
HOLMES ON THE *LOCHNER* COURT

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INTRODUCTION

In evaluating the forays of Robert Post, David Bernstein, and Howard Gillman into the history of *Lochner*-era jurisprudence, Barry Cushman comes to accept that there are at least two faces of Lochnerism.¹ The early twentieth-century invalidation of a number of “economic” regulations, he says, rested sometimes on a principle of equality – the disapproval of “class legislation” emphasized by Gillman – and sometimes on a principle of liberty (characterized in different ways by Post and Bernstein) to the effect that certain areas of each individual’s life must be treated as immune to the government’s regulatory powers altogether.² Cushman also acknowledges, however, that these two principles might really be one.³ Just as the idioms of constitutional equality and constitutional liberty in the present day can often (or always) be said to supply equally eligible modes for arguing against any particular government action, so might the analogous idioms of the *Lochner* era. Rather than try to resolve the question whether there was only one or maybe two faces of Lochnerism – or three if you separate Post and Bernstein – I will instead offer what may be an additional face of Lochnerism.

To find another angle on Lochnerism, I thought I would look at the jurisprudence of the man commonly thought to be the *Lochner* wing’s fiercest foe, Justice Oliver Wendell Holmes, Jr. Holmes wrote the famously stinging

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¹ Barry Cushman, *Some Varieties and Vicissitudes of Lochnerism*, 85 B.U. L. REV. 881, 881-83 (2005) (asserting that there are two interpretations of Lochner-era decisions: the traditional, which holds that these decisions were based on the principle of neutrality, and the more recent, which holds that these decisions were based on the principle of individual liberty and autonomy).

² *Id.*

³ *Id.* at 941-44, 954 (attempting to reconcile Gillman’s “class legislation” theory with both Bernstein’s “liberty of contract” theory and Post’s “lifeworld” hypothesis).

dissents in *Lochner* and *Adkins v. Children's Hospital*⁴ and generally seems to have advocated a jurisprudence that was antithetical to that of the *Lochner* Court. But the compelling reason for looking at Holmes is not that he was a reliably anti-*Lochner* justice, consistently pointing out the flaws in that jurisprudence. Rather, as Cushman notes, he joined many a *Lochner*-era majority in striking down a number of economic regulations.⁵ He even wrote quite a few opinions in such cases. So what do we make of him? Was he important mainly as a kind of legal crank or prophet, irrelevant in his own time, however much he might speak to later generations? Or was he in fact a mainstream justice, whose unique powers of expression and rhetorical iconoclasm only manifested the main lines of *Lochner*-era jurisprudence in an especially revealing manner?

To explore these questions, I'll look at a more or less arbitrarily limited run of Holmes's own judicial writing in Fourteenth Amendment cases. Without doing a comprehensive, independent search of my own, I gathered all of the Holmes Fourteenth Amendment opinions that I was able to find in a quick search of Cushman's and others' footnotes. I'll also take a look at the irresistible *Adkins* dissent (a Fifth Amendment case), but otherwise I've excluded Fifth Amendment cases and Commerce Clause cases, despite close doctrinal relevance. I think these opinions represent most of what Holmes wrote in this area, but in any case they certainly represent a pretty good sample.

The result of my reading is a few observations about the structure of Holmes's jurisprudence regarding constitutional review of economic cases and how his chosen rhetoric might signify differences from and similarities to the constitutional idioms discussed in Cushman's paper. These suggestions are: 1) that Holmes advocated a somewhat more pointed rule of deference to legislatures than did most of his colleagues, but that his language in this respect was far less radical than is often supposed;⁶ 2) that, while he expressed disgust at the uses to which the language of "liberty of contract" and the language of "classification" were put, his own deployment of "takings" language in a number of cases manifested values and concerns very similar to those of the other justices; 3) that, in cases that others might decide by reference to unconstitutional conditions,⁷ he seized the chance to vindicate a

⁴ 261 U.S. 525 (1923).

⁵ See, e.g., Cushman, *supra* note 1, at 917-24 (citing cases where Holmes, as part of the majority, struck down various economic regulations).

⁶ See, e.g., HOWARD GILLMAN, THE CONSTITUTION BESIEGED 131 (1993); Jack M. Balkin, "Wrong the Day It Was Decided": *Lochner* and Constitutional Historicism, 85 B.U. L. REV. 677 (2005).

⁷ On unconstitutional conditions, see generally Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989). For a thorough survey of the cases in Holmes's time, see generally Robert L. Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321 (1935).

rather extreme version of state autonomy that he thought indispensable to the “scheme of the Union” even after the Fourteenth Amendment had scaled back states’ rights; in the face of the ever-expanding federal commerce power, the Court had to preserve some residual principle of state power – not because state autonomy was a good idea but simply because the Constitution still commanded judges to recognize some such sphere.

Running through these propositions, moreover, was Holmes’s eagerness to find positive law and follow wherever it led.⁸ For the most part, Holmes really wasn’t interested in defending any particular substantive policies of his own but only his (sometimes perverse) desire to make himself into a great judge by slavishly following positive law (including his chaste understanding of the Fourteenth Amendment), almost relishing the badness of the social or economic policy that might result from his decisions. But did that positivism and arguable perversity of temperament fundamentally separate him from the other Justices? Or did the substance of his constitutional theory actually put him more or less in the mainstream of the Court? The evidence of his opinions suggests that he served less as prophet or as conscience of the Court and more as the greatest – or only – literary figure of the *Lochner* Court. He used his words as weapons to puncture platitudes, expose the empty lawyers’ rhetoric of so many opinions, and thus clarify the true stakes and motives driving the justices’ opinions. But, as important as such rhetorical contributions were and are, it is equally true and important that he did not separate himself much from his fellow justices’ methods, values, and jurisprudence.

I. THE *LOCHNER* DISSSENT AND JUDICIAL RESTRAINT

Holmes’s *Lochner* dissent is probably more famous than any of the other opinions in the case, and some of the individual aphorisms in the case are probably even more famous than the dissent as a whole. Yet the sting of the dissent turns out to serve a far less radical legal position than is sometimes supposed.

First, the *Lochner* dissent did not so much reject “liberty of contract” as a category of constitutional analysis as embrace a traditional kind of restraint in using such categories. Responding to a majority opinion that rested squarely on liberty of contract and the heightened scrutiny that protection of that liberty demanded of the Court, Holmes exposed the relativity of any such “right” by pointing out how often it had been eroded with the Court’s blessing.⁹ Given

⁸ Holmes’s positivism is, of course, widely acknowledged. See, e.g., G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 120 (1993) (observing that Holmes’s positivism was one of his chief jurisprudential commitments).

⁹ *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (demonstrating that the Court frequently upheld statutes “cutting down the liberty of contract”). A nice discussion of Holmes’s well known impatience with “rights” can be found in G. Edward White’s account of the *Lochner* dissent in JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 328 (1993) (discussing how Holmes was “deeply suspicious” of words like

that record and tradition, the judge's role was generally to let legislatures do what they wanted with this fluid "right."¹⁰ And Holmes was far from alone in advocating such substantial deference. The dissent of Harlan, joined by White and Day, said that "the rule is universal that a legislative enactment . . . is never to be disregarded or held invalid unless it be, beyond question, plainly and palpably in excess of legislative power" or "unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed . . ."¹¹ These words, like Holmes's, were pretty strong, but they only echoed the "reasonable doubt" or "doubtful case" rule, which had peppered constitutional opinions since at least the early nineteenth century and which remained an established doctrine of constitutional law into the *Lochner* Era.¹² Harlan's call for restraint simply paralleled Holmes's own insistence that legislatures be allowed wide freedom, limited only by "fundamental principles" of law.¹³

So why didn't Holmes join Harlan's dissent? His own opinion suggests that he objected only to Harlan's willingness to resort to empirical evidence to sustain the reasonableness of the *Lochner* statute as a health regulation. Contrasting his opinion to Harlan's, Holmes insisted that "[i]t does not need research" to show that the statute could be understood as rationally related to the state's interest in public health.¹⁴ To sign on to the other dissenters' empirical "research" on that score was to say that a legislature's impingement on the liberty of contract (real, though it was) was something special, requiring special fact-finding and justification – beyond common sense and dominant opinion – rather than simple judicial recognition of the plausibility of the statute. So did this separate him from Harlan's jurisprudence in some important way? Or did it simply reflect his rhetorical combativity? Perhaps he exhibited a deeper insight into the scope of judicial competence, but he evinced little difference from Harlan in methods of actually deciding cases.

After all, Harlan had not declared that such empirical evidence was necessary, and his statement of the standard of judicial review certainly didn't suggest so; he just saw no reason to ignore such evidence, apparently, when it

"right" and "liberty of contract," because he thought of them as "vague generalizations," and "nothing but prophecies").

¹⁰ *Lochner*, 198 U.S. at 75-76 (Holmes, J., dissenting) (arguing that the Constitution does not embody a particular economic theory, and that the Court should not determine the constitutionality of statutes based on their own opinions).

¹¹ *Id.* at 67-68 (Harlan, J., dissenting).

¹² For the early period, see, for example, SYLVIA SNOWISS, *JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION* 60-65, 130-32, 157-61 (1990) (tracing the "doubtful case" rule through 18th- and 19th-century cases). For a statement nearly contemporaneous with the *Lochner* period, see James B. Thayer's classic article, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

¹³ *Lochner*, 198 U.S. at 76 (Holmes, J., dissenting).

¹⁴ *Id.*

was easily available. And, like Harlan, Holmes was very clear that he too would strike down legislation in the right case.¹⁵ Thus, immediately after announcing the “general proposition” that judges’ pet economic theories or other notions of good policy should not control their judgments in constitutional cases, Holmes declared that, “General propositions do not decide concrete cases.”¹⁶ He was not referring here (as I had always casually assumed) to the majority’s arid principles of liberty of contract or laissez-faire – or at least not immediately to them. Instead, he referred most immediately to his own “proposition just stated,” that judges should not use the Fourteenth Amendment as an excuse to “prevent the natural outcome of a dominant opinion” – i.e., to invalidate a statute.¹⁷ Applicable as that general principle of restraint might prove to be in *Lochner*, it was equally true, he suggested, that judges *should* intervene whenever a rational person would have to admit that a statute flouted “fundamental principles as they have been understood by the traditions of our people and our law.”¹⁸

In other words, although Holmes had made a big deal of his own commitment to restraint, he also acknowledged that that restraint must bow before the more general principle that judges had to recognize when fundamental principles had been violated, just as the *Lochner* majority had. In the end, he disagreed with the majority only on the question whether the New York statute really was a plausible health regulation, and with Harlan only on the question whether discussion of available empirical research was called for in deflating the majority’s assumptions. Although Holmes wielded a terribly sharp rhetorical knife, he used it to defend a traditional and conventional theory of constitutional review. If he didn’t mind turning that knife even on his allies, that was less because there was a deep jurisprudential gulf between him and Harlan than because, as a matter of aesthetics as much as anything else, he preferred to dismiss a mistaken majority in a handful of paragraphs that would offer no respect or quarter to the purveyors of judicial pretense.

Holmes subsequently reiterated his commitment to restraint on a number of occasions, but his *Adkins* dissent deserves special notice. There, Holmes reiterated his *Lochner* argument in the context of federal legislation and the Fifth (rather than Fourteenth) Amendment.¹⁹ Writing only a few years after *Bunting v. Oregon*²⁰ had apparently offered *Lochner* “a deserved repose,”²¹

¹⁵ *Id.* (contending that a law could be invalidated on constitutional grounds so long as a rational man would conclude that the law infringed on fundamental principles of law).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Adkins v. Children’s Hospital of D.C.*, 261 U.S. 525, 568-71 (1923) (Holmes, J., dissenting).

²⁰ 243 U.S. 426, 433-34, 438 (1917) (sustaining a statute establishing a ten-hour maximum work day and providing time-and-a-half overtime pay for up to three hours per day for factory workers as a valid exercise of state power on the grounds that it was

Holmes impatiently expanded on his earlier resistance to the notion that liberty of contract was something special in constitutional analysis: “The earlier decisions . . . went no farther than an unpretentious assertion of the liberty to follow the ordinary callings. Later that innocuous generality was expanded into the dogma, Liberty of Contract.”²² In reality, he argued, a statute’s impingement on liberty of contract revealed very little about whether the statute was constitutional or not, as his citations to a flood of cases easily proved.²³ Holmes’s impatience with the majority’s “dogma” extended as well to arguments in the “class legislation” idiom: “The fact that the statute warrants classification, which like all classifications may bear hard upon some individuals, . . . is no greater infirmity than is incident to all law.”²⁴ But Holmes did not condemn all judicial intervention by way of the Due Process Clause. As argued further below, Holmes happily invalidated legislation when he could do so in terms of “takings,” and he would have been happy to strike down the statute in *Adkins* if its chosen means had “compel[led] anybody to pay anything” or otherwise appeared assimilable to an unconstitutional “taking.”²⁵ Finding, however, that the *Adkins* statute suggested no taking by the authorities, Holmes again disdained the government’s effort to prove the value of the legislation by reference to empirical research when the merest glance at the realities of the world (through the lens of judicial notice) showed all that needed to be shown – that is, that reasonable persons might believe the statute to serve the “public good.”²⁶

A nice tip-off that Holmes’s own colleagues considered his distinctiveness to lie more in his rhetoric than in his jurisprudence comes in Chief Justice Taft’s dissent in *Adkins*. The rather conservative Taft wrote separately from Holmes not because of any serious disagreement on the substance of Holmes’s objections but because of Holmes’s rhetorical vehemence and sweep: “But for my inability to agree with some general observations in the forcible opinion of MR. JUSTICE HOLMES, who follows me, I should be silent and merely record my concurrence in what he says.”²⁷

In sum, if Holmes could not restrain his rhetoric as he responded to the evasions and dogmas of his colleagues’ written work, he hardly invented or even extended the brand of judicial restraint that he so colorfully advertised and that many, if not all, of his colleagues practiced with him.

necessary to preserve employee health).

²¹ *Adkins*, 261 U.S. at 570 (Holmes, J. dissenting).

²² *Id.* at 568.

²³ *Id.* at 568-69 (citing examples of laws that had been upheld despite interfering with the liberty of contract).

²⁴ *Id.* at 570.

²⁵ *Id.* See *infra* pp. 10-18 (discussing cases where Holmes invalidated legislation based on unconstitutional takings).

²⁶ *Adkins*, 261 U.S. at 570-71.

²⁷ *Id.* at 567 (Taft, J., dissenting).

II. "TAKINGS" CASES

Holmes's conventionality becomes all the more clear when one considers that he joined his colleagues quite a few times in using the Fourteenth Amendment to invalidate statutes and wrote a number of the opinions in those cases himself. He may have preferred the language of "takings" to that of "liberty" or "equality," perhaps because it seemed to offer a more disciplined sort of rhetoric for a judge, a rhetoric more conducive to his own overriding ambition to achieve judicial greatness when all around him appeared so sloppy and political. Nevertheless, his own chosen language necessarily left him making the same kinds of judgments that the rest of the Court made with their sometimes different rhetorical tools.

The main category of cases in which Holmes's opinions for the Court invalidated legislation involved what he saw as a takings aspect of the Fourteenth Amendment, not the Takings Clause as such nor the Takings Clause as incorporated through the Fourteenth Amendment. When Holmes identified a "taking of private property" without adequate compensation, he did not hesitate to step in and strike down the statute any more than his colleagues might have done when spying an "arbitrary classification" or an erosion of the "liberty of contract." Taken one way, his *Lochner* dissent might have suggested that, as long as "dominant opinion" considered a regulated party's loss non-compensable, the usual and justifiable sort of price that one pays for living in a well regulated society, then judges should never interfere. But, as shown above, the engaging rhetoric of the dissent added up to no such position. It ultimately stood only for the pedestrian proposition that judges had to make judgments, that they had to reason as best they could about when a statute crossed the line of irrationality, and thus unconstitutionality, in light of American traditions. Holmes freely made that judgment whenever he thought a statute looked too much like a taking of private property, whether in the form of money exacted, labor compelled, tangible property appropriated, or even opportunities for profit denied.

Thus, for example, in *Louisville and Nashville Railroad v. Central Stock Yards Co.*,²⁸ a provision of Kentucky's Constitution required one railway to surrender its cars to another for the final leg of a trip without, according to Holmes, affording the first carrier compensation for the temporary loss of its property and its use by another party:

In view of the well-known and necessary practice of connecting roads, we are far from saying that a valid law could not be passed to prevent the cost and loss of time entailed by needless transshipment or breaking bulk, in case of an unreasonable refusal by a carrier to interchange cars with another for through traffic. We do not pass upon the question. It is enough to observe that such a law perhaps ought to be so limited as to

²⁸ 212 U.S. 132, 139 (1909) (citing the Kentucky Constitution, which stated that all railroad companies were required to transport, receive, load and unload all freight passing through without discrimination as to payment or charges).

respect the paramount needs of the carrier concerned, and at least could be sustained only with full and adequate regulations for his protection from the loss or undue detention of cars, and for securing due compensation for their use. The Constitution of Kentucky is simply a universal, undiscriminating requirement, with no adequate provisions such as we have described.²⁹

As these words suggest, Holmes did not doubt that the Kentucky regulation had very plausible justification as a facilitation of commerce within the state. But rather than simply deem this the sort of regulation for which a reasonable person could easily divine the public justification, Holmes judged it a deprivation of property without due process of law, at least so long as Kentucky failed to provide adequate compensation.³⁰

Another aspect of the same Kentucky regulation required one railroad to provide switching services to another under certain circumstances, even though those services were not separately paid for: "If the principle is sound, every road into Louisville, by making a physical connection with the Louisville & Nashville, can get the use of its costly terminals and make it do the switching necessary to that end, upon simply paying for the service of carriage."³¹ Not only did the state compel the use of private property for public ends, but it compelled a private company to provide labor and services to another for these same ends. "To require such [services] from a railroad is to take its property in a very effective sense, and cannot be justified unless the railroad holds that property subject to greater liabilities than those incident to its calling alone."³² For Holmes this was essentially a takings case, a case that could be distinguished from ordinary regulation since the state compelled a person to part with physical property and, perhaps even more compellingly, to provide services and labor that it had not freely committed itself to by virtue of entering into the "calling" of railroading.

Similarly, in *Missouri Pacific Railway Co. v. Nebraska*,³³ Holmes assumed the legitimacy of a statutory effort to prevent a grain-elevator monopoly. He even assumed that the statute might require a railroad to service elevators other than its own.³⁴ But he bridled at the requirement that the railroad itself build and pay for the necessary side tracks and do so whenever the operator of such an elevator so requested.³⁵ Using the conventional judicial language of the day, Holmes declared, "Clearly, no such obligation is incident to their public duty, and to impose it goes beyond the limit of the police power."³⁶ Even if

²⁹ *Id.* at 143-44.

³⁰ *Id.* at 145.

³¹ *Id.*

³² *Id.*

³³ 217 U.S. 196 (1910).

³⁴ *Id.* at 206-07.

³⁵ *Id.* at 207.

³⁶ *Id.*

the statute were shrunk to a more reasonable shape, Holmes wondered, “Why should the railroads pay for what, after all, are private connections? We see no reason.”³⁷ Holmes perhaps bridled at the thought that the railroad could be compelled to *construct* these tracks (as he bridled at the Kentucky railroad’s being required to perform services it had not contracted for), but ultimately he only insisted that they could not be required to go uncompensated for the work: “[T]his statute is unconstitutional . . . because it does not provide indemnity for what it requires.”³⁸

In *Brooks-Scanlon Co. v. Railroad Commission of Louisiana*,³⁹ Holmes similarly and impatiently found that the Fourteenth Amendment prevented the Railroad Commission of Louisiana from compelling a company to provide services that could not be operated at a profit.⁴⁰ The company had run a railroad at a profit as long as its parent company’s logging business had paid a large share of the freight.⁴¹ When the parent company ran out of logs, the railroad shut down, but the state Railroad Commission ordered it to continue operations as long as the losses did not use up the profits of the parent company.⁴² Holmes and the Court found this order “would deprive the plaintiff of its property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States”⁴³ After all, even though public needs might justify a requirement that a railroad fulfill its charter obligations even when it could only do so at a loss, the private decision to stop operating the railroad altogether was different: “The plaintiff may be making money from its sawmill and lumber business but it no more can be compelled to spend that than it can be compelled to spend any other money to maintain a railroad for the benefit of others who do not care to pay for it.”⁴⁴ Here as elsewhere, Holmes could as easily have said that this order was unconstitutional as the equivalent of “class legislation,” a naked redistribution of property from A to B; or he could have called it a violation of the railroad’s “liberty of contract,” its freedom to contract or not with whomever it chose for whatever services it chose to provide. Any of these idioms would have made sense of the case, and each of them would have (and did) require an exercise of judgment, not a mechanical application of a clear rule.

Finally, in *Forbes Pioneer Boat Line v. Everglades Drainage District*,⁴⁵ Holmes was able to identify a “definite sum of money” to which the boat

³⁷ *Id.*

³⁸ *Id.* at 208.

³⁹ 251 U.S. 396 (1920).

⁴⁰ *Id.* at 399.

⁴¹ *Id.* at 398.

⁴² *Id.* at 398-99.

⁴³ *Id.* at 397.

⁴⁴ *Id.* at 399.

⁴⁵ 258 U.S. 338 (1922).

company was entitled and which the state sought to keep.⁴⁶ The company had paid certain tolls under duress at a time when no such tolls were authorized by the state.⁴⁷ The state then sought to keep the money through retroactive legislation (“ratification” of the tolls).⁴⁸ But the state’s argument, said Holmes, once “[s]tripped of conciliatory phrases” – Holmes’s favorite activity – simply sought to “take away from a private party a right to recover money that [was] due when the act [was] passed.”⁴⁹ The state could no more extinguish this right to a definite sum of money “without compensation” than it could extinguish a conventional “claim for goods sold.”⁵⁰

Relying on the language of takings, even though the Takings Clause itself was inapplicable to these cases, Holmes disdained the languages of liberty and equality, presumably because they had proven overly attractive excuses for the judiciary’s second-guessing of legislatures. Holmes’s “takings” cases, in contrast, drew on more explicit language and tradition, or so he seems to have believed. For a judge who really was more interested in achieving greatness in his calling than in pressing a particular substantive agenda for the nation, those virtues of the takings idiom would have been very seductive.

Another benefit of that idiom, though, might have been that it did advance a major part of Holmes’s constitutional agenda, his conviction that individual rights were never absolute – hardly “rights” at all in the face of the ever-present and necessarily superior demands of the public interest. The language of takings never formally prevented whatever regulation the state saw fit to enact; it never set up a right that was above utilitarian calculation. It only required that the state pay for its regulations, at least in those cases where the traditions of American law would unmistakably identify a compensable seizure of a person’s labor, money, or physical property.

Here I might cite a passage from the criminal law chapter of Holmes’s *THE COMMON LAW*, a passage that suggests that Holmes understood the requirement of just compensation as having little to do with individual property or contract rights and much to do with the necessity of protecting public power by preventing it from undermining itself. Viewing criminal law as simply one of many branches of social regulation, not altogether different from later Progressive reform legislation, he impatiently disparaged the notion that individuals have any unregulable “rights,” such as the Kantian right not to be used as means to public ends.⁵¹ Yet he also provided a limiting principle for the broad, utilitarian legislative discretion he thereby endorsed: a legislature

⁴⁶ *Id.* at 340.

⁴⁷ *Id.* at 338.

⁴⁸ *Id.*.

⁴⁹ *Id.* at 339.

⁵⁰ *Id.* at 340.

⁵¹ O.W. HOLMES, JR., *THE COMMON LAW* 43, 46-47 (1881) (claiming that our criminal law does “treat the individual as a means to an end, and uses him as a tool to increase the general welfare at his own expense”).

must not sacrifice the individual irrationally by imposing rules that are “too severe for that community to bear.”⁵² And, to illustrate, he used a takings analogy: the community, he noted, will seize “old family places” from individuals for public use, regardless of claims of property or other rights, and it must be allowed to do so in the public interest.⁵³ But, of course, the community also traditionally pays market compensation for the taking – an amount probably inadequate to the deprived owner but adequate in the eyes of a reasonable member of the community.⁵⁴ All communities sacrifice the individual’s interests for the sake of the public’s, but no civilized community sacrifices the individual more than necessary, Holmes said.⁵⁵ Why? Because doing so would itself undermine the public interest, would manifest not a violation of individual rights but a rule “too severe for that community to bear,”⁵⁶ a rule “too hard for the average member of the community,”⁵⁷ a rule that must defeat its own purposes because it violates the well founded judgments of the main body of the community. The takings idiom, it would seem, was specially congenial to Holmes’s view of law as a positive emanation of state power rather than as a catalogue of “rights.”

If Holmes embraced such an argument for the use of “takings” language rather than his colleagues’ preferred idioms, he still had to acknowledge that it was judges – not the unmediated voice of “the community” – who must apply the Constitution to particular cases. And judges could have done the work of judicial review – imparted their measure of rationality to state power – through any of the idioms of constitutional law then current. Holmes seemed to glom on to the language of takings because of its relative determinacy and its easy affinity with the Fourteenth Amendment’s own language of deprivation of property. But determinacy is often in the eye of the beholder. If it has not already been obvious that Holmes’s own takings opinions were far from determinate applications of takings rules, then Holmes’s most famous takings case, *Pennsylvania Coal Co. v. Mahon*,⁵⁸ clearly makes the point.

Mahon presents a Holmes who was as ready as any of his colleagues simply to judge matters of degree in constitutional law rather than deferring to the legislature whenever a reasonable person might endorse the statute. To this point, perhaps Holmes had not had to confront so starkly his awareness that the difference between a regulation and a taking could not always be easily drawn. The cases discussed above contained pretty plausible examples of regulations that looked overtly like takings from the outset, never even triggering the usual

⁵² *Id.* at 50.

⁵³ *Id.* at 43 (alleging that a civilized government will not sacrifice the citizen more than it can help, but will sacrifice the citizen’s “will and welfare” for the good of the rest).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 50.

⁵⁷ *Id.* at 57.

⁵⁸ 260 U.S. 393 (1922).

rhetoric of deference to legislative judgment. But *Mahon* was trickier, suggesting that the deferential review Holmes abstractly advocated for most Fourteenth Amendment cases was being arbitrarily disregarded in Holmes's practically *de novo* review in takings cases.

In *Mahon*, the coal company was not compelled to perform any service, nor deprived directly of any of its property or money. It was simply deprived of a preexisting right to mine coal – an opportunity for future profits – insofar as the mining would cause subsidence of the residential lots overhead.⁵⁹ The statute might thus be a regulation of property or it might be a taking. So Holmes had to acknowledge that the question was a matter of degree: “The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”⁶⁰ Unlike in the previous cases he had written, the taking here was not a simple matter of common sense and “general propositions,” a case of knowing it when he saw it: “As we already have said this is a question of degree – and therefore cannot be disposed of by general propositions. But we regard this as going beyond any of the cases decided by this Court.”⁶¹

Recognizing that the question whether there was a “taking” here was just a matter of degree, he nevertheless failed to intimate that the state deserved any deference for its policy. Nor did he argue, as his *Lochner* standard should have required, that this regulation would necessarily be deemed unreasonable by any rational and fair person. (With Justice Brandeis dissenting, he may not have relished such an argument.) For Holmes, it was simply the case that the Fourteenth Amendment banned takings and that this regulation seemed like a taking. Why did it seem so? Simply because, if judged otherwise, this regulation might threaten the very survival of “private property,”⁶² a fairly silly and uncharacteristically melodramatic argument for Holmes.

In this case, judging degrees as he was, Holmes might as well have concluded that the regulation deprived the coal company of its “liberty of contract” or transferred its property from A (the coal company) to B (the surface residents). But he did not. Instead, he relied again on the idiom of takings, apparently to replace the dogmas of the *Lochner*ites with a principle that, unlike “Mr. Herbert Spencer’s Social Statics,”⁶³ was indeed explicitly enacted in the Constitution as positive law. But that language eventually returned him to questions of degree and indeterminacy anyway, in the face of which he cheerily denied to the legislature of Pennsylvania in 1922 the sort of

⁵⁹ *Id.* at 412-13.

⁶⁰ *Id.* at 415.

⁶¹ *Id.* at 416.

⁶² *Id.* at 415 (arguing that when the Fourteenth Amendment’s “seemingly absolute protection” of private property is qualified by police power, “the natural tendency of human nature is to extend the qualification more and more until at last private property disappears”).

⁶³ *Lochner v. New York*, 198 U.S. 45, 75 (1905).

deference he had championed for the legislature of New York in 1905.

III. STATE SOVEREIGNTY AND UNCONSTITUTIONAL CONDITIONS

If Holmes's positivist formalism in takings cases tended to erase his philosophy of deference, he adopted a different formalist extreme when confronted with claims of unconstitutional conditions. In these cases, he insisted that there were areas of regulation where the states retained a degree of autonomy and sovereignty that precluded even the most deferential rationality review. Where the state could have "arbitrarily" prohibited the conditioned activity at the outset, Holmes argued, even the most irrational subsequent conditions on the activity were beyond federal constitutional review.

In *Western Union Telegraph Co. v. Kansas ex rel. Coleman*,⁶⁴ Holmes dissented from an invalidation of a Kansas "charter fee," imposed by the state on the corporation as a condition of doing business within the state.⁶⁵ The fee might be excessive or otherwise unjustifiable, but the entry of a foreign corporation into the state to do local business was "a matter over which a state has absolute arbitrary power,"⁶⁶ wrote Holmes. The state, therefore, could place absolutely any conditions it wanted on such local business. It did not matter to Holmes that to grant a state such unlimited power over the local business of a national company like Western Union might realistically amount to significant power over the company's interstate business as well.⁶⁷ Rather, apparently with one eye on the rising tide of the federal commerce power and the other on the constitutionally mandated state sovereignty that seemed to be sinking behind the horizon, Holmes opted for the result that was "more true to the scheme of the Union," an utterly arbitrary sovereignty for the states but only in limited areas that could be defined out of the federal commerce power.⁶⁸

Similarly, but even more dramatically, in *City of Denver v. Denver Union Water Co.*,⁶⁹ Holmes dissented from a ruling that a private water company was entitled under the Fourteenth Amendment to an adequate rate of return for its services.⁷⁰ Holmes reasoned that, since the city could at any time arbitrarily exclude the water company from the city altogether, it certainly could offer the company as low a rate of return as it liked, leaving the company to abandon the

⁶⁴ 216 U.S. 1 (1910).

⁶⁵ *Id.* at 7, 47-48.

⁶⁶ *Id.* at 54 (Holmes, J., dissenting).

⁶⁷ *Id.* at 53-54 (arguing that the fact that a company might have to use interstate business earnings to pay state-imposed fees for maintaining local business "is no reason for cutting down powers that up to this time the states always have possessed").

⁶⁸ *Id.* at 53 ("I think it more logical and more true to the scheme of the Union to recognize that what comes in only for a special purpose can claim constitutional protection only in its use for that purpose, and for nothing else.").

⁶⁹ 246 U.S. 178 (1918).

⁷⁰ *Id.* at 194.

business if it so chose.⁷¹ Holmes acknowledged the reality that the water company, which had laid pipe throughout the city, and the city, which did not own the pipe, were mutually dependent.⁷² But he declared that “the mutual dependence of the parties upon each other in fact does not affect the consequences of their independence of each other in law.”⁷³ Since the city could, in law if not in reality, exclude the water company for any reason at all, it could also set utterly inadequate rates for the company.⁷⁴

In these cases, Holmes declined to do what he was famous for doing in at least some other cases – looking behind the formalisms (like liberty of contract) to account for the reality of the situation. Although Holmes had been very willing to halt the dragooning of businesses into the service of the state without just compensation, he had no qualms about the state equally destroying the property of a business through the mere regulation of rates. Moreover, the standard he applied was not even deferential rationality review but absolute judicial withdrawal from the case.

CONCLUSION

Notwithstanding the formalism involved in such distinctions, Holmes carried out judicial review in at least three different ways: deference to dominant opinion in the execution of rationality review (*Lochner*); no apparent deference at all in cases where he detected “takings”; and no constitutional review at all in cases where he supposed the Fourteenth Amendment to have left absolute state sovereignty in place. This last result seemed to rest on a belief that “the scheme of the Union” must survive the commerce power and its ever-growing potential to render a constitutionally, positivistically required federalism nugatory. Thus although Holmes seemed to embrace a judicial role in imparting rationality to public power, he did not seem to believe that the Fourteenth Amendment’s requirement of rationality inhered in the notion of government or republicanism or law; it was simply a (very desirable) requirement that the makers of the Fourteenth Amendment had generally chosen to place on the states. But, as a merely positive imposition, it went no further than it went; Holmes seemed to take a certain positivistic delight in discovering areas of state power that the Fourteenth Amendment did not reach at all, perhaps because these small pockets of unreviewable arbitrariness reminded him (and the Platonists on the Court, he hoped) that rationality in government was a mere choice, which dominant opinion could endorse or not as it liked.⁷⁵

⁷¹ *Id.* at 196-97 (Holmes, J., dissenting).

⁷² *Id.* at 197 (recognizing that, practically, the water company “cannot stop furnishing water without being ruined, or the city stop receiving it without being destroyed”).

⁷³ *Id.* at 197-98.

⁷⁴ *Id.*

⁷⁵ Was it also evidence of Holmes’s positivism that, once he had lost to the majority in enough cases of unconstitutional conditions, he acquiesced in the law decreed by the Court

Unlike some other justices of his time, Holmes did not clearly manifest a particular political orientation in his judging. Rather, he revealed a ceaseless ambition to find greatness in his profession (and be recognized for it). Holmes himself might have admitted that the greatness he sought in a life on the bench could not be had by the creation of distinctive doctrine (the unconstitutional conditions cases that he lost could have taught him that). The very nature of law, forever honoring prior authority, discouraged explicit doctrinal innovation. But, in Holmes's age, as in ours, the law seemed to cry out for someone to cut through the humbug of judicial rhetoric. I think that Holmes did indeed contribute (along with other justices) a third idiom of Fourteenth Amendment review to the two that Cushman's paper has identified,⁷⁶ a language of takings which turned out to be as conventional as the other two and nearly interchangeable with them. Each of the three fit easily with a general philosophy of deference in judicial review, and each called on the justices simply to exercise judgment when faced with a claim that a legislature had gone too far in light of American traditions of law. But Holmes's positivism, iconoclasm, and rhetorical skill persistently exposed the political qualities of the justices' work for all to see. And at least in part, that is where his greatness lay and where, I suspect, he was happy for it to lie.

It is true that, having exposed the arbitrariness and politics underlying the legalisms of "liberty of contract" and "arbitrary classification," he only (and inevitably) substituted his own mainstream legalisms of "takings" and the like. In the meantime, however, he had enshrined in Supreme Court case law the rhetorical tools by which, as he said in a different setting, "the dragon" – any inherited legalism – could be gotten "out of his cave on to the plain and in the daylight, [where] you can count his teeth and claws, and see just what is his strength."⁷⁷ Holmes's third face of Lochnerism did not really contribute a functionally different doctrine to *Lochner*-era constitutional review. But his *Lochner*-era contributions, revealing the "faces" of the law as "masks," made it forever afterwards an embarrassment – even for a judge – to pretend that the language of law could wholly conceal the political dimensions of the Court.

and even went on to write opinions invalidating legislative imposition of unconstitutional conditions? See Hale, *supra* note 7 at 338-43.

⁷⁶ See *supra* notes 1-2 and accompanying text.

⁷⁷ Oliver Wendell Holmes, *The Path of the Law*, 78 B.U. L. Rev. 699, 708 (1998; orig. 1897).