**The Jacobs Era in U.S. Labor Standards Law and Regulation, 1885-1898**

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ALBANY, Jan. 20, 1885.—“The Court of Appeals decided to-day that the Tenement House Cigar bill, passed last Winter, is unconstitutional. [[1]](#footnote-1)

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For many cigar makers in the 1880s, the New York State high court’s decision in the In re Jacobs case was a bitter disappointment. Against these workers’ hopeful expectations, the Court of Appeals struck down a state law passed in 1883 and again in 1884 that banned tenement house production of cigars. Reversing a lower state court decision that had upheld the act, New York’s high court held that this early example of workers’ protective legislation violated the rights of tenement owners and tenement cigar makers to contract freely for their property or their labor.[[2]](#footnote-2) This ruling marked a fateful proclamation of a legal workplace order governed solely by unregulated competition between putative legal equals in which several kinds of regulation of labor standards were for some years thereafter rarely permitted.[[3]](#footnote-3)

 The Jacobs precedent opened a regime of arch individualism in the legal and social relations of this and other forms of commodity production. In striking down the Anti-tenement law, the state’s high court also drastically curtailed the exercise of regulatory powers of the several states known as the police powers. It established the doctrine of laissez faire as the standard to be observed in the broad area of social relations that included measures intended to protect against job hazards and regulate working hours. Between 1885 and the turn of the century, the Jacobs ruling became an influential precedent, cited constantly in other state level cases and controlling in many of those cases.[[4]](#footnote-4)

 The Jacobs ruling anticipated by 20 years the Lochner decision of 1905 that legal historians long labeled the start of the “Lochner era” for the reign of “freedom of contract” in industrial relations that was proclaimed to have extended until that doctrine’s reversal when the U.S. Supreme Court upheld a Washington state minimum wage law in West Coast Hotel v. Parrish in 1937.[[5]](#footnote-5) Lochner won wide recognition as the marker for periodization in part because it provoked Justice Oliver Wendell Holmes’ widely quoted satiric comment: “The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics.”[[6]](#footnote-6) Like the Jacobs decision years earlier, Lochner offered a sweeping “freedom of contract” rationale for rejecting such regulatory measures. Also enhancing its hindsight visibility to historians, Lochner’s demise marked the culmination of the country-wide revolution in the regulation of industrial relations signaled by the Supreme Court ruling in United States v. Darby Lumber Company that upheld the Fair Labor Standards Act of 1938.[[7]](#footnote-7)

 This article offers three related arguments regarding the era of labor standards regulation that opened with the Jacobs decision in 1885. First, it will argue through a detailed review of recourse to state-level police powers that we should all along have dated the truly transformative “freedom of contract” moment in law and policy *not* as the Lochner era but rather as the Jacobs era! Naming matters, and renaming can in this instance shifts our attention in important new ways, toward a fresh examination of the discourses surrounding state-level laws aimed to “police” Gilded Age labor standards.

 Second, it will propose that shining fresh light on the state-level story contributes to an important reconsideration of the “weak-state/strong state” debate among historians over how to characterize the U.S. 19th century state. A much needed intervention in that debate would disaggregate the many roles of government in order to consider separately the motives and actions of each of the three branches of the U.S. state and states, the legislative and executive as well as the judicial. It will thus emphasize a key element in this story: the appearance of an *attempted* stronger state-level state in key policy domains in the late nineteenth century at the behest of state legislatures. It will highlight the arrival of a new genre of opposition between the legislative and judicial branches of government regarding the exercise in specific areas of regulatory reform of constitutionally derived police powers, which attach to the individual states.

 Such an intervention should make us more keenly aware of potential prejudices (meaning here pre-judgments) that may result from using the dichotomous and value-laden terms “weak” and “strong” for the state as a singular entity. Even as we continue to use these terms cautiously for the analytical value that they do possess, we should recognize fully that the entity termed in this discourse as “the state” must in the U.S. case more than most others be disaggregated into its component branches, functions, and levels of government, so as to determine the “strength” or “weakness” of each. This approach will also provide alternatives to existing measures of “state strength” that, for example, assess the presence or absence of agencies for expert bureaucratic administration or that document the vigor of national state actions—extensive postal service, war, Indian removal, and the like—that occurred beyond the notice or direct experience of most citizens. [[8]](#footnote-8)

 Third, having disaggregated the U.S. state into its separate branches and levels, it will argue that we should record and analyze the appearance in the Jacobs era of instances of “strong law,” even in the context—following judicial reaction—of a state ultimately rendered incapable of implementing democratically-framed regulatory legislation covering specific areas of private action. We can utilize the category of “strong law” to designate actions by legislatures that have claimed whole new areas of regulatory control, initiated new rules of required or forbidden behavior, provided mechanisms for enforcement, and set penalties for violations. Bearing a title frequently used in accounts of policy innovations beyond the discipline of history, strong laws have often involved innovative uses of state-level police powers. They are often organic in nature, creating new government agencies and new enforcement mechanisms for the promotion of the public good. [[9]](#footnote-9) The Anti-tenement law, a “strong law” by these criteria, rendered illegal in designated cities a formerly legal private activity conducted by individual private parties through the mechanism of private contract within a privately owned property, and it prescribed penalties for non-compliance.[[10]](#footnote-10)

 Capitalism requires private contracts. Historically, over the emergence and extension of markets for labor and goods, the mechanism of contract became essential to the formation of the capitalist social and legal relations. As the expectation of fulfillment of contracts became deeply embedded in most aspects of production and exchange, legal enforcement mechanisms became indispensable in specifying both what goods and services could be exchanged by contract and what kinds of contracts would—and would not—be enforced by law.[[11]](#footnote-11) In enacting the Anti-tenement law, given the years of agitation of the issue, New York state’s lawmakers knowingly adopted a strong position by responding affirmatively to those who declared that the specified class of contracts must be considered contrary to the public interest.

 If we adopt this approach, the New York state legislature’s passage of the Anti-tenement law was an instance of “strong law.” More than this, it was a powerful example of what legal scholars and sociologists have termed “responsive law,” a form of law that, again, can come into being only through the action of the legislative branch. This is the category of law that responds to urgent civic discourses pressing for governmental action in order to enhance welfare or suppress perceived evils, often in an area deemed to require active social protection beyond the realm of private legal action for redress. [[12]](#footnote-12) Reconstructing such discourses can help us attend to social and political forces that have pressured for enhanced “state strength” through mobilizing legislatures to reach for “law strength.”

**Cigar Makers and Law Makers Seek a Strong Law**

 Strong and responsive law outlawing tenement-house cigar making was the goal of the cigar makers union in New York City from the early 1870s.[[13]](#footnote-13) A powerful mobilization of New York City’s organized cigar makers and their ardent sympathizers had won legislative support for regulation as a measure essential, they argued, to protecting the health and safety of workers in the trade. Their demand for government action was based squarely, as they described it, on a well-established public health rationale for exercise of a state’s police powers. As early as 1874, a meeting of the German cigar makers union and other unions had assembled “to protest against cigar-making and other factory work in tenement houses, owing to the danger to the health of the inmates.” Members blamed “constantly inhaling the narcotic and poisonous vapors of moist tobacco” for impairing the health of workers, many of them women and children who were “toiling sixteen to eighteen hours in twenty-four, only to earn a meagre [sic] living.” Their protests cited high death rates among babies exposed to noxious fumes and children who worked in such quarters.[[14]](#footnote-14)

 Protests continued, waxing and waning according to the degree of unity or disorganization in the cigar making trade, the state of the economy, and the perceived provocation at hand. When the likelihood of achieving strong law waned, direct action at times ensued. In the following year, striking cigar makers of the Schwartz Kopf factory attacked a family being moved in to make cigars in a tenement next door and before the police dispersed them broke up the furniture of these potential competitors. Workers in the trade who had suffered repeated wage cuts during the 1870s depression also mobilized a series of strikes for higher wages. One such strike, in 1879, again produced strident denunciation of tenement production, in the language characteristically designed to invoke “police” action by law makers, “as being dangerous to health and morals.”[[15]](#footnote-15) A few days later a large mass meeting rallied in support of a resolution by the United State Senate’s Finance Committee in favor of an amendment to the U.S. revenue laws that would tax tenement cigar making out of existence! The Cigar Makers Union had drafted the Senate committee’s resolution and sent its leader, Adolph Strasser, to Washington to lobby for its passage. In response, reported the *New York Times*, the Senate Finance Committee “proposed amendment to the Revenue law, which aims to abolish the tenement-house cigar-making system.”[[16]](#footnote-16)

 Adding an economic justification to their crusade, opponents of cigar making in tenements charged again in 1880 that it drastically lowered wages in the trade, thus impoverishing a major segment of the city’s working class. A German speaker at the meeting, M. Homrichhausen, testified that “manufacturers, in their greed … resorted to that system of labor to obtain work cheap.” Noting that at least forty or fifty such work locations existed on the east side of the city, hiring mostly Bohemian immigrants who earned half what factory-based cigar makers did, the meeting empowered a committee led by Cigar Makers International Union leader John Swinton to bring further action against the evil.[[17]](#footnote-17)

 In the pursuit of state-level legislation, Local 144 of the Cigar Makers Union had added a new strategy for promoting the cause after the 1879 strike wave. Gompers, convinced that the public would respond to demands for reform if the facts were known, turned to publishing in *N. Y.* *Volkszeitung* the results of on-site investigations of tenement production. In Hermann Blaskopf’s tenement, visiting inspectors found, fifteen families lived, four to a floor, each crowded into only a main room and a bedroom. Tobacco was stacked everywhere and the smell of tobacco permeated the air. Working from 6:00 in the morning until 10:00 or later at night, families with two workers produced 2800 cigars a week and earned from $4.25 to $6.00 in wages, from which was deducted $7.00 to $9.00 per month for rent. In another home, similarly arranged, tobacco was stacked and processed everywhere—on the marriage bed, on the kitchen table, in the hallways, atop a bin in the yard where children played. If a water closet existed, its drain was often clogged, emitting a nauseating stench from a mix of urine and tobacco scraps.[[18]](#footnote-18)

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 Producing such reports aimed to convert the parochial grievances of the cigar makers into a broadly shared civic consciousness of an obvious evil that could, and should, be corrected through strong and responsive law. Given a well-orchestrated campaign to widen the base, the state-level effort finally gained passage in early 1883, and again in 1884, of bills that banned tenement production. Cigar manufacturers’ warnings that much of the trade would leave the state were offset by organized workers’ claims that the trade would expand if handled only in factories, as many dealers in cigars refused to buy from New York, wishing not to be sold the tenement house product! After touring the tenement manufacturing districts with Samuel Gompers, newly elected state assemblyman Theodore Roosevelt strongly supported the bill, and Governor Grover Cleveland, with some misgivings, signed it.[[19]](#footnote-19)

 The highest New York state court moved to invalidate the Anti-tenement law in stages. Initially, in 1884, the court struck down the law initially on the grounds that, despite its stated intention to apply to such work only in tenement houses, its imprecise wording allowed its application to any dwelling in the city. The court endorsed the view that tenement houses were considered “apt to be ill-ventilated, unclean, and packed full of inmates and to become centers or radiating points of contagious disease” that “might become the proper subjects of sanitary regulation in the interest of the public health.” If a revision that corrected the “misleading and deceptive” wording of the law should come before it, the court held somewhat ominously, it would then be necessary to consider “whether the act as a whole is within the police powers of the state, and capable of being sustained under the Constitution.”[[20]](#footnote-20)

 And precisely this reckoning ensued following a hasty revision of the Anti-tenement law. Acting on a speeded-up second appeal against a second lower court ruling that upheld the ban, New York’s high court reversed the lower judicial action in what distinguished legal historian Edwin Borchard later termed an “Individualist Manifesto.”[[21]](#footnote-21) More than this, the high court ruling mounted a rather amazing denunciation of the “strong law” method as foreshadowing a “return to feudalism.”

 Such legislation may invade one class of rights today and another

tomorrow, and if it can be sanctioned under the Constitution, while far removed in time we will not be far away in practical statesmanship from those ages when governmental prefects supervised the building of houses, the rearing of cattle, the sowing of seed, and the reaping of grain, and governmental ordinances regulated the movements and labor of artisans, the rate of wages, the price of food, the diet and clothing of the people, and a large range of other affairs long since in all civilized lands regarded as outside of governmental functions.

Detecting inadmissibly strong law from the perspective of assumed constitutional constraints, the appeals court raised two key issues: what would constitute a sufficient threat to public health to justify preventive legislation and, more compelling in the view of the court, what would demonstrate the presence of a *general* public whose health and safety must be protected by exercise of the police powers. [[22]](#footnote-22)

 Now resort to the state’s police powers to enact strong law against health threats had certainly not been uncommon in the decades leading up to the 1880s. William Novak’s *The People’s Welfare* offers plentiful evidence of strong action by local and state-level legislative bodies empowering sanitary police or state boards of health, beginning with Louisiana’s in 1855, to act against nuisances that could harm health. As announced in a statement by U.S. Army surgeon John Billings, “every member of the community [was] entitled to protection in regard to his health” and “his liberty and his control of his property are only guaranteed to him on condition that they shall be so exercised as not to … be injurious to the health of the community at large.” Yet for the court’s majority in Jacobs the public to be protected from a nuisance or danger was required to be a single, unitary entity encompassing the entire community. Invoking this standard, the New York high court determined that the Anti-tenement law was “class legislation,” impermissibly protecting only a portion of the whole public.[[23]](#footnote-23)

 Significantly also, looking back upon earlier uses of the police powers, examples offered in *The People’s Welfare* did not include either individual cases or a category of cases involving labor standards regulation. This invaluable study precisely documented hundreds of cases showing aggressive public-interest regulation by local governing bodies and state legislatures between the 1830s and the 1870s. These regulations are found all to have fallen within four main domains: controlling nuisances, policing public health and morals, guaranteeing public safety, and ensuring equal access for buyers in local markets. Novak’s chapters report legislative rule making under the headings of “Fire and the Relative Rights of Property,” “Public Ways: The Legal Construction of Public Space,” and “Public Morality: Disorderly Houses and Demon Rum.” Most relevant for our purposes, he also defines a major category as “Quarantines, Noxious Trades, and Medical Police,” which includes individual sections titled “Quarantine,” “Offensive Trades,” and “The Road to Slaughterhouse.” But there was no mention of tobacco and no mention of “Labor Standards” regulation in these categories.[[24]](#footnote-24)

 In cases of protective legislation through the middle decades of the nineteenth century, a typical source of a health threat to the public welfare was a nuisance emitting an unpleasant odor such as the numerous small slaughterhouses set up all over a city that were at issue in the Slaughterhouse Cases of 1879. In that landmark ruling, the Supreme Court majority upheld a requirement to locate all slaughtering in a single regulated and confined location. Yet in their dissenting opinions Justices Stephen Field, Salmon P. Chase, Noah Swayne, and Joseph Bradley laid the basis for later successful assertions, as in Jacobs, of inviolable individual liberty and property rights against this same type of traditional protection for the people’s welfare.[[25]](#footnote-25)

 The view that class legislation was unconstitutional had authority in U.S. constitutional law from its earliest days, descending from the revolutionary fervor for equality and animus against special privileges common in monarchies. In a foundational study of this doctrine, legal historian William E. Nelson traces multiple sources of its long-standing influence. Among them, he cites the wide appeal of social contractarian thought and the impact of Enlightenment natural rights doctrine in the early republic, the reaction against national authority over individual states’ powers in the Jacksonian era, and the abolitionist view that slaves deserved not only freedom but all the rights of white Americans. He credits the framers of the Fourteenth Amendment not only with intending to extend civil rights to all classes of citizens and assert the authority of the national government over the states in matters involving “equal protection.” They aimed also to disallow the infamous Black Codes passed by southern states that explicitly limited the contract rights of recently freed African American persons. And this concern for safeguarding liberty of contract showed itself—to quite different effect—in the Jacobs decision.[[26]](#footnote-26)

 New York’s union cigar makers saw class legislation quite differently, as resulting from the court’s, not the legislature’s actions. Reframing the meaning of “class” in this context and hurling a charge of corruption against the New York state high court, cigar makers in New York City maintained that its decision reeked not of equal rights and universal justice but of class prejudice. At a full-house meeting at Cooper Union English, German, and Bohemian speakers condemned the decision as “made by the court at the direction of the capitalists…who are desirous of crushing labor.” Resolutions called for the organization of a labor party capable of passing laws that would be held to be constitutional and would benefit labor. Strikes to improve conditions followed in subsequent years, even at the behest of the tenement cigar workers, whom the factory workers aided in sympathy.[[27]](#footnote-27)

**Property and Contract Rights Versus Police Powers**

The ban on class legislation in the Jacobs case instigated a further shift in the direction of restraints on efforts by state legislatures to regulate relations between business and labor. [[28]](#footnote-28) This shift occurred in the face of an increasingly well documented pattern in which unregulated competition between employers drove what a noted economist of the period influentially termed the “moral plane of competition” down to the level of the most unscrupulous employers, who would hire young children, demand excessively long hours at work, and deny workers a decent wage. On this basis, reformers demanded that strong law should privilege the basic need for decent subsistence, and thus the *human* rights of individuals, over the property and contract rights of workers, even if some individual workers might, perhaps in their desperate need to survive, claim a protected right to work as they “chose” to do.[[29]](#footnote-29)

 For our purposes the Jacobs ruling also opened a new chapter in a manner more radically periodizing than the later Lochner decision. [[30]](#footnote-30) Legal historian Edwin Borchard cites this as the initial case of a genre in which the courts moved “to arrogate to themselves this immense power of finally passing on social legislation. This was done in the Jacobs case by questioning the integrity of the legislative use of the police power.”[[31]](#footnote-31) The court had condemned the law as legislative misapplication of the essential categories of police and public:

While generally it is for the legislature to determine what laws are required to protect and secure the public health, comfort and safety, under the guise of police regulations it may not arbitrarily infringe upon personal or property rights; and its determination as to what is a proper exercise of the power is not final or conclusive, but is subject to the scrutiny of the courts. When, therefore, the legislature passes an act ostensibly for the public health, but which does not relate to, and is inappropriate for the purpose, and which destroys the property or interferes with the rights of the citizen, it is within the province of the court to determine this fact and to declare the act violative of the constitutional guaranties of those rights.” [[32]](#footnote-32)

 In assessing this formative event in legal reasoning, we must recognize that so reprimanding New York lawmakers was no routine or little noticed matter. The sharp turn about to be taken in Jacobs had been noted by prominent attorney Peter Butler Olney, who argued in defense of the New York statute before the Court of Appeals. Olney referred to what in his view were settled principles governing the exercise of the police powers in matters involving protection of the public health. The first precedent he cited was Wynehamer v. the People, a case that had contested the constitutionality of a New York state statute titled, suitably for a police powers action, “An act for the prevention of intemperance, pauperism and crime.” This law, passed in 1855, had made it a criminal offense to sell intoxicating liquors on the grounds—prevalent in the temperance movement at the time—that they were harmful to the public health, morals, and safety. It had been the basis for the arrest of a Buffalo, New York bar owner for selling alcoholic beverages, and for the confiscation and destruction of liquors he possessed. In two successive trials, counsel for the defense argued that Wynehamer’s property rights had been violated. Yet the trial courts upheld both the statute in question and the conviction of Wynehamer as being in keeping with solid and ancient justifications for a plenary power in the exercise of the police powers.[[33]](#footnote-33)

 As later happened in Jacobs, the State Court of Appeals reversed the lower courts in Wynehamer, but only on the grounds that he had acquired the confiscated property *before* the statute had been passed, thus giving the state’s action an *ex post facto* character. The court was especially full throated in its affirmation of a very broad legislative authority. Said a member of the majority, “the occasion and necessity for the exercise of the power embodied in a statute is wholly a matter of legislative judgment and discretion.... Whoever bestows the slightest reflection upon the nature and character of the judicial office, will see that…to draw it within their jurisdiction, would be a clear invasion of the legislative province and a usurpation of legislative power.” [[34]](#footnote-34) Yet although this ruling offered a broad definition of allowable legislation to protect the public health, it did not directly provide a precedent for the Anti-tenement law.

It was only in Jacobs, legal historian Edward Corwin has shown, that the doctrine of vested rights achieved a basis fully in the due process clauses, as foreshadowed in dissents in the Slaughterhouse Cases in 1873 and again a decade later in Butchers Union Co. v. Crescent City Co. [[35]](#footnote-35)

 Despite this judicial turn, responsive state legislatures extended their attempts to define and regulate workplace hazards. In the years immediately following the Jacobs finding, a powerful case began to be made for extending the exercise of the police power to protections for workers whose health and safety were compromised not only by the unique hazards of a particular type of workplace but also by the number of working hours required and even by restrictions that employers placed upon their use of their earnings.Thus, in Pennsylvania and other states lawmakers moved to end the so-called “truck system,” in which employers paid their workers in scrip, redeemable only at company stores. In evading such laws, ironically, employers who overworked and underpaid laborers or compelled their living and shopping patterns could rely on an inherited conception of republican manhood! In their responses, state court rulings almost identical to the Jacobs finding extended the field that a liberty of contract judicial stance could seal off from legislative regulation. [[36]](#footnote-36)

 In Godcharles v. Wigeman, 1886, for example, the Pennsylvania Supreme Court nullified a state law that required monthly payment in cash wages. The ruling hung on the court’s determination—as in Jacobs—that it constituted a form of class legislation. Defending the workers as legal individuals, the court declared them independent agents who were *sui juris*, and thus capable of making their own contracts to sell their labor as they wished. In aggressively gendered language, the court declared the law “an insulting attempt to put the laborer under a legislative tutelage, which is not only degrading to his manhood, but subversive of his rights as a citizen of the United States.”[[37]](#footnote-37) Their ruling echoed Justice Field’s famous Slaughter House dissent that had declared, “Liberty, in its broad sense as understood in this country, means the right … of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation.”[[38]](#footnote-38)

 Liberty “as understood in this country!” Was there a settled understanding of the meaning of liberty “in this country?” Or had the court here as in Jacobs moved to instate a particular meaning of liberty—as ever more fully untrammeled freedom from “state interference,” a term of art in Anglo-U.S. political discourse from the early 19th century. Citing a tendency of state legislatures to over-reach in defining their police powers and a consequent judicial duty of strict scrutiny, the New York Court of Appeals had spoken directly to the question in Jacobs, saying: “But under the pretense of prescribing a police regulation, the State cannot be permitted to encroach upon any of the just rights of the citizen which the Constitution intended to secure against abridgment.”[[39]](#footnote-39)

**Political Economy and Social Justice in the Jacobs Era**

 Between Wynehamer and Jacobs, as well, the U.S. economy had changed, as had the ways that wealth-producing properties were used and labor power was exchanged and exploited. These changes provoked institutional innovation in the knowledge-producing capacities of the state and states. Over the brief span of years between the harsh 1870s depression and the Jacobs judgment, an alternative method for defining the public good had been forming through a rapid acceleration and deepening of the investigative capacities of the legislative branches of state and national governments and the demands of working and middle class reformers for regulated labor standards. State legislatures authorized factory investigations, investigated mine disasters, and established mine investigation bureaus. Special investigating committees headed by members of an incipient congressional labor bloc took testimony from leaders of organized labor who understood workers’ hardships in class terms. Congressional supporters then sought solutions that recognized organized workers as the equals of organized capital, including proposals for arbitration of disputes and national chartering of unions. They also ended contract immigration and repeatedly sought, unsuccessfully, to curtail immigration over all. Special committees looked into the causes of strikes, as in the case of the House Select Committee Investigation of Labor Troubles in the Southwest. Congress also created and funded a U.S. Bureau of Labor Statistics in 1885, the exact moment of the Jacobs ruling. [[40]](#footnote-40)

From the findings of these new investigative capacities and the observations of astute investigators came a growing recognition of the existence of an industrial society organized increasingly, in its institutions, its consciousness, and its formation and expression of economic and social identities, as a class society. Legislative scrutiny flagged the looming danger to the wider public good of the increasingly violent clashes between these hostile classes. Individualism must give way, in these readings, to recognition of the inherent collectivism of modern industrial life and of the duty of responsible and responsive governments to mitigate industrial evils. Yet, against this grain, an intentionally disruptive court ruling in Jacobs had found that “the police power which every state possesses … however broad and comprehensive, is not above the constitution.”[[41]](#footnote-41)

An even stronger condemnation of a legislature’s alleged paternalism appeared in the West Virginia Supreme Court of Appeals ruling that struck down a state law, like Jacobs earlier upheld by a lower court, that outlawed payment of miners in scrip unless payable in 30 days in lawful money.[[42]](#footnote-42) Condemning it as class legislation, outraged state justices determined in State v. Goodwill that this law was “a species of sumptuary legislation which has been universally condemned, as an attempt to degrade the intelligence, virtue, and manhood of the American laborer, and foist upon the people a paternal government of the most objectionable character, because it assumes that the employer is a knave, and the laborer an imbecile.” [[43]](#footnote-43)

“Universally condemned?” Or condemned in a judicial discourse of *manliness* and attempted *paternalism*? The gendered discourse adopted here might have silenced some adverse reaction in an era that fetishized manly virtues. But citizens and lawmakers in other states were not deterred from seeking legislated solutions to key parts of the labor question, including—to no immediate avail—methods for regulating the labor of women. Courts often deemed women alongside male workers to be wronged by legislative impairments to a property right in their labor. Strict scrutiny was applied particularly to claims for the need for legislation to protect women workers’ health. Thus in the familiar Illinois case Ritchie v. People, 1895, the state supreme court invalidated section 5 of the Factory and Workshop Inspection Statute for violating a prohibition of the Illinois constitution against abridging free contract. It acted as well for what it saw as an unwarranted claim that the “public” health was harmed when women worked more than eight hours in manufacturing. “When a health law is challenged in the courts as unconstitutional on the ground that it arbitrarily interferes with personal liberty and private property without due process of law,” the by then familiarly worded ruling read, the court must see “that the public health is the end actually aimed at, and that it is appropriate and adapted to that end. This we have not been able to see in this law, and we must, therefore, pronounce it unconstitutional and void.” [[44]](#footnote-44)

Citing Jacobs once again to denounce the singling out of female citizens here, the court called for authority upon the declaration in Minor v. Happersett “that a woman is both a ‘citizen’ and a ‘person’.” Thus the Illinois law had mandated unacceptable class legislation twice over. This court also—ironically in retrospect, given later cases—quoted the learned legal writer Christopher Tiedeman as follows: “There can be no more justification for the prohibition of the prosecution of certain callings by women because the employment will prove hurtful to themselves than it would be for the state to prohibit men from working in the manufacture of white lead because they are apt to contract lead poisoning, or to prohibit occupation in certain parts of iron-smelting works, because the lives of the men so engaged are materially shortened.”[[45]](#footnote-45)

**The Holden v. Hardy Rejection of the Jacobs Rule—via Munn!**

Yet pressure for protective legislation covering specific dangerous occupations continued. In the early 1890s, for example, well organized miners and their supporters in Utah lobbied intensely for an 8-hour law, which they won from the state’s lawmakers. Aimed to prevent judicial censure, Utah’s first state constitution had specifically required the legislature to use its police powers to protect the health and safety of workers in factories, mines, and smelters. The desired Utah law limiting working hours in mines and smelting operations to eight per day had been upheld the previous year by Utah’s state high court. It was upheld again on the defendant’s appeal in Holden v. Hardy (1898) by the United States Supreme Court![[46]](#footnote-46)

In this matter, an employer, Holden, had been convicted of employing one man for ten hour days in a mine and another for twelve hour days in a smelter, in knowing violation of the eight-hour law for both employments. In the Utah courts Holden’s defense had mobilized every available argument against the law setting a legal day’s work for hazardous occupations. Prominently citing Jacobs, counsel argued that the law deprived individuals who were *sui juris* of liberty of contract, that it violated the equal protection of the law guaranteed by the Fourteenth Amendment, and that it was illegitimately class legislation as not for the protection of the whole public.[[47]](#footnote-47)

Acting preemptively, Holden’s defense attorneys also made a sharp distinction between the Utah law that it labeled, harshly, as illegitimately fashioned class legislation and an earlier Illinois law regulating storage charges by grain elevators. In Munn v. Illinois, 1877, the Supreme Court had determined that the public interest in reasonable rates overrode the individual property rights of the owners of those facilities, who exercised a monopoly of storing and marketing midwestern grain. By virtue of that status, they had voluntarily placed their property in the service of the public. Exploiting the Munn language and logic, employer Holden’s defense contended sarcastically, for the Utah law to stand, the *whole public* must need protection from the working hours required of *only a few* mine and smelter workers whom they did not know and would never see! Reflecting the general confusion regarding how to interpret the Munn rule regarding private property subject to public regulation, Holden’s attorneys contrasted sharply the conflicting high court holdings in Jacobs and Munn.[[48]](#footnote-48)

Although Munn had countervailed against recognized compulsions of the Fourteenth Amendment’s due process and equal protection clauses toward state legislation, its controlling language had proved difficult to apply elsewhere. Intoned by Justice Morrison Waite, the Munn language had spoken eloquently of the well-established role of the states’ police powers: “Under the police powers, government regulates the conduct of its citizens,” he explained, “and the manner in which each shall use his property, when such regulation becomes necessary for the public good.” But Justice Waite’s further refinement of what created a public interest was both more universal in potential application and more oblique. “When, therefore, one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created.” [[49]](#footnote-49)

At first glance, this language had seemed to suggest that a clear distinction between uses of property that did, and did not, affect the public as a whole might be easily detected. But shortly before Holden came to trial an important review of contemporary legal thinking found considerable confusion amidst ever greater pressure for certainty. The situation was urgent, this important law review study found: “For the questions involved are much more than mere legal ones turning upon the application of generally conceded legal principles, or the construction of doubtful phrases. They put in issue the deep underlying matters of political economy which are agitating the whole civilized world of our day.”[[50]](#footnote-50)

Holden’s defense attorneys took up this challenge by further circumscribing Munn. Attacking the Utah eight-hour law, they attempted to reinvigorate the *sic utere ut alienum non laedas* maxim by identifying two kinds of law. Criminal laws were those that forbade and penalized acts that were wrong in themselves, regardless of the time or place where they occurred. But the kind of law at stake in Holden was not such. It was rather, the defense insisted, an exercise of the state’s discretionary authority to make and enforce police regulations, defined as laws made “for the purpose of enforcing a duty and to punish acts or omissions which may be right or wrong according to the time, place or manner of doing them.” In aiming to protect what could only be seen as a special class of workers from an alleged evil that certainly did not endanger the whole public, pled the appellants, the Utah legislature itself had committed an act that was always constitutionally wrong and thus impermissible. The court should therefore not depart from the received wisdom of sticking to untrammeled free contract in matters involving working conditions.[[51]](#footnote-51)

 In considering this argument, the Holden court majority made progress in the direction of clarifying the issue raised by the charge of class legislation, but not by attempting to draw a new bright line. Rather, it insisted on the court’s duty to look beyond the merely formal or theoretical categories framed by the defense. Instead, case by case, the court should weigh actual conditions behind labor contracts and actual effects of specific employment relations on the human beings affected. In this process, the court’s majority hoisted the Holden defense on its own petard. It found that the Utah legislature’s ban on excessive working hours in mines and smelters had been a valid one precisely within the recognition that the police powers might distinguish between uses of contract that were “right” or “wrong” according to the time, place or manner of doing them. And what then constituted a right action in this time and place? One element, said this court, breaking new ground by further interpreting Munn, was that private actions in the industries in question had become “clothed with a public interest” because their impact upon the designated workers had consequences for the community at large that overrode concerns about individual rights.[[52]](#footnote-52)

Writing for the majority in defense of this point, Justice Henry Billings Brown launched a judicial discourse loaded with meanings that were taken from the recent rapidly changing nature of capitalism. Attention should be given to the impact of new forms of employment relations that were distinctive to the current era, he insisted, including forms of labor that required an intensity of effort and exposure to harms not demanded in earlier forms of employment. Experience had demonstrated that the underground labor of miners, complete with exposure to foul air and dust, set this form of work apart as provably dangerous to health. [[53]](#footnote-53) In highly capital intensive industries, toil in large groups that were easily hired and lightly fired had become normal to workers’ lives. These newly normal conditions of inequality in bargaining power between employers and prospective hands might well overwhelm the individual worker’s capacity to contract freely—surely so if that meant he could contract equally—in his own behalf.[[54]](#footnote-54)

But where in this line of reasoning was the indisputable link to the public good? Simply in this regard, the court declared: “The rights of labor shall have just protection through laws calculated to promote the *industrial* *welfare of the State*.” [Emphasis added] In keeping with this new category of public concern, such police actions were not laws aimed solely to ease undue burdens on workers for their own sake. Rather, if the state’s *industrial* welfare depended on maintaining an ample and effective *industrial* work force, the court recognized here explicitly, then, a general public interest could require controlling the impact of any such *particular* groups’ working conditions on the *general* health and welfare of the local or general economy.[[55]](#footnote-55)

The Holden court recognized that property rights on both sides of the labor contract must be seen in their prevailing context, not as subject to universal laws, but in need of new construction as the ways they could be exercised through the employment bargain were in a process of transformation. New employment relations brought in by capital intensive processes had greatly empowered the employer class while in considerable degree disempowering many types of workers, placing them under the pressure of necessity for continued employment for wages to support their families. It would be far too strong to infer that Justice Brown blamed capital for proletarianizing labor, or even that he placed class and class relations at the center of his legal vision. Yet, stressing a constitutive element for the actual exercise of rights in the new structure of power relations in key parts of the economy, Justice Brown expanded for the majority on the new dimension he asserted of the public interest:

But the fact that both parties are of full age and competent to contract does not necessarily deprive the State of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself. ‘The State still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety and welfare are sacrificed or neglected, the State must suffer.’ [[56]](#footnote-56)

“The State must suffer!” No matter how “reckless” the individual might be, the court determined, the state had a separate and higher interest in maintaining his labor power and the health, endurance, and labor power of its laboring masses as a whole.

 Following this logic, Justice Brown took the country to school on the history of the Fourteenth Amendment, carefully historicizing its context to demonstrate that the law at issue did not violate it in the outrageous manner that Jim Crow laws then routinely had. He lavishly commended Justice Lemuel Shaw’s opinion in Commonwealth v. Alger, which had endorsed what has been classified in this analysis as strong law. “Rights of property, like all other social and conventional rights,” Shaw had proclaimed “are subject to such reasonable limitations in their enjoyment, as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient.” Building from there, Brown found that formally equal protection might in actual fact be dangerous to a general public whose prosperity depended on sustaining the laboring capacities of all its working men. This larger dependency warranted regulation of labor standards under particularly dangerous conditions on behalf of the public good.[[57]](#footnote-57)

 Marking out a new path that tended toward legal realism, Brown proclaimed the law “a progressive science.... Some State methods of procedure, which at the time the Constitution was adopted were deemed essential to the protection and safety of the people, or the liberty of the citizen,” he continued, “have been found to be no longer necessary; [whereas] certain classes of persons, particularly those engaged in dangerous or unhealthful occupations, have been found to be in need of additional protection.” The U.S. constitution then should not automatically be used to suppress strong and responsive law. It “should not be so construed as to deprive the States of the power to amend their laws as to make them conform to the wishes of the citizens as they may deem best for the public welfare without bringing them into conflict with the supreme law of the land.”[[58]](#footnote-58)

 Brown concern for the health and welfare of workers cannot be easily distinguished from a view of them as instrumental to sustaining profits, rent, and interest that flowed to the capitalist class. Nor can it be associated clearly with either of the movements that had contributed since the 1880s to the invention and articulation of two innovative currents in social and political thought offering alternatives to the classical Smithian liberalism that had been an economic orthodoxy in elite circles through the middle decades of the 19th century. One such alternative, a most statist and more democratic “new liberalism,” was the product of linked currents in reform thought led by U.S. evangelical economists trained in Germany by members of the German historical school and founders of the *Verein fur Sozialpolitik*, who had rejected what the orthodoxies of *Manchestrismus*. Other advocates for statist reform included a class of activist female reformers such as Florence Kelley who demanded factory legislation and state capacities for inspection. The second was the somewhat later imagined “corporate liberalism,” which was like conventional laissez faire anti-statist, but like statist new liberalism also collectivist. Institutionalized in the National Civic Federation and similar elite formations, this strand was devised to restrain “cut-throat competition,” allow combination, and suppress overt class conflict.[[59]](#footnote-59)

 This court’s judgment also anticipated the onset of what English “more statist” reformers referred to as “welfare economics.” The suggestion that “the State” might suffer from a demand for excessive working hours preceded by two decades a similar argument by A. C. Pigou. A student of Alfred Marshall, Pigou examined in his path-breaking *Economics of Welfare*, 1920, the factors needed to shape the capacity for sustained productivity growth in a national economy. Regarding “Hours of Labour,” he wrote: “It is evident that, after a point, an addition to the hours of labour normally worked in any industry would, by wearing out the workpeople, ultimately lessen, rather than increase, the national dividend.” In today’s language, he referred to the gross domestic product, or GDP.[[60]](#footnote-60)

 Like Brown, Pigou refuted the view that the self interest of both parties to a work contract would guarantee a socially beneficial result. “Prima facie,” Pigou wrote, “it might be thought that…the self-interest of employers and workpeople must prevent unduly long hours from being worked. There is, however, a large volume of experience, which contradicts this optimistic view and suggests that private self-interest has often seriously failed in this matter.”[[61]](#footnote-61) Exactly so, the Holden majority held in 1898, as it credited the people’s elected representatives in Utah for addressing the unequal power relations at play in the making of a labor contract. The Holden court had thus abolished the “bright line” set down back in 1885 in Jacobs against labor standards laws deemed to protect only a particular class and not the whole public. Indeed, for the benefit and welfare of the new industrial capitalist order, this court in this case demanded the making of strong law even where others might judge it a kind of class legislation.[[62]](#footnote-62)

 By the late 1890s, then, the judicial discourse regarding the police powers had become bipolar, and results varied from state to state, allowing for conflicting measures of the demands of protecting the public good. In a similar case, In re Morgan (1899), Colorado’s high court took the opposite path to Holden, ruling it “beyond the power of the legislature, under the guise of the police power, to prohibit an adult man who desires to work thereat from working more than eight hours a day, on the ground that working longer may ... injure his own health.” The case involved the petition of Morgan, who had contracted to work for ten hours a day as a smelter operator, for a writ of habeas corpus to win release from prison, where he languished after violating the ban on working more than eight hours a day. In its ruling, the court “held that state police power did not extend to the abolition of rights, the exercise of which did not involve an infringement of the rights of others.” Unlike the Holden court in Utah, the Morgan court did indeed draw a bright line between a valid exercise of the police powers and what this court deemed an invalid exercise that aimed, in effect, at overriding the individual’s liberty and property rights in order to protect a person from himself.[[63]](#footnote-63)

A novel and contentious rights discourse had thus developed in the ongoing consideration of the extent of legislative police powers in regard to matters raised by the new organization of capitalism. In this vein, the Jacobs, Godcharles, and Morgan cases represent for historian William Forbath “the failure of late nineteenth-century public use and police power doctrines to extend their guidance to labor-strife management.” Indeed, as Forbath has shown, even as reformers and receptive lawmakers continuously pushed for worker protection, state courts struck down over 60 labor standards laws during the late-nineteenth century, many of them in rulings where liberty of contract trumped protection against workplace evils. Public use and police power doctrines that were freely exercised in the middle decades of the 19th century to safeguard the people’s health or morals had much more disputed application to important areas of labor standards regulation in the U.S. Jacobs era.[[64]](#footnote-64)

A forceful argument to the contrary was mounted in 1913 by eminent legal scholar Charles Warren who, in two articles in the *Columbia Law Review*, aimed to challenge what he saw as an invalid argument for the existence of “an evil consisting in the supposed tendency of the National Supreme Court to invalidate by its decisions the liberal and progressive State legislation of the day.” In defense of the progressiveness of the court, Warren took it upon himself to examine 560 cases decided between 1887 and 1911, concluding that the court had invalidated only three State laws involving a social or economic question of the kind included under the phrase "Social Justice" legislation. But under the broad heading of “Laws Affecting the Police Powers,” he did not include a category of labor standards cases! Neither the Jacobs, nor the Godcharles, nor the Holden, nor the Morgan case appeared among the cases he surveyed. Jacobs and Godcharles were conveniently settled prior to the period he examined, and all but Holden were settled finally only in state-level high courts, whose rulings he did not consider.[[65]](#footnote-65)

Between Jacobs and Holden, lawmakers and judges had engaged in a highly formalized dance, in which dancers with conflicting ideologies and values had sparred over which of them might “lead.” In the ordinary run of cases, the effect of “liberty of contract” rulings had left the parameters of individual and collective wages and working conditions to determination by the workings of competition in a “free market” that open immigration, rapid mechanization, and scientific management kept chronically overstocked with labor.

Yet we must also accept in light of Holden that the boundary erected by the New York high court at the start of the Jacobs era had exhibited cracks, even for male workers. The absolutist quality of freedom of contract restrictions came strongly into question in Holden v. Hardy, emboldening states to push against its iron fences. Arguments on behalf of a wider meaning for the public interest and a broader rationale for permissible restraints on freedom of contract continued to be pressed and, as in another working hours case for factory workers, in Bunting v. Oregon, 1917, occasionally to succeed. The path from Jacobs in 1885 to Holden in 1898 had branched, allowing alternate routes to the designation of a public interest. This divergence would widen with the further articulation of statist new liberalism and the flowering of legal realism.[[66]](#footnote-66)

**Conclusion**

The argument to this point is that developments in newly controversial realms of Gilded Age law and policy instigated a situation in which new tensions arose between lawmakers responding to demands for social protection and a generation of judges schooled in, and solicitous of sustaining, the denial of “class legislation.” Widening out the lens, the analysis offered here has witnessed the rise from the mid-1880s of a discursive and normative opposition between attempted strong law aimed to raise the moral level of competition and imputed new limitations on the police powers of the states. Seeming to strict constitutionalists consistent both with hallowed republican values and with strong present currents upholding laissez faire, these were limitations newly invigorated by the due process and equal protection clauses of the Fourteenth Amendment. They were impelled by a judicial turn toward strict scrutiny of state-level regulatory powers and—within that frame—of the discretionary powers of state lawmakers, which had been much more routinely honored in earlier times.

But we would remiss to conclude that “[t]he fate of the well-regulated society was ultimately sealed when the contrary constitutional rhetorics of substantive due process and inalienable police power replaced common law discussion of regulated liberty and salus populi.”[[67]](#footnote-67) To sustain that position, we would have to ignore the responsiveness of lawmakers to mobilized public opinion regarding the newly unequal relations of contract. We would have to disregard the piecemeal, jerky, but in telling situations unmistakable judicial rethinking of the states’ police powers so as to include the possibility of strong and responsive law governing labor standards—law that could be deemed essential to the public interest. Conditions demanded rethinking of what it meant to “police” the new capitalist social formations. Following the Holden v. Hardy extension of the Munn principle, following its validation of protection for endangered workers in their interest and the interest of the public, the seal was porous.

 And the Holden ruling finally returned like the repressed in West Coast Hotel v. Parrish, 1937. The high court there held as follows: That the “power under the Constitution to restrict freedom of contract … may be exercised in the public interest with respect to contracts between employer and employee is undeniable.” The first supporting authority claimed for this plenary power was Holden v. Hardy! Also relating its stance to Waite’s ruling opinion in Munn v. Illinois, the West Coast Hotel court continued: “In dealing with the relation of employer and employed, the legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression.” Health, safety, and good order: in other words, a “well regulated” polity. [[68]](#footnote-68)

 In pressing its case for relying on the Holden precedent, the New Deal court proclaimed: “The point that has been strongly stressed that adult employees should be deemed competent to make their own contracts was decisively met nearly forty years ago in Holden v. Hardy, supra, where we pointed out the inequality in the footing of the parties.” Its ruling opinion then followed exactly the finding of Holden to the effect that the state had a duty to interfere where the parties to a contract were unequal in their actual power to express their best interests, and when self-interest was therefore not a safe guide either to the contracting worker or to the wider public. Then, again, as in Holden, the state acting through its legislators must step in.[[69]](#footnote-69)

 In the interim between Holden and West Coast Hotel, what we might call “class injustice” continued, even in what had become irrevocably a class-defined form of capitalism in which individuals in a wage relation to employers often could not bargain equally. Yet the path to vindication of strong law had been well marked, if not routinely followed, in the culmination, in Holden, of what we have nominated as the Jacobs era, defined by the damnation and then the redemption in judicial and wider social thought of new forms of labor standards regulation. When, in the midst of the Great Depression, the dam holding back workers organization was broken in the Wagner Act, the political empowerment of industrial workers finally vindicated Samuel Gompers’ directive that workers must look first to the union in order to move the state. Even after West Coast Hotel, the limited coverage of the Fair Labor Standards Act was further proof that the battle for worker protection would still be hard won. It became even harder—in the shadow of the New Deal order’s decline.[[70]](#footnote-70)

 Something like the Jacobs era returned in the freedom of contract core of the “right to work” provision of the Taft Hartley Act of 1947, adopted immediately in several southern states and spreading recently to the old industrial core. The initial impact of right to work—frustration of the CIO’s southern strategy and weakening of the union movement—eroded the capacity of organized labor and has undercut efforts by similarly inclined lawmakers to protect and improve labor standards regulation, including through maintaining fair working hours and a realistic living wage.[[71]](#footnote-71) It is these aspects of the present situation—the erosion of labor standards, the weakening of the bargaining and enforcement structure that once prevailed through the National Labor Relations Board, the ruthless exploitation of low-paid service workers, and the threatened further devolution of remaining control over labor standards back to the states—that should evoke powerfully for us the significance of the Jacobs era!

1. *New York Times* (Jan. 21, 1885). Photograph by Jacob Riis shows a Bohemian cigar maker and family working in a tenement in 1890. [↑](#footnote-ref-1)
2. In the Matter of the Application of Peter Jacobs, 98 N.Y. 98 (1885), hereafter In re Jacobs. [↑](#footnote-ref-2)
3. Ruth Crawford, “Development and Control of Industrial Homework,” *Monthly Labor Review* 58 (1944):1145-58 states at 1147 that the Jacobs ruling “effectively blocked for 30 years any further attempt to prohibit homework.” See also Eileen Boris, *Home to Work: Motherhood and The Politics of Industrial Homework in the United States* (New York: Cambridge University Press, 1994). [↑](#footnote-ref-3)
4. Michael Les Benedict, “Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism,” *Law and History Review* 3:2 (1985): 293-33, argues at 298 that classing laissez faire judicialism as a product of favoritism toward the business classes as earlier legal history scholars had done suggests an inability to enter into the mental world of 19th century legal thinkers for whom laissez faire meant, first and foremost, that “the power of government could not legitimately be exercised to benefit one person or group at the expense of others.” I am not persuaded, as Benedict asserts, that “the overwhelming majority of intellectuals” agreed with them. [↑](#footnote-ref-4)
5. On the origins and character of the classical tradition, see Morton Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992); Owen M. Fiss, *Troubled Beginnings of the Modem State, 1888-1910* (New York: Macmillan, 1993); Paul Kens, “Lochner v. New York: Tradition or Change in Constitutional Law,” *New York University Journal of Law and Liberty* 1 (2005):404-431; Charles W. McCurdy, “Roots of Liberty of Contract Jurisprudence Reconsidered: Major Premises in the Law of Employment, 1867-1937,” *Yearbook of the United States Supreme Court* (Supreme Court Historical Society, 1984):20-33; Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (Durham, N.C.: Duke University Press, 1993). A notable early revision of Lochner era origins and periodization was Stephen Siegel, “Lochner Era Jurisprudence and the American Constitutional Tradition,” *North Carolina Law Review* 70:1 (1991-1992):1-111. [↑](#footnote-ref-5)
6. Holmes dissent also emphatically affirmed the legitimacy of the states’ police powers: “It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we, as legislators, might think as injudicious, or, if you like, as tyrannical, as this, and which, equally with this, interfere with the liberty to contract.” Lochner v. New York, 198 U.S. 45 (1905), Mr. Holmes dissenting at 75. [↑](#footnote-ref-6)
7. United States v. Darby Lumber Co., 312 U.S. 100 (1941). [↑](#footnote-ref-7)
8. Definitions vary widely, of course, regarding what constitutes a strong state, running from the Weberian state with its monopoly of violence and bureaucratized structure through the capitalist-dominated state of Nicos Poulantzas. For the most noticed historians’ representations, see Stephen Skowronek’s *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920* (New York: Cambridge University Press, 1982) and Brian Balogh, *A Government Out of Sight: The Mystery of National Authority in 19th Century America* (New York: Cambridge University Press, 2009).. [↑](#footnote-ref-8)
9. Mark Humphery-Jenner, “The Need for Both Strong Regulators and Strong Laws,” Harvard Law School Forum on Corporate Governance and Financial Regulation, suggests for another area of public policy formation that strong law without strong regulation may actually be counterproductive to the desired outcome. https://corpgov.law.harvard.edu/2012/06/01/the-need-for-both-strong-regulators-and-strong-laws/ (accessed 11-15-2016). [↑](#footnote-ref-9)
10. Seldom seen in academic works indexed by JSTOR, the label “strong law” appears often in in scholarly works indexed by ProQuest Social Sciences Index. A typical use is Malcolm Ross, “The Outlook for a New FEPC,” *Commentary* 4 (Jan. 1, 1947):false301-308. This article assessed the prospects for passage of a Fair Employment Practices Act in light of expected Southern opposition. “A weak law would prove itself unsatisfactory by Nov. 1948, and the expected gratitude of Negro Voters might not be forthcoming.” Also Scott L. Greer, “The weakness of strong policies and the strength of weak policies: Law, experimentalist governance, and supporting coalitions in European Union health care policy,” *Regulation & Governance* 5 (2011):187–203; Sally Bader Mackle, “New Law in State of Washington,” *Women's Studies Newsletter* 4:1 (Winter, 1976), and John Syrett’s review of James McPherson, *The Abolitionist Legacy: From Reconstruction to the NAACP*, *Canadian Journal of History/Annales Canadiennes d'Histoire*11.2 (Aug 1, 1976): 262, which states at 308: “Most abolitionists favored a strong law to prevent school segregation, for example, but failed to object strongly when the Supreme Court invalidated the weak law Congress had enacted.” Weak law in this frame refers to laws that merely express desired outcomes without mechanisms for inspection or for guaranteeing enforcement. [↑](#footnote-ref-10)
11. On this historical connection, see David R. Dow, “Advocacy, Truth, Fairness, and Law,” *Journal of Legal Education* 39:3 (Sept. 1989):443-454; Guido Calabresi, *Future of Law and Economics: Essays in Reform and Recollection (*New Haven: Yale University Press, 2016), Ch. 2: Commodification and Commandification. [↑](#footnote-ref-11)
12. Philippe Nonet and Philip Selznick, *Law and Society in Transition: Toward Responsive Law, with a New Introduction by Robert Kagan*, 2d.ed. (1978; New Brunswick, New Jersey: 2009. This study places “responsive law” in a continuum across three modes of legal order that describe alternative ways that law has been related to political power: repressive law, autonomous law, and responsive law. Repressive law obstructs anti-government efforts, using law as a mechanism for maintaining unresponsive political power. Autonomous law enforces legal rules that have achieved standing in judicial theory and legal precedent independent of the desires of those currently in political power and their constituents. Responsive law enacts measures actively sought by citizens seeking to address new social needs as they become evident—as they are converted from mere “conditions” to “social problems.” See also Phillip Selznick, *The Moral Commonwealth: Social Theory and the Promise of Community* (Berkeley and Los Angeles: University of California Press, 1992). See also the important study by Christopher H. Achen and Larry M. Bartels, *Democracy for Realists: Why Elections Do Not Produce Responsive Government* (Princeton: Princeton University Press, 2016). [↑](#footnote-ref-12)
13. Eileen Boris, “‘A Man’s Dwelling Is His Castle’: Tenement House Cigar Making and the Judicial Imperative,” *Work Engendered: Toward a New History of American Labor*, ed.Ava Baron (Ithaca: Cornell University Press, 1991), 114-41 describes gendered conceptions of work and work locations suitable for male and female cigar makers that entered into organizational disputes among unionized and non-union workers and tenement owners over the need for regulation. [↑](#footnote-ref-13)
14. “The Cigar Trade: A Dangerous System of Labor—Protest by Cigar Makers, *New York Times* (hereafter *NYT*), Sept. 28, 1874. Cigar makers had approached a meeting of the city Board of Health seeking amendments to the city Sanitary Code, Section 19, prohibiting the use of sleeping apartments for industries using noxious materials that particularly endangered the health of children, causing many premature deaths. See “Action by the Board of Health. Cigar Making in Tenement Houses—Proceeding Against Nuisances,” *NYT*, June 23, 1879. [↑](#footnote-ref-14)
15. The allegation of health effects was confirmed in *Report of the Condition of Women and Child Wage Earners in the United States*, Vol. VIII (Washington: Gov’t. Printing Office, 1911) at 124, which listed cigar making as one of several industries that were employment dangerous to life or limb, injurious to the health or depraving of the morals of such child” and in need of regulation in light of the “danger or menace to the health or safety of minors.” [↑](#footnote-ref-15)
16. “Turbulent Cigar Makers,” *NYT* (Jan. 6, 1878); “Grievances of Cigar Makers. One Thousand of the Workers Hold Mass Meeting—the Tenement House System Denounced,” *NYT* *(*Feb. 3, 1879); “Cigar Making in Tenement Houses,” *NYT* (Feb. 16, 1879). See “Tenement-House Cigar Work: East Side Property-Owners Protest against It,” *NYT* (Feb. 28, 1880) for middle class reformer support. See also “Journal of the Senate of the United States of America,” Serial Set Vol. No. 188, 46th Congress, 2nd Session, 1879, Senate Finance Committee “Mr. [Newton} Booth presented a petition of the Cigar Makers Association of the Pacific Coast praying the passage of a law preventing the system of tenement house; which was referred to the Senate Committee on Finance.” Booth was then a former governor of California who demanded in a Spencerian mode restraints against a “clash of civilizations” that he declared would stem from continued racial mixing. Chinese immigrants did work to some degree in cigar making in California, but in the New York case at the time of this movement, the immigrant tenement workers were mainly Bohemian. In a manner reminiscent of recent U.S. attacks on immigrants who “take American jobs,” Booth predicted downward pressure on wages. Quoted in Martin Gold, *Forbidden Citizens: Chinese Exclusion and the U.S. Congress : a Legislative History* (The Capitol Net, Inc., July 4, 2012). [↑](#footnote-ref-16)
17. “Strike of Cigar Makers. The Workmen of Five Factories Demanding Higher Rates—No Danger of a General Strike,” *NYT*, August 29, 1877; “The Cigar Makers Protest,” *NYT* (Feb. 21, 1880.) Pay for cigar makers ranged from $4.00-$5.00 in factories for making 1000 cigars to half that amount, typically $2.00, in tenements. [↑](#footnote-ref-17)
18. *The Samuel Gompers Papers, Vol. 1: The Making of a Union Leader, 1850-86* (Champaign: University of Illinois Press, 1991), 172-76. [↑](#footnote-ref-18)
19. “Tenement House Cigar Making: Contents of the Bill Just Passed by the Legislature,” *NYT* (March 14, 1883). See *The Bar* 16 (Jan. 1909): 28 for Roosevelt’s support of the ban and for his later plea “for the recognition and validity of an act of the legislative department.” Roosevelt described the Jacobs court judges as “without any sympathetic understanding of the needs and conditions of life of the great mass of their countrymen … of the lives that were lived where the tenement house and the factory were one and the same.” Quoted in *Outlook* editorial titled “A Judicial Experience” at *The Bar*, at 29. See also Theodore Roosevelt, *The Rough Riders: An Autobiography* (New York: The Library of America, 2004), Chronology, 858.  [↑](#footnote-ref-19)
20. “Tenement Cigar-Making: The Law Against It Declared Unconstitutional. A Court of Appeals Decision Based on the Fact That the Title of the Act Is Defective,” *NYT* (Jan. 29, 1884). See also the related case, 94 N.Y. 497 (1884) “In the Matter of the Application of David A. Paul for a Writ of Habeas Corpus.” The court dismissed charges against Paul on the grounds described above. [↑](#footnote-ref-20)
21. “Hurrying the Cigar-Makers Case,” *NYT* (Oct. 20, 1883). On the individualist theory of the ruling, see Edwin Borchard, “The Supreme Court and Private Rights,” *Yale Law Journal* 47:7(1938):1051-1078, at 1058; Gerald Friedman. “American Labor and American Law: Exceptionalism and its Politics in the Decline of the American Labor Movement,” *Law, Culture and the Humanities* (2012):1-14. [↑](#footnote-ref-21)
22. In the Matter of the Application of Peter Jacobs, 98 N.Y. 98 (1885), 583. [↑](#footnote-ref-22)
23. John S. Billings, *A Treatise on Hygiene and Public Health*,” ed. Albert H. Buck (New York, 1879), quoted in William Novak, *The People’s Welfare: Law and Regulation in Nineteenth Century America* (Chapel Hill: University of North Carolina Press, 1995), 195. [↑](#footnote-ref-23)
24. Index entries for Public Economy, Public good, Public health, and Public morality do not include labor standards. See also the *AHR* Exchange: “On the “Myth” of the “Weak” State,” *American Historical Review* 115 (2010):766-800. [↑](#footnote-ref-24)
25. Slaughterhouse Cases, 83 U.S. 36, 97 (1873). On Field’s intentions in the Slaughterhouse dissent, see Charles Mc Curdy, “Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897,” *Journal of American History* 61:4 (Mar., 1975):970-1005; McCurdy, “Roots of ‘Liberty of Contract’ Reconsidered,” 20-24. See also Novak, *People’s Welfare*, “Road to Slaughterhouse,” 229-33. [↑](#footnote-ref-25)
26. William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* (Cambridge: Harvard University Press, 1988), passim. See also Mark G. Yudof, “1990 Survey of Books Relating to the Law; I. The Federal Courts and the Constitution: Equal Protection, Class Legislation, and Sex Discrimination: One Small Cheer for Mr. Herbert Spencer's *Social Statics*,” *Michigan Law Review* 88 (1990):1366-1392. [↑](#footnote-ref-26)
27. “The Court of Appeals Denounced,” *New York Times,* Feb. 2, 1884. The New York activists had support from across the nation. In one instance, the desire that strong law protect decent labor standards was tinged with racial prejudice. A San Francisco cigar makers union carried a banner reading “Down with Tenement House and Chinese Labor. WHITE CIGAR-MAKERS: Arrival of the Eastern Contingent,” *San Francisco Chronicle* (Jan 3, 1886). A powerful affirmation that judges typically responded to pressure came a few years later in Christopher Gustavus Tiedeman, “Dictum and Decision,” *Columbia Law Times* 6 (1892-1893):35-39, at 35: “Self-interest is the great motive power in all social movements, and whichever interest exerts the strongest influence in the given case will undoubtedly succeed in controlling the judicial utterance.” [↑](#footnote-ref-27)
28. A good example of such analyses is Haggai Hurvitz, “American Labor Law and the Doctrine of Entrepreneurial Property Rights: Boycotts, Courts, and the Juridical Reorientation of 1886-1895,” *Industrial Relations Law Journal* 8:3 (1985):307-361. McCurdy, “The Roots of ‘Liberty of Contract’ Reconsidered,” offers a masterful analysis of the relevant historiography on this point. See also for the broader context Herbert Hovenkamp, *The Opening of American Law: Neoclassical Legal Thought, 1870-1970* (New York: Oxford University Press, 2015), esp. Part Four, Neoclassical Public Law. [↑](#footnote-ref-28)
29. Henry Carter Adams, “Relation of the State to Industrial Action,” *Publications of the American Economic Association* 1:6 (Jan., 1887):7-85. For another late nineteenth-century view, see Everett V Abbot, “Police Power and the Right to Compensation,” *Harvard Law Review* 3:5 (1889-1890):189-205. See also for the broader context Logan Sawyer, “Revising Gilded Age History,” *History of the Gilded Age and Progressive Era,* forthcoming. [↑](#footnote-ref-29)
30. Melvin I. Urofsky, “State Courts and Protective Legislation during the Progressive Era: A Reevaluation,” *Journal of American History* 72:1 (1985):63-91. [↑](#footnote-ref-30)
31. Consideration of the “health, safety, and morals” justification became a staple of the court decisions of the Gilded Age and Progressive Era. According to Herbert Hovenkamp, the phrase appeared in 44 cases before 1890, in an additional 100 cases between 1890 and 1900, and in 1100 more between 1900 and 1930. Hovenkamp to Furner, Sept. 14, 2014, in the author’s possession. Quotation is at Borchard, “Supreme Court and Private Rights,” 1066. [↑](#footnote-ref-31)
32. In re Jacobs, Opinion by Earl, 590. [↑](#footnote-ref-32)
33. “Wynehamer v. the People - Prohibition and Property,” http://law.jrank.org/pages/25395/Wynehamer-v-People-Prohibition-Property.html, accessed Oct. 16, 2016. See also Horwitz, *Transformation of American Law,* n. 120. [↑](#footnote-ref-33)
34. Wynehamer v. People, 13 N.Y. 378 (1856), 181. [↑](#footnote-ref-34)
35. Edward S. Corwin, “The Extension of Judicial Review in New York: 1783-1905,” *Michigan Law Review* 15:4 (Feb., 1917): 281-313. References to Wynehamer and Jacobs are at 283, 293, 295, 296. [↑](#footnote-ref-35)
36. State courts struck down truck laws in cases decided in Illinois, Kansas, and Indiana in the 1890s. The Illinois court relied on a thoroughly republican understanding of their society that condemned class legislation, stating: “In this country the employee to-day may be the employer next year, and laws treating employees as subjects for such protective legislation belittle their intelligence and reflect upon their standing as free citizen,” at 594. State v. Haun, 59 *Pacific Reporter*, quoted in Henry R. Seager, “The Attitude of American Courts Towards Restrictive Labor Laws,” *Political Science Quarterly* 19:4 (1904):589-611. Three states’ courts upheld anti-truck laws between 1897 and 1900. Ibid., 595-98. [↑](#footnote-ref-36)
37. Godcharles v. Wigeman, 113 Pa. St. 431 (1886), 356. For a superb analysis of this case, see Laura Phillips Sawyer, “Contested Meanings of Freedom: Workingmen's Wages, the Company Store System, and the Godcharles v. Wigeman Decision,” *Journal of the Gilded Age and Progressive Era*12 (2013):285-319. [↑](#footnote-ref-37)
38. Quoted in “Opinion by Earl,” In re Jacobs, at 590. [↑](#footnote-ref-38)
39. In re Jacobs, with Wynehamer the first supporting case cited, at 583. [↑](#footnote-ref-39)
40. Mary O. Furner, “The Republican Tradition and The New Liberalism: Social Investigation, State Building, and Social Learning in the Gilded Age,” *The State and Social Investigation in Britain and the United States*, eds. Michael J. Lacey and Mary O. Furner (New York: Cambridge University Press, 1993), 171-241. [↑](#footnote-ref-40)
41. On the recognition of a class-ordered society, see Richard Grant White, “Class Distinctions in the United States,” North American Review 137:322 (1883):231-246; Francis Amasa Walker,

“Efforts of the Manual Laboring Class to Better Their Condition,” *Publications of the American Economic Association* 3:3 (1888): 7-26; In re Jacobs, 98 NY 98, 101. [↑](#footnote-ref-41)
42. Acts 1887, c. 63 para 5.in Uriah Barnes, ed. *West Virginia Code* (Albany: J.B. Lyon Company, 1916. [↑](#footnote-ref-42)
43. State v. Goodwill, 33 W. Va. 179 (1889). [↑](#footnote-ref-43)
44. Ritchie v. People 155 Ill. 98 (1895) 460, 467. Andrew Alexander Bruce, “The Illinois Ten-Hour Labor Law for Women,” *Michigan Law Review* 8: 1 (1909):1-24. The Ritchie opinion cited In re Jacobs, State v. Goodwill, and Godcharles v. Wigemann in support of recognizing labor as property. Thus the court held that “the mere fact of sex will not justify the legislature in putting forth the police power of the state for the purpose of limiting her exercise of those rights.” Quotation at 458. [↑](#footnote-ref-44)
45. Minor v. Happersett, 88 U.S. 162 (1875). Christopher Gustavus Tiedeman, *Constitutional Limitations Which Rest Upon the Legislative Powers of the States of the Union* (St. Louis: Thomas Law Book Co., 1886), quoted at 460. [↑](#footnote-ref-45)
46. Holden v. Hardy, 169 U.S. 366 (1898). [↑](#footnote-ref-46)
47. Holden v. Hardy, Argument for Plaintiff in Error, 371. [↑](#footnote-ref-47)
48. Holden v. Hardy, Argument for Plaintiff in Error, 373-79 [↑](#footnote-ref-48)
49. Munn v. Illinois, 94 U.S. 113, 125, 126. [↑](#footnote-ref-49)
50. W. Frederic Foster, “The Doctrine of the United States Supreme Court of Property Affected by a Public Interest, and Its Tendencies,” *Yale Law Review* 5:2 (1895): 49-52, quotation at 49. [↑](#footnote-ref-50)
51. Holden v. Hardy, 169 U.S. 366 (1898), 372-73. Holden’s presentation argued, “Police regulations are, therefore, not enacted for the purpose of punishing wrongs, as such, but to enforce duties to the public in respect to matters which can only become wrongs *sub modo*.” The defense cited numerous precedents upholding freedom of contract in cases involving terms of employment, among them Jacobs, Godcharles v. Wigeman, and Ritchie v. People. [↑](#footnote-ref-51)
52. Ibid., 391-92. [↑](#footnote-ref-52)
53. For the standard accounts, see, e.g., Fiss, *Troubled Beginnings of the Modern State, 1888-1910*, 172-75. [↑](#footnote-ref-53)
54. Holden v. Hardy, 393-97. [↑](#footnote-ref-54)
55. Holden v. Hardy, 381, 397. Joined by Chief Justice Fuller, Harlan, Gray, Shiras, White, and McKenna, Justice Brown ruled to uphold the Utah law in Holden. Only Justices Peckham and Brewer dissented. On the high bench from 1890 to 1906, Brown wrote the majority opinion in Plessy v. Ferguson and later sided with the majority in Lochner v. New York. Note here the greater intensity of manufacturing and mining labor under supervision of bosses that what had prevailed in artisanal or agricultural labor, as documented in numerous studies in the “new” labor history since the 1960s. E.g., David Montgomery, *Workers' control in America: Studies in the history of work, technology, and labor* (New York: Cambridge University Press, 1979). [↑](#footnote-ref-55)
56. Holden v. Hardy 169 U.S. 366, 397. See also Claudio Katz, “Protective Labor Legislation in the Courts: Substantive Due Process and Fairness in the Progressive Era,” *Law and History Review* 31 (2013): 275-310. Note here also the greater intensity of manufacturing and mining labor under supervision of bosses that what had prevailed in artisanal or agricultural labor, as documented in numerous studies in the “new” labor history since the 1960s. E.g., David Montgomery, *Workers' control in America: Studies in the history of work, technology, and labor* (New York: Cambridge University Press, 1979). [↑](#footnote-ref-56)
57. Holden v. Hardy, 392. Shaw quotation is from Commonwealth v. Alger, 7 Cush. 53, 81. [↑](#footnote-ref-57)
58. Holden v. Hardy, 385, 386, 387. On the juxtaposition of individual and social justice, see R. W. Kostal, “Legal Justice, Social Justice: An Incursion into the Social History of Work-Related Accident Law in Ontario, 1860-86,” *Law and History Review* 6:1 (Spring, 1988):1-24; Lawrence Friedman and Jack Ladinsky, "Social Change and the Law of Industrial Accidents," *Columbia Law Review* 67 (1967):50-82. See also William Forbath, *Law and the Shaping of the American Labor Movement* (Cambridge: Harvard University Press, 1991); Melvin I. Urofsky, “State Courts and Protective Legislation During the Progressive Era: A Reevaluation,” *Journal of American History* 72:1 (1985):63-91. [↑](#footnote-ref-58)
59. For an account of the two iterations of “new liberalism,” see Furner, “Republican Tradition”; idem, “From ‘State Interference’ to the ‘Return to the Market’: The Rhetoric of Economic Regulation from the Old Gilded Age to the New,” *Government and Markets: Toward a New Theory of Regulation*, eds. Edward Balleisen & David Moss (New York: Cambridge University Press, 2009), 92-142. The reader should be sure to distinguish between statist liberalism and its later variant, New Deal liberalism, on the one hand, and state capitalism, in which the state controls the investment function, on the other. [↑](#footnote-ref-59)
60. A. C. Pigou, *Economics of Welfare,* 4th ed., (1920: London: MacMillan, 1932), 463. Earlier work had demonstrated from statistical studies that shortening the work day actually increased the productivity of the hours worked by better rested operatives. S. J. Chapman, “Hours of Labour,” *The Economic Journal* 19:75 (1909):353-373. [↑](#footnote-ref-60)
61. Pigou, *Economics of Welfare*, 465. See also Tom Walker, “The Hours of Labour and the Problem of Social Cost,” http://www.disei.unifi.it/upload/sub/pubblicazioni/msb/vol\_12\_2011/walker2011.pdf , accessed Dec. 6, 2016. [↑](#footnote-ref-61)
62. Following the Holden precedent, Missouri and Nevada passed eight-hour laws similar to Utah’s for miners and smelter workers, Rhode Island banned more than a ten hour work day for street railway operators, and New York passed the ten-hour law for bakers that led in 1905 to the Lochner ruling. See Friedman and Ladinsky, "Social Change and the Law of Industrial Accidents," 607. [↑](#footnote-ref-62)
63. Morgan had contracted to work for ten hours a day as a smelter operator. His defense offered the Jacobs precedent and contrasted its outcome with the definition of a public interest in Munn v. Illinois. Plaintiff also drew support from Thomas McIntyre Cooley, *A Treatise on the Limitation of Police Power in the United States* (1871 and from Tiedeman, *Constitutional Limitations*. [↑](#footnote-ref-63)
64. William Forbath, *Law and the Shaping of the American Labor Movement* (Cambridge: Harvard University Press, 1991); see also Melvin I. Urofsky, “State Courts and Protective Legislation during the Progressive Era: A Reevaluation,” *Journal of American History* 72:1 (1985):63-91. [↑](#footnote-ref-64)
65. Charles Warren, “The Progressiveness of the United States Supreme Court,” *Columbia Law* *Review* 13: 4 (1913): 294-313; idem, “A Bulwark to the State Police Power—The United States Supreme Court,” *Columbia Law Review* 13: 8 (1913):667-695. [↑](#footnote-ref-65)
66. In Bunting, the U.S. Supreme Court declined to “ascribe to the legislature an intent to disguise an illegal purpose” or to challenge its assertion of the necessity for the law. Bunting v. Oregon, 243 U.S. 426, 436-37. [↑](#footnote-ref-66)
67. Novak, *People’s Welfare*, 232. [↑](#footnote-ref-67)
68. West Coast Hotel Co. v. Parrish 300 US 379 393. [↑](#footnote-ref-68)
69. Ibid., 393-94, supporting the public interest argument, the court stated: “The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenceless against the denial of a living wage is not only detrimental to their health and well being but casts a direct burden for their support upon the community. What these workers lose in wages the taxpayers are called upon to pay.” For the Holden quotation, see 16-17 above. Economist John Maurice Clark has made precisely this case a decade earlier in *Social Control of Business* (Chicago: University of Chicago Press, 1926). [↑](#footnote-ref-69)
70. For this much longer story, see Ira Katznelson, *Fear Itself* *:The New Deal and the Origins of Our Time* (New York: Liveright, 2012). [↑](#footnote-ref-70)
71. For a concise account of the decline of organized labor, see Nelson Lichtenstein, *State of the Union: A Century of American Labor,*(revised and expanded edition: Princeton: Princeton University Press, 2013). [↑](#footnote-ref-71)