The Monopolistic Vices of Progressive Constitutionalism

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I. Introduction: Three Challenges to Constitutional Interpretation

It is my great pleasure to be asked to deliver the Cato Institute's third annual B. Kenneth Simon Lecture in Constitutional Thought, and to follow on the heels of Judge Douglas Ginsburg and Professor Walter Dellinger, two of this nation's most distinguished constitutional thinkers. The connection here is especially fitting because I shall pick up on themes that are contained in both of those lectures. Judge Ginsburg's inaugural lecture was entitled ''On Constitutionalism,''[1] dealing with interpretive issues inherent in a written constitution. Professor Dellinger spoke next on ''The Indivisibility of Economic Rights and Personal Liberty,''[2] an issue especially vexing to modern constitutional thought.

Judge Ginsburg's essay addresses the difficult question of how one can keep faithful to the original Constitution once it is understood that the Constitution cannot be read as a self-contained document. That objective depends for its success on at least three related tasks. The first is the explication of the common but critical terms in

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[1] Douglas H. Ginsburg, On Constitutionalism, 2002–2003 Cato Sup. Ct. Rev. 7 (2003).

[2] Walter Dellinger, The Indivisibility of Economic Rights and Personal Liberty, 2003–2004 Cato Sup. Ct. Rev. 9 (2004).

the document that resist easy analysis: commerce, private property, freedom of speech, impairment of the obligation of contract, as well as a host of more technical terms like ''Letters of Marque and Reprisal,''[3] ''any Office of Profit or Trust,''[4] and ''Capitation, or other direct, Tax.''[5]

The second task is to identify the appropriate level of scrutiny that should be brought to any particular legislative provision or administrative act that is challenged on judicial review. Is there a case for exacting strict scrutiny at one extreme or the most forgiving standard of rational basis review at the other? Or is the proper approach to somehow split the difference by adopting some intermediate standard that hovers uneasily between the poles? On this attitudinal issue, the Constitution itself is mute.

The third task is to articulate the implied doctrines and exemptions that should be read into the Constitution as a matter of either history or constitutional logic. There is no obvious theory of plain meaning, no set of dictionary definitions dealing with key building blocks of constitutional theory that are *not* stated in the text but must nonetheless be imported for that text to make any sense.

Problems such as those are not small. They are huge, and central to the entire enterprise of interpretation. State sovereign immunity against suits by individuals, for example, is nowhere mentioned in the Constitution but was clearly understood by the Framers as a background proposition, even if it is hotly disputed today;[6] intergov-

[3]U.S. Const. art. I, § 10, cl. 1.

[4]U.S. Const. art. I, § 9, cl. 8.

[5]U.S. Const. art. I, § 9, cl. 4.

[6]See, e.g., The Federalist Nos. 81, 82 (Alexander Hamilton). For an exhaustive discussion, see Hans v. Louisiana, 134 U.S. 1, 12–15 (1890) (affirming the general applicability of the doctrine, relying in part on Hamilton). It should be noted that modern constitutional lawyers have entered into enormous disputes over this question, in part because of distaste for the doctrine, which I share.

Much of the confusion, however, comes from the reading of the Eleventh Amendment, which states, ''The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.'' U.S. Const. amend. XI. If this provision were the only source of sovereign immunity, then it would be hard to see how the doctrine could protect states from suits by their own citizens. But such is not the case. The key word here is ''construed,'' which indicates that the Amendment is designed to correct some prior misapprehension as to the scope of the doctrine; here it was the then-recent decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), which allowed a suit by a South Carolina citizen

ernmental immunity has a similar status.[7] Likewise, as I shall note briefly in this lecture, the dormant Commerce Clause is absolutely critical to the constitutional design; but it arises, if at all, only by implication. And finally, an adequate theory of interpretation must find a place for the most ubiquitous concept in constitutional law, ''the police power.'' Ernst Freund, perhaps the greatest cross between lawyer and political scientist of his generation, wrote that it should be understood ''as meaning the power of promoting the public welfare by restraining and regulating the use of liberty and property.''[8] Yet there is no specific textual reference to the police power in the Constitution, even though it influences the interpretation of many key clauses of the Constitution that deal with both individual rights and jurisdictional limitations.[9]

Choosing the proper modes of interpretation lies close to the core of this lecture, and forms the centerpiece of Professor Dellinger's lecture, whose theme of indivisibility of economic and property rights on one hand and personal liberties on the other has long been close to my own heart.[10] The argument here rests on two propositions. First, it is difficult in principle to draw a sharp line between these two categories, for rules that govern the workplace, for example,

against Georgia for a revolutionary war debt. *Id*. at 450–51 (Blair, J.); *id*. at 465–66 (Wilson, J.); *id*. at 475–77 (Jay, C.J.). But as *Hans* explained, the basic doctrine was not created by the Eleventh Amendment, nor limited in scope to it. 134 U.S. at 10–19. That said, *Hans* has been at the center of modern constitutional law debate. See, e.g., Seminole Tribe v. Florida, 517 U.S. 44, 69, 72 (1996) (rejecting the claim that Congress under its commerce power could abrogate the doctrine of state sovereign immunity). As should be evident, the contention that the commerce power could even reach state sovereign immunity depends heavily on the vast modern extensions of the power, which receive no support from either the text or the structure of the Constitution. For modern critiques of the doctrine, see Erwin Chemerinsky, Against Sovereign Immunity, 53 Stan. L. Rev. 1201 (2001); for a defense of *Hans,* see David P. Currie, The Constitution in the Supreme Court: The Second Century: 1888–1986, at 7–9 (1990).

[7]See, e.g., McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 428, 435–36 (1819) (federal immunities); Collector v. Day, 78 U.S. (11 Wall.) 113, 126–27 (1871) (state immunities), discussed in David P. Currie, The Constitution in the Supreme Court: The First Hundred Years: 1789–1888, at 160–68 (1985).

[8]Ernst Freund, The Police Power: Public Policy and Constitutional Rights iii (1904).

[9]For discussion, see Richard A. Epstein, The ''Necessary'' History of Property and Liberty, 6 Chap. L. Rev. 1 (2003).

[10]See, e.g., Richard A. Epstein, The Indivisibility of Liberty Under the Bill of Rights, 15 Harv. J.L. & Pub. Pol'y 35 (1992).

could easily impact the way in which political or religious activities can take place through the firm. And banning discrimination in private clubs, to take another example, threatens both the exclusive right to possession on one hand and the freedom of association on the other.[11] Second, and ultimately more important, the judicial tendency to fragment liberties means that the lower level of respect accorded to economic liberties will often dilute the level of protection given to those personal rights (such as freedom of conscience) that are of tangential interest to business or commerce.

II. The Progressive Challenge to the Old Court

Both of those themes play an important role in this lecture, which concerns the vision of American constitutional law championed by the Progressive movement. That movement proved strong and vital in the period between 1900 and 1930 and set the agenda for many of the lasting New Deal reforms that were introduced in the 1930s, some of which remain centerpieces of American law and policy to this day. As a political matter, the Progressives backed an ambitious legislative agenda of extensive regulation on a wide range of issues: sometimes they had to do with rate regulation and the aggressive enforcement of antitrust laws; at other times they had to do with the regulation of the workplace in the form of maximum hours and minimum wage regulation on one hand and strong protection for unions on the other.

To achieve their goals, Progressives envisioned two fundamental transformations of constitutional law. The first was a bold expansion of federal power, seeking to bring all forms of productive activity under the mantle of the Commerce Clause, which provides that ''Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.''[12] The second was a truncation of the scope of individual constitutional rights. To do this, Progressives had to reverse field on two key developments of the earlier law as fashioned by their intellectual and political adversaries on what is called (as part of winner's history) the ''Old Court.'' The first thing that needed to be reversed was the Old Court's broad definition of liberty, which extended to cover liberty

[11] See, e.g., Boy Scouts of America v. Dale, 530 U.S. 640 (2000).

[12] U.S. Const. art. I, § 8, cl. 3.

of contract. The second was its conception of state police power; a broader conception was needed, to dovetail with the narrower class of liberties presumptively entitled to constitutional protection. The Old Court had sought to limit the police power so that it did not consume the very liberties it was intended mainly to protect; thus, the Court customarily held that the power reached only matters that advanced the ''safety, health, morals, and general welfare of the public.''[13]

Those two battles were fought over the entire period from the end of the Civil War to the climactic 1937 Supreme Court term. The common view is that the Progressives were sound on both fronts and were therefore justly entitled to the fruits of their labors. I disagree with that assessment and think that both constitutional law and the American polity would have been far better off if we had stuck with the two doctrines of the Old Court that were so criticized by the Progressives. Let there be a thousand rationales for the shift; on the ground, they all boil down to one: the Progressives thought they could tell a good monopoly from a bad one; thus, they constantly propped up monopolies in labor, goods, and services for their select clientele. The Old Court was not perfect in articulating its own position, but it clearly and rightly saw state-created monopolies as a threat to be constrained rather than a social advance to be welcomed.

To set the framework for the constitutional debate that follows, it is useful to note the tenets of the Progressive position in support of state-created monopolies. Chief among those was the view that the transformation of the means of economic production had rendered obsolete all the optimistic predictions of traditional classical liberal thinkers such as John Locke, David Hume, William Blackstone, Adam Smith, David Ricardo, and Jeremy Bentham.[14] The earlier

[13] Lochner v. New York, 198 U.S. 45, 53 (1905).

[14] For a sympathetic critique of this position, see Jacob Viner, The Intellectual History of Laissez Faire, 3 J.L. & Econ. 45 (1960), which ultimately rejects laissez faire for its inability to deal with the problems of monopoly and wealth distribution. Yet the regulation of monopolies was accepted by the versions of laissez faire that influenced the United States Supreme Court; and the Court showed little resistance to the introduction of progressive taxation—done, of course, with an eye toward the redistribution of income and wealth. See, e.g., Brushaber v. Union Pac. R.R., 240 U.S. 1 (1916). The purest versions of laissez faire never gained a foothold within the Supreme Court.

writers had all stressed, in their own way, three propositions. The first is that a system of strong property rights is necessary to allow individuals to plan for the future and to internalize the benefits of their own labor. The maxim that ''only those who sow should reap'' was agricultural in its origins, but its implications were far broader: the point was that no one will make any investment in resources unless he can be confident of a return. The ability to own and protect land over time allowed this condition to be satisfied. Any insecurity in the title to land, whether it came through taxation or regulation, would reduce the incentive to invest. The second proposition stressed by the earlier writers was that voluntary contract allowed individuals to pool their talents, combine their resources, and swap goods and services in ways that worked to their mutual benefit. The third was that the state had to develop a limited and consistent system of taxation and regulation to defend property rights and facilitate voluntary exchange. Included in those functions were the supply of infrastructure that was difficult for individuals to assemble through voluntary means, and the control and regulation of monopolies, first in connection with common carriers and other network industries, and later in connection with large industrial complexes that sought to use mergers and cartels to advance their ends.

The Progressives did not oppose the classical liberal agenda to the extent that it sought to supply infrastructure or to allow for taxation. But they clearly thought that the mix of public and private power had to be radically shifted in favor of broader government control to meet the challenges of an industrial age. On matters of taxation, for example, the Progressives rejected the ''benefit theory'' of taxation, which sought to tax individuals only to the extent that they benefited from the services government provided. They championed instead a system of progressive taxation, where the marginal rates increased with income, on the explicit ground that it would redistribute wealth from rich to poor, based on some ability to pay.[15] More important for these purposes, they thought that an antitrust law was not sufficient to deal with the fundamental imbalances of

[15] See generally Henry Simons, Personal Income Taxation (1938), for the most sophisticated statement. The progressive tax itself was upheld by the Old Court. See Brushaber, 240 U.S. at 25–26. I shall not discuss questions of taxation further here. For my general views, see Richard A. Epstein, Can Anyone Beat the Flat Tax?, 19 Soc. Phil. & Pol'y 140 (2002), answering no.

industrialization. To their minds, large firms in nominally competitive industries exerted a dominance of bargaining power with both workers and consumers. As Felix Frankfurter wrote: ''These are not days of Hans Sachs, the village cobbler and artist, man and meistersinger. We are confronted with mass production and mass producers; the individual, in his industrial relations, but a cog in the great collectivity.''[16]

To redress this imbalance, strong legislative measures were necessary in labor and consumer markets. The older belief in freedom of contract was thought to be manifestly unequal to the challenges of the day. What John Dewey wrote in 1927 of labor relations really applied to any transaction in which big business was on one side and the little man on the other:

> In general, labor legislation is justified against the charge that it violates liberty of contract on the ground that the economic resources of the parties to the arrangement are so disparate that the conditions of genuine contract are absent; action by the state is introduced to form a level on which bargaining takes place.[17]

One would never know from this gloomy assessment that between 1900 and 1930 real wages at the bottom of the economic pyramid turned upward by a factor of about two, while the number of hours worked by unskilled laborers declined from around sixty per week to fifty.[18] For all their insistence on realism, the Progressives never were concerned with the actual level of advancement of the ground. Rather, they took their self-evident propositions about the conditions of modern social life to validate the expansion of government intervention.

Those deep, well-nigh unshakable, convictions led Progressives to move on both fronts previously mentioned. Broad federal power was needed to forestall various forms of competition among states; and narrow conceptions of individual liberty, coupled with a broad view of state police power, were needed to cabin that dangerous ''formal'' conception of freedom of contract, given that ''genuine''

[16] Felix Frankfurter, Law and Order, 10 Yale Rev. 225, 233–34 (1920).

[17] John Dewey, The Public and Its Problems 62 (1927).

[18] U.S. Bureau of the Census, Historical Statistics of the United States: Colonial Times to 1957, at 91 (Series D 589–602).

freedom of contract was not possible due to the inequality of bargaining power between the individual and the new industrial firm. The doctrines of the Old Court, which stood in the path of ''progress,'' had to go by one means or another.

What follows is a quick trip through the demise of the traditional doctrines of limited federal power and broad individual rights. That demise opened the door for the Progressive agenda, which at root knew only one way to combat the social dangers against which the Progressives railed: the substitution of state-monopolies and cartels for competitive markets.[19] Let us begin with the commerce power and then move to individual rights.

III. The Ever-Expanding Commerce Power

Under the original conception of the Constitution, the states held the vast body of unenumerated powers to regulate the behavior of their citizens, while the federal government was one of enumerated powers to deal with such matters as bankruptcy, immigration, patents and copyrights, post roads, and, of course, commerce among the several states.[20] The exact meaning of the Commerce Clause was not tested until *Gibbons v. Ogden*[21] was decided in 1824, and even then the meaning was tested only by indirection, for at issue in that case was not the validity of any federal legislation but an act by New York that gave to Robert Fulton (who assigned his rights to Ogden) the exclusive right to use steam power in New York waters. Gibbons had set up a steam run from Elizabethtown, New Jersey, to New York City, and his claim was that the federal power over interstate commerce trumped the state power to assign monopolies on what was unquestionably a journey that crossed state lines. Chief Justice Marshall had to do some fast stepping in order to find a conflict between the federal laws and state power, which he did by holding that the 1793 federal licensing acts for ships in interstate waters were inconsistent with the state-created local monopoly.[22]

[19] I address these themes at length in Richard A. Epstein, Free Markets Under Siege (Institute of Economic Affairs 2004), reprinted in an American edition (Hoover Institution 2005).

[20] For a more detailed statement of my views, see Richard A. Epstein, The Proper Scope of the Commerce Power, 73 Va. L. Rev. 1387 (1987).

[21] 22 U.S. (9 Wheat.) 1 (1824).

[22] *Id.* at 211–12.

On the facts of this decision, he no doubt advanced a coherent procompetitive agenda. But by the same token, his major concern was with the delineation of national power, not economic theory. In all likelihood, that is, he would have decided the case in favor of federal power even if the United States had sought to create a monopoly for an interstate run that a state opposed.

Yet there were limits to the extent to which Marshall was prepared to promote federal power, for his view of the commerce power only touched ''commerce,'' and commerce ''among'' the several states. As he wrote concerning the latter, ''Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one.''[23] The point of this was to make it clear that there were forms of ''commerce''—by which he meant navigation, trade, and, more generally, business intercourse of all sorts—that were wholly within a given state, and to them the federal commerce power did not reach. The point here was critical, for if all commercial transactions counted as commerce among the several states, then the United States could have limited contracts for the sale of slaves within the antebellum south—which, however welcome on moral grounds, would have destabilized the Union long before 1860.[24] But once it was accepted that this domain of *intrastate* commerce lay beyond the reach of federal power, then it necessarily followed that those productive activities one step removed from commerce, including manufacture, mining, and agriculture, fell outside the scope of the federal commerce power. It is easy to infer that this was Marshall's understanding, for he also insisted that states, in exercise of their police power, had the exclusive right to conduct the inspections of goods that either preceded or followed the shipment

[23] *Id.* at 194.

[24] Note that Article I, Section 9, Clause 1 provides that ''[t]he Migration or Importation of such Persons as any of the states now existing shall think proper to admit, shall not be prohibited by the Congress prior to [1808].'' U.S. Const. art I, § 9, cl. 1. That clause was protected from amendment under Article V. Only after the expiration of the provision could Congress regulate this trade under its power to control foreign commerce. It is odd to think that before 1808 the Commerce Clause allowed Congress to regulate in-state sales. The issue here is not the ugliness of slavery. It concerns what the knowledge of slavery does to highlight key constitutional structures. Stated otherwise, the extension of citizenship to all former slaves under Section 1 of the Fourteenth Amendment does not change the scope of the commerce power.

of goods in commerce.[25] The marginal case on this view was whether a journey that took two ships instead of one could count as a single interstate journey subject to federal regulation, if the entire trip crossed state lines, as was later held in *The Daniel Ball*.[26]

Thus, the decision in *Gibbons* upholding federal regulation of commerce across state lines was hostile to state regulation that could interfere with the operation of a national competitive market. That view survived and, indeed, flourished during the Progressive Era,[27] often under the judges who, unlike Marshall, believed in the inexorable expansion of federal power. The important movement from *Gibbons* that expanded federal regulatory power took place in two stages. First, the Court rejected Marshall's proposition that there was a discrete subset of commerce that could be described as internal to any state. That change was completed before the New Deal. Second, that principle was later expanded to all forms of manufacture and agriculture. That task was completed during the New Deal.

Concerning the first step, the key decision came in the *Shreveport Rate Cases*,[28] which allowed the Interstate Commerce Commission to regulate the rates of an in-state railroad that was competing with an interstate run.[29] The clear impact of this decision was a reduction in the level of competition that could otherwise have taken place if the Commerce Clause had been kept to its earlier contours. The anticompetitive nature of this expansion was made even more clear by the decision nearly a decade later in *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy Railroad Co*.[30] That decision allowed the regulation of a wholly intrastate line that was *not* in

[25] Gibbons, 22 U.S. (9 Wheat.) at 203 (''They [inspection laws] act upon the subject before it becomes an article of foreign commerce, or of commerce among the States, and prepare it for that purpose.'').

[26] 77 U.S. (10 Wall.) 557, 565 (1870).

[27] See, e.g., Dean Milk Co. v. City of Madison, 340 U.S. 349, 356 (1951) (invalidating local ordinance that required all milk sold within the city to be processed within fifty miles of Madison, Wisconsin); H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 530–31, 545 (1949) (invalidating licensing system that prohibited new plants in order to protect local interests); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523–25 (1935) (striking down differential tax on out-of-state milk intended to stabilize prices).

[28] 234 U.S. 342 (1914).

[29] *Id*. at 350–52.

[30] 257 U.S. 563 (1922).

competition with an interstate run; it introduced a general rate-of-return regime for the entire railroad system—government cartelization.[31] The simple insight here is that the broader the scope of the federal power, the more comprehensive and effective the federal cartel. The Commerce Clause was a two-edged sword, which during this period was used to increase the scope of national cartelization along lines congenial to the Progressives rather than to take competition into the bowels of the state.

Note, however, that these railroad cases left untouched the distinction in *United States v. E.C. Knight Co.*:[32] ''Commerce succeeds to manufacture, and is not a part of it.''[33] The same of course applied to agriculture and mining. Those limitations made it harder for the United States government to exert its power in favor of two groups that wielded inordinate influence in the Progressive period, labor and agriculture. Both groups benefited from the first Progressive initiative, section 6 of the Clayton Act, which held, in so many terms, that combinations among workers or farmers did not amount to combinations ''in restraint of trade.''[34] But that protection against private suits did not protect these organizations against defection by their own members; nor did it prevent outsiders from entering the market and lowering wages or lowering the prices for agricultural commodities. Those objectives required the ability to restrict entry into the market. For labor markets, the National Labor Relations Act of 1935[35] achieved that goal because it imposed on management a duty to bargain with

[31] *Id*. at 588–90.

[32] 156 U.S. 1 (1895).

[33] *Id*. at 12. *E.C. Knight* itself could be opposed on its facts given that the merger involved corporations in different states. But the major premise was good even if the minor premise was bad, and long before the New Deal, the justices of the Old Court, dealing with an issue that Chief Justice Marshall had not anticipated, accepted that the commerce power reached nationwide cartels. See, e.g., Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 241–42 (1899).

[34] 15 U.S.C. § 17 (2000) (''The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.'').

[35] 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–69).

a union, as the exclusive representative of employees, if that union had been selected in local elections. And to sustain the statute, the Supreme Court in *NLRB v. Jones & Laughlin Steel Corp.*[36] overturned quite recent case law[37] to hold that all manufacture was part of interstate commerce because of the effects that local disturbances in production could have on nationwide activities[38]—a point that was as true in 1787 as it was in 1937, but apparently had gone unnoticed for 150 years.

This expansion of federal power continued inexorably with respect to agriculture, where the New Deal policy was to create strong output restrictions in an effort to keep prices above world market levels. But the effort to regulate either the prices or the quantities of grain and dairy products shipped in interstate commerce would not be equal to the task, as savvy farmers shifted to various in-state uses of their grain rather than suffer the loss of production. Hence the Court inverted the maxim of Chief Justice Marshall: no longer was the commerce power *restricted* to *that* commerce that involved more states than one; instead, it was *extended* to *all* commerce, period. Thus, in *United States v. Wrightwood Dairy Co.*,[39] the Court held that Congress could regulate the sale of milk within a single state.[40] In *Wickard v. Filburn*[41] the Court finished the job by holding that Congress could limit farmers' right to feed their own grain to their own cows on the ground that the amount of grain they consumed locally could influence the interstate price of grain.[42] The objective of the scheme was to keep the price of grain in the United States at $1.16 per bushel when the world price was $.40.[43] The same administration that could enforce the antitrust laws with one breath could with another create the very cartels that are exhibit A of illegal collective action (inviting treble damages and criminal sanctions under the

[36] 301 U.S. 1 (1937).

[37] See A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (overturning codes of fair competition for poultry industry).

[38] 301 U.S. at 36–41.

[39] 315 U.S. 110 (1942)

[40] *Id*. at 121.

[41] 317 U.S. 111 (1942).

[42] *Id*. at 127–29.

[43] *Id*. at 126.

antitrust laws, which the Progressives also favored). The labor and agriculture cases make clear how the Progressive program operated on the ground. All the talk about fair relationships between parties had only one real consequence: the preference for cartels over competition, even when every standard economic theory cries out for the opposite. The source of the error was the deep belief that firm size is the key determinant of prices and wages, when in fact the number of available alternatives is, and always has been, the key. The images of big-little conflicts that dominated the likes of Frankfurter and Dewey translated into deeply antisocial results.

There has been much talk of a revival of the Commerce Clause limitation because the Supreme Court has in the last decade struck down some statutes as outside the scope of the commerce power. But the current synthesis leaves matters largely unchanged, for the decision in *United States v. Lopez*,[44] which invalidated a Texas law that forbade the possession of guns near schools,[45] and that in *United States v. Morrison*,[46] which invalidated a provision of the Violence Against Women Act that would have created federal causes of action for local crimes against women,[47] are in fact only tiny deviations of doctrine. Both decisions affirmed the basic teaching of *Wickard* regarding economic affairs, and the Supreme Court has just reaffirmed that position emphatically in *Gonzales v. Raich*,[48] which dealt with claims of state autonomy allowing the medical use of marijuana that was either home-grown or supplied for free from in-state sources.[49] Today, the strong impulse to comprehensive legislation is not only a Progressive inclination. It also dominates modern social conservative thought, which is why defenders of the classical liberal tradition of limited government, like myself, feel ever more isolated now that both political parties have thrown in the towel on the Commerce Clause limitations. But justices are not politicians: why they should *want* to move heaven and earth to give an expansive

[44] 514 U.S. 549 (1995).

[45] *Id*. at 583.

[46] 529 U.S. 598 (2000).

[47] *Id*. at 614–17.

[48] 125 S. Ct. 2195 (2005).

[49] *Id*. at 2200.

reading of the Commerce Clause to prop up nationwide cartels is a question that the Progressives have never satisfactorily answered.

IV. Individual Rights and the Police Power

The second set of issues on which the Old Court drew the ire of the Progressives involves the interaction between liberty and property on one hand, and the legitimate scope of the police power on the other. As noted earlier, throughout the Progressive Era, the key question never concerned the existence of the police power, but rather the scope of its operation as recognized by the Old Court. For these purposes, it is correct to say that the dominant impulse of the Old Court insofar as it related to the regulation of economic affairs, broadly conceived, was more libertarian than it was conservative. The Court certainly showed little sign of being influenced by any Social Darwinist or religious attitudes, for example.[50] The judges who operated within that framework did not treat the phrase ''safety, health, morals, and [the] general welfare'' as being so broad as to authorize anything, for such a treatment would have meant that an unexpressed police power could nullify explicit constitutional protections. That was most definitely not the case in this period, and the point is most clearly brought home by seeing the kinds of government laws and actions that fell *outside* the scope of the police power. Three types of statutes immediately come to mind: those that work a confiscation of property of firms not ''affected with the public interest''; those ''labor'' statutes that are defined in opposition to statutes that deal with health and safety; and statutes concerning the right of labor organizations to engage in collective bargaining on behalf of employees.

A. Businesses Affected with the Public Interest

In dealing with this issue, it is useful to note why this category of business was thought special by the Old Court. The question was whether the state had the power to regulate the rates that certain firms charged for their goods and services. The traditional English view on this subject did not rest on constitutional grounds, but nonetheless became the basis of the American constitutional law on the subject. The doctrine originated with Sir Matthew Hale, writing

[50] James W. Ely Jr., The Fuller Court 192–93 (2003).

in the seventeenth century,[51] and his views were adopted almost wholesale by Lord Ellenborough in *Allnut v. Inglis* in 1810.[52] The basic position was that in most markets everyone is entitled to charge what the market will bear, but that this principle did not apply in those cases in which a firm had either a legal or a natural monopoly. At that point some form of rate regulation was permissible to counteract the use of monopoly power, and much ingenuity had been used by both the Old Court and the Progressives to decide exactly what form of rate regulation was appropriate. There is room for debate on a question for which there is really no first-best answer. The Supreme Court over the years has had learned debates over which formula best regulates these activities and to this day gives extensive latitude to the scope of their regulation, even though it is keenly aware of the risk that rates could be set so low as to confiscate the investment that private firms commit to the regulated industry.[53]

It should be evident, therefore, that no member of the Old Court thought that the conception of businesses affected with the public interest was empty. Regarding such firms, the narrower conception sought to limit their power to engage in monopolistic practices, either alone or in conjunction with others. The upshot was that conservative justices such as Rufus Peckham were prepared to enforce the Sherman Antitrust Act against nationwide cartels.[54]

[51] Sir Matthew Hale, De Portibus Maris, reprinted in A Collection of Tracts Relative to the Law of England (Francis Hargrave ed., 1787). The original work was written around 1670.

[52] 12 East. 527, 530, 104 Eng. Rep. 206, 208 (K.B. 1810).

[53] For a summary of these views, see Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989). For the view that the system of regulation undercuts dynamic innovation that uses technology to undercut natural monopolies, see Harold Demsetz, Why Regulate Utilities?, 11 J.L. & Econ. 55 (1968); Richard A. Posner, Natural Monopoly and Its Regulation, 21 Stan. L. Rev. 548 (1969). One vindication of this view is the unfortunate history of rate regulation under The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 58 (codified at 47 U.S.C. § 151 et seq.). When the Act was passed, the local Bell Companies had monopolies over ''the last mile'' of telephone service. Today that monopoly has been eroded not only by cell phones, but also by Internet and cable providers, which will soon be joined by electricity providers. Modern technology has led to the fusion of what used to be separate industry spaces, leading to enhanced competition within the broader market. In the meantime, the system of direct regulation of landlines has created a nightmare that could have been avoided with a little bit of patience.

[54] Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 241–45, 247–48 (1899).

Accordingly, both state and federal court judges accepted systems of rate regulation against natural monopolies.

The key question, therefore, was whether these restrictions would be enforced against those firms that did not possess monopoly power. The Progressives generally were dismissive of the view that regulation was not needed in cases of this sort. A 1932 case that shows the differences in the two positions was *New State Ice Co. v. Liebmann*,[55] where the Old Court, speaking through Justice Sutherland, invalidated a statute that required any new entrant into the ice business to obtain a certificate of public interest and necessity from the state.[56] The Old Court's view stems from the sensible conclusion that the only reason why such permission might be denied is to build a legal monopoly on behalf of the first entrant into any market. Justice Brandeis, in dissent, offered up an eloquent but misguided argument to the effect that the state has a legitimate interest in protecting producers against the ''ruinous competition'' of new entrants even though the very survival of a market economy depends on the ability of new firms to win customers away from their established rivals by offering a mix of lower prices and superior quality.[57] But the urge for cartelization that drove the Progressives on Commerce Clause issues carried over here as well.

The coup de grace came with *Nebbia v. New York*,[58] which involved a challenge to a New York statute that imposed minimum prices on milk in order to stop ''ruinous competition'' in the dairy industry. The Supreme Court, through Justice Roberts, sustained this exercise of government power on the ground that, for constitutional purposes, it made no difference whether the legislation was aimed at limiting the prices that could be charged by a natural monopoly or at propping up the prices of a competitive industry.[59] The adverse consequences of this misguided policy should not be difficult to see. Consumers, many of whom were in dire straits, now had to pay more for dairy products. And farmers who might have exited the industry in an orderly fashion were now encouraged to hang on

[55] 285 U.S. 262 (1932).

[56] *Id*. at 278–80.

[57] *Id.* at 292 (Brandeis, J., dissenting).

[58] 291 U.S. 502 (1934).

[59] *Id*. at 534–39.

through thick and thin, in ways that impeded the rationalization of the dairy industry in the face of rising productivity. The upshot was another round of agricultural and dairy subsidies with the usual distortions: extra burdens on those taxed, and over-production by those receiving the tax. The anticompetitive schemes that discriminated against foreign sellers were not tolerated under the dormant Commerce Clause, but under an expanded conception of the police power those equally counterproductive schemes that impacted local and out-of-state sellers alike received a constitutional imprimatur, and the dislocations that have followed dominate the Byzantine field of agricultural subsidies to this day.

B. Wages and Hours Regulation

A second great battle between the Old Court and the Progressives was over labor regulation—specifically, over state initiatives that sought to impose maximum hours or minimum wages for industrial workers in various industries. Within the classical framework, such regulations could not be justified by claiming that the relevant businesses were affected with the public interest, for there was virtually no evidence of natural monopolies in, for example, the bakery business. But there was an extended question of whether the regulations could be justified as health or safety measures under the police power. One defensible view is that the regulations are justified only in those cases where the harms in question are to strangers, as in nuisance cases, or where the dangers to the protected class of workers stem from undisclosed conditions that pose dangers for people in their ordinary employment. That position, which leaves it to workers to decide the level of known risks that they wish to take as part of their employment, is quite consistent with general principles of laissez faire. And it was defended on just those grounds by its most diligent advocates.[60]

But the members of the Old Court did not push this line consistently, for in areas of dangerous employment, they were in general willing to override freedom of contract even when informed parties

[60] See, e.g., Smith v. Baker & Sons, [1891] A.C. 325, 344 (Lord Bramwell, J.) (''It is a rule of good sense that if a man voluntarily undertakes a risk for a reward which is adequate to induce him, he shall not, if he suffers from the risk, have a compensation for which he did not stipulate.'').

might have been prepared to assume the risk.[61] The Federal Employer Liability Act, which removed the defense of assumption of risk for railroad employees involved in accidents, was challenged on the ground that it applied to intrastate journeys that were (at least before 1914 and the *Shreveport Rate Cases*)[62] arguably in intrastate commerce, but no challenge was mounted to the substantive provision that removed the assumption of risk defense on what was indisputably, after all, a matter of safety. And it is possible to find many cases in this period that upheld decisions to override the common law's fellow-servant rule (whereby a firm could not be held vicariously liable for the injuries that one worker suffered at the hands of a fellow servant).[63] It was similar reasoning that led Justice Pitney to write a unanimous opinion for the Court sustaining the constitutionality of the New York workmen's compensation statute in *New York Central Railroad Co. v. White*.[64] The decisions here are hardly remarkable. Once health and safety entered as justifications under the police power, the terms were construed in their ordinary sense.

In dealing with these issues, there is good reason to think that the Old Court may not have placed the various safety statutes under sufficient scrutiny.[65] Although the point is not widely appreciated, the original workers' compensation plans were not introduced by statute but were entered into on a voluntary basis by various firms in the mining and transportation industries, where the high rate of accidents in large establishments made it possible to bear the fixed costs associated with putting one of these plans into action. The celebrated Wainwright Commission recommended their mandatory

[61] See, e.g., Holden v. Hardy, 169 U.S. 366, 393–96 (1898) (upholding maximum hour law for miners).

[62] See note 28, *supra*.

[63] See, e.g., Second Employer Liability Cases, 223 U.S. 1, 50 (1912). For the leading exposition of the fellow-servant (or common employment rule), see Farwell v. Boston & Worcester R.R. Corp., 45 Mass. 49 (1842) (Shaw, J.).

[64] 243 U.S. 188, 200–02, 205 (1917).

[65] For key elements of this history, see Richard A. Epstein, The Historical Origins and Economic Structure of Workers' Compensation Law, 16 Ga. L. Rev. 775 (1982); Price V. Fishback, Liability Rules and Accident Prevention in the Workplace: Empirical Evidence from the Early Twentieth Century, 16 J. Legal Stud. 305 (1987); Price V. Fishback & Shawn Everett Kantor, A Prelude to the Welfare State: The Origins of Workers' Compensation (2000).

adoption in New York State.[66] But in the famous case of *Ives v. South Buffalo Railway Co.*,[67] the New York Court of Appeals struck down the initial version of the law on state constitutional grounds.[68] This reversal led to a prompt change in the New York Constitution to allow workmen's compensation statutes. But the willingness of large players (such as General Electric, the B&O Railroad, and International Harvester) to support these schemes should not be read as proving that whatever schemes enlightened firms adopt voluntarily should be imposed on others as a matter of statute. The cost of implementing these plans often makes sense for large firms with team production, which these companies are. The size matters because it allows the firm to spread the costs of introducing the plan over many workers. The team production matters because these firms do not suffer an efficiency loss from collectivizing the loss: it is less likely that any worker will be the sole cause of his own loss. Little firms are not likely to have either of these advantages.[69] The economic logic shows how even health and safety statutes can garner support for anticompetitive reasons. But the Old Court did not wish to deal with these mixed motives in cases challenging laws that had a clear and evident relation to workplace safety.

When the discussion turned to maximum hours and minimum wage laws, the question of mixed motivations remained, but the connection to safety was more attenuated and the anticompetitive and paternalistic aspects of the statutes were more evident. The famous 1905 decision in *Lochner v. New York*[70] sustained a constitutional challenge to a criminal conviction for violating a statute that provided:

> No employee shall be required or permitted to work in a biscuit, bread, or cake bakery or confectionery establishment

[66] The commission, chaired by J. Mayhew Wainwright, produced the *First Report to the Legislature of the State of New York by the Commission Appointed Under Chapter 518 of the Laws of 1909 to Inquire into the Question of Employer's Liability and Other Matters* (1910).

[67] 99 N.E. 431 (N.Y. 1911).

[68] *Id*. at 448.

[69] For a discussion of these cross-subsidies with the Occupational Safety and Health Administration (OSHA), see Ann P. Bartel & Lacy Glenn Thomas, Predation Through Regulation: The Wage and Profit Effects of the Occupational Safety and Health Administration and the Environmental Protection Agency, 30 J.L. & Econ. 239 (1987).

[70] 198 U.S. 45 (1905).

> more than sixty hours in any one week, or more than ten hours in any one day, unless for the purpose of making a shorter work day on the last day of the week.[71]

Clearly there were signs that something was amiss from the face of the statute itself. It applied not to all bakers, but only to those who worked ''in a biscuit, bread, or cake bakery or confectionery establishment.''[72] It exempted self-employed bakers, even though they faced the same health risks.[73] And the provision on maximum hours follows in the statute one that regulates sleeping quarters.[74]

This last point is telling because the immigrant bakers in Mr. Lochner's establishment worked more than sixty hours per week because they had to quite literally ''sleep on the job'' as part of their routine work cycle, during which time any exposure to dust and other particles would be at a minimum. The statute would have no effect on firms that used different modes of production—one crew bakes bread in the evening, say, and another packs and distributes it in the morning. The statute looks as though its apparent paternal gaze was really an effort to upset the competitive balance between different firms, yet that did not stop the Progressives from denouncing the decision for its ''ill-conceived'' interference in the workplace. Needless to say, *Lochner* was an easy casualty when the Court upheld the Fair Labor and Standards Act of 1938,[75] which imposed major restrictions on all forms of employment practices. Once again, the net effect of these decisions is to allow firms and unions to resist competition from new upstarts that might offer more efficient modes of production.

The decision in *Lochner* was close because the safety and health issues could not be ignored. It was for that reason that the dissent of Justice Harlan went to such lengths to validate this statute as a

[71] *Id.* at 46 n.1 (quoting 1897 N.Y. Laws art. 8, ch. 415, § 110).

[72] *Id.*

[73] Brief of Appellant at 8, Lochner v. New York, 198 U.S. 45 (1905) (No. 292).

[74] *Id.* (quoting 1897 N.Y. Laws art. 8, ch. 415, § 113) (''*Wash-rooms and closets; sleeping places.*—. . . No person shall sleep in a room occupied as a bake-room. Sleeping places for the persons employed in the bakery shall be separate from the rooms where flour or meal food products are manufactured or stored.'') (emphasis in original).

[75] United States v. Darby, 312 U.S. 100, 116–17 (1941) (overruling Hammer v. Dagenhart, 247 U.S. 251 (1918)).

health measure, in sharp contrast to Justice Holmes' dissent, which inveighed against the Court for its reflexive adherence to laissez faire, but which could not command the support of even one other justice. If the connection between maximum hours legislation and safety is tenuous at best, the connection between a minimum wage statute and safety is altogether absent, which makes such statutes' anticompetitive aspects all the more clear: workers with minimum skills cannot compete for a place on the first rung by offering their services at lower rates. This anticompetitive effect is the best justification for why *Adkins v. Children's Hospital*,[76] which struck down a minimum wage law,[77] was defensible as a matter of first principle, then as now.

Nor did the Old Court's effort to distinguish between health and safety statutes on one hand and ''labor'' statutes on the other stop with minimum wage laws. In a series of well-publicized decisions, including *Coppage v. Kansas*,[78] the Old Court struck down on constitutional grounds statutes barring ''yellow-dog'' contracts that required workers not to join unions while they remained in the service of their employer.[79] In addition, as a common law matter, in *Hitchman Coal & Coke Co. v. Mitchell*,[80] the Old Court held that employers were entitled to obtain an injunction against any union that sought to induce individuals to join (or even promise to join) a union while remaining on the job in violation of that stipulation of undivided loyalty.[81] Here again the decision makes good sense. The tort of inducement of breach of contract is carefully limited so that anyone is entitled to offer a higher wage to lure an at-will employee away from his or her current position. But the yellow-dog provision has the important social advantage that it cuts down on the power of a labor union to organize a devastating strike that can be timed to generate maximum disruption of the business. Workers of course remain free to leave their jobs at any time to throw their lot in with the union, but their gradual departure will allow replacements to

[76] 261 U.S. 525 (1923).

[77] *Id*. at 561–62.

[78] 236 U.S. 1 (1915).

[79] See, e.g., *id*. at 26; Adair v. United States, 208 U.S. 161, 179–80 (1908).

[80] 245 U.S. 229 (1917).

[81] *Id*. at 261–62.

be hired in a wider labor market. There is no evidence whatsoever that Justice Pitney extended the tort of inducement of breach to impose special burdens on unions. Nor is there any public policy reason to dislike a result that strengthens competitive forces in labor markets. As noted earlier, in the long run workers benefit from these rules, as the consistent upward movement in wages and downward movement in hours can be traced to only one cause: the consistent increase in productivity translated into high wages just as the old school economists such as Smith and Ricardo had argued.

At this point, it is imperative to mention one case in which the Old Court deviated, with tragic consequences, from its effort to rein in the scope of the police power. On matters of race relations, the Court did not take the narrow view of the police power that it adopted in *Lochner*; rather, it used a far broader conception to sustain racial segregation in transportation, marriage, and, in *Plessy v. Ferguson*,[82] schooling. The discussion of the race cases in Freund is all too cryptic, occupying only five pages of the 800-page text.[83] It expresses some uneasiness but no outrage at a set of decisions that depended on a broad conception of the police power to hold that the separation of the races was little different from the separation of the sexes, and could be justified in order to protect against the dangers of miscegenation, mixed carriage on rails, or integrated schools. The level of deference here is far greater than in *Lochner*. The only opposition that Freund expressed to these decisions was that they could operate in an unfortunate fashion as a limitation on freedom of association, which of course is liberty of contract in yet another guise.[84]

The tension between the *Lochner* and the *Plessy* lines of thought posed a dilemma for Progressives. Once committed to legislative supremacy, they could do little to oppose *Plessy* at the same time they championed the reversal of *Lochner.* It is a pity that Progressives did not see in this any reason to slow down their attacks on the classical liberal conception that speaks of the protection of the like liberties of all. Clearly, that rule would allow for freedom of association and would call into question any exercise of public power that

[82] 163 U.S. 537 (1896).

[83] Freund, *supra* note 8, at 717–21.

[84] *Id.* at 720.

discriminates among individuals, requiring a clear public justification related to health and safety. But that was not meant to be. It was, after all, a Progressive and former Princeton professor and president, Woodrow Wilson, who led the successful effort to segregate the federal civil service once he became president of the nation, and he did so without any judicial resistance, precisely because the decision in *Plessy* gave such a broad account of the police power as to foreclose judicial challenge. At this point, the dangers of ''science'' and ''expertise'' should become clear. They allow for a degree of discretion in government behavior that can be put to bad as well as good purposes. Nor did the Progressives stay their hand only on race relations. In *Meyer v. Nebraska*[85] and *Pierce v. Society of Sisters*,[86] it was members of the Old Court who gave a broad definition of liberty to protect the rights of parents and children as well as private and religious schools. Justice Holmes had followed his *Lochner* line and was willing to allow the state to limit foreign language instruction,[87] as was Felix Frankfurter who, while opposed to the legislation in *Meyer* and *Pierce,* was reluctant to advocate striking it down lest he slow down the judicial demise of *Lochner, Adair,* and *Coppage.*[88]

So in the end, all other interests were subordinate to the labor questions. On these matters, *Lochner, Adair,* and *Coppage* were anathema to the Progressive movement, which saw in labor relations the key test of its conviction that state power on the side of labor was necessary to redress the imbalance of power that existed in labor markets. To make their case, the Progressives pounded on two related claims. The first was that the narrow (for so they seemed) categories of the police power under the old law did not reflect the full nature of the public interest that properly limited the scope of property and liberty. In their view a worker who had a weaker bargaining position than the employer might not be able to advance himself through private agreement. Progressives insisted that the Old Court had held to the contrary based upon outmoded and weak

[85] 262 U.S. 390, 403 (1923) (striking down statute that forbade the instruction of foreign languages in schools to students who had not passed the eighth grade).

[86] 268 U.S. 510, 536 (1925) (striking down statute that banned private education, secular or religious, for children between eight and sixteen years of age).

[87] Bartels v. Iowa, 262 U.S. 404, 412 (1923) (Holmes, J., dissenting).

[88] Felix Frankfurter, Can the Supreme Court Guarantee Toleration?, The New Republic, June 17, 1925, at 85.

formal or mechanical claims that did not stand the test of modern social science. In arguments that prefigured the rise of the administrative state, they claimed that good science leads to the abandonment of old formalities and to an increased trust of experts in dealing with a wide range of social and economic issues. The theme was expressed by Freund, and even more forcefully by Roscoe Pound in his well-known essay *The Need of a Sociological Jurisprudence*.[89] The same theme was of course adopted by Louis Brandeis in his famous brief in *Muller v. Oregon*[90] in support of maximum hours legislation for women—yet another misguided result that should not have survived the Progressive period because the ostensible protection it provided worked chiefly to prevent competition by women.

The Progressive cause, then, must make peace with the deleterious consequences of the laws it supported. But oddly enough Progressives were often more concerned with attacking laissez faire than with developing their own substantive theories of market behavior. For example, the explicit target of Roscoe Pound was ''[t]he individualist conception of justice as the liberty of each limited only by the like liberties of all,'' which, he noted, sociologists regarded as the celebration of an outmoded conception of ''legal justice'' in opposition to the richer sociological conception of justice to which the legal system should aspire.[91] But Pound and his followers had not a clue as to what a system of sociological justice would entail, or why it performed better than the so-called formal or legal justice it aimed to displace. Not only could Progressives not explain the improvement in wages and prosperity under the regime they despised, but they could not offer any theoretical explanation for their broad conception of inequality of bargaining power and employer exploitation. It was clear that most employers did not enjoy any position of monopoly power and that the Old Court had accepted the application of the antitrust laws to cartel-like behaviors. But while the Old Court had applied the same conception to labor and management

[89] Roscoe Pound, The Need of a Sociological Jurisprudence, 19 The Green Bag 607 (1907) [hereinafter Pound, Sociological Jurisprudence]; see also Roscoe Pound, Mechanical Jurisprudence, 8 Colum. L. Rev. 605 (1908).

[90] Brief for Defendant in Error, Muller v. Oregon, 208 U.S. 412 (1908) (No. 107), in Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law 63–178 (Philip B. Kurland & Gerhard Casper eds., 1975).

[91] Pound, Sociological Jurisprudence, *supra* note 89, at 612, 615.

alike,[92] the Progressives had by 1914 secured the exemption of labor and agriculture from the antitrust laws altogether—a clear case of partisan advantage covered up by sociological high jinx that took no note of the adverse social consequences of monopoly behavior.

With monopoly to one side, the question is whether workers would take jobs that left them worse off than they were before. To avoid that unhappy result, they do not need to form coalitions. They simply need to have the power to refuse to deal, which was a cardinal element of the synthesis of the Old Court. As Justice Pitney (who on these issues was far more astute than Justices Holmes and Brandeis combined) insisted in *Coppage v. Kansas,* contracts for labor, like other contracts, were formed only when each side felt that it was better off than before.[93] That conclusion holds, moreover, notwithstanding any real or apparent disparity in wealth at the outset of the transaction. And any effort to insist that the worker receive, as by some unexplained metric, the larger fraction of the surplus generated by employment contracts is sure to disrupt one mechanism of progress on which overall prosperity depends. Mutual gain does not depend on the parity of wealth of the parties in their initial positions. No matter how great the disparity in wealth, the poorer party will not enter into a transaction that makes him worse off than before. Remember, despite their ''empirical'' and ''sociological'' bent, it was the Progressives who lacked any overall social conception of justice. They were concerned only with union members; not with those excluded from unions; not with those who paid higher prices; and not with those whose welfare was disrupted by strikes and other forms of job actions.

None of this of course had any effect on the defenders of unionization. Felix Frankfurter expressed the dominant position well when he insisted: '' 'Collective bargaining' is the starting point of the solution and not the solution itself. This principle must, of course, receive ungrudging acceptance. It is nothing but belated recognition of economic facts—that the era of romantic individualism is no more.''[94]

However misguided it was, this campaign enjoyed success when the main causes of the Depression—the currency deflation and the

[92] See Loewe v. Lawlor, 208 U.S. 274 (1908).

[93] 236 U.S. 1, 17 (1915).

[94] Felix Frankfurter, Law and Order, *supra* note 16, at 233–34.

Smoot-Hawley tariff—wreaked massive damage to the overall economic system. But those measures were no product of industrialization as such; rather, they were calculated policy choices by Congress that were inconsistent with the views of the Old Court, but beyond its capacity to review. The tariff marked a massive interference with voluntary exchange, and deflation counted as a major, if tacit, transfer of wealth from debtors (who have to pay back fixed denomination loans with more valuable dollars) to creditors.

Nonetheless, such was the dominant Progressive ethos of the time that the Progressives thought that the best way to deal with these legislative interventions was to disrupt the system of voluntary exchange yet a third time by the adoption of rules that displaced the pro-competitive constitutional rules of the Old Court with major systems of monopoly power. The Norris-LaGuardia Act of 1932 declared that the yellow-dog contract was against public policy, and rested that view on a finding that freedom of contract was not a viable ideal in the absence of full equality of bargaining power.[95] In a similar vein, a key finding of the National Labor Relations Act of 1935 (NLRA) took a page out of the Progressive handbook:

> The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association, substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.[96]

This finding was an effort to allow labor unions to stabilize the wages of their members, but to do so in a fashion that put all the burden of economic fluctuation on other workers and firms. The Act offers no explanation as to how free competition could be the source of depression, or why the steady increase in wages should not be attributed to market forces. And its effort to stabilize wage rates within industries amounts to little more than an effort to extend

[95] 29 U.S.C. §§ 102–103.

[96] 29 U.S.C. § 151.

the scope of cartels across the full range of markets. As a statement of economic principle, the entire NLRA is riddled with economic blunders whose effect is to introduce a costly system of collective bargaining, replete with organizational struggles and strikes. Yet there is not a single word on how any of these measures would, or could, counter the effects of tariffs and deflation.

There is, on balance, little doubt that the Supreme Court, which sustained this statute, has read it as it was intended, giving full effect to the important modifications introduced by the Taft-Hartley Act that control the ability of unions to enter into various secondary boycotts of those firms that do business with another firm that is subject to a unionization drive or strike. And yet, the rate of unionization continues to plunge from a high of about thirty-five percent of the private sector in the 1950s to well under ten percent today. Many try to find in this decline some story about the efforts of judges and firms to subvert the Act, but that claim rings hollow given the remarkably constant interpretation the Act has received over the past fifty years. Rather, the decline in unionization should be read as a vindication of the view that most unions do not supply workers with value that equals the costs associated with membership. For the hope of getting a short-term profit, a union worker takes the risk that a strike will bring down an entire firm (as happened, for example, with Eastern Airlines) or that high labor costs will force firms into bankruptcy (as happened with United Airlines) or that foreign imports will simply take the ground out from American firms struggling to cope with inefficient labor practices and high wage costs. Make no mistake about it: Strong labor unions must work with their unionized employers to keep high tariff walls around their businesses. But over time these will erode through end-runs that even the wary cannot foresee. Still, it seems as though neither courts nor legislatures will learn the one lesson that this history has to teach, which is that the overinflated claims of the Progressives make no sense today. Many will give the Progressives the benefit of doubt on these issues by saying that unions are not necessary today even though they were critical to social advancement years ago. But that claim to social relativism should fall on deaf ears unless someone is prepared to explain which local circumstances made monopoly superior to competitive industries.

V. Conclusion

At the end of the day, no matter where we look, it is this one stark question—whether we have a constitutional preference for competition or monopoly—that defines the difference between classical liberalism and the Old Court on one hand and modern social welfare liberalism and Progressivism on the other. The blunt truth here is that for all their efforts to cloak themselves in advanced learning and social sophistication, the Progressives were wrong on just about every point on which they differed from their classical liberal rivals. In the end, the most secure route to a safe and prosperous society lies not in the rejection of the principles of Locke, Smith, Hume, and Bentham as being the work of ''romantic individualists.'' Rather, it lies in understanding that their powerful and coherent theories can be applied with precision and understanding to circumstances that lay far outside their comprehension. The invisible hand, as it were, has its place in intellectual history.