the activity at the deepest and most philosophical level. Indeed, “any judge’s opinion is itself a piece of legal philosophy, even when the philosophy is hidden and the visible argument is dominated by citation and lists of fact.” In fact, philosophy of law is the “silent

prologue to any decision at law.”⁶² Hercules (and a Dwork) knows that only a community based upon law as integrity “can claim the authority of a genuine associative community and can therefore claim moral legitimacy—that its collective decisions are matters of obligation and not bare power—in the name of fraternity.”⁶³ Indeed, a Dwork believes that when Hercules “intervenes in the process of government to declare some statute or other act of government unconstitutional, he does this in service of his most conscientious judgment about what democracy really is and what the Constitution, parent and guardian of democracy, really means.”⁶⁴

A Dwork will have much in common with Peckham. First, they both will see the Court’s position as one of protector principle and foundational rights. As Peckham does, so does a Dwork see the Supreme Court as the proper realm wherein to set definite and principled limits to what the legislature may or may not enact. What a democratic process is allowed to do is for both what the Court properly allows it to do. For both the Court is the proper ultimate protector of individual rights as trumps against social legislation, even if the legislation would make the whole society better off. Both accept the image of the Court as the ultimate forum as principle, a forum that should not involve itself with policy because policy is outside the realm of law. Therefore, the issue in *Lochner* is whether or not the law is properly principled in both fit (dutifully following the proper precedents), and moral vision (holding a proper moral reading of the Constitution). As this is an issue of legal interpretation and not policy, Dworks agree with Peckham that the judges of the Court are not substituting their judgment for that of the legislature but are merely acting in their proper role as deciders of ultimate law.

Further, from the prevailing scholarship on *Lochner* it seems as if precedent was on the side of Peckham and the Court majority. Peckham, as would a Dwork, carefully follows and distinguishes previous cases in order to distill the principle behind previous “chapters” of the Court’s jurisprudence. The majority opinion exemplifies, possibly as well as any other case in American Supreme Court history, a clear and consistent picture (moral conception) of limited government based upon inalienable rights and common-law foundations. In other words, the majority opinion is in many ways a paradigm of principle. Further, a law that just changes the rules of contract in one discreet area of labor, that of baking, and not more universally, so that only one group of laborers or employees lose their neutral right to contract certainly reads as checkerboard. Dworks, therefore, as imagined followers of the principled judge Hercules, have much in common with the assumptions exemplified in Peckham’s opinion.

As to Harlan’s dissent, Dworks have less in common. While a Dwork certainly does agree that the legislature may often be able to better determine what the interests of the public require, a Dwork never lets the interests of the public trump the individual rights that are deemed constitutionally essential. And determining what is essential is the domain of the Court. Because of this, Harlan’s deferential stance towards the legislature reads to a Dwork as a

dereliction of duty, and not an act of judicial virtue. A Dwork asks, "If the justices of the Supreme Court will not protect individual liberties against populist intrusion, then who will?" This question, of course, shows how far a Dwork is from agreeing with Holmes's dissent. For a Dwork, Holmes allows much too much leeway for democratic (read factional) decision making. Further, Holmes seems to ridicule attachment to talk of principle when he states, "general principles do not decide concrete cases." Dworks would find this type of statement distasteful and contrary to all that is worthy in law.

From the above analysis it appears that a Dwork judge would agree with the majority's opinion in *Lochner* and find that New York's Bakeshop Act was indeed an unconstitutional infringement upon each individual's right to liberty of contract. In deciding, a Dwork will describe such a decision as standing up for principle and rights in the face of legislative activism.

While Dworks place law in a central position and highlight moral principle, Poses see law and democracy largely in terms of limits to the market economy. Poses begin by dividing all democratic theory into two types: *concept 1 democracy*, an aspirational, utopian or deliberative democracy, modeled upon a faculty workshop; and *concept 2 democracy* which is "realistic, cynical, and bottom-up," a democracy based upon the aim of satisfying private interests, and founded upon economic competition.⁶⁵ Poses advocate for concept 2 democracy because they think it is constructed upon a "unillusioned conception of the character, motives, and competence of the participants in the governmental process."⁶⁶ Within concept 2 democracy the private realm of the market is to be left alone as far as possible, and government's limited function is to structure those areas where the price system is seen to be in need of small corrections. Concept 2 democracy sees the democratic process as a competitive power struggle of a political elite for the votes of the masses. This "realistic" democratic and pragmatic liberalism emphasizes "the institutional and material constraints on decision making by officials in a democracy."⁶⁷ Ultimately, American democracy is successful because it "enables the adult population, at very little cost in time, money, or distraction from private pursuits commercial or otherwise, to punish at least fragrant mistakes and misfeasances of officialdom, to assure an orderly succession of at least minimally competent officials, to generate feedback to the official concerning the consequences of their policies, to prevent officials from (or punish them for) entirely ignoring the interests of the governed, and to prevent serious misalignments between government action and public opinion."⁶⁸ Under this conception democracy largely functions as a means of protecting the private sphere and enabling the public to create laws to curb the external costs of other people's behavior. This type of democracy is "nonparticipatory," because "the benefit of voting to the individual is negligible."⁶⁹

So, for a Pose, democracy is a particular manner of limited government parasitic upon commercial life. And here, "Not only do philosophical, theological, and even scientific theories have little direct relevance to

commercial life; they impede it, by drawing resources and attention away from the market and by stirring conflict and animosity.”⁷⁰ Indeed, too much deliberation is seen as a recipe for social unrest. At the end of the day, “Commercial activity and private life are not only more productive of wealth and happiness than the political life; they are also more peaceable, which in turn reinforces their positive effect on wealth and happiness.”⁷¹

Where Poses do seem to agree with Dworkin is that their answer to the question of what law is centers around the judge. For a Pose, the main issue in law is how an oligarchic judiciary fits in to the implementation of governmental aims. First, Poses believe that “pragmatism is the best description of the American judicial ethos,” in the sense that judges show a mood or disposition to look to facts and consequences before “conceptualisms, generalities, pieties, and slogans.”⁷² The Pose judge is a forward-looking antitraditionalist who uses past cases as information, not as a source of duty to be followed. Most important is that the Pose judge doesn’t believe legal formalism is a viable option. “Principle” is not determinative for a Pose, so he or she will need to be better empirically informed than judges traditionally feel necessary. Of course all of this is in service of a picture of society bifurcated into a private realm of market transactions (the “price system”) and a limited public realm where government, and therefore law, is called for when adjustments are needed due to various types of market failure. This leads to the second major part of a Pose’s theory of law; the law and economics theory that judges should make decisions that either further the functioning of markets or, if this is not directly possible, decide in a manner that “mimics” the market. Democracy itself is seen as only a useful means towards a better functioning “private” market.

Poses think that Dworkin have an insufferably high opinion of themselves and their abilities to come to principled decisions based upon moral reasoning.⁷³ As opposed to seeing judges as central to law and as a foundational force protecting society’s formal democratic ground rules, Poses see themselves as peripheral to the main business of society, which is business. The price system and the market encompass the main system of allocation within society and politics serves, at best, to temper rent seeking activities and correct market failures. Government does this by structuring clear laws and having periodic democratic elections in order to keep the most egregious failures of the market and various rent seeking activities under check. Economic elites contest for the public’s votes and through this process get to pursue their own interests to an extent limited by the proximity of the next election. Poses see this description of liberal democratic society as realistic and unillusioned. They see themselves as “pragmatic” in relationship to this system of “elite” democracy and therefore judge so as to further the virtues of the private market and the limited and limiting factors of representative democracy. This pragmatism is more a tough-minded “mood” than a philosophy, but it does entail that the judge must look not just to moral principle but also more directly to policy and empirical fact.

So how would a Pose decide *Lochner*? First, a Pose will accept that the right to freely contract does have a place in constitutional law. A Pose treats clear property rights and the market economy as foundational and more important than any strong picture of democratic governance. Therefore a Pose will find the legislature's interference with traditional property rights and open contracting questionable, and quite possibly an example of rent seeking by a small group of employees or bakeries. But as opposed to the picture of judicial positioning accepted by both Peckham and a Dwork, a Pose does not have the high ground of principle, moral vision or absolute individual rights from which to rule laws unconstitutional. Further, a Pose will look at the relevant precedents for information, but those offered by Peckham do not really help to fill out the specifics of the New York Bakery industry and its employee pool. What is needed according to a Pose, therefore, is less talk of principle and more empirical investigation. This is especially the case if the state police power exceptions to the Fourteen Amendment's implied limits under the due process clause have to be justified in relationship to the "safety, health, morals and general welfare of the public." Of course for a Pose, as opposed to a Dwork, the moral aspect of this list is largely irrelevant. But for any judicial decision upon how a law affects the safety, health or general welfare of the public, a Pose will need empirical data and not see this as definable in terms of "the" law.

This means that a Pose's judicial reasoning has much more in common with Harlan's dissent. A Pose, much like Harlan, would allow that the right to liberty of contract is essential, but that states should have some ability to curb the excesses and faults of the market through the use of police powers. As Harlan emphasizes, the legislature is often in a much better position than the Supreme Court to determine the empirical aspects of safety, health and general welfare legislation. This, in turn, means that in the majority's search in to both legitimate ends, but more specifically in relation to the proper choice of means, the Court might be exceeding its domain of institutional competence. If the area being regulated is empirically complex and evolving it is an important question to ask of the Court how it is properly to determine that the explicit purpose of a law is really pretext? At the very least an informed opinion will have to look carefully at the social context of the law (as Harlan does in his dissent). If choice of means implicates empirical facts a Pose would agree with Harlan that legislative action should be accorded a large amount of discretion and cannot be decided purely upon legal principle.

Finally, as to Holmes's dissent, a Pose will happily go along with the idea that the Dwork/Peckham appeal to principle and integrity is pretense and that such a picture of legal reasoning is judicial romanticism and idiosyncratic personal judgment wrapped up in the euphemistic garb of morality. This is especially true in relation to areas of the common law that have become economically inefficient due to changing circumstances. On the other hand, a Pose would not be so accepting of the dismissal of laissez faire economic theory or as deferential to popular opinion. A Pose sees modern free-market ideas in the

form of Chicago School economics to be not based upon the written Constitution, but as the only empirically viable, pragmatic or “realistic” structuring mechanism for a free society. “Democratic” decision-making through regular elections is for a Pose just a safety valve mechanism that keeps the greatest types of market failures in check. Even so, a Pose will often agree that legislative acts are unjustified attempts at rent seeking. Many of these laws might be best left by the Court to society at large to be decided through a Darwinian or Holmesian battle of ideas. But there will be times when a Pose can identify the market breakdown, or that a law is a clear example of rent seeking. In that case, the Pose’s imperative to further the proper activities of the market through enforcing and sometimes creating clear legal entitlements as well as deciding in a manner that best mimics the results of a properly functioning market will put Pose legal reasoning in conflict with that of Holmes’s *Lochner* dissent.

Ultimately, a Pose would want to decide *Lochner* much like Harlan. A Pose would want to limit legislative intervention to areas where the market through liberty of contract cannot function properly. On the other hand, a Pose acknowledges that courts are often not the proper venue to decide whether or nor legislation is in service of real social needs rather than mere pretence. Because of this, New York’s Bakeshop Act would be held constitutional by a Pose on the grounds that judicial deference is justifiable given the complexity of legal and, more importantly, empirical issues involved.

Dews, like Dworkin and Poses, start with some core ideas about democracy, law and the proper realm of the legislative branch. First, for a Dew democracy in its most central meaning is a way of life that is social before it is seen more narrowly as a political concept. Democracy to be realized in a meaningful rather than formalist manner “must affect all modes of human association.”⁷⁴ For political institutions are secondary to, and are the effects of, the underlying culture; “democracy can be served only by the slow day to day adoption and contagious diffusion in every phase of our common life of methods that are identical with the ends to be reached and that recourse to monistic, wholesale, absolutist procedures is a betrayal of human freedom no matter in what guise it presents itself.”⁷⁵ Dews think that democracy entails pluralistic values and a decentered picture of social institutions. By having plural and decentered institutions as well as a form of life that practices democratic social habits there are multiple avenues that allow for information to be communicated and solutions to be proposed. Dews acknowledge and appreciate the great complexity of causal forces in human society. They think that a “monistic view” just cannot handle the multiple forces that operate in human society. Indeed, they emphasize that one of the great challenges for human society is being able to coordinate, communicate and understand such multiple and diffuse forces.

As Dews see the process, social groups feel consequences before being able to label them. Noting and finding ways to control/solve unfortunate consequences of social life demand the construction of symbols. Common

meanings are created through the construction of symbols which then help animate a public discussion. This whole process is encouraged by the proliferation, interconnection and overlapping of associations. Third, Dews describe the public (or publics) in functional terms. A public is created when social consequences that affect people beyond the immediate group are noted and found to be in need of social control.⁷⁶ A distinctly political democracy, therefore, comes into being where there is a recognized need to control consequences of social activity. And because problems are in constant change, states need to be continuously “re-made.”⁷⁷ Therefore the state is best seen as a secondary type of association formed because of perceived externalities of individual or group activities and based upon the given fact of social and intersubjective life. “The only statement which can be made is a purely formal one: the state is the organization of the public effected through officials for the protection of the interests shared by its members.”⁷⁸

For Dews this view of the state eliminates the possibility that there is an *a priori* rule or procedure identifiable as sufficient to define democratic government. In a properly democratic state, instead of a top-down constitutional structure determining the parameters of governmental rule, the state reacts to multiple groupings formed upon the basis of interests and acts in order to encourage more socially desirable associations. Further, going back to democracy as a social way of life prior to the political and to the functional idea of the public as formed in relationship to specific and immediate social issues; Dews believe that a living democratic society rests upon experimental intelligence. Dews don’t find this claim controversial because this is only taking a type of intelligence that has proven useful across various human societies and that every human being habitually enacts in everyday life and utilizing it more consistently for the problems of governance. Fear of change and the psychological need for greater certainty have kept society from fully utilizing this greater use of experimental intelligence in social life. Instead, “we have set undue store by established mechanisms.” A blatant example of this is “idolatry of the Constitution.”⁷⁹ Fifth, the public and its government are institutions based upon real conflict. Democracy is based upon specific problems as problems. It needs no argument to acknowledge that here are real conflicts.⁸⁰ The only question worth answering is how to settle them in manner that is best for the widest amount of people. Finally, for Dews democracy utilizes both scientific knowledge and creativity for communication and solution. Importantly, social problems cannot be solved solely through allocation of decision-making to technocrats. There are unavoidable problems in the appeal to expertise and “elite” democracy where voting is relegated to the function of safety valve. For example, Dews think that the theory of “elite” representative democracy cannot account for democracy’s usefulness because the populace’s purported inability to understand, deliberate and vote upon the complex and technical issues of the day is not remedied by representation of an elite because the same problems are just replicated one step later (the general claim is that governmental problems

are too complex for the voters to understand, but why at one step removed and at the level of voting for representatives the issues would be better understood by the voters is unclear and the “elite” become necessarily isolated from the social world and therefore cannot represent the voters needs).⁸¹

Law, for a Dew, is seen as just one of multiple social institutions that might, when utilized properly, further the social goal of a truly democratic society. Ultimately, there is one main question; what standard or criterion are we to use to evaluate legal practice? The quest for a standard, though, does not transcend the issues of the period in which the analysis is produced because legal philosophies are products of their time and place and the issues relevant to that specific context. Therefore standards cannot be judged outside of acknowledgement of context. It follows that law “can be discussed only in terms of the social conditions in which it arises and of what it concretely does there.”⁸² This specificity of context and use “renders the use of the word “law” as a single general term rather dangerous.”⁸³ In good pragmatic fashion, Dews hold that, “A given legal arrangement *is* what it *does*, and what it does lies in the field of modifying and/or maintaining human activities as going concerns.”⁸⁴

Dews believe that much legal theory shows a “confusion of sovereignty with the organs of its exercise.”⁸⁵ This confuses sovereignty with a specific source of command. Dewsian legal theory, to the contrary, rules out any search for a unifying rule of recognition, and instead allows for plural sources of law. But not every potential source of law is equal. For instance, Dews are quite suspicious of appeals to natural law. Of course natural law has been centrally important in jurisprudential history; in fact in the past appeals to natural law have often served to promote legitimate and progressive human aims. Dews, though, note that “nature” can also be taken as the given, the status quo. This means that injustice may also be supported by an appeal to natural law. Therefore, appeal to natural law may be used to fossilize given values or rules. For Dews, “the effect of any theory that identifies intelligence with the given, instead of with the foresight of better and worse, is denial of the function of intelligence.”⁸⁶

Dews accept a description of law as emanating from “the minor laws of subordinate institutions – institutions like the family, the school, the business partnership, the trade-union or fraternal organization.”⁸⁷ This allows for a pluralistic and “bottom-up” conception of the sources of law, one that maps nicely on to traditional legal practice. For instance, it easily handles the case-based and analogical reasoning central to the common-law tradition. It can also handle statutory law as well as the thought that constitutional law is law and not positive morality. But law often arises out of other habits, traditions and customs within society. Importantly though, when law recognizes a custom, it also “represents the beginning of a *new* custom.”⁸⁸ Further, Dews believe that “while there would not be laws unless there were social customs, yet neither would there be laws if all customs were mutually consistent and were universally adhered to.”⁸⁹ Of course law itself is a type of custom, and much of law is made

up of the concepts it inherits from earlier decisions. So, Dews develop a historicized picture of law that, for example, notes the survival in modern maritime law of the concept of a ship “as personal and responsible being.”⁹⁰ For Dews, this illustrates that in law, “the old is never annihilated at a stroke, the new never a creation *ab initio*. It is simply a question of morphology. But what controls the modification in the historic continuity is the practical usefulness of the institution or organ in question.”⁹¹

Ultimately Dews believe that law is “social in origin, in purpose or end, and in application.”⁹² It is historically based and yet contextually varied. Indeed, law as an institution and as a concept “cannot be set up as if it were a separate entity, but can be discussed only in terms of the social conditions in which it arises and of what it concretely does there.”⁹³ Finally, for Dews, because this theory of law is decentralized and flexible it can allow for multiple sources for law and, further “the development of quite new organs of law-making.”⁹⁴

The end of law is, for Dews, a matter of how and why legal force will be used in society. Law, when properly utilized, can be thought “as describing a method for employing force economically, efficiently, so as to get results with the least waste.”⁹⁵ Law is not a substitute for force – law is institutionalized force. Law should be justified, therefore, not by its “lawfulness,” but by whether or not it is “an effective and economical means of securing specific results.” If it is not effective and economical, then “we are using violence to relieve our immediate impulses and to save ourselves the labor of thought and construction.”⁹⁶ Power becomes violence “when it defeats or frustrates purpose instead of executing it or realizing it.”⁹⁷

Dews realize that this analysis might scare people who admire legal stability and adherence to tradition. But, this analysis doesn’t call for radical changes across the board. For example, experience has shown that it is inefficient for parties to judge their own case, so some type of third part adjudication seems pragmatically warranted. Further, existing legal systems were built up “at a great cost” and constant recourse to other means “would so reduce the efficiency of the machinery that the local gain would easily be more than offset by widespread losses in energy available for other ends.”⁹⁸ Ultimately, though, for Dews the use of force within a legal system is judged by an external standard. The standard is that of a democratic society and the values this entails. This conclusion entails that the legal profession cannot be fully justified by appeals to an internal perspective, but must always be sensitive to the greater goals of society.

Finally, Dews worry about the application of law. For instance, recall the Dew’s suspicion of appeals to natural law. One version of this type of appeal would utilize Spencer’s *laissez-faire* theory of human reason as a form of natural law theory and, therefore, not acknowledging alternative possibilities. Dews worry about appeals to any other concepts that in like manner can be read in static or *a priori* ways. For instance, legal decisions pertaining to ideas of *due diligence* and *undue negligence*, wherein reason is used as the standard, and

personal liability rests upon whether the care and prudence exercised was “reasonable,” might use these terms too passively. Courts, a Dew might note, often equate the word “reasonable” with “the amount and kind of foresight that, as a matter of fact, are customary among men in like pursuits.”⁹⁹ Further, this use of reasonable is then applied even though the results are undesirable. Dews would redefine “reasonable” functionally as the “kind foresight that would, in similar circumstances, conduce to desirable consequences.”¹⁰⁰

Dews are also intensely interested in the nature of legal reasoning and how such reasoning is applied in specific cases. Logic, for Dews, “is ultimately an empirical and concrete discipline.”¹⁰¹ This conception of logic is contrasted with that dismissed in Holmes’s famous line that “the life of law has been experience and not logic.” Dews explain that Holmes is attacking a picture of logic based solely upon “formal consistency,” whereas according to a Dewian conception of experimental logic, “the undoubted facts which Justice Holmes has in mind do not concern logic, but rather certain tendencies of the human creatures who use logic, tendencies which a sound logic will guard against.”¹⁰² For a Dew, the formalist picture of logic is dangerous because it distorts the actual reasoning process and gives rise to an unrealistic expectation of certainty. For instance, in the actual activity of legal practice, premises are not just found but “only gradually emerge from analysis of the total situation.”¹⁰³

Further, the lawyer usually begins with the conclusion that is hoped for, and then analyzes the facts so as to “form” premises. But this is only part of the real story. Courts are also expected to justify their decisions. This is a different type of logic. The judge’s exposition of a decision aims at making the investigatory logic seem clearer, less vague and situational. Courts are therefore tempted to substitute for the “vital logic” which had been used in the process in order to reach the conclusion, “forms of speech which are rigorous in appearance and which give an illusion of certitude.”¹⁰⁴ Such exposition may have the salutary effect of strengthening legal stability and regularity, but the packaging also risks confusing a form of apparent logical rigor with stability of practical results in the world. The implication is that law needs to focus much more upon a “logic *relative to consequences rather than to antecedents*.”¹⁰⁵ Dews do not in any way argue that logic is useless, or that there is only the illusion of logical reasoning in law. What is argued is that there are various types of argumentation in law – various types of logic – and that a conflation of the various tasks and tools used creates mistaken expectations and distorted processes.

Dews also note that there are many ways in which legal process can be misused. For instance, Dews believe that “strictly legalistic methods of reasoning” may be used in a manner that allows a procedure to avoid facing the most important issues at question. For instance, one might by splitting the issue into separate and isolated questions create a type of argument by divide and conquer which can allow a procedure to “whittle down the significance of the admitted facts.”¹⁰⁶ Further, the ability to shift the standards of evaluation and

burdens of proof very effectively allows for manipulation. A concrete example might be the ability to change the levels of credibility afforded the various participants. Here Dews show sensitivity to the way alternate legal procedures, different agenda setting strategies and various levels of evidentiary scrutiny, can profoundly change the outcome.

On the other hand, legal procedure can also have its proper place. Dews allow that it is often important to define what is inside or outside the professional jurisdiction of judges, for example.¹⁰⁷ Here Dews highlight the virtues of legal process and properly constructed evidence laws and therefore argue that it is important to encourage limits to judicial reach. A Dew is not properly read as a full “anti-formalist,” or as against procedure or professional-ism in law. Dews clearly accept the necessity and virtues of institutional rules. What is not accepted, on the other hand, are self-justifying institutional rules untested by empirical and scientific methods. For Dews law is one of a number of institutions that, at best, helps further democratic society. As such, law is evaluated as a system in terms of its effectiveness towards this goal.

Dews would decide the *Lochner* case quite differently than would both Dworks and Poses. As opposed to Dworks, Dews think that appeals to principle, like that of appeals to natural law, might often support good causes, but could also support causes much less just. The problem is that “principle” is a quite vague term with multiple possible conceptualizations. Indeed, the distinction Dworks find perfectly clear between principle and policy, Dews find simplistic and more apt to frustrate proper decision-making than to clarify. Further, Dews are very skeptical of appeals to principle if such appeals are mostly retrospective because this ignores the real important constructive and active aspect of actual legal inquiry. Precedent, for Dews (as for Poses), functions as important data, and as important determinants of social expectations. But, precedent does not carry the moral weight that the Court majority or Dworks hold it to have. In fact, precedent is only one type of information and Dews think it is important to look to a much broader set of sources of information than Peckham or Dworks think relevant. This, of course, means that much of Peckham’s decision is at best useless and probably even untrustworthy from a Dewian point of view. This is because the style of reasoning the majority opinion exhibits might very well cover up the real underlying forces, and falsify the real reasons determining the Court’s decision.

Further, instead of seeing judges and the Supreme Court as the ultimate moral guardians of the Constitution as well as the necessary structural conditions of democracy, as Peckham and Dworks do, Dews think such a picture is very naïve. For a Dew, society has to have a democratic set of habits for a democratic government to be possible, not vice versa. To hope that a judicial oligarchy can protect democracy is, from this perspective, absolutely backwards. To believe that a small legal elite can protect democracy is to put a quasi-religious worship of text, institution or judge in place of careful empirical inquiry and democratic habits. This quasi-religious worship of text might

explain why the majority opinion blithely ignores the necessity of factual inquiry. Not only do Dews think that society must have some democratic habits in order to create a democratic political realm, but law, at its best, is for them just one of a number of institutions both political and social that can further democracy. Law is not the ultimate and foundational rule creator or protector of democracy. Instead, social democracy creates the grounding for a political realm wherein law serves a limited role. Further, a constitution is a document that must be constructed in practice, is best seen as a blueprint for experiments, not a tether to the past. From this it can be seen that a Dew's judicial decision will have very little in common with Peckham's majority opinion. Peckham sees law as foundational, as is the liberty of contract, and democracy as parasitic upon a common law natural rights baseline largely determined by a retrospective analysis of tradition and precedents. While Dworks will find this very familiar and properly representative of law as integrity, Dews (as well as Poses) find this more a falsely naturalized ideology perfectly fit to justify an oligarchical judicial elite than a plausible description of legal practice in a modern democracy.

As for Poses, Dews see them as false pragmatists much too attached to an *a priori* and non-experimental conception of what is humanly possible combined with dogmatic acceptance of free market ideas. Dews are more humble than Poses in their claims to knowledge of human nature and the relative virtues of disparate social coordination and arrangement strategies. They also are wary of reducing the complexities of human society down to a private realm of market transactions and a public sphere of elite liberal democracy. At the same time, Dews are open to a more ambitious and flexible conception of political aims and arrangements because without fixed assumptions as to what is possible, experiments in governance are encouraged. What should be emphasized are the actual ends in view. Dews will not ignore the need for strong side constraints to certain types of state regulation, but will aim to not prematurely rule out plausible options. This analysis allows a comparison between the Pose's and the Dew's evaluation of the Harlan dissent. Poses can largely accept Harlan's police powers analysis because they are, like Peckham, and Dworks for that matter, still believers in a clear public/private split and the conception of limited government based upon neutral or at least empirically necessary foundations. Therefore the limits upon the various institutions, legal, legislative and executive, can be mapped out in essentialist terms. This, in turn, allows some aspects of the situation to be described as neutral and others to be regarded as affirmative activity. Dews cannot accept this type of institutional essentialism or the conception of baseline neutrality it is founded upon.

In this sense, Dews identify much more with the reasoning in *West Coast Hotel v. Parrish* or *Miller v. Schoene*. For a Dew, each social institution is constructed in context. In one context common law might have been a progressive social tool, in another situation it might get in the way of essential social programs. In either case the common law is seen as a human construction, an active chore, and is to be evaluated through the results it brings about rather

than as to whether or not it is living up to some ideal type. Dews may argue, like Harlan, that American courts, and especially the Supreme Court, are not good at factual inquiry and therefore should defer to legislative judgment. But a Dew cannot make this argument based upon any given political, legislative or legal essence. Dews would have to argue this from empirical evidence in light of the democratic aims they deem worthy of pursuit. In addition, Dews are not comfortable in placing the judge in the center of attention, whereas Peckham, Harlan, Dworks, and Poses all are judge-centered in their legal philosophy. A Dew, though, raises the very important question as to whether or not the Court should be deciding anything as to the legitimacy of the legislature's actions. This sense of skepticism towards any claim of a specifically valuable legal mode of authoritative constitutional interpretation is something Dews have in common with Holmes. Indeed, both a Dewian judge and Holmes in his dissent invert a central claim of the majority opinion and hold that it is the *Lochner* Court that is indulging in pretext rather than rooting it out.

As a Pose does, a Dew will find economic reasoning important to utilize as a tool of analysis though a Dew will be much more sensitive to the limits inherent in such a reductionist analysis. First, as noted above, a Dew will not accept any form of natural law theory as dispositive. This prohibition includes any theory that would see social Darwinism or laissez faire ideas as natural and inevitable. Dews are pluralists and therefore expect multiple values to be present and important to weigh. In this sense Dews have more in common with Dworks than Poses who seem to think that all values can be mapped on to one metric. Further, Dews are cognizant of the shifting issues that create the need for various publics, and are suspicious of any conception of "Law" supposedly able to structure a solution to every need, or to any need in a once-and-for-all fashion. Dews therefore defer to more empirically effective and sensitive branches of government unless they have overwhelming reasons. Once again, all this leads to the conclusion that a Dew will find much in common with the Holmes dissent.

So how would a Dew decide *Lochner*? From the above analysis it is clear that a Dew cannot accept the analysis offered by Peckham or Harlan because they both trade in essentialist arguments about the place of law and liberty of contract in American democracy. A Dew cannot accept this because it naturalizes and treats as inevitable and timeless social institutions that are properly seen as a contextually specific social constructs. The Dew judge has much more in common with Holmes in that both have a healthy skepticism towards the purported "reasoning" of traditional law, as well as the naturalized base-line that advocates of common law accept as neutral. Dews, though, are not actual skeptics about values moral, political or otherwise, and believe that there are ways in which society can be improved through experiments in legislation. What the best means are to the ends in view are, though, not to be found *a priori* but rather through careful inquiry and sensitive experiments in governance. Therefore, a Dew would most certainly uphold the New York Bakeshop Act's

limit on employee hours and agree with Holmes that there may be room for further labor legislation. That is, if a Dew did not deny the Court's jurisdiction in the matter at all.

5. Conclusion

The above analysis shows that the legal theories of Dworkin, Posner and Dewey would entail drastically different conclusions in the *Lochner* case. This is not to say that the results of the Dews, Dworks, and Poses argued for above map on to the personal beliefs of Ronald Dworkin, Richard Posner, or John Dewey. Indeed, all three theorists find Peckham's majority opinion to be a mistake. For instance Dworkin argues that Hercules "would not have joined the *Lochner* majority" and this is "because he would have rejected the principle of liberty the Supreme Court cited in that case as plainly inconsistent with the American practice and anyway wrong and would have refused to reexamine the New York legislature's judgment on the issues of policy that then remained."¹⁰⁸ As to reasons why Hercules would find this, he cites the "superior constraint of integrity."¹⁰⁹ Later he argues that "Overruling was absolutely necessary in order to protect the coherence of constitutional law as a whole."¹¹⁰

From the analysis offered in this paper, though, it seems that Dworkin's own philosophical tools would have Hercules, and therefore a Dwork, ruling opposite of Dworkin's own personal conclusions. The reasons he gives against the actual *Lochner* result, that it is inconsistent with the American practice and incoherent (not integral) with the constitutional law of the time, actually all point to the opposite conclusion. Indeed, Tribe, Nedelsky, and Gillman all offer compelling arguments as to why *Lochner* was consistent with precedent, principled and founded upon a coherent moral reading of the Constitution. Given the more coherent and principled nature of Peckham's opinion a Dwork would decide *Lochner* as the majority did, despite Dworkin's own belief to the contrary. Indeed, it is difficult to imagine how a Dwork would get from attachment to the conception of law as integrity anything but *Lochner*'s actual result.

As to Posner, he thinks Holmes's dissent in *Lochner* is the greatest judicial opinion of the last 100 years.¹¹¹ He also accepts that Holmes was correct in describing the *Lochner* decision as guilty of deciding the case upon "an economic theory (that of laissez-faire) that much of the nation did not accept."¹¹² But his own analysis sounds much more like Harlan's than Holmes's; "Most economists ... believe that limiting hours of work by law is inefficient. If workers are willing to work long hours, presumably for more pay than if they insisted on shorter hours, then that is the efficient employment contract and refusing to enforce it can only impair the efficiency of the labor market and make the workers themselves worse off."¹¹³ Posner, though, has to balance his attachment to free market ideals with an analysis of the institutional limitations of the court; "Yet there is a pragmatic argument against the result in *Lochner*.

The case was decided in 1905, when social legislation of the kind at issue in the case was in its infancy. No one could be *confident* at so early a date that a maximum-hours law was inefficient. The effect of the Court's decision was thus to stifle, for a time, potentially worthwhile social experimentation.¹¹⁴ Therefore, because there is room for debate the Court should defer to the legislature. Of course the other side of this statement is the assumption that today's economist with new superior knowledge would be justified in seeing the law as inefficient and therefore unlawful. This would have a Pose largely agreeing with Epstein and Bernstein on the virtues of the *Lochner* decision. Ironically, therefore, Posner can be plausibly read as arguing that *Lochner* was wrongly decided in its time, but given superior contemporary economic knowledge if the current Court decided a case factually identical to *Lochner*, it should decide as Peckham and the majority did. This, of course, inverts the conclusion Balkin offers (though it does accept that the meaning of the Constitution changes due, at the very least, to changes in fact or knowledge).

It is interesting to note that Posner reads Holmes's dissent in *Lochner* as a "Deweyan approach" because "In Dewey's intellectual universe, invalidating a statute is not just checking a political preference. It is profoundly rather than merely superficially undemocratic" because (a point "missed by many of Dewey's current avatars in the legal academy") this gets in the way of "intellectual natural selection" and "democratic experimentation."¹¹⁵ In this description Posner is largely correct. Indeed, Dewey in the 1932 edition of *Ethics* uses *Lochner* as the specific example of the Court contracting state police power. Dewey follows this with a statement that "In the case of legislation affecting wages the issue is between the older individualistic principle of freedom in the wage contract, on the one hand; and on the other the more recently affirmed principle that in the interest of social welfare it may be wise for a state to protect its members against exploitation."¹¹⁶ This description, it should be noticed, anticipates the ideas adopted by the Court in *West Coast Hotel v. Parrish* (in effect overruling *Lochner*) four years later.

That Dewey uses *Lochner* as the example of narrow police powers jurisprudence also leads one to question Bernstein's own libertarian morality tale wherein a revisionist liberal, Laurence Tribe, highlights a relatively obscure case, a case unnoticed in its own time, and creates a new narrative justifying the New Deal with *Lochner* at the center. Elsewhere, there is further evidence that Dewey thought Holmes's dissent in *Lochner* to be important; such as when he observes that Holmes was properly against an absolutist use of the Fourteenth Amendment because that would prevent social experimentation under a delusion of "exactness."¹¹⁷ Also, in *Liberalism and Social Action* Dewey notes approvingly that in the *Lochner* opinion "Justice Holmes found it necessary to remind his fellow justices that, after all, the *Social Statistics* of Herbert Spencer had not been enacted into the American constitution."¹¹⁸ Therefore, all the evidence from Dewey's own writings is perfectly consistent with the decision a Dew would make. This also maps on to the analysis offered by Sunstein and

Nedelsky. For them, as for Dewey and a Dew, appeal to neutral baselines is incoherent and factually false.

Analyzing *Lochner* through Dewey, Dworkin, and Posner's philosophical systems highlights the powerful assumptions that each uses in constructing their theory of law and its relationship to democratic governance. If one accepts the premise that a small group of democratically unaccountable judicial elites are the best protectors of democratic government the Dworkin's theory of law might be convincing. Yet, if one believes that Chicago school economics has a necessarily privileged spot in governance and democracy is largely useful as a safety valve, then Posner's work exemplifies a correct theory of law. Alternatively, if democracy is to be the central guiding principle, then neither of the above theories will do.

Dewey offers a theory of law that is indeed humbling compared to the other two. This theory places law among other democracy enhancing institutions, not at the top as the organizing principle. It notes that the traditional form of decision-making is attached to a picture of reasoning that is misleading and often falsifying as to the actual process. And it argues for a prospective rather than retrospective form of inquiry. Through analyzing how each theory would affect the outcome of *Lochner*, Dewey's theory offers a picture of law that is empirical, non-dogmatic, prospective and compatible with vigorous democratic government. Dewey's philosophy of law offers an attractive conception of law for a democratic society.

NOTES

1. In just the last Supreme Court session two of the most significant and somewhat unpredictable cases, one on takings, *Stop the Beach Renourishment v. Florida Department of Environmental Protection*, 560 U.S. __ (2010), and another incorporating the current Court's idiosyncratic take on the Second Amendment right to bear arms through the due process clause of the Fourteenth Amendment onto the states, *McDonald v. Chicago*, 561 U.S. __ (2010), are notable for the back and forth accusations whereby variously Scalia (*Stop the Beach* majority opinion, p. 16), Thomas (*McDonald* concurrence p. 7), and Stevens (*McDonald* dissent p. 22, 37) accuse the other justices of various types of "Lochnering."

2. Laurence Tribe, *American Constitutional Law* (New York: Foundation Press, 1988), p. 564.

3. *Ibid.*, p. 1.

4. *West Coast Hotel v. Parrish* 300 U.S. 379 (1937).

5. Tribe, *American Constitutional Law*, p. 564.

6. *Ibid.*, p. 569.

7. *Miller v. Schoene* 276 U.S. 272 (1928).

8. Tribe, *American Constitutional Law*, p. 577.

9. *Ibid.*, p. 584.

10. Paul Kens, *Lochner v. New York: Economic Regulation on Trial* (Lawrence: University Press of Kansas, 1998).

11. *Ibid.*, p. 100.
12. *Ibid.*, p. 180.
13. William H. Marnell, *Man-Made Morals: Four Philosophies that Shaped America* (New York: Anchor Books, 1966), p. 257.
14. David A. Strauss in “Why Was Lochner Wrong?” *University of Chicago Law Review* 70 (2003): 373–386.
15. This analysis is supported by Sunstein’s narrative tracing such an “activist” stance both forward through *Roe v. Wade* (1973) and backwards to *Dredd Scott v. Sanford*. Cass R. Sunstein, *Radicals in Robes: Why Extreme Right-Wing Courts Are Wrong for America* (New York: Basic Books, 2005), pp. 82–86.
16. Strauss, “Why Was Lochner Wrong?” p. 375.
17. Jack M. Balkin in “‘Wrong the Day It Was Decided’: Lochner and Constitutional Historicism,” *Boston University Law Review* 85 (2005): 677–725.
18. Bruce Ackerman, *We the People 1: Foundations* (Cambridge, MA: Harvard University Press, 1991), pp. 64–65.
19. Howard Gillman in *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (Durham, N.C.: Duke University Press, 1993).
20. *Ibid.*, p. 10.
21. *Ibid.*, p. 205.
22. Perhaps the clearest version of this type of argument is offered in Cass R. Sunstein, “Lochner’s Legacy,” *Columbia Law Review* 87 (1987): 873–919.
23. *Ibid.*, p. 880.
24. *Ibid.*, p. 889.
25. Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and Its Legacy* (Chicago: University of Chicago Press, 1990), p. 228.
26. Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge, MA: Harvard University Press, 1985).
27. Richard A. Epstein, *Supreme Neglect: How to Revive Constitutional Protection for Private Property* (Oxford: Oxford University Press, 2008).
28. *Ibid.*, p. 166.
29. David E. Bernstein, “Lochner v. New York: A Centennial Retrospective,” *Washington University Law Quarterly* 85 (2005): 1469–1528.
30. *Ibid.*, p. 1472.
31. *Ibid.*, p. 1473.
32. *Ibid.*
33. *Lochner v. New York*, 198 U.S. 45 (1905), p. 53.
34. *Ibid.*
35. *Ibid.*
36. *Ibid.*, p. 54.
37. *Holden v. Hardy*, 169 U.S. 366 (1898).
38. *Atkin v. Kansas*, 191 U.S. 207 (1903), *Knoxville Iron Co. v. Harbison*, 183 U.S. 13 (1901).
39. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), *Lochner*, p. 55.
40. *Ibid.*, p. 56.
41. *Ibid.*
42. *Ibid.*, pp. 56–57.
43. *Ibid.*, pp. 58, 61.
44. *Ibid.*, p. 64.

45. *Ibid.*, p. 65.
46. *Ibid.*
47. *Ibid.*, p. 66.
48. *Ibid.*, p. 68.
49. *Ibid.*
50. *Ibid.*, p. 72.
51. *Ibid.*, p. 75.
52. *Ibid.*, pp. 75–76.
53. *Ibid.*, p. 76.
54. *Ibid.*
55. Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1978), p. xi.
56. Ronald Dworkin, *Freedom's Law* (Cambridge, MA: Harvard University Press, 1996), p. 6.
57. Dworkin, *Freedom's Law*, p. 17, see also *Is Democracy Possible Here?* (Princeton, N.J.: Princeton University Press, 2008) pp. 9–11, 133.
58. *Ibid.*, p. 31.
59. *Ibid.*, p. 75.
60. *Ibid.*, p. 38.
61. Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986), pp. 187–188, 211.
62. *Ibid.*, p. 90.
63. *Ibid.*, p. 214.
64. *Ibid.*, p. 399.
65. Richard Posner, *Law, Pragmatism, and Democracy* (Cambridge, MA: Harvard University Press, 2003), p. 188.
66. *Ibid.*, p. 385.
67. *Ibid.*, p. ix.
68. *Ibid.*, p. 182.
69. Richard Posner, *Overcoming Law* (Cambridge, MA: Harvard University Press, 1995), p. 26, see also Posner, *Economic Analysis of Law* (New York: Aspen Law & Business), pp. 773–774.
70. Posner, *Law, Pragmatism*, p. 31.
71. *Ibid.*, p. 173.
72. *Ibid.*, p. 3, 26.
73. See Richard Posner, *The Problematics of Moral and Legal Theory* (Cambridge, MA: Harvard University Press, 1999), p.7.
74. John Dewey, *The Public and Its Problems*, in *The Later Works of John Dewey*, vol. 2, ed. Jo Ann Boydston (Carbondale: Southern Illinois University Press, 1984), p. 325.
75. John Dewey, *Freedom and Culture*, in *The Later works of John Dewey*, vol. 13, ed. Jo Ann Boydston (Carbondale: Southern Illinois University Press, 1988), p. 187.
76. Dewey, “*The Public*,” pp. 244–245.
77. *Ibid.*, p. 255.
78. *Ibid.*, p. 256.
79. Dewey, “*Freedom*,” p. 175.
80. Indeed, it is surprising the number of claims to the effect that Dewey underestimates the kind and amount of social conflict. This is absurd. First, Dewey does not feel the need to “prove” there is social conflict – this is accepted as a given. Second,

Dewey does not claim that all conflict is, in the end, eliminable. What is claimed is that if it is eliminable in a manner that harmonizes interests, his proposed form of government is best placed to find the solution.

81. Dewey, "The Public," p. 364.

82. John Dewey, "My Philosophy of Law," in *The Later Works of John Dewey*, vol. 14, ed. Jo Ann Boydston (Carbondale: Southern Illinois University Press, 1988), p. 117.

83. *Ibid.*

84. *Ibid.*, p. 118.

85. John Dewey, "Austin's Theory of Sovereignty," in *The Early Works of John Dewey*, vol. 4, ed. Jo Ann Boydston (Carbondale: Southern Illinois University Press, 1971), p. 73.

86. John Dewey, "Nature and Reason in Law," in *The Middle Works of John Dewey*, vol. 7, ed. Jo Ann Boydston (Carbondale: Southern Illinois University Press, 1979), p. 63.

87. Dewey, "Austin's Theory," p. 87.

88. John Dewey, "Review of Carleton Kemp Allen's *Law in the Making*," in *The Later Works of John Dewey*, vol. 3, ed. Jo Ann Boydston (Carbondale: Southern Illinois University Press, 1984), p. 327.

89. *Ibid.*

90. John Dewey, "Anthropology and Law," in *The Early Works of John Dewey*, vol. 4, ed. Jo Ann Boydston (Carbondale: Southern Illinois University Press, 1971), p. 40.

91. *Ibid.*, p. 40–41.

92. Dewey, "My Philosophy of Law," p. 117.

93. *Ibid.*, p. 117.

94. John Dewey, "Review of H. Krabb's *The Modern Idea of the State*," in *The Later Works of John Dewey*, vol. 17, ed. Jo Ann Boydston (Carbondale: Southern Illinois University Press, 1990), p. 102.

95. John Dewey, "Force, Violence and the Law," in *The Middle Works of John Dewey*, vol. 10, ed. Jo Ann Boydston (Carbondale: Southern Illinois University Press, 1980), p. 212.

96. *Ibid.*, p. 214.

97. John Dewey, "Force and Coercion," in *The Middle Works of John Dewey*, vol. 10, ed. Jo Ann Boydston (Carbondale: Southern Illinois University Press, 1980), p. 246.

98. *Ibid.*, p. 247.

99. John Dewey, "Nature and Reason," in *The Middle Works of John Dewey*, vol. 7, ed. Jo Ann Boydston (Carbondale: Southern Illinois University Press, 1979), p. 59.

100. *Ibid.*, p. 59.

101. John Dewey, "Logical Method and the Law," in *The Middle Works of John Dewey*, vol. 15, ed. Jo Ann Boydston (Carbondale: Southern Illinois University Press, 1983), p. 68.

102. *Ibid.*, p. 69.

103. *Ibid.*, p. 71.

104. *Ibid.*, p. 73.

105. *Ibid.*, p. 75.

106. John Dewey, "Psychology and Justice," in *The Later Works of John Dewey*, vol. 3, ed. Jo Ann Boydston (Carbondale: Southern Illinois University Press, 1984), p. 190.

107. Dewey, "Social realities v. Police Court Fictions," in *The Later Works of John Dewey*, vol. 14, ed. Jo Ann Boydston (Carbondale: Southern Illinois University Press, 1988), p. 243.
108. Dworkin, "Law's Empire," p. 398.
109. Dworkin, "Freedom's Law," pp. 82–88.
110. *Ibid.*, p. 125.
111. Posner, "Overcoming Law," p. 195.
112. *Ibid.*, pp. 401–402.
113. Posner "Law, Pragmatism," pp. 78–79.
114. *Ibid.*, p. 79.
115. *Ibid.*, p. 122.
116. John Dewey, *Ethics*, in *The Later Works of John Dewey*, vol. 7, ed. Jo Ann Boydston (Carbondale: Southern Illinois University Press, 1985), pp. 414–415.
117. John Dewey, "Justice Holmes and the Liberal Mind," in *The Later Works of John Dewey*, vol. 3, ed. Jo Ann Boydston (Carbondale: Southern Illinois University Press, 1984), p. 180.
118. John Dewey, *Liberalism and Social Action*, in *The Later Works of John Dewey*, vol. 11, ed. Jo Ann Boydston (Carbondale: Southern Illinois University Press, 1987), p. 16.

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