An Empirical Appraisal of the Liberty of Contract

"I got my first job when I was nine. Worked at a sheet metal factory.
In two weeks, I was running the floor.
Child labor laws are ruining this country."

-Ron Swanson

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Abstract

From approximately 1895-1937, the US Supreme Court interpreted the Constitution's Due Process clauses to implicitly protect a "Liberty of Contract"—the right of individuals to make contracts without arbitrary government interference. The Court relied on this principle to invalidate a variety of regulatory measures, including maximum hours and minimum wage laws. The Court abandoned its enforcement of this doctrine in 1937, and today, the Liberty of Contract is widely condemned by legal thinkers as right-wing judicial activism. Supposedly, the Court's protection of contractual freedom imposed a strict *laissez-faire* ideology on the country, interfered with Progressive reform legislation, and harmed public welfare—especially that of workers, consumers, and the poor. But such claims are often made without empirical support. My aim here is to evaluate, based on the surviving data and evidence, the practical impacts of the Liberty of Contract by examining a) the extent to which the doctrine interfered with policymakers' efforts at economic regulation, and b) the economic and social effects of notable decisions in which the Court invalidated legislation on Liberty-of-Contract grounds. I conclude a) that the Court was quite deferential to legislators in Liberty-of-Contract cases, though its decisions to invoke the doctrine in invalidating laws were often arbitrary; and b) that the societal effects of such invalidations were often either neutral or positive.

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I. Introduction

The US Constitution's Due Process clauses prohibit state or federal authorities from "depriv[ing] any person of life, liberty, or property, without due process of law." For more than a century, the US Supreme Court has interpreted these provisions to guarantee individuals not only procedural protections against punitive government action, but also certain basic liberties that may not be abridged regardless of what procedures are followed beforehand, a principle known as Substantive Due Process.[1] From the late 19th Century until the mid-1930s, the Court relied on Substantive Due Process primarily to invalidate legislation infringing upon the economic freedom that it considered implicit in the protections for "liberty" and "property." Perhaps the most controversial component of that freedom was the "Liberty of Contract"—the right of individuals to enter into and negotiate the terms of contracts without arbitrary government interference, a right subject to restriction only when necessary to protect public safety, health, or morals.[2] This doctrine came under fire from political Progressives, who accused the Court of merely pursuing its own conservative policy objectives when it relied on the Liberty of Contract to strike down various popular regulatory measures, including laws limiting hours of work, establishing minimum wages, banning yellow-dog contracts, prohibiting private employment agencies from soliciting fees from jobseekers, restricting entry into certain industries, and requiring arbitration of labor disputes.[3] This period of Supreme Court history has been dubbed the "*Lochner* Era," a reference to the infamous 1905 decision of *Lochner v. New York*, now

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[1] See *Hurtado v. California*, 110 U.S. 516, 532 (1884).

[2] Not to be confused with the Constitution's Contract Clause, Art. I, Sec. 10, prohibiting states from enacting laws "impairing the Obligation of Contracts," which forbids only the impairment of contracts that have already been signed, not the regulation of future contracts. *Ogden v. Saunders*, 25 U.S. 213 (1827).

[3] *Lochner v. New York*, 198 US 45 (1905); *Adkins v. Children's Hospital*, 261 U.S. 525 (1923); *Coppage v. Kansas*, 236 U.S. 1 (1915); *Adams v. Tanner*, 244 U.S. 590 (1917); *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932); *Chas. Wolff Packing Co. v. Court of Ind. Relations*, 262 U.S. 522 (1925).

considered the high watermark of Liberty-of-Contract jurisprudence and "likely the most disreputable case in modern constitutional discourse" (Bernstein 2011, 1).

The dispute leading up to the *Lochner* decision arose in 1902, when a Utica, New York bakery owner named Joseph Lochner was arrested and convicted of violating a provision of the state's 1895 Bakeshop Act that prohibited requiring or permitting bakery employees to work more than 10 hours in a day or 60 hours in a week. Lochner challenged the law on appeal, arguing that it violated the Liberty of Contract, while New York defended the measure as a reasonable public health regulation. After his loss in New York's highest tribunal, Lochner appealed to the US Supreme Court, who, in a 5-4 decision, sided with Lochner and declared the contested provision unconstitutional. Justice Rufus Peckham's majority opinion recognized that while the Liberty of Contract could be restricted in order to protect "safety, health, morals and general welfare," the hours limitation was merely an "unreasonable, unnecessary and arbitrary interference" with individual liberty; the Court reasoned that since "almost all occupations more or less affect the health, […] [t]here must be more than the […] possible existence of some small amount of unhealthiness to warrant legislative interference with liberty," or else all occupations would be "at the mercy of legislative majorities."[4] Citing occupational health statistics, the Court concluded that "the trade of a baker, in and of itself, is not an unhealthy one" to any significant degree, and that while the state was free to directly regulate unsanitary conditions in bakeries, the hours restriction had "no such direct relation to, and no such substantial effect upon, the health of the employee" to justify upholding it as a genuine "health law."[5]

[4] *Lochner v. New York*, 198 US 45, 53-61 (1905). *Lochner* was arguably overruled *sub silentio* in *Bunting v. Oregon*, 243 U.S. 426 (1917), but the reversal did not constitute a repudiation of Liberty of Contract as a general principle.
[5] Ibid., 59, 64.

Litigants before the Supreme Court continued to challenge legislation on Liberty-of-Contract grounds sporadically over the next three decades, though with only occasional success. Still, the doctrine remained controversial, and, facing intense political pressure from the second Roosevelt Administration, the Court eventually abandoned the Liberty of Contract altogether, announcing in a 1937 decision that from then on, it would defer virtually without limit to legislatures' judgment on matters of economic regulation.[6] Since then, *Lochner* has come to be "widely viewed as one of the worst Supreme Court decisions in American history," with most judges and legal scholars emphatically rejecting the idea of a constitutional Liberty of Contract (Millhiser 2013). Between 1940 and 1980, only one published law review article expressed "even mild support" for such a freedom (Bernstein 2011, 2). Prominent legal thinkers across the political spectrum have disdainfully dismissed *Lochner* and the cases that relied on it as unprincipled activism, leading to the widespread adoption of the term "*Lochner*ism" as shorthand for judicial overreach.[7] According to conventional wisdom, the *Lochner* Era was a regrettable period in which conservative justices, hell-bent on undermining progressive policies, inscribed their *laissez-faire* beliefs into the Constitution by adopting broad conceptions of the freedom to engage in business[8] without interference from government regulation.[9]

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[6] *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). As was later explained of the *Parrish* standard, "state legislatures […] are entitled to their own standard of the public welfare; they may within extremely broad limits control practices in the business-labor field, so long as specific constitutional prohibitions are not violated and so long as conflicts with […] federal laws are avoided," *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 424 (1952).
[7] See *Malmed v. Thornburgh*, 621 F.2d 565, 575; *Obergefell v. Hodges*, 135 S.Ct. 2584, 2616 (Roberts, C.J., dissenting); and Elizabeth Sepper, "Free Exercise Lochnerism." *Columbia Law Review* 115, no. 6 (2015).
[8] Many criticisms of the Court's behavior during this era take issue not only with its protection of the Liberty of Contract, but also with its narrow reading of Congress's Art. I power to regulate interstate commerce, or Congress's ability to delegate rulemaking power to regulatory agencies. This paper focuses solely on the Liberty of Contract and does not address other areas of the Old Court's jurisprudence.
[9] "[T]he very word 'Lochner' is for legal insiders synonymous with judicial overreach" (Amar 2012); "The *Lochner* era featured conservative Justices who were deeply committed to a laissez-faire economy, protecting businesses from legislative regulation" (Chemerinsky 2003, 41); "The received wisdom is that *Lochner* was wrong because it

II. Research Questions

The criticisms of judicially enforced contractual liberty fall into two primary categories: those arguing that the right, as a purely legal matter, lacks a constitutional basis[10]; and those arguing that it had negative effects on society—namely, that it prevented the enactment of legislation that was necessary to protect the public welfare against exploitation by powerful business interests.[11] It is the latter variety of arguments against the Liberty of Contract on which I focus here. These consequentialist attacks on the Supreme Court's Liberty-of-Contract jurisprudence typically rely on intuitive or abstract arguments for why markets need regulation, or for why judges are not well-equipped to formulate economic policy. At the same time, however, a rogue contingent of legal thinkers has recently begun to question the anti-*Lochner* consensus, citing the principles of Classical economic thought to argue that contractual freedom is beneficial.[12] Yet, with only a few exceptions, neither the defenders nor the critics of the Liberty of Contract have adduced much in the way of empirical evidence for their views, appealing instead to purely theoretical assumptions about the characteristics of labor markets, the

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involved 'judicial activism': an illegitimate intrusion by the courts into a realm properly reserved to the political branches of government" (Sunstein 1987, 874).

[10] "The Court made up an entire new set of freedoms, including a liberty to enter into contracts the legislature had prohibited […] Perhaps there ought to have been a constitutional provision invalidating [laws restricting contractual liberty]. But there was not, and the Court had no business striking them down" (Bork 1990, 44-47); "The Constitution […] treats social legislation of the form struck down in *Lochner* as a matter of policy, not principle […] the Court's decision was unjustifiable" (Dworkin 179, 2002).

[11] "[T]he overarching motif of the *Lochner* Era involved the Supreme Court striking down laws intended to help workers and consumers, which in turn benefited corporations and wealthy propertied interests" (Chemerinsky 2003, 35). "With the market as a constitutional baseline against which to evaluate burdens and benefits, courts inevitably overlooked the costs that businesses imposed on employees and the public. They could not perceive that businesses created significant negative externalities by failing to pay adequate wages, ensure safe working conditions, and provide support to injured employees. […] The artificiality of the market went unacknowledged" (Sepper 2015, 1463); "the Court without clear textual warrant struck down a multitude of reasonable reform statutes regulating free-market excesses" (Amar 2012); "The *Lochner* Court turned a blind eye to workplace conditions that gave the lie to their naive view of workplace bargaining" (Millhiser 2016, 517); "the economic realities of the Great Depression graphically undermined *Lochner*'s premise" (Tribe 1990, 85).

[12] See Barnett (2012), Bernstein (2011), Siegan (2006), Wonnell (2001), Epstein (2006), Muris (1999), Mayer (2011), Posner (1986, 589-93) and Phillips (2001).

efficacy of regulation, or the motivations of lawmakers—assumptions whose persuasiveness often depends on one's ideology. The aim of my thesis is to empirically evaluate the real-world effects of the Liberty of Contract as the Supreme Court understood it during the *Lochner* Era, a topic that has not been thoroughly explored in the existing literature.

My assessment of the impact of the Liberty-of-Contract doctrine consists of several components. First, it is necessary to statistically measure the extent to which this doctrine interfered with policymakers' implementation of their legislative goals. The central inquiries here are, first, the rate at which the Court struck down regulations in Liberty-of-Contract cases, as opposed to deferring to legislators and upholding the challenged policies; and, second, whether there is an empirical basis for the common claim that the Court invoked the Liberty of Contract arbitrarily. Next, I examine several notable instances in which the Court found a violation of the Liberty of Contract, in order to determine if, in interfering with policymakers' goals, the Court caused societal harm.[13] In each of these case studies, I bring together a variety of evidence in order to evaluate as thoroughly as possible the competing theoretical claims about the decision's impact. Many of the primary sources I rely on have never, to my knowledge, been consulted before in any scholarship on this topic. My approach is necessarily somewhat ad hoc, as the historical data are often incomplete or unreliable, and because the variable on which contractual liberty's effects should be measured varies depending on the case. In general, however, the case studies usually include the following elements: a) a description of factual background and the basis for the Court's decision, b) discussion of the political factions and

[13] "Harm," for my purposes, is defined in relation to the social ill the challenged legislation is aimed at preventing; for example, if the Court invalidated a law that was intended to reduce disease, and the evidence shows that the law successfully reduced disease, then one might say that the Liberty of Contract was having a negative impact.

interests that motivated passage of the challenged legislation, c) presentation of common hypotheses about the probable effects of the Court's decisions, and d) analysis of data on relevant social indicators to determine the impacts of legislation or its invalidation. I conclude that the Liberty of Contract posed, at best, a minor obstacle to lawmakers' regulatory efforts, but that the Court behaved capriciously in striking down challenged legislation pursuant to the doctrine. I further find based on the available information that, in several of the most high-profile and notorious Liberty-of-Contract decisions, the Court's invalidations of regulatory policies appear to have had either neutral or positive effects on the relevant indicators of societal welfare.

III. The Supreme Court's Understanding of the Liberty-of-Contract Doctrine

A) The Doctrine in Detail. By the beginning of the *Lochner* Era, it was well-established in American common law that in order to avoid arbitrary nullification of private contracts, courts should adopt a presumption in favor of enforcing such agreements, a principle often referred to as the "freedom of contract." But this doctrine limited only judges' power to declare contracts unenforceable; it was not a constitutional limit on legislatures' power to enact laws regulating contractual terms or conditions (Fleming 2012, 1091). The origins of the Liberty of Contract as a personal freedom protected from legislative infringement are murky, though state courts appear to have recognized its existence or that of some functionally equivalent right several decades before *Lochner* was decided,[14] while explicit references to contractual freedom as a basic right

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[14] Substantive Due Process was articulated by New York courts as early as 1856 (*Wynehamer* v. *People*, 13 N.Y. 378); later invocations were more explicit: "the act [is] utterly unconstitutional and void, inasmuch as […] an attempt has been made by the legislature to […] prevent persons who are sui juris from making their own contracts. The act is an infringement alike of the rights of the employer and the employe. […][The laborer] may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal; and any and every law that proposes to prevent him from so doing is an infringement of his constitutional privileges," *Godcharles v. Wigeman*, 6 A. 354, 356 (Pa. 1886); "no general power resides in the legislature to regulate private business, […] fix the price of commodities or services, or interfere with *freedom of contract* […] The merchant and manufacturer, the artisan and laborer, under our system of government, are left to pursue and provide for their own interests […]

appeared in published commentary in the United States as early as 1823[15] and had long been familiar in English Common Law.[16] A majority of the US Supreme Court expressly acknowledged the Liberty of Contract as a constitutional right for the first time in the 1895 decision *Frisbie v. United States*, where the Court's unanimous opinion remarked that, "generally speaking, among the inalienable rights of the citizen is that of the liberty of contract," yet nonetheless upheld the challenged piece of legislation on the grounds that contractual freedom "is not absolute and universal. It is within the undoubted power of government to restrain some individuals from all contracts, as well as all individuals from some contracts."[17] Two years later, in *Allgeyer v. Louisiana*, the Court, for the first time, struck down an act of government as a violation of the Liberty of Contract, explaining that the right was among those protected by Substantive Due Process.[18] But the Court's statements in *Frisbie* and *Allgeyer* regarding the scope of contractual liberty were nebulous, leaving open many questions about when the right could and could not be regulated.

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untrammeled by burdensome and restrictive regulations which, however common in rude and irregular times, are *inconsistent with constitutional liberty*" (emphasis added), *People v. Budd*, 117 N.Y. 1, 22 N.E. 670, 675 (1889).

[15] In 1823, Louisiana Governor Thomas Robertson returned, with his objections, an anti-usury bill to the state legislature, writing that "[r]eligion, the press, the price of labor, of articles of commerce, have all, from time to time, been subject to the regulations of government-one by one, however, they have been reluctantly freed from restraint, and the great truth generally acknowledged, that mankind, when left to themselves, are better judges than their rulers, of what best promotes their happiness and interests. […] Free governments leave individuals, as much as possible, to themselves; indeed, freedom of action and *freedom of contract*, abstaining always from injuring others by force or fraud, is the very definition of personal liberty-of that liberty which it is the duty of governments to respect" (emphasis added), qtd. in 24 *Niles' Weekly Register* 129, 144.

[16] The "general principle is favored both in law and justice, that every man may fix what price he pleases upon his own property or the use of it," *Allnut v. Inglis*, 12 East, 527 (1810). "[F]or the law to interpose and say, 'You shall charge no more than this whatever your expenditure of paper, time and brains,' is a trespass beyond the province of jurisprudence and violation of the liberty of contract," 27 *Law Times* 9, 10 (1856). The "liberty of contract" is "the ordinary rule which prevails with all property," 48 *Law Times* 1, 2 (1869).

[17] 157 U.S. 160, 165-166 (1895).

[18] "The statute is a violation of the Fourteenth Amendment […] in that it deprives the defendants of their liberty without due process of law […] The "liberty" mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen […] to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned," 165 U.S. 578, 598-599 (1897).

Over the course of the next three-and-a-half decades, the Court attempted to establish criteria for adjudicating Liberty-of-Contract claims: limitations on individuals' freedom to make contracts could be sustained only if the restrictions were "reasonable and appropriate exercise[s]" of the "police power," a term that referred to the states' established authority to pass laws protecting "the morals, the health or the safety of the people."[19] The Court's application of these criteria involved a degree of judicial scrutiny that went beyond a mere superficial review of lawmakers' stated justification for passing an act: "The mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate."[20] Nevertheless, the Court during this period upheld numerous regulations as legitimate exercises of the police power, including maximum-hours laws for coal miners and women, limitations on waivers of employers' liability for occupational injuries, prohibitions on employing children under sixteen in hazardous occupations, and laws requiring coal mines to maintain wash houses and mineshaft entrances of at least a certain width.[21] In addition, the Court came to recognize a few other categories of legislation considered exceptions to the Liberty of Contract: "(1) Those [laws] dealing with statutes fixing rates and charges to be exacted by businesses impressed with a public interest," which referred to natural monopolies or businesses with state-granted exclusive franchises, "(2) Statutes relating to contracts for the performance of public work," which did not implicate the "right to condition private contracts,

[19] *Lochner v. New York*, 198 US 45, 56 (1905). The Court was wary of what it labeled "purely labor" laws, by which it meant those regulating private employment "with no reference whatever to the question of health," *Lochner* at 57.
[20] Ibid., 57.
[21] *Holden v. Hardy*, 169 U.S. 366 (1898); *Muller v. Oregon*, 208 U.S. 412 (1908); *New York Central R. Co. v. White*, 243 U.S. 188 (1917); *Sturges & Burn Mfg. Co. v. Beauchamp*, 231 U.S. 320 (1913); *Wilmington Star Mining Co.* v. *Fulton*, 205 U.S. 60 (1907); *Barrett v. Indiana*, 229 U.S. 26 (1913).

but [only] the right of the government to prescribe the conditions upon which it will permit work […] to be done for it," and "(3) Statutes prescribing the character, methods and time for payment of wages," which did not interfere with the core terms of the employment contract, but instead were meant only "to prevent unfair and perhaps fraudulent methods in the payment of wages."[22]

Before moving on, there is a common doctrinal criticism of the Liberty of Contract that deserves some attention. This view condemns the Court's approach primarily on the grounds that it refused to recognize the redistribution of wealth as a legitimate justification for restricting contractual freedom, thereby frustrating legislative attempts to mitigate the income inequality that characterized the era.[23] The argument is technically correct, but is, at best, a feeble indictment of the Court's jurisprudence. Even assuming that redistribution for its own sake is a laudable objective, the Liberty of Contract posed no obstacle to this goal; lawmakers still had the fiscal tools of taxation and spending—arguably more effective and efficient modes of redistribution than indirectly trying to spread wealth with a smattering of restrictions on private contracts. Fiscal redistribution, in requiring that transfers of wealth be overt and that their contributors and beneficiaries be identified, promotes transparency and increases the likelihood that benefits reach their intended recipients. This topic will be revisited near the end of Sec. VII.

B) Identifying the Cases to be Studied. Empirically assessing the impact of the Liberty-of-Contract jurisprudence requires identifying those instances in which the doctrine was invoked in striking down government policy. I begin by compiling a list of such cases using Phillips' (2001)

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[22] *Adkins v. Children's Hospital*, 261 U.S. 525, 546-47 (1923).
[23] "[T]he basic thrust of the standard critique of *Lochner*" is that it was "impermissibly anti-redistributivist" (Amar 2012); "Efforts to redistribute resources [were] constitutionally out of bounds […] This limitation of the category of permissible ends had important implications, excluding a wide range of measures enacted by majorities […] there can be no doubt that most forms of redistribution and paternalism were ruled out" (Sunstein 1987, 877).

framework, which identifies fifteen: ten in which the Court expressly relied on that liberty, and five in which it implicitly did so by citing its own previous Liberty-of-Contract holdings. To these, I have added three more: the notorious decision in *New State Ice Co. v. Liebmann* (1932), where the Court struck down restrictions on entry into the ice industry; *Tyson & Brother v. Banton* (1927), where it invalidated a law setting maximum prices for resold theater tickets; and *Ribnik v. McBride* (1928), where the Court held unconstitutional a law setting maximum fees that employment agencies could charge job seekers.[24] The resulting eighteen cases can be grouped into the following categories:

Cases concerning restrictions on hours of labor	● *Lochner*
Cases concerning minimum wages[25]	● *Adkins v. Children's Hospital*, 261 U.S. 525 (1923) ● *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936) ● *Donham v. West-Nelson Co.*, 273 U.S. 657 (1927) ● *Murphy v. Sardell*, 269 U.S. 530 (1925) ● *Chas. Wolff Packing Co. v. Court of Ind. Relations*, 262 U.S. 522/267 U.S. 552 (1925) ● *Dorchy v. Kansas*, 264 U.S. 286 (1924)
Cases concerning prohibitions on yellow-dog contracts	● *Coppage v. Kansas*, 236 U.S. 1 (1915) ● *Adair v. United States*, 208 U.S. 161 (1908)
Case concerning regulatory barriers to entry/rate regulation	● *Liebmann*, 285 U.S. 262 (1932). ● *Tyson & Brother v. Banton*, 273 U.S. 418 (1927)
Cases concerning barriers to interstate/foreign commerce	● *Allgeyer v. Louisiana*, 165 U.S. 578 (1897) ● *St. Louis Cotton Compress Co. v. Arkansas*, 260 U.S. 346 (1922) ● *Compañía General de Tabacos de Filipinas v. Collector of Internal Revenue*, 275 U.S. 87 (1927) ● *New York Life Insurance Co. v. Dodge*, 246 U.S. 357 (1918)
Cases concerning bans/regulations on private employment agencies	● *Adams v. Tanner*, 244 U.S. 590 (1917) ● *Ribnik v. McBride*, 277 U.S. 350 (1928)
Misc.	● *Fairmont Creamery Co. v. Minnesota*, 274 U.S. 1 (1927)

For the purposes of this paper, I will omit from my analysis the decisions in the category "Cases concerning barriers to interstate/foreign commerce," as the Court almost certainly would have

[24] The lead opinions in *Ribnik* and *Tyson* explicitly relied on the Liberty of Contract, and *Liebmann* (though Phillips considers it an "occupational freedom" case) relied on at least one explicit Liberty-of-Contract precedent (*Wolff Co. v. Industrial Court*), one implicit Liberty-of-Contract precedent (*Dorchy v. Kansas*) and, based on its prior history in the lower courts, was litigated as a Liberty-of-Contract case. Still, I admit that *Liebmann*'s inclusion here is debatable, though many cases from this era seem to rest on similarly ambiguous reasoning.

[25] It should be noted that a few of the decisions that I placed in the "minimum wages" category actually involved laws that required mandatory arbitration of labor disputes in certain industries by an administrative board empowered to mandate legal minimum wages if it so chose, with *Chas. Wolff Packing* being the leading such case.

struck down those challenged pieces of legislation even in the absence of a Liberty of Contract, probably by relying on the "Dormant" (or "Negative") Commerce Clause doctrine.[26] The Dormant Commerce Clause doctrine has been much less divisive than the Liberty of Contract was—and, unlike the Liberty of Contract, the Dormant Commerce Clause continues to be recognized and enforced by the Court to this day,[27] suggesting that mainstream legal thinkers concede that its effects are not so detrimental as to warrant its abandonment. For these reasons, and because I am concerned with the Liberty of Contract's effects as an *independent* doctrine, I will not examine the impacts of cases striking down barriers to interstate commerce. Moreover, in the interest of keeping the project within a manageable scope (and due to a lack of available data on the circumstances surrounding the more obscure decisions), I examine only one case from each category, usually the best known of the group, and omit from my analysis the "Misc." category. Thus, of the eighteen successful Liberty-of-Contract challenges to legislation, I include cases studies of *Lochner*, *Liebmann*, *Adkins*, *Adams*, and *Adair*.

IV. How Strictly Did the Court Enforce the Liberty of Contract?

Before discussing the effects of the particular Liberty-of-Contract decisions selected as case studies, it is necessary to statistically measure the extent to which this doctrine interfered with policymakers' implementation of their legislative goals. The central inquiries here will be, first, the rate at which the Court struck down regulations in Liberty-of-Contract cases, as

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[26] This principle stated that the Constitution, in granting the US Congress the power to "regulate commerce […] among the several states" and then providing that the "powers not delegated to the United States by the Constitution […] are reserved to the States," contained an implied prohibition on certain state laws that burdened interstate commerce, even where Congress was silent on the matter. As the Court said in 1886, "if it be a regulation of commerce, […] it must be of that national character, and the regulation can only appropriately exist by general rules and principles, which demand that it should be done by the Congress of the United States," *Wabash, St. Louis & Pacific Railway Company v. Illinois*, 118 U.S. 557, 577 (1886).

[27] See *Comptroller of the Treasury of Maryland v. Wynne*, 575 U.S. ___ (2015).

opposed to deferring to legislators and upholding the challenged policies; and, second, whether there is an empirical basis for the common claim that the Court invoked the Liberty of Contract arbitrarily, deciding such cases on a *per se* basis rather than according to fixed rules.

A) Literature. It is commonly alleged that the Liberty of Contract, as enforced by the judiciary, presented a substantial obstacle to lawmakers' formulation of sound public policy. Proponents of this view accuse the Court of adopting too strict an approach to protecting freedom, leaving legislatures with few options for addressing social problems.[28] For example, Strauss (2003) claims that "[t]he *Lochner*-era Court went far beyond" any sort of "careful, case-by-case enforcement, undertaken with sensitivity to the limitations of the right"; instead, it "treated freedom of contract as a cornerstone of the constitutional order and systematically undervalued reasons for limiting or overriding the right" (375). It allegedly "ma[de] freedom of contract a preeminent constitutional value that repeatedly prevail[ed] over legislation that, in the eyes of elected representatives, serve[d] important social purposes" (375). On the other hand, some legal historians have argued in response "that the turn-of-the-century judiciary was not wedded to a policy of *laissez-faire*. Courts upheld a host of statutes promoting economic growth and regulating it in the public interest" (Katz 2013, 277-78).[29]

[28] Examples of this argument abound; Sepper (2015) claims the Court's invalidation of "highly salient legislation aimed at safeguarding workers" on contractual-freedom grounds "formed a serious barrier to economic regulation from 1923 to 1937" (1463). She concludes that the chief defect of the misguided Liberty-of-Contract jurisprudence was the courts' "overly stringent—sometimes absolutist—approach" to guarding that liberty against infringement; the Court, in her view, championed the protection of "virtually absolute rights to contract and to pursue one's livelihood" (1460; 1454). Hacker (2002) similarly contends that *Lochner*-Era policymakers "found it difficult to uphold any economic regulation against the force of what had become economic due process"; over the course of this period, "the Court struck down numerous state economic regulations, virtually on a per se basis" (685). Even Senator Barack Obama claimed in a 2005 speech that, "[i]n the *Lochner* case, and in a whole series of cases prior to *Lochner* being overturned, the Supreme Court consistently overturned basic measures like minimum wage laws [and] child labor safety laws […] The basic argument in *Lochner* was you can't regulate the free market," going on to say that this "judicial philosophy essentially stopped every effort" to address effects of the Great Depression.
[29] Warren (1922) concludes that from 1888-1918, "[w]ith comparatively few exceptions, […] the Court […] upheld the validity of the State legislation" challenged on 14th Amendment grounds (463). Phillips (2001), too, finds that

B) Analysis. Since all judicially protected individual rights create the potential for courts to invalidate actions of the political branches, the question of whether the Liberty of Contract was a particular imposition—a "serious barrier"—on policymakers is best framed in relative terms, by comparing the Old Court's enforcement of contractual liberty to the enforcement of other liberties during other periods in the Court's history. As a contextual benchmark, it may be useful to first consider the general rate at which the modern Supreme Court strikes down government actions in constitutional cases. I generated the following estimate for this figure using Washington University Law School's Supreme Court Database: between 1975 and 2015, the Court produced 1,595 judgments regarding constitutional matters, including 345 such decisions in which it declared any statute, regulation, or ordinance unconstitutional—suggesting that the Court found unconstitutionality in roughly 21.6% of cases where it was alleged.[30] In First Amendment cases concerning the freedoms of speech, press, or assembly, the figure was 37.2%; in cases involving abortion or contraception, it was 34.2%; in *Miranda* warnings cases, the Court sided with criminal defendants 21.9% of the time; and the Court found Fourth Amendment violations in 31.7% of cases in which the provision was at issue.

It is more difficult to quantify the balance struck by the *Lochner*-Era Court between the competing considerations of contractual liberty, on the one hand; and of public safety, health, and morals on the other. To hear the anti-*Lochner* camp tell it, the Court was intensely skeptical of lawmakers' justifications for their challenged policies: the "consensus view" contends that the

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"[w]ithin most of the categories comprising the core of Lochner-era substantive due process, […] cases rejecting a substantive due process challenge considerably outnumber those striking down government action on that basis" (41).

[30] The actual figure is undoubtedly higher; this database's coding for declarations of unconstitutionality includes only cases in which statutes, regulations, or ordinances were struck down, and thus omits decisions finding other types of governmental action, such as police searches, to be unconstitutional.

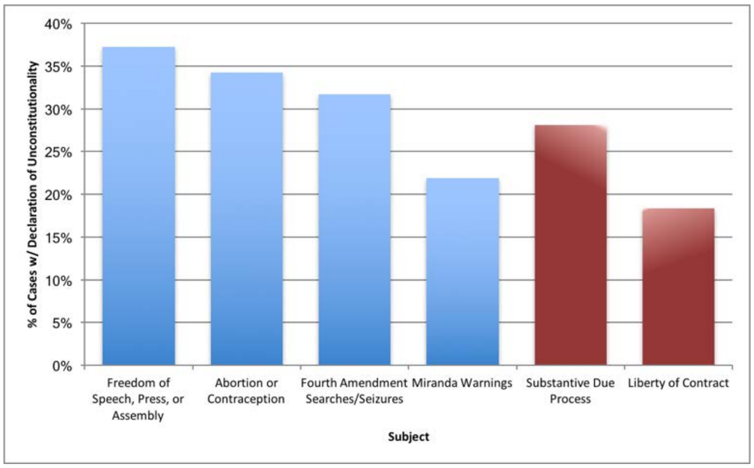
Court invalidated over 200 laws between approximately 1900 and 1935 pursuant to its holding in *Lochner* (Phillips 2001, 55). It is unclear where this figure originated, though Phillips suggests, by tracing the chain of citations backward, that it was likely derived from a list of “Cases Holding State Action Invalid Under the Fourteenth Amendment” (220 of which were decided between 1897-1937), compiled by law professor (and later Associate Justice) Felix Frankfurter. However, upon closer examination of this list, Phillips finds that over three-quarters either involved provisions of the Fourteenth Amendment other than the Due Process clause, addressed issues of procedural (rather than Substantive) Due Process, or merely relied on the Due Process Clause to incorporate federal Bill-of-Rights protections against the states. Only 56 of the initial 220 were decided purely on Substantive-Due-Process grounds. And the Old Court was much more likely to uphold regulations challenged under Substantive Due Process than to strike them down; the 56 successful challenges represented only 28.1% of Substantive Due Process decisions handed down between 1897 and 1937. Of those 56, Phillips finds that only 15 relied specifically on the Liberty-of-Contract component of Substantive Due Process, including ten cases where the Court explicitly relied on the Liberty of Contract to strike down policies and five where it struck down policies by relying on its other Liberty-of-Contract decisions, but did not mention the Liberty of Contract by name (2001, 55-58). Phillips does not provide an exact figure for Liberty-of-Contract challenges to legislation that were rejected by the Court, though he mentions that “a relatively informal search unearthed over forty” such cases during the years 1902 to 1932 inclusive (58). This suggests an invalidation rate of approximately 35% in Liberty-of-Contract cases, though more precise figures will be necessary for accurate evaluation of the Old Court’s behavior.

Despite the difficulties associated with narrowing the list of Substantive Due Process cases to only those involving the Liberty of Contract,[31] a bit of cursory research, in conjunction with Phillips' findings, suggests that the Court was even less protective of contractual freedom than it was of Substantive Due Process in general. During the 1897-1937 period in which Phillips counted 15 successful Liberty-of-Contract challenges to legislation, I found, using Hein Online's Fastcase database, a total of 70 Supreme Court decisions with the keyword phrase "Liberty of Contract," and 59 with the keyword phrase "Freedom of Contract" (a term sometimes used instead of "Liberty of Contract"). I combined these with the 70 "Liberty of Contract" results, removed any duplicates, and was left with 104 total Liberty-of-Contract cases decided between 1897-1937. Of those, I excluded 20 that mentioned contractual liberty but were decided wholly on other grounds, and, after cross-referencing the remainder with a list of all decisions I had cited during the course of my research, added 5 Liberty-of-Contract cases that were missing from the 84.[32] To account for the subtle variations in terminology ("the liberty *to* contract," "*right* to contract," and "freedom *to make* contracts," among others), I then searched for "due process," and within those results searched for "contract" and "contracts"; among these, I unearthed another 9 relevant cases. Of the remaining 98, there were 18, by my count, in which the Court found an act of government to violate the Liberty of Contract (Phillips' 15, plus *Tyson*, *Liebmann*, & *Ribnik*), resulting in an estimated invalidation rate of 18.4% in Liberty-of-Contract

[31] The Old Court struck down many regulations on Substantive Due Process grounds, but was often unclear about whether the Liberty-of-Contract component of was a factor. Still, Phillips finds that even if one errs on the side of caution and includes *all* pure Substantive Due Process cases from this period (subtracting those that challenged land-use regulations or taxes, which presumably were unlikely to implicate contractual freedom), the total invalidation rate still only comes to 25.9% (41 out of 158 cases), which does not radically affect my conclusion (2001, 57-58).
[32] I have confidence in the initial estimate of 89 cases, as other methods produce a similar figure; using the LexisNexis Academic database, I searched for "Liberty of Contract" in the text and summaries of Supreme Court cases between 1897-1937, finding 115 results. I arranged them in descending order of relevance and was able to eliminate as irrelevant about 25 or 26 of the last 27, so the Fastcase database seems to be a valid search method.

cases. Fig. 4.1 compares the invalidation rates by subject matter of the "Modern" Court (1975-2015, represented by the blue bars) and the Old Court (1897-1937, represented by the red).

Figure 4.1



When the *Lochner*-Era rate of striking down laws on Due Process or Liberty-of-Contract grounds is compared with, for example, the rate at which Fourth Amendment decisions went against the government during the past forty years, it appears that the old Court was no more a prisoner of its *laissez-faire* ideology than the modern Court is of some sort of anti-police bias.

C) Other Considerations. An argument sometimes made against the above approach to measuring contractual liberty's impact is that looking only at the invalidation rates of the "Old" Court may fail to capture the true extent to which the Liberty-of-Contract doctrine interfered with Progressive legislative goals, as it is possible that lawmakers took to heart the threat of judicial invalidation of such measures and were thus deterred by the Liberty of Contract from even attempting to enact the laws in the first place (Galvin 2016b). In response, I would argue, first, that since my position is that the Liberty of Contract was a fairly permissive doctrine *relative* to other personal freedoms that the Court continues to recognize, I would not assume that neglecting to account for "deterrence" in the Liberty-of-Contract context would undermine the argument, as I also did not include a measure of deterrence in my figures for the Modern Court's invalidation rates either. In any event, I would expect that the "deterrence" phenomenon, if it existed at all, likely had minor effects on legislative behavior during the *Lochner* Era.[33] If economic-regulatory measures were popular among the electorate, then legislators would still have had every incentive to enact them even if they were ultimately struck down; elected officials would be regarded favorably for making the effort and could easily shift blame to the courts when the beloved regulations were invalidated. Posner (1999a) has even argued that "legislatures are *most* likely to pass unconstitutional laws when they know that the courts will strike them down," since lawmakers can take credit politically with the assurance that the judiciary will invalidate their most harmful enactments (emphasis added)(3). There are few statistical trends that emerged during the *Lochner* Era that, while not entirely dispositive, suggest that legislatures were not discouraged to any significant degree by the Court's behavior.

Figure 4.2

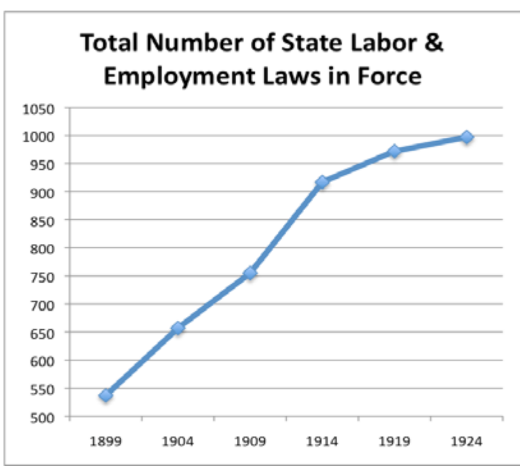
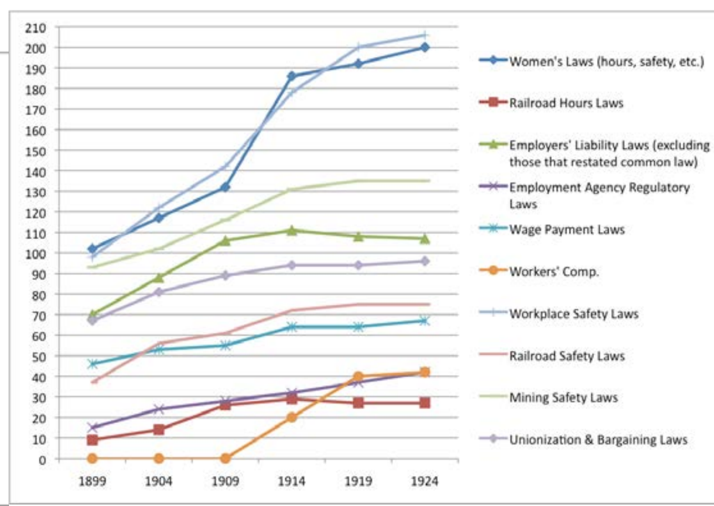


Figure 4.3



[33] Gillman (2005) takes a similar view: "there is no evidence that [*Lochner*] had especially important consequences for American politics […] In the short term, some reformers in the states were undoubtedly discouraged from advocating expanded protections against excessive working hours, but no one gave up" (859-60).

State laws regulating the terms or conditions of private employment (the sort of legislation most likely to raise Liberty-of-Contract concerns) became increasingly ubiquitous during this time period. Data compiled by Holmes (2003) indicate such a trend; Figures 4.2 and 4.3 rely on these figures to show both the total number of state enactments in force each year that regulated the terms or conditions of private employment, and the breakdown by category of legislation.

But although lawmakers might not pass *fewer* laws due to the threat of judicial invalidation, those they do pass might be qualitatively different. Since pro-reform legislators were likely motivated by both their constituents' desire for social legislation and their own desire to see such legislation implemented, their best strategy was to modify progressive measures to make them as unobjectionable to the courts as possible. Legislators would get political credit for the enactments and, without the judicial threat, their favored policies would remain in force longer. In his case study of the 1912 campaign for a workers' compensation law in Wisconsin, Ingram (2003) finds evidence of such modification, demonstrating that progressive lawmakers responded to the *Lochner* precedent by crafting their proposals so as to increase their chances of survival in court. He presents his account as an indictment of *Lochner*, which he claims "deterred progressive legislators and reformers from pursuing broad legislative schemes […], forcing them to settle instead for an incremental, piecemeal approach to social problems," and for a workers' compensation scheme in which employers' participation was voluntary, rather than compulsory (785). But the case study is weak as a general criticism of the Liberty of Contract. For one, the doctrine's effects on workers' compensation were short-lived; in 1917, the Supreme Court upheld a compulsory workers' compensation law against a Liberty-of-Contract challenge.[34] And

[34] *New York Central R. Co. v. White*, 243 U.S. 188 (1917).

although the judicial threat seemed to weaken protection for laborers in Ingram's case study,[35] the effect of contractual-liberty jurisprudence in general may not have been so bad; if lawmakers were watching the Court in order to craft legislation that would be upheld, they probably would have tried to enact laws that addressed safety and health issues through appropriate means and were supported by strong evidence of their importance and efficacy—hardly a tragic outcome. Whether or not one accepts this optimistic hypothesis, it is enough for now to say that any unseen deterrent effects of the Liberty of Contract were no greater a hindrance to effective policymaking or enforcement than are the deterrent effects of individual rights that the Court still enforces, including *Miranda* warnings or protections against unreasonable searches.

Some readers still may not be satisfied that the foregoing analysis truly captures how burdened lawmakers were by contractual freedom. Yet, if nothing else, by calculating the rate at which the Liberty of Contract was successfully used to challenge government action, it is possible to quantify, to some extent, the Court's degree of "strictness" in enforcing that right—and to thereby amass evidence against the trope of "nine old men" with a formalistic or unyielding attachment to *laissez-faire*. On the contrary, with respect to second-guessing the judgment of elected policymakers, the *Lochner*-Era Court is in no way an outlier.

D) Arbitrariness. A related criticism of the Supreme Court's approach to the Liberty of Contract was that "the justices of this era applied their own rules haphazardly," invoking and applying the doctrine "virtually on a per se basis" (Millhiser 2016, 517; Hacker 2002, 685). Rogers and Vanberg (2007) observe that "legal indeterminacy" has been "the major objection to

[35] The reformers in Ingram's account seem to have been vastly overestimating the obstacle that *Lochner* posed to their legislative efforts. If they were primarily looking to the Supreme Court's behavior to determine their prospects of success, they would have noted that from 1906-1911, the Court decided eighteen cases involving Liberty-of-Contract attacks on legislation, and had upheld all but one of the challenged laws.

Lochner among legal scholars and commentators" (447). The famed jurist Learned Hand remarked in 1908 that the Court was adjudicating claims of contractual freedom "not upon any fixed rules of law, but upon the individual opinions upon political or economic questions of the persons who compose it" (qtd. in Rogers & Vanberg 2007, 501). In measuring the Court's consistency, I proceed from the assumption that lower courts, because they are bound by Supreme Court precedent, should generally be able to correctly apply—and should generally attempt to correctly apply—the reasoning of the Supreme Court's opinions in the way that the Supreme Court intended. Therefore, the clearer and more consistent the Supreme Court's opinions are, the less often it should reverse the holdings of lower courts.[36]

Unfortunately for the Old Court, the charge of arbitrariness happens to be one respect in which Liberty-of-Contract's critics seem to be right. Of the 98 Liberty-of-Contract cases that reached the US Supreme Court, the court immediately below had found violations in 17.3% of them, while the Supreme Court, as discussed earlier, had found violations in 18.4%. If one assumes, given these rates, that lower courts are no more able to properly apply the Supreme Court's precedents than someone guessing randomly, then one would expect that the Supreme Court would affirm the holdings of the lower courts at a rate equal to the probability that both tiers find a Liberty-of-Contract violation ($0.184 * 0.173$) plus the probability that both find no such violation ($0.816 * 0.827$), which adds up to a rate of about 70.7%. Said otherwise, assuming the lower courts were completely unable to anticipate how the Court above would apply the law,

[36] In the past half-century, this approach would be invalid because the Supreme Court had near-total control over its docket, and so high reversal rates may simply be an indication of the fact that the Court is disproportionately choosing to hear cases it thinks were decided incorrectly by the court below. But during the period in which contractual liberty was protected (1897-1937), the losing party in cases arising under the US Constitution had a right of appeal to the Supreme Court, who was required to decide the case on the merits (Hellman 1978, 1711-12; "Landmark Judicial Legislation"). Hence, selection bias cannot explain reversal rate during this era.

one would expect the Supreme Court to affirm the lower court 70.7% of the time and reverse 29.3%. In reality, the Supreme Court affirmed about 73% and reversed 27% of lower court holdings in Liberty-of-Contract cases; the difference between the affirmation rate expected if the two tiers were acting independently (the null hypothesis) and the actual rate is small and statistically insignificant (p=0.31). The Court's dismal record suggests that it failed to articulate—or perhaps failed to adhere to—a Liberty-of-Contract doctrine coherent enough for lower courts to achieve substantially better accuracy than someone guessing randomly.[37]

It is possible, of course, that the high reversal rate resulted from the fact that the lower courts struggled to apply the Liberty-of-Contract doctrine at first, but later improved their accuracy as the Supreme Court developed this area of law. If this were true, it would suggest that the Court, far from acting arbitrarily in its adjudicating this issue, actually clarified confusion among the courts below. But the pattern of reversals across time (Fig. 4.4) tells a different story. The reversals of lower courts are not concentrated in the earlier years of the Lochner Era; if anything, they seem slightly skewed toward the latter part of the period. This pattern tends to weigh against the benign alternative explanation for the reversal rate, and is more consistent with the view of the Supreme Court's Liberty-of-Contract jurisprudence as capricious.

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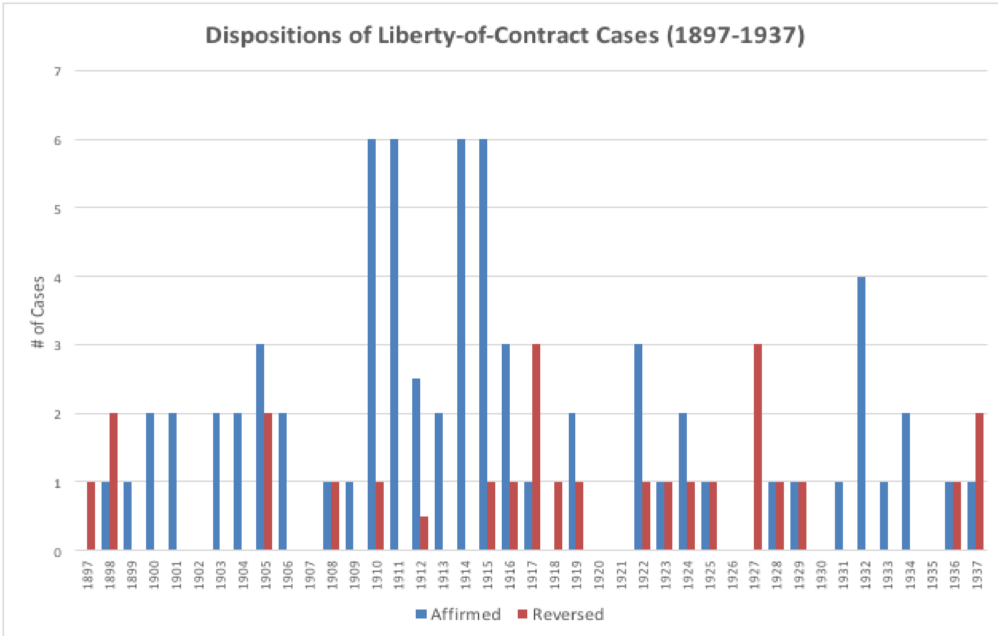
[37] Admittedly, these figures are equally consistent with the alternative hypothesis that the lower courts, unable to grasp the Liberty-of-Contract doctrine articulated by the Supreme Court, are actually the ones behaving arbitrarily. But if the expert jurists that sit on state supreme courts and the lower federal courts are unable to understand how to apply the Supreme Court's rules, then that suggests either that the Supreme Court's case law is inconsistent, or that the Supreme Court's opinions are unclear about the rules governing Liberty-of-Contract disputes. Even if the latter explanation is correct, it would be just as much an indictment of the Court's performance as the charge of arbitrariness, for it is the Court's duty to clarify the law; if judges with years of legal training cannot understand the Court's case, it is likely that neither the people nor their representatives can either.

Figure 4.4



Although there may be other alternative explanations for the reversal rate and trend in dispositions over time that I have not contemplated, there is substantial qualitative evidence that the Supreme Court regularly acted arbitrarily and inconsistently. Mayer (2009) describes the standard of review in Liberty-of-Contract cases as merely "a general presumption in favor of liberty" that "was apparently riddled with exceptions," demonstrating that, especially in the areas of maximum hours laws and price regulations, the *Lochner*-Era Court relied on reasoning that seemed to repudiate earlier Liberty-of-Contract holdings, but did not explicitly overrule them (275-80). Even some Supreme Court justices were baffled by inconsistency in the Court's Liberty-of-Contract jurisprudence. Chief Justice Taft, dissenting in *Adkins v. Children's Hospital*, criticized the majority opinion for its apparent incompatibility with precedent:

> It is impossible for me to reconcile the *Bunting* case and the *Lochner* case, and I have always supposed that the *Lochner* case was thus overruled *sub silentio*. Yet the opinion of the Court herein in support of its conclusion quotes from the opinion in the *Lochner* case as one which has been sometimes distinguished but never overruled. Certainly there was

> no attempt to distinguish it in the *Bunting* case. However, the opinion herein does not overrule the *Bunting* case in express terms.[38]

Taft's colleague Justice Holmes, in a separate dissent, similarly reviewed numerous Liberty-of-Contract precedents and found that the minimum wage statute invalidated by the majority was, "in its character and operation, […] like hundreds of so-called police laws that have been upheld."[39] Subjective evaluations of this sort, when viewed in conjunction with the aforementioned empirical trends, are powerful evidence for oft-repeated criticism that the Supreme Court was inconsistent in its application of the Liberty of Contract.

To the extent that the Old Court demonstrated incompetence or insufficient attention to detail in adjudicating Liberty-of-Contract claims, at least some of the blame must lie with Congress. Before 1925, the Supreme Court lacked control over its docket and was thus encumbered with a virtually unmanageable workload. In all cases involving a federal question (a dispute arising under treaties, the US Constitution, or federal statutes), the losing party in either a state court of last resort or a US District Court had an automatic right of appeal to the Supreme Court. But, thanks to the exhaustive efforts of Chief Justice Taft, Congress took into account the justices' demands for reform and passed the Judiciary Act of 1925, which provided that the Court would hear cases only if four justices voted to grant certiorari. Mandatory jurisdiction was retained only for appeals from state supreme courts or US appeals courts of cases arising under the US Constitution (Hellman 1978, 1711-12; "Landmark Judicial Legislation"). The difference in the Court's workload is quantifiable; a yearly breakdown, derived from the records of Washington University's Supreme Court Database, appears in Fig. 4.5.

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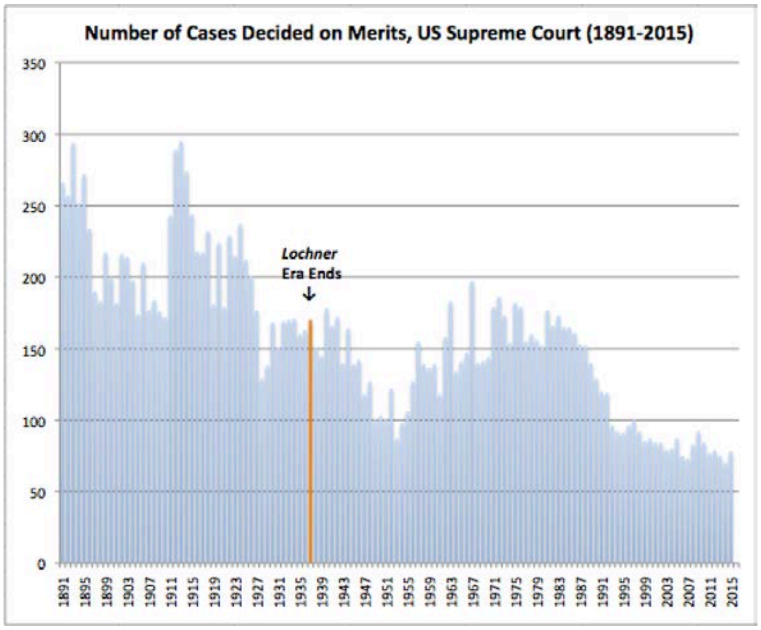
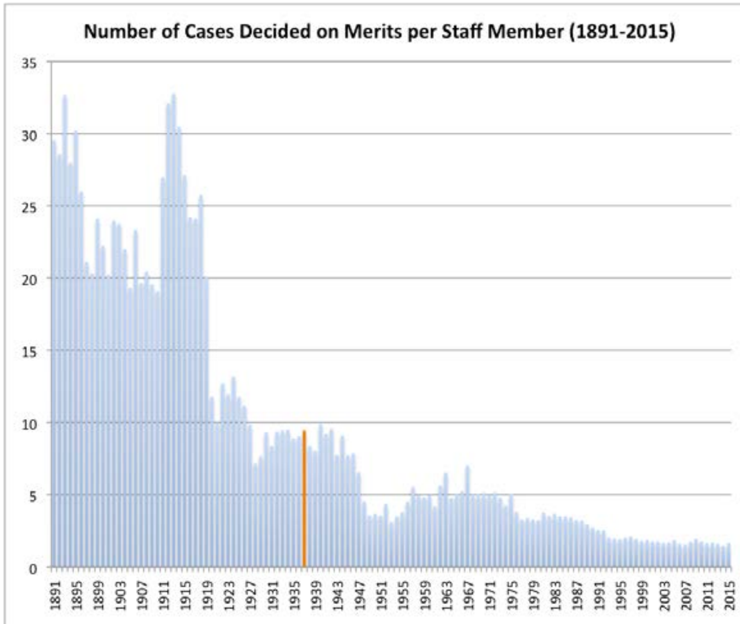
[38] *Adkins*, 261 U.S. 525, 564 (1923)(Taft, C.J., dissenting).
[39] Ibid., 570 (Holmes, J., dissenting).

Figure 4.5



But the difference in workload between the "Old" and "modern" eras is even more substantial that the numbers above suggest; in addition to its larger docket, the pre-New Deal Court was also severely understaffed compared to the Court of today. Until 1919, the Court's budget permitted each justice to hire only one assistant—a stenographic clerk—to handle, for fairly modest pay, the tedious work of typing. Justice David Brewer, in 1905, described this position as "simply a typewriter, a fountain pen, used by the judge to facilitate his work" (qtd. in Cushman 2016, 49, 39). In 1919, Congress appropriated funds for each justice to hire an additional assistant: a clerk trained as a lawyer who could work alongside the justice on tasks requiring legal expertise. It was not until 1947 that justices were allowed to hire two law clerks each—or three, in the Chief Justice's case. Today, each associate justice may hire four clerks and the Chief Justice five (Cushman 2016, 50, 64).

Figure 4.6



(Sources: Cushman 2016; Little 1981, 69)

When the caseload is considered relative to the size of each justice's staff, the burden on the Old Court is apparent. Fig. 4.6 displays the annual ratio of cases to the number of staff with legal training (a figure that includes only the justices and their law clerks).[40]

It appears, then, that the Old Court's slapdash approach to the Liberty of Contract was not necessarily a sign that this particular freedom was inherently resistant to principled adjudication; it is at least as likely that the justices of that period failed to articulate a systematic approach because they were demonstrably overburdened compared to justices of the post-New Deal era. Hence, the Old Court's jumbled record lends very little support to the argument that courts should not afford any protection to contractual liberty.

[40] I calculated these ratios using the number of clerks each justice was *allowed* to hire with public funds, not the actual number hired; in the modern era, some justices have not felt the need to hire their full allotment. In 1979, for example, the maximum total number of clerks allowed was 37, but only 32 were hired (Little 1981, 69). I could not find annual data on actual number hired, but it is unlikely that the difference would be large enough to undermine the larger point.

V. The Liberty of Contract, Maximum Hours Legislation, and *Lochner v. New York*

The first case study will examine the circumstances surrounding the infamous 1905 decision in *Lochner v. New York*, which, as discussed in the introduction, struck down a law limiting the hours of bakery employees. Because this is the best-known and most frequently debated of the contractual liberty cases (and, hence, because the relevant data is most available), this case study will be the most detailed and comprehensive of the five undertaken in this paper.

A) Literature and Hypotheses. Most scholarship expressing an opinion on the public-policy impact of *Lochner* tends to reaffirm the prevailing view of the decision as a bad one. Within this school of thought, there are two common criticisms of *Lochner*'s effects: one contending that the Court's decision disadvantaged workers due to the phenomenon of unequal bargaining power in labor markets, and another alleging that the invalidated legislation was actually an appropriate measure for the protection of public health, especially that of the bakery employees.[41] However, these claims are usually made in passing, often without empirical evidence, and often in articles more interested in making a legal argument than a policy one. The most thorough piece of empirical anti-*Lochner* scholarship that I have found is an article by Bewig (2005) addressing the public health issues surrounding the case. He assembles an exhaustive array of primary sources to support his contention that the law had a valid health justification based on medical knowledge at the time. On the opposing side are the defenders of *Lochner*, who argue that the decision had a neutral, or perhaps even a positive, impact on the public welfare. A number of authors, including Epstein (2006) and Siegan (2006), argue that the invalidated Bakeshop Act was not related to public health at all, but was instead a special-interest

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[41] See supra notes 8-11.

measure intended to confer a competitive advantage on larger bakeshops at the expense of smaller ones. Bernstein (2011) finds that the role of large bakeshops in pressing for the act's adoption was more limited, but presents a much more thorough empirical defense of *Lochner* as public policy. Wonnell (2001) also finds the special-interest hypothesis quite plausible, though his principal conclusion is that the invalidated part of the legislation did little for the public health, and may even have been detrimental to employees' wellbeing. Both he and Phillips (2001) dismiss the unequal-bargaining-power criticism of *Lochner* as unsupported by the evidence. Finally, the exhaustive account by Kens (1998) is too nuanced to fall squarely into the either the pro- or anti-*Lochner* factions, but his research is useful nonetheless as a source of background information. In addition to the scholarly literature, there are also the arguments and evidence offered in the *Lochner* litigation itself, both the parties' briefs and the justices' opinions. The main point of contention between the majority opinion and the principal dissent was the health rationale, though the dissent threw in a brief nod to the bargaining-power issue.[42]

B) Facts and Background. At the time the Supreme Court decided *Lochner* in 1905, government regulation of hours of labor was a rather novel concept. For the better part of the period since the Revolutionary War, the length of the working day had not even been a subject of negotiation, much less one of regulation. A day's work, common wisdom dictated, lasted from dawn until dusk. Following the Civil War, however, the movement for regulation of working hours began gathering momentum. "Eight-Hour Leagues" formed among laborers in cities across the country. The National Labor Union and the Knights of Labor, formed in 1866 and 1869

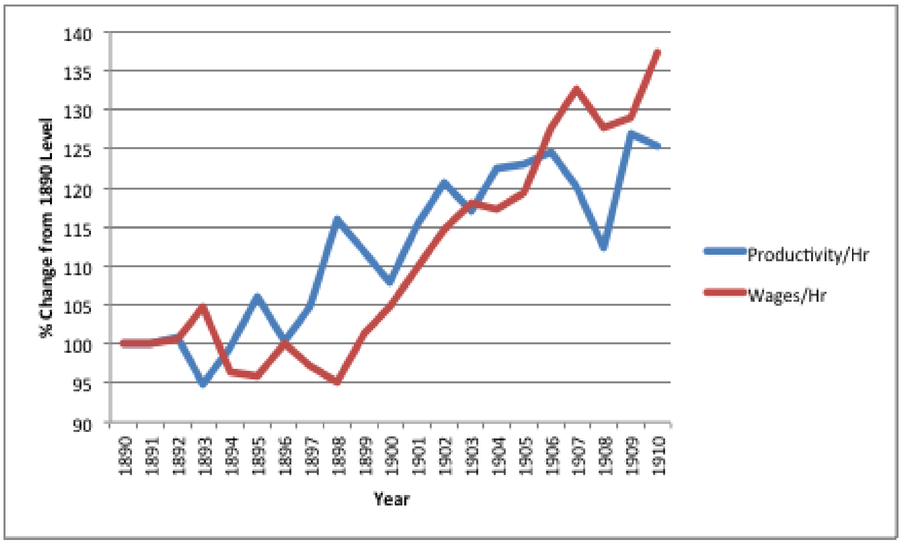
[42] "It may be that the statute had its origin, in part, in the belief that employers and employees in such establishments were not upon an equal footing, and that the necessities of the latter often compelled them to submit to such exactions as unduly taxed their strength," *Lochner*, 198 US 45, 69 (Harlan, J., dissenting).

respectively, included the eight-hour day in their initial platforms. But the legislation they inspired regulating private employers was largely ineffectual, consisting almost exclusively of "legal day's work" declarations, which were neither mandatory nor backed by any sanctions against offending employers (Kens 1998, 15-24). In the ensuing decades, the strength of the maximum-hours movement began to wane somewhat as major unions such as the American Federation of Labor shifted their focus toward securing reductions through collective bargaining rather than legislation directly regulating the terms of employment (Ratner 1980, 187-189). The Federation's president Samuel Gompers went so far as to publically declare his opposition to such laws (Woloch 2015, 27-28). Part of this shift was attributable to the fear that mandating shorter hours might lead to decreased overall earnings for workers, who had little reason to accept limitations on hours if their hourly wages would not change. One would thus expect that shorter hours would only be demanded where wages were high enough that workers needed extra leisure and decreased fatigue more than they did the greater earnings that came with a longer work day. On the other hand, advocates of hours restrictions frequently argued that such laws would reduce the supply of labor, leading to an increase in wages (Kens 1998, 22).

Theoretically, hours limitations do not reduce the total supply of labor, in that laborers could split their time between multiple employers so that the total number of hours worked remains the same even where there is universal compliance with the maximum hours law. If this was, in fact, the result of laws like the one at issue in *Lochner*, then the legislature's stated purpose of protecting employees against exploitation or the health risks of overwork would have been completely defeated; employees would be working just as much, except that they would bear the added burden of any logistical costs associated with securing and commuting to an additional position. On the other hand, the marginal cost to employers of hiring and training each additional employee needed to obtain the same number of total hours might have meant that employers tended not to hire the extra workers, and therefore that hours limitations effectively reduced the labor supply (Wonnell 2001, 56). A reduction in the aggregate supply of labor, all else remaining constant, would raise its cost (wages), which, in turn, would probably decrease employment (Landes 1980, 478-80). Even if a reduction in the labor supply did not raise the average hourly cost of labor, it is still possible that, "[f]orced to reduce the work day, the employer would compensate by reducing the daily wage"—an adjustment that would simply reduce the total earnings of any employees unable to secure a second position to make up for the reduction in hours at the first (Posner 1986, 593). The evidence for each of these predictions will be discussed later, though none of them seem to bode well for the law at issue in *Lochner*.

C) Unequal Bargaining Power. Many critics of *Lochner* maintain that government regulation of hours is necessary because, contrary to the assumptions of Classical Economics, the labor market will not naturally lead to improvements in the terms of employment for laborers; according to this theory, there is an "inequality of bargaining power" between employers and employees that allows employers to offer wages and working conditions less favorable than those that would result in a perfectly competitive labor market—including hourly rates of pay lower than the marginal productivity of labor (Kaufman 1991, 151-153). In the context of wages, this phenomenon would result in a situation in which labor productivity increases did not lead to comparable increases in workers' pay (Goodwin et al. 2014, 527-28). Conversely, the Classical model would tend to predict that wages would generally vary with productivity (Dorman 2014, 358). Though most would admit that each school of thought has an element of truth, the Classical prediction is marginally better borne out by the data from the relevant time period. The figure below compares growth in hourly compensation of wageworkers in manufacturing industries to growth in nationwide employee productivity:

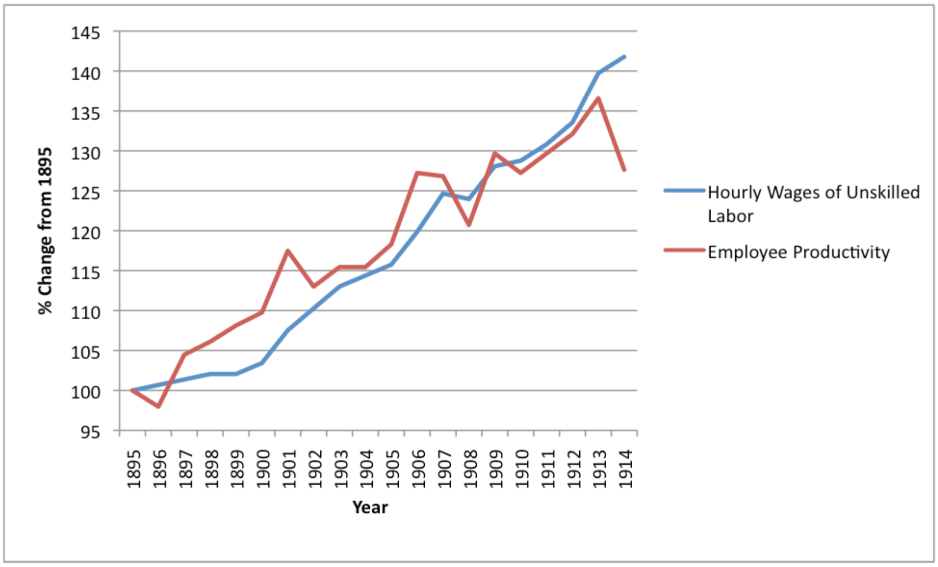
Figure 5.1



(Source: US Census Bureau, 1976)

The general trend indicated above is corroborated by other findings, including one study finding that from 1889-1919, productivity per hour increased 1.3%, while real hourly earnings increased by 1.7% and by 1.9% for wageworkers in manufacturing industries (Fabricant 1959, 30-33). As proponents of the unequal-bargaining-power view will be quick to point out, the extent of the alleged inequality is different in different sectors; lower-skilled workers, for example, are said to be more vulnerable to exploitation than are their skilled counterparts. While the data from this period do somewhat suggest such a difference across industries, the overall patterns still demonstrate that even among unskilled wageworkers, hourly compensation tended to vary with hourly productivity.

Figure 5.2

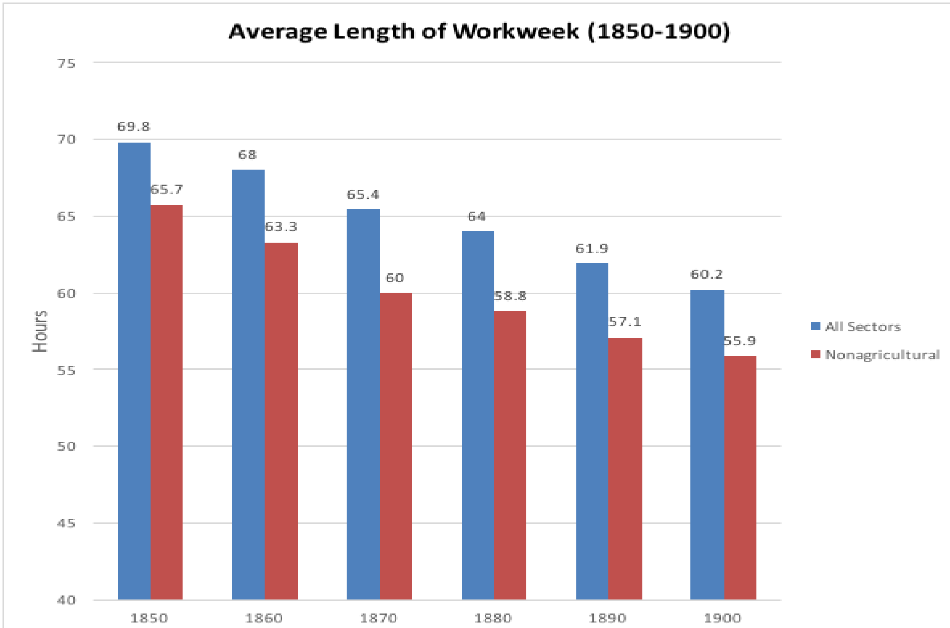


(Source: US Bureau of the Census 1949, 67)

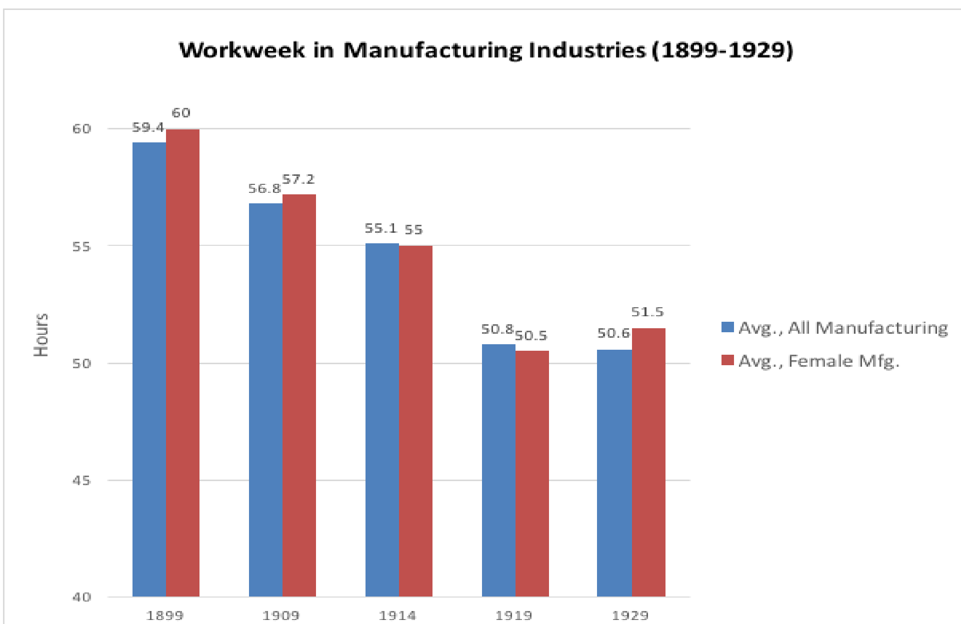
Moreover, assuming the unequal-bargaining-power hypothesis is generally correct, one would expect that its effects would be most evident on those terms of the employment contract related to compensation; since every extra dollar in wages resulted in a one-dollar decrease in the employer's revenue, wage increases would require a great deal of bargaining power on the employees' part. But where non-price terms of employment (such as hours) are at issue, the bargaining-power view would suggest that workers would be at least somewhat more successful at extracting concessions from bosses, as a reduction in hours may produce an increase in workers' utility that is much greater than the resulting decrease in the employer's utility (Wonnell 2001, 9-11). Sure enough, hours of labor uniformly declined throughout this period, even where the decrease could not have been the result of maximum hours laws,[43] as figs. 5.3-5.4 demonstrate. Even the average weekly hours of unskilled laborers show this pattern (fig. 5.5), though it is somewhat less pronounced than for wageworkers generally.

[43] Steinberg (1982) finds that in 1900, only 4% of American workers were covered by any maximum hours legislation, rising slowly to 7% in 1910, and 12% in 1920 and 1930 (qtd. in Whaples 2001).

Figures 5.3-5.4



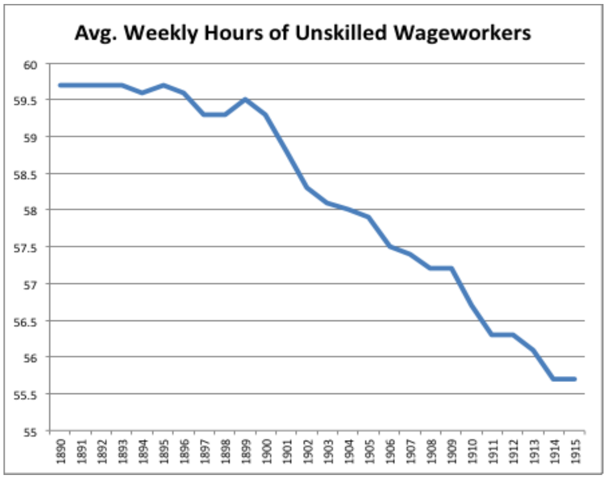
(Source: Lester qtd. in Wonnell 2001, 31)



(Source: Jones qtd. in Wonnell 2001, 41)

Averages for the above charts include hours of wageworkers only.

Figure 5.5



(Source: U.S. Bureau of the Census 1949, 67)

These trends, combined with the relative weakness of the unequal-bargaining-power model in explaining patterns of wages during the same era, tend to weigh against the idea that maximum hours laws were a necessary means of securing the optimal terms of employment for laborers.

As for the particular case of New York's baking industry, there is similarly little reason to suspect that any substantial disparity in bargaining power existed between employer and employee. For one, a key characteristic of employers that supposedly would give them the upper hand is their vast wealth or large profits, which would allow them to manage without the employee's labor more easily than the employee can manage without work (Phillips 2001, 131-34). But the New York baking trade was overwhelmingly "carried on with very small capital, in very small establishments, and with very few workers in each"—about three per bakery, on average; "the capital invested by each [bakeshop owner] is comparatively small […] the profit on every loaf baked is very small, and the smaller baker must economize as much as possible if he wishes to make a living" (New York Factory Investigating Comm'n., 1912, 208-209). Similarly, figures from 1899 indicate that 78% of the state's bakeries employed four or fewer people, weighing heavily against the idea that the trade at this time pitted workers against corporate-behemoth bakeshops (Kens 1998, 7). Another theorized cause of employee/employer inequality of bargaining power is that employees may be "trapped," to some extent, in service to their bosses, in that they would be too dependent on their meager wages to quit and shop around for more favorable terms of employment (Phillips 2001, 133). But here, too, the numbers tell a different story; as the New York Labor Department's 1896 Annual Report found, there was a great deal of turnover in the New York baking trade: "[a] good many shops have work for extra men only a few weeks in the year," and those who "secure these odd jobs are subject to frequent changes. Then there are others who, dissatisfied with their disagreeable surroundings, […] are constantly on the move from place to place" (57). That publication further reported that about 60% of the 3,253 bakeshop employees included in the Department's study had worked less than one year for their current employers (57-73). This turnover, much of it voluntary on the employees' part, likely increased their bargaining position vis-à-vis employers. As one bakery owner told the *Times*, during the summers his employees would "go away to the watering places" for other work; "They have their own ways, whether union men or not, and the boss must put up with them or shut up shop. It's no good to send them off, for the next ones are just the same. With the small profits and trouble with help, I have often wanted to sell out" (Drysdale 1896, 8). Finally, a factor often cited as a cause of unequal bargaining power is a monopsony in the labor market, where there are so few employers that workers feel they have no choice but to agree to terms of employment less favorable than those they would accept in a competitive market (Kaufman 1991, 153; Phillips 2001, 134-36). Again, this was not at all the situation in the New York baking trade; by the estimate of the New York Labor Department, there were 1,059 bakeries in New York City, 40 in Buffalo, 60 in Albany, 22 in Utica, 30 in Rochester, and so on (1896, 6-9). In sum, there is no reason to suspect that inequality of bargaining power between employees and employers was a particular problem in the baking industry.[44]

But however real the unequal-bargaining-power phenomenon may have been during the Liberty of Contract's heyday, it would still be an exceedingly odd basis on which to defend the Bakeshop Act that the Court struck down in *Lochner*. If the law was intended to ameliorate the effects of unequal bargaining power on working hours, it would likely prohibit employers from requiring more than a certain number of hours of work *as a condition of employment*; this way, employees would not have to fear being fired for their refusal to accept unreasonable hours, thus removing the bargaining chip that usually gave employers the upper hand (i.e., threatening laborers with dismissal).[45] But that is not what the Bakeshop Act said. Instead, it provided that "[n]o employee shall be *required or permitted* to work in a biscuit, bread, or cake bakery or confectionery establishment more than 60 hours in any one week or more than 10 hours in any one day" (emphasis added).[46] It prohibited employees from exceeding the hours limitations even by their own choice—and even where that choice was not made out of fear of losing their jobs,[47]

[44] Citing slightly less detailed figures, Phillips reaches the same conclusion: "it does not appear that the state's baking industry was marked by widespread monopsony power […] late in the nineteenth century" (2001, 139).

[45] It has been argued that an hours limitation that only prohibited hiring an employee to work beyond the maximum as a condition of employment would be much more difficult to enforce than an hours limitation that could not be exceeded even if the employee chose to do so without threat of discharge (Roberts 2017). But this does not seem likely to be true. In fact, enforcing a law of the latter type would almost certainly be more difficult; if both employer and the employee may *want* to form a contract for the employee to exceed the hours limit, then the only two parties likely to have firsthand knowledge of the violation have incentives to cover it up. But hours limitations of the former type would only apply in case where employees were actually aggrieved, in that they were coerced by threat of dismissal into exceeding the hours limit, and they would thus be motivated to expose the employer's violation.

[46] N. Y. Laws 1897, p. 485, chap. 415, art. 8 §110.

[47] Such was the case in *Lochner*, where Joseph Lochner's supposedly "overworked" employee Aman Schmitter had chosen to work in excess of the legal hours limitation in order to learn from Lochner the trade of cake baking (Bernstein 2011, 29).

an aspect of the legislation that the majority opinion in *Lochner* found especially objectionable.[48] The Factory Inspector of New York even reported in 1898 that the major difficulty in enforcing the hours provision was that bakery employees, even more fiercely than employers, resisted compliance with it.[49] This issue may explain why the state's brief in *Lochner* primarily defended the law as a public health measure, rather than as a remedy for the problem of unequal bargaining power. If long hours were injurious to the health of bakery workers and consumers, it would be appropriate to limit the length of the workday even in situations where employees were genuinely willing to work longer hours.

D) Health Argument. Admittedly, the New York legislature's decision to regulate the baking industry for public health reasons seemed eminently reasonable given the conditions that characterized bakeries in the late-19th Century United States. Many medical authorities warned that the dusty conditions found in bakeries during this era put employees at an increased risk of "consumption," a catch-all term referring to illnesses characterized by lung trouble and emaciation, particularly tuberculosis (Bernstein 2011, 24; Kens 1998, 10). Of particular concern were bakeries located in cellars, establishments notorious for their dirtiness and lack of ventilation or light; an 1896 New York Department of Labor report estimated that such places comprised 85% of commercial bakeries in the state (9). Reform advocates were also troubled by

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[48] "It is not an act merely fixing the number of hours which shall constitute a legal day's work, but an absolute prohibition upon the employer's permitting, under any circumstances, more than ten hours' work to be done in his establishment. The employee may desire to earn the extra money which would arise from his working more than the prescribed time, but this statute forbids the employer from permitting the employee to earn it," *Lochner*, at 52-53.

[49] "[T]he journeymen [bakeshop workers] are quite frequently found indifferent and careless. It is the journeymen in whose interest, almost exclusively, some of the provisions have been enacted, provisions such as the ten-hour workday, and yet he will not arouse from his apathy and co-operate with the department to have them enforced. Many have been found who even aid the employers in evading that provision of the law. They will make false statements deliberately, and will refuse to file affidavits as to the hours they are employed in excess of the legal limit. Under these circumstances the enforcement of the Ten-hour Law has become very difficult" (765).

the fact that turn-of-the-century bakery employees had, on average, one of the longest workdays found in any industry (Faulkner 1951, 256). Progressives joined bakers' unions in calling for a reduction in hours; since bakery employees were generally paid by the day, most reformers expected that a shorter workday would not result in less income. At any rate, conditions in most bakeshops, poor as they were, were steadily improving throughout the 1880s and 90s, due in part to advancing cooking technology, shortening the workday and sanitizing the process; and, in part, to collective action on the part of bakeshop employees (Bernstein 2011, 24).

The primary catalyst for New York's regulation of the baking industry was a damning 1894 exposé published in the *New York Press* bearing the sensational headline "Bread and Filth Cooked Together." The story, the work of muckraking reporter Edward Marshall, described disgusting conditions in New York City bakeries, from roach infestations to poor ventilation, and called for remedial legislation to protect both consumers and bakeshop employees. There is, however, reason to doubt the reliability of Marshall's reporting. For one, his investigation was coordinated with the Journeymen Bakers' Union as part of campaign for regulatory legislation (Bernstein 2011, 23-26). And Dr. Charles Purdy, in an 1896 report to the Brooklyn Health Commissioner, concluded, after fact-checking the exposé, that much of Marshall's story was "greatly exaggerated and most of it absolutely false" (4).[50] Still, lawmakers responded quickly, passing the Bakeshop Act, which went into effect with the governor's signature in May 1895. The law, modeled after England's 1863 Bakehouse Regulation Act,[51] required bakeries to have

[50] Purdy went on to say that "[m]uch of the matter which has been published" alleging unsanitary bakery conditions "is gross exaggeration"; "the danger to public health does not lie in the bakeries, but in the stores" where their goods are sold and in consumers' homes. He further observed that "people who are so anxious to have special bake shop laws passed are evidently inspired by something else than their desire to advance the public welfare" (1896, 4).
[51] *People v. Lochner* (1904) 177 N. Y. 145, 169 (Vann, J., concurring).

adequate ventilation, plumbing, and drainage systems; to maintain certain conditions for the preparation of bread; and to abstain from a number of other unsanitary practices. At the behest of the bakers' union, lawmakers also tacked on the hours restriction, a provision that had no analog in England's law. The Factory Inspector was authorized to inspect bakeries for violations of the Act.[52] In light of these circumstances, was the Supreme Court right to dismiss the hours provision as insufficiently related to the protection of safety or health? The conventional wisdom on *Lochner* would answer in the negative, defending the Bakeshop Act as a legitimate public health measure—a measure of which the hours limitation was an integral part. The opposing view contends that the Act (or at least its hours limitation) likely had no effects or even negative effects on employee welfare; instead, the law was primarily a result of scheming on the part of larger, unionized bakeshops in an attempt to undermine their less technologically advanced competitors—who needed their employees onsite for longer periods of time.

The *Lochner* critics' dismal view of contemporary conditions in bakeries seems, in many respects, to be borne out by the evidence. A comprehensive study of New York bakeshops in eight major cities, conducted in 1895 by the state Department of Labor and published in the Department's 1896 report, concluded that most such establishments were "nothing more nor less than cellars of the worst description," and "absolutely unfit for the manufacture of food products," as well as "damp, fetid, and devoid of proper ventilation and light" (6). Of the 1,603 bakeries investigated, 38% were deemed "unhealthy" (the worst of the eight possible designations), while only 18.6% received any of the top three ratings of "clean," "fair," or "healthy" (9-10). Such conditions, the report found, were the "primary cause of considerable

[52] N. Y. Laws 1897, p. 485, chap. 415, art. 8

illness," the most serious of which was said to be the "unusual proportion" of "pulmonary complaints," indicative of "the tendency toward consumption for those working in these cellar or basement shops" (20). The proportion reporting such complaints was, in New York City, 2.5% of the 2,192 bakeshop employees examined (2.9% if unidentified ailments that were merely assumed to be related to ventilation are counted). The corresponding figure for all eight cities was similar (2.55%) (20-21). Many insisted that correcting such deplorable sanitary conditions would require not only legislation mandating healthy practices, such as ventilation and drainage, but also limitations on hours. The 1894 issue of the *Bakers' Journal* took the position that, "for the permanent relief of the men, which is essential to their cleanliness, the principal requirement is the reduction of the hours of labor" (qtd. in Bewig 2005, 483). Excessive hours—sixteen per day, on average, according to one 1880 study—were blamed not only for contaminating the products, but also for bakers' ill health (Bewig 2005, 480). A concurring opinion authored by a judge on New York's highest appellate court, which heard the *Lochner* case before it was appealed to the US Supreme Court, agreed with the New York court's decision to uphold the Bakeshop Act's hours limitations on health grounds: "vital statistics show that those vocations which require persons to remain for long periods of time in a confined and heated atmosphere filled with some foreign substance, which is inhaled into the lungs, are injurious to health and tend to shorten life."[53] Though the US Supreme Court reversed the state court on appeal, a similar argument in favor of the hours restrictions was made in Justice Harlan's dissenting opinion; "[t]here are many reasons of a weighty, substantial character, based upon the experience of mankind, in support of the theory that, all things considered, more than ten hours' steady work

[53] *People v. Lochner* (1904) 177 N. Y. 145, 169 (Vann, J., concurring).

each day […] in a bakery or confectionery establishment, may endanger the health, and shorten the lives of the workmen."[54]

On the other hand, defenders of the *Lochner* decision have offered a substantial body of competing factual evidence. This view largely concedes the existence of sanitation issues afflicting bakeshops at that time, but argues that unhealthy practices themselves should be directly subject to prohibition or regulation. As the majority opinion put it,

> several sections provide for the inspection of the premises where the bakery is carried on, with regard to furnishing proper wash-rooms and water-closets, apart from the bake-room, also with regard to providing proper drainage, plumbing and painting […] and for other things of that nature; […] These various sections may be wise and valid regulations, and they certainly go to the full extent of providing for the cleanliness and the healthiness, so far as possible, of the quarters in which bakeries are to be conducted. Adding to all these requirements a prohibition to enter into any contract of labor in a bakery for more than a certain number of hours a week is, in our judgment […] wholly beside the matter of a proper, reasonable and fair provision.[55]

It could of course be said in response that some unhealthy aspects of baking may be impossible to eliminate, and so their effects must be mitigated by limiting workers' exposure to them with maximum-hours rules. But the then-common characterization of baking as an unhealthy profession is not wholly supported by the data. As for the risk of consumption, Prudential Life Insurance company statistics on tuberculosis mortality rates from 1907-1910, including breakdowns by occupation, suggest that bakeshop workers were nowhere near the top of the list, and indeed died from tuberculosis at rates substantially lower than the average for all employed males (Wonnell 2001, 16). Similarly, Lochner's Supreme Court brief cited data from the Annual Report of the Registrar-General on mortality rates of various professions in England from 1890-92; not only were bakers in the bottom quartile of the 48 occupations examined when ranked by

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[54] *Lochner v. New York*, 198 U.S. 45, 72 (1905) (Harlan, J., dissenting).
[55] *Lochner*, 198 U.S. 45, 61-62.

mortality rate, but bakers' mortality rate was also lower than that of occupied males generally.[56] The aforementioned 1895 Labor Department study of bakeries, while initially decrying the "unusual proportion" of bakeshop workers suffering from consumption, in fact found that only 0.215% reported having the illness (1896, 26). To put that in perspective, the 1913 report of New York City's Department of Health indicates that 31,212 individuals out of 4.8 million living in the city (likely a slight overestimate) were registered with the municipal health department as currently suffering from pulmonary tuberculosis, or about 0.65% of the population (90-93). Bear in mind that this includes only tuberculosis (as opposed to all types of "consumption") and that this is for the city in general (not merely the working population); if anything, 0.65% is likely an *underestimate*—and given that tuberculosis rates were falling throughout this period, the figure was likely *higher* in 1895, a fact that makes the bakers' consumption rate of 0.215% look quite low, and, hence, makes the contention that their industry was especially in need of hours regulation seem overstated.

But could it be that, even if work in bakeries was not exceptionally harmful, the provision restricting hours nonetheless had a positive effect on bakeshop employees' health—one that could not be achieved with the sanitation regulations alone? Further scrutiny of the factual circumstances suggests not. For one, the unusually long hours in the industry were largely explained by the fact that most bakery employees often slept during their shifts, as technological constraints made their duties sporadic but required them to remain on the premises in order to be nearby throughout the baking process (Bernstein 2011, 24-25; *New York Times* 1896, 9;

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[56] *Lochner*, Transcript of Record, Brief for Plaintiff in Error, 53-56.

Drysdale 1896, 8).[57] Furthermore, the distinct feature of bakeshop work that put bakery employees at risk of pulmonary disease—exposure to flour dust[58]—comprised only a short portion of the employees' workday. The part of the baking process in which flour dust was emitted was that of making dough (or "sponge"), a task that, "even in small shops," occupied only "an hour or two hours of the days' work"; moreover, "[i]n almost every" break or cake bakery in the state's "large cities [that] has any considerable amount of business, mixing machines are installed for making the dough […] These mixing machines absolutely remove any possibility of flour dust filling the air."[59] A law reducing hours from twelve to ten would thus seem to lack a "direct relation, as a means to an end," to protecting bakery workers' safety and health. Moreover, the possibility that the hours restriction could have reduced bakery workers' earnings meant that it may have *increased* their risk of disease; experts at this time were gradually coming to accept that the most important factor in resistance to consumption was proper nutrition (and, hence, wages), rather than hours or working conditions.[60] Even more suspect are the gaps in the Bakeshop Act's coverage, which do not wholly eliminate the

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[57] New York Dept. of Labor's Annual Report (1896) found that 46% of bakery employees boarded and lodged with employers (368-371); "Sleeping […] in the small shops is a common thing for bakers" (*Brooklyn Daily* 1896, 22).

[58] "The journeymen bakers strongly believed that flour dust, heat, humidity, fumes, and smoke—particularly when encountered for hours on end in the poorly ventilated cellar bakeries—contributed to high rates of consumption in their trade" (Bewig 2005, 481). Dr. George Price's 1913 report, published by the New York Factory Investigating Comm'n., stated that "the degree of excess in consumption frequency is partly the result of continuous and considerable inhalation of flour dust" (though Price also blamed "general conditions" such as hours and night work)(231-32).

[59] *Lochner*, Transcript of Record, Brief for Plaintiff in Error, 19-20. Though some expressed skepticism about the machines removing the flour dust from the air, the brief's claim is supported by other contemporary sources; "in a New York bakery," an article in *The Sketch* began, most "of the breadmaking process is done by machinery […] seven to ten barrels of flour are first carried to the top floor of the and their contents are dumped bodily into a chute, the sides of which are composed of glass and so screened and protected that no flour-dust whatever escapes into the room" (Northrop 1903, 444); a 1918 *American Miller* piece explained that because "all flour handled in the departments is […] handled by [mixing] machinery in closed form, there is very little flour dust encountered" (Williams 387).

[60] The US Public Health Service concluded in 1913 that "wages rather than working conditions best explained differences in tuberculosis death rates among occupations"; a 1944 report found that earnings were much more correlated with resistance to tuberculosis than were working conditions (qtd. in Wonnell 2001, 24-25).

possibility that its hours provision had positive effects, but do call into question the motivation behind the law's passage. The law announces its intention to apply to "any person engaged in the business of baking," yet then applies the hours provision only to such persons who are employed "in a biscuit, bread or cake bakery or confectionary establishment"—effectively exempting those employed "in pie bakeries, hotels, restaurants, clubs, boarding-houses, and private families"; moreover, the bakery owners could (and often did) work as long in their shops as they pleased, an odd practice to permit if it is per se unhealthy to spend more than ten hours in a bakery (or to consume bread made by someone who did).[61] The two exempted groups constituted, by one estimate, "at least one-third to one-half of the persons engaged in the baking business"[62]

A review of the health-related arguments in the *Lochner* case would be incomplete without consideration of the principal dissenting opinion, penned by Justice John Marshall Harlan and joined by Justices William Day and Edward White. Harlan was a firm believer in the Liberty of Contract, and, three years later, would deliver the majority opinion in *Adair v. United States*, in which the Court struck down a law prohibiting Yellow-Dog contracts. In *Lochner*, however, Harlan considered it "plain that [the challenged] statute was enacted in order to protect the physical wellbeing of those who work in bakery and confectionery establishments."[63] It

[61] Perhaps the exemption for bakeshop owners could be justified by claiming that the law is a safeguard against unequal bargaining power and, as such, did not need to protect owners. But, as discussed earlier, if the law is meant to address unequal bargaining power, it should have prohibited working over 10 hrs. per day as a condition of employment, rather than prohibiting it in all circumstances. Moreover, the bargaining-power justification would still fail to explain the other exemption for bakers in hotels, pie bakeries, boarding houses, etc.

[62] *Lochner*, Transcript of Record, Brief for Plaintiff in Error, 8. Though I point out elsewhere in this paper that appellate briefs' factual assertions that have not been established by a trial-level court should not be relied upon by appellate courts (such as the US Supreme Court, in this case), this particular fact was not disputed by the opposing brief, so there is reason to believe it is at least trustworthy enough for my own research. And if the Court felt it necessary to use information of this sort in the *Lochner* case, the proper course of action would have been to remand the case to a trial-level court for fact-finding, and then to make a final determination based on such facts when the litigation reached the Supreme Court for the second time.

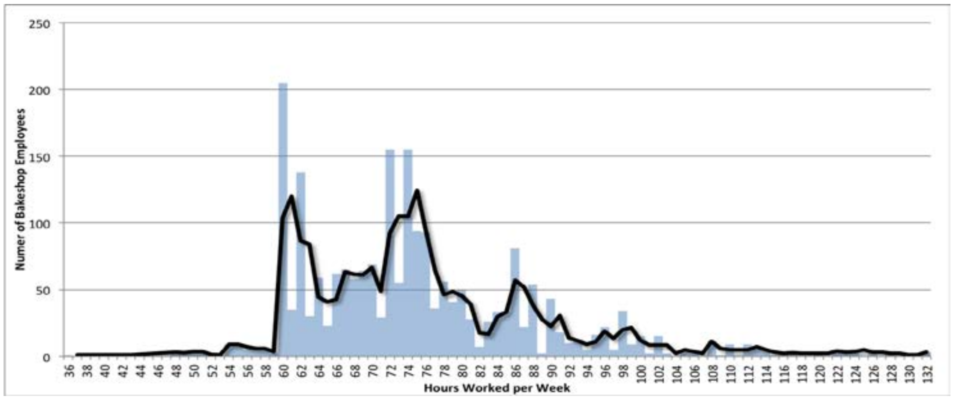
[63] *Lochner*, 198 US 45, 69 (Harlan, J., dissenting).

appears that the facts on which Harlan's conclusion depends were gathered through his own independent research, and were not based on the record compiled at the trial phase of the litigation or even the facts to which both parties had stipulated in their briefs. Even if Justice Harlan's sources were credible, his meandering away from the record is inherently problematic, as it is highly improper for an appellate court to base its holding on facts that have not been thoroughly tested by cross-examination or otherwise subject to the evidentiary standards of a trial court. That said, the first external source he quotes is a passage from "Professor Hirt" (referring to Ludwig Hirt), from his 1871 work *Die Krankheiten der Arbeiter* (The Diseases of the Workers). The quoted portion is simply a paragraph of vague statements describing baking as "hard work," but without any data whatsoever to support them. In fact, if Harlan had read the entire work instead copying exactly a translated passage from a union organizer's 1904 pamphlet (as he appears to have done), he might have seen that Hirt's study actually found that bakers (*Bäckern*) suffered from lung diseases (consumption or Pneumonia) at a lower rate than workers in non-dusty trades (15.4 compared to 15.7) (30). Harlan's second piece of evidence is another vague passage that he attributes to "another writer," without any further citation. The literature on the *Lochner* case expresses puzzlement as to Harlan's source; as Bernstein (2011) put it, "[w]here [Harlan] came across this information is unclear" (35). As it turns out, the quoted language is the work of a Dr. Ramazzini, published in 1741! However, it seems almost certain, based on my research, that Harlan came across both this passage and that of Hirt in "For Day Work and Eight Hours," a 1904 pamphlet by Joseph Schmidt, editor of the *Bakers' Journal* and *Deutsch-Amerikanische Baecker-Zeitung*—and published "in the interest of the Bakery and Confectionery Workers' International Union of America." The exact quotations that Harlan used appear on pages 16-17 in the order in which he quoted them, and are exactly the same length. Apart from these, Harlan relies only on a tangentially related passage from the Annual Report of the New York Bureau of Statistics of Labor, which briefly mentions the benefits of shorter hours, with no reference to any data or to the baking trade. All things considered, Harlan's dissent does not present any information that strengthens the argument in favor of the Bakeshop Act.

E) Bakeshop Act as Special Interest Legislation. The aforementioned incongruence between the hours provisions' purported ends and its means suggest (albeit weakly) that something other than health concerns were behind its passage. Is it possible, as one pro-*Lochner* hypothesis suggests, that the Bakeshop Act's limitations on hours were enacted to serve special interests, with the sanitary justification merely serving as a cover? This view holds that at the time the act was passed, there were two factions of bakeshops: larger, usually German-owned, unionized shops with superior technology that increased productivity and decreased hours; and smaller, non-unionized shops based in cellars, usually poorly equipped and operated by other immigrant groups. The latter group of bakeries had inferior technology (meaning employees were less productive, which led to long hours and low wages), and needed their employees to remain on the premises for long stretches of time, often sleeping onsite between shifts. The larger bakeries and their unionized workers, who already rarely worked more than ten hours a day, allegedly supported the Bakeshop Act's hours limitations as a means of undermining their competition from small bakeries (Siegan 2006; Epstein 2011).

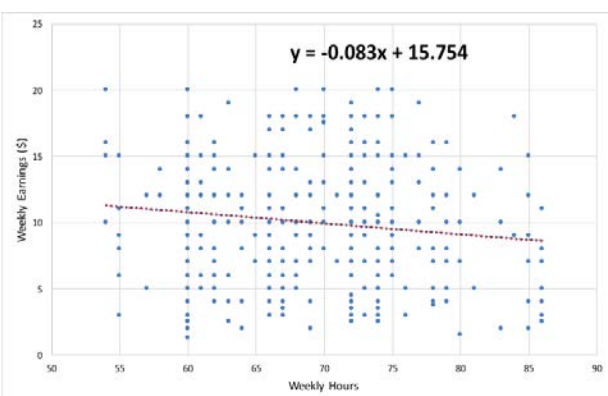
The pro-*Lochner* camp's characterization of the baking industry during this period appears, in many respects, correct. New York's Bureau of Statistics of Labor, in its 1895 study of the state's baking industry, concluded that the union wage rate "materially surpasses that received by the unorganized workers," and that the union workweek averaged 68 hours, compared with 74 hours for non-union bakeshop workers (1896, 259). The unionized shops' owners and employees felt threatened by the unorganized, low-wage faction, condemning them as "the cheap labor of the green hand from foreign shores" (qtd. in Bernstein 2011, 24-25). The Factory Inspectors of New York similarly reported in 1900 that the "old-time method of sleeping in bakeshops," was, by then, "confined chiefly to Italian and Jewish bakeries" (805). Such disparities in hours apparently arose largely due to differences in technology; the 1896 Labor Department report confirms that "the length of time which is considered a day's labor in bakeries varies greatly—those conducted on a modern plan, with improved appliances and proper workrooms, rarely work their men more than ten hours a day," while in other bakeries, "the men were compelled to work from twelve to twenty-two hours" (42). As one wholesale bakeshop owner explained, these differences existed primarily because, at the small bakeries, "it was necessary to keep men on for sixteen hours to get ten hours of work" (qtd. in Bernstein 2011, 25). And, as the May 1916 edition of *Bakers Review* described the situation, "[m]achinery has so far justified the claims of the manufacturers as to the reduction in cost of labor, that the bakers' union in the city of Chicago grants a working time of eight hours to the employee where machinery is in use, and nine hours' time to the employer operating without machinery" (77). The June 1916 issue of that publication similarly lamented the difficulty of "obtain[ing] outsiders to assume the awkward hours necessitated by the requirements of the average small baker" (56). A histogram of the Labor Department's 1895 data for all bakery employees in New York City shows a sort of bimodal distribution, suggesting the existence of one group of bakeshop employees working about 60 hours per week, and another working over 70:

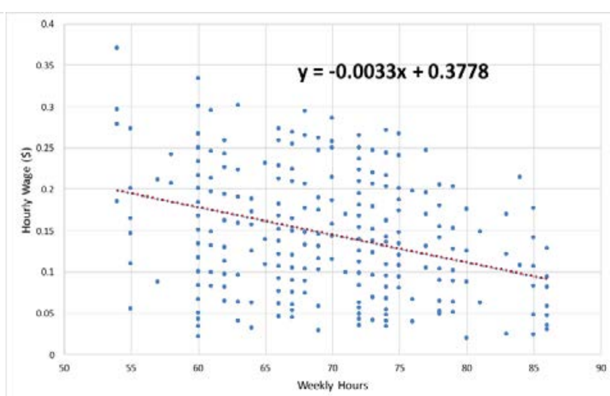
Figure 5.6



Also relevant are the following statistics relating to wages, earnings, and hours of New York City bakeshop employees, as reported by state's Labor Department in 1896. The first chart displays the relationship between weekly hours for such employees and their weekly earnings, while the second shows the relation between weekly hours and hourly earnings. Both slopes are negative and significant at the 99% level, though the trend is more substantial for hours and hourly wages than for hours and weekly earnings (*p*<0.0001 compared to *p*=0.0046). These findings support the hypothesis that the group working in shops requiring long hours were less productive than their counterparts working shorter weeks.

Figures 5.7-5.8





As for the interests involved in passing the Bakeshop Act, it seems clear that the journeyman bakers' union played a leading role. Labor organizer and *Bakers' Journal* editor Henry Weismann, with the assistance of some union colleagues, petitioned the New York legislature in 1894 with a series of policy demands that eventually became the Bakeshop Act; at the behest of Weismann and the union, the hours limitation was tacked on after the bill was introduced in the Assembly.[64] Both legislative chambers voted unanimously in favor of the bakeshop bill, which was then submitted for review to lawyer Charles Z. Lincoln, counsel to Governor Levi Morton. Notably, Lincoln's only concern was the hours limitation, which he feared may be unconstitutional. After a private meeting between Lincoln and Weismann about the issue, the bill was returned to the legislature and bakery owners were exempted from the restriction on employees' hours with the hope that this would ameliorate any constitutional problems (Kens 1998, 64-65). These events explain the addition of at least one of the allegedly suspicious omissions from the provision's coverage, weighing against (but not wholly refuting) the hypothesis that this exemption was evidence of an invidious ulterior motive. However, other evidence provides support for the argument that the maximum-hours provision would benefit large bakeries at the expense of smaller ones. Owners of the larger shops, though they do not appear to have actively lobbied for the legislation, strongly supported its passage,[65] while proprietors of small bakeshops uniformly opposed it, not least because they felt that it would

[64] In a particularly unexpected turn of events, Weismann later went on to pass the bar exam, open his own bakery, and represent Lochner before the Supreme Court, arguing that the law for which he had lobbied a decade earlier was unconstitutional. Weismann explained his about-face by claiming to have "undergo[ne] an intellectual revolution" in which he concluded that the act was "unjust to the employers" and came to believe in "the right of a man to work an hour or so overtime for extra compensation if necessity arises" (*New York Times* 1905, 1).

[65] "[O]rdinary corner bake shops […] claim that the law would drive them out of business and give the owners of the big bakeries a monopoly […] the large establishments are heartily in favor of the bill, claiming they are already conforming with all its requirements," "Big Bakers Back Audett," (*Brooklyn Daily*, 1896); the National Association of Master Bakers, at its 2nd and 4th national conventions, endorsed laws of the same type (Bernstein 2011, 26-27).

afford their large competitors an unfair competitive edge.[66] Indeed, Dr. Charles Purdy, in a report to Brooklyn's Health Commissioner, cited the act's weak "health" justification as evidence that "people who are so anxious to have special bake shop laws passed are evidently inspired by something else than their desire to advance the public welfare" (1896, 4).

F) Possible Secondary Effects of the Bakeshop Act. The defenders of *Lochner* further argue that not only did the hours limitation lack a safety or health justification, it may have even had negative effects on the welfare of the bakery employees it purported to protect, a concern also expressed in the *Lochner* majority opinion: "limiting the hours of labor […] might seriously cripple the ability of the laborer to support himself and his family."[67] These fears seem well-founded. If the provision had the effect of reducing the aggregate supply of labor, then labor costs (wages) per hour would either increase, in which case employment would likely decrease; or there would be no effect on hourly wages, in which case bakery employees' earnings would decrease. If the provision did not affect the labor supply, then that would indicate that laborers divided their time between multiple employers so as to work just as many hours as before—which would mean that the law failed to protect health, succeeding only in inconveniencing both bakery owners and employees. And it is quite possible that, in light of the technological constraints small bakeries faced that caused them to require long hours, the maximum hours provision would seriously interfere with their operations, leading them to cut daily wages, lay off workers, or even close down.[68] Unfortunately, it is impossible to empirically evaluate this theory

[66] "It is impossible for the small bakeries to comply with all the laws. The laws are all in favor of the large bakeries and the aim seems to be to drive the small bakers out of business" (*New York Times* 1896, 9).
[67] *Lochner*, 59.
[68] One flour shop owner argued the 10-hour rule would "operate unfairly against the smaller bakeries and practically drive them out of business. He sees no reason why [bakers] should not work more than ten hours per diem," since "there is always a considerable period during the day when they are necessarily idle" (*Brooklyn Daily* 1896).

with data from the period immediately following the Bakeshop Act's enactment, and even if such data were available, it would be largely meaningless; because courts required the sworn affidavits of at least two employees of a given bakeshop in order to prove a violation of the law—evidence that proved nearly "impossible to obtain," the act's hours limitations[69] faced enforcement obstacles and were almost uniformly ignored (Reynolds 1901, 4).[70] However, the available qualitative evidence strongly suggests that compliance with the maximum-hours provision would have been a substantial imposition on small bakeries. Upon passage of the act, the Bakers' Association president complained that "[i]t is impossible for the small bakeries to comply with all the laws. The laws are all in favor of the large bakeries and the aim seems to be to drive the small bakers out of business" (*New York Times* 1896, 9). A few months later, the *Times* published an interview with the owner of a small bakery, who reportedly "groaned […] at the mention of [the cost of] labor"; the owner said that his employees "all ha[d] to be boarded on the premises […] In general, they work about twelve hours a day […] we can have no exact hours in this business, and there is no piece work. The sponge must be set, and then it must rise. The weather makes a great difference with that" (Drysdale 1896, 8).[71] The *Brooklyn Daily Eagle* likewise reported that many bakeshop proprietors "realize[d] that the ten hour section would mean to them an increased expense […] as they would be obliged to employ additional […] bakers" (1896). Other objective sources from the period seem to confirm the legitimacy of the

[69] However, the Factory Inspectors' report found the sanitary regulations much more successful: "The four years during which time bakeshops in New York have been under State inspection, have obliterated many evils existing prior to the enforcement of such a law—the low, unclean, poorly lighted, ill-ventilated and unsanitary bakeshop has given place to the bakeshop of to-day, remarkable for its cleanliness and […] sanitation" (1900, 805).
[70] In fact, the New York Labor Department's 1896 report based on its 1895 study found that a shocking 84% of the 1,603 shops examined systematically required or permitted their employees to exceed the maximum hours (380).
[71] This interviewee's additional complaint that his profit margins were extremely modest seems to be borne out by report of the state Factory Investigating Commission: "the profit on every loaf baked is very small, and the smaller baker must economize as much as possible if he wishes to make a living from his trade" (1912, 209).

bakeries' complaints. A 1902 *Scientific American* piece on baking methods (with a focus on New York large, modern bakeries) remarked, "[h]ow great is the saving in time and labor wrought by these machines may be conceived when it is considered that the work which each performs in twenty minutes required at one time the incessant labor of two men for three quarters of an hour" (379). Moreover, the New York Factory Inspectors reported in 1900 that "many of the employers," much more so than the bakery employees, were "ever ready to complain of violations of the hours of labor by their competitors," a pattern of behavior suggesting that bakery owners regarded the hours restriction as an imposition (804).[72]

Further empirical inferences about the Bakeshop Act can be made from statistical studies of similar laws during this period. One study by Landes (1980) examined state maximum-hours laws for women during the period from 1900-1920, finding that such laws had a negative (but statistically insignificant) effect on the share of manufacturing-industry workers who were female, though when the female employees were divided into categories of foreign-born, first-generation, and all others, the data reveal that the hours restrictions reduced employment of foreign-born and first-generation immigrants by almost 30 percentage points; native-born white women with native born parents, on the other hand, tended to work in higher-paying jobs with shorter hours even before the hours laws went into effect, and were thus unaffected by the limits. If these results have any applicability to bakeshop employees' situation in *Lochner*, it would suggest that the hours limitations the Court struck down would have unequal effects on the employees of small and large bakeries. Moreover, the study's finding that maximum-hours laws

[72] Ironically, however, the employees supposedly aggrieved by long hours were generally less opposed to the arrangement and less inclined to complain of violations (See supra note 49); also, "The average journeyman baker does not seem to mind [working more than ten hours per day][…] He appears to be perfectly satisfied to work twelve or fourteen hours a day, so long as he can hold his position" (*Brooklyn Daily Eagle* 1896, 22).

have the effect of reducing the aggregate supply of labor suggests that such laws would have artificially driven up wages in the turn-of-the-century New York baking industry, something that small bakeries could not have afforded; their employees, after all, were working with crude technology, and were thus not productive enough, *ceteris paribus*, to justify a wage hike.

There is, furthermore, evidence (albeit somewhat weak) suggesting that legislation with detrimental effects on small bakeries would pose problems for consumers, as well. As the 1902 *Scientific American* piece acknowledged, it was “the little cellar bakery” that “supplie[d] the bread of the people who live in the poor quarters of a large city such as New York” (379). An 1894 *New York Tribune* story on the abuses of the “Bread Barons” (large bakery owners) credited the small bakeries with better meeting “the demand of the poor for cheaper bread” by offering lower prices than their large competitors. Contrary to many accusations, the small bakeries’ product was not of considerably inferior quality, and consumers were in fact flocking increasingly to small shops, the *Tribune* reported. Dr. Abraham Korn, president of the United Real Estate Owners’ Association, testified before the Senate of New York in 1913 that “[i]f you eliminate further [cellar bakeshops] you are playing into the hands of the trust, and the poor man is going to suffer, and we are crying now for the high cost of living. If you wipe out the cellar bakeries, the poor man will get a small loaf of bread,” adding that one could “keep cellar bakeries just as sanitary as […] bakeries above the curb level” (2298). A memorandum submitted to the New York Factory Investigating Commission that same year by the New York Retail Bakers’ Association concerning a proposed regulatory bakeshop bill made a similar point: “From the very nature of the baking business, and the character of bakery products, customers are best served by being most quickly and most directly served. Most distinctively we like our bakery products fresh. This can only be attained by close proximity between the baker and the consumer. […] The consuming public being widely distributed, the producing centers must be widely distributed. And yet the unavoidable result of abolishing cellar bakeries will be to reduce materially the number of bakeries, and to that extent concentrate the manufacture of bakery products in fewer hands" (1318-19). While some of these sources undoubtedly reflect the vested interests of their authors, the effect of bakery regulation on the consuming public is nonetheless an issue deserving of careful attention.

At any rate, taking the risk of imposing an hours restriction proved to be quite unnecessary. Improved baking technology became increasingly available, leading to increases in productivity and earnings and, consequently, a decline in hours of labor. By 1909, less than 9% of bakery employees nationwide worked over ten hours per day; by 1919, that number had declined to about 3% (Bernstein 2011, 37-38). A 1909 article in the *Sun* reported that "machinery has worked the greatest possible changes in the [New York City baking] industry and has made possible the reforms that have been accomplished"—namely, it had "shorted the hours of work." Moreover, the health issues affecting the baking industry seem to have continued their decline; as the same *Sun* piece declared: "City's Bakeshops Sanitary; no longer ill ventilated basement places." A 1913 study by New York City's Department of Health reported that 0.1% of the 12,000 bakery workers examined were suffering from tuberculosis (compared to a rate of 0.65% for the general city population in the same year) (33). The following year, the department reported that "[t]he general condition of bakeries, it is safe to say, is over 100% better than twelve (12) months ago. Hardly a bakery exists where renovation of some kind has not been effected" (1914, 90). The same trend was occurring in Buffalo, whose Health

Department reported in 1909 that “[r]egular inspection of baking and confectionary plants shows that […] cleanliness and procedures maintained at a generally higher standard than ever before” (59). However, an exception to this alleged trend was the anomalous report of Dr. George Price (published by the New York Factory Investigating Commission), who led a 1911 investigation of 800 workers in 497 bakeries in New York City, finding comparatively high rates of tuberculosis (2.3%) and strikingly “unsanitary conditions” in the shops (1912, 225). But Price’s conclusions, drawn from a non-random sample in a study in which the bakers’ union was heavily involved,[73] came under fire, especially from the head of the state’s Retail Bakers’ Association, who noted that Price’s findings contradicted other data (Hill 1913, 38-41). The City Health Department Reports quoted earlier seem to validate the concerns about Price’s study, as they found significantly lower figures for disease and much cleaner conditions in general.

G) Conclusion. In sum, the events surrounding the infamous decision in *Lochner v. New York* may be described from a political standpoint as follows: well-intentioned reformers, disturbed by unsanitary conditions and long hours in a certain trade, exaggerated the health risks to workers in that industry; they then successfully lobbied for legislation that directly addressed the sanitation issues, but also threw in a maximum-hours provision upon the mistaken beliefs a) that long hours in the trade were an inherent health risk and b) that the provision restricting hours was a reasonable means of achieving the objective of improving employee health. At the same time, groups of industry actors quietly supported the law from the sidelines, hoping it would

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[73] “This examination has been made by a staff of competent physicians during the bakers’ working hours and at their place of work. The examination has been greatly assisted by the Bakers’ Union, which sent representatives to each shop, advising their members to submit to such an examination” (141-42); “the physical examination […] of 800 bakers in the bake-shops during working hours […] occupied four weeks, and was made with the assistance of officials of the Bakers’ Union of New York City” (24); “The International Bakers’ Union and its locals in the city have closely co-operated with the Commission, and in a large number of cases sent their representatives to accompany our inspectors” (204), etc.

have the secondary effect of affording them a competitive advantage. Ultimately, the new law suffered from enforcement difficulties, resulted in only a handful of prosecutions, and was widely defied; hence, the hours limitation probably had little effect in the aggregate. However, there is some reason to believe that had compliance with that provision been secured, the effect on workers' health would have been either negligible or even detrimental, and also would have imposed serious burdens on small bakeries' operations. The effect of the Court's invalidation of the law was also virtually indiscernible, as the reduction in hours the law sought to achieve was occurring naturally through technological advance, while improved health outcomes proved attainable with legislation that more directly addressed the unsanitary practices themselves.

In light of the scant empirical evidence presented in the briefs[74] (especially that of the respondent),[75] one might argue that the *Lochner* Court was reckless in its decision to enter the economic-policy realm without a sufficient understanding of the potential consequences. I would defend the Court's presumption in favor of contractual liberty on the following grounds: first, a maximum-hours law either has the effect of reducing the aggregate supply of labor, or it has no effect on the labor supply. If the latter is true, then that simply means that laborers divided their time between multiple employers so as to retain at least as many hours as before, and if that is

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[74] To be fair, Lochner's brief did offer a degree of factual support for its position; he pointed out that the stage of the baking process in which one was exposed to flour dust was only a small portion of the workday, that data from the English baking trade show that bakery employees have quite a low mortality rate, that the Bakeshop Act's hours limitations had odd exceptions for those employed as bakers in firms other than confectionary establishments and for a bakeshop owner's own hours of work (both of which called into question the "health" justification for the law), and, lastly, that a number of medical experts had suggested reforms to protect bakery employees' health, none of which included hours limitations. None of the statistical findings of New York's state agencies, nor data from any other authorities, was mentioned in Lochner's brief. *Lochner*, Transcript of Record, Brief for Plaintiff in Error.

[75] New York Attorney General Julius Mayer's brief in defense of the Bakeshop Act lacked any kind of empirical or statistical analysis or rebuttals to the arguments made in Lochner's brief. The entirety of its defense of the hours limitation seems to consist of pointing out that the restriction is encoded in the section of the New York statutes that deal with issues of health and safety and therefore is justified as a health law. *Lochner*, Transcript of Record, Brief for Defendants in Error, 8-19. The document's poor quality has been acknowledged before; ex., Abrams, Douglas E. "How Written Advocacy Shapes Doctrine (Part I): Did Bad Briefing Decide *Lochner v. New York*?" (2012).

the case, then any justifications for the law that rely on "health" or "protecting against exploitation" are inapplicable because each laborer's hours are no shorter than before. All that would have been accomplished is to inconvenience both employers and employees. On the other hand, if maximum-hours laws *do* restrict the supply of labor, then there could be two possible effects: either hourly wages increase, or they remain the same. If they increase, there is a high probability that it will reduce employment; if they remain the same, then each worker's weekly earnings decrease, an outcome that may be devastating for the worst-off among the turn-of-the-century labor force (Posner 1986, 593). It is hard to imagine a scenario in which maximum-hours laws of the type at issue in *Lochner* (those with no exception for voluntary overtime) are beneficial to employee or employer welfare. Accordingly, I conclude that the Court was justified in reaching its conclusion even though the factual evidence presented to it was fairly scant.[76]

VI. Liberty of Contract and Rate Regulation/Barriers to Entry in Industries

A) Introduction. By the time of the *Lochner* Era, it was a well-established principle of American law that industries bearing the status of "public utilities"—those that were "affected with the public interest"—were subject to greater regulation than were ordinary private business ventures.[77] The public-utility designation generally applied to industries that tended toward natural monopoly (a situation in which high fixed costs or other barriers to entering the trade prevented competitive market forces from operating as they usually would), or to situations in which a certain firm had been granted an exclusive government franchise to perform an

[76] My finding is confined to the particular legislation that the Court confronted in *Lochner*. I do not mean to imply that restrictions on hours are *never* reasonable; indeed, in professions where public safety is immediately imperiled by fatigued employees, such as truck driving or brain surgery, such restrictions may be necessary to mitigate the externalities of overwork. And, in other contexts, limiting the hours an employee may be required to work as a condition of employment may also be warranted due to unequal bargaining power.
[77] *Munn v. Illinois*, 94 U.S. 113, 126 (1876).

important function. In either case, the lack of competition was thought to justify departure from the presumption that customers' and firms' contractual liberty allowed them to conduct business without regulation of the terms of sale. Consequently, American law adopted the English custom of requiring businesses affected with the public interest to charge reasonable rates and provide adequate service for customers. Nineteenth-century American courts frequently cited the English case *Allnutt v. Inglis*, decided by the King's Bench in 1810, where the Lords held that, notwithstanding the "general principle [that] is favored both in law and justice, that every man may fix what price he pleases upon his own property or the use of it," in cases where the tradesman had the "benefit of [a] monopoly, he must as an equivalent perform the duty attached to it on reasonable terms."[78]

Until approximately the 1920s, this principle was uncontroversially accepted and applied in the United States. With the rapid growth of such "large network industries" as telephony, railroads, and electricity after the Civil War, the doctrine became an impetus for the creation of regulatory agencies at the state and federal levels designed to monitor and supervise the new industries in order to protect consumers. In addition, another form of regulation of public-utility industries began emerging at the state level in the 1870s: the establishment of barriers to entry, in which prospective entrants to the regulated trade had to obtain permits from a government body by showing that "public convenience and necessity" demanded the additional service. The reasoning behind these permitting requirements was the prevailing view among economists of the day that in natural-monopoly industries, high fixed costs and low marginal costs meant that the same amount of service can often be more efficiently provided by one firm than by multiple

[78] 12 East, 527.

firms. Since a firm with high fixed costs requires a large number of customers in order to obtain an adequate return on investment, dividing the market between more firms would mean that each must charge customers higher rates in order to recoup their initial investment (Garvey & Garvey 1990, 47-48). However, beginning in the 1920s, states gradually extended their stringent regulatory regimes, especially barriers to entry, to industries that arguably had no natural-monopoly characteristics. A rash of state statutes to this effect between 1910 and 1920 declared motor carriers to be public utilities, despite the lack of evidence that the motor transport industry had any natural-monopoly traits (Jones 1979, 505; Posner 1999b, 2; Hazlett 1986, 1343). Such legislation prompted accusations that the laws' true purpose was not to protect consumers against abuses by firms with monopoly power, but instead to protect firms' profit margins from market forces. This trend soon reached the federal level, with the Motor Carrier Act of 1935 and the Civil Aeronautics Act of 1938 erecting barriers to entry to the motor and air transport industries.

B) Economic Theory & Barriers to Entry. A natural monopoly refers to a situation in which "the entire demand within a relevant market can be satisfied at lowest cost by one firm rather than by two or more" (Posner 1999b, 1). "If a natural monopoly brought about by the technology of an industry were replaced by competition, there would be an increase in unit costs, as happens when a natural monopoly […] is split up, losing the advantages of technical scale economies" (Rutherford 2013). While high fixed costs relative to variable costs (as well as economies of scale) are often associated with industries of this type, these characteristics alone are not determinative of natural-monopoly status; in Hazlett's view, "a market may exhibit large fixed costs and important economies of scale and still be contestable, meaning that no tendency towards monopolistic output restriction is evidenced in open market competition. A contestable market must have either low barriers to entry or low barriers to exit" (1986, 1342). On the demand side, it is generally argued that a leading factor contributing to natural monopoly is the existence of highly "limited and […] precisely focused" demand for the relevant good or service (Jones 1979, 504).

When natural-monopoly conditions do exist, a firm serving that market without competitors often must, in the interest of efficiency, be subject to government regulation to ensure that it neither raises prices higher than necessary to obtain a reasonable rate of return nor provides an inadequate quality of service. For the better part of the Twentieth Century, a significant number of economists also advocated for erecting regulatory barriers to entering such industries to avoid the "wasteful duplication" that would result if multiple firms entered a natural-monopoly market (Bamzai 2004, 1525, qtg. Kahn 1971). Yet it is unclear that barriers to entry are a necessary form of regulation, even in natural-monopoly industries. If some industries are natural monopolies due to prohibitively high startup costs, there seems to be little reason for establishing a legal regime to keep people from entering those trades; "[i]f a prospective entrant realizes there is room for only one firm in the market, it will not enter unless confident of being able to supplant the existing monopolist. If it enters in the mistaken belief that the market will support more than one seller or that it is more efficient than the incumbent, it will soon be eliminated either by bankruptcy or by being acquired" (Posner 1999b, 77). Hence, if a regulatory body in charge of restricting entry was kept busy denying people permission to engage in the regulated industry, then it would seem to refute the premise underlying the body's existence: that said industry tended toward natural monopoly due to exorbitant startup costs. Furthermore, "if the regulatory agency had been exercising effective control over utility efficiency and profit level (to the degree it claimed it would in the certification proceeding), it is unlikely that there would be a prospective entrant in a position to offer something better" (Jones 1979, 503). Posner's and Jones' views on this issue are far from idiosyncratic; Hazlett (1986) similarly condemns the argument for barriers to entry as relying on "the nonsensical proposition that governmental power should be used to guarantee what is already guaranteed by market forces" (1346).

Admittedly, it may be plausibly argued by barriers-to-entry advocates that, although a natural-monopoly market with too many entrants may eventually "correc[t] itself without government intervention," restricting entry into the trade is advisable nonetheless, as it prevents such wasteful attempts to enter such a market in the first place (Posner 1999b, 47). But this argument takes a dim view of market actors by assuming that they are frequently reckless and overly optimistic about their prospects of success in a given industry. In Hazlett's words,

> To argue that self-interested business persons, risking their own dollars and reputations, are less able to recognize ruinous competition than [regulators] who do not directly realize any profit or loss is a curious economic theory indeed. The very idea of regulators trying to save an experienced […] competitor, much against its will, from a disastrous fate, is itself testimony to the level of incredulity this theory would garner among professional economists […] In any event, it is not the purpose of public franchising to protect irrational investors to the detriment of consumers. (1986, 1351).

Even assuming a sudden onset of self-destruction irrationality among prospective entrants to the industry, the worst conceivable outcome of the resulting "price war" between firms is, "of course, […] the elimination through competition of all but one survivor: just the result that municipal franchising agencies routinely seek to impose" (Hazlett 1986, 1352-53). Moreover, the argument in favor of barriers to entry does not seem to take account of the potential *risks* of imposing such hurdles. For example, a paradoxical negative consequence of regulatory barriers to entry may be to "perpetuate monopoly long after a market has ceased to be naturally monopolistic. A firm that reckons that cost conditions are now favorable to entry must convince a government agency of that fact," often a tremendously costly and time-consuming undertaking (Posner 1999b, 77).

In any event, regardless of whether natural monopolies justify entry restrictions, there seems to be broad agreement that "[i]f the firm is *not* operating in a market with natural monopoly characteristics, it is difficult to perceive why the firm's investments should require protection not accorded to investments of firms in other sectors of the economy" (emphasis added)(Jones 1979, 511). So regardless of whether entry restrictions are in fact necessary in natural-monopoly markets, it is necessary, as a threshold matter, to establish whether natural monopoly existed in the first place. With that in mind, I will proceed to assess whether the *Lochner*-Era Supreme Court was on solid ground when it issued its famous decision invalidating Oklahoma's barriers to entry into the ice industry.

C) The Liebmann *Case.* The seminal case from the *Lochner* Era on this topic is *New State Ice Co. v. Liebmann*, a 1932 decision in which the Court struck down Oklahoma's 1925 Ice Act, a statute forbidding any person from engaging in the ice business without first obtaining a license from the state Corporation Commission. In deciding whether to grant a license, the Commission was to consider factors such as the "necessity" for additional service, as well as the qualifications of the applicant and of any firms already licensed in the region that the applicant sought to serve. Ultimately, however, discretion as to whether to grant a license was vested in the Commission, which also enjoyed the power to issue any regulations it deemed necessary to control prices and service in the industry.[79] A serious secondary consequence of this law, one neither apparent from

[79] *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

its text nor discussed in the existing scholarship on the *Liebmann* decision, was that, according to the February 1926 issue of *Ice and Refrigeration*, the Corporation Commission was

> quite overburdened with work […] and, as a result, quite a long time elapses between presentation and conclusion of questions at issue. In Oklahoma, no additional appropriation, or increase in personnel of the commission […] was made when the ice industry was placed under its authority, and it is understood that a large number of applications from the ice industry are awaiting its action (230).

The dispute leading to the *Liebmann* litigation arose in March of 1930, when the New State Ice Company, a Delaware-based corporation, requested that the US District Court for the Western District of Oklahoma enjoin Ernest Liebmann, owner of an Oklahoma City property on which he was in the process of constructing an ice plant, from engaging in the manufacturing or sale of ice. Liebmann had obtained approval for his project from the proper municipal authorities, but refused to seek a license to enter the ice trade from the state Corporation Commission. New State Ice, as well as a handful of other ice companies that soon joined the complaint against Liebmann, had "practically a monopoly of that business" in Oklahoma City, and were thus aggrieved by the threat of a new competitor.[80] Liebmann's response to the companies' complaint alleged that the Ice Act was unconstitutional, and further claimed that the measure "was enacted through the influence of and for the benefit of […] large ice manufacturing interests, in order to prevent competition in their business" and as such was not a proper exercise of the police power to protect public safety, health, or morals."[81] After reviewing the substantial testimony and documentary evidence produced by both parties to the suit, the District Court sided with Liebmann, declaring the Ice Act unconstitutional. The opinion, delivered by Judge John Pollock, concluded that, based on the facts established during the trial,

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[80] *New State Ice Co. v. Liebmann*, 42 F.2d 913, 914 (1930).
[81] *Liebmann*, Transcript of Record, Answer of the defendant, 7-8.

> it is clearly shown the act of the Legislature here under consideration in its actual operation and effect has had the result in many cities and towns of the state of absolutely destroying all competition in the manufacture and distribution of ice. It further appears the act has had in actual operation the effect of enhancing the price charged by the ice plants to the consumers of ice when and where competition has been eliminated. While it is shown there are more ice plants engaged in the business of manufacturing and distributing ice in Oklahoma City than there were at the date the statute was enacted, yet, *while there are more plants, there are less owners of these plants*. […] [A]s said by Mr. Chief Justice Taft: "It will be impossible to reconcile [such a law] with the *freedom of contract* and of labor secured by the Fourteenth Amendment" [emphasis added].[82]

On appeal, a three-judge panel of the Tenth Circuit Court of Appeals unanimously affirmed the ruling, citing further statistics bolstering the District Court's conclusions that the Oklahoma law unjustifiably suppressed competition and harmed consumers.[83] Undeterred, the major ice companies appealed again, this time to the US Supreme Court.

The Supreme Court, like the two tribunals below, agreed that the Ice Act was unconstitutional, affirming the Tenth Circuit by a vote of 6-2. Writing for the Court, Justice George Sutherland first noted that "[i]t must be conceded that all businesses […] may be subjected to appropriate regulations in the interest of the public health," but that "the question here is whether the [ice] business is so charged with a public use as to justify the particular restriction" of barriers to entering the trade.[84] The Court answered in the negative, concluding that the Ice Act was not a measure meant

> to protect the consuming public either with respect to conditions of manufacture and distribution or to insure purity of product or to prevent extortion. The control here asserted does not protect against monopoly, but tends to foster it. The aim is not to encourage competition, but to prevent it; not to regulate the business, but to preclude persons from engaging in it. […] We are not able to see anything peculiar in the business here in question which distinguishes it from ordinary manufacture and production. […] It is not the case of a natural monopoly, or of an enterprise in its nature dependent upon the grant of public privileges. The particular requirement before us was evidently not

[82] Ibid., 917-918.
[83] *Southwest Utility Ice Co. v. Liebmann*, 52 F.2d 349 (10th Cir. 1931).
[84] *Liebmann*, 285 U.S. 262, 273 (1932).

> imposed to prevent a practical monopoly of the business, since its tendency is quite to the contrary.[85]

However, in what has become one of the most frequently cited separate opinions of the century,[86] Justice Brandeis, joined by Justice Stone, dissented. Brandeis urged more deference on the part of the Court to the Oklahoma legislature's judgment that the Ice Act was a reasonable enactment: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[87] The judiciary, he believed, could invalidate such a policy only if the "measure is arbitrary, capricious, or unreasonable," as opposed to merely unwise; Brandeis considered Oklahoma's arguments in support of passing the Ice Act to be reasonable enough to sustain the legislation.[88]

D) Literature. Aside from the judicial opinions directly related to the *Liebmann* litigation, very little has been written on the case that empirically evaluates the arguments for and against each side's position. To be sure, history has looked far more favorably on the views expressed in Brandeis' dissent than those in the majority opinion, though there is hardly any literature that seriously engages the policy arguments made in either. An exception is a brief piece by Sellars (2001), which provides thorough historical background on the US ice industry, Oklahoma's regulatory efforts, and the *Liebmann* case. Although Sellars does not expressly make defending Brandeis's views on the case the central theme of his article, he speaks favorably about Brandeis

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[85] Ibid., 279.
[86] "Nearly 50 years after he wrote them, Brandeis's words remain a powerful and relevant legal doctrine. For, as Brandeis's protégé Felix Frankfurter wrote his mentor at the time, the justice had produced 'one of those dissents that render history'" (Sellars 2001, 266).
[87] *Liebmann*, 285 U.S. 262, 311 (Brandeis, J., dissenting).
[88] Ibid.

and expresses considerable skepticism about the Court's basis for striking down the law. On the opposing side, there is Epstein (2006), whose book devotes a few pages to discussion of *Liebmann*. Epstein approvingly reiterates the highlights of Sutherland's majority opinion, before criticizing Brandeis' "dubious economic logic," and alleging that his argument "misfires in context" (38-39). Posner (1986) similarly devotes a few pages to attacking Brandeis' economic rationale for sustaining the act (590-593). But a far more thorough defense of *Liebmann* (and criticism of Brandeis) comes from Michael J. Phillips (2001), who carefully reviews the evidence and arguments presented in the dissent, checking them against economic theory and empirical data (97-105). A review of the factual circumstances leading up to the decision in *Liebmann* will be necessary before evaluating claims made in the literature and judicial opinions.

E) Background & Interests Involved. The first artificial ice-making plants began to appear in the United States during the 1850s and 60s. This innovation led to the development of the refrigerated boxcar, stimulating the growth of the meatpacking industry and in turn allowing cattle ranchers, once confined to local markets, to expand their reach nationwide. Artificial ice also revolutionized domestic life by prompting the proliferation of iceboxes; by 1900, most US households relied on iceboxes to maintain their food's freshness. Ice production was initially very expensive, as it required quantities of distilled water so large that, for the most part, they could only be obtained with steam-powered electrical generating plants. Citing the allegedly high barriers to entering the industry, the importance of ice in preserving food and medicine, and the general lack of competition in the industry (underscored by complaints that the Western Ice Manufacturers Association had formed a trust and was colluding to raise prices), the Oklahoma legislature enacted the Anti-Trust Act in 1908. This law vested the state's Corporation

Commission with powers to regulate the quality, price, and delivery of ice in order to protect consumers. But as the industry grew, the Commission began receiving another sort of complaint—this one from ice producers rather than consumers: that there was *too much* competition in the business. The Commission came to agree with the major ice companies, and joined them in lobbying the legislature for a law to erect legal barriers to entering the industry, so as to prevent "ruinous competition" (i.e., to keep ice prices up)(Sellars 2001, 252-255). The Commission's stated purpose for supporting such legislation appeared in its 1916 Annual Report:

> The scope of legislation pertaining to those utilities which serve the public generally should be broadened. […] The same jurisdiction should be given the Corporation Commission over ice plants as it exercises over gas, electric and water companies. […] We also recommend for your favorable consideration legislation having to do with requiring public utilities to secure from the Corporation Commission what is known as a "certificate of public convenience and necessity" before the duplication of facilities. This would prevent ruinous competition resulting often in the driving out of business of small though competent public service utilities by more powerful corporations, and often consequent demoralization of service, or the requiring of the public to patronize two utilities in a community where one would be adequate (Corporation Commission, 5-6).

A similar rationale for supporting this sort of legislation was expressed by ice company executives during the trial phase of their litigation against Liebmann, one of whom testified that, in the absence of barriers to entry,

> duplication of manufacturing equipment and delivery equipment, and expenses of delivery, necessarily makes for high prices; it is also necessary for those operating in the same community to maintain the price of ice high enough to cover the cost of investment or one or the other will go broke; with these conditions existing at some time the public will have to pay the exorbitant price.[89]

The eventual result was the 1925 Ice Act, which declared the ice business to be "affected with the public interest," subjecting the industry's prices and practices to the Commission's close control, as well as requiring the Commission's approval to engage in selling ice.

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[89] *Liebmann*, Transcript of Record, 40.

Just as in the section of this paper discussing *Lochner*, it is useful here to examine the societal interests behind the passage of the Ice Act, as doing so provides insight into the likely beneficiaries of the legislation, a sort of indirect means of studying the statute's real-world impact. As was explained in the account above, the major ice companies are often said to be the main interest group responsible for securing the law's passage, a fact to which even Sellars (2001) readily stipulates, despite his favorable view of Brandeis' arguments (253-254). Posner (1986) emphasizes the same information in denouncing the Ice Act as merely serving "the interest of […] established ice companies to be free from competition" (591-592). Despite the lack of concrete evidence provided in the literature demonstrating the ice companies' involvement, I found ample evidence in my review of historical sources (both primary and secondary) to corroborate the information. For example, one industry representative (a "Mr. King"), in his speech at the 1925 Oklahoma Ice Manufacturers' Association Convention (as published in *Ice and Refrigeration*), admitted that the 1925 "bill was the creation of the ice manufacturers." A team of ice-industry attorneys defended barriers to entry in the March 1930 edition of *Ice and Refrigeration*: "[t]hat our industry has been declared a public utility and placed under state supervision is most important" (230). An editorial in the April 1926 issue of the same journal reported the Oklahoma Association's secretary's own admission that the Ice Act, like "practically all the bills proposed during the [last] twelve years," was "proposed by the ice men" (399). And when the Oklahoma House of Representatives began efforts to repeal the Ice Act in 1930, the *Wall Street Journal* reported that members of the Ice Manufacturers' Association were testifying in an effort to stop it, and in that in general the "[i]ce manufacturers are opposing the repeal of the present law" (1931, 4). The same publication had previously reported that efforts had been made to repeal the act twice before (in 1927 and 1929), both of which passed in the state House but failed in the state Senate (1930, 7). During fact-finding by the District Court, it was stipulated by both parties that the Ice Act "had been generally acquiesced in by the industry from the date of its passage to the present time," and neither side offered anything during the litigation to contradict the claim made in Liebmann's response to the initial complaint, which contended that the legislation "was enacted through the influence of and for the benefit of […] large ice manufacturing interests, in order to prevent competition in their business."[90]

It would be impossible to conclude the discussion of the interests supporting or opposing the Ice Act without addressing the strange mischief of one W.P. Hill, the then-Secretary of the Oklahoma Ice Manufacturers' Association, a phenomenon that has not been mentioned in any secondary sources that I have encountered. On the one hand, Hill's activities during the *Liebmann* litigation support the view that the major ice companies were the beneficiaries of the challenged legislation; he was instrumental in filing the suit against Ernest Liebmann, and appears to have given by far the longest testimony of any witness, during which he argued ferociously in favor of the Ice Act.[91] However, less than a decade earlier, W.P. Hill had written a seething article in the July 1922 edition of *Ice and Refrigeration*, the industry's main trade journal, in which his self-proclaimed goal was to

> poin[t] out the many disadvantages of the public regulations of the ice industry, both from the standpoint of the consumer and of the industry. Public control by the state implies protection. Regulation by the state creates that which the law prohibits, i.e., monopoly, and a destruction of healthful competition. It creates a uniform price and uniform service, […] thereby taking away the initiative to construct and build up, upon economical costs and good service, which comes from active competition […] *there has never been an instance where public regulation brought about a cheaper cost to the consumer than it had been before upon a competitive basis* […] The consumer will tell

[90] *Liebmann*, Transcript of Record, Stipulation as to Facts, 44; Answer of the defendant, 8-9.
[91] Ibid., 31-36.

> you that in Oklahoma his rates on gas, fuel, heat, electric lights and power, have steadily increased, year by year, until public sentiment is very unfavorable towards the public regulation of these industries [emphasis added](421-423).

Hill went on to implore readers to "[c]ombat public regulation propaganda," strong language from a man that would be contradicting almost all of his own arguments under oath (and whose organization would lobby hard against repeal of the sort of legislation he was attacking in this piece) just a few years later (423). The significance of Hill's about-face is ambiguous; did he have a change-of-heart, was he consciously lying at one point, or did he accept his own criticisms of public regulation before later realizing that he could exploit its characteristics in order to enrich himself and those in his industry? Whatever the case may have been, Hill's actions suggest opportunistic, rather than principled, motivations on his part, and arouse a degree of suspicion regarding the major Oklahoma ice companies' involvement with the Ice Act.

F) Evaluation. What were the effects of this statute? The empirical data on this matter is, at best, fragmentary, but a fair amount of insight can be gleaned from the transcript of record in the *Liebmann* case, a source of information that the extant scholarly literature seems to have overlooked. This document includes an account of this trial phase of the litigation, including the District Court's factual findings and the testimony on which they were based. The most salient passage Judge Pollock's opinion synopsizes those findings as follows:

> under the proofs in the instant cases it is clearly shown the act of the Legislature here under consideration in its actual operation and effect has had the result in many cities and towns of the state of absolutely destroying all competition in the manufacture and distribution of ice. It further appears the act has had in actual operation the effect of enhancing the price charged by the ice plants to the consumers of ice when and where competition has been eliminated. While it is shown there are more ice plants engaged in the business of manufacturing and distributing ice in Oklahoma City than there were at the date the statute was enacted, yet, while there are more plants, there are less owners of these plants.[92]

[92] *New State Ice Co. v. Liebmann*, 42 F.2d 913, 917-18 (1930).

If the District Court's factual assertions are sound, it would certainly weigh against the idea that the ice industry tended toward natural monopoly; if prices increased where competition was eliminated, it would suggest that demand was being more efficiently met by multiple firms in competition with one another than by one or few firms in a heavily regulated market. The court's statements appear to be based on the testimony of Liebmann and the witnesses he called, including two local dairymen, a Ford dealer, and a salvager of used cars, all of whom used ice in their professions and all of whom testified that ice prices increased notably after the Ice Act's passage in June 1925.[93] No information was revealed on cross-examination that contradicted their claims, but the now-familiar W.P. Hill testified on behalf of the plaintiffs that "since the passage of the Act of 1925 the trend of prices on ice sold in the state has been downward."[94] An executive at one of the plaintiff ice companies likewise claimed to have calculated the total amounts saved annually by consumers since the act's passage.[95] The Court of Appeals' formulation was different still, finding that the act had not reduced prices, and that "if allowance is made for the decrease in the cost of manufacture, […] the price of ice […] has increased"[96]

Regarding production costs, both Liebmann and an Oklahoma City refrigeration engineer testified that the machinery used to make ice was not expensive and had only decreased in price since the act's passage, while the former went on to explain that due to other developments, the overall cost of manufacturing ice had fallen considerably, so much so that "there were a good

[93] I must admit that, based on the condensed version of the record that has been preserved, I do not know exactly how the District Court reached its specific conclusion that "the act has had in actual operation the effect of enhancing the price charged by the ice plants to the consumers of ice when and where competition has been eliminated"; this statement is reconcilable with the plaintiffs' contention that prices fell statewide, though it is unclear where the District Court found information specifically on places where competition was eliminated.
[94] *Liebmann*, Transcript of Record, 33.
[95] Ibid., 38.
[96] Ibid., 56.

many individual ice plants in […] the state; […] hotels, restaurants, meat markets, and hospitals often have their own plants."[97] Once again, neither man's testimony on this issue was called into question on cross-examination, nor was it contradicted by any witnesses on behalf of the ice companies.[98] The Tenth Circuit apparently considered "the decrease in the cost of manufacture" since 1925 to be firmly established by the record. Even Brandeis, in his dissent (which will be discussed in detail later in this section), readily admitted that entering the ice trade was easy and inexpensive. What these statements about the ease of manufacturing ice suggest is that the industry did not have the prohibitively high startup expenses or other fixed costs associated with natural monopoly. Moreover, as the Court of Appeals pointed out, the 1928 Ice Blue Book's table of prevailing ice prices indicate that, out of the eleven southern states, Oklahoma's were by far the highest, even though all ten others allowed unrestricted entry into the ice business at that time.[99] True, the Ice Act may not be responsible for this disparity. But the fact that every other state in the region enjoyed vastly cheaper ice with competitive entry into the trade weighs against the idea that it is a natural monopoly that demands close regulation.

For further insight, one may turn to the annual prevailing ice prices in each state, as reported by *Ice and Refrigeration* every June. Though the Tenth Circuit briefly mentioned this publication and quoted its figures for 1928, none of the existing literature on the *Liebmann* case, to my knowledge, has consulted it in order to study the decision's impact. Fig. 6.1 shows ice prices (in 1920 dollars) for the eleven states in the "Southern" region.[100] The blue line represents Oklahoma and the black line the regional average.

[97] Ibid., 21.
[98] Ibid., 20-24.
[99] *Southwest Utility Ice Co.*, at 355.
[100] Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, N. & S. Carolina, Oklahoma, Tennessee, & Texas.

Figure 6.1

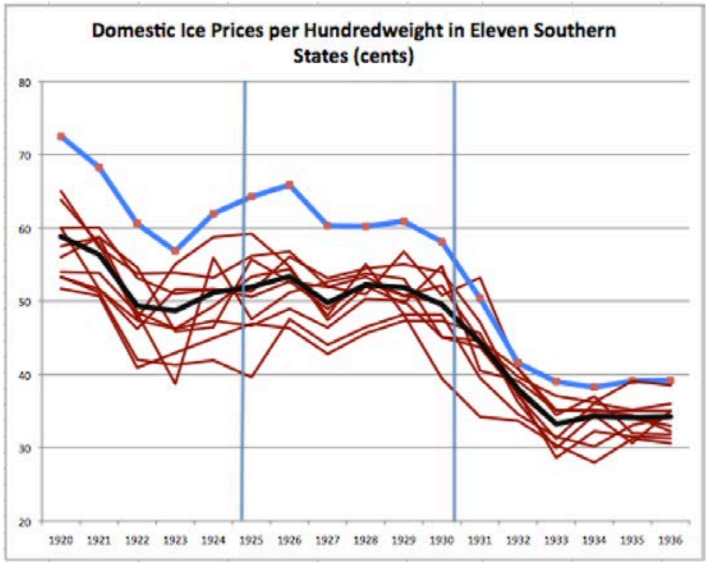
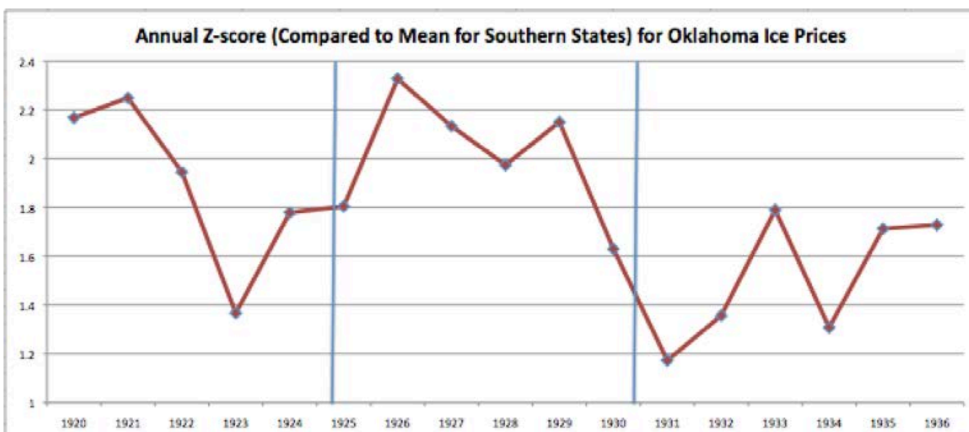


Figure 6.2



The vertical lines represent the legislature's enactment (April 1925) and the District Court's invalidation (June 1930) of the Ice Act. On the one hand, it is evident from the annual data that the Act was not the *cause* of Oklahoma's exceptionally high prices, as they were similarly aberrant even before the law was in effect. Next, the ice manufacturers' contention that ice prices had trended downward in the state between 1925 and 1930 is true, but not (as they claimed) due to the Ice Act; after all, an almost identical pattern is evident during that period throughout the southern region. Finally, the claim that striking down the Act (and, hence, allowing free entry to the business) would result in higher prices for consumers is unequivocally wrong, if the downward trend following the law's 1930 invalidation is any indication.

But why did the Ice Act seemingly have so little effect? Based on my review of documentary evidence from that era, I argue that the most important factor was the competition the ice industry faced from the increasing availability of mechanical refrigeration, both in businesses and private homes. Even where the industry could use the regulatory regime to keep out new ice manufacturers, they could do nothing about competition from mechanical refrigeration, which undoubtedly exerted a downward pressure on market prices for manufactured ice. As Hill testified before the District Court, "private refrigeration was just coming into use in 1925," but by 1930, "people [were] using refrigeration that never knew the use of it three or four years ago," though he also said that the resulting "loss to the manufacturer" was largely "in restaurants and places of that sort," rather than in the domestic market.[101] In a 1929 piece published in *Ice and Refrigeration*, Hill similarly reported that "ice manufacturers have seen their commercial tonnage and a part of their home delivery being lost to mechanical refrigeration." And, in the February 1935 issue of that publication, it was reported that at the Oklahoma Association of Ice Industries' 1934 Annual Convention, "[p]ractically the entire conversation was devoted to the persistent problems of merchandising ice and refrigerators in competition with mechanical refrigerators" (86). One letter read at that event similarly observed that "the invention of the mechanical refrigerator […] has gradually become the real competitor of the ice manufacturer" (88).

[101] *Liebmann*, Transcript of Record, 34-46.

Next, particular attention should be given to the arguments Justice Brandeis' dissent offers in defense of the Oklahoma law, many of which appear to be largely based on his own independent research, as opposed to the record compiled at the trial phase of the litigation. Already, this should arouse suspicion, as it is highly improper for an appellate court to base its holding on facts that have not been thoroughly tested by cross-examination and or otherwise subject to the evidentiary standards of a District Court.[102] In any event, the crux of Brandeis' argument seems to be that "the business of supplying ice is not only a necessity, like that of supplying food or clothing or shelter, but the legislature could also consider that it is one which lends itself peculiarly to monopoly."[103] The first point is hard to dispute, but would seem only to justify regulations prohibiting excessive prices, not barriers to entry. Regarding the "monopoly" claim, Brandeis speaks at length about the subject, lamenting that before the law, in "only six or seven localities in the state containing, in the aggregate, not more than 235,000 of a total population of approximately 2,000,000, was there 'a semblance of competition'; and that even in those localities the prices of ice were ordinarily uniform. The balance of the population was, and still is, served by companies enjoying complete monopoly."[104] But it makes perfect sense that, in a single locality, ice prices would be similar: where "the product is uniform, one would expect competitive sellers to charge the same rate" (Posner 1986, 591).

[102] Supreme Court briefs and other non-evidentiary sources are "inappropriate place[s] to develop the key facts in a case. [The Court] normally give[s] parties more robust protection, leaving important factual questions to district courts and juries aided by expert witnesses and the procedural protections of discovery. See Fed. Rule Crim. Proc. 16(a)(1)(F), (G); Fed. Rules Evid. 702–703, 705. An adversarial process in the trial courts can identify flaws in the methodology of the studies that the parties put forward" so as to avoid "untested judicial factfinding," *Sykes v. United States*, 564 U. S. ____ (2011)(slip op., at 5)(Scalia, J., dissenting).
[103] *Liebmann*, at 291 (Brandeis, J., dissenting).
[104] *Ibid.*, 293.

What is even more bizarre is that, after decrying the evils inherent in monopolies and claiming that Oklahoma's law was justified precisely because it was meant to address them, Brandeis proudly proclaims that "[i]t is no objection to the validity of the statute here assailed that it fosters monopoly. That, indeed, is its design."[105] Such fostering is appropriate, he claims, because "[w]here there was competition, it often resulted to the disadvantage rather than the advantage of the public, both in respect to prices and to service."[106] If this were at all true, it would almost certainly be the case that in the aftermath of the judicial invalidation of the law, ice prices would be higher than they otherwise would have been. Yet the previously examined data on annual ice prices strongly weigh against this contention. The basis for Brandeis' statements even seems to be undermined by claims made elsewhere in his own opinion:

> the relative ease and cheapness with which an ice plant may be constructed exposes the industry to destructive and frequently ruinous competition. Competition in the industry tends to be destructive because ice plants have a determinate capacity, and inflexible fixed charges and operating costs, and because in a market of limited area the volume of sales is not readily expanded. Thus, the erection of a new plant in a locality already adequately served *often causes managers to go to extremes in cutting prices* in order to secure business. [emphasis added][107]

So where competition existed, it resulted in higher prices for the public, and also in ice producers going to extremes in cutting prices? Contradiction aside, Brandeis' insistence that the public broadly supported and benefitted from the Ice Act seems suspicious; as *Ice and Refrigeration* was forced to admit in mid-1926, "operation of the ice business in Oklahoma under state regulation is not proving to be all that it was expected to be, as there is a good deal of dissatisfaction throughout the state in connection with the matter" (363). As the daily *Oklahoman*

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[105] *Ibid.*, at 304.
[106] *Ibid.*, at 293-94.
[107] *Ibid.*, at 292.

had reported in March of that year, "[w]hen [the] legislature meets and laws come up for repeal, [the Ice Act] will be No. 1 on the list […] There are a score of objections, but the main one is that it brings many small competitive business matters before the commission which should be settled by the economic law of supply and demand." The *Oklahoman*'s assessment of the Ice Act's unpopularity seems correct in light of the legislature's many subsequent votes to repeal it.

Moreover, Brandeis's recognition of the "ease and cheapness with which an ice plant may be constructed" seems to undermine his earlier assertion that the industry naturally tends toward monopoly by admitting that the ice trade lacks the high startup costs associated with such markets; indeed, he admits that the ease of entry exposes the industry to *too much* competition. Phillips (2001) also recognizes Brandeis' incoherence in this regard: "not only does Brandeis's ruinous-competition argument fail to provide a reasonable basis for legislative intervention, but it undermines his local-monopoly argument too" (104). And if said competition were "destructive" and "ruinous," and resulted in extreme price cutting, what are we to make of Brandeis' earlier observation that in areas that already have competition among local ice producers, "the prices of ice were ordinarily uniform?" If that were the case, it sounds as if prices stabilized at just above the point at which the ice producers would destroy themselves. Indeed, key evidence suggests exactly this, strongly refuting Brandeis' claim that "ruinous competition" was an existential threat to the ice industry. The February 1935 issue of *Ice and Refrigeration*'s summary of the Oklahoma Association of Ice Industries' 1934 Annual Convention quoted an industry representative as reporting that, even deep in the Depression years, the ice "industry is strong in production and distribution," while another speaker dedicated most of his remarks to applauding the industry's "improved business outlook" (88). Even during the Great Depression, and without barriers to entering the ice business, the industry was apparently capable of survival.

What's more, the sources Brandeis cites in support of his position, more often than not, seem to undermine his claims; one quoted passage from a 1916 Corporate Commission report reads, "[n]umerous complaints are received by the Commission each year as to *extortionate practices* of ice companies and *exorbitant prices* charged" (emphasis added)—and, in the very next footnote, Brandeis defends the Commission's recent decision to deny a license to a would-be ice producer because an existing ice producer's plant "could not be maintained in the face of the [applicant's] competition"[108]—yet this admission seems to suggest that, if anything, the applicant would charge *less*. So if Brandeis is lauding the Commission for keeping prices up, his earlier contention that Oklahoma's regulation was justified because ice was "a necessity, like that of supplying food or clothing or shelter," seems absurd; after all, "it is difficult to see how higher prices would increase 'the consumptive capacity of the people'" (Phillips 2001, 105). What makes Brandeis' approval of price hikes even more puzzling is that the Ice Act, had it survived, almost certainly would have disproportionately burdened the poor. And as Brandeis admits (*in his own opinion,* no less), "the mechanical household refrigerator is still an article of relative luxury" available only to a few; Oklahoma's law, he continues, was therefore a piece of "[l]egislation essential to the protection of individuals of limited or no means."[109]

G) Conclusion. It seems that Epstein (2006), Phillips (2001), and Posner (1986) were entirely correct in their criticism of the Ice Act and in their defense of the *Liebmann* decision. The invalidated law was a piece of special interest legislation crafted and lobbied for by

[108] *Ibid.*, at 297-298.
[109] *Ibid.*, at 290.

powerful industry actors for the purpose of protecting their profits. The ice business was not a natural monopoly, and did not demand regulatory barriers to entry more than did any other trade. Still, it turned out that the Ice Act had almost no discernable effect on prices, likely because the state's ice manufacturers still faced competitive pressures from the rise of mechanical refrigeration. But the law also seems to have had no benefits whatsoever, as evidenced by the facts that price trends in Oklahoma while it was in effect were occurring throughout the region, and that its judicial repeal had none of the catastrophic consequences that its proponents predicted. The Supreme Court was therefore on solid ground when it struck down the Ice Act, and, in direct contrast to its critics' accusations, acted to protect ordinary persons from the abuses of powerful politicians and corporations.

I feel confident in concluding that the legal reasoning the Court relied on in *Liebmann*, had it survived the New Deal, would have saved the country from a deluge of harmful legislation that erected barriers to entering a number of competitive industries—most infamously, the motor carrier, air transport, and railroad businesses. These restrictive entry regimes were in place well into the 70s. But as their negative effects became increasingly clear, their abolition became a widely-shared objective: "[t]ransportation deregulation was a policy objective common to the Nixon, Ford, and Carter administrations. It was a bipartisan issue with congressional support spanning the political spectrum. The Airline Deregulation Act of 1978, the Motor Carrier Act of 1980, and the Staggers Act of 1980 all passed both houses of Congress with large majority votes"; the same article then proceeds to make the bold statement that these "architects of transportation deregulation policies did a good job. [Their] framework has been maintained and has delivered the intended consequences" (Caves, Christensen, & Swanson 2010, 30-31).

Summing up the literature on this issue, Phillips (1991) observed that transportation "deregulation has yielded enormous benefits for society by any conceivable measure," an assertion with which nearly all the scholarly work on this subject agrees (539). Indeed, a staggering number of works were cited in support of this conclusion.[110] This harmful regulatory trend (or, as Brandeis would call it, "experimentation") almost certainly could have been avoided if the Court had stuck to its guns on the Liberty of Contract. Concededly, there are benefits to allowing legislative experimentation, but that does not mean that experimentation is an overriding value to which all other values must always yield. If it were, the concept of "rights" would cease to exist, as they too would have to be the objects of experimentation. But virtually no one—certainly not Brandeis[111]—advocates such a total abdication of judicial responsibility. I

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[110] Regarding airline deregulation: Michael E. Levine, "Airline Competition in Deregulated Markets: Theory, Firm Strategy, and Public Policy," 4 Yale J. Reg. 393 (1987); Thomas Gale Moore, "U.S. Airline Deregulation: Its Effects on Passengers, Capital, and Labor," 29 J. Law & Econ. 1 (1986); Gregory D. Call & Theodore E. Keeler, "Airline Deregulation, Fares, and Market Behavior: Some Empirical Evidence," in Analytical Studies in Transport Economics 221 (Andrew F. Daughety ed. 1985); Steven A. Morrison & Clifford Winston, *The Economic Effects of Airline Deregulation* (1986); Steven A. Morrison & Clifford Winston, "Empirical Implications and Tests of the Contestability Hypothesis," 30 J. Law & Econ. 53 (1987); and Severin Borenstein, "Hubs and High Fares: Dominance and Market Power in the U.S. Airline Industry," 20 Rand J. Econ. 344 (1989).

Regarding railroad deregulation: Theodore E. Keeler, *Railroads, Freight, and Public Policy* (1983); Thomas Gale Moore, *Rail and Truck Deregulation, in The Revolution in Regulation: What Actually Happened* 14 (Leonard Weiss & Michael Klass eds. 1986); Christopher C. Barnekov, "The Track Record," 11 Regulation19 (1987); Laurence T. Phillips, "The Railroad Industry: The Road to Recovery," 21 Bus. Econ. 52 (1986); Kenneth D. Boyer, "The Costs of Price Regulation: Lessons from Railroad Deregulation," 18 Rand J. Econ. 408 (1987); Henry McFarland, "The Effects of United States Railroad Deregulation on Shippers, Labor, and Capital," I J. Reg. Econ. 259 (1989); James M. MacDonald, "Railroad Deregulation, Innovation, and Competition: Effects of the Staggers Act on Grain Transportation," 32 J. Law & Econ. 63 (1989); and General Accounting Office (GAO), "Railroad Regulation: Economic and Financial Impacts of the Staggers Rail Act of 1980" (1990).

Regarding motor carriers: Karen Borlaug Phillips & Laurence T. Phillips, "Research, Politics, and the Dynamics of Policy Development: A Case Study of Motor Carrier Regulatory Reform," 17 Pol'y Sci. 367 (1984); and Diane S. Owen, "Deregulation in the Trucking Industry" (Staff Report, Federal Trade Commission 1988).

[111] As he famously wrote, the "makers of our Constitution […] conferred against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men," *Olmstead v. United States*, 277 U.S. 438, 478 (1928)(Brandeis, J., dissenting). And he expressed these sentiments often: "Thus, all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States. […] These [rights] may not be denied or abridged. […] The power of the courts to strike down an offending law is no less when the interests involved are not property rights, but the fundamental personal rights of free speech and assembly," *Whitney v. California*, 274 U.S. 357, 373-74 (1927)(Brandeis, J., concurring).

realize that this argument merely begs the question of whether access to basic consumer products and the freedom to enter a trade deserve the status of constitutional rights that may not be infringed without compelling reason, although that is a legal question and as such is beyond the scope of this paper.

But if there was ever a situation in which courts should curb legislative decision-making, the *Liebmann* case was it. Just as there are "market failures" in economics (where markets fail to allocate goods or services efficiently), there are circumstances in which the political process produces counter-majoritarian outcomes. A common example of this phenomenon is the passage of measures that, like Oklahoma's Ice Act, benefit small groups of industry actors at the expense of large groups, such as consumers. These laws are often enacted because small, well-organized factions with an intense interest in the issue are better able to convince each of their members that his or her participation in a lobbying campaign is critical, whereas, in a larger group, the incentive to free-ride is greater and the members' sense of obligation to participate lower. A small, heavily-invested interest group, moreover, can credibly threaten to revoke their support for elected officials who oppose the faction's favored policy, while the electoral majority disadvantaged by the policy are usually not concerned or knowledgeable enough about the particular issue to condition their vote on it. These phenomena "explain why consumers fare badly in the legislative process: They are too numerous to organize an effective 'cartel' in support of or in opposition to […] legislation" (Posner 1986, 497). The case for policy experimentation through the political process is thus at its weakest in *Liebmann*. If one accepts that economic liberties are deserving of *any* judicial protection, then the foregoing analysis strongly suggests that the justices who defended the principle of contractual freedom in

Liebmann got it right—and that subsequent generations of legal thinkers' fawning treatment of Brandeis' dissent rests on a much shakier foundation than is usually acknowledged.

VII. The Liberty of Contract and Minimum Wage Laws

A) Introduction. Perhaps the most far-reaching and controversial implication of the Liberty of Contract was its incompatibility with legislation setting minimum wages, measures whose wisdom remains a frequent subject of debate even today. An overwhelming body of literature already exists regarding the effects of minimum wage laws on employment, and so I do not speak at great length about this purported phenomenon here—though I discuss briefly the most recent reviews of such scholarship done by others in order to see if any sort of a consensus has emerged on the minimum-wage/employment question (it has not). I then attempt to determine the impacts of the law invalidated in *Adkins,* as well as the impacts of the Court's invalidation. First, I examine the conditions under which this statute was passed to determine whether it was a rational means of addressing a pressing issue. Next, I look for evidence from before and after the law's enactment as to what, if any, were its effects. Finally, I consider whether, after the Supreme Court nullified their minimum wage laws, these groups of lawmakers retained other equally effective (or perhaps more effective) means of achieving the same goals.

B) Minimum Wage Laws' Effects on Employment. Traditional economic theory predicts that when wages are raised above the equilibrium price of labor, all else being equal, the demand for labor (and, hence, employment) decreases. Proponents of minimum wage laws disagree for a variety of reasons, though a common line of argument is that due to inequality of bargaining power between employers and employees, employers tend to pay wages below market level, and therefore can absorb the cost of increased wages without having to reduce employment or raise prices. While each school of thought offers a fairly sound intuitive defense of its position, the empirical studies addressing this question are innumerable. Their conclusions point in all directions and, in the end, seem only to further confuse the issue. Indeed, "[t]he employment effect of the minimum wage is one of the most studied topics in all of economics" (Schmitt 2013, 1). The first wave of minimum-wage/employment studies crested in the 1970s, focusing on such laws' effects on the employment of teenagers (who were generally unskilled and likely to work in minimum-wage jobs); these studies largely coalesced around the conclusion that minimum wages reduced employment, with estimates of employment elasticity ranging from -0.1 to -0.3 (Neumark 2014, 3-6). In 1981, the Minimum Wage Study Commission released the 250-page report that it had been preparing since 1977, in which the Commission concluded that minimum wage reduced teen employment, but that its effects on adults were "uncertain in the empirical work" at that time (qtd. in Schmitt 2013, 2-4). In the early 90s, a new generation of minimum-wage research, relying largely on state-level data from pairs of neighboring states in which one had raised its minimum wage and the other had not, challenged the consensus by producing findings contradicting the traditional prediction of the supply-and-demand model. Since the early 2000s, studies have produced findings of all sorts, with battle lines gradually forming between the pro- and anti-minimum wage camps. In response, a trend of minimum-wage "meta-studies" has emerged, in which large numbers of studies' estimates of minimum wages' effects are aggregated to estimate whether the literature points more clearly in one direction than the other. But meta-studies have done little to resolve the debate, as their findings have been as scattered and contradictory as those of the studies they examine (Neumark 2014, 3-6; Schmitt 2013, 4-7).

Despite the inconclusive nature of the minimum-wage/employment literature, there are a few common pitfalls that seem to affect a large proportion of such studies, and that, if corrected for, could generate more uniform results. First, many studies finding negligible disemployment effects fail to exclude employees whose wages were high enough that they were unaffected by the enactment of (or increase in) the minimum wage. The result is that the elasticity of labor is systematically underestimated (Neumark 2014, 6). Second, an increase in the minimum wage increases the cost of one *hour* of labor, not of hiring one additional employee; hence, measuring changes in employment rates without considering changes in average hours worked fails to truly capture any employment effects, if they exist (Schmitt 2013, 15). Finally, a minimum-wage increase might negatively effect employment in such a way that an upward trend in job growth is "dampened" by the passage of the new minimum. But if average employment *levels* before and after passage were measured, as opposed to employment trends, it could give the impression that the new legislation increased employment, when it actually reduced it (Meer & West 2013, 3-4).

Another possibility is that minimum wage increases cause firms to raise prices, either instead of or in addition to reducing the hours of labor they purchase. On this issue, the literature is somewhat less conflicted, generally finding that raising the minimum wage increases prices, though there is not unanimous agreement as to the size of the effect.[112] The minimum wage's

[112] Lemos' 2004 literature review of existing studies on the price/minimum-wage relationship concluded that "[d]espite the different methodologies, data periods and data sources, most studies found that a 10% US minimum wage increase raises food prices by no more than 4% and overall prices by no more than 0.4%" (13); Card's and Krueger's controversial 1994 study "f[ound] that prices of fast-food meals increased in New Jersey relative to Pennsylvania, suggesting that much of the burden of the minimum-wage rise was passed on to consumers," though, in New Jersey, they found "*no* evidence that prices increased more in stores that were most affected by the minimum-wage rise" (792); Aaronson, French, & MacDonald (2008) find, in a study of 82 cities, that "the share of workers in a city's restaurant industry that are paid the minimum wage" is significantly and substantially positively correlated with "the ratio of the log change in city food away from home prices to the log change in the city's minimum wage," and a) that a 10% increase in the minimum wage leads to an overall price increase of 0.7% and 1.55% increase among limited-service restaurants, and b) that a 10% hike in the minimum more increases the

possible adverse impacts on both prices and employment must be considered together when evaluating its effectiveness as a poverty reduction strategy. In this case, however, no price data are available for specific firms in the District of Columbia—or even for the District in general—from the period in question (approximately 1918-1925), but the purported price-increase phenomenon should be kept in mind nonetheless.

C) Early Minimum Wage Laws. Between 1912 and 1919, fourteen states, the District of Columbia, and Puerto Rico enacted minimum wage laws (Thies 1991). All of these applied exclusively to female employees, a limitation likely included in reaction to the Supreme Court's 1908 decision in *Muller v. Oregon*, where the justices unanimously held that an otherwise unconstitutional maximum-hours law could actually be a permissible exercise of the police power if it applied only to women. Such limitations on women's contractual liberty were permissible as health regulations because, according to the Court, "woman's physical structure […] place[s] her at a disadvantage" and so "legislation designed for her protection may be sustained even when like legislation is not necessary for men."[113] Accordingly, policymakers relied on this line of reasoning in crafting the first wave of state minimum wage laws. A 1915 Report of the Illinois Senate Vice Committee urged the adoption of such a law on the grounds that poor women were more likely to fall into prostitution (an offense against morality that could be prohibited under the police power) and that women needed higher wages to cover the cost of child-rearing. That document cited earlier committee reports from Wisconsin and Michigan that similarly argued that the enactment of a minimum wage for women would prevent them from

probability from 12% to 28% of a given firm raising prices, leading the authors to conclude that "minimum wage cause prices to rise in competitive labor markets" (697-702, 688).

[113] 208 U.S. 412, 421-22 (1908).

becoming prostitutes (23-55). The Illinois report, moreover, suggested that "young, inexperienced girls" could not be "permitt[ed] […] to go out into the business world, guided solely by their own instincts and judgments," as they lacked the capacity to resist manipulation (49). Finally, a common purpose lawmakers cited for early minimum wage laws was "to supply the necessary cost of living to […] women workers to maintain them in good health" (as D.C.'s law provided),[114] a clear attempt to invoke the Supreme Court's recognition of the "heath" exception to the Liberty of Contract.

D) Literature. As with other cases from the *Lochner* Era, there is precious little scholarship evaluating the particular minimum wage laws invalidated by the Court. Some authors applaud the Court's decisions, denouncing the early minimum wage laws as job-killers. Thies (1991) presents data suggesting such disemployment effects, as well as arguing that many of the laws' proponents had sinister motivations, including sexism, racism, and contempt for immigrants and the disabled. Bernstein (2011) is less concerned with empirical analysis, but similarly emphasizes the insidious objectives of many minimum-wage advocates, implying that they may have been involved in the passage of D.C.'s law. On the other hand, Phillips (2001) criticizes the *Adkins* decision for "ignor[ing] unequal bargaining power," pointing out that most of those covered under D.C.'s law were "young, single women living at home with their parents. Those who were married presumably were tied to a male breadwinner"; most of them "probably had little geographic mobility and thus relatively little ability to shop among competing employers" (141).[115]

[114] The Minimum Wage Act of Sept. 19, 1918, c. 174, 40 Stat. 960, § 9.
[115] However, this argument, if one accepts minimum-wage laws' disemployment effects, cuts both ways: if the women lacked mobility or had too few choices of employers, then they would be especially injured by dismissal from their positions or reductions in their hours.

E) Adkins *and The District of Columbia's Law*. In December of 1916, the US Congress passed a joint resolution directing the Bureau of Labor Statistics to conduct a study of wages and the cost of living in the District of Columbia. The Bureau gathered data on approximately 600 white, wage-earning women, 72% of whom were 21 years of age or older, 46% of whom earned less than $8 per week, 21% of whom had dependents, and 31% of whom lived away from home. These statistics were among the reasons cited by those who testified before the Senate Subcommittee on the District of Columbia during its April 1918 hearings on the issue. Nearly all those who spoke supported passage of a minimum wage, and so the measure was approved by the subcommittee and enacted into law in September 1918. It established a three-member Minimum Wage Board, an administrative body charged with holding evidentiary hearings and issuing "standards of minimum wages for women workers in the occupation under inquiry and as to what wages are inadequate to supply the necessary cost of living to women workers in such occupation and to maintain them in health and to protect their morals."[116] The Board was authorized to grant exemptions allowing employers to pay lower wages to learners, and to women "whose earning capacity has been impaired by age or otherwise," the "otherwise"

[116] The Minimum Wage Act of Sept. 19, 1918, c. 174, 40 Stat. 960, § 9.

referring to serious physical disabilities.[117] In practice, however, the Board granted exemptions to the latter group parsimoniously.[118]

Soon after the Board's order covering women working in hospitals, lodgings, or places where food is served went into effect in May 1920, the Children's Hospital of the District of Columbia, a nonprofit corporation employing many women who were covered by the order, requested an injunction from the US District Court for the District of Columbia against the Board's orders on the basis that the minimum wage abridged the Liberty of Contract. The hospital employed predominantly young women, who the hospital claimed received "adequate compensation for services rendered," but, in many cases, earned less than the new minimum wage.[119] The hospital further explained that it would, for lack of income, "be compelled to discontinue" its services as currently rendered, or at least would be "restricted to the employment only of women who are capable of performing labor sufficient to earn" the minimum.[120] The complaint further explained that most of its young, female employees lived at home or were otherwise supported by other streams of income, such that it was unnecessary for them to earn a wage as high as the minimum set by the Board.[121] In September of the same year, a similar

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[117] Ibid., § 13. These exceptions may sound reasonable as a matter of policy, but in light of the law's stated purpose, they are quite nonsensical. If the law's intent was to ensure that women's wages were high enough that they could maintain a healthy standard of living, why make exceptions for disabled or elderly women? Surely they require just as much (if not more) compensation to support themselves as other women. If the justification for the exception is that the exempted women were rarely their households' sole breadwinners, then the exemption should be much broader, as the same was true of most non-disabled and non-elderly women. If the justification is that the exempted women's labor was unlikely to justify payment of the minimum (and so their employment might be reduced), then, once again, the exemption should be broader, as the same was undoubtedly true of many non-disabled and non-elderly women.

[118]According to the Minimum Wage Board's 4th Annual Report, the "board does not issue a special license unless it is convinced that the applicant's earning capacity is actually impaired […] In no case is a license issued without a personal interview with the applicant. […] During the year 1920 the board issued 23 special licenses" (1921, 22).

[119] *Adkins*, Transcript of Record, Bill for Injunction, 6.

[120] Ibid., 7.

[121] Ibid., 6-7.

complaint was filed in the D.C. District Court, this time by Willie Lyons, a twenty-one-year-old woman previously employed in the Congress Hall Hotel as an elevator operator, but who had been discharged after her employer concluded that her services could not justify her continued employment at the new minimum wage for hotel workers. She claimed that the hours were short (not more than six hours per day), the work light, and the conditions of employment favorable.[122] Accordingly, she joined the Children's Hospital in attacking the minimum wage law as a violation of the Liberty of Contract. In its replies, the District disputed the plaintiffs' disemployment claims as "conjecture," assuring the court that the effect of the minimum wage law would be "to decrease poverty and sickness."[123] The District Court sided with the defendants (whose claims had been consolidated in a single proceeding), upholding the act as a reasonable health measure, while, on appeal, the Supreme Court of the District of Columbia reversed and agreed with the plaintiffs, striking down the law in October 1921.

The Supreme Court affirmed, striking down D.C.'s statute in the April 1923 decision *Adkins v. Children's Hospital*. A noteworthy occurrence was the intervention of the National Woman's Party, a high-profile women's rights and suffrage organization, who filed an *amicus* brief on behalf of the appellees urging the Court to strike down the District's law on the grounds that the minimum wage raised the costs of women's labor and effectively reduced their employment (Phillips 2001, 146). The Court was apparently of the same mind. On the gender issue, Justice Sutherland's majority opinion held that, "while the physical differences [between sexes] must be recognized in appropriate cases, and legislation fixing hours or conditions of work may properly take them into account, we cannot accept the doctrine that women of mature

[122] *Adkins*, Transcript of Record, Bill of Complaint, 19-23.
[123] *Adkins*, Transcript of Record, Answer to Rule to Show Cause, 9-11.

age […] may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances."[124] The remainder of the Court's reasoning reflected the majority's adherence to principles of Classical economics:

> The price fixed by the board need have no relation to the capacity or earning power of the employee, the number of hours which may happen to constitute the day's work, the character of the place where the work is to be done, or the circumstances or surroundings of the employment; and, while it has no other basis to support its validity than the assumed necessities of the employee, it takes no account of any independent resources she may have. […] It applies to any and every occupation in the District, without regard to its nature or the character of the work. […] The law takes account of the necessities of only one party to the contract. It ignores the necessities of the employer by compelling him to pay not less than a certain sum not only whether the employee is capable of earning it, but irrespective of the ability of his business to sustain the burden, generously leaving him, of course, the privilege of abandoning his business as an alternative for going on at a loss. […] It forbids two parties having lawful capacity […] to freely contract with one another in respect of the price for which one shall render service to the other in a purely private employment where both are willing, perhaps anxious, to agree, *even though the consequence may be to oblige one to surrender a desirable engagement and the other to dispense with the services of a desirable employee*. [emphasis added][125]

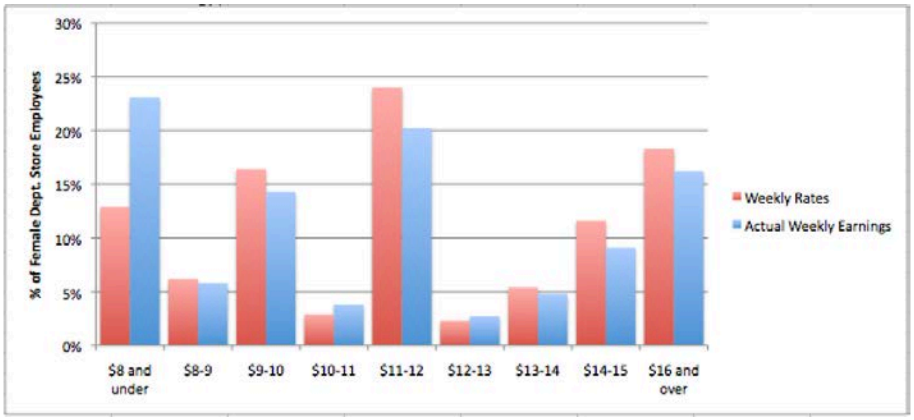
The Court dealt with the issue three more times during the *Lochner* Era, striking down Arizona's minimum wage statute in 1925 (*Murphy v. Sardell*), Arkansas' in 1927 (*Donham v. West Nelson Mfg. Co.*), and New York's "living wage" law in 1936 (*Morehead v. New York ex rel. Tipaldo*). Because *Adkins* was the Old Court's "landmark" minimum-wage case,[126] I will focus here on the impact of D.C.'s law, although I will discuss those of Arizona, Arkansas, and New York in the conclusion section of part VII to the extent that they are relevant for evaluating the Court's impact on this area of policy.

[124] 261 U.S. 525, 553.
[125] Ibid., 554-57.
[126] The issue had actually reached the Court before then, in *Stettler v. O'Hara*, 243 U.S. 629 (1917), but the justices split 4-4, affirming, by default, the Oregon Supreme Court's decision to uphold a minimum wage law.

F) Evaluation. Based on statutory text alone, it is difficult to go about estimating the law's effects, as Congress itself made almost no policy decisions regarding minimum wages in the District, but instead delegated broad authority to a Minimum Wage Board to make such decisions on an industry-by-industry (or even individual) basis. As an initial matter, however, a few things can be said about the apparent reasonableness of the District's law as an antipoverty measure. First, the BLS' summary of its 1916 study, published in the January 1918 edition of *Monthly Labor Review*, observes that the "lowest income received by any of these workers was $130.50 per year. This was received by a sales girl, age 17, her maximum wage being $4 per week, and 10 weeks being lost through inability to find work" (3). The summary makes no other mention of average hours of work, an omission that begs the question of how much of the problem of low weekly earnings was simply a problem of un- or underemployment.[127] While no figures are available for 1916, subsequent BLS findings suggest that this was indeed the main explanation for women's low earnings. A 1920 study of 3,000 women in occupations that had not yet been the subject of Minimum Wage Board orders revealed that "[m]ore than one-half (51.2 per cent) of the women employed in office and-other buildings received less than $9 per week, but this is explained by the small number of hours worked per day" (*Monthly Lab. Rev.*, June 1921, 72). A study in June 1919's *Monthly Labor Review* of women working in the District's mercantile industry noted at the outset "that rates of pay did not measure actual earnings. Earnings averaged well below full-time rates" (191). A table of data for 1,483 female department store employees (fig. 7.1) reflects such a trend:

[127] The BLS report explains, however, that, "[e]xcept in a few very unusual cases, such as protracted illness, no woman was included who had not worked during at least nine calendar months of the year 1916, *unless the occupation was seasonal in character and so failed to furnish nine months' employment during the year*" (emphasis added)(2).

Figure 7.1



Regarding the women in the "$8 and under" group, the report said the following: "While the low earnings of some of these women was due to the fact that they were regularly employed as part-time workers, the greater number earned less than their wage rate because of absenteeism. Insufficient records as to reasons for absence made it impossible to come to any conclusions concerning the causes of this irregular attendance" (192).

The 1916 study (in the Jan. 1918 *Monthly Labor Review*) also raised the issue of female wageworkers' living situations. 542 of the 600 women included were single, while 58 were either widowed, divorced, or separated; of those 58, 15 had children dependent on them. 414 of the women (69%) lived at home with their immediate families, and of those women, all but 51 lived with parents. Of the 186 (31%) that did not live at home, just 84 lived "in private families," while the rest either lived in boarding houses, homes for working girls, or were live-in housekeepers. The situation in the District therefore seems to have been that women's low weekly earnings were due largely to low total hours worked, and that most had living arrangements such that it was not necessary for them to earn a wage sufficient to cover all expenses of living by themselves. The report attempts to obfuscate this fact by stating that "[o]f the 600 women included in this study," only 272 (45%) "were found to be in receipt of outside assistance" (5). The statement is deceptive because it seems that the report does not necessarily consider permitting someone to live in one's house to be a form of assistance,[128] as evidenced by the fact that 100 of the 414 women living with their families at home were classified as "self-supporting." Finally, the report noted that, "[a]s would be expected, assistance occurred chiefly among the women workers with the small annual incomes. Thus of the 274 women with incomes of less than $400 per year (approximately $8 per week), 203, or 74 per cent, were assisted"—likely more, if those who were permitted to live in parent's or spouse's home were counted as "assisted"; "[o]n the other hand, 6 women, or 17 per cent, of those receiving $800 or more per year were assisted. […] Certainly 99 per cent of all those included were working because working was necessary" (6).

On the whole, the circumstances in D.C. at that time seem to be the sort of conditions under which minimum wage laws, according to their critics, are unlikely to be effective antipoverty tools. First, the low earnings here appear to primarily be the result of less time spent working, either because women choose to work only part-time, or because there is not enough work to be had. Moreover, wage-working women in the District often had living arrangements such that they did not need their employers to pay a wage high enough that they could afford to maintain their own household. This also suggests that the benefits of a minimum wage increase (assuming such an increase did not substantially reduce employment) would not necessarily go to the households most in need of it; after all, the aforementioned study demonstrated that

[128] On the issue of assistance, the report says the following: "in a number of cases a girl [living at home] was classed as self-supporting" even "when she probably could not have obtained the same living conditions at the same price commercially […] At best, the question of assistance is one that often can not be readily determined. Usually it is in the form of board or lodging without pay or at reduced rates. But sometimes, particularly with women living at home, assistance is given in forms impossible to trace" (5).

women with lower incomes were much more likely to live in households with multiple earners. And if it is indeed the case that "99 per cent of all those included were working because working was necessary," then it seems that any disemployment effects of the minimum wage (if they occurred) would have the effect of making affected women substantially worse off.

As for the seriousness of the alleged disemployment effects in the context of the D.C. law, there is, in light of the scant data, very little that can be said that would convince a skeptical reader either way. Thies (1991), for his part, cites the Bureau of Labor Statistics' report (published in the June 1922 issue of *Monthly Labor Review*) on the D.C. Board's October 1919 order setting a weekly minimum of $16.50 for women and minors in mercantile industries; BLS before-and-after data show that 4,557 total women or minors were employed in D.C. mercantile establishments in Feb./Mar. 1919, compared to only 4,347 in Mar./Aug 1921. Thies considers this evidence of disemployment, while the BLS report brushes it off as "negligible in itself"; the "decrease in the number of women employed of only 2.6 per cent" (and the overall decrease of 4.6%) was, the BLS' report claimed, "more than explained by the present business depression and the decrease in the population of the District during the period" (101). Neither of these statements seems to be true. Regarding the supposed "decrease in the population," data from the Reports of the Health Officer (published in the Annual Report of the Commissioners of the District of Columbia) indicate that the District's population was 455,428 in 1919 and 454,026 in 1921, while US Census Bureau puts the figures at 445,000 and 446,000, respectively. So the District's population either declined by less than 0.31%, or it increased by just over 0.22%. Hence, even viewing the numbers in the light most favorable to the BLS report, population change does not explain the decline in employment. As for the "present business depression," the

BLS is correct about its existence, although some scholarship suggests that the mercantile industry was one of a number of sectors in which employment continued to grow throughout the aforesaid recession (Committee on Economic Security 1937, 62). And though no figures are available, it does not seem that the District was suffering from general unemployment at that point; in January 1921, the *Washington Post* reported that the District was "most fortunate among the cities of the country, having but 8,613 unemployed, or 1.9 per cent of her total population" (6).[129] The situation apparently continued to improve, as a September 1921 *Post* headline proclaimed, "FEW IDLE IN CAPITAL: City Is Brightest Spot in East, Unemployment Report Shows," with only "5,700 unemployed" (1). Of those 5,700, the "biggest field of unemployment is the clerical one," with dismissed female clerks formerly employed by the federal government comprising about 2,000 of jobless in the District. Otherwise, employment in most trades was robust, despite the "Influx of Men Looking for Places From All Parts of the Country Add[ing] to [the District's] Unemployed Population" (1). Notably, however, "[o]ne of the largest classes of females out of employment […] is the colored domestics. Every day the employment Bureau is flooded with colored women seeking work as domestics" (1). This is consistent with the view espoused in some literature that Black workers in less skilled trades are most injured by any disemployment effects of a minimum wage; sure enough, in March of that year, the Minimum Wage Board had issued an order mandating a minimum wage for laundry workers, who were "predominantly colored," while in July of 1920, its order for women working in "any hotel, lodging house, apartment house, club, or hospital" took effect (Min. Wage Board

[129] A study published in the October 1921 issue of *Monthly Labor Review* supports the *Post*'s assessment, showing 4,752 unemployed persons in the District, 1,130 of whom were clerical and 1,684 were domestics (jobs were found for 1,581 of the 4,752)(119).

of D.C., 3rd Annual Report, 16). These overall trends should be kept in mind as changes in employment among the affected women are taken into account.

Moreover, somewhere between 22.4% and 25.5% of the employees covered by the Board's order in 1919 were almost certainly not affected by it, since they had already been earning a weekly wage equal to or greater than the new minimum of $16.50. Inclusion of this group in the calculation thus leads to one of the pitfalls discussed earlier: the elasticity of the demand for labor is underestimated due to the inclusion of unaffected workers in the study. These criticisms of the BLS' report should not be understood as an affirmation of Thies' (1991) conclusion that the District's minimum wage law reduced employment; even if the BLS' methodology was far from unassailable, there is still insufficient evidence of a disemployment effect in this instance. It also leaves unanswered the question of working hours, another omission that makes inferences about the degree of disemployment very difficult.

Ironically, however, the best evidence against D.C.'s minimum wage statute comes from the reports of the District's own Minimum Wage Board. The Board's first report, published in 1919, made the bold admission that

> The putting into effect of the minimum wage orders revealed the existence of a considerable number of able-bodied persons who because of lack of initiative, education, and opportunity were unable to compete on an equal footing with the other workers in a particular class of work. For example, some women who had been employed as saleswomen were dismissed when the order became operative on the ground that they were incapable of earning the minimum rate (28).

The report attempts to allay these concerns by suggesting that the new group of unemployed women can solve their own problems by "shifting into new lines of work," yet nonetheless concedes that displaced women would face substantial obstacles to doing so:

> One drawback, however, to a perfect adjustment of the worker to the job is found in the limited number of industries in the District. There are comparatively few factories to

> which the woman unfitted for salesmanship can turn. Hotels, restaurants, laundries, telephone and telegraph offices are the only establishments which offer employment on a comparatively large scale. These industries may not offer the kind of work for which the applicant is best suited. There are other groups of women for whom no occupation can possibly be found in which they can compete successfully with workers of ordinary ability. […] The attention of the community can not be called too soon to the existence of these groups in industry who appear to suffer from rather than benefit by the minimum wage law. The children, the widows, the aged and infirm, the mentally defective, the substandard workers cannot be adequately protected by wage legislation. They must be cared for in some other way (28-29).

Interestingly, the Board's subsequent reports downplayed the extent of the negative employment effects that it at first considered disconcerting. In its fourth and final report, published in 1921, the Board included the following table to illustrate its claim that the disemployment effects of its wage orders were minimal (29):

Figure 7.2

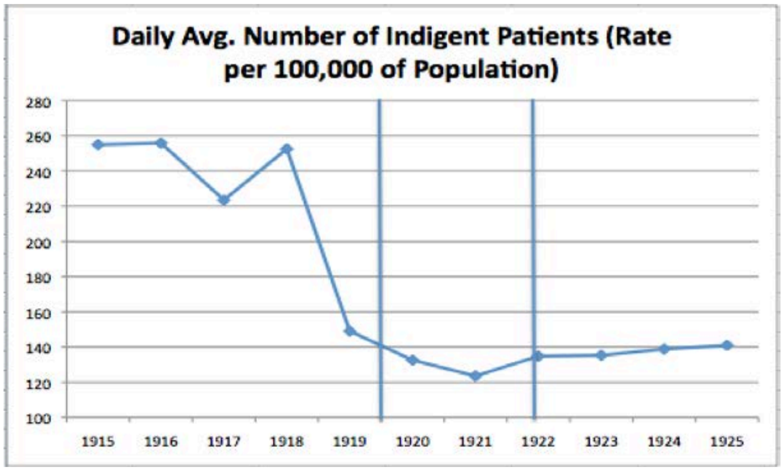
TABLE XXI.—*Number of women employed in identical establishments in two specified years, before and after the establishment of minimum wage rates, by industrial groups.*

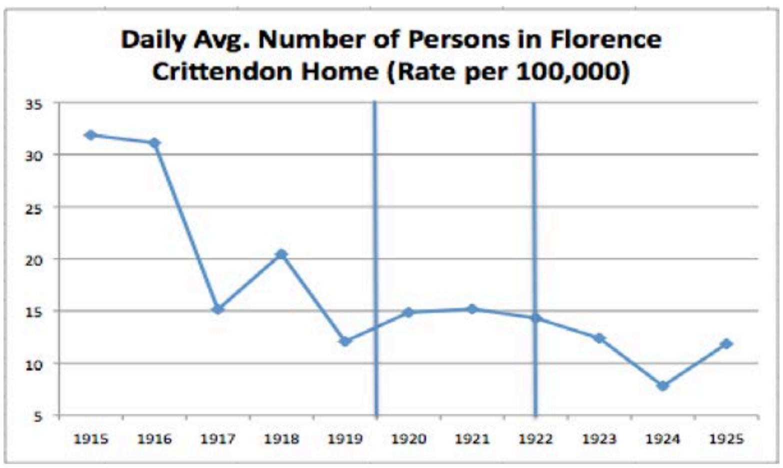
Industrial groups.	Number of women employed in—		Percentage, increase or decrease.
	1919	1921	
Mercantile (*102 establisments*)	4,557	4,347	−4.6
Hotels (*14 establishments*)	792	821	+3.7
Restaurants (*18 establishments*)	483	392	−18.8
Commercial printing and publishing (*36 establishments*)	326	284	−12.9
Noncommercial printing and publishing (*5 establishments*)	422	564	+33.6
Total	6,580	6,408	−2.6

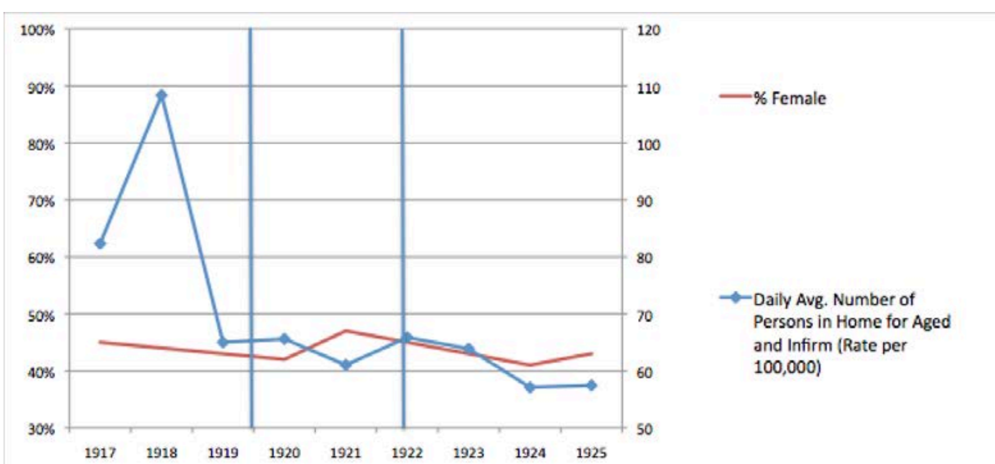
The problem with this conclusion is, first, that Board statistics indicate that about 22.4-25.5% of the 4,557 women working in the mercantile industry in 1919 already had a weekly wage rate at or above the minimum. Figures are not available for the other sectors, but it is safe to assume at least some women in each were at or above the minimum before the Board had issued the order affecting their industries. Moreover, there was a notable decrease in average working hours among those who kept their jobs, especially in the hotel industry: “Part-time employment was undoubtedly increased by the introduction of the order; hotel employers avowedly shortened working schedules wherever possible to avoid payment of the full minimum wage”; however, “[i]t is probable that the introduction of the minimum wage has caused little change in the working hours in restaurants,” where the losses appear to have manifested themselves as reductions in the number of employees rather than in average hours worked (1921, 21-22).

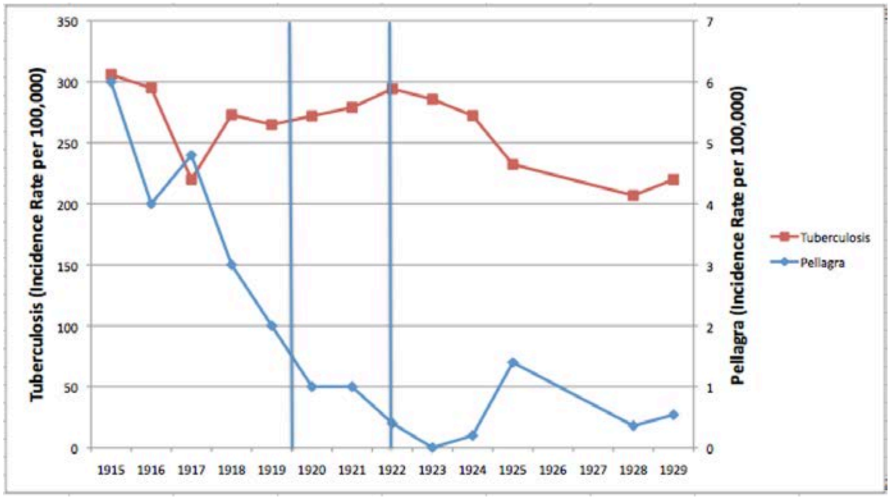
As for “health,” the particular interest allegedly motivating D.C.’s law, there is hardly enough data to make a determination as to the statute’s success in this regard. One proxy measure of this concept could be the incidence rates of tuberculosis and pellagra, the only two diseases strongly linked with malnutrition for which the District’s Health Officer recorded annual data. Additionally, the Annual Reports of the D.C. Commissioners released statistics every year in June on the daily average number of indigent patients being treated in District Hospitals, the daily average number of patients being treated in the Home for the Aged and Infirm (which treated exclusively indigent persons) as well as the percentage of those in the Home that were female, and the daily average number of women at the Florence Crittendon Home (a home for “young women who have already become public charges or else stand in danger of doing so,” and their infants)(Annual Report of the D.C. Commissioners 1907, 668). The following are graphical representations of these trends, with the vertical blue lines representing the effective date of the Board’s first order (Oct. 1919) and the date of the D.C. Supreme Court’s decision striking down the Minimum wage law (Nov. 1922):

Figures 7.3-7.6









There are no noteworthy effects on any of the variables, and, at any rate, there is insufficient data to make any determination regarding the D.C. minimum wage. The law was not in effect long enough for any of its possible impacts to be apparent in the annually collected statistics.

G) Interests Involved. Once again, it is worth examining the factions that were advocating for and against the sort of legislation whose impact is at issue. The most obvious motivation behind passage of early minimum wage laws was, as with minimum wage laws today, a Progressive-Era desire to alleviate poverty. There is no doubt this was a key impulse motivating supporters of D.C.'s minimum wage law. Florida Senator Park Trammell, the first to speak during the Senate hearings on the measure,[130] believed the legislation would ensure that working women "may provide sustenance and the necessaries of life for themselves and frequently for loved ones, children, and possibly mothers who have reached the age of decrepitude" (7). One of the most thorough and detailed statements in support of the law came from then-Harvard Law School Professor and later-Supreme Court justice Felix Frankfurter, who hoped that the enactment of a minimum wage would ensure that laborers earned "an adequate return for the

[130] Minimum Wage Board for the District of Columbia: Hearings on S. S. 3993 (1918).

basic necessities of the human body" (13). District Health Officer W.C. Woodward and District Commissioner Louis Brownlow concurred with Frankfurter in their statements, with the former calling the proposed a law a means of "support[ing] health in a decent and a proper way" (34). One surprising voice in favor of the law was that of Charles Columbus, Secretary of the Merchants and Manufacturers' Association of the District of Columbia, an organization "made up of 33 organized lines of trade, and included among those units, which are known as trade sections, such as our department store section, which employs about 5,000 people, are the section for laundries and our sections for specialty houses, for ladies' tailors, merchant tailors, and so on" (8). Columbus testified that his organization unanimously voted to support the minimum wage law. Its Board of Governors considered it "a good bill," and it had "the full approval of the department stores," Columbus claimed, because "Business men must have a real organization, and no man can have a real organization about him when his people are not satisfied; and the business men of Washington want to satisfy their people, because unless individuals are happy in their jobs, the job itself or the business itself can not very well succeed" (9-10). If this statement is true, than it would suggest that the minimum wage law would not cause most employers, at least in the mercantile sector, to behave any differently towards their employees than they otherwise would; if employers in this trade want the bill passed because it will be better for their business to have high wages, then why are they not already offering such wages? A likely answer is that they are, and that the wage increases that the Minimum Wage Board would later attribute to its own orders would have occurred anyway. This would, after all, be consistent with

Justice Sutherland's observation that wage increases were a widespread trend for which D.C.'s law was clearly not responsible.[131]

There were, however, a number of more insidious interests associated with the "Progressive" movement who were pressing for adoption of the early minimum wage statutes, including the one enacted in D.C. Oddly, many of these minimum-wage supporters, like their opponents from the Classical school of economic thought, acknowledged the disemployment effects of such laws, yet these Progressives considered job losses to be a *desirable* effect of minimum wages. The basis for this view was, to put it rather mildly, unsavory—an outgrowth of Eugenics, racism, nativism, and other forms of bigotry. Progressive economist John R. Commons wrote in 1907 that regulatory measures to keep wages artificially high were necessary because "competition has no respect for the superior races," in that the "race[s] with lowest necessities"—allegedly including Blacks, who Commons viewed as "indolent and fickle,"—could "displac[e] others" (qtd. in Leonard 2005, 215). In 1912, Harvard Progressive and member of Massachusetts' wage commission Arthur Holcombe spoke approving of Australia's minimum wage because he felt that it "protect[ed] the white Australian's standard of living from the invidious competition of the colored races, particularly of the Chinese" (215). In 1911, Florence Kelley, who testified in support of D.C.'s law, similarly applauded Australia's law for reducing employment of "women, children, and Chinese" (215). Columbia University economist Henry Seager, writing in 1913, advocated a minimum wage as a means of

[131] "That the earnings of women now are greater than they were formerly, and that conditions affecting women have become better in other respects, may be conceded, but convincing indications of the logical relation of these desirable changes to the law in question are significantly lacking. They may be, and quite probably are, due to other causes. We cannot close our eyes to the notorious fact that earnings everywhere in all occupations have greatly increased—not alone in States where the minimum wage law obtains, but in the country generally," *Adkins*, at 560.

“extend[ing] the definition of defectives to embrace all individuals, who even after having received special training, remain incapable of adequate self-support,” continuing on to warn that, “[i]f we are to maintain a race that is to be made of up of capable, efficient and independent individuals and family groups we must courageously cut off lines of heredity that have been proved to be undesirable by isolation or sterilization,” a recommendation that might fairly be labeled genocide for the faint of heart (213). In a passage that reads as if it came from a dystopian novel, Royal Meeker, a Princeton economist and the Commissioner of Labor under Woodrow Wilson, eerily argued in 1910 that “[i]t is much better to enact a minimum-wage law even if it deprives these unfortunates of work […] Better that the state should support the inefficient wholly and prevent the multiplication of the breed than subsidize incompetence and unthrift, enabling them to bring forth more of their kind” (213-14). In a 1913 editorial, journalist and Progressive activist Paul Kellogg advocated a minimum wage for immigrants that was twice the average level for ordinary laborers at the time, hoping that this would force “racially undesirable” immigrants out of jobs, or, as he put it, would exclude “Angelo Lucca and Alexis Spivak” and protect “John Smith and Michael Murphy and Carl Sneider” (qtd. in Leonard 2016). In a 1912 article advocating for minimum wage laws, Progressive economist and socialist Sidney Webb justified his view by saying of the unemployed class that, “of all ways of dealing with these unfortunate parasites, the most ruinous to the community is to allow them unrestrainedly compete as wage earners” (qtd. in Bernstein & Leonard 2009, 186). Even Felix Frankfurter, himself a Jewish immigrant, seemed to accept a watered-down version of this line of reasoning, writing in a 1917 brief that “the state […] may use means, like the present [minimum wage] statute, of sorting the normal, self-supporting workers from the unemployables and then deal with the latter appropriately as a special class" (qtd. in Bernstein 2011, 54).

In drawing attention to these disturbing justifications for minimum wage laws, I do not mean to suggest that all or even most advocates of minimum wages, either during the *Lochner* Era or today, are surreptitiously working to further a racist or otherwise bigoted agenda. But it is undeniable that a staggering proportion of minimum-wage proponents at this time at least admitted the existence of, if not proudly boasted about, substantial job losses that resulted from mandatory legal wage floors. Even the National Woman's Party, a preeminent association of sex equality advocates, had weighed in before the Supreme Court with its *amicus* brief explaining how these disemployment effects would be detrimental for female workers. When one considers that the prevailing view in the economic thought of that period—regardless of whether one supported or opposed minimum wages—was that the disemplyoment effects were real, the Supreme Court's decision to invalidate such laws appears significantly more reasonable and defensible. After all, an evaluation of the Court's Liberty-of-Contract jurisprudence must, to some extent, inquire whether the justices behaved reasonably *in light of the information available*. And in this respect, the Court's decision deserves a much more favorable assessment.

H) Other Invalidated Laws and Conclusion. When the Supreme Court struck down the minimum wage laws of Arizona in 1925 and Arkansas in 1927—*Murphy v. Sardell* and *Donham v. West-Nelson Mfg. Co.*, respectively—it did so, in both cases, with a single sentence, issued as an unsigned *per curiam* opinion merely stating that lower court rulings invalidating minimum wage laws were "affirmed upon the authority of *Adkins v. Children's Hospital*." The implication of such a terse resolution of both cases is that the Court was not terribly concerned with explaining on a case-by-case basis why each minimum wage statute had not passed muster, but instead viewed minimum wage legislation as *per se* unconstitutional—a departure from its approach to legal barriers to entering industries or maximum hours laws. Therefore, an inquiry into whether the Liberty-of-Contract doctrine did harm in the area of minimum wages is functionally the same as an inquiry into whether minimum wages laws are, generally speaking, good policy. Meaningfully contributing to this longstanding debate would be a tremendous undertaking, one that could easily produce enough volumes to fill a library—and one that, at any rate, would be unlikely to end the longstanding disagreement on the issue. The foregoing analysis of the District of Columbia's law produced no conclusive evaluation of what happened in that particular instance, let alone of what impact minimum wage laws have in general.

To avoid concluding a twenty-page discussion without saying anything useful, it may be appropriate to reframe the issue by considering a hypothetical, one in which the circumstances imagined are those most favorable to the opponents of the Old Court and the Liberty on Contract. Suppose that proponents of D.C.'s law and their posthumous allies, the modern generation of Liberty-of-Contract critics, are right that the invalidated statute (or any other minimum wage statute) served its intended purpose of helping the poor afford to maintain a healthy standard of living, and that the Supreme Court reversed those positive effects when it struck the laws down. What options do policymakers pursuing the same objective have to mitigate the impact of the Court's decision, and are they likely to be as effective?

The ostensible answer is a fiscal approach to social policy based on taxation and redistribution. A program of government-distributed, means-tested benefits not only accomplishes the same objective as minimum wage laws, but does so much more effectively.

First, since such programs are funded publically, the burden of paying for them is presumably spread out among taxpayers—the costs are "borne by society," rather than concentrated on employers of low-wage workers, which one would expect to make any disemployment effects either negligible or at least less dramatic than those caused by a minimum wage (Friedman 1982, 192). In fact, minimum wage laws' illogical distribution of costs across society was cited by the Court in *Adkins* as evidence of the statute's likely inefficacy and arbitrariness.[132] Second, because these programs are means-tested, they, more so than the minimum wage, are "directed specifically at the problem of poverty," in that their greatest beneficiaries are those most in need (Friedman 1982, 192). Minimum wages, by contrast, mandate the same minimum rate for an unwed mother with a dependent child as they do for a teenager living at home and supported by parents who works only to earn extra spending money and gain experience. A more efficient poverty reduction tool would give the former more and the latter less. Finally, social-welfare-based approaches to helping the poor, since they are no more difficult to implement than systems of taxation that have long been common throughout the country, would probably carry a much lighter "total administrative burden" than the common "rag bag of measures directed at the same end," such as minimum wages, public support for charities and healthcare facilities, certain publically provided free services, or requirements that employers provide certain fringe benefits (Friedman 1982, 192-93). To the extent that the Supreme Court's intolerance of minimum wage laws induces policymakers interested in poverty reduction to enact social welfare programs

[132] "The law is not confined to the great and powerful employers, but embraces those whose bargaining power may be as weak as that of the employee. It […] amounts to a compulsory exaction from the employer for the support of a partially indigent person, for whose condition there rests upon him no peculiar responsibility, and therefore, in effect, arbitrarily shifts to his shoulders a burden which, if it belongs to anybody, belongs to society as a whole," *Adkins*, at 557-58.

instead of minimum wages, its negative impacts may be undetectable, or might even be outweighed by positive impacts.

Two objections to this prognosis come to mind. First, enacting a welfare program of this sort would be politically more difficult than a minimum wage, because it would mean more members of the electorate feel the costs (probably in the form of tax increases). Indeed, even advocates of such a program admit that it would "mak[e] explicit the cost borne by society" (Friedman 1982, 192). The best that can be said in response is that it would be quite strange if the same legislators who expressed their desire to help the poor by enacting a minimum wage law would then lose interest in that endeavor as soon as the Supreme Court shot down their first attempt. Still, it could perhaps be the case that lawmakers would be more reluctant to pursue the same goal through fiscal policy, because voters could very easily see who paid and who benefitted, as the wealth transfers would be more direct. But that reluctance might give way to action if the minimum-wage option was taken off the table and legislators were left with little else. And if the Liberty of Contract's effect is merely to require that governmental transfers of wealth be done more overtly and the identities of their contributors and beneficiaries be made clearer, then that seems to me to be reason to celebrate, rather than disparage, that doctrine.

A second objection may be that a social welfare program is more difficult to administer than a minimum wage statute, an argument that, if true, would be especially formidable in the context of a pre-New-Deal America. If it is true, however, the difference is likely to be negligible. Minimum wage and other laws regulating conditions of employment are not especially easy to enforce; even today, "[e]vidence of noncompliance abounds. […] Violations of minimum wage laws […] are widespread and they disproportionately affect the most vulnerable workers in society" (though overtime violations are actually the "most common [and] expensive type of wage theft")(Galvin 2016a, 327, 325). In fact,

> Employees recovered at least $933 million in private wage-and-hour lawsuits and administrative rulings in 2012—more than the total amount lost in all bank, residential, convenience store, gas station, and street robberies put together—[and] those cases only represent the *known* cases that were successful in recovering back wages for employees (Galvin 2016a, 327).

With such difficulties persisting today, it is no wonder that "statutes to enforce state minimum wages during the Progressive era were of questionable effectiveness" (Galvin 2016a, 341). But would public distribution of social welfare benefits have been more successful during that period? Events in D.C. subsequent to the invalidation of its minimum wage law suggest that policymakers were optimistic. After a pair of January 1926 hearings led by the Senate's Committee on the District of Columbia, an act of Congress established the Board of Public Welfare, responsible for overseeing operation of charitable institutions for the indigent and sick, and empowered to administer new programs to provide childcare and other valuable services to destitute mothers ("Chapter 1," D.C. Code). There is little reason to think that this enactment was any more difficult to administer than a regulation of wages; a system of direct distribution of benefits "would [have] fit directly into" a simple tax-collection regime (which the District obviously already had), and, being no more complex an undertaking than collecting taxes, "could [have] be[en] administered along with" existing systems of taxation (Friedman 1982, 192).

Present-day data suggest that this "fiscal-policy" alternative to minimum wage would be both more effective and more rational as a means of assisting the poor. In 2015, 54.6% of minimum-wage workers were between the ages of 16 and 24, 66.6% were part-time employees (less than 35 hours per week), only 19% were the sole breadwinners of their households, and most did not come from poor homes (Bureau of Labor Statistics 2016; Bernstein, J. 2014). One study, based on 2010-2014 data concluded that, assuming neither hours nor employment rates decreased, only 18% of the income gains from raising the federal hourly minimum wage to $10.10 would go to poor households, while 32% would go to households with incomes at least three times greater than the poverty level (Lundstrom 2014). The 2013 US Census reported that only 2.7% of those employed full-time were living at or below the poverty line (13). And other 2013 data indicate that only 12% of working-age (ages 18-64) Americans living in poverty worked full-time and year-round during the past year (compared to 53% of all working-age Americans), while 27% worked less than full-time/year-round, and 62% had not worked at all (UC Davis 2014). The implication of this information is *not* that the poor are unwilling to work, but rather, that poverty as it exists is largely a result of the fact that they *cannot find work*. The problem is not that wages are too low, which explains why regulation of wages is not a terribly effective means of combating poverty. Indeed, “the general conclusion from this literature is that there is no statistically significant relationship between raising the minimum wage and reducing poverty” (Neumark & Wascher 2010; Sabia & Nguyen 2015). The bulk of the literature indicates that the connection between minimum wage increases and poverty reduction “is weak or nonexistent” (Shannon 2013). And none of these figures account for any possible disemployment or inflationary effects of minimum-wage increases, which, even if one believes that both would likely be mild, are at best two more nails in the coffin for the idea of minimum wage as a reasonable approach to helping those in poverty.

My conclusion, then, is that even if one very generously concedes every argument made by the supporters of minimum-wage laws of the sort that the Supreme Court once held invalid—that they do not reduce employment or hours, that they do not raise prices, and that they may raise incomes for low-wage workers, I still see the Liberty of Contract's impact as, at *worst*, the elimination of what is either an ineffective or a barely effective poverty reduction scheme, possibly galvanizing policymakers to implement a substitute system that is significantly more effective, efficient, and transparent. If such an effect is the worst-case scenario of the plausible outcomes, the *Adkins* decision can hardly be called a catastrophe.

VIII. *Adams v. Tanner*: Liberty of Contract and For-profit Employment Agencies

A) Introduction and Background. An important aspect of the Supreme Court's Liberty of Contract jurisprudence, one that has received strikingly little attention in the literature, is its protection of private employment agencies that collect fees from jobseekers. Unlike the issues involved in all the preceding case studies, the Court's policy judgment on this matter—that such businesses should be permitted to exist—has actually become the prevailing view among policymakers in the hundred years since *Adams v. Tanner*, the landmark employment-agency case, was decided in 1917. Today, the practice of charging fees to jobseekers in exchange for securing employment for them is legal in every state in the country, though many jurisdictions subject such businesses to extensive regulations (Martinez 1976, 68). While it is far from dispositive, the fact that the situation the Court effectively created with its holding in *Adams* is now the one that exists everywhere in the United States should surely weigh against the idea that the Court's decision had a seriously detrimental impact.

The sentiments leading to the ban on private employment agencies struck down in *Adams* had ancient roots in the United States, dating back to the establishment of the first such businesses in Colonial times. The first private employment agency in America was founded by William Meyer in Philadelphia in 1756. Meyer's clients were employers, from whom he collected fees in exchange for supplying them with apprentices, journeymen, day laborers, or slaves. Over the next several decades, private employment agencies, including many that collected fees from jobseekers rather than employers, rapidly increased in number. Almost immediately, these businesses earned a sordid reputation as dishonest and manipulative for their alleged exploitation and deception of desperate clients. Despite such perceptions, the industry continued to grow throughout the 19th Century; by the 1880s, private agencies were the predominant means of securing employment in many industries, notwithstanding some critics' characterization of them as "leeches engaged in sucking the life blood from the poor," or, as Irving Bernstein described the state of the employment agency business in 1930, "[f]requently run by crooks, these exchanges were distinguished for such practices as misrepresentation of wages, extortionate fees, kickbacks to foremen, inducement of discharges to increase business, white slavery, and blacklisting of union members" (Finkin & Jacoby 2001, 2-3). A 1912 US Bureau of Labor report summarized the most common deceitful practices of private agencies:

> 1) Charging a fee and failing to make any effort to find work for the applicant.
> 2) Sending applicants where no work exists.
> 3) Sending applicants to distant points where no work or where unsatisfactory work exits, but whence the applicants will not return on account of expense involved.
> 4) Collusion between the agent and employer (e.g., foremen), whereby the applicant is given a few days work and then discharged to make way for new workmen, the agent and employer divide the fee.
> 5) Charging exorbitant fees or giving jobs to such applicants as contribute extra fees, presents, etc.
> 6) Inducing workers who have been placed, particularly girls, to leave, pay another fee, and get a better job (36).

These abuses were even more sordid when one considers that the victims tended to be unskilled, temporary, or immigrant laborers, groups vulnerable to exploitation and poorly situated to take action against agencies. In response to complaints of exploitative practices, many reform-minded policymakers, beginning around the turn of the century, established free public employment offices that would compete with private agencies and thereby act as a check on the agencies' exploitative behavior. Ohio established the first public employment office in 1890, and by 1910, there were 51 such offices in operation in 19 states. Yet even by then, the use of public offices by jobseekers, as a percentage of the labor force, was below 1% (Lee 2009, 161-63). By contrast, private agencies were much more heavily relied upon; reports on Indianapolis's six operational agencies, for example, indicate that during April 1910 they collectively placed 255 jobseekers in positions, while Indiana's public employment bureau placed only 166 statewide (Bureau of Labor 1912, 44).[133] Still, in 1917, an increased demand for labor resulting from the wartime growth of industry led to the establishment of the US Employment Service (USES), a federal public employment office. Use of USES and other public offices soared in 1918 as soldiers returned home. But as the country returned to normalcy, jobseekers' reliance on public officers again plummeted, and USES, starved by budget cuts, shrunk its operations and turned over many of its local branches to state or city governments. During the decade of the 1920s, annual use of public offices averaged about 5% of the total labor force, with successful placements adding up to about 3% (Lee 2009, 163-64).

Despite policymakers' "expectation[s] that [public offices] would drive private offices out of business, or at least bring an improvement in their methods," many jurisdictions nonetheless "found further legislation essential" to regulating private establishments (Bureau of

[133] The same was true in most states where public offices competed with private agencies. In 1912, the Bureau of Labor of the U.S. reported that private agencies in Illinois "constitute[d] the most important factor in the distribution of labor" in the state by far, and the conditions of the state's private-agency industry won the "unanimous approval" of charity workers, sociological investigators, and agency operators (55). The same report found that there was "little doubt that the most important agencies for the distribution of labor in Massachusetts and in Boston [were] the private employment agencies" (74). In Oklahoma, during 1910, the state's free employment bureau furnished 12,852 persons with employment while private agencies in the state did so for 31,692 in the same period (135-36).

Labor 1912, 36). The particularly pessimistic 1915 Final Report of the Commission on Industrial Relations stated that "[a]ttemps to remove [private agencies'] abuses by regulation have been made in 31 states, but with few exceptions have proved futile"—though it also contradictorily admitted that these attempts *had* been successful in "promot[ing] a higher standard of honesty in the business" (111). On the other hand, the same 1912 Bureau of Labor report quoted earlier, while admitting that there were problems in the industry, seemed to partially repudiate the Industrial Relations Commission's glum outlook, emphasizing that, "[w]ith proper regulation, private employment offices are of great service to the public," and strongly advising against prohibition of such businesses, warning that their abolition would be "disastrous" (37).

B) The Adams *Case.* Authorities in the State of Washington had been concerned about private employment agencies that collected their fees from jobseekers for a number of years before such businesses were outlawed entirely. In 1912, the Bureau of Labor of Washington recommended to the legislature that measures be adopted requiring anyone wishing to operate one of these agencies to obtain a state license: "It has been demonstrated that state control of employment agencies is the most effective way to properly regulate them. I would earnestly recommend a state law similar to the one in Illinois that went into effect July 1, 1911," which established a licensing system (8th Biennial Report, 16). The Seattle Labor Commissioner went a bit further, lamenting in a letter to the Bureau that "many abuses […] are heaped upon the unemployed by licensed employment agents," and that he had "come to the conclusion […] that the only proper solution of the whole problem is the control by the state of all labor agencies, both public and private, the ideal condition being the placing of efficient public offices in the principal cities of the state with the idea of the practical elimination of all pay or private offices," though he stopped short of advocating a ban on private agencies (8th Biennial Report, 197).

This distrust of private employment agencies was apparently shared by a decent portion of the electorate, because, in November 1914, Washington voters approved Ballot Initiative No. 8, prohibiting any person from "collecting fees from the workers for furnishing them with employment," by a vote of 162,052 to 144,544,[134] and the measure went into effect on December 3rd.[135] But the state Bureau of Labor's 9th Biennial Report, in the weeks leading up to the vote on Initiative No. 8, expressed some uncertainty about the wisdom of Initiative No. 8. It admitted that there were "many abuses perpetrated by some private employment agencies," and that improvements would be "necessary and [would] doubtless be welcomed by those agencies doing a legitimate business," but also that "there would be so much expense attached to the establishment of an efficient system of state free employment bureaus that there is a question whether the people would want to foot the bill, consequently involving the further question whether the employer and employe [sic] directly benefited should not both be assessed a small amount for the service given" (283). Though it admitted that some municipalities had found attempts at regulating these agencies "unsatisfactory," it warned that "to do away entirely with any employment agency system is liable to give rise to a greater problem […] Some means, of course, is necessary to enable employers to get the workmen they need and the unemployed to get jobs, and when there is no such means the employe [sic] suffers more than the employer, for the latter can resort to the agencies operating in other states [to] get the help he needs," and observing in summation that "there is room for much argument and a wide difference of

[134] *Adams*, Transcript of Record, Brief of Appellees, 8.
[135] Ibid., Brief and Argument of Solicitors for Appellants, 5.

opinion" on the topic (283). Still, the report, while acknowledging the complaints against private agencies, goes on to explicate in greater detail the problems with eliminating them, a decision that would present "a host of conflicting questions," not to mention "the magnitude of the detail, work and expense connected with establishing such a [public office] system on the proper, efficient basis." In Washington, the public employment offices "cut a very small figure, in most cases being a negligible factor in supplying the demand" for labor. The reason for this, it reports, is "the inefficiency of the public offices" and their incompetent management (286-87). Nonetheless, the report concedes, there are some places in the country where public offices operate efficiently and provide formidable competition to private agencies. It concluded by cautiously saying that the issue seemed "to warrant further investigation" (306).

The Bureau's next Biennial Report, published after Initiative No. 8 had been in effect for nearly two years, began its discussion of employment offices by cheering the fact "[t]hat the man or woman seeking work is no longer at the mercy of the employment agency shark" (1916, 119). It expresses many times its optimism that public offices will eventually pick up the slack, and in doing so seems to imply that significantly fewer jobseekers were being placed without private agencies. That would make sense; a letter from Seattle's Labor Commissioner (published in the report) observed that "practically thirty out of forty [private] employment agencies have been closed" in the city as a result of the ballot measure, "and that those who are still doing business are doing so through the assistance of employers from whom they receive fees" (132). A further implication of this information is that simply switching to soliciting fees from employers rather than jobseekers was, in most cases, not a viable strategy for private agencies.

The controversy leading to the *Adams v. Tanner* litigation began in late November 1914, almost immediately after Ballot Initiative No. 8's passage, when Joe Adams and several other Spokane- and Seattle-based proprietors of employee-fee-based employment agencies filed a complaint in the US District Court for the Eastern District of Washington, asking the court to enjoin enforcement of the new measure on the grounds that it "unnecessarily deprive[d]" them "of their right and liberty of contract" in violation of the Fourteenth Amendment to the US Constitution.[136] The plaintiffs emphasized that many people depended upon their services; between the fourteen agencies involved, they had furnished 90,000 people with employment in the last year, out of a total 200,000 applications received.[137] The "fields of labor in the State of Washington," the plaintiffs later claimed in the brief they submitted to the Supreme Court, "are so diversified and, in many instances, at such remote points from transportation that it is impossible for employes [sic] to keep in touch with the labor market or know where employment can be secured," a problem for which they believed their business was the remedy.[138] All were licensed, bonded, and regulated by the city (either Seattle or Spokane), and none had ever been found in violation of any laws regulating private agencies. All also stated that they could not survive without charging fees to prospective employees.[139] On the opposing side, the state assembled affidavits from regulators at the municipal and state levels, as well as the President of the State Federation of Labor, claiming that the private-agency business was rife with fraud and exploitation of its job-seeking clients, an evil that only an outright ban would suffice to control. The Seattle Labor Commissioner took aim directly at the Seattle-based plaintiffs, claiming that in

[136] *Adams*, Transcript of Record, Complaint, 11.
[137] Ibid., 4-6.
[138] *Adams*, Transcript of Record, Reply Brief of Solicitors and Appellants, 24.
[139] Ibid., Complaint.

his two-and-a-half years supervising private agencies, he had received about "several hundred" complaints against them, and that "many" were against the plaintiffs; of those, he estimated that 75% were "meritorious" from the complainant's point of view.[140] But his vague musings are hard to take seriously given that *none* of the complaints were actually successful. Apart from these witnesses' general impressions, the state offered no statistics or new information.

Nonetheless, a majority of the District Court panel voted to deny the plaintiffs' request for an injunction against Initiative No. 8, holding 2-1 that the law was constitutional. Judge Jeremiah Neterer's majority opinion, handed down September 3, 1915, found the legislation to be an "exercise [of] reasonable discretion" with a "real and substantial relation" to legitimate goal of protecting "[t]he public welfare" against harmful business practices, and therefore a valid exercise of the police power.[141] Judge Cushman dissented, arguing that the law was not a "regulation" of the employment agency business, but rather an act "destroying and prohibiting the business of such agencies, where neither public health, safety nor morals are concerned," and therefore an impermissible limitation on contractual liberty.[142] Because the prohibited trade was harmful only when improperly conducted, the Initiative was "beyond what is reasonable in a remedy"; it went "beyond the disease and deprive[d] the patient of life."[143] The plaintiffs appealed directly to the US Supreme Court, who, in a June 1917 opinion, reversed the District Court by a vote of 5-4. Justice McReynolds' terse majority opinion, just over six pages long, held that Initiative No. 8 was "arbitrary and oppressive, and that it unduly restrict[ed] the liberty

[140] Ibid., Defendants' Exhibits "A"-"D," 71-51.
[141] *Wiseman v. Tanner*, 221 Fed. 694, 703-04 (1915).
[142] Ibid., 704 (Cushman, J., dissenting).
[143] Ibid., 717.

of appellants, guaranteed by the Fourteenth Amendment, to engage in a useful business."[144] Agreeing with Judge Cushman, the Court admitted that "abuses may, and probably do, grow up in connection with this business," which was "adequate reason for hedging it about by proper regulations," this fact could not justify total "destruction of one's right to follow a distinctly useful calling in an upright way."[145] Justice Brandeis dissented, penning a nearly eighteen-page opinion citing numerous non-evidentiary materials, including government reports and legislative testimony, as to why only outright prohibition (as opposed to mere regulation) of employee-fee-paid private employment agencies could control their abuses. Brandeis' arguments will be specifically addressed later.

C) Literature. While no literature addresses the *Adams* case in particular, a handful of scholarly articles have studied the phenomenon of employee-fee-paid private employment agencies, though most of these focus only on the activities of these businesses in Europe. One view holds that because labor markets are characterized by high transaction costs, firms that can lower such costs will improve the efficiency of the market; since private employment agencies rely on profits (and, hence, on successfully furnishing jobseekers with employment) to survive, they are superior to public offices, that are financed by taxes and need not successfully place clients at as high a rate (Zweifel & Zaborowski 1996). Another view posits that private employment agencies exploit the desperation of jobseekers who have few alternatives in order to extract higher profits (and therefore do not reduce transaction costs) (Gray 2002). One study of two Michigan counties found that, in one county, public and private agencies were equally effective at placing jobseekers, while in the other the private agencies were more effective; still,

[144] *Adams v. Tanner*, 244 U.S. 590, 596 (1917).
[145] Ibid., 594.

the study did not include enough controls to suggest the superior performance was caused by their private status (Carcagno, Cecil, & Ohls 1980). Another author found, by contrast, that across the US as a whole, private agencies were much more popular and effective than public ones, and in fact would be even more effective if not undermined by many public agencies' distribution of unemployment benefits (Cooley 1962). Two studies conducted in 1960 and 1968 comparing public offices to private agencies in San Francisco found that USES' job-placement-to-staff ratio was 35% better and their referral-to-staff ratio 48% better than those of the private agencies; however, Clark (1988) finds that USES a) regularly exaggerates their output (sometimes by as much as 56%), b) makes placements that result in significantly below-average retention, and c) places jobseekers in lower-paying positions than do private agencies, all of which he argues "provid[e] indirect support for the prediction of nonoptimal government output" (385, 389-94). Yet another hypothesis states that private employment agencies undermine employees' job security and compensation in general, since they mobilize a reserve of cheap labor (the unemployed), which they make readily available to employers, thereby undermining the bargaining power of employees overall (Peck & Theodore 1998). On the flipside, others have suggested that private employment agencies are beneficial because they increase opportunities for the unemployed, redistributing the best jobs from "insiders" to "outsiders" (Meadows 1996). The applicability of each of the foregoing theories to the situation confronting the Supreme Court in 1917 will be considered in the next section.

D) Evaluation. As an initial matter, it is necessary to examine the somewhat unusual conditions that characterized the Washington labor market during this period. The state had, according to its labor bureau's Ninth Biennial Report, a "remarkable predominance of seasonable enterprises offering only intermittent employment" and a "lack of staple industries […] operating day in and day out the year around" (1914, 13). The "remarkable fluctuation in the demand for labor" resulted from the fact that the "great bulk of [the state's] industries are the lumber mills and allied enterprises, the fish and the fruit canneries, and from the very nature of things these cannot operate at a stated ratio the year around and some are compelled to close down several months during the year" (1914, 13). These conditions resulted in "unemployment […] of very wide extent"; in Washington, "the number of wage earners during the month of minimum employment was but 74 per cent of those at work during the month of maximum employment" (Hanna 1917, 9). In its April 1917 issue, the *Monthly Labor Review* lamented that, in the Pacific states, during "the winter months one-quarter at least of all the workers, and in some sections a much larger proportion, are without jobs" (557). And even "in the summer," when opportunities for employment are most numerous, "the complaint is frequently heard that labor is hard to get," wrote the Bureau of Labor of Washington; moreover, many positions were at remote locations where jobseekers could neither hear of nor access them, and so the unemployed "gathered in […] large cities and thus focus the state's labor problem in its largest centers" (9th Biennial Report 1914, 15-16). Washington at this time was therefore a place in which one would expect well-operated employment agencies to be most useful: high transaction costs in the labor market meant workers often failed to be matched with appropriate jobs, and the state suffered from persistent unemployment. Notably, the April 1917 *Monthly Labor Review* article quoted earlier faulted Pacific states for their weak remedial measures for unemployment, and even complained specifically that Washington abolished private agencies "because of the sins of many of them, but it did not provide any substitute system" (557).

Available data suggest that Washington's public employment offices were unable to handle the volume of jobseekers on their own. Although the US Bureau of Labor had recognized the state of Washington's system of public employment offices as "noteworthy" among state systems in large part due to "the large number of positions secured," these offices still did considerably less business than the state's private employment agencies (1912, 136-37).[146] For example, during the year 1914, the state's Bureau of Labor reported that the two existing free public offices in Seattle (the municipal office and the Seattle branch of the US Employment Service) collectively furnished a total of 21,165 persons with employment (Tenth Biennial Report 1916, 127-28, 133-34); during the same period, the fourteen employee-fee-paid private agencies involved in the *Adams* litigation alone did so for over 90,000 jobseekers. Granted, those fourteen were divided between Seattle and Spokane, but Seattle was by far the state's largest city—and so even if one assumes the existence of two Seattle-sized cities, each with equally effective public employment offices, the public offices would have placed only 42,330 persons, still less than half the figure of the fourteen private agencies in question. Moreover, it is clear that the fourteen agencies involved in the *Adams* litigation were *significantly* less than a majority of private agencies operating in Seattle and Spokane in the year 1914, since, as reported earlier, there were forty such agencies in Seattle alone at the end of that year; hence, 90,000 is an extreme underestimate of the share of business handled by private agencies in the two cities. The available data, as well as the qualitative evidence from reputable sources, leads to the conclusion that, like everywhere else in the United States at that time, the overwhelming majority of all jobseekers placed in positions were placed by private employment agencies rather than free

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[146] Public offices, according to the state's Bureau of Labor, "cut a very small figure, in most cases being a negligible factor in supplying the demand" (9th Biennial Report 1914, 286).

public offices. One reason for this could be that public offices were provided with insufficient resources and thus lacked the capacity to handle as many clients as private agencies. The other reason could be that public offices had the capacity, but jobseekers overwhelmingly chose private agencies over public ones. Either way, the enactment of Initiative No. 8 would have almost certainly done more harm than good; if public offices lacked the capacity, then the vast majority of jobseekers would have instantly lost their means of securing employment (given that the state did not simultaneously provide for quintupling the resources devoted to its public offices), and if jobseekers had simply been choosing private agencies over public offices, then the measure would have forced those prospective employees into relying on what they apparently consider their second-best option (public offices).

But is it possible that the exploitative and fraudulent practices were so inherent to the employee-fee-paid private agency business that they outweighed any benefits the agencies might have provided, or that private agencies were so impossible to effectively regulate that abolishing the industry was the only remedy for its abuses? This is the essence of Brandeis' argument in his dissent, as well as that made by the State of Washington in its brief. As for the former, Brandeis' opinion begins with a list of private agencies' "abuses," relying on a list numbered 1-6 compiled by the US Bureau of Labor (and already quoted in part A of this section). Yet he completely ignores an important passage on the very next page of the sources he quotes:

> With proper regulation, private employment offices are of great service to the public, and where free offices do not exist may be regarded as a necessity. It is probable that in discussions relating to private agencies too much emphasis has been laid upon the evil practices of unprincipled agents, and too little upon the service rendered by the properly conducted bureau. Until public employment agencies have developed to a far greater usefulness than at present, and until much more money is appropriated for their extension and support, the private agency will continue to fill a need and to charge for its services. *To legislate such offices out of existence, as has sometimes been proposed, would be*

> *disastrous*, and to hope to drive them out of business by the competition of free public offices is, for the present at least, unwarranted [emphasis added](1912, 37).

As for Brandeis' attempt to demonstrate that nothing short of a total ban would do, he has only one source: a section of the 1915 Final Report of the Commission on Industrial Relations claiming that "[a]ttemps to remove [private agencies'] abuses by regulation have been made in 31 states, but with few exceptions have proved futile"—though even that report admitted that regulation was successful in "promot[ing] a higher standard of honesty in the business" (111).

Aside from the handful of writings that support Brandeis' position, one generally finds quite a different sentiment expressed in the primary sources. For one, even the 1912 US Bureau of Labor bulletin that Brandeis quoted to demonstrate the "evils" of private agencies actually contained overwhelming evidence that regulation of those establishments could be effective in controlling their abuses. Besides claiming that "[w]ith proper regulation, private employment offices are of great service to the public, and where free offices do not exist may be regarded as a necessity," it included state-by-state assessments that supported this claim.[147] In Illinois, the Bureau reported, private agencies were "the most important factor in the distribution of labor," and "on every hand, from charity workers, sociological investigators, and the better class of private offices there was unanimous approval of the present administration of the law. The opinion was expressed that some of the crooked practices commonly found among private employment offices still remained, but that where these could be detected they were ferreted out and punished by the supervisors" (55). In the City of Detroit, "[t]he licensed employment

[147] Of the 21 states examined, none reported a desire to ban private agencies, nor did any claim that regulation had proven ineffective, though two suggested that further regulation would be ideal; by and large, states reported that private agencies were an important part of the labor market, and/or that existing agency regulations were either effective or at least that conditions were improving.

agencies are under the jurisdiction of the sergeant of police of Detroit," and as for the ordinance regulating private agencies, "[t]he opinion prevails that the law is well administered" (88). In Rhode Island, after the state's 1905 investigation of private agencies, "it was not found possible to substantiate the charges" of fraud made against such businesses (118).

The October 1922 edition of the BLS' *Monthly Labor Review* reaffirmed this positive evaluation, noting that, although only a "few of the departments which administer private employment agency laws are *entirely* satisfied with the conditions which exist in their States" (emphasis added), "nearly all of them believe that regulation has proven its value. There is no doubt that regulation has tended to eliminate the worst abuses of unregulated private employment agencies" (14). Connecticut's Deputy Labor Commissioner said that year that "[t]he private employment agencies in this State are well managed, and we have very few complaints of misconduct, and those not of a serious nature, and Connecticut is really to be congratulated upon its employment agencies" (16). In Pennsylvania, ever "since the passage of the law regulating private employment agencies in 1915," the "reports indicate that these conditions have materially improved" (19). In South Dakota, "[n]o complaints ha[d] been made against any of" any private agencies in the state (though there were admittedly only four); in Tennessee, virtually all the private agencies "that [we]re operating [we]re complying with the law"; and Utah's industrial commission reported that there were "but few complaints against [private] agencies" (of which it had nineteen) (19). Interestingly, where enforcement difficulties did exist, they were predominantly of a particular type; as the 1922 report explains,

> [M]ore difficult than the task of keeping the operations of licensed agents within the law is the problem of preventing unlicensed agents from operating. This problem was particularly pressing during the period of great demand for labor from 1916 to 1920. Only a few of the private employment agency laws appear to be broad enough to reach

> fly-by-night agents, who operate from hotels or on the streets or in cheap lodging houses. Yet these are the worst types of private employment agents (15).

If the worst abuses (especially during the period from 1916-1920) were perpetrated by those who never had legal approval to operate private agencies in the first place, then banning private agencies would solve absolutely nothing, as the most problematic establishments had already been "banned." Indeed, prohibition of all agencies would almost certainly lead to an increase the number of "fly-by-night" operations, which would proliferate in order to meet the demand for job placement service that was previously handled by legitimate establishments.

When it came to conditions in Washington specifically, Brandeis' argument looks weaker still. Despite implying that the state had found mere regulation inadequate, he quoted from a BLS report stating that "in Washington [p]rior to 1914, there was practically no legislation regarding private employment agencies, and there had been *no attempt* at state supervision of their conduct" (emphasis added), a fact that Brandeis even reiterates: "Washington had not tried direct regulation of private employment offices" prior to Initiative No. 8.[148] And though the state Labor Bureau had recommended such regulation, it had *never* recommended a full prohibition on agencies. On the contrary, as was explained in part B of this section, the Washington Bureau's 9th Biennial Report had substantial concerns about such a sweeping measure, warning that "there would be so much expense attached to the establishment of an efficient system of state free employment bureaus" (283). Though it admitted that some municipalities had found attempts at regulating these agencies "unsatisfactory," it warned that "to do away entirely with any employment agency system is liable to give rise to a greater problem […] Some means, of course, is necessary to enable employers to get the workmen they need and the unemployed to

[148] *Adams*, at 609-11 (Brandeis, J., dissenting).

get jobs, and when there is no such means the employe [sic] suffers more than the employer, for the latter can resort to the agencies operating in other states [to] get the help he needs" (283). Moreover, the Bureau's 7th Biennial Report stated in 1910 that, due to indirect regulation through the competition of public offices, "many of the evils that formerly flourished in connection with the private employment agencies have been checked. Proprietors of the latter class of establishments knowing that they must meet the competition of the public agency are less inclined to […] take unfair advantages of the persons who apply to them for positions" (151).

In any event, Brandeis' contention that the Court ought to defer to the conclusion reached by the political process that private agencies ought to be banned is not persuasive.[149] For one, the state's conclusion was less a product of legislative experience and judgment than one of mob rule. Initiative No. 8 was passed not by lawmakers who had thoroughly investigated the subject (or discovered through experimentation that other methods did not work), but instead by voters who read the proposed measure on the ballot and thought it sounded like a pretty good idea. And these voters could not have had the benefit of experience to demonstrate to them that lesser forms of regulation would not suffice, since no such regulation had ever been attempted at the state level in Washington. What's more, the initiative appeared on the ballot preceded by a value-laden and inflammatory preamble with no apparent purpose other than to anger the electorate into supporting the measure that followed: "The Welfare of the State of Washington

[149] "There is reason to believe that the people of Washington not only considered the collection by the private employment offices of fees from employees a social injustice, but that they considered the elimination of the practice a necessary preliminary to the establishment of a constructive policy for dealing with the subject of unemployment. It is facts and considerations like these which may have led the people of Washington to prohibit the collection by employment agencies of fees from applicants for work," Ibid., 614-15.

depends upon the welfare of its workers and demands that they be protected from conditions that result in their being liable to imposition and extortion" (qtd. in Martinez 1976, 66).

Finally, though I am not aware of any evidence or hypotheses suggesting that Washington's Initiative No. 8 was the product of well-connected political factions disguising a law meant to benefit themselves as public-interest legislation, primary sources suggest that another sinister motivation—racism—may have been at least partially behind the law's passage. Washington's workforce, like that of the other Pacific states during the early 20th Century, had a sizeable minority of Asian immigrants. Although a 1913 study of male laborers in 21 selected industries conducted by the state Bureau of Labor (and published in its 9th Biennial Report) revealed that Asian workers comprised only 6.3% of male employees in the trades examined, these laborers, as a result of occupational segregation, were concentrated in certain types of employment, especially the state's fish canneries, where 41.5% of male employees were Asian (50). In earlier decades, as the Bureau's 10th Biennial Report explained, the state's canning industry, had "almost exclusively employed" Chinese labor, "but since the passage of the Chinese Exclusion Act, the supply of this class of labor has gradually decreased until today but few canneries rely on" Chinese workers; instead, "[i]t is almost invariably the rule that Japanese are filling the places thus vacated by the Chinamen, and this intensifies the problem rather than offering a solution, for the people in general have greater antipathy toward the Japs" (107). White workers resented competition from Asian immigrants, "causing much irritation in the communities of the state" where the latter were a substantial portion of the labor force (107).

Racial prejudice against Chinese and Japanese individuals was so intense that it gave rise to "uprisings and demonstrations" against what the state's Labor Commissioner referred to as the "brown men who have invaded the field of white labor"; he further reported that, in one city where business was "unusually dull owing to a forced closing down of the lumber mills in that vicinity and unemployment was at its height," the local white jobseekers "became enraged at the sight of the Japs coming to the canneries," agitation that culminated in a mass public demonstration whose organizers were arrested for inciting a riot (10th Biennial Report, 107-08). Also relevant was the fact that, of 21 industries examined in the 1913 study, the canning industry experienced the greatest seasonal fluctuation, with the number regularly employed being only 63.7% of peak employment in the industry during that year (9th Biennial Report, 51). The Bureau's 10th Biennial Report further found that in the average Washington cannery, "the great bulk of workmen employed are almost exclusively Orientals, and work only during the regular fishing season […] This labor is *usually secured through Oriental employment agencies in Seattle or Portland*" (emphasis added) and is almost exclusively Japanese (111). The Japanese workers were looked upon with "disfavor by the cannerymen and the white residents of the cannery communities"; it was widely believed that immigrants displaced white men, who were thought to have "no means […] at hand for securing these jobs" (113-14). Notably, the disgruntled whites decried the fact that employers allegedly had "ready access to the hordes of Chinese and Japs gathered in [the state's] large cities and [thus] had no necessity for considering our white local population of small home owners, *whose appeal to employment agencies when they needed work usually met with poor results*" (emphasis added)(114). By contrast, "the white laborers employed in the canneries" were "generally […] hired directly by the proprietor" (Bureau of Labor of WA, 9th Biennial Report, 95).

Hence, many whites, to some degree, saw private employment agencies as contributing to their alleged displacement by Asian workers. And the state Bureau's 10th Biennial Report concluded its discussion by urging greater reliance on public employment offices:

> The employment of white labor can be largely accelerated by the assistance of the Federal Labor Department through its employment agency system […] These people may be reached and their applications received for the work long before the canning season so that an adequate supply may be assured. […] How [the cannery owner] can be assured of this […] must be determined; how the right kind of white labor can be secured to do the work must also be determined. These questions must be settled before he can act freely in the matter. The object of the Bureau of Labor in presenting this report is to open the way for a more general employment of our white home owners whose earnings will be expended in the development of the State. […] If the cannerymen will properly co-operate with the Bureau of Labor in this direction, and there is every reason to believe that they will, the conditions soon will be ameliorated (116).

The thrust of this passage seems to be that the desire of both the white workforce and cannery owners to favor whites in hiring would be better served through greater reliance on public, as opposed to private, employment agencies.

To be sure, the hope that abolition of private agencies would disproportionately impact Asian laborers was sometimes presented in more humanitarian terms; as Olympia's labor commissioner wrote in the state Bureau of Labor's 8th Biennial Report, "[f]oreigners seem to be the special prey of the unscrupulous employment agent, as they often look for work where a great many go together. The agent that places them does it through an interpreter, and usually can get a lump of from $2.00 to $5.00 per head for them […] I have known cases where as many as one hundred were hired in one bunch […] The only way to put a stop to this graft is to abolish the private employment agency and maintain a free employment office in each town or city" (199-200). The 11th edition of that publication similarly lamented that "foreign born men," predominantly, "have been the victims of the grafting propensities of the irresponsible employment agent" (1918, 103). Perhaps these remarks expressed their authors' sincere desire to protect vulnerable immigrant groups against agency fraud—and perhaps most of the voters who voted “yes” on Initiative No. 8 shared this benign motive. But 162,000 Washingtonians voted for this measure, and so it is almost inconceivable that its passage was the product of any single motivation. There is reason to believe that at least some among the electorate hoped that the law would disadvantage Asian laborers in relation to whites, and so voted “yes” on it not in spite of, but *because* of, its racially disparate impact.

E) Implications and Conclusion. All told, what was the impact of the Court’s invocation of the Liberty of Contract in *Adams v. Tanner*? Martinez (1976) suggests that its effects were profound, outlasting the *Lochner* Era by at least a half-century: “If the philosophy permitting legislatures much freedom to experiment […] [had] prevailed at this stage, as […] it did at a later date, then the development and spread of private employment agencies might have been cut off in the United States in 1916. The abuses and public sentiment against these agencies was [sic] at such a peak during this period that the Washington legislation might easily have swept the country” (67). And “by the time similar social legislation became acceptable to the judiciary, alternative means of regulating private employment agencies had proved relatively successful […] [T]he private employment agency had firmly established itself within the American economy to the extent that complete prohibition was never again seriously considered as a means of correcting the problems generated by the industry” (68). Martinez’s study of former clients of private employment agencies revealed overwhelmingly positive impressions from the respondents: “When the sample applicants were asked if they felt that private employment agencies were a useful business, almost all agreed” (1976, 140). Even more strikingly, the applicants that reported being “desperate” when they sought the agencies’ help (meaning they needed work, even temporary work, immediately), "indicated a general satisfaction" with the quality of agency service; the desperate respondents "uniformly believed that agencies could be useful to some people in a tight situation, or might have little desire to go through the hectic process of finding a job by oneself" (127, 140-41). More recently, Andersson, Holzer, and Lane (2009), in a comprehensive study of 18,560 workers from 44 states during the period from 1993-2001, find that although earners who used private temp agencies "have lower earnings than others while working at these agencies," temp earners' "earnings are generally higher" once they secure stable employment; "In particular," they "find that the effects of temp agency employment in the base period on subsequent earnings are uniformly positive […] for all earnings once [they] control for job tenure," and that "those working for temp agencies subsequently work for higher-wage firms than do comparable low earners who do not work for temps" (374). Their findings, they conclude, "suggest that the positive effects of temp agencies […] on the job-matching process for low earners might be real and persistent" (396).

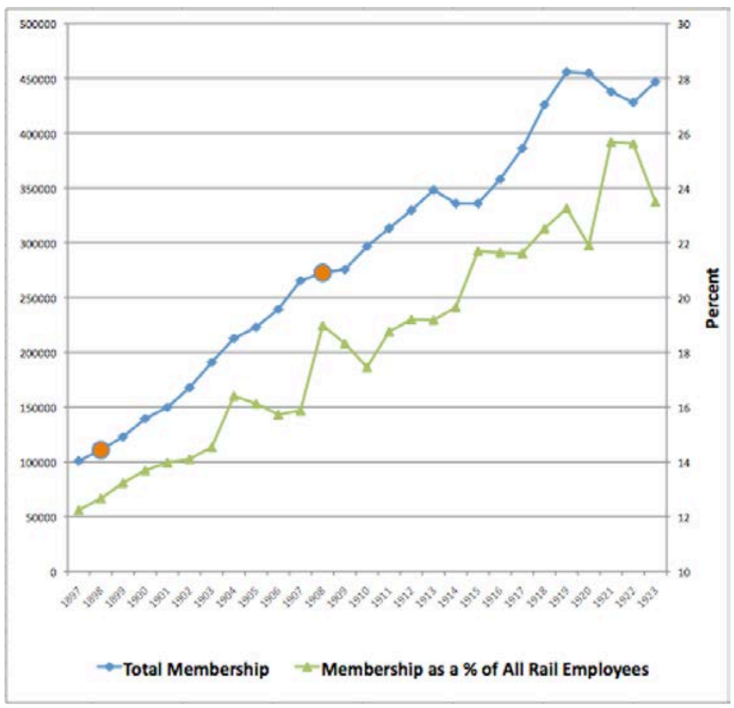
In sum, the impact of *Adams v. Tanner* was to halt the spread of ill-considered bans on private employment agencies that collected fees from jobseekers. In Washington, such a prohibition was enacted without improving the capacity and quality of the free public offices. The weight of the evidence suggests that Initiative No. 8 likely created more problems than it solved, especially for less-skilled and immigrant workers. The Supreme Court's decision in *Adams* recognized that private agencies, while prone to engaging in deceptive practices, could be adequately regulated so as to mitigate their abuses while preserving their benefits. State policymakers have since come to agree; even after the Liberty of Contract's abandonment, private employment agencies that collect fees from prospective employees have remained legal (though regulated) in every state. Ironically, in defying Progressive-Era reformers, the Court embraced what later proved to be the more forward-thinking approach to this area of policy.

IX. *Adair* and *Coppage*: Liberty of Contract and Yellow-Dog Contract Bans

Due to space and time constraints, the fifth and final case study is a "shadow case," a much more perfunctory investigation bringing some suggestive data to bear without extended analysis. Still, this information carries substantial implications about the impact of the Court's decisions in *Adair v. United States* and *Coppage v. Kansas*, which struck down, on Liberty-of-Contract grounds, a federal law and a state law (respectively) banning yellow-dog contracts, a term referring to employment contracts in which the employee agrees, as a condition of employment, not to join a labor union.

There are two general approaches to empirically measuring the effects of these decisions. One is to determine whether the Court's holdings reduced union membership or unionization rates. The other is to determine whether the holdings, regardless of their effect on union membership, discernibly impacted conditions of employment, such as compensation, accident rates, or hours of work. Unfortunately, there is not enough state-level information available to undertake this type of investigation of the Kansas statute invalidated in *Coppage*, so my inquiry will focus on the similar federal statute invalidated in *Adair*. In 1898, Congress passed the Erdman Act in order to regulate labor relations in the railroad industry. The legislation's most significant provision was Section 10, prohibiting a railroad employer from demanding that employees not join a union as a condition of employment. The Act applied to those employees working on moving trains, such as engineers, firemen, brakemen, telegraphers, and conductors—but not to station clerks, those who maintained rail cars, or other positions of that nature.[150] Below are several charts displaying trends in the aforementioned statistics during the relevant period, with the orange circles representing the Erdman Act's passage (1898) and the Supreme Court's invalidation of it (1908). Fig. 9.1 displays total membership in all unions representing persons in the positions affected by the law, as well as the membership in such unions as a percentage of all railroad employees.

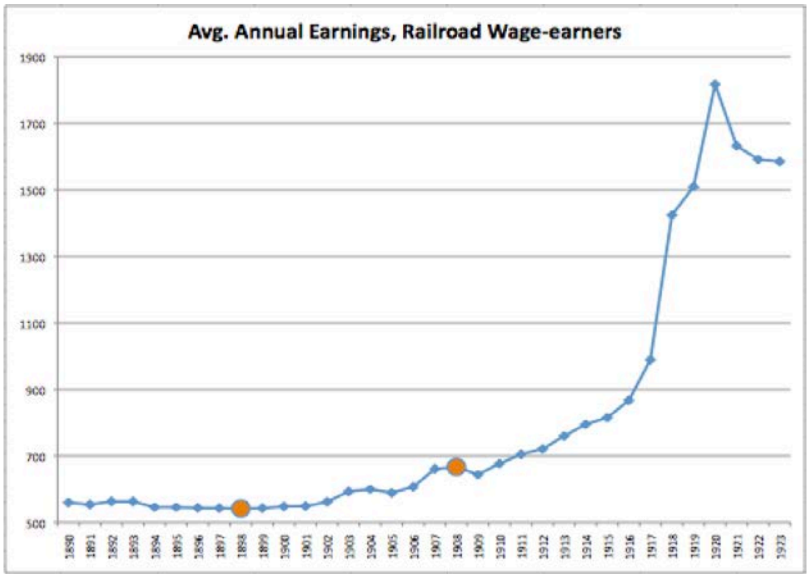
Figure 9.1



(Source for membership data: Wolman 1924, 116-17; source for #s of rail employees: US Census Bureau 1949, 206)

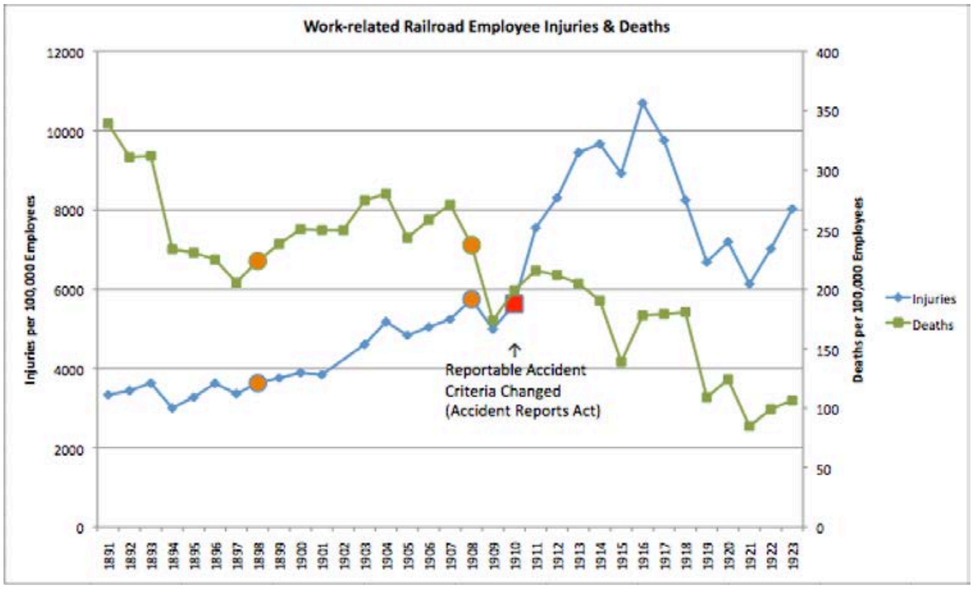
[150] "[A]ll persons actually engaged in any capacity in train operation or train service of any description, and notwithstanding that the cars upon or in which they are employed may be held and operated by the carrier under lease or other contract; Provided, however, That this Act shall not be held to apply to employees of street railroads and shall apply only to employees engaged in railroad train service," Erdman Act of 1898, June 1, 1898, ch. 370, 30 Stat. 424.

Figure 9.2



(Source: US Census Bureau 1949, 68; earnings in inflation-adjusted USD)

Figure 9.3



(Source: US Census Bureau 1949, 206)

Though one could conceivably argue that the noticeable uptick in the injury rate between 1910 and 1916 is a consequence of railroad unions' loss of power in the wake of *Adair*, this contention would be a weak one. The passage of the 1910 Accident Reports Act (represented by the red square) broadened the criteria for what qualified as a reportable accident. The increase, then, is due either to the change in measurement or to some other factor unrelated to unions, rather than to railroad executives' sudden lack of concern for occupational safety; indeed, a look at accident rates for passengers, trespassers onto railroad property, and those occurring at rail crossings demonstrate that all three experienced similar surges (Savage 1998, 11-15). Aside from these oddities in data collection, the metrics tend to undercut the idea that the Court's invalidation of laws banning Yellow-Dog contracts had detrimental effects on employee welfare. Union membership, unionization rates, annual earnings, and employee fatality rates appear to have continued improving unaffected by the enactment or the judicial repeal of the Erdman Act.

X. Conclusion and Implications

In sum, I argue that the Liberty-of-Contract doctrine developed by the Supreme Court, while invoked somewhat arbitrarily, had minor impacts on society and policymaking compared to many other principles of Constitutional Law that the Court continues to protect. Those impacts were almost certainly not negative, and in many instances, they may have been positive. To the extent that they were negative, lawmakers had readily available alternative strategies for pursuing their goals that did not violate the Liberty of Contract. I anticipate, however, that critics of contractual freedom will fall back on the more general line of argument that courts are not as capable to of making decisions relating to economic and social policy as are legislatures; if any of the Court's Liberty-of-Contract decisions had neutral or positive effects, it was not due to the justices' good judgment, but rather to dumb luck. In light of the evidence presented in Section IV of this paper that the Court was arbitrary in deciding which abridgements of contractual liberty to invalidate, the criticism concededly carries some weight. Yet, if anything, the fact that the effects of the Liberty of Contract were neutral-to-positive in spite of the randomness with which it was used to invalidate policies suggests that the Liberty of Contract *itself* is actually a good principle and, with a more careful approach, could prove a great deal more beneficial, especially when one considers the increased availability of—and the improved methods of collecting—social and economic statistics that could be relied upon to evaluate challenged legislation.

The argument that the Court *as an institution* (as opposed to the Old Court specifically) is less competent than are legislatures when it comes to complex questions of policy is difficult to evaluate—and, hence, difficult to refute—quantitatively. But the force of this argument is seriously undercut by the fact that, even if it is correct, it would lead to the conclusion that judicial review itself should be almost entirely abandoned, which, by and large, is *not* something that the Liberty of Contract's critics advocate. To illustrate the point, one need only look at the Court's 2015 decision in *Whole Woman's Health v. Hellerstedt*, in which it declared unconstitutional a Texas statute requiring that doctors performing abortions must have admitting privileges at a hospital no more that thirty miles away from where they perform any abortion, and that abortion facilities must meet the regulatory standards applied to ambulatory surgical centers under state law.[151] The Court held that the statutory requirements were not legitimate health measures, and placed an "undue burden" on what the Court viewed as a woman's Substantive-Due-Process right to abortion. Of course, whether the statute was an appropriate health regulation turned upon complex factual questions, often of a scientific nature. But the Court was not intimidated, and refused to apply a more deferential standard of review, writing

> The statement that legislatures, and not courts, must resolve questions of medical uncertainty is […] inconsistent with this Court's case law. Instead, the Court, when

[151] 136 S.Ct. 2292 (2016).

> determining the constitutionality of laws regulating abortion procedures, has placed considerable weight upon evidence and argument presented in judicial proceedings. In *Casey*, for example, we relied heavily on the District Court's factual findings and the research-based submissions of *amici* in declaring a portion of the law at issue unconstitutional. […] And, in *Gonzales* the Court, while pointing out that we must review legislative "factfinding under a deferential standard," added that we must not "place dispositive weight" on those "findings." 550 U. S., at 165. *Gonzales* went on to point out that the "*Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake*." Ibid. [emphasis in original][152]

With that established, the Court proceeded to consider both statutory provisions. One particularly illustrative passage comes from the majority's discussion of the surgical-center standards:

> The record makes clear that the surgical-center requirement provides no benefit when complications arise in the context of an abortion produced through medication. That is because, in such a case, complications would almost always arise only after the patient has left the facility. […] The record also contains evidence indicating that abortions taking place in an abortion facility are safe—indeed, safer than numerous procedures that take place outside hospitals and to which Texas does not apply its surgical-center requirements. […] The total number of deaths in Texas from abortions was five in the period from 2001 to 2012, or about one every two years (that is to say, one out of about 120,000 to 144,000 abortions). […] Nationwide, childbirth is 14 times more likely than abortion to result in death, ibid., but Texas law allows a midwife to oversee childbirth in the patient's own home. Colonoscopy, a procedure that typically takes place outside a hospital (or surgical center) setting, has a mortality rate 10 times higher than an abortion. […] And Texas partly or wholly grandfathers […] about two-thirds of the facilities to which the surgical-center standards apply. But it neither grandfathers nor provides waivers for any of the facilities that perform abortions.[153]

This is exactly the sort of rigorous analysis employed earlier in this paper when discussing the impacts of *Lochner* and other cases—and exactly the sort of analysis whose complexity is the primary reason that Liberty-of-Contract opponents cite for why the Court is incapable of protecting that liberty.[154] The depth and complexity of the factual inquiry undertaken by the

[152] Ibid., 2310.
[153] Ibid., 2315.
[154] In a particularly ironic twist, the *Hellerstedt* majority opinion was authored by Justice Stephen Breyer, who is notoriously paranoid about any legal theory that even faintly reminds him of *Lochner*. One writer even dubbed him a "*Lochner*-phobe," accusing him of using *Lochner* "as a bogeyman" (Bernstein 2016). For example, in his dissent in the 2011 case *Sorrell v. IMS Health, Inc.*, in which the Court struck down a Vermont law restricting the sale and disclosure of records revealing individual doctors' prescribing practices, Breyer wrote the following: "At best the

Court in *Hellerstedt* is far from an aberration. The justices regularly probe the records in cases concerning issues of overwhelming intricacy—and on which they have no prior expertise.[155] How is it, then, that they would be incapable of scrutinizing a maximum-hours law or an employment-agency ban in the same manner, in order to determine if the measures were reasonably well-adapted to safeguarding the public welfare and no more burdensome than necessary to serve that objective? It is unclear why the Court would have any more difficulty applying such a test to infringements of contractual liberty than it would applying strict scrutiny—as it already does—to infringements of what it considers "fundamental" rights.[156]

It is frequently said in response that even if the Court has the *competence* to review lawmakers' policy judgments about when to limit the Liberty of Contract, it still should abstain from such matters because, as a politically unaccountable body, its justices cannot "be voted out for poor performance" and, hence, lack a clear institutional incentive to make the right decision (Roberts 2017). But the same can be said of any situation in which the Court declares an act of government unconstitutional; the Constitution is meant as a statement of principles so

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Court opens a Pandora's Box of First Amendment challenges to many ordinary regulatory practices that may only incidentally affect a commercial message […] At worst, it reawakens *Lochner*'s pre-New Deal threat of substituting judicial for democratic decisionmaking where ordinary economic regulation is at issue," 564 U. S. ____ (2011)(Breyer, J., dissenting, at 24).

[155] For example, in 2015, the Court found that a District Court's decision not to grant an injunction against Oklahoma's method of execution was not clearly erroneous, writing, "The District Court found that midazolam is capable of placing a person "at a sufficient level of unconsciousness to resist the noxious stimuli which could occur from the application of the second and third drugs." App. 77. This conclusion was not clearly erroneous. Respondents' expert, Dr. Evans, testified that the proper administration of a 500-milligram dose of midazolam would make it "a virtual certainty" that any individual would be "at a sufficient level of unconsciousness to resist the noxious stimuli which could occur from application of the 2nd and 3rd drugs" used in the Oklahoma protocol […] And petitioners' experts acknowledged that they had no contrary scientific proof. See id., at 243–244 (Dr. Sasich stating that the ability of midazolam to render a person insensate to the second and third drugs "has not been subjected to scientific testing")," *Glossip v. Gross*, 576 U.S. ___ (2015)(slip op., at 18-19).

[156] When a policy "significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests," *Zablocki v. Redhail*, 434 US 374, 388 (1978).

fundamental that they may not be contravened by ordinary state or federal legislation. And placing constitutional limits on the democratic process means that the body charged with effectuating those limits should be somewhat removed from popular sentiment. The fundamental issue, then, is whether the Liberty of Contract is (or should be) one of those constitutional principles that cannot be abridged without an extremely compelling justification. That is ultimately a legal question, and, as such, it is beyond the scope of this paper. Still, it is unclear why the Liberty of Contract should be any less "fundamental" than many of the rights that the Court continues to enthusiastically enforce. The US Constitution, in no uncertain terms, protects the rights attendant to private property: it may not be taken for public use without just compensation, nor may any person be deprived of it without Due Process of law. Most, if not all, readers will agree that both guarantees are vital in a liberal democracy. How, then, could one simultaneously maintain that the state ought to have virtually unlimited and judicially unreviewable power to deprive persons of the primary means of acquiring property (the right to freely contract)? Indeed, there is substantial evidence that such a freedom may have been among the natural rights that the Founding generation considered inalienable.[157]

[157] An early draft of the constitutional provision protecting unenumerated rights declared that "[t]he people have certain natural rights which are retained by them when they enter into Society […] Such are the rights of Conscience in matters of religion; *of acquiring property* and of pursuing happiness & Safety," among others (emphasis added)(qtd. in Barnett 2012, 6). At about the same time, a nearly identical proposal was introduced in the Senate based on an amendment that Virginia had suggested in its request for a federal Bill of Rights, and similar provisions were adopted in the state constitutions of Massachusetts, New Hampshire, Pennsylvania, and Vermont: respectively, "All people are born free and equal, and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property"; "All men have certain natural, essential, and inherent rights—among which are […] acquiring, possessing and protecting property"; "All men […] have certain natural, inherent and inalienable rights, among which are those of […] acquiring, possessing and protecting property"; "That all men are born equally free and independent, and have certain natural, inherent, and unalienable rights, amongst which are the enjoying and defending life and liberty; acquiring, possessing, and protecting property" (qtd. in Barnett 2012, 6-7).

Even if the Liberty of Contract lacks a constitutional basis, perhaps it is still a principle that deserves a place among such broad, widely-shared civic values as equality, human dignity, or provision of basic services—many of which are common considerations among elected officials during policymaking even when they are not judicially enforced. There is certainly a normative argument for this type of societal commitment to a "politically enforced" Liberty of Contract: when A and B mutually agree that A will give X to B in exchange for Y, efficiency is increased; A values Y more than X, and B values X more than Y, and so A and B are both better off for the transaction. And in an economy where there are multiple individuals offering both X and Y, competition among them ensures that all will be induced to make the most generous possible offer to the other party that still guarantees them a net gain; said otherwise, in a competitive market, neither A nor B may demand any more from the other without making the transaction no longer mutually beneficial (which would presumably mean the transaction would not occur). Hence, prohibiting the making of a contract leaves both would-be parties to the agreement in a worse position than if the contract had been allowed. And even when the state merely restricts the terms of certain contracts, it runs a substantial risk of changing the terms of the transaction such that the exchange would no longer produce a net gain for both parties. Of course, as critics of contractual liberty are exceedingly fond of pointing out, "the economic model underlying this philosophy" assumes conditions that often do not exist, namely, those of "so-called perfect competition in which price equals marginal cost, a vast number of sellers are present, and information is costless" (Muris 1999, 95). But this criticism attacks a straw man. The Liberty of Contract permits restrictions on contracting in virtually every conceivable instance of market failure (by which I mean a failure of unregulated markets to efficiently allocate resources), including (but not limited to) imperfect information, negative externalities, and monopoly. Far from imposing a rigid conception of *laissez-faire*, the Liberty of Contract merely adopts a *presumption* of liberty, one that can be overcome by showing that a regulation is a reasonable and proportionate means of addressing market failure.

Almost all will agree (and none more strongly than the Liberty of Contract's staunchest opponents) that an unregulated market economy does not always naturally produce efficient or desirable outcomes in the realms of economic or social policy. Accordingly, almost all would reject a judicial Liberty-of-Contract doctrine that permitted absolutely *no* restrictions whatsoever on the terms of purely voluntary agreements. But is it any more sensible to adopt a doctrine that permits virtually *all* restrictions on the terms of contracts? After all, such deference to policymakers arguably reflects the belief that the *political* process will inevitably produce efficient or desirable outcomes in the realms of economic or social policy.[158] Advocates of an endlessly deferential approach similar to the one to which the modern Court adheres, in favoring government to market, make the classic mistake of comparing the imperfect market of the real world to the perfect government of a fantasy world. The truth is that not every government action is motivated by a desire to increase public welfare, and not every government action with such a motivation actually achieves what it intends to. That should come as no surprise; the

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[158] To be fair, the modern Supreme Court, in abandoning the Liberty of Contract, has not entirely adopted a practice of upholding *all* economic regulations; the rational-basis standard of review, while extremely deferential, does not always result in the challenged legislation being upheld. In *Morey v. Doud*, 354 U.S. 457 (1957), the Warren Court held 6-3 that an Illinois law exempting the American Express Company from licensing rules for firms issuing money orders was a violation of the Equal Protection Clause because it lacked a rational basis for the distinction. And in *Allegheny-Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336 (1989), the Rehnquist Court unanimously struck down, on Equal-Protection grounds, a tax assessor's practice of valuing "real property on the basis of its recent purchase price, but ma[king] only minor modifications in the assessments of land which had not been recently sold," resulting in "gross disparities in the assessed value of generally comparable property." These decisions, however, are outliers, and, as Equal Protection cases rather than Due Process cases, they have more to do with unreasonable classifications than unreasonable abridgements of economic liberty.

government, after all, is a monopoly, has imperfect information, and (perhaps by virtue of its monopoly status) is on the favorable end of a tremendous inequality of bargaining power.

The last one hundred thirty-some pages notwithstanding, I suspect that many readers will not be moved from their initial views on the Liberty of Contract for the simple reason that the viewpoint defended in this paper is so deeply at odds with the orthodoxy in legal academia and American jurisprudence that it is, for many, viscerally unacceptable and always will be. I urge readers who feel this way to keep in mind that the overwhelming uniformity of opinion against *Lochner* and its progeny that pervades legal academia is not the result of strong arguments and unimpeachable logic, but rather of a culture of ideological conformity. In writing this paper, I hope to have called into question at least one flimsy basis for abandonment of the Liberty of Contract (but not of other unenumerated rights): that it did societal harm. Regardless of whether these efforts were convincing, I would like to point out that I am being held to an unfairly exacting standard; courts continue to uncritically enforce principles such as *Miranda* rights, constitutional protections for criminal defendants, the freedom of speech, the right to trial by jury, and the separation of powers, among many others, all without ever demanding any empirical proof that the societal effects of enforcing such doctrines is net-positive. Perhaps one could argue that those freedoms have stronger historical underpinnings as fundamental rights than does the Liberty of Contract; admittedly, I have not addressed that contention in this paper, and I absolutely would not advocate the resurrection of justiciable contractual freedom unless the right had a clear constitutional basis. Still, it is hard to imagine how contractual liberty could have any less historical support than *Miranda* warnings[159] or rights to abortion[160] and sodomy.[161]

My aim here is not to suggest that courts should once again recognize a constitutional Liberty of Contract, nor is it to propose a judicial test for adjudicating Liberty-of-Contract cases. I merely argue that the animus against this freedom that pervades the literature is without solid empirical foundation; on the contrary, the evidence weighs heavily in favor of the idea that the Court's invocations of the Liberty of Contract often had societal benefits. Due to fragmentary nature of the evidence, I concede that my conclusions are not unassailable, and I doubt I will have the last word on this topic. But I hope to have at least presented a case substantial enough to shift the burden of proof onto those claiming, as though it were a self-evident truth, that the Liberty of Contract was injurious to society.

[159] "The proposition that the privilege against self-incrimination forbids in-custody interrogation without the warnings specified in the majority opinion […] has no significant support in the history of the privilege or in the language of the Fifth Amendment," *Miranda v. Arizona*, 384 U.S. 436, 526 (1966)(White, J. Dissenting).

[160] "[T]he Court necessarily has had to find […] a right [to abortion] that was apparently completely unknown to the drafters of the Amendment. As early as 1821, the first state law dealing directly with abortion was enacted […] By the time of the adoption of the Fourteenth Amendment in 1868, there were at least 36 laws enacted by state or territorial legislatures limiting abortion," *Roe v. Wade*, 410 U.S. 113, 174-77 (1973)(Rehnquist, J. dissenting).

[161] "Proscriptions against [sodomy] have ancient roots. […] Sodomy was a criminal offense at common law, and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws. [n6] In fact, until 1961, [n7] all 50 States outlawed sodomy" (intn'l quotes & citations omitted), *Bowers* v. *Hardwick,* 478 U.S. 186, 192-94 (1986), overruled in *Lawrence v. Texas*, 539 U.S. 558 (2003).

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