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Defending the Lifeworld: Substantive Due Process in the Taft Court Era

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Savoring his landslide election, Warren G. Harding used his Inaugural Address to set an agenda for the coming decade. He surveyed the state of the nation, and pronounced that “our supreme task” would be “the resumption of our onward, normal way.” The country would have to strain to re-inhabit a way of life that it had heretofore merely taken for granted. “After the great storm,” Harding remarked, “we must strive for normalcy to reach stability.”

The disruption of the normal was most immediately attributable to World War I. War mobilization entailed “the most sweeping extension of national power experienced by the country up to that time.” The federal government took control of the operations of the nation’s railroads, its telegraphs and telephones, and its shipping industries. It assumed authority to regulate the production and prices of food and fuel. It actively intervened to shape the priorities of the wartime economy. It instituted sharply progressive income taxes. It established national labor policies and agencies. It imposed national prohibition. Nothing like this explosion of federal regulatory power had ever happened before.
In retrospect, wartime regulation can be seen as the distillation and consummation of progressive tendencies manifest throughout the preceding two decades. As early as 1915, progressives could characterize war preparations as a "Trojan horse" for the implementation of a peacetime reform agenda. And in 1918, surveying the War's massive consequences, The New Republic could report with an unmistakable air of self-satisfaction that they had forever exploded the myth that all we have to do is to leave things alone. . . . [T]he war has forced men to turn over to the state the chief means of production and to regulate monopolies, prices, wages and labor conditions. Laissez-faire has been adjourned. . . . We have entered upon the stage of state-capitalism in which all our main economic activities are subordinated to the public interest.

The domestic "story" of World War I, as Grosvenor Clarkson put it, was that "of the conversion of a hundred million combatively individualistic people into a vast cooperative effort in which the good of the unit was sacrificed to the good of the whole."

Although most of the wartime measures and agencies established by the Wilson Administration had long since been dissolved by the time Harding assumed office in March 1921, there was nevertheless a brooding sense of
ideological rupture. Wartime mobilization had actualized hitherto unthinkable forms of state intervention, and the question looming over the dawning decade of the twenties was whether these new possibilities would remain within the potential repertoire of domestic state regulation during times of peace. Striving for normalcy meant, in essence, working to restore the country to a more natural balance between unmanaged individual initiative and the prerogatives of public order.10

American constitutional law articulates the bounds of political possibility. It was therefore inevitable that during the 1920s constitutional adjudication would become a central site for the national struggle to contain and assimilate the powerful ideological implications of the War. “Congress is passing extraordinary legislation and the Administration is doing many extraordinary things,” George Sutherland wrote his friend Arthur Thomas, the ex-Governor of Utah, in September 1917.11 “As soon as peace is declared, the flood of litigation will begin and Washington ought to be a place where a lawyer can earn bread and butter.”12 Buoyed by that flood, the United States Supreme Court throughout the 1920s would aspire to re-establish the domain of the normal, only to find its vision and authority subject to increasingly sharp contestation.

Harding was fated to wield a disproportionate influence on this struggle. Although he would only remain alive as President for slightly more than two years, he had the remarkable fortune to appoint four Justices to the Supreme Court.13 Chief Justice Edward D. White died on May 19, 1921, a bare two months after Harding assumed office.14 On June 30 Harding nominated, and the Senate immediately confirmed, William Howard Taft as White’s successor.15 A little more than a year later, and in rapid succession, Harding ap-

10 On the disintegration of prewar Progressivism, see Arthur S. Link, What Happened to the Progressive Movement in the 1920’s, 64 AM. HIST. REV. 833 (1959).
11 Letter from George Sutherland to Hon. Arthur L. Thomas (Sept. 21, 1917) (Sutherland Papers). The Sutherland Papers are located at the Library of Congress.
12 Id. At the time Sutherland was in private practice. He added, “I have no doubt both legislative and executive powers are being exceeded in many particulars.” Thomas had written Sutherland: “I fear, very much fear, that the day of reckoning is not far off. The old fashioned idea of a government of balanced powers is rapidly being displaced by the most absolute centralization of power the world has ever known, and this is happening in the Great American Republic.” Letter from Arthur L. Thomas to George Sutherland (Sept. 10, 1917) (Sutherland Papers).
13 See Russell W. Galloway, Jr., The Taft Court (1921-29), 25 SANTA CLARA L. REV. 1, 3 (1985).
14 See id. at 4.
pointed George Sutherland to replace John H. Clarke;16 Pierce Butler to replace William R. Day;17 and Edward T. Sanford to replace Mahlon Pitney.18

In conjunction with the five remaining justices—Joseph McKenna,19 Oliver Wendell Holmes,20 Willis Van Devanter,21 James C. McReynolds,22 and Louis D. Brandeis,23 Harding’s four new appointments were successful in pushing the Court decidedly to the right.24 Even Coolidge’s appointment of Harlan Fiske Stone to replace McKenna in early 1925 did not stem the tide.25 The result was what has been called a “significant divide in the history of the Supreme Court.”26 The Court, whose jurisdiction had actually been expanded in 1914 in order to create a check against conservative state court interpretations of the federal Constitution,27 would by the time of Taft’s resignation in February 1930 come to be characterized as “the zenith of reaction.”28

Although we now tend to speak in general and undifferentiated terms of the “Lochner”29 era,” legal observers during the early 1930s perceived a clear

16 See id.
17 See id. at 846.
18 See id. at 847.
19 See id. at 835 (Justice McKenna had been appointed by President McKinley in 1898).
20 See id. (Justice Holmes had been appointed by President Roosevelt in 1902).
21 See id. at 840 (Justice Van Devanter had been appointed by President Taft in 1911).
22 See id. at 842 (Justice McReynolds had been appointed by President Wilson in 1914).
23 See id. (Justice Brandeis had been appointed by President Wilson in 1916).
26 BICKEL, supra note 24, at 4.
27 See Act of Dec. 23, 1914, Pub. L. No. 224, 38 Stat. 790 (1914) (empowering the United States Supreme Court to use a writ of certiorari to review judgments of the highest court of a state upholding a federal right). The purpose of the Act was to empower the Court to review state court decisions striking down progressive labor legislation. See, e.g., FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 188-98 (1927); Charles Warren, The Progressives of the United States Supreme Court, 13 COLUM. L. REV. 294, 296 (1913).
28 Editorial, Supreme Court and Interstate Commerce Commission, 69 NEW REPUBLIC 256, 256 (Jan. 20, 1932); see also Ray A. Brown, Due Process of Law, Police Power, and the Supreme Court, 40 HARV. L. REV. 943, 944 (1927) (“[I]n the six years since 1920 the Supreme Court has declared social and economic legislation unconstitutional under the due process clauses of either the Fifth or Fourteenth Amendment in more cases than in the entire fifty-two previous years during which the Fourteenth Amendment had been in effect.”).
29 See Lochner v. New York, 198 U.S. 45, 64 (1905) (invalidating a New York statute restricting bakery employees to working no more than 60 hours per week).
periodization. They noted that the Court had “pursued a more liberal attitude” for a “period” after the *Lochner* decision, but that the Court was “particularly active since the World War in striking down legislation, both State and federal.”

Contemporaries recognized a “Progressive Phase” of the Supreme Court, which they viewed as terminated by the rush “Back to Normalcy.” They consequently castigated “the Taft Court” as “an anachronism in its attempt to restore the conditions of an earlier generation.”

There is considerable truth to this periodization. Having glimpsed the full potential of the regulatory state during World War I, a majority of the Justices of the Taft Court urgently felt the need to establish the principles of a more normal peacetime constitutional order. This meant articulating constitutional limits more sharply and forcefully than the Court had heretofore experienced the need to do. The upshot was a full flowering of the jurisprudence that would eventually launch the Court on its epic course of collision with the New Deal.

In this address I shall parse that jurisprudence, as it was expressed in the Taft Court’s substantive due process decisions. In Part I, I shall explore how

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31 Louis B. Boudin, 2 GOVERNMENT BY JUDICIARY 474 (1932). On the cause of the “progressive phase,” see Thomas Reed Powell, *The Police Power in American Constitutional Law*, 1 J. SOC. COMP. LEGIS. & INT’L L. 160, 171 (3d ser. 1919): The *Bake Shop Case* and the annulment of a workmen’s compensation law by the New York Court of Appeals furnished munition for Mr. Roosevelt’s demand in 1912 for the “recall of judicial decisions”—a device for taking direct appeals from the judiciary to the electorate on decisions annulling police measures. . . . As a campaign slogan it aroused wide popular interest . . . . The proposal shocked the conservative traditions of the American bar, but it is thought by many to have induced Courts to relax somewhat their censorship over novel police measures.

the Court's use of substantive due process appealed to pieties of everyday, normal life in order to resist the bureaucratic interventions authorized by the War. In Part II, I shall explain how the Court used the doctrine of "property affected with a public interest" to distinguish domains of social life which could constitutionally be subject to pervasive forms of administrative regulation, from those domains of "ordinary" life which could not. Finally, in Part III, I shall discuss possible constitutional justifications for this distinction and outline the doctrinal structure implied by these justifications.

Throughout the 1920s, the Court's substantive due process decisions were widely regarded by contemporaries as reviving congeries of hostilities toward social legislation that might be lumped together under the rubric of Lochnerism. The ghost of Lochner has haunted efforts at aggressive judicial protection of constitutional rights since the New Deal, even when such protection has been informed by a liberal agenda as in the days of the Warren Court.\textsuperscript{33} Lochner remains an unnerving presence precisely because we do not have a convincing account of the criteria by which our own aspirations to preserve constitutional rights should be compared to, and therefore distinguished from, what has become a paradigmatic example of judicial failure. It is my hope in the third and last part of this short address to sketch the possibility of such an account.

I. THE CONSTITUTIONAL RETURN TO NORMALCY

Writing early in 1920, Justice Willis Van Devanter confessed to an uneasy sensation that "everything is on edge" and that "existing conditions are not well balanced. Some day they may take a slide just as the snow does on the mountain and carry everything before them."\textsuperscript{34} Particularly disturbing was the apprehension that those in power were out of "a sense of fear grabbing at straws."\textsuperscript{35} Governments, Van Devanter observed, "cannot be maintained... on the principle of the sailor who thinks any port looks good in a storm."\textsuperscript{36} Nine months later Van Devanter sought to mute his elation at Harding's huge victory by reminding himself that "so many things have to be done and done wisely to put us on a good footing again that it will be almost impossible to do what the people generally want done. Sickness, when it has become pronounced, cannot be thrown off quickly no matter who the doctor is."\textsuperscript{37}

\textsuperscript{33} See, e.g., Mary Cornelia Porter, That Commerce Shall Be Free: A New Look at the Old Laissez-Faire Court, 1976 SUP. CT. REV. 135, 135-38.

\textsuperscript{34} Letter from Willis Van Devanter to J.H. Farley (Feb. 12, 1920) (Van Devanter Papers, Letterbook 31). The Van Devanter Papers are located at the Library of Congress.

\textsuperscript{35} Id.

\textsuperscript{36} Id.

\textsuperscript{37} Letter from Willis Van Devanter to John C. Pollock (Nov. 4, 1920) (Van Devanter Papers, Letterbook 31).
Van Devanter's ominous sense of dislocation was no doubt due to his alarm at the massive state intrusions into the private sector unleashed by World War I. Restoring the body politic to health would require pruning these interventions and establishing a more stable balance between public and private, between individual rights and the demands of the collectivity.\textsuperscript{38} War, as the Court unanimously pronounced in an opinion by Justice Sutherland,

is abnormal and exceptional; and, while the supreme necessities which it imposes require that, in many respects, the rules which govern the relations of the respective citizens of the belligerent powers in time of peace must be modified or entirely put aside, there is no tendency in our day at least to extend them to results clearly beyond the need and the duration of the need.\textsuperscript{39}

The war thus posed a twofold challenge to the Taft Court. The need and duration of wartime requirements would have to be measured and accommodated, but they would also have to be cabined and subordinated to the effort to restore normalcy. On the one hand, therefore, the Court was quite sympathetic to extraordinary wartime legislation. In \textit{Highland v. Russell Car & Snow Plow Co.},\textsuperscript{40} for example, the Court, in a unanimous opinion by Justice Butler, upheld the power of Congress in the Lever Act\textsuperscript{41} to authorize the President during the war “to fix the price of coal, to regulate distribution among dealers and consumers, . . . and to require producers to sell only to the United States through a designated agency empowered to regulate resale prices.”\textsuperscript{42} Although the Court stressed that “[i]t is everywhere recognized that the freedom of the people to enter into and carry out contracts in respect of their property and private affairs is a matter of great public concern and

\textsuperscript{38} The judicial agenda implied by this program is made clear in the following anecdote, reported by federal District Judge George M. Bourquin:

It is said that Chief Justice White admitted that “in my time we relaxed constitutional guarantees from fear of revolution,” and that Chief Justice Taft declared that “at a conference I announced 'I have been appointed to reverse a few decisions,' and, with his famous chuckle, 'I looked right at old man Holmes when I said it.'” What a pity were these illuminating incidents lost to history save in so far as the court's reports will verify them.


\textsuperscript{39} Sutherland v. Mayer, 271 U.S. 272, 287 (1926).

\textsuperscript{40} 279 U.S. 253 (1929).

\textsuperscript{41} Pub. L. No. 41, 40 Stat. 276 (1917) (authorizing the regulation of fuel due to economic conditions arising from the war).

\textsuperscript{42} \textit{Highland}, 279 U.S. at 259. The federal government was to set prices based upon “the cost of production, including the expense of operation, maintenance, depreciation and depletion plus a just and reasonable profit.” \textit{Id.} Thus prices were not to be set lower than a producer could demand as just compensation were the coal to be seized through eminent domain. \textit{See id.} at 260.
that such liberty may not lightly be impaired," it nevertheless concluded that price controls on coal during war were constitutional. It explained that the Lever Act only deprived coal producers of "the right or opportunity by negotiation to obtain more than [their] coal was worth," and that price regulation was necessary for successful employment of the war power.

On the other hand, however, the Court was also deeply concerned to limit the abnormal reach of wartime power. The best illustration of this tendency is the Court's decision in Chastleton Corp. v. Sinclair, which concerned the constitutionality of rent control in the District of Columbia. Three years previously, in Block v. Hirsh, the Court had upheld a 1919 congressional statute temporarily imposing rent control in the District in response to "emergencies growing out of the war, resulting in rental conditions in the District dangerous to the public health and burdensome to public officers, employees and accessories, and thereby embarrassing the Federal Government in the transaction of the public business." In an opinion for a five-person majority that included Justices Brandeis, Day, Pitney, and Clarke, Justice Holmes had observed that the emergency declared by Congress was "a publicly notorious and almost world-wide fact," and that it sufficed to clothe "the letting of buildings in the District of Columbia with a public interest so great as to justify regulation by law."

43 Id. at 261.
44 See id. at 262.
45 Id.
46 See id. ("The fixing of prices was calculated to serve the convenience of producers and dealers as well as of consumers of coal needed to carry on the war.").
47 264 U.S. 543 (1924).
48 The story of Chastleton is well told in Christopher N. May, In the Name of War: Judicial Review and the War Powers Since 1918, at 223-53 (1989).
49 256 U.S. 135 (1921).
50 Id. at 154. The Court simultaneously upheld rent control within New York City. See Marcus Brown Holding Co., Inc. v. Feldman, 256 U.S. 170, 199 (1921).
51 Id. at 162. The Court simultaneously upheld rent control within New York City. See Marcus Brown Holding Co., Inc. v. Feldman, 256 U.S. 170, 199 (1921).
Reiterating the need to respond to the same wartime emergency that had convinced the Court in *Block*, Congress renewed rent control in the District in 1921,\textsuperscript{52} and again in 1922.\textsuperscript{53} *Chastleton* arose when a landlord whose rents were controlled during 1922 brought a bill in equity alleging that the emergency justifying the 1919 statute was no longer in effect, so that Congress's two extensions of the rent control statute were unconstitutional. The lower courts dismissed the bill on the authority of *Block*. By the time *Chastleton* was argued at the Supreme Court in April 1924, however, the only remaining members of the *Block* majority were Justices Holmes and Brandeis. Justice Butler's docket book nevertheless indicates that the Court unanimously voted to reverse the judgment of the lower courts.\textsuperscript{54} Justice

before morning—which, in days of legislative activity and general scheming, otherwise he
scarcely would feel secure about. I am afraid McKenna thinks that security at an end.”
Letter from Holmes to Frankfurter (Apr. 20, 1921), in HOLMES AND FRANKFURTER: THEIR

It is clear, however, that even Holmes felt some discomfort with the extent of rent
control authorized by congressional statute. Eighteen months later, for example, he would
write that “The late decisions upon laws dealing with the congestion of Washington and
New York, caused by the war, dealt with laws intended to meet a temporary emergency
and providing for compensation determined to be reasonable by an impartial board. They
got to the verge of the law.” Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416
(1922). In *Block*, Holmes had specifically stressed that “A limit in time, to tide over a
passing trouble, well may justify a law that could not be upheld as a permanent change.”
*Block*, 256 U.S. at 157. Nevertheless in March 1922, in a 6-3 opinion authored by Justice
Clarke (with Justices McKenna, Van Devanter and McReynolds dissenting), the Court re-
affirmed the constitutionality of rent control in the state of New York in a way that dis-
tinctly de-emphasized the relevance of emergency conditions to constitutional assessment.
of the justification for rent control barely mentioned the presumably temporary conditions
caus ed by the War:

The warrant for this legislative resort to the police power was the conviction on the
part of the state legislators that there existed in the larger cities of the State a social
emergency, caused by an insufficient supply of dwelling houses and apartments, so
grave that it constituted a serious menace to the health, morality, comfort, and even
to the peace of a large part of the people of the State.

*Id.* at 245. Clarke's only concession to the temporary quality of the “emergency” justify-
ing rent control was to note in passing the “notorious fact that a grave social problem has
arisen from the insufficient supply of dwellings in all the large cities of this and other
countries, resulting from the cessation of building activities incident to the war.” *Id.* at
246.

\textsuperscript{52} Act of Aug. 24, 1921, Pub. L. No. 71, 42 Stat. 200 (1921) (extending rent control
until May 22, 1922).

\textsuperscript{53} Act of May 22, 1922, 42 Stat. 5443 (1922) (extending rent control until May 22,
1924). *Chastleton* was decided on April 21, 1924.

\textsuperscript{54} Docket Book of Justice Butler 342 (1923). Justice Butler's docket book for the 1923
Term is available in the Archives at the United States Supreme Court.
Van Devanter is recorded as taking the position that the extensions were "bad" and that this did not depend upon any "objective question of fact."\(^{55}\) Justices Sutherland, Butler and Sanford were noted as agreeing with Van Devanter.\(^{56}\) Justice Holmes alone contended that the constitutionality of the rent control extensions was "a question of fact" which turned on whether the "emergency" continued to exist.\(^{57}\)

With characteristic shrewdness, Taft assigned the opinion to Holmes, who framed the question as whether "the emergency that justified interference with the ordinarily existing private rights in 1919 had come to an end in 1922, and no longer could be applied consistently with the Fifth Amendment of the Constitution."\(^{58}\) While not retreating from the holding of *Block*, Holmes noted that

> a Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared. . . . A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed.\(^{59}\)

Holmes regarded it as a "matter of public knowledge that the Government has considerably diminished its demand for employees that was one of the great causes of the sudden afflux of people to Washington."\(^{60}\) And then, with deft strokes, Holmes quietly undercut the continuing influence of World War I: "[i]f about all that remains of war conditions is the increased cost of living, that is not in itself a justification of the act . . . In that case the operation of the statute would be at an end."\(^{61}\)

Holmes ended the original draft of his opinion with a quick and efficient remand to the trial court for a determination of the relevant facts.\(^{62}\) But at the very time *Chastleton* was under consideration, Congress was debating whether to extend rent control in the District to 1925. The conservative members of the Court were determined to draw a sharper constitutional line between the extraordinary emergency of the War and the normal conditions

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\(^{55}\) Id.

\(^{56}\) Id.

\(^{57}\) Butler records that McReynolds "thinks the bill good and [should be] reversed." \*Id.\* Brandeis is recorded as having advocated a "short cut. Validity need not be answered" because of inadequate service to the parties. \*Id.\* Brandeis eventually adopted this position in his separate published opinion "concurring in part." \*See Chastleton Corp. v. Sinclair, 264 U.S. 543, 549 (1924).\*

\(^{58}\) *Chastleton*, 264 U.S. at 546.

\(^{59}\) *Id.* at 547-48.

\(^{60}\) *Id.* at 548.

\(^{61}\) *Id.*

\(^{62}\) Holmes Papers. The Holmes Papers are located at the Harvard Law School Library, Special Collections Department.
then obtaining under Calvin Coolidge. Holmes was forced to recirculate his opinion with the notation “Corrected by C.J. in accord with majority view.” He altered the conclusion of the second draft to read:

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\text{[If the question were only whether the statute is in force today, upon the facts that we judicially know we should be compelled to say that the law has ceased to operate. Here however it is material to know the conditions of Washington at different dates in the past. Obviously the facts should be accurately ascertained and carefully weighed, and this can be done more conveniently in the Supreme Court of the District than here.}^64
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The message of Chastleton, then, was that the extraordinary powers unleashed by World War I could be confined by boundaries cognizable by judicial notice. The limits of the abnormal could be established as a mere “matter of public knowledge.” This was not a happy message to those progressives who had hoped to use wartime legislation as a “Trojan horse” for

\[63\] Justice McReynolds, for example, replied to Holmes’ circulated draft: “I will not say no. But I should much prefer to have you say that facts within the knowledge of the court make it entirely clear that no emergency exists and the act is no longer in force. This will put an end to mischievous agitation now going on in Congress and clear the air.” Id. (emphasis added). Similarly, Justice Sutherland wrote: “I voted to go further and reckon the Emergency to have passed on what we know. Perhaps it is better to dispose of the case as you have done, but I should like to hear what the brethren who voted as I did think about it.” Id. In an analogous vein, Justice Van Devanter wrote Holmes that “I have read and reread your opinion in the rent case and am still inclined to take the view that we ought to end it now, but I have not had an opportunity to take it up with others who also had that view.” Id.

\[64\] Chastleton, 264 U.S. at 548-49 (emphasis added). Even this change, however, was not enough completely to satisfy McReynolds, who wrote to Holmes: “I will acquiesce in this if it is accepted all round. But I do think that if we held conditions [existing in] 1922 were such as to show no emergency the result would be better.” Holmes Papers. Justice Butler responded, “Yes, I go along with the others. Would prefer to hold law invalid and have an end of it now.” Id.

\[\] Chastleton was decided on April 21, 1924, and, on the basis of the paragraph quoted in text, the Court of Appeals of the District of Columbia declared rent control unconstitutional as of May 2, 1924. See Peck v. Fink, 2 F.2d 912, 913 (D.C. Cir. 1924). The Court could not resist making the lesson of Chastleton explicit: “It of course is unnecessary for us to attempt to add to the reasoning of the Supreme Court, but we may say with propriety that, if the emergency in question is not at an end, then this legislation may be extended indefinitely, and that which was ‘intended to meet a temporary emergency’ may become permanent law.” Id. at 913.

\[65\] As Brandeis wrote to Frankfurter: “To fully appreciate the rent decision, recent Congressional record & files of Washington papers on proposed extension of law to 1926 must be considered.” Letter from Louis Brandeis to Felix Frankfurter (Apr. 23, 1924), in 5 LETTERS OF LOUIS BRANDEIS 1921-1941: ELDER STATESMAN 126 (Melvin I. Urofsky & David W. Levy eds., 1978).
undercutting constitutional restrictions that had been imposed upon public legislation before the War. Thus Fiorello LaGuardia, in the course of congressional debates about whether to extend rent control to 1925,\textsuperscript{66} argued that rent control ought to be constitutional whether or not there was a wartime emergency, and complained that “the only blessing that came from the war is that it brought a condition which gave the legislatures of the various States sufficient courage to pass, for the first time in history, regulatory powers over dwellings in cities.”\textsuperscript{67} But progressive pleas that such powers receive peacetime constitutional sanction were insufficient to halt the Court’s relentless march toward normalcy.

The deep implications of that march are most visible in a decision like \textit{Jay Burns Baking Co. v. Bryan},\textsuperscript{68} which the Court decided the week before \textit{Chastleton}. \textit{Jay Burns Baking Co.} involved a challenge to a Nebraska statute fixing minimum and maximum weights for standard-sized loaves of bread.\textsuperscript{69} In 1913, the Court had unanimously upheld a statute fixing minimum weights for bread loaves,\textsuperscript{70} but in 1924, Justice Butler, writing for a majority of seven justices, struck down the provision of the Nebraska law that set maximum weights.\textsuperscript{71} Butler wrote that this provision “is not necessary for the protection of purchasers against imposition and fraud by short weights and is not calculated to effectuate that purpose, and that it subjects bakers and sellers of bread to restrictions which are essentially unreasonable and arbitrary, and is therefore repugnant to the Fourteenth Amendment.”\textsuperscript{72}

At the core of Butler’s opinion lies a resolutely common-sense judgment, verging on outrage, that a law seeking to prevent fraudulently short-weighted loaves should perversely set maximum weights.\textsuperscript{73} The rhetoric of the opinion oddly recapitulates the way in which \textit{Chastleton} relies on public knowledge and judicial notice to set the bounds of the normal. The Nebraska statute permitted a variation from standard weights of 2 ounces per pound, and

\textsuperscript{66} Remarkably, Congress did vote to extend rent control until May 22, 1925. \textit{See} Act of May 17, 1924, Pub. L. No. 119, 43 Stat 120 (1974). The law, however, was judicially overturned. \textit{See} MAY, supra note 48, at 244-53.

\textsuperscript{67} 65 CONG. REC. 7391-92 (1924) (statement of Fiorello LaGuardia).

\textsuperscript{68} 264 U.S. 504 (1924).

\textsuperscript{69} Id. at 511.

\textsuperscript{70} \textit{See} Schmidinger v. Chicago, 226 U.S. 578, 589-90 (1913).

\textsuperscript{71} \textit{Jay Burns Baking Co.}, 264 U.S. at 517.

\textsuperscript{72} Id.

\textsuperscript{73} Butler wrote: “Undoubtedly, the police power of the State may be exerted to protect purchasers from imposition by sale of short weight loaves. . . . But a state may not, under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them. . . . Constitutional protection having been invoked, it is the duty of the court to determine whether the challenged provision has reasonable relation to the protection of purchasers of bread against fraud by short weights and really tends to accomplish the purpose for which it was enacted.” \textit{Id.} at 513.
Butler accepted as a fact that in many conditions of humidity and temperature it would be “impossible to comply with the law without wrapping the loaves or employing other artificial means to prevent or retard evaporation.” He then concluded:

The uncontradicted evidence shows that there is a strong demand by consumers for unwrapped bread. It is a wholesome article of food, and plaintiffs in error and other bakers have a right to furnish it to their customers. . . . It would be unreasonable to prevent unwrapped bread being furnished to those who want it in order technically to comply with a weight regulation and to keep within limits of tolerance so narrow as to require that ordinary evaporation be retarded by wrapping or other artificial means. It having been shown that during some periods in Nebraska bread made in a proper and usual way will vary in weight more than at the rate of two ounces to the pound during 24 hours after baking, the enforcement of the provision necessarily will have the effect of prohibiting the sale of unwrapped loaves when evaporation exceeds the tolerance.

While far from accomplished writing, the passage does carry a certain force, which draws almost entirely upon an implicit opposition between the “ordinary” world of “wholesome” unwrapped bread, “made in a proper and usual way,” and the “artificial” and “technical” requirements of the statute. The Court uses the Fourteenth Amendment to stand firm for everyday routines and expectations. The threat to these expectations stems from an “administrative necessity” powerfully evoked in Justice Brandeis’ brilliant dissent, which provides a detailed and overwhelming demonstration of expert opinion to the effect that “excess weights” should be prohibited “as a

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74 Id. at 515.
75 Id. at 516.
77 See Jay Burns Baking Co., 264 U.S. at 520. Brandeis was joined by Justice Holmes, who commented that the dissent was “A-1. A sockdologer. I agree of course.” Brandeis Papers. Brandeis later said to Frankfurter that the case “was really 5 to 4, but Van Devanter ’got busy,’ in his personal way, talking & laboring with members of Court, finally led Sutherland & Sanford to suppress their dissents.” Melvin I. Urofsky, The Brandeis-Frankfurter Conversations, 1985 SUP. CT. REV. 299, 328. Butler’s docket book, however, indicates that Justices Brandeis, Holmes, Sutherland, and McKenna had voted in conference to affirm the constitutionality of the Nebraska statute. See Docket Book of Justice Butler, supra note 54, at 265. In the Brandeis Papers there is a note from McKenna to Brandeis, stating: “Disturbing doubts have come to me. I am struggling with them and frankly I don’t know whether they go to the conclusions or to details and reasoning.” Letter from McKenna to Brandeis (Brandeis Papers). The Brandeis Papers are located at the Harvard Law School Library, Special Collections Department.
means of preventing short weights." Most pertinent for our purpose, however, is the genealogy of that opinion. As one commentator summarized the point, Brandeis showed

that during the war the United States Food Administration after a three months' investigation adopted regulations providing for a standard weight loaf of bread with an excess tolerance of not more than one ounce to the pound. This provision remained in force during the war and its successful operation caused twelve states, Porto Rico [sic] and Hawaii to enact similar statutes.79

Limitations on excess bread weights began as a wartime regulation, imposed in 1917 by Herbert Hoover and the United States Food Administration as part of a general licensing scheme for food production.80 The limitations were deemed necessary to ensure efficient mobilization of nutritional resources. "The efficacy of the prohibition of excess weights as a means of preventing short weights having been demonstrated by experience during the period of Food Administration control, a widespread demand arose for legislative action in the several States to continue the protection which had been thus afforded."81

In Jay Burns Baking Co. the Court stood foursquare against this extension of wartime administrative control into the normal conditions of peacetime. It associated these conditions with the ordinary expectations of everyday life, which it aligned against "technical" and "artificial" forms of bureaucratic supervision connected to the extraordinary circumstances of the war. In so doing the decision was widely regarded as "an unexpected reversion to the past,"82 and as, more pointedly, "reminiscent of the majority opinion in Lochner v. New York."83

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78 Jay Burns Baking Co., 264 U.S. at 525. "The prohibition of excess weight is imposed in order to prevent a loaf of one standard size from being increased so much that it can readily be sold for a loaf of a larger standard size." Id. at 519.


80 See Jay Burns Baking Co., 264 U.S. at 522 (Brandeis, J., dissenting).

81 Id. at 525.

82 Monnig, supra note 76, at 450.

83 Robert Cushman, Constitutional Law in 1923-1924, 19 AM. POL. SCI. REV. 51, 63 (1925). Brandeis himself wrote to Frankfurter that he regarded the opinion as "worse even than Lochner." Letter from Brandeis to Felix Frankfurter (Apr. 23, 1924), in 5 LETTERS OF LOUIS BRANDEIS, supra note 65, at 126. The opinion prompted Holmes to comment to Pollock that "The Fourteenth Amendment is a rogueish thing." Letter from Oliver Wendell Holmes to Sir Frederick Pollock (May 11, 1924), in 2 HOLMES-POLLOCK LETTERS 136 (Mark DeWolfe ed., 1946).
Lochner had of course struck down a New York statute limiting the permissible hours of work in bakeries. Jay Burns Baking was reminiscent of Lochner not merely because it happened to concern bakeries, and not merely because it summoned the Due Process Clause of the Fourteenth Amendment to check social legislation, but because it did so in a way that was vulnerable to a central progressive critique of Lochner. The critique, most forcefully articulated by Roscoe Pound, was that the Lochner Court practiced what might today be called formalism, and what Pound himself termed "mechanical jurisprudence." In Pound's view, the Lochner Court had blundered through a "cloud of rules . . . at the expense of practical results" and had appealed "to artificial criteria of general application" that prevented "effective judicial investigation or consideration of the situations of fact behind or bearing upon the statutes." Butler's opinion in Jay Burns Baking Co. was similarly scorned for its dogmatism and its inability to face facts. Thomas Reed Powell, for example, dryly commented that "One of the judicial reforms for which Mr. Justice Brandeis has long been contending is the abandonment of speculative, doctrinaire, a priori effusions in judicial opinions and the substitution of a realistic and concrete examination of the relevant facts. Those who wish to see both methods in their respective perfections should read Jay Burns Baking Co. v. Bryan."

84 See Lochner v. New York, 198 U.S. 45, 64 (1905) (invalidating a New York statute restricting bakery employees to working no more than 60 hours per week).

85 Roscoe Pound, Mechanical Jurisprudence, 8 COLUM. L. REV. 605, 616 (1908). A distinct, and somewhat inconsistent indictment of Lochnerism, is that it exemplified class bias. See, e.g., Owen M. Fiss, 8 History of the Supreme Court of the United States: Troubled Beginnings of the Modern State, 1888-1910, at 12-19 (1993). It would of course be an odd doctrine indeed that managed simultaneously to ignore "practical results" and yet also to transparently realize the material interests of a particular class. While we could read Jay Burns Baking Co. as serving the material interests of bakers (and manufacturers generally), in fact the opinion, with its fastidious distinction between minimum and maximum loaf weights, and with its focus on preserving a certain ("unwrapped") relationship between bakers and their customers, does not fit easily into any very simple narrative of class bias.


87 Thomas Reed Powell, The Work of the Supreme Court, 40 POL. SCI. Q. 71, 75 (Supp. 1925). Robert Cushman cited the opinion as an example of the "willingness of the court to form its own opinion with respect to the existence or nonexistence of the facts upon which the validity of the act must in the last analysis depend, and to adhere to that opinion in the face of the conflicting testimony of experts and the contrary opinion of the legislature." Robert Cushman, Constitutional Law in 1923-1924, 19 AM. POL. SCI. REV. 51, 63 (1925). A note in the Yale Law Journal observes that "the distinguishing characteristic between the majority opinion of the Court . . . and the minority . . . lies in the absence, in the majority opinion, of any extended discussion of the facts of scientific experience in the making and distribution of bread, and in the almost exclusive devotion of the minority opinion of Justice Brandeis to an exhaustive discussion of the scientific investigations of the federal and state governments and of experts . . . It is not necessary even to
But it is not quite accurate to characterize Butler’s opinion in *Jay Burns Baking Co.* as either formalist or arbitrary. Instead we might interpret his opinion as struggling to control the kind of experience that should inform adjudication under the Due Process Clause. Butler evokes the “ordinary” experience of “wholesome” unwrapped bread, whereas Brandeis summons “the history of the experience gained under similar legislation, and the result of scientific experiments made, since the entry of the judgment below. Of such events in our history . . . the Court should acquire knowledge, and must, in my opinion, take judicial notice, whenever required to perform the delicate judicial task here involved.”

Just as the Court in *Chastleton*, in order to set limits to wartime regulations, would take judicial notice of what Holmes in an early draft of his opinion referred to as “all that a man with his eyes open can see,” so Butler in *Jay Burns Baking Co.* appealed to the “ordinary” experience of bakers and their customers to limit an “administrative necessity” originally introduced during wartime. To this experience Brandeis counterposed the need for “judicial notice” of scientific experiment and expert knowledge.

agree with the preponderant conclusion of the experts in order to believe that the Supreme Court made an error in substituting its own judgment as to policy or reasonableness or appropriateness of means to end for that of the legislature, sustained by the state court.” Comment, *State Police Legislation and the Supreme Court*, 33 YALE L.J. 847, 848-49 (1924).

In his dissent, Justice Brandeis fairly invited Butler’s majority opinion to be characterized as both formal and arbitrary. Brandeis wrote that “[k]nowledge is essential to understanding; and understanding should precede judging. Sometimes, if we would guide by the light of reason, we must let our minds be bold. But, in this case, we have merely to acquaint ourselves with the art of breadmaking and the usages of the trade.” *Jay Burns Baking Co.* v. Bryan, 264 U.S. 504, 520 (1924) (Brandeis, J., dissenting). Brandeis branded the Court’s second-guessing of legislative facts the “exercise of the powers of a super-legislature—not the performance of the constitutional function of judicial review.” *Id.* at 534. For examples of the rich subsequent history of the phrase “super-legislature,” see Nollan v. California Coastal Comm’n, 483 U.S. 825, 846 (1987) (Brennan, J., dissenting); Shea v. Louisiana, 470 U.S. 51, 62 (1985) (White J., dissenting); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 64 (1973); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 31 (1973); Shapiro v. Thompson, 394 U.S. 618, 661 (1969) (Harlan, J., dissenting); Griswold v. Connecticut, 381 U.S. 479, 482 (1965); West Virginia v. State Bd. of Educ. v. Barnette, 319 U.S. 624, 648 (1943) (Frankfurter, J., dissenting).

88 *Jay Burns Baking Co.*, 264 U.S. at 533 (Brandeis, J., dissenting).

89 Holmes Papers.

90 It is noteworthy in this regard that Felix Frankfurter’s indictment of *Lochner* was that “[t]he majority opinion was based upon ‘a common understanding’ as to the effect of work in bakeshops upon the public and upon those engaged in it. ‘Common understanding’ has ceased to be the reliance in matters calling for essentially scientific determination.” Felix Frankfurter, *Hours of Labor and Realism in Constitutional Law*, 29 HARV. L. REV. 353, 370 (1916).
If we were inclined to give Butler’s opinion a sympathetic modern spin, we might perhaps characterize it as struggling to preserve the “lifeworld”—a set of “more or less diffuse, always unproblematic, background convictions” from “colonization” through a “juridification” of scientific rationality. But this would be merely to restate the central constitutional difficulty of the case. For scientific rationality is the means by which complex societies organize themselves to achieve their purposes, and to deny such rationality would leave a society adrift and rudderless. There can be no doubt that World War I had vastly accentuated the state’s use of bureaucratic expertise in order to accomplish its ends, but so long as this expertise remained subject to democratic direction, why would the Court use the doctrine of substantive due process to check its application to everyday life?

II. SETTING THE CONSTITUTIONAL BOUNDARIES OF EVERYDAY LIFE

We might begin to explore this question by briefly examining the doctrine of property “affected with a public interest.” The doctrine exemplifies the revival of Lochnerism during the Taft Court. First propounded in 1876 in the famous case of Munn v. Illinois, the doctrine identified the kinds of property or businesses that could constitutionally be subject to extensive administrative regulation. Railroads, utilities, insurance companies, and grain elevators were examples of such property.

Until 1923 there had been an erratic but steady expansion of the kinds of property deemed “affected with the public interest.” The apex of this expansion was perhaps the Court’s 1914 decision in German Alliance Insurance Co. v. Kansas, which held that fire insurance was “so far affected with a

93 94 U.S. 113, 126 (1876). For a good discussion of the background of the case, see Harry N. Scheiber, The Road to Munn: Eminent Domain and the Concept of Public Purpose in the State Courts, 5 Persp. Am. Hist. 329, 402 (1971).
94 For contemporaneous accounts of the doctrine, see Walton H. Hamilton, Affectation with Public Interest, 39 Yale L.J. 1089, 1089-1112 (1930) (discussing the history behind the phrase “affected with a public interest” and the Court’s use of this doctrine as its guiding principle in cases of legislative price regulation); Breck P. McAllister, Lord Hale and Business Affected with a Public Interest, 43 Harv. L. Rev. 759, 759-91 (1930) (same); Dexter Merriam Keezer, Some Questions Involved in the Application of the ‘Public Interest’ Doctrine, 25 Mich. L. Rev. 596, 596-621 (1927) (searching for an economic pattern underlying the expansion of the “affected with a public interest” doctrine); Gustavus H. Robinson, The Public Utility: A Problem in Social Engineering, 14 Cornell L.Q. 1, 1-27 (1928) (discussing what makes a business private or public under the doctrine); Gustavus H. Robinson, The Public Utility Concept in American Law, 41 Harv. L. Rev. 277, 277-308 (1928) (same).
95 233 U.S. 389 (1914).
public interest as to justify legislative regulation of its rates."^96 It was 
thought that this trend would continue even after the conclusion of World 
War I.\textsuperscript{97} But during the 1922 Term Justices Sutherland, Butler and Sanford 
replaced, respectively, Justices Clarke, Day, and Pitney,\textsuperscript{98} and the Court 
almost immediately executed "a flat reversal of direction."\textsuperscript{99} In four important 
decisions between 1923 and 1929, the Court both sharply limited the 
category of "property affected with the public interest" and held that the state 
could regulate prices only with respect to such property. In 1934 these deci-
sions were reversed in \textit{Nebbia v. New York},\textsuperscript{100} which has for this reason 
quite properly been regarded as a "milestone in American constitutional de-
velopment."\textsuperscript{101}

I shall examine the Taft Court's development of this significant doctrine in 
order to make three points. First, the Taft Court was willing to cede 
enormous scope to the prerogatives of administrative control in appropriate cir-

\begin{footnotesize}
\textsuperscript{96} \textit{Id.} at 406. In a strong opinion for five members of the Court, Justice McKenna con-
cluded:

To the contention that the business is private we have opposed the conception of the 
public interest. We have shown that the business of insurance has very definite char-
acteristics, with a reach of influence and consequence \textit{beyond and different from that 
of the ordinary businesses of the commercial world}, to pursue which a greater liberty 
may be asserted. The transactions of the latter are independent and individual, termin-
nating in their effect with the instances. The contracts of insurance may be said to be 
interdependent. They cannot be regarded singly, or isolatedly, and the effect of their 
relation is to create a fund of assurance and credit.

\textit{Id.} at 414 (emphasis added). Justice Lamar authored a powerful dissent, joined by Chief 
Justice White and Justice Van Devanter. \textit{See id.} at 434.

\textsuperscript{97} \textit{See, e.g.,} Note, \textit{Price Regulation Under the Police Power}, 19 \textit{Mich. L. Rev.} 74, 
75-77 (1920). Recall that the Court had also held in April 1921 that wartime emergency 
conditions had temporarily clothed rental housing stock with a public interest sufficient to 
justify rent control. \textit{See Block v. Hirsh}, 256 U.S. 135, 158 (1921); Marcus Brown Hold-
ing Co., Inc. \textit{v.} Feldman, 256 U.S. 170, 199 (1921). In \textit{Edgar A. Levy Leasing Co. v. Siegel}, 258 U.S. 242 (1922), decided during the 1921 Term, Justice Clark had taken this 
holding to the verge of eviscerating the requirement of temporary wartime emergency 
conditions. \textit{See supra} note 51 and accompanying text.

\textsuperscript{98} \textit{See Congressional Quarterly's Guide to the U.S. Supreme Court}, \textit{supra} note 
15, at 855-57.

\textsuperscript{99} Arthur L Haugan, \textit{Vicissitudes of the Price Fixing Doctrine}, 2 \textit{Dakota L. Rev.} 430, 
431 (1929); \textit{see also} R. G. Tugwell, \textit{That Living Constitution}, 55 \textit{New Republic} 120, 120 
(June 20, 1928) (noting a reversal in the trend of business regulation).

\textsuperscript{100} 291 U.S. 502 (1934).

\textsuperscript{101} Barry Cushman, \textit{A Stream of Legal Consciousness: The Current Commerce Doctrine 
from Swift to Jones & Laughlin}, 61 \textit{Fordham L. Rev.} 105, 130 (1992); \textit{see also} Richard 
D. Friedman, \textit{Switching Time and Other Thought Experiments: The Hughes Court and 
the importance of the \textit{Nebbia} case). \textit{But see} Michael Ariens, \textit{A Thrice-Told Tale, Or Felix 
the Cat}, 107 \textit{Harv. L. Rev.} 620, 642-43 (1994) (arguing that \textit{Nebbia} did not announce a 
change in judicial philosophy).
\end{footnotesize}
cumstances. Second, the Court sought to limit those circumstances through rhetorical appeals to the inviolability of everyday economic life in a manner quite analogous to Butler’s opinion in Jay Burns Baking Co. Third, the Taft Court’s inability to articulate what was constitutionally at stake in these appeals rendered the doctrine susceptible to attack as a noxious form of “mechanical jurisprudence.”

A. Property Affected with a Public Interest

The doctrine of “property affected with the public interest” essentially drew a boundary between property that could unproblematically be subject to comprehensive government regulation, and property that could not. With respect to the former, the Taft Court was prepared to sustain expansive managerial supervision, which extended not merely to rigorous price controls, but even to explicit redistribution. In Dayton-Goose Creek Railway Co. v. United States, for example, the Court unanimously upheld the “recapture” provisions of the Transportation Act of 1920, which authorized the Interstate Commerce Commission to appropriate “excess” profits from strong railroads in order to create a fund that would benefit financially weak railroads. Administrative intervention was deemed necessary to preserve “the efficiency of the interstate commerce railway system” considered as “a unit.”


103 263 U.S. 456 (1924).


105 Dayton-Goose, 263 U.S. at 485; see also Akron, C. & Y. Ry. Co. v. United States, 261 U.S. 184, 191 (1923) (stating that the purpose of the recapture provisions was to raise the revenue needed for the maintenance of the nation’s entire transportation system). See, e.g., Charles W. Bunn, The Recapture of Earnings Provisions of the Transportation Act, 32 Yale L.J. 213, 214-23 (1923); Edward S. Joett, The Law of Railroad Rate-Making, 10 Va. L. Rev. 618, 630 (1924) (stating that the ultimate end of the statute was securing an adequate transportation system for the county); Samuel W. Moore, Railroad Rates and Revenues, 16 Va. L. Rev. 243, 244 (1930) (“The commercial interests of the country were suffering from a lack of adequate transportation, due in part to the need of the carriers for additional revenue required for providing adequate service.”). As the Detroit News pointed out:
The relative equanimity with which the Court embraced this "form of communism enforced by governmental fiat" should caution against any coarse equation of Lochnerism with "a narrow protective view of the privileges of property and business," or against any simple reduction of Lochnerism to the "concept . . . that the power of government could not legitimately be exercised to benefit one person or group at the expense of others." The function of the doctrine of "property affected with a public interest" was precisely to demarcate social life in ways that would both give ample scope to the managerial requirements of the burgeoning administrative state, and yet also confine those requirements to an appropriate sphere. The doctrine thus requires us to explain why Lochnerism was willing to give constitutional teeth to the prerogatives of private property in some circumstances, but not in others.

By carefully examining exactly how the Taft Court used the doctrine of property affected with a public interest to inscribe boundaries in American economic life, we may begin to discern the outlines of such an explanation.

B. Wolff Packing and the Managerial Control of Ordinary Economic Life

The first major decision of the Taft Court to address the question of how property could be classified as affected with a public interest, and perhaps the most illuminating, was Wolff Packing Co. v. Court of Industrial Relations. At issue in the case was the constitutionality of a Kansas statute declaring that industries involved in manufacturing or producing clothing, food, and fuel were "affected with a public interest." The statute established

In spite of the successful roads' insistence on independence and privacy, it is becoming universally recognized that every railroad is part of a single great public highway system, just as streets are units in a city system. A railroad without connections would be comparable to a street without intersections or entrance or exit. The prosperity of a railroad depends on contact with other railroads, and it is fair that the paying road assist the weaker connecting line which assures its prosperity.

The recapture clause is one incident along the road toward a working out of these truths in practice.

*Quoted in To Make Strong Roads Aid the Weak, 80 Literary Digest 14 (1924).*

106 Powell, *supra* note 87, at 77. *The New Republic* viewed *Dayton-Goose* as "a most important contribution to economic liberalism" because "there can no longer be any question, after this decision, that the power to regulate public utility rates is essentially and fundamentally the power to delimit the right of private property in public utility enterprises." Editorial, *The Supreme Court on Economic Surplus*, 37 New Republic 216, 216 (Jan. 23, 1924).


a Court of Industrial Relations with the power to fix wages and other conditions of operation within such industries whenever their "continuity or efficiency" was endangered. Because the statute also prohibited strikes, it was widely regarded as imposing compulsory arbitration.

The statute was proposed by Kansas Governor Henry Justin Allen. Upon returning from Europe after the war, Allen confronted a great public emergency caused by a bitter coal strike during a cold winter. Allen was a progressive, Bull Moose Republican, with a robust conception of the public interest. He broke the strike by summoning a volunteer army of mostly ex-servicemen to mine coal in place of the striking miners. And he resolved that the public would never again suffer because of private labor disputes. He therefore proposed a statute that went beyond the forms of vol-

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111 See, e.g., Wolff Packing Co. v. Court of Indus. Relations, 267 U.S. 552, 564-65 (1925) (arguing that the Kansas statute establishes mandatory arbitration by dispensing with the usual consent of the parties); Howat v. Kansas, 258 U.S. 181, 184 (1922) (remarking that the Kansas Act effectively "provides for compulsory arbitration between labor and capital in certain industries and employment").

112 See Henry J. Allen, A Substitute for Strikes, SATURDAY EVENING POST, Mar. 6, 1920, at 6-7 (recounting the coal strike in Kansas after World War I that gave rise to the court of industrial relations).

113 See HOMER E. SOCOLOFSKY, KANSAS GOVERNORS 152-55 (1990); May Day in Kansas, 125 OUTLOOK 58, 58 (May 12, 1920).

114 According to Allen, the court of industrial relations was not "for the general regulation of business, of capital, or of labor, but for the protection of the public in an emergency when the processes of production are threatened and all efforts at conciliation have been exhausted. The law adds to the provisions of the second industrial conference: when that fails then the law takes hold." Quoted in P.F. Walker, A Year of the Kansas Industrial Court, 1 MGMT EFFICIENCY 171, 174 (Sept. 1921).

115 See Henry J. Allen, Speech at the Annual Banquet of the League for Industrial Rights, in The Annual Banquet of the League, 2 LAW & LAB. 82, 85 (Apr. 1920); Henry J. Allen, Liberty and Law in Kansas, 61 AM. REV. OF REV. 597, 597 (June 1920) (recalling that volunteers were brought in to operate the mines during the strike).

untary public control over industrial strife developed during World War I and imposed full-fledged "legal compulsion" onto the workplace. See, e.g., Willard Atkins, The Kansas Court of Industrial Relations, J. OF POL. ECON. 339, 339 (1920); John A. Fitch, Government Coercion in Labor Disputes, 90 ANNALS OF AM. ACAD. OF POL. & SOC. SCI. 74, 77 (July 1920). Even as early as 1918, writers like Thorstein Veblen were advocating that "the derangement of conditions caused by the war, as well as the degree in which the public attention now centres on public questions, mark the present as the appointed time to take stock and adopt any necessary change in the domestic policy." Thorstein Veblen, A Policy of Reconstruction, 14 NEW REPUBLIC 318, 318 (Apr. 13, 1918). Veblen advocated public control over industrial disputes, because, "seen from the point of view of the interest of the community," private rights in property and in the right to strike "figure up to something that may be called a right to exercise an unlimited sabotage, in order to gain a private end, regardless of the community's urgent need of having the work go on without interruption and at full capacity." Id. at 319. For a similar view, see Walter Lippman, Unrest, 20 NEW REPUBLIC 315, 315-22 (Nov. 12, 1919).

Although the Kansas Industrial Court had "the distinction of being opposed by both capital and labor," William Allen White, Industrial Justice—Not Peace, NATION'S BUS. 14 (May 1922), it nevertheless struck a chord of intense national interest. See John A. Fitch, Industrial Peace by Law—The Kansas Wage, 44 SURVEY 7 (Apr. 3, 1920). As the ST. LOUIS DAILY GLOBE-DEMOCRAT observed, "Perhaps no industrial legislation in recent years has attracted as much public attention as the Kansas creating an industrial court." Editorial, The Industrial Court Decision, ST. LOUIS DAILY GLOBE-DEMOCRAT, June 13, 1923, § II, at 14. Analogous legislation was "introduced in State after State." Editorial, Courts of Industrial Injustice, 110 NATION 416 (Apr. 3, 1920); see also K.H. Condit, The Kansas Industrial Court, 53 AM. MACHINIST 749, 752 (Oct. 21, 1920); John A. Fitch, Shall Strikes Become Crimes: The "Industrial Court" Movement and What It Means, 11 LAB. AGE 2 (Mar. 1922); Gompers Sees Labor Defying Court Law: Warns That an Industrial Relations Act Here Will Not Be Obeyed, N.Y. TIMES, Jan. 6, 1922, at 19; Editorial, Industrial Relations Courts, N.Y. TIMES, June 14, 1921, at 14; Labor Opposing Anti-Strike Bill: Illinois Measure to Prohibit "Unwarranted Industrial Warfare" Would, It Is Alleged, Do Away with Trade Unions, CHRISTIAN SCI. MONITOR, Mar. 23, 1921, at 5; Manufacturers in 21 States Seek Industrial Court Law, N.Y. CALL, Feb. 20, 1921, at 2; Glen E. Plumb, Plumb Dissects Oklahoma Industrial Court Bill; It Is Similar to Labor Laws Proposed for Several States, LABOR, Feb. 5, 1921, at 21; Editorial, The Public and the Strike, N.Y. TIMES, Feb. 9, 1922, at 16; REPORT OF THE PROCEEDINGS OF THE FORTIETH ANNUAL CONVENTION OF THE AMERICAN FEDERATION OF LABOR 90, 262, 264-65, 378-83 (1920); State Control of Strikes, 108 INDEP. & WkLY. REV. 192 (Feb. 25, 1922); Harry Tipner, Labor Courts Do Not Solve Problem, 46 AUTOMOTIVE INDUSTRIES 629, 629 (Mar. 16, 1922) ("There are pending in ten states bills modeled along the lines of the Kansas law for the establishment of industrial courts with the expectation of eliminating strikes."). Even Harding in his Annual Message of Dec. 6, 1921, declared that "In an industrial society such as ours the strike, the lockout, and the boycott are as much out of place and as disastrous in their results as is war or armed revolution in the domain of politics. The same disposition to reasonableness, . . . the same provision of fair and rec-
True to Allen’s intentions, the Kansas Court of Industrial Relations (“KCIR”) summoned a public interest that transcended the “private war”119 of capital and labor. Its theory was succinctly caught by a question put by Allen to Samuel Gompers during a well-publicized debate between the two men. Gompers vigorously attacked the Kansas statute’s prohibition of strikes as a denial of “liberty,” of “the right to own oneself . . . that he may do with


Allen energetically promoted the idea of the Court, and at one time Allen was even considered a presidential possibility because of it. See Fitch, Industrial Peace, supra; Frank P. Walsh, Henry Allen’s Industrial Court, 110 NATION 755 (June 5, 1920) (“The one big campaign card of Governor Allen as a candidate for the Presidency is the passage of his Kansas Industrial Court Bill last January.”). Indeed Brandeis wrote in his note marking his concurrence in Taft’s opinion striking down the Kansas Court that “this will clarify thought and bury the ashes of a sometime presidential boom.” Taft Papers, Reel 639. The Taft Papers are located at the Library of Congress.

119 The Court of Industrial Relations, 61 AM. REV. OF REV. 294, 294 (Mar. 1920). The metaphor of “industrial war,” William Allen White, supra note 118, at 14, was quite prevalent in contemporary discussions of the Kansas Court, so much so that the Kansas statute could be termed a “war against war,” William Leavitt Stoddard, Industrial Courts, Collectives Agreements, or What? 4 ADMINISTRATION 261, 268 (Sept. 1922), and the NEW YORK TIMES could refer to the statute as “legislation born in the stress of war.” Industrial Relations Courts, N.Y. TIMES, June 12, 1921, at 14. See Walter Gordon Merritt, SOCIAL CONTROL OF INDUSTRIAL WARFARE (League for Industrial Rights, n.d.). Allen himself argued:

The Kansas court of industrial relations is founded upon the principle that government should have the same power to protect society against the ruthless offenses of an industrial strife that it has always had to protect against recognized crime. . . . It was time . . . when a tribunal should be established having the power to take under its jurisdiction the offenses committed against society in the name of industrial warfare.

. . . . It is of the utmost importance that we should waken to the fact that the battle is not alone between employer and employee. It is between government and those class-minded organizations which seek to supplant it.

Henry J. Allen, How Kansas Broke a Strike and Would Solve the Labor Problem, 68 CURRENT OPINION 472, 474-77 (Apr. 1920); Allen, supra note 115, at 600-01 (discussing the rule of the Kansas Court of Industrial Relations in fighting industrial welfare). Sometimes the characteristics of industrial strife justifying public intervention were described not in terms of “war” but in terms of “a free-for-all exemplification of the Darwinian doctrine of the survival of the fittest.” Ben Hooper, Peaceful Settlement of Differences Between Carriers and Employees, 2 STATION AGENT 19, 21 (Feb. 1922).
his powers what best conserves his interests and his welfare.” Allen responded with a question:

When a dispute between capital and labor brings on a strike affecting the production or distribution of the necessaries of life, thus threatening the public peace and impairing the public health, has the public any rights in such a controversy, or is it a private war between capital and labor?

If you answer this question in the affirmative, Mr. Gompers, how would you protect the rights of the public? Allen’s question revealed how the purpose of the KCIR perfectly exemplified the classic progressive preoccupation with public “mastery” of collective problems, even at the expense of private rights.

From the perspective of constitutional theory, this purpose fit naturally with the concept of “property affected with the public interest.” Thus the Kansas Supreme Court upheld the statute stating:

Heretofore, the industrial relationship has been tacitly regarded as existing between two members, industrial manager and industrial worker. They have joined wholeheartedly in excluding others. The Legislature proceeded on the theory there is a third member of those industrial relationships which have to do with production, preparation, and distribution of the necessaries of life, the public. The Legislature also pro-

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121 Id. at 37-38. The question sparked a huge literature. See, e.g., Ralph M. Easley, IS THE LABOR PROBLEM UNSOLVABLE? 5 NAT’L CIVIC FED’N REV. 1 (July 10, 1920); J.B. Gardiner, LABOR—THE NEW TYRANT, 67 FORUM 396, 400 (May 1922); The Industrial Court, N.Y. TIMES, Feb. 18, 1921, at 10. Gompers eventually responded to Allen’s question by arguing that there was no public wholly separate and apart from employers and employees. See HENRY J. ALLEN, THE PARTY OF THE THIRD PART: THE STORY OF THE KANSAS INDUSTRIAL RELATIONS COURT 114-16 (1921). For an example of the discomfort of progressives who were both opposed to the anti-strike provisions of the Kansas statute and who believed in the prerogatives of the public, see Editorial, THE KANSAS CHALLENGE TO UNIONISM, 27 NEW REPUBLIC 3, 4 (June 1, 1921) (“Are we to accept the thesis of the extreme defenders of trade unionism methods that the interest of the public is in the long run identical with the interest of labor, and that therefore the public ought to bear with good grace the inconveniences and sufferings incident to the labor struggle?”). For early and prescient evidence of this discomfort, see Walter Lippmann, CAN THE STRIKE BE ABANDONED? 21 NEW REPUBLIC 224, 224 (Jan. 21, 1920) (recognizing the tension between the positions of labor and of the public).

122 See generally WALTER LIPPMANN, DRIFT AND MASTERY (1914); John Spargo, THE PUBLIC IN INDUSTRIAL WARFARE, 103 INDEPENDENT 173 (Aug. 14, 1920). Henry Allen put it this way: “We stand at this hour to give evidence that no class under government shall live above the law.” Allen, HOW KANSAS SETTLES ITS LABOR DISPUTES, 6 WORLD OUTLOOK no. 8, at 39 (Aug. 1920).
ceeded on the theory the public is not a silent partner. Whenever the
dissensions of the other two become flagrant, the third member may see
to it the business does not stop... The rights of society as a whole... are dominant over industry.123

In the eyes of the Kansas Court, the pressing public interest in the continuous
availability of the “necessaries of life” was sufficient to render their produc-
tion “affected with the public interest”:

Organized government has never been without power to make regula-
tions whenever the conduct of business threatened public harm, and the
power has been exercised as occasion required... In 1876, the deci-
sion in Munn v. Illinois... was rendered. That decision was followed
by determined reactionary efforts to limit its application to definite
classes of business... These and other efforts to limit, and even to
overthrow, the doctrine of the Munn Case, failed, and all the arguments
by which they were sustained were refuted in the opinion in the case of
German Alliance Insurance Co. v. Kansas... a landmark in the prog-
ress of the law almost as noteworthy as the case of Munn v. Illinois.124

In Wolff Packing the United States Supreme Court sharply cut back on this
expansive understanding of “property affected with a public interest.”125 It
has become commonplace among legal historians to interpret Lochnerism as
expressing the Court’s effort to maintain “one of the central distinctions in
nineteenth-century constitutional law—the distinction between valid economic
regulation,” which served the public interest, and “invalid ‘class’ legisla-
tion,” which merely served factional or partial interests.126 But while this

124 Id. at 701.
125 In an editorial The Providence Journal stressed the “exceptional importance” of
the Wolff Packing decision, noting that “it comes at a time when the general tendency has
been too strongly in the direction of interferences by State and national authority with pri-
ivate industry, and its effect may be to modify that tendency very materially. “ Editorial,
The Kansas Industrial Court, PROVIDENCE J., June 14, 1923, § II, at 16; see also Edi-
torial, In the Kansas Case, PHILA. PUB. LEDGER, June 13, 1923, at 10 (“The opinion calls a
sharp halt on the efforts of legislators, State and national, who for a generation have been
steadily encroaching upon the rights of the individual in attempts to regulate business and
industry in ‘the public interest.’ The Nation had come to a place where a line had to be
drawn as nearly as possible between what is undoubtedly the ‘public interest’ and what is
not.”).
126 Howard Gillman, The Constitution Besieged: The Rise and Demise of
Lochner Era Jurisprudence 10 (1993). Gillman nicely summarizes the historical lit-
erature at 6-9; see also John V. Orth, Taking From A and Giving to B: Substantive Due
Process and the Case of the Shifting Paradigm, 14 CONST. COMMENTARY 337, 337-45
(1997); G. Edward White, Revisiting Substantive Due Process and Holmes’s Lochner Dis-
sent, 63 BROOK. L. REV. 87, 88-89 (1997) (Substantive due process claims tested “the
boundary between the police powers of the states and the principle that no legislature could
distinction was certainly of great importance to the Taft Court, particularly in its labor decisions. At no time in Wolff Packing did the Court ever imply that the Kansas statute reflected class rather than truly public interests. Indeed we know from extrinsic evidence that members of the Court firmly believed that the public did have a strong and legitimate interest in diminishing industrial strife. Wolff Packing, and in fact the Taft Court’s development of the doctrine of “property affected with the public interest,” thus do not reflect any distinction between public and class legislation. They instead directly address constitutional limitations on the authority of the public interest.

The particular challenge to the KCIR that found its way to the United States Supreme Court in Wolff Packing concerned a KCIR order raising wages and altering other conditions of employment within a small and unprofitable meat packing company. Chief Justice Taft authored a unani-

128 Thus Sutherland had written to Harding in 1920 that with respect to the labor question, special emphasis should be laid upon the rights of the general public, from whose pockets in the last analysis come both dividends and wages and who, while greatly outnumbering both employers and workmen, are unorganized and therefore in danger of being ground between these highly disciplined organizations. I am not sure but that one of the gravest dangers the people as a whole are facing is that of being dominated and exploited by and for the benefit of organized minorities of various kinds who know exactly what they want. The government while bound within the legitimate scope of its powers to enforce a square deal as between labor and capital, owes a pecu liar, if not a paramount duty to the general public—numerically strong, but strategically weak—to see that it is not made the victim of the conscious or unconscious selfishness of both classes. I am afraid that compulsory arbitration is not the remedy. There are inherent and serious difficulties in the way of supplying the coercive processes of the law to large groups of men whose offense may often consist of simply failing to recognize and discharge their economic duties to society. But I think at least we should devise some plan by which the claims of either against the other where they cannot be settled by mutual arrangement, may be heard and determined by a thoroughly impartial tribunal whose standing and character will be such that its findings will have behind them the sanction of an instructed and determined public opinion.

Letter from George Sutherland to Warren G. Harding (June 26, 1920) (Sutherland Papers). Taft held quite similar views. See e.g., Industrial Peace (May 26, 1919), in William Howard Taft: Collected Editorials, 1917-1921, at 216-19 (James F. Vivian, ed., 1990); see also Red Control of Labor (Oct. 18, 1919), in id., at 287-89; Gary and Unionism (Apr. 27, 1921), in id. at 571-72; Labor and the Farmers (June 29, 1921), in id. at 591-93.
129 For a report of the decision of the KCIR, see The Kansas Court of Industrial Relations Regulates Labor Relations in the Packing Industry, LAW & LAB. 144 (June 1921). The KCIR ordered, inter alia, that “women workers should receive the same wages as men engaged in the same class and kind of work.” Id. at 146; see also Decision of the Court of Industrial Relations of Kansas in Meat Packing Company Case, 13 MONTHLY
mous opinion holding the order of the KCIR unconstitutional. In his original draft, Taft had apparently based his decision on the theory that the preparation of human food was not "affected with the public interest," but

LAB. REV. 206, 206-07 (July 1921). On the whole, the rulings of the KCIR were highly favorable to labor. For example, the KCIR held that workers were entitled to a "living wage," meaning "a wage which enables the worker to supply himself and those absolutely dependent upon him with sufficient food to maintain life and health; with a shelter from the inclemencies of the weather; with sufficient clothing to preserve the body from the cold and to enable persons to mingle among their fellows in such ways as may be necessary in the preservation of life." State v. Topeka Edison Co., reproduced in WILLIAM L. HUGGINS, LABOR AND DEMOCRACY 165 (1922). The Court also held that workers were entitled to a "fair wage," by which it meant, among many other things, that "'first-class workers' as well as 'skilled workers' . . . are entitled to a wage which will enable them by industry and economy not only to supply themselves with opportunities for intellectual advancement and reasonable recreation, but also to enable the parents working together to furnish the children ample opportunities for intellectual and moral advancement, for education, and for an equal opportunity in the race of life. A fair wage will also allow the frugal man to provide reasonably for sickness and old age." Id. at 166-67.

130 Progressives like Felix Frankfurter at THE NEW REPUBLIC were simultaneously relieved and concerned. "The Kansas Court of Industrial Relations is dead. That great achievement of the Middle Western 'law and order' movement is killed by the Supreme Court of the land. . . . Thus fails another social experiment, not because it has been tried and found wanting, but because it has been tried and found unconstitutional. . . . The New Republic is opposed to the idea which underlay the Kansas Industrial Court. . . . We . . . disbelieve in compulsory arbitration as a social policy; but we do not disbelieve in Kansas or any other state venturing a trial of the experiment. . . . We too rejoice with Messrs. Gompers and Emery over the death of the Kansas Industrial Court; but it was for the legislature of Kansas, and not for the Supreme Court, to kill it." Editorial, Exit the Kansas Court, 35 NEW REPUBLIC 112, 112-13 (June 27, 1923).

131 We do not have the original draft of Taft's opinion, but on May 29, 1923, he wrote to Van Devanter asking him to review the manuscript and make "suggestions." Letter from Taft to Van Devanter (May 29, 1923) (Taft Papers, Reel 254). Van Devanter responded with a long (undated) analysis, arguing that

As a whole, I fear the opinion will leave the impression that if only the Wolf [sic] Company's business were affected with a public interest, the provisions of the statute as applied to it would be valid. To my mind this would not be so. Take for instance an elevator business and concede that it is so far affected with a public interest that the legislature may prescribe the rates to be charged to the public. Does this carry with it a power to make the owner continue the business, or a power to fix the wages which he must pay and his employees must accept, etc.? This hardly can be so. I cannot believe that all business affected with a public interest may be put on the same ground, nor that the power of regulation concededly extending to some features of such a business extends to every feature. The phrase "affected with a public interest" to me does not convey a definite conception of uniform application. . . .

Even if Kansas could regulate the price at which the Wolf [sic] Company may sell its meat products, I do not think this carries with it what really is in question in the present case. I fear that the opinion lays too much stress upon the question of when a business is affected with a public interest and not enough on the other questions.
in his final, published version, Taft merely cast strong doubt on this question and decided that, even if the enterprise were clothed with the public interest, its owners and workers could not be ordered to continue in business "on terms fixed by an agency of the State."\textsuperscript{132}

\textsuperscript{132} Wolff Packing Co. v. Indus. Relations, 262 U.S. 552, 534 (1925). For an example of Taft's willingness to require continuity of service with respect to property affected with a public interest, see Western & Atl. R.R. v. Georgia Pub. Serv. Comm'n, 267 U.S. 493, 496-98 (1922) (holding that an order requiring the Railroad Company to continue service on an industrial side track did not deprive the company of its property without due process of law). \textit{See also} Southern Ry. Co. v. Clift, 260 U.S. 316, 321 (1922) ("The service of a railroad is in the public interest; it is compulsory... "). In Wolff, however, Taft held that such "continuity of a business" could only be required "where the obligation to the public of continuous service is direct, clear and mandatory and arises as a contractual condition express or implied of entering the business either as owner or worker. It can only arise when investment by the owner and entering the employment by the worker create a conventional relation to the public somewhat equivalent to the appointment of officers and the enlistment of soldiers and sailors in military service." Wolff Packing Co., 262 U.S. at 541. Supporters of the KCIR had advanced precisely this metaphor of employers and employees conscripted into public service. Thus F. Dumont Smith argued that employees in necessary industries were like a "locomotive engineer" who is not free to quit while the train is running, but must "remain with his engine until he reaches the next division point."

When once we get that principle, we will understand... that this law is constitutional; when we establish that these industries are essential to human life and to human health, whoever enters those industries in effect enlists exactly as does the soldier or the policeman in the preservation of the public peace. He is bound, not to continue to work individually—he may retire from that employment at any moment. But he can't conspire, he can't stir up a mutiny that shall destroy the army of the public weal.

F. Dumont Smith, \textit{The Kansas Industrial Court, Report of the Forty-Fifth Annual Meeting of the American Bar Association} 208, 214 (1922); \textit{see also} Editorial, \textit{The Right to Strike}, 110 \textit{NATION} 389, 389 (Mar. 27, 1920) (quoting remarks of Judge Wendell Phillips Stafford of the Supreme Court of the District of Columbia, to the effect that public employees "have no more right to strike than any other soldier has."). Indeed, Taft had himself invoked the image of employees as soldiers in his condemnation of the Boston Police strike of 1919. \textit{See} William Howard Taft, Address of William Howard Taft at Malden, Massachusetts 20 (Oct. 30, 1919) (Taft Papers, Reel 574). (Police "are not compelled to serve. Their duty is as high as that of soldiers and sailors in the army of the United States, but they are not as strictly bound. A soldier or sailor can not resign—a policeman may. He is not compelled to serve, but he may not combine with his fellows to embarrass the state he serves by a strike which shall leave that state helpless. That is a
Taft’s discussion of the “affected with the public interest” doctrine was nevertheless quite extensive and revealing. It began with the premise that “[f]reedom is the general rule, and restraint the exception.” Taft knew full well that “[a]ll business is subject to some kinds of public regulation,” so that, in his most careful formulation, he fashioned the doctrine to determine “when the public becomes so peculiarly dependent upon a particular business that one engaging therein subjects himself to a more intimate public regulation.”

But Taft had enormous difficulty giving analytic content to this boundary. His opinion sometimes evoked the “indispensable nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected without regulation.” Sometimes it referred to the “fear of monopoly.” Sometimes it employed the image of an “owner . . . devoting his business to the public use.” Sometimes it spoke of “great temporary public exigencies,” such as those that were determinative in Block v. Hirsh. In the end, however, Taft was forced to confess that “it is very difficult under the cases to lay down a working rule by which readily to determine when a business has become ‘clothed with a public interest.’”

Taft’s difficulty arose because he had no articulate account of the functional purpose of the doctrine. While he could distinguish national emergencies, such as those that existed during the World War, he did not possess an

combination that ought never to be permitted and ought to be denounced by law. With soldiers and sailors it would be punishable as mutiny, and morally it is the same offense with policemen.”

Wolff Packing Co., 262 U.S. at 534. Taft drew this premise from Justice Sutherland’s opinion in Adkins v. Children’s Hospital, decided two months previously: “There is, of course, no such thing as absolute freedom of contract. It is subject to a great variety of restraints. But freedom of contract is, nevertheless, the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances.” Adkins v. Children’s Hosp., 261 U.S. 525, 546 (1923).

Wolff Packing Co., 262 U.S. at 536. Taft wrote that the determination of this status is “always a subject of judicial inquiry” and never merely a matter of “the mere declaration by a legislature.” Id.

Id. at 538-39.

Id. at 538.

Id.

Id. at 535.

Id. at 542. Taft distinguished Wilson v. New on these grounds. In New the Court had upheld a congressional statute temporarily setting wages for railroad workers. See Wilson v. New, 243 U.S. 332 (1917) (declaring constitutional a statute enacted to avoid the catastrophe of a general railroad strike).

Wolff Packing Co., 262 U.S. at 538.
analytic framework capable of usefully discriminating among the myriad lesser public purposes that could be served by regulation. Nor had he any explanation of the relationship between constitutional values and the classification of particular forms of property as either private or public.\textsuperscript{141}

Instead the rhetorical structure of Taft's opinion points vaguely but unmistakably toward the importance of safeguarding from state intrusion a realm of freedom, whose boundaries are normative rather than functional, and whose center is located in the rounds of everyday life. Thus Taft anchors the boundary drawn by the doctrine in the premise that "the \textit{common callings}," the "\textit{ordinary producer, manufacturer or shopkeeper},"\textsuperscript{142} must be free from "minutely detailed government supervision."\textsuperscript{143} "It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by State regulation."\textsuperscript{144} In the end, therefore, Taft's opinion in \textit{Wolff Packing} evokes the same normative vision of ordinary life as that which underlies Butler's opinion in \textit{Jay Burns Baking Co.}

Although Taft's opinion in \textit{Wolff Packing Co.} does not explain what constitutional values might underwrite this normative vision, the debate that sur-

\textsuperscript{141} Taft's schema of three classes of "businesses said to be clothed with a public interest justifying some public regulation" is almost pathetically circular:

(1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities.

(2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, \ldots Such are those of the keepers of inns, cabs and grist mills.

(3) Business which though not public at their inception may be fairly said to have risen to be such and have become subject in consequences to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner by devoting his business to the public use, in effect grants the public an interest in that use and subjects himself to public regulation to the extent of that interest although the property continues to belong to its private owner and to be entitled to protection accordingly.

\textit{Id.} at 535.

\textsuperscript{142} \textit{Id.} at 537 (emphasis added). On the origins of the phrase "ordinary callings" see \textsc{Frank R. Strong}, \textsc{Substantive Due Process of Law: A Dichotomy of Sense and Nonsense} 96 (1986) (noting that the phrase "derived from long-standing hostility toward publicly granted monopoly").

\textsuperscript{143} \textit{Wolff Packing Co.}, 262 U.S. at 543.

\textsuperscript{144} \textit{Id.} Surely resonating in this quotation is that nursery-rhyme evocation of the quotidian: "The butcher, the baker, the candlestick maker \ldots" Taft adds in his opinion that to permit "the common callings" to become "clothed with a public interest by a mere legislative declaration, which necessarily authorizes full and comprehensive regulation within legislative discretion," would constitute "a revolution in the relation of government to general business." \textit{Id.} at 539.
rounded the KCIR does offer some intriguing suggestions. Opposition to the KCIR centered on the claim that it brought everyday enterprises "under the managerial control of the State,"145 that it sought to establish "managerial supervision, regulation, and control of a very extensive field of private industries."146 Such supervision, however, was simply the natural expression of progressive faith in "the exercise of will and mastery" through the use of a "science of administration and management, which rests on research, planning and cooperative control."147 Just as Butler in *Jay Burns Baking Co.* sought to limit the reach of administrative expertise, so Taft sought in *Wolff Packing* to limit the managerial prerogatives implicit in that expertise.148

We might interpret the function of the doctrine of "affected with the public interest," then, to be that of separating areas of social life in which state managerial expertise could routinely be exercised from those in which such "will and mastery" could be subject to constitutional challenge. This function was clearly expressed in Justice McReynolds' *cri-de-coeur* in his 1934 dissent in *Nebbia v. New York*149, when the court finally dismantled the doctrine by holding that price controls could be imposed whenever a State deemed it "for the public good"150:

145 Kansas Labor Court Between Two Fires, N.Y. TIMES, Feb. 25, 1922, at 19 (Remarks of Harry Sharp, Secretary of Associated Industries of Kansas).

146 Matthew Woll, How the Kansas Plan Defies Fundamental American Freedom, 29 AM. FEDERATIONIST 317, 321 (May, 1922); see also Kansas Labor Court, supra note 145 (Remarks of John S. Dean, counsel for Associated Industries of Kansas).

147 George Soule, Hard Boiled Radicalism, 65 NEW REPUBLIC 261, 265 (Jan. 21, 1931). We have now come to regard this faith as the natural foundation of the state. So, for example, Felix Frankfurter could write in 1912: "The tremendous economic and social changes of the last fifty years have inevitably reacted upon the functions of the state. More and more government is conceived as the biggest organized social effort for dealing with social problems . . . Growing democratic sympathies, justified by the social message of modern scientists, demand to be translated into legislation for economic betterment, based upon the conviction that laws can make men better by affecting the conditions of living." Felix Frankfurter, The Zeitgeist and the Judiciary, 29 SURVEY 542, 542 (Jan. 25, 1913).

148 It is fair to say the supporters of the KCIR precisely believed that managerial organization had already invaded the domains of economic life regulated by the KCIR. Thus Elmer T. Peterson, Associate Editor of the WITCHITA BEACON (of which Henry Allen was the editor), wrote:

Organization, advanced by specialization, invention and other modern developments, has set up an invisible government. The only way the people have of retrieving their political power and staving off economic pressure is to erect governmental tribunals with power to prevent economic strangulation . . . .

Elmer T. Peterson, Is the Labor Problem Unsolvable? 5 NAT'L CIVIL FED'N REV. 14 (Sept. 25, 1920). The logic of the KCIR, in other words, was to invoke organization in order to fight organization.


150 Id. at 536. "Price control," the Court ruled, "like any form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the
This is not regulation, but management, control, dictation—it amounts to the deprivation of the fundamental right which one has to conduct his own affairs honestly and along customary lines. The argument advanced here would support general prescription of prices for farm products, groceries, shoes, clothing, all the necessities of modern civilization, as well as labor.\textsuperscript{151}

McReynolds perceived the doctrine as exactly policing a boundary between “customary” life and state managerial “dictation.”

But on what constitutional grounds could the Court claim the authority to limit the domain of managerial control in this way? The Court’s opinion does not tell us. Popular objections to the KCIR, however, stressed the incompatibility between administrative prerogative and freedom. On all sides of the political spectrum opposition to the KCIR circled around the claim that it subordinated social life to the dictates of an “administrative tribunal . . . miscalled a court,”\textsuperscript{152} which was empowered to adjust the “common machine”\textsuperscript{153} of industrial life according to the requirements of administrative expertise. On the left, advocates of labor opposed the KCIR because it denied the “right of all workers to control their own lives.”\textsuperscript{154} On the right,

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\textsuperscript{151} McReynolds perceived the doctrine as exactly policing a boundary between “customary” life and state managerial “dictation.”

\textsuperscript{152} Howat v. Kansas, 258 U.S. 181, 183 (1922); see also State ex rel. Hopkins v. Howat, 198 P. 686, 694 (Kan. 1921).

\textsuperscript{153} Henry J. Allen, The Settlement of Labor Disputes, ELECTRIC RAILWAY J. 753 (Oct. 16, 1920) (“All reasonable men, whether they belong in the ranks of capital or labor, realize that we are working under modern conditions and that all the elements of manufacturing, production, transportation, and distribution are mixed together in a common machine; that a break in one part of the far-flung machinery breaks down the whole public relations.”).

\textsuperscript{154} Frank P. Walsh, Henry Allen’s Industrial Court, 110 NATION 755, 757 (June 5, 1920); see also W.B. Rubin, The Kansas Industrial Act and the United States Supreme Court, AM. FEDERATIONIST 832, 833 (Oct. 1923) (“The right to free contract, the right to work or not to work, the right to advise or not to advise some one to join with another in such things marks the boundary line between slavery and freedom.”); Matthew Woll, Industry’s Eternal Triangle, 8 NATION’S BUS. 17, 17-18 (June 1920) (arguing that the right of laborers to strike is a fundamental democratic right). The AMERICAN FEDERATIONIST argued that the KCIR would “legislate men into serfdom,” because “the very essence of democracy is found” in “the trade union practice of collective bargaining and . . . trade agreement.” Samuel Gompers, What’s the Matter with Kansas? 27 AM. FEDERATIONIST
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business interests opposed the KCIR because it violated "the American principle of economic freedom."\textsuperscript{155} The liberal center opposed the KCIR because it transformed independent democratic citizens into objects of managerial supervision. "What we want is a self-reliant, independent, free people, capable of working out their own destinies. The more opportunities people can have for self-control and the less they are dominated and directed . . . the more likely they are to develop in that direction."\textsuperscript{156}

These popular objections to the KCIR suggest an important tension between managerial control and constitutional citizenship. Within the domain of managerial supervision, persons are figured as objects to be manipulated in order to attain given objectives. Persons are merely the means for the accomplishment of whatever ends the state wishes to achieve. Citizens, however, particularly in a democracy, are imagined quite differently. Citizens should be autonomous and independent, capable of choosing their own fate. Politics, which management denies, is precisely the process by which such choices are made. State managerial control denies the political autonomy of citizens entrusted with the collective self-determination of their own destiny.\textsuperscript{157}

This tension between management and constitutional citizenship rests upon paradox, for a democracy uses managerial control precisely to implement a self-determining political will; indeed such control is necessary if a democracy is to act effectively in the world. The exercise of collective self-government thus entails the creation of forms of social order in which the prerequisites of self-government are negated. This suggests that the tension between democracy and management must be understood as a matter of bal-

\textsuperscript{155} Editorial, \textit{The Kansas Decision}, N.Y. TRIB., June 13, 1923, at 12; see also Editorial, \textit{Kansas Industrial Court Dead}, BROOK. DAILY EAGLE, June 12, 1923, at 6; Editorial, \textit{The Kansas Industrial Court}, N.Y. TIMES, June 13, 1923, at 18. \textit{The Philadelphia Public Ledger} interpreted the \textit{Wolff Packing} decision as a direct warning to "progressives" in the Senate who sought to regulate business. "Not alone for its effect on the nationally known Kansas Court, . . . but as a warning to the 'Progressive bloc' in the next Congress, bent on governmental regulation of all manner of industries—chiefly coal, sugar, gasoline—was the Supreme Court's decision held to be of the highest importance." Robert Barry, \textit{High Court Halts State Wage Fixing}, PHILA. PUB. LEDGER, June 12, 1923, at 1. In a subsequent editorial, the Ledger observed that "If progressives of both parties . . . have been seeking a sign from the Supreme Court, they now have that sign. They know now what that tribunal's attitude will be toward more government in industry at the expense of the individual's rights." Editorial, \textit{In the Kansas Case}, PHILA. PUB. LEDGER, June 13, 1923, at 10.

\textsuperscript{156} John A. Fitch, \textit{The Case Against the Law}, 44 SURVEY 303 (May 29, 1920).

\textsuperscript{157} On the incompatible constructions of the person within democratic and managerial domains, see ROBERT C. POST, \textit{CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT} 4-15 (1995).
A democracy cannot so pervasively establish managerial domains as to threaten the autonomy prerequisite for self-government; it cannot entirely reduce its citizens to objects of administrative supervision without simultaneously undercutting its own claim to democratic legitimacy. The doctrine of “property affected with a public interest” might thus most plausibly be interpreted as setting bounds on the constitutional capacity of the American state to objectify its citizens in this manner.

C. Formalism and the Doctrine of Property Affected with a Public Interest

Interpreted in this way, the Taft Court’s revival of the doctrine of “affected with the public interest” need not necessarily have been inconsistent with Pound’s call for a jurisprudence that would embody “pragmatism as a philosophy of law” and that would restore reason “to its true position as an instrument.” The Taft Court could have developed a pragmatic account of the domains of freedom required by American democratic citizenship and of the kinds of public interests sufficient to justify infringements of those domains. Such an account would have had to explain why the Court insisted on endowing the arena of everyday economic life with special constitutional protection.

But the Taft Court entirely failed even to attempt this task. In the years after Wolff Packing, Justice Sutherland authored three opinions for the Court, each sharply constricting the scope of “property affected with a public interest.” These opinions dogmatically reasserted the self-evident value of freedom within the ambit of everyday economic life; they neither articulated any theory of the constitutional significance of this freedom, nor did they explore relevant variations in the importance of distinct claims on behalf of the public interest.

158 See id. at 188-89.

159 This interpretation is especially visible in Justice Brandeis’ concurrence in Wolff Packing. In a note signifying his assent to Taft’s opinion, Brandeis wrote that “In Wilson v. New there was ‘clear and present danger’ and the ‘curse was in its bigness.’” Brandeis to Taft (Taft Papers, Reel 639). On Wilson v. New, see supra note 139. A month later, in conversation with Felix Frankfurter, Brandeis made clear his belief that “fundamental rights” concerning “speech,” “education,” “choice of profession,” and “locomotion” should “not be impaired or withdrawn except as judged by ‘clear and present danger’ test.” Urofsky, supra note 77, at 320. It is thus most plausible to interpret Brandeis’ concurrence in Wolff Packing as expressing his view that the KCIR was an assault on fundamental liberties. We might appreciate why this is so by recalling that as early as 1913 Brandeis had made clear his opposition to compulsory arbitration because of its impairment of the “moral vigor” necessary to maintain “the fighting quality, the stamina, and the courage to battle for what we want when we are convinced that we are entitled to it.” Louis Brandeis, quoted in Brandeis on the Labor Problem: How Far Have We Come on the Road to Industrial Democracy? 5 LA FOLLETTE’S WKLY. MAG. 5-15 (May 24, 1913).

160 See Pound, supra note 86, at 609-10.
The first of these decisions, *Tyson & Brother v. Banton*, set the pattern. At issue in *Tyson* was a New York statute forbidding brokers for theater tickets from reselling tickets “at a price in excess of fifty cents in advance of the printed price.” The Court explicitly held that “the power to fix prices . . . ordinarily, does not exist in respect of merely private property or business . . . but exists only where the business or the property involved has become ‘affected with a public interest.’” Although the classification of property as having the “status of a private business” thus precluded price regulation but not other forms of administrative control, Sutherland did not explain why price regulation in particular should be subject to such strict judicial scrutiny.

In a closely divided five to four decision, the Court held that “a theatre is a private enterprise.” Although the outcome of the case turned entirely on the attribution of this status to theaters, Sutherland conceded at the outset that the distinction between private property and property “affected with a public interest” was “at best an indefinite standard, and attempts to define it have resulted, generally, in producing little more than paraphrases, which themselves require elucidation.”

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162 Id. at 427-28.
163 Id. at 430. Sutherland had held this view even before being appointed to the Court. In January 1921, for example, he had told the New York State Bar Association:

The power to fix prices by law or administrative order has been uniformly denied by the courts save in those exceptional cases where the business or the service is clothed with a public interest. In all other cases the owner has an inherent, constitutional right to the market price, fixed by what is called the “higgling of the market,” irrespective of the extent of his profits. Such a right is, indeed, itself essentially property which stands upon an equality with life and liberty, under the guaranties of the Fifth and Fourteenth Amendments.

George Sutherland, *Principle or Expedient?* 44 N.Y. ST. B. ASS'N PROC. & REP. 263, 277 (1921).

164 Sutherland said only that “the right of the owner to fix a price at which his property shall be sold or used is an inherent attribute of the property itself.” *Tyson*, 273 U.S. at 429. He did not clarify why “the status of a private business” was compatible with licensing requirements, but not with price regulation. It is in this regard noteworthy that as early as 1925, the Court had had before it provisions of the same New York statute that it would consider two years later in *Tyson*. In *Weller v. New York*, the Court upheld provisions of this statute that required ticket brokers to be licensed, holding that the price-fixing provisions of the statute were “severable.” *Weller v. New York*, 268 U.S. 319, 325 (1925).

166 Id. at 430. Sutherland ultimately came to rest on the patently fictional formulation that “a business or property, in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been devoted to a public use and its use thereby, in effect, granted to the public.” Id. at 434.
Sutherland made no effort to explain why theaters ought to be free from managerial supervision. He instead insisted on the necessity of establishing some boundary between managerial prerogatives and economic freedom, and he attempted to show that any rationale that would clothe the theaters with a public interest would also prove inconsistent with the maintenance of that boundary. Sutherland thus argued that businesses were not “affected with the public interest” merely because they were “large or because the public are warranted in having a feeling of concern in respect of [their] maintenance.”

To allow price control for theaters, Sutherland claimed, would justify its extension to “every possible form of amusement, including the lowly merry-go-round with its adjunct, the hurdy gurdy.” In such circumstances it would be “hard to see where the limit of power in respect of price fixing is to be drawn.”

Sutherland’s bland opinion provoked a radical and cutting dissent by Holmes. Although Holmes had joined in Wolff Packing, he argued in Tyson that there ought not to be any distinction between private property and property “affected with a public interest”:

[T]he notion that a business is clothed with a public interest and has been devoted to the public use is little more than a fiction intended to beautify what is disagreeable to the sufferers. The truth seems to me to be that, subject to compensation when compensation is due, the legislature may forbid or restrict any business when it has a sufficient force of public opinion behind it.

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167 In a pre-argument memorandum on Weller, Sutherland had commented that “I am disposed to think that a theatre is not a business impressed with a public interest, but a private enterprise as much under the control of the owner as a shop for the sale of goods.” Memorandum from Sutherland to Taft (Apr. 23, 1925) (Taft Papers, Reel 73).

168 Tyson, 273 U.S. at 430. Lest there be any ambiguity, Sutherland explicitly characterized German Alliance Insurance Co. as the “extreme limit to which this court thus far has gone in sustaining price fixing legislation.” Id. at 434.

169 Id. at 442.

170 Id. at 442. The New Republic correctly viewed Tyson as the portent of a swelling conservative tide. “Until recent years the Court could generally be counted on to take a liberal attitude toward statutes outside the labor field. . . . The last three years have witnessed a marked change. The Nebraska bread law, the Pennsylvania shoddy law [Weaver v. Palmer Brothers Co., 270 U.S. 402 (1926)], and now the New York scalping law, have been successively invalidated. . . . [I]f the trend of the past three years continues, the due process clause will furnish an increasingly effective obstruction to every effort of legislature or city council.” Editorial, The Constitution Shelters the Ticket Speculator, 50 New Republic 84, 86 (Mar. 16, 1927).

171 Tyson, 273 U.S. at 446 (Holmes, J., dissenting). Justice Brandeis joined Holmes’ dissent. Holmes later described his dissent as taking a “whack at ‘police power’ and ‘dedicated to a public use’—as apologetic phrases springing from the unwillingness to recognize the fact of power.” Letter from Holmes to Harold Laski, (Mar. 17, 1927), in 2 Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J.
Holmes' dissent essentially foreshadows the complete collapse of the doctrine as it would occur seven years later in *Nebbia v. New York.*

Stone's dissent in *Tyson,* by contrast, accepted the boundary implicit in Sutherland's opinion, but attempted to endow that boundary with functional substance. Stone argued that property ought be clothed with a public interest sufficient to justify price control whenever there existed "circumstances materially restricting the regulative force of competition, so that buyers or sellers are placed at such a disadvantage in the bargaining struggle that serious economic consequences result to a very large number of members of the community." Stone offered a compelling empirical account of how the New York statute operated to forestall the "virtual monopoly" of ticket brokers.

The combination of Stone's functional analysis of the requirements of the "public interest" and Sutherland's refusal to articulate a pragmatic account either of the public good or of the domain of economic freedom, resulted in a professional and doctrinal disaster for the Court. Sutherland was left reciting empty doctrinal categories, hoping in that way to protect everyday life from administrative supervision. "No comment on Mr. Justice Sutherland's elaboration of the words 'affected with a public interest' could be more cruel," wrote Thomas Reed Powell, "than to place his discourse in juxtaposition with Mr. Justice Stone's elucidation of its question-begging meaninglessness." Stone himself wrote to John Bassett Moore that he was less...
concerned about the result in Tyson than with "the reasoning which was used to support it. I am anxious to see this Court . . . deal with realities rather than meaningless phrases."\textsuperscript{176}

The disaster only grew worse in the following year when the Court consolidated Tyson in Ribnik v. McBride.\textsuperscript{177} Ribnik held that employment agencies were immune from price regulation because they were not clothed with a public interest.\textsuperscript{178} Sutherland’s opinion for the Court focused once again almost entirely on employing the doctrine to protect everyday economic life from administrative control.

An employment agency is essentially a private business. True, it deals with the public, but so do the druggist, the butcher, the baker, the grocer, and the apartment or tenement house owner, and the broker who acts as intermediary between such owner and his tenants. Of course, anything which substantially interferes with employment is a matter of public concern, but in the same sense that interference with the procurement of food and housing and fuel are of public concern. The public is deeply interested in all these things. The welfare of its constituent members depend upon them. The interest of the public in the matter of employment is not different in quality or character from its interest in the other things enumerated; but in none of them is the interest that

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\item[(1927).] For a summary of the academic literature disapproving the decision, see Maurice H. Merrill, \textit{The New Judicial Approach to Due Process and Price Fixing}, 18 KY. L.J. 3, 16 n.56 (1929) (citing a list of sources discussing the \textit{Tyson v. Banton} holding). Taft wrote to his brother that Tyson "has awakened the condemnation of a good many, but it is right, and that is the way the academicians and those who are not in favor of any Constitution get even with us." Letter from Taft to Horace D. Taft (Jan. 7, 1929) (Taft Papers, Reel 307). \textit{See} Letter from Horace D. Taft to William Howard Taft (Jan. 4, 1929) (Taft Papers, Reel 307).
\item\textsuperscript{176} Letter from Stone to John Bassett Moore (Mar. 3, 1927) (Stone Papers). On the same day Stone wrote to his ex-colleague Young B. Smith at Columbia that he wouldn’t "have troubled to write the dissent if the prevailing opinion had frankly met the issue and assigned some real reason for the conclusion reached, but it is time we stopped talking nonsense in such phrases as ‘affected with a public interest’ and ‘grant of a business to a public use.’” Letter from Stone to Young B. Smith (Mar. 3, 1927) (Stone Papers).
\item\textsuperscript{177} 277 U.S. 350 (1928). With characteristic shrewdness, \textit{The New Republic} instantly appreciated the significance of the case: "A few years ago, when the business of insuring against fire was brought within the category of those businesses which are so ‘affected with a public interest’ as to make them regulable, it seemed that the Court might easily go on extending this classification to other employments hitherto regarded as private. The Tyson case reversed the trend. Ribnik vs. McBride confirms the reversal.” Tugwell, \textit{supra} note 99, at 120.
\item\textsuperscript{178} The decision was six to three. Justice Sanford concurred specially “upon the controlling authority of” \textit{Tyson}. \textit{Ribnik}, 277 U.S. at 359 (Sanford J., concurring). Justice Stone dissented, joined by Justices Holmes and Brandeis.
\end{itemize}
"public interest" which the law contemplates as the basis for legislative price control.\textsuperscript{179}

Stone authored a brutal dissent. He argued that there was no "controlling difference between reasonable regulation of price, if appropriate to the evil to be remedied, and other forms of appropriate regulation which curtail liberty of contract or the use and enjoyment of property."\textsuperscript{180} Taking a leaf from Brandeis' dissent in \textit{Jay Burns Baking Co.}, Stone proceeded to marshal the data of "repeated investigations, official and unofficial," to mount a devastating case about abuses in the employment agency business and the need for price control to remedy those abuses. It was one thing, Stone acerbically noted, "[t]o overcharge a man for the privilege of hearing the opera, . . . to control the possibility of his earning a livelihood would appear to be quite another."\textsuperscript{181} Matters of such importance should not be decided with eyes closed "to available data throwing light on the problem with which the Legislature had to deal."\textsuperscript{182}

\textit{Ribnik} was roundly and justifiably criticized.\textsuperscript{183} R.G. Tugwell, for example, celebrated the "pragmatic view of human necessity" informing Stone's

\textsuperscript{179} \textit{Id.} at 357. In response to the Court's judgment in \textit{Ribnik}, New Jersey enacted a strict licensing law that required, among many other things, employment agencies to post a public schedule of fees. \textit{See} Ch. 283, 1928 N.J. Laws 775-84.

\textsuperscript{180} \textit{Ribnik}, 277 U.S. at 373 (Stone, J. dissenting). Stone continued: "[I] can see no difference between a reasonable regulation of price and a reasonable regulation of the use of property, which affects its price or economic return. The privilege of contract and the free use of property are as seriously cut down in the one case as in the other." \textit{Id.} at 374. In a letter to Herman Oliphant, Stone commented that his dissent "points out a little more effectively than has hitherto been done that there is no essential difference between rate regulations and other forms and that to say, as the majority did, that other forms of regulation are permissible is, in effect, to deny the only form of regulation which is appropriate or effective." Letter from Stone to Herman Oliphant (June 14, 1928) (Stone Papers).

\textsuperscript{181} \textit{Ribnik}, 277 U.S. at 373; \textit{see also id.} at 362.

\textsuperscript{182} \textit{Id.} at 363. Stone began to complain at about the time of \textit{Ribnik} that argumentation before the Court did not provide the data necessary for decision. "Verbal logic chopping, with no apparent consciousness of the social and economic forces which are really involved, are about all we get. If anything more appears in the opinion it is because some member of the court takes the time and energy to go on an exploring expedition of its [sic] own." Letter from Stone to John Bassett Moore (June 5, 1928) (Stone Papers); \textit{see also} Letter from Stone to Hessel E. Yntema (Oct. 24, 1928) (Stone Papers) ("[T]here is still much to be done in the education of lawyers and judges. Take, for example, the recent case of \textit{Ribnik} and \textit{McBride}, in which I wrote a dissenting opinion. You will search in vain in briefs and prevailing opinions for any reference to the considerable amount of material to which I referred in my dissenting opinion. It seems not to have occurred to any of them that such data had very much to do with the case.").

\textsuperscript{183} For a review of the highly unfavorable academic reactions to \textit{Ribnik}, see Merrill, \textit{supra} note 175, at 16 n.56. Merrill regarded the "sinister aspect" of \textit{Ribnik} to lie in its "apparent abandonment of the fruitful practicality of the method of approach to which ex-
dissent and condemned the “blind adherence to some outmoded faith” animating Sutherland’s majority opinion.\(^{184}\) He noted that “[t]he majority makes no attempt to meet the theoretical objections to its position; its statement is pure and unreasoned dogma, its use of ‘public interest’ an obvious statement of prejudice and dislike for bureaucratic meddling.”\(^{185}\) Ribnik was particularly significant because at the time more than twenty-eight states imposed some form of price regulation on employment agencies.\(^{186}\) The Court was therefore unambiguously reaching out aggressively to strike down widespread forms of accepted regulation.

The next year, in *Williams v. Standard Oil Co.*,\(^{187}\) the Court struck down a Tennessee statute regulating the price of gasoline. Sutherland’s opinion for the Court was pro forma:\(^{188}\) Gasoline, he said, “is one of the ordinary commodities of trade, differing, so far as the question here is affected, in no essential respect from a great variety of other articles commonly bought and sold by merchants and private dealers in the country.”\(^{189}\) Justices Brandeis and Stone concurred in the result; only Holmes bothered to dissent, and even he did so without opinion.\(^{190}\) The Court had finally secured the line between

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\(^{184}\) See Tugwell, supra note 99.

\(^{185}\) Id.

\(^{186}\) See Note, *The Regulation of Employment Agencies*, 38 *Yale L.J.* 225, 229-30 (1928). The Note regards *Tyson* and *Ribnik* as “radical innovations.” *Id.* at 234. “It is surprising,” the author of the Note writes, “to find Justice Sutherland disposing of an issue in public policy by a purely conceptual argument; it is disturbing to find the selection of concepts resting upon nothing more basic than an arbitrary choice.” *Id.* at 233.

\(^{187}\) 278 U.S. 235 (1929).

\(^{188}\) Sutherland did admit that it was only in “recent decisions” that the Court had “settled” the question that “a state legislature is without constitutional power to fix prices at which commodities may be sold, services rendered, or property used unless the business or property involved is affected with a public interest.” *Id.* at 239. Compare Sutherland’s remarks in 1921, supra note 163.

\(^{189}\) *Id.* at 240 (emphasis added).

\(^{190}\) Holmes wrote to Stone that “in spite of Brandeis’ exhortations I do not intend to write. I have said my say. I thought that I should say this: ‘Of course I yield to the authority of decided cases, and although I thought that this case might be distinguished from its predecessor it is for the propriety that established the precedents to say how far the violet rays of the Fourteenth Amendment reach.’ I am rather pleased with this innuendo of ‘violet rays.’” Letter from Holmes to Stone (Dec. 20, 1928) (Stone Papers). Stone replied to Holmes: “I like your phrase about the violet rays of the Fourteenth Amendment and would like to join you in it, but I hesitate merely because there are so many solemn-minded people, unembarrassed by any sense of humor, who might feel that we were treating lightly and irreverently a very serious matter.” Letter from Stone to
ordinary economic activity and managerial supervision, but at the cost of stripping that line of any functional justification. The charge of mechanical jurisprudence was thus very much to the point.

III. THE CONSTITUTIONAL STRUCTURE OF SUBSTANTIVE DUE PROCESS

The dogmatism and formalism that characterized the Taft Court’s development of the doctrine of property “affected with a public interest” represent a major failure of judicial craft. But this failure does not imply that the values underwriting the doctrine were merely a matter of “meaningless phrases.” To the contrary, our analysis of the popular debates surrounding Wolff Packing suggests that Lochnerism during the Taft Court era may have expressed an important tension between the prerogatives of state managerial control and the perceived requirements of democratic citizenship. The Court used the doctrine of substantive due process to separate the domains of social life in which persons could routinely be objectified according to the dictates of administrative expertise, from the domains of social life in which these dictates could be subject to constitutional challenge.

Modern First Amendment jurisprudence seeks in a similar way to separate domains of speaker autonomy from domains of state managerial control. It is striking that almost all the doctrinal techniques that we now employ in order to accomplish this delicate task of demarcation are plainly visible within the Taft Court’s substantive due process decisions. The Taft Court developed strong doctrines of vagueness, for example, and also of unconstitutional conditions. Many of its substantive due process decisions have exactly the form of what today would be described as “overbreadth” analy-

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Holmes (Dec. 21, 1928) (Stone Papers). Stone added, “Of course there is a good deal in the majority opinion which seems utter rubbish to me.” Id.

191 See supra text at note 176.
192 See Post, supra note 157, at 9-10.
193 See, e.g., Small Co. v. American Sugar Refining Co., 267 U.S. 233, 235 (1925) (holding that statute violates due process by creating a duty “so vague and indefinite as to be no rule or standard at all”); Connolly v. General Constr. Co., 269 U.S. 385, 391 (1926) (holding that a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess as to its meaning and differ as to its application, violates the first essential of due process of law); Cline v. Frink Dairy Co., 274 U.S. 445, 458 (1927); see also Robert C. Post, Reconceptualizing Vagueness: Legal Rules and Social Orders, 82 CAL. L. REV. 491, 499-503 (1994).
194 See Frost Trucking Co. v. Railroad Comm’n, 271 U.S. 583, 592-94 (1926) (holding that a state may not affix to a private carrier’s privilege of using its highways the unconstitutional condition that the carrier shall assume against its will the burdens and duties of a common carrier).
sis.\textsuperscript{195} Its category of "great temporary public exigencies"\textsuperscript{196} is highly analogous to the clear and present danger test.\textsuperscript{197}

Modern constitutional law, however, employs these doctrinal techniques to protect a realm of autonomous speakers whose constitutional value is articulated within a fully-developed jurisprudential theory of the importance and scope of public discourse. The Taft Court, in contrast, never articulated why constitutional value ought to attach to the expectations of everyday life. Even on the assumption that democratic citizens could not entirely be subject to managerial control, the Taft Court nevertheless lacked any theory capable of clarifying when particular aspects of everyday experience should justifiably be given constitutional shelter from that control.

From this perspective, it is especially noteworthy that the substantive due process decisions of the Taft Court extended constitutional protections to remarkably diffuse and undifferentiated aspects of ordinary experience, far exceeding merely economic transactions. This is particularly evident in \textit{Meyer v. Nebraska}.\textsuperscript{198} Decided a week before \textit{Wolff Packing}, \textit{Meyer} struck down a

\textsuperscript{195} In his comprehensive summary of the Court's doctrine, Thomas Reed Powell notes the many cases in which the Court refused to allow state regulations to "extend beyond the area of actual evil in order to make more certain that no evil will escape":

A flat prohibition of price discrimination in purchases of milk cannot be sustained as a means of preventing monopoly and restraint of trade, since such practices do not necessarily tend to monopoly and it is feasible to confine the prohibition to discrimination in aid of such ultimate vice. [Fairmont Creamery Co. v. Minnesota, 274 U.S. 1, 9 (1927).] Maximum weights cannot be set for loaves of bread as a means of preventing fraud against customers who mistake a large small loaf for a small large one. [Burns Baking Co. v. Bryan, 264 U.S. 504, 517 (1924).] The state cannot exclude all shoddy from a...comfortable in order to ensure that no unsterilized shoddy finds its way in. [Weaver v. Palmer Brothers Co., 270 U.S. 402, 415 (1926).]

\textsuperscript{196} See Wolff Packing Co. v. Court of Indus. Relations, 262 U.S. 552, 542 (1925).

\textsuperscript{197} For an example of Brandeis' use of the clear and present test in the context of an economic substantive due process decision, see \textit{supra} note 159.

Nebraska statute prohibiting the teaching of foreign languages before eighth grade and the offering of private school instruction “in any language other than . . . English.” At least twenty-three States had enacted language restrictions of this kind, restrictions that were commonly regarded as springing “out of a war hysteria.” As Barbara Woodhouse has pointed out, however, these restrictions were also “supported by many who described themselves as progressive,” in part because of their vision of Americanization as a vehicle for the creation of “one common people, united for the common good in a just society, free from divisions of class and race.” Indeed, the Nebraska Supreme Court, in upholding the state’s statute, had stressed that the legislation was in good progressive fashion not “class legis-

199 262 U.S. at 397. The case was decided simultaneously with Bartels v. Iowa, 262 U.S. 404 (1923), in which the Court struck down an Iowa statute similar to Nebraska’s, and an Ohio statute specifically prohibiting the teaching of German before the eighth grade. In a letter to a friend, Chief Justice Taft described what he regarded as the exact parameters of the decision in Meyer, which, in Taft’s words, held that the liberty, secured by the 14th Amendment to the Federal Constitution against State legislation, makes invalid a State law, which forbids a private school and a private school teacher from teaching German. It does not prevent the Legislature from excluding German or any other subject from the curriculum of a public school, and it does not prevent the Legislature from requiring the study of English and the study of the fundamental branches in English in every private school, but it does prevent the Legislature from forbidding a parent to employ a private school or private school teacher to teach his child any subject matter which is not itself vicious.

Letter from William Howard Taft to George L. Fox (July 31, 1923) (Taft Papers, Reel 255).


201 The Week, 35 NEW REPUBLIC 54, 57 (June 13, 1923). On the close relationship between these statutes and World War I, see Ross, supra note 200, at 127-34; Niel M. Johnson, The Missouri Synod Lutherans and the War Against the German Language, 1917-1923, 56 NEB. HIST. 137-56 (1975); Carroll Engelhardt, Compulsory Education in Iowa, 1872-1919, 49 ANNALS OF IOWA 58, 75 (Summer/Fall 1987); Carl Zollmann, Parental Rights and the Fourteenth Amendment, 7 MARQ. L. REV. 53, 53 (1923); Note, Foreign Languages in Private Schools—Unconstitutionality of Statutes, 9 IOWA L. BULL. 123, 124 (1924); Editorial, 116 NATION 681, 682 (June 13, 1923). The decision of the Iowa Supreme Court upholding the statute struck down in Bartels made this connection explicit:

The advent of the great World War revealed a situation which must have appealed very strongly to the Legislature as justifying the enactment of this statute. Men called to the colors were found to be in some instances not sufficiently familiar with the English language to understand military . . . orders. It was to meet this situation, to encourage the more complete assimilation of all foreigners into our American life, to expedite the full Americanization of all our citizens that the Legislature deemed this statute for the best interests of the state.


202 Woodhouse, supra note 198, at 1003.

203 Id. at 1017.
lation, discriminating against some and favoring others,” but was "necessary for the public good," and that in such cases "individual rights must yield to the general public benefit."

The Taft Court set against this claim of public good “the liberty guaranteed . . . by the 14th Amendment.” In a remarkable opinion for seven members of the Court, Justice McReynolds explained:

While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration. Without doubt it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. . . . The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive, but is subject to supervision by the courts.

The passage is rich and allusive. It perfectly captures the same realm of everyday life as that evoked by Butler in Jay Burns Baking Co. It specifically posits judicial review in order to safeguard that realm from unjustifiable interference. And it resolutely refuses to confine that realm to mere matters of economic exchange. This refusal is particularly striking because the

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204 Nebraska Dist. Of Evangelical Lutheran Synod of Missouri v. McKelvie, 187 N.W. 927, 928-29 (Neb. 1922) (quoting Barbier v. Connolly, 113 U.S. 27, 31 (1885)).
205 Id. at 929 (quoting Wenham v. State, 91 N.W. 421, 424 (Neb. 1902)).
206 Id. at 928-29.
208 Justices Holmes and Sutherland dissented.
209 Meyer, 262 U.S. at 399-400.
210 At oral argument, Taft put the problem in this way:
Here are two conflicting principles—I hope they are not conflicting; but at any rate, they seem to be currents flowing in different directions—here is the regulatory power of the State, to require proper education among its people, to protect itself, and to protect all the people in the education of all. . . . And then, on the other hand, is this freedom, this liberty.

21 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 779-80 (Philip B. Kurland & Gerhard Casper eds., 1975). Note that for Taft the crux of the matter was plainly not whether the state’s interest was class-based or factional, but whether a genuine public interest was sufficient to justify intrusion into a constitutionally protected realm.
passage's assertions are supported only by the citation of a long string of substantive due process decisions dealing with specifically economic regulation, ranging from *Lochner* itself to *Adkins v. Children's Hospital*.\(^{211}\) Evidently the aspects of the lifeworld regarded by the Taft Court as constitutionally valuable were not exhausted by matters of property or economic exchange.\(^{212}\)

This suggests that any account of substantive due process in the Taft Court era must explain more than attitudes toward the marketplace or property. It must also explain constitutional protections that radiated out into completely unrelated areas of everyday experience. Some contemporary substantive due process decisions offer the outline of such an account, for they seek to safeguard "from unjustified interference by the State" those aspects of "the culture and traditions of the Nation" deemed necessary for "the ability independently to define one's identity that is central to any concept of liberty."\(^{213}\) Underlying this aspiration lies the complex notion that citizens acquire "selves" through their socialization and participation in customary and traditional practices and norms.\(^{214}\)

Although these practices appear to us as merely the stuff of everyday life, as merely the tacit assumptions of a "lifeworld," they are from a sociological point of view prerequisite for endowing citizens with their very identities. As Holmes was fond of "eternally repeating: ... man is like all other growing things and when he has grown in a certain crevice for say twenty years you can't straighten him out without attacking his life."\(^{215}\) Because our customs make us into what we are, the very independence from state mana-

\(^{211}\) 261 U.S. 525 (1923).

\(^{212}\) This conclusion is confirmed by the casual way in which the pre-New Deal Court would cite *Meyer* in support of substantive due process decisions protecting economic freedoms. See, e.g., Louis K. Liggett Co. v. Baldridge, 278 U.S. 105, 113-14 (1928); Seattle Trust Co. v. Roberge, 278 U.S. 116, 120-23 (1928); Wolff Packing Co. v. Court of Indus. Relations, 267 U.S. 552, 562-69 (1925); Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 513 (1924), and, conversely, the way in which the Court would cite economic decisions in support of extending protections to freedoms that we would now regard as civil liberties. See, e.g., *Near v. Minnesota*, 283 U.S. 697, 707-08 (1931); *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 527 (1926). As a general matter, the pre-New Deal Court did not draw sharp lines of distinction between "liberty" and "property" in adjudication under the Due Process Clause. See, e.g., *Adair v. United States*, 208 U.S. 161, 173-75 (1908); Coppedge v. Kansas, 236 U.S. 1, 14 (1914).


gerial control required by constitutional democracy can in fact be understood as embodied in specific historical social practices.

This suggests that Meyer can be read as extending "fundamental rights" to the kinds of cultural practices deemed necessary to sustain the individuality presupposed by democracy. In Meyer this distinctly political apprehension of liberty lies just beneath the surface of the opinion, but two years later McReynolds would make it explicit in Pierce v. Society of Sisters, a unanimous decision using Meyer to strike down an Oregon law prohibiting private school education:

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Modern constitutional law continues to celebrate cases like Meyer and Pierce as "the true parents of the privacy doctrine." This is because the value of the traditions protected by these cases remains apparent to us. Like the Taft Court, we also believe that comprehensive state control over the family would somehow be incompatible with the maintenance of persons who would be independent in the ways required by our constitutional tradi-

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217 Thus McReynolds writes:

In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and entrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and state were wholly different from those upon which our institutions rest.

Id. at 402. Of course in this regard McReynolds was drawing on a rich judicial tradition that regarded "the home [a]s the nursery of the family, and the family [a]s the nursery of the state." Williamson v. Liverpool, L. & G. Ins. Co., 105 F. 31, 36 (C.C.D. Mo. 1900).
218 268 U.S. 510 (1925).
219 Id. at 535. Taft wrote to a friend regarding Pierce: "We had no difficulty after we had decided the Nebraska language case. I can tell you sometime about how we made the Court unanimous." Letter from Taft to Charles P. Hillis, (June 9, 1925) (Taft Papers, Reel 274). Cf. Letter from George Sutherland to William H. Church (June 8, 1925) (Sutherland Papers) ("The decision of our Court in the Oregon School law case . . . was the only possible one. There was never any division of sentiment in the Court from the beginning.").
221 See Moore v. City of East Cleveland, 431 U.S. 494, 500-03 & n.8 (1976) (opinion of Powell, J.).
tions. But understanding the historical phenomenon of Lochnerism requires us to appreciate that the pre-New Deal Court valued the “culture and traditions” of the marketplace in this same way. The Court deemed economic liberty as necessary for the sustenance of independent persons, and hence as a constitutionally essential dimension of the national experience. It regarded “the closest control” by the state of individual economic decisions as inconsistent with “the more independent and responsible status of citizens and property owners.” To deny a person the “property which is the fruit and badge of his liberty,” asserted Sutherland, evoking the grand American tradition of free-labor ideology, “is to . . . leave him a slave.” That is why the lower court opinion in Adkins could describe compulsory wage regulation in almost the identical language that McReynolds would later use in Pierce: “Take from the citizen the right to freely contract and sell his labor for the highest wage which his individual skill and efficiency will com-

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222 Even Holmes was quite willing to acknowledge the connection between property and identity:

A man who has lived with a belief, however uncritically accepted, for thirty years, instinctively rejects a new truth no matter how deeply founded in reason and fact if it threatens the existing structure. He fights for his life—and that is why reason has so little of the power that we expect it to have. One of my old chestnuts is that property, friendship and truth have a common root in time. Title by prescription is the most philosophically grounded of any.

Letter from Holmes to The Viscount Kentaro Kaneko (Aug. 19, 1925) (Holmes Papers). For Holmes, “We end with an arbitrary can’t help.” Letter from Holmes to Harold Laski (Feb. 6, 1925), in 2 HOMES-LASKI LETTERS, supra note 171, at 706.

223 See Charles A. Reich, The New Property, 73 YALE L.J. 733, 771-74 (1964) (“Property performs the function of maintaining independence, dignity, and pluralism in society by creating zones within which the majority has to yield to the owner.”). For a good discussion of the history of the moral values that American have attached to economic liberty, see Harry N. Scheiber, Economic Liberty and the Constitution, in ESSAYS IN THE HISTORY OF LIBERTY: SEAVER INSTITUTE LECTURES AT THE HUNTINGTON LIBRARY 75-99 (1988).

224 Shaw v. Gibson-Zahniser Oil Corp., 276 U.S. 575, 579 (1928). For a modern restatement of this point, see Cass R. Sunstein, On Property and Constitutionalism, in CONSTITUTIONALISM, IDENTITY, DIFFERENCE AND LEGITIMACY 389-93 (Michael Rosenfeld ed., 1994) (“A constitutional system that respects private property should be regarded not as an effort to oppose liberal rights to collective self-government, but instead as a way of fortifying democratic processes.”).


226 Sutherland, supra note 163, at 278. Sutherland believed that “The more democratic a people is, the more it is necessary that the individual be strong and his property sacred.” George Sutherland, Private Rights and Public Duties, in REPORT OF THE FORTIETH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 197, 213 (1917).
mand, and the laborer would be reduced to an automaton—a mere creature of the state.”  

There is a puzzle, however, at the heart of this concept of autonomous citizens. At the very moment that substantive due process renders persons as autonomous with respect to the state, it also renders them as embedded within the cultural practices and traditions that are the true objects of the doctrine's protection. Thus although *Meyer* was received as marking "the recovery of American liberty from the vandalism of the non-combatants who went mad during the war," and although *Pierce* was celebrated as “a decision against tyranny,” the cultural traditions secured from government interference by these cases might in actuality be anything but liberal. McReynold's valorization of the parent's independence from the state effaces the potentially oppressive dependence of the child upon the parent.

That dependence is of course legally constructed. It can generally be said that social practices are themselves dependent upon and responsive to state legal interventions. At the time of *Meyer*, for example, the institution of the family was saturated with legal regulation, and this was fully appreciated by the Court. That is why McReynolds in *Meyer* concludes his praise of the forms of everyday life protected by the 14th Amendment with the pronouncement that it comprehends the catch-all right "to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

In cases like *Meyer* and *Pierce*, therefore, the law is characterized in two quite distinct ways. On the one hand, legal “privileges” defining the family are figured as sustaining social practices that are pre-political and that are necessary for the development of individual autonomy. On the other hand, the Nebraska and Oregon statutes struck down by the opinions are imagined

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227 Children's Hosp. v. Adkins, 284 F. 613, 623 (App. D.C. 1921), aff'd, 261 U.S. 525 (1923) (emphasis added); see also Dodge v. Woolsey, 59 U.S. (18 How.) 331, 375 (1855) (Campbell, J. dissenting) ("Individuals are not the creatures of the State, but constitute it. They come into society with rights, which cannot be invaded without injustice.").

228 Editorial, *A Decision for Liberty*, WORLD, June 6, 1923, at 12; see also *The Week*, supra note 201, at 57 ("The acts prohibiting the teaching of foreign languages sprang out of a war hysteria that did us small credit."); Editorial, NEW REPUBLIC, supra note 201, at 57; Editorial, NATION, supra note 201, at 682; Editorial, *The Right to Learn Foreign Tongues*, N.Y. TIMES, June 6, 1923, at 20; Editorial, *Languages in Schools*, CHI. DAILY TRIB., June 6, 1923, at 8.

229 *Death of the Oregon School Law*, 85 LITERARY DIG. 1, 1 (June 13, 1925).


232 For an excellent discussion of how the legal constitution of such practices have been protected under the rubric of privacy, see Reva B. Siegel, *The Rule of Love: Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2118-19 (1996).
as controlling persons from the outside, as dictating to them in ways that inhibit the development of their independent personhood. We can perceive in this distinction the contrast between a law that aspires to be internalized into the identity of its subjects and thereby to create normalized agents, and a law that aspires to control behavior to achieve explicit purposes, and thereby to objectify persons.233

Following American legal tradition, which viewed common law as "founded on long and general custom"234 and as reflecting the teachings of "experience,"235 the Taft Court generally associated common law with the first aspiration.236 Hence the Court was prepared to explain common law negligence as enforcing "a standard of human conduct which all are reasonably charged with knowing," precisely because it regarded the standard as al-

233 For a discussion of this distinction, see POST, supra note 157, at 10-11.
235 See id. at 348; see also CHARLES B. GOODRICH, THE SCIENCE OF GOVERNMENT AS EXHIBITED IN THE INSTITUTIONS OF THE UNITED STATES OF AMERICA 239 (1853); ZEPHANIAH SWIFT, I SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 40 (Windham Press 1795).

Perhaps nothing has contributed so much to create and foster hostility to courts and law and constitutions as this conception of the courts as guardians of individual natural rights against the state and against society, ... of constitutions as declaratory of common-law principles, which are also natural-law principles, anterior to the state and of superior validity to enactments by the authority of the state, having for their purpose to guarantee and maintain natural rights of individuals against the government and all its agencies.

On the account I am developing, however, common law principles do not so much stand for natural law principles of individualism, as they embody the social practices through which persons acquire and sustain their individuality. The difference can plainly be seen in a decision like Butler v. Perry, 240 U.S. 328 (1916), in which a unanimous Court, speaking through Justice McReynolds, upheld a Florida statute requiring males between twenty-one and forty-five years of age "to work on the roads and bridges of the several counties for six days" a year. Id. at 329. McReynolds noted that conscription for road work was a traditional form of tax and that the statute "introduced no novel doctrine." Id. at 333. "[T]o require work on public roads has never been regarded as a deprivation of either liberty or property." Id. Because the Fourteenth Amendment was intended to preserve and protect fundamental rights long recognized under the common law," there was no violation of due process of law. Id. Needless to say, this reasoning is sharply inconsistent with any constitutional view of the common law as embodying a philosophy of "natural rights of individuals against the government and all its agencies." Id.
ready socialized within the identity of "the average man." In contrast, the "scientific experiments" celebrated by Brandeis in his *Jay Burns Baking Co.* dissent were decidedly foreign to the everyday life of the ordinary person. Invoking the authority of a "science of administration and management, which rests on research, planning and cooperative control," law based upon such bureaucratic expertise was seen to exemplify the aspiration to achieve explicit ends regardless of the identities of persons.

Although law of this kind had underwritten the vast expansion of the American administrative state, culminating in the organizational triumphs of World War I, it was nevertheless viewed with suspicion. Thus Charles Evans Hughes, speaking in 1924, could contrast the common law, which he regarded as "springing from custom" and as embodying "the experience of free men," to "those insidious encroachments upon liberty which take the form of an uncontrolled administrative authority—the modern guise of an ancient tyranny, not the more welcome to intelligent free men because it may bear the label of democracy." Hughes conceded that it was "doubtless impossible to cope with the evils incident to the complexities of our modern life . . . by the means which were adapted to the simpler practices of an earlier day," but he insisted that "there is no panacea for modern ills in bureaucracy." He therefore celebrated the constraints imposed upon state power by the doctrines of substantive due process, characterizing them as

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240 President Hughes Responds for the Association, 10 A.B.A. J. 567, 569 (1924).
241 Id. Hughes continued: "There is still the need to recognize the ancient right—and it is the most precious right of democracy—the right to be governed by law and not by officials—the right to reasonable, definite and proclaimed standards which the citizens can invoke against both malevolence and caprice. We of the common law respect authority, but it is the authority of the legal order. We respect those who in station high or humble execute the law—because it is our law." Id. Notice that in this formulation the legal order itself acquires legitimacy by embodying experience that is shared and that therefore creates, as James Wilson asserted, a sense of "consent" and authorship. *See Works of Wilson supra*, note 234. Legal requirements coming from outside that experience are figurred as willful impositions and as therefore potentially arbitrary. Notably absent from this formulation is any notion of the shared authorship of a common democratic will. With the possible exception of Brandeis' concurring opinion in *Whitney v. California*, 274 U.S. 357 (1927), this notion does not appear in the jurisprudence of the Taft Court. Its development will await the First Amendment opinions of the next decade. On the theoretical and sociological priority of community norms to both democratic legitimacy and judicial review, see Robert Post, *Democracy, Popular Sovereignty, and Judicial Review*, 86 Cal. L. Rev. 429, 437-42 (1998).
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“an education in reasonableness after the essential method of the common law.”

To speak exactly, therefore, the individual autonomy celebrated by substantive due process was less a matter of independence from state legal interventions, than of independence from what the Court was prepared to characterize as legislative objectification. And while the Taft Court was certainly willing in appropriate circumstances to subordinate the normalized expectations of the common law to the managerial imperatives of statutory policy, cases like *Meyer* and *Pierce* indicate that the Taft Court would draw the line when it understood managerial dictation to impair social practices that the Court regarded as essential to the construction of independent personhood.

Courts applying the doctrine of substantive due process were thus required to decide both whether a given law was normalizing or objectifying and whether a given social practice was necessary for the maintenance of the kind of individual autonomy required by democracy. The doctrine also demanded yet another inquiry. The pre-New Deal Court was willing to countenance the regulation of social practices, even practices regarded as necessary for personhood, so long as regulation sprang from “some purpose within the competency of the state to effect,” as McReynolds put it in his opinion in *Meyer*. While the Court was not prepared to approve regulations whose very purpose was to alter essential attributes of such practices, it would typically uphold legislation designed to prevent recognized harms. It is for this reason that, in *Meyer*, McReynolds went out of his way to stress that “heretofore” the teaching of foreign languages “has been commonly looked upon as helpful and desirable.” And it is why, in *Pierce*, McReynolds carefully characterized private schooling as “a kind of undertaking not inherently harmful, but long regarded as useful and meritorious.”

The implication of this approach is that substantive due process adjudication was caught in a perennial effort to distinguish between “harmful” aspects of social practices and aspects deemed intrinsic to the identity of the practices themselves. Because social practices are usually sites of contention, in which there are disputes concerning what is essential to a practice,

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242 *President Hughes*, *supra* note 240, at 569.


244 *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923). Note in this regard Taft's careful qualification that *Meyer* only prevented “the Legislature from forbidding a parent to employ a private school or private school teacher to teach his child any subject matter which is not itself vicious.” Letter from Taft to George L. Fox, *supra* note 199 (emphasis added).

substantive due process doctrine necessarily embroiled the courts in ongoing controversies about the nature of social practices.

This consequence is particularly important in understanding the ambiguous nature of Lochnerism in the pre-New Deal era. By insulating economic arrangements from state regulation, the Court simultaneously figured citizens as independent from the state and as embedded within marketplace practices (that were themselves constituted by legal interventions). The Court knew that these practices, like most social traditions, unevenly distributed power and resources, and it was explicitly prepared to accept "those inequalities that are but the normal and inevitable result" of "the normal exercise of personal liberty and property rights." From the Court's perspective, regulation serving no purpose other than to eliminate these inequalities was unacceptable because it would strike at the essential character of the market.

But the Court was also prepared to approve regulations of marketplace behavior that were for the purpose of preventing harms to "health, safety, morals, or public welfare." It was even willing to sanction the regulation of marketplace practices that could be characterized as "selfish." The Court was therefore constantly forced to distinguish between regulations aimed at effects deemed intrinsic to the marketplace, at the "normal and inevitable" consequences of its essential practices, from regulations aimed at effects that were not regarded as constitutive attributes of the marketplace. As is evident in *Jay Burns Baking Co.*, the Court was especially inclined to characterize "customary" or "ordinary" economic practices as essential, and hence as meriting constitutional protection.

This stance is perfectly captured in Justice McReynolds' opinion in *Fairmont Creamery Co. v. Minnesota*, which struck down a statute forbidding purchasers of dairy products from paying different prices in different geographical locations:

The real question comes to this: May the state, in order to prevent some strong buyers of cream from doing things which may tend to monopoly, inhibit the plaintiff in error from carrying on its business in the usual way heretofore regarded as both moral and beneficial to the public and not shown now to be accompanied by evil results as ordinary incidents? ... Looking through form to substance, it clearly and unmistakably infringes private rights whose exercise does not ordinarily produce evil consequences, but the reverse.

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246 Coppage v. Kansas, 236 U.S. 1, 17-18 (1915).
247 Id.
248 Leonard v. Earle, 279 U.S. 392, 396 (1929). And the Taft Court was willing to rely on the judgment "of experts" in order to sustain such regulation. Id. at 393.
249 274 U.S. 1 (1927).
250 Id. at 8.
The passage exemplifies the jurisprudential structure of Lochnerism. It demonstrates how thoroughly the doctrine entangled the Court in moral evaluations of particular transactions within the marketplace. It well illustrates the deeply conservative bias enacted by such evaluations because of their acceptance of the “usual” and the “ordinary” as a baseline for constitutional adjudication. The difficulty with this baseline was not merely its intrinsic hostility to innovation, but also its precarious instability within the context of a rapidly changing economy. If, as Pascal once remarked, “[c]ustom is the whole of equity, for the sole reason that it is accepted,” the normative force of custom is very much in tension with the pace of twentieth-century economic transformation. In contrast to scientific expertise, which may offer a flexible and useful instrument for responding to and mastering unsettling social change, the very aspiration to conserve social practices through moral judgment is in such circumstances rendered uncertain.

Thus, for example, when the Court initiated the revolution against Lochnerism by overruling the important Taft Court precedent of Adkins v. Children’s Hospital, which had struck down a minimum wage law for women, the Court appealed to the “common knowledge through the length and breadth of the land” of hardships caused by the “depression” and by “unconscionable employers,” and it concluded that “the community may direct its law-making power to correct the abuse which springs from their selfish disregard of the public interest.” But it is precisely the point that in 1923 in Adkins the Taft Court had not regarded wage inequities as selfish, but had instead been concerned to uphold “[t]he moral requirement implicit in every contract of employment, viz. that the amount to be paid and the service to be rendered shall bear to each other some relation of just equivalence.”

251 PASCAL’S PENSEES 72 (Martin Turnell trans., 1962). Pascal continues: “That is the mystic foundation of its authority. Anyone who tries to trace it back to its first principles will destroy it.” Id.
252 261 U.S. 525 (1923).
253 West Coast Hotel Co. v. Parrish, 300 U.S. 379, 399-400 (1937) (emphasis added).
254 Adkins v. Children’s Hosp., 261 U.S. at 558 (emphasis added). “To sustain the individual freedom of action contemplated by the Constitution,” wrote Sutherland, “is not to strike down the common good, but to exalt it; for surely the good of society as a whole cannot be better served than by the preservation against arbitrary restraint of the liberties of its constituent members.” Id. at 561. The political implications of this cultural understanding are made characteristically explicit by the lower court opinion in the case: “The tendency of the times to socialize property rights under the subterfuge of police regulations is dangerous, and if continued will prove destructive of our free institutions. . . . [W]hen the citizen is deprived of the free use and enjoyment of his property, anarchy and revolution follow, and life and liberty are without protection.” Children’s Hosp. v. Adkins, 284 F. 613, 622 (App. D.C. 1922).
Ultimately, however, the fate of Lochnerism was sealed not because of changing moral judgments about marketplace practices, but rather because the dominant opinion in the country came to regard such judgments as simply irrelevant. We do not now ordinarily see everyday economic transactions either as "normal" or as "selfish"; instead we have as a general matter simply ceased to understand them as morally significant sites for the enactment of independence from state control. To the extent such transactions are now routinely regulated, it is because they are not understood to bear on the creation of the autonomous self required by democratic citizenship.

This is in fact the way that the Taft Court mostly regarded property categorized as affected with a public interest. The "intimate public regulation" imposed on such property was largely upheld without triggering concerns about safeguarding individual independence. What caused the Court to regard "property affected with a public interest" in this way is perhaps most strikingly revealed in a decision that, paradoxically, addressed private property. In *Euclid v. Ambler Realty Co.*, Justice Sutherland authored for the Court a strongly forward-looking opinion that for the first time upheld a comprehensive urban zoning plan.

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256 I qualify this statement because by the end of the decade the Taft Court had begun to issue highly controversial decisions constricting rate regulation with respect to public utilities otherwise affected with a public interest. The premise of these decisions was that "the property of a public utility, although devoted to the public service and impressed with a public interest, is still private property." United Ry. & Elec. Co. v. West, 280 U.S. 234, 249 (1930). As the Court moved progressively to the right, this theme became more pronounced. See, e.g., Delaware, Lackawanna & W. R.R. v. Morristown, 276 U.S. 182, 193-94 (1928); see also Letter from Van Devanter to Taft, supra note 131.


259 Euclid, 272 U.S. at 388. Justices Van Devanter, McReynolds, and Butler dissented without opinion. Alfred McCormick, Stone's law clerk that Term, has written that "Justice Sutherland . . . was writing an opinion for the majority in Village of Euclid v. Ambler Realty Co., holding the zoning ordinance unconstitutional, when talks with his dissenting brethren (principally Stone, I believe) shook his convictions and led him to request a reargument, after which he changed his mind and the ordinance was upheld." Alfred McCormick, *A Law Clerk's Recollections*, 46 COLUM. L. REV. 710, 712 (1946).
Sutherland could have upheld zoning by branding incompatible land usages as "nuisances." Such a common law approach would have been compatible with Lochnerism, because it would have preserved the authority of the Court to pass moral judgment on particular market transactions. But this approach would also have undermined the capacity of zoning ordinances to regulate usages that were otherwise "of an innocent character." Instead of maintaining the fiction of independent moral evaluation, therefore, Sutherland boldly invoked the "comprehensive reports" of "commissions and experts" to portray urban land as subject to "complex conditions" of interdependence, "analogous to those which justify traffic regulations." He therefore concluded that the regulation of urban land could not be constitutionally evaluated by an assessment "of the thing considered apart, but by considering it in connection with the circumstances and the locality." An apartment house "which in a different environment would be not only entirely unobjectionable but highly desirable," could constitutionally be prohibited because of its mere incompatibility with the managerially imposed objective of achieving a neighborhood of "detached residences."
By regarding land usage in this morally neutral way, *Euclid* became an important charter for “social planning,” as distinct from the mere common law regulation of nuisances. Commentators found it “difficult to believe that it is the same Mr. Justice Sutherland who wrote the majority opinions in” *Tyson* and *Euclid*. Yet the social planning authorized by *Euclid* was founded on Sutherland’s appreciation of the systemic interdependence of urban land usages. Just as this same interdependence rendered the values of individual initiative and independence meaningless within the context of automobile traffic, so it rendered these values meaningless within the context of urban land.

This same appreciation of complex interdependence importantly underlay the Court’s understanding of “property affected with a public interest.” In *Dayton-Goose*, for example, the Court clearly grounded its decision on the systemic interdependence of railroad property, which for this reason required administration as “a unit.” And when McKenna held the business of insurance to be “affected with the public interest,” he explicitly contrasted the “interdependent” nature of “contracts of insurance” with the “independent and individual” transactions of “the ordinary businesses of the commercial world,” which “terminate[e] in their effect with the instances.” By contrast with such interdependent transactions, the Court manifestly believed that the decisions of private persons to set the prices of theatre tickets, employment evident sympathy for the managerial goal of exercising public control of labor unrest was not sufficient for him to impose managerial controls on labor in *Wolff Packing*.

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$267$ See ROBERT AVERILL WALKER, THE PLANNING FUNCTION IN URBAN GOVERNMENT 77-80 (1941). For a contrary view, see Charles M. Haar, *Reflections on Euclid: Social Contract and Private Purpose*, in *ZONING*, *supra* note 258, at 336 (“The Court seemed to accept fully the thrust of Bettman’s argument in his brief that zoning is a form of nuisance cataloguing, a legislative declaration and codification, as it were, of the common law rules about the compatibilities and incompatibilities of land uses.”). On the distinction between the nuisance and “social engineering” approaches in the briefing of the case, see Garrett Power, *Advocates at Cross-Purposes: The Briefs on Behalf of Zoning in the Supreme Court*, 2 J. SUP. CT. HIST. 79 (1997).

$268$ Note, *Constitutional Regulation of Fees of Employment Agencies*, 14 CORNELL L. Q. 75, 80 n.36 (1928); see also Robert E. Cushman, *Constitutional Law in 1926-1927*, 22 AM. POL. SCI. REV. 70, 94 (Feb. 1928) (“The opinion of Mr. Justice Sutherland embodies a most liberal attitude toward the states’ police power. In fact, it is hard to realize that he is the same justice who wrote the majority opinions in *Tyson* and . . . *Adkins*.”).


agencies, or gasoline were "independent and individual." This perceived independence was in fact an essential and defining characteristic of the "ordinary businesses" which the Court resolutely refused to clothe with a public interest.

To a degree that would have been incomprehensible only seventy years ago, we have since the great depression come to view economic transactions in the way that Sutherland viewed urban land in *Euclid*. And in that difference we can most precisely measure the gulf that separates us from the Lochnerism of the Taft Court. The difficulty with Lochnerism is therefore not, as has sometimes been asserted, that it assumes a natural "baseline" by which the independence of the citizen from the state is to be assessed. Some such baseline is implicit in all due process adjudication that seeks to safeguard a private realm from unjustified state intrusion. The difficulty lies instead in the particular practices in which the pre-New Deal Court sought to locate morally significant sources of the self. That is a matter of substantive political assessment, neither more nor less. Our difference from *Lochner*, therefore, turns less on defining appropriate judicial roles, than it does on the constitutional meanings we inscribe onto the national map of our social and economic experience.

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