THE LOCHNER ERA

Introductory Commentary

Justice Benjamin Cardozo once observed: "The great tides and currents which engulf the rest of men do not turn aside in their course, and pass the judges by." B. Cardozo, *The Nature of the Judicial Process* 168 (1921). America's economic expansion in the late nineteenth century was reinforced by the intellectual currents of Conservative Social Darwinism -- the philosophy of the survival of the fittest applied to social and economic relations. Conservative Social Darwinism perpetuated the myths of rugged individualism and laissez-faire capitalism.

The Court was gradually infused with this philosophy of laissez-faire capitalism, as its composition changed between 1877 and 1890 with the elevation of corporate lawyers to the ranks of justices. For four decades (from 1887 to 1937) the philosophy of laissez-faire capitalism held sway with a majority of the Court under Chief Justices Morrison Waite (1874-1888), Melville Fuller (1888-1910), Edward White (1910-1921), William Howard Taft (1921-1930), and Charles Evans Hughes (1930-1941). Never before or since were federal and state economic regulations more severely scrutinized. Close to 200 federal and state laws were overturned during the *Lochner* era.

The Court did not strike down all such legislation, however. When legislation imposed health, safety, or moral standards with little or no impact on economic liberty, the Court deferred to the

states and Congress. In *Mugler v. Kansas* (1887), for example, the Court sustained a state prohibition law reasoning:

> [F]or we cannot shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety, may be endangered by the general use of intoxicating drinks; nor the fact, established by statistics accessible to everyone, that the idleness, disorder, pauperism, and crime existing in the country are, in some degree at least, traceable to this evil.

The extent to which the Court was predisposed to defer to the states when regulations had no direct economic impact is underscored in two further rulings during the *Lochner* era. In *Jacobson v. Massachusetts* (1905), the Court refused to question the basis for a state law requiring smallpox vaccinations. And in *Buck v. Bell* (1927), the Court demonstrated no inclination to scrutinize seriously the basis for Virginia's law requiring the sterilization of those who were mentally challenged or afflicted with epilepsy that had been passed in response to the eugenics movement. The *Buck v. Bell* decision affirmed the compulsory sterilization of Carrie Buck, a seventeen-year-old woman in a state mental institution whose mother had also been an inmate and who had already given birth to a mentally challenged child. Justice Holme's opinion for the Court revealed not only his deference to legislatures but his acceptance of the tooth and claw of Social Darwinism:

> It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their

> imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. . . . Three generations of imbeciles are enough.

When legislation aimed at promoting health, safety or welfare *and* directly affected economic activities, the Court did *not automatically* strike it down. But the Court had to be convinced of the reasonableness of the regulations. For example, in *Muller v. Oregon* (1908), the Court unanimously approved a state law limiting the workday for women in industries to ten hours per day. There the Court was persuaded by what became known as "the Brandeis brief." When defending Oregon's law, the progressive and highly regarded labor lawyer, Louis Brandeis, filed an extraordinary brief, containing only two pages of legal argument and more than a hundred pages of statistics and social science studies. The brief supported the reasonableness of the state's law by demonstrating how long hours of labor endangered the health of women.

Acknowledging its debt to "the brief filed by Mr. Louis D. Brandeis," the Court ruled that a "woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil."

Although upholding state regulations in cases like *Muller*, the Court's prevailing practice was to strike down economic regulations. . . . In *Adair v. United States* (1908), for example, the Court struck down a section of a congressional labor-relations law that banned yellow-dog contracts -- contracts signed by workers promising they would not join labor unions -- and that prohibited the firing of employees who belonged to unions. Similarly, in *Coppage v. Kansas* (1915), the Court struck down a state law forbidding yellow-dog contracts. Justice Pitney's opinion for the Court issued another vintage expression of the doctrine of a liberty of contract:

> [S]ince it is evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights. But the 14th Amendment . . . recognizes "liberty" and "property" as coexistent human rights, and debars the states from any unwarranted interference with either.
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> And since a state may not strike them down directly, it is clear that it may not do so indirectly, as by declaring in effect that the public good requires the removal of those inequalities that are but the normal and inevitable result of their exercise.

Derived from David O'Brien, *Constitutional Law and Politics, Volume Two: Civil Rights and Civil Liberties* 230-239 (1991).