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Rufus W. Peckham and Economic Liberty

*James W. Ely, Jr.**

It is striking that Rufus W. Peckham has received so little scholarly attention and remains without a biography.[1] He was, of

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1. *See generally* JAMES W. ELY, JR., THE FULLER COURT: JUSTICES, RULINGS, AND LEGACY 69–73 (2003) (giving a short sketch of Peckham's life and judicial service); Megan W. Benett, *Rufus Wheeler Peckham, Jr., in* THE JUDGES OF THE NEW YORK COURT OF APPEALS: A BIOGRAPHICAL HISTORY 233, 233–38 (Albert M. Rosenblatt ed., 2007) (same); Scott Horton, *Rufus Wheeler Peckham, Jr., in* BIOGRAPHICAL ENCYCLOPEDIA OF THE SUPREME COURT 395, 395–98 (Melvin I. Urofsky ed., 2006) (same); Richard Skolnik, *Rufus Peckham, in* 3 THE JUSTICES OF THE UNITED STATES SUPREME COURT 806, 833–52 (Leon Friedman & Fred L. Israel eds., Chelsea House Publishers, 3d ed. 1997) (same); *see also* William F. Duker, *Mr. Justice Rufus W. Peckham: The Police Power and the Individual in a Changing World,* 1980 BYU L. REV. 47, 47–67 (reviewing Peckham's liberty of contract and antitrust decisions); Robert L. Lasky, Rufus Wheeler Peckham: His Life and Times (Apr. 11, 1951) (unpublished A.B. thesis, Harvard University) (on file with author); Paul Mandelstam, Rufus W. Peckham, His Career and His Influence (1944) (unpublished A.B. thesis, Harvard University) (on file with author). One

course, the author of *Lochner v. New York* (1905),[2] one of the most famous and contested decisions in the history of the Supreme Court. Moreover, Peckham wrote important opinions dealing with contractual freedom, antitrust law, eminent domain, dormant commerce power, and the Eleventh Amendment. Indeed, Owen M. Fiss maintains that Peckham and David J. Brewer were intellectual leaders of the Fuller Court, "influential within the dominant coalition and the source of the ideas that gave the Court its sweep and direction." Even when they did not prevail, Fiss observed, Peckham and Brewer "set the terms for the debate."[3]

Why has such an influential jurist been so conspicuously overlooked in the historical literature? One might be tempted to explain this neglect in terms of the disdain that many scholars feel toward the jurisprudence of the Gilded Age, with its emphasis on economic liberty and limited government. It is an old adage that winners write history. Scholars who view the work of the Supreme Court through the lens of the Progressive and New Deal mindset would likely have little sympathy for Peckham.[4] After all, he was skeptical about much of the legislation associated with the Progressive movement and strenuously rejected the emerging statist liberalism.

While no doubt this is a partial explanation, it is not ultimately persuasive. Other leading jurists of the late nineteenth century—Stephen J. Field,[5] Melville W. Fuller,[6] Brewer,[7] Thomas M. Cooley[8]—have received considerable scholarly attention. Even the controversial *Lochner* decision has been the subject of revisionist and

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possible reason for scholarly neglect of Peckham could be the lack of primary research documents. Peckham left no cache of revealing personal papers casting light on his judicial career.

2. 198 U.S. 45 (1905).

3. OWEN M. FISS, TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910, at 33 (1993) (discussing the prominent influence both Peckham and Brewer had on the Fuller Court).

4. Brian Z. Tamanaha, *The Bogus Tale About the Legal Formalists* 81–82 (St. John's Legal Studies Research Paper No. 08-0130, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1123498 ("The day was won by the welfare state, and histories written by progressives denigrated the vanquished opponents.").

5. *See generally* PAUL KENS, JUSTICE STEPHEN FIELD: SHAPING LIBERTY FROM THE GOLD RUSH TO THE GILDED AGE (1997).

6. *See generally* JAMES W. ELY, JR., THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER, 1888–1910 (1995).

7. *See generally* MICHAEL J. BRODHEAD, DAVID J. BREWER: THE LIFE OF A SUPREME COURT JUSTICE, 1837–1910 (1994).

8. *See generally* ALAN R. JONES, THE CONSTITUTIONAL CONSERVATISM OF THOMAS MCINTYRE COOLEY: A STUDY IN THE HISTORY OF IDEAS (1987).

more sympathetic accounts in recent years.[9] So we are left with an unresolved question as to why Justice Peckham lingers in relative obscurity. I propose in this Article to take a fresh look at Peckham's career and assess his contributions to constitutional jurisprudence.

I. BACKGROUND

Born in 1838 in Albany, New York, Peckham was part of a family of prominent lawyers and judges. Indeed, in many respects Peckham's early career followed his father's path. The elder Peckham was a district attorney, a member of Congress, and served on both the New York Supreme Court and the Court of Appeals.[10] Rufus Peckham was educated locally and studied law in his father's office. He was admitted to the New York bar in 1859. Joining the family firm, Peckham built a successful practice representing the Albany and Susquehanna Railroad, a local bank, and real estate interests.[11] As the sectional crisis worsened on the eve of the Civil War, Peckham expressed no sympathy for abolitionism or racial equality. "I am proud I believe in no negro equality" he wrote to his brother in late 1860.[12] Two years later Peckham favored vigorous prosecution of the Civil War to preserve the Union but also respect for the rights of the South under the Constitution. He worried that "the radical abolitionists" were "making it a war for the freedom of the slaves, in spite of the Constitution and if necessary in spite of the Union."[13] As might be expected given his views, Peckham did not serve in the military.

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9. *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 211–14 (2004) (explaining the reasoning behind the *Lochner* decision); RICHARD A. EPSTEIN, SUPREME NEGLECT: HOW TO REVIVE CONSTITUTIONAL PROTECTION FOR PRIVATE PROPERTY 165–66 (2008) (highlighting the benefit of *Lochner* on labor market competition); Hadley Arkes, Lochner v. New York *and the Cast of Our Laws*, *in* GREAT CASES IN CONSTITUTIONAL LAW 94, 94–129 (Robert P. George ed., 2000) (analyzing the importance of *Lochner*); David E. Bernstein, Lochner *Era Revisionism, Revised:* Lochner *and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 42–51 (2003) (discussing the so-called *Lochner* era); Ellen Frankel Paul, *Freedom of Contract and the "Political Economy" of* Lochner v. New York, 1 N.Y.U. J. L. & LIBERTY 515, 519–61 (2005) (unraveling Justice Holmes's criticism of *Lochner*); Bernard H. Siegan, *Rehabilitating* Lochner, 22 SAN DIEGO L. REV. 453, 453–97 (1985) (justifying the *Lochner* decision).

10. Lasky, *supra* note 1, at 33–38.

11. *Id.* at 38–46.

12. Letter from Rufus Peckham to Wheeler Peckham (Nov. 1860) (on file with the Vanderbilt Law Review and with the Library of Congress, Papers of Wheeler H. Peckham Family, vol. 2, box 1, folder 22).

13. Letter from Rufus Peckham to Wheeler Peckham (Oct. 29, 1862) (on file with the Vanderbilt Law Review and with the Library of Congress, Wheeler H. Peckham Family Papers, vol. 2, box 1, folder 28).

Peckham was active in Democratic Party affairs, and in 1868 he was elected district attorney for Albany County, a post that he held for three years. From 1881 to 1883 he was corporation counsel for the City of Albany. Participating regularly in Democratic Party conventions at both the national and state level, Peckham emerged as a leading spokesman for upstate Democrats in their struggle to prevent domination of the party by Tammany Hall. He formed a close friendship with Grover Cleveland and actively supported Cleveland's rise in New York political life. In 1883, Peckham was elected to the New York Supreme Court. Three years later, then-President Cleveland helped to engineer Peckham's election to the New York Court of Appeals.[14]

II. COURT OF APPEALS

During his nearly ten years on the New York appellate bench Peckham proved to be an able judge who avoided partisanship. He authored more than 300 opinions for the court on a wide variety of private law topics, including property, torts, contracts, and wills. Peckham wrote only eight dissenting opinions, but he dissented more than eighty times without opinion. Most interesting for our purposes, however, are Peckham's opinions raising constitutional issues. He demonstrated skepticism about governmental regulation of the economy, an aversion to class legislation, and a disposition to define liberty as encompassing economic freedom. Because Peckham carried these views with him to the Supreme Court, his work on the Court of Appeals warrants careful consideration.

Peckham's opinion in *People v. Gillson* (1888) is especially revealing.[15] At issue was the defendant's act of giving away a teacup and saucer to the purchaser of two pounds of coffee as part of a promotional scheme. The state alleged that this transaction violated a section of the penal code that banned the distribution of gifts or prizes with the sale of food. It argued that the measure was a valid exercise of the police power to prohibit lotteries and prevent the sale of unwholesome food. Speaking for a unanimous bench, Peckham found that the statute amounted to a deprivation of both liberty and property without due process of law as guaranteed by the New York Constitution. Emphasizing that liberty encompassed the right "to earn his livelihood in any lawful calling and to pursue any lawful trade or avocation," he pictured the statute as an anticompetitive regulation. It

14. Lasky, *supra* note 1, at 46–56.

15. 17 N.E. 343 (N.Y. 1888).

was, Peckham complained, "of that kind which has been so frequent of late, a kind which is meant to protect some class in the community against the fair, free and full competition of some other class . . . ."[16] He insisted that the statute infringed upon the owner's liberty to pursue a lawful calling and deprived him of property by curtailing the power of sale. After considering at length the state's police power argument, Peckham concluded that there was no element of chance here and hence no lottery. Although conceding that the legislature could ban lotteries and prevent the sale of adulterated food, he declared that the statute did not accomplish either purpose.

Peckham's *Gillson* opinion anticipates much of his reasoning in *Lochner*. He broadly defined liberty to include economic activities and required the state to demonstrate that its exercise of regulatory authority was "reasonably necessary for the common welfare."[17] Peckham did not accept the state's ostensible purpose at face value. Instead, he undertook an extensive economic analysis of the regulation and independently weighed the evidence, finding that the measure had no relationship to its alleged purpose. Thus, Peckham persuasively ruled that on the facts presented, the state failed to justify its interference with liberty and property. Moreover, the *Gillson* opinion underscores Peckham's intellectual debt to Jacksonian Democracy, with its stress on equal rights and distrust of class legislation. The Jacksonian distaste for granting special economic privilege and preference for competition had a significant impact on constitutional thought in the Gilded Age.[18]

It bears emphasis that Peckham's solicitude for economic liberty was not confined to business enterprises. He championed the right to pursue ordinary trades, a right seemingly threatened by the rise of occupational licensing in the late nineteenth century. Accordingly, Peckham viewed occupational licensing with deep skepticism. In *Nechameus v. Warden of the City Prison* (1895) the court majority upheld a state law that required master plumbers—those who employed other plumbers to work for them—to pass an examination and obtain a license from a board of plumbers.[19] The

16. *Id.* at 345.

17. *Id.* at 346.

18. HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF *LOCHNER* ERA POLICE POWERS JURISPRUDENCE 33–60 (1993) (noting the continuing importance of Jacksonian doctrines in shaping judicial support for free markets); Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 793, 318–20, 327–31 (1985) (stressing the significance of Jacksonian hostility to class legislation).

19. 39 N.E. 686 (N.Y. 1895).

majority reasoned that the statute, although coming "pretty close" to the borderline of legitimate police power, related to public health and welfare. In a vigorous dissent, however, Peckham blasted the licensure scheme as a deprivation of the liberty to follow an ordinary trade. Finding no health or safety rationale for the act, he declared: "[I]t would seem quite apparent that its purpose is to enable the employing plumbers to create a sort of guild or body among themselves, into which none is to be permitted to enter excepting as he may pass an examination, the requisites of which are not stated . . . ." Peckham added that the license requirement was "vicious in its purpose and that it tends directly to the creation and fostering of a monopoly."[20]

Peckham's commitment to economic rights was also manifest in his dissenting opinion in a pair of cases concerning the power of the state to set maximum charges for grain elevators. The power of state governments to impose rates on railroads and allied industries was much contested in the Gilded Age. Peckham vigorously disagreed with the court majority, which sustained the state's ratemaking authority.[21] Recognizing that the state could protect the public health and morals, he insisted that "a power to limit compensation is another and far greater and more dangerous power."[22] Peckham rejected the reasoning of the Supreme Court in *Munn v. Illinois* (1877), which held that states could prescribe rates for businesses "clothed with a public interest."[23] In his view, the state's authority to fix charges was confined to exceptional situations such as common carriers and those enterprises that had a privilege granted by government. Peckham flatly rejected the contention that the grain elevators in question amounted to a "virtual monopoly" which justified price regulation.[24] He stressed that other individuals were free to go into the same business.[25] Peckham proclaimed "the general rule of absolute liberty of

20. *Id.* at 691 (Peckham, J., dissenting).

21. People v. Budd, 22 N.E. 670 (N.Y. 1889).

22. *Id.* at 682 (Peckham, J., dissenting). Peckham was apparently the first American judge to use the phrase "liberty of contract" in a constitutional context. *Id.* I am indebted to David E. Bernstein for calling this point to my attention. Peckham evidently prepared this dissenting opinion for the companion case of *People v. Walsh*, 22 N.E. 1127 (N.Y. 1889), which presented the same issues. But the court rendered no written opinion in *Walsh* and Peckham's dissent was published in connection with *Budd*. The *Budd* decision by the New York Court of Appeals was affirmed by the Supreme Court by a vote of six to three. Budd v. New York, 143 U.S. 517 (1892). Justice David J. Brewer's dissenting opinion, however, closely followed the analysis proposed by Peckham. *Id.* at 548–52 (Brewer, J., dissenting).

23. Munn v. Illinois, 94 U.S. 113, 126 (1877).

24. *Budd*, 22 N.E. at 684, 689.

25. *Id.*

the individual to contract regarding his own property," a doctrine that would be a hallmark of his jurisprudence. Further, Peckham renewed his warning against the evil of class legislation:

> To uphold legislation of this character is to provide the most frequent opportunity for arraying class against class, and in addition to the ordinary competition that exists throughout all industries, a new competition will be introduced, that of competition for the possession of the government, so that legislative aid may be given to the class in possession thereof in its contests with rival classes or interests . . . .[26]

In addition to business regulations, Peckham wrestled with fledgling land use controls in a number of cases. He maintained that courts should carefully scrutinize such legislation, but was prepared to uphold those controls that imposed reasonable burdens and clearly preserved public health and safety. At the same time, he disapproved of land use controls that effectively deprived an owner of the beneficial enjoyment of his or her property.

Peckham's approach to land use issues was well illustrated by *Health Department of New York v. Rector of Trinity Church* (1895).[27] A state law required the owner of tenement houses in New York City to furnish a supply of water to tenants on each floor. The Health Department sued the owner to recover a fine for failure to comply. Writing for the court, Peckham rejected the defendant's argument that the legislation amounted to a deprivation of property without due process of law. He began by asserting that an exercise of the police power must "tend in a degree that is perceptible and clear" toward the health and welfare of the public. Nor would Peckham accept the ostensible purpose of legislation blindly. Rather, he declared that courts must look at "the true character of the act" to ascertain if it was passed for an object within the police power or "for a distinct and totally different purpose."[28]

Having preserved far-reaching judicial scrutiny of regulations, Peckham stated that the legislature could not command the expenditure of an unreasonable amount of money by landowners, but reasonable exactions could pass judicial muster. Peckham explained:

> We may own our property absolutely and yet it is subject to the proper exercise of the police power. We have surrendered to that extent our right to its unrestricted use. It must be so used as not improperly to cause harm to our neighbor, including in that description the public generally. . . . The legislature, in the exercise of this power, may direct that certain improvements may be made in existing houses at the owners'

26. *Id.* at 694. For an insightful analysis of Peckham's dissent in *Budd*, see Alan J. Meese, *Liberty and Antitrust in the Formative Era*, 79 B.U. L. REV. 1, 29–34 (1999).

27. 39 N.E. 833 (N.Y. 1895).

28. *Id.* at 835.

> expense, so that the health and safety of the occupants and of the public through them may be guarded.[29]

Hence, the fact that the regulation entailed some expense to the owner did not constitute a deprivation of property. In this connection, Peckham noted that laws regulating manufacturing plants or governing building projects in urban areas also cause increased expense. Expressing sympathy with legislative efforts to improve tenement living conditions, Peckham found that the legislation was a valid exercise of the police power to safeguard the health and safety of the public.

Yet Peckham had no hesitancy to strike down land use controls that lacked a compelling justification or imposed an unduly severe burden on landowners. In *Forster v. Scott* (1893), the court heard a challenge to the practice of mapping certain urban lots for possible future acquisition by local government.[30] A statute provided that no compensation would be paid for any building erected on these lots subsequent to filing such a map. The purpose of this measure was to hold down the cost of obtaining those parcels should local government eventually decide to do so. As a practical matter, it severely restricted the right to use or dispose of land. The plaintiff, owner of a vacant lot in New York City, argued that his lot was primarily valuable for building purposes, but that because of the mapping regulation, the lot could not be used except at risk to the owner of losing the cost of any building. Peckham joined a unanimous court in declaring the regulation void as to the plaintiff:

> What the legislature cannot do directly, it cannot do indirectly, as the Constitution guards as effectually against insidious approaches as an open and direct attack. Whenever a law deprives the owner of the beneficial use and free enjoyment of his property, or imposes restraints upon such use and enjoyment, that materially affect its value, without legal process or compensation, it deprives him of his property within the meaning of the Constitution. All that is beneficial in property arises from its use and the fruits of that use, and whatever deprives a person of them deprives him of all that is desirable or valuable in the title and possession. It is not necessary, in order to render a statute obnoxious to the restraints of the Constitution, that it must in terms or in effect authorize an actual physical taking of the property or the thing itself, so long as it affects its free use and enjoyment, or the power of disposition at the will of the owner.[31]

The court not only defined the right of property ownership broadly to include use, but its analysis made clear that future developmental rights were entitled to constitutional protection.

Questions pertaining to the exercise of eminent domain also occupied Peckham's time. He sought to secure the right of owners to

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29. *Id.* at 836.

30. 32 N.E. 976 (N.Y. 1893).

31. *Id.* at 977.

receive compensation when their land was taken by the state. In *Clark v. Water Commissioners of Amsterdam* (1895), the owner's land was condemned to help provide a municipal water supply.[32] Inexplicably the owner waited nearly ten years before initiating proceedings to obtain compensation. Peckham, writing for a unanimous court, brushed aside the city's argument that a statute of limitations governing liabilities created by statute should be applied. Instead, he maintained that payment of compensation for appropriated property was a constitutional, not a statutory, obligation.

Another question arising in the eminent domain context concerned the construction of elevated railroads in New York City, which severely impacted land use and gave rise to prolonged litigation.[33] Fearing loss of property value due to noise, smoke, and vibration, adjacent landowners sought compensation for damages caused by the operation of such railroads. In a line of decisions, the Court of Appeals determined that abutting landowners held easements of light, air, and access to public streets appurtenant to their land. The elevated railroads were found to be liable for interference with these easements by their structure or operation. Peckham joined in numerous opinions awarding damages to adjacent landowners.[34] But he also denied recovery for destruction of such easements where the owners could not demonstrate a loss.

In *Bohm v. Metropolitan Elevated Railway Co.* (1892),[35] he grappled with the thorny question of how to ascertain the measure of compensation for loss of light, air, and access easements when no land of the claimants was taken for the railroads. Peckham revealingly explained the court's larger concern with the diminution of property values caused by the elevated railroad:

> When the courts acquired possession of the question, and it was seen that abutting land, which before the erection of the road, was worth, for instance, $10,000, might be reduced to a half or a quarter of that sum in value, or even rendered practically worthless, by reason of the building of the road, it became necessary to ascertain if there were not some principle of law which could be resorted to in order to render those who wrought such damages liable for their work. It has now been decided that, although the land itself was not taken, yet the abutting owner, by reason of his situation, had a kind of

32. 42 N.E. 414 (N.Y. 1895).

33. *See* Elizabeth Arens, *The Elevated Railroad Cases: Private Property and Mass Transit in Gilded Age New York*, 61 N.Y.U. ANN. SURV. AM. L. 629, 633–39 (2006).

34. *See, e.g.*, Kane v. N.Y. Elevated R.R., 26 N.E. 278 (N.Y. 1891) (affirming landowner damages); Abendroth v. Manhattan Ry. Co., 25 N.E. 496 (N.Y. 1890) (same); Porter v. Metro. Elevated Ry. Co., 24 N.E. 454 (N.Y. 1890) (same).

35. 29 N.E. 802 (N.Y. 1892).

> property in the public street and for the purpose of giving to such land facilities of light, of air, and of access from such streets.[36]

He noted the general rule that a condemning party must pay "the full value of the land taken at its market value, and no deduction can be made from that value for any purpose whatever."[37] Peckham maintained, however, that light, air, and access easements were only of nominal value in themselves. Their value therefore had to be established by the loss inflicted on the adjoining land.

Peckham concluded that there had been no damage unless the owner suffered a loss in market value to the remaining land by virtue of the taking of the easements. If the evidence showed that the property had actually increased in value, there could be no recovery. In short, Peckham attempted to harmonize the interests of both parties. "The rule," he declared, "permits a recovery by the abutting owners of the full amount of the actual damages sustained by them, while at the same time it will not permit such owners to recover, by some theoretical or abstract mode of reasoning, alleged damages, which in plain truth they have never suffered."[38]

Peckham also participated in several cases and wrote one opinion that sought to define the concept of "public use" as a limitation on the exercise of eminent domain. He was guided by several cardinal principles. "Private property," he stressed, "cannot be taken for private use against the will of its owner, even upon full compensation being made."[39] According to Peckham, whether a taking of property was for a "public use" was a judicial question. He further maintained that the terms "public use" and "public interest" were not synonymous. Peckham explained the difference:

> There is . . . unquestionably a distinction between the use which is public and an interest which is public, and where there is simply a public interest, as distinguished from a public use, the right of eminent domain cannot be exercised. The interest may be of a public nature when the use may tend incidentally to benefit the public in some collateral way. In such a case the right to take property *in invitum* does not exist.[40]

There is no hint in Peckham's language that he would defer to a legislative determination of what constitutes public use. Indeed, he joined in two opinions that invalidated proposed takings of property on grounds that the acquisition was essentially for private gain.[41] As

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36. *Id.* at 804.

37. *Id.*

38. *Id.* at 807–08.

39. *In re* Application of the Mayor, 31 N.E. 1043, 1044 (N.Y. 1892).

40. *Id.*

41. *In re* Application of the Split Rock Cable Rd. Co., 28 N.E. 506 (N.Y. 1891); *In re* Application of the Niagara Falls & Whirlpool Ry. Co., 15 N.E. 429 (N.Y. 1888).

in other areas of law touching upon economic rights, Peckham was prepared to make an independent assessment about the legitimacy of governmental action. Yet he certainly did not shut the door on the exercise of eminent domain. In *Application of the Mayor* (1892), Peckham, writing for the court, upheld the authority of New York City to condemn waterfront land for the construction of piers and wharves.[42] He conceded that a "public use" was generally defined as a use open to public resort and not dependent on the will of a private party. Nonetheless, Peckham noted that the city was under a legislative duty to provide adequate facilities for seaborne commerce. He therefore reasoned that the taking of waterfront property was for a "public use" even if some of the land might subsequently be leased for the exclusive possession of steamship companies. "The use is public while the property is thus leased," Peckham asserted, "because it fills an undisputed necessity existing in regard to these common carriers by water, who are themselves engaged in fulfilling their obligations to the general public."[43]

Not all of Peckham's noteworthy rulings on the Court of Appeals were concerned with economic issues. Two of Peckham's opinions dealing with election law illustrate important aspects of his jurisprudence. In 1891, the court's majority held that, under the Ballot Reform Act, some 1,250 defective ballots mistakenly distributed by election officials could not lawfully be counted in a state senate race.[44] This decision had the result of depriving the Republican candidate of a majority and awarding the seat to his Democratic opponent. Peckham's vigorous dissent did much to establish his reputation as a nonpartisan jurist. He pointed out that only qualified voters had participated in the election, and that the ballots of innocent voters were discarded without fault on their part. He charged that the majority's action was a "gross injustice" that worked "a burlesque on the Ballot Act and its construction."[45]

More remarkable was Peckham's prescient concern for equity in legislative apportionment. At issue in *Baird v. Board of Supervisors of the County of Kings* (1893) was a challenge to assembly districts set by the county supervisors.[46] There was considerable population disparity among the districts. Writing for a unanimous court, Peckham asserted judicial supervision of the legislative

42. *Application of the Mayor*, 31 N.E. at 1046.

43. *Id.*

44. Nichols v. Bd. of County Canvassers of Onondaga County, 29 N.E. 327 (N.Y. 1891).

45. *Id.* at 344 (Peckham, J., dissenting).

46. 33 N.E. 827 (N.Y. 1893).

apportionment process. Reviewing the principles governing the theory of representation in New York, he proclaimed: "There were no privileged classes among [citizens], no class which enjoyed special civil rights or immunities, and therefore, when representatives were to be apportioned among the population represented, the fundamental and natural idea was, in this state, that such apportionment should be equal."[47] At that time, the New York Constitution did not expressly mandate that assembly districts contain equal numbers of inhabitants, but Peckham insisted that a requirement of equal population districts could be implied from prior constitutional language and the state's recognized policy. He agreed that perfect equality of districts could not be attained, and that the board had considerable discretion in formulating districts. Still, Peckham observed that "a grave, palpable and unreasonable deviation from the standard" would call for judicial redress.[48] He then struck down the Kings County apportionment.

Peckham's expansive vision of the judicial role was also evident in his dissenting opinion in *Talcott v. City of Buffalo* (1891).[49] The case turned upon the authority of a taxpayer to maintain an action against the municipal governing body to prevent the substitution of electric street lighting for the existing gas lighting. The majority construed the statute authorizing taxpayer suits to cover only illegal or dishonest acts by municipal officials. It expressed concern that judicial review of local government decisions would produce excessive litigation and inconvenience, and the holding suggested that taxpayers look to the political process for a remedy. Dissenting, Peckham argued that the statute empowered courts to enjoin "a plain, bald, useless waste of the property or funds of the public."[50] He acknowledged that courts should not substitute their judgment for that of local officials, but he was skeptical of effective political redress. "The right, at some future time," Peckham concluded, "to elect other officers in place of the reckless ones who have already wasted the moneys of the public, affords no redress for the wrong already done, and experience has shown that it has the very slightest deterrent effect."[51]

In contrast to his commitment to economic liberty and political equity, Peckham demonstrated no interest in racial equality. At issue

47. *Id.* at 829.
48. *Id.* at 833.
49. 26 N.E. 263 (N.Y. 1891).
50. *Id.* at 265 (Peckham, J., dissenting).
51. *Id.*

in *People v. King* (1888) was a New York statute outlawing discrimination by owners of theaters and places of amusement for reasons of race or color.[52] Rejecting the contention that the measure was an unconstitutional interference with the rights of property owners, the court majority upheld it as a valid exercise of the police power. Peckham and another judge, however, dissented without opinion. They were likely bothered by the majority's characterization of places of resort as quasi-public in nature, and thus subject to regulation. This dissent foreshadowed similar behavior in civil rights cases while Peckham was on the Supreme Court.

Nor did Peckham display much sympathy for the victims of industrial accidents. He was prepared to invoke the common law assumption of the risk defense, despite harsh consequences for injured parties. For example, in *Hickey v. Taaffe* (1887), he concluded that a fourteen-year-old girl, badly hurt by a machine in a laundry, was not entitled to any recovery.[53] "[T]he plaintiff, in accepting this work and entering upon the employment about this machine," Peckham reasoned, "assumed the usual risks and perils of employment and such as were incident to the use of this machine in its then condition, so far as such risks were apparent."[54] He agreed that an employer must give careful instruction to "a person of immature years" who was put to work on dangerous machinery. But he insisted that the evidence showed that the plaintiff was aware of the dangers inherent in working the machine. Peckham described the assumption of the risk doctrine as a "well settled and healthful" principle.[55]

Public health regulations could also represent questions relating to individual liberty. Periodic outbursts of smallpox in the late nineteenth century posed significant public health issues.[56] Peckham joined a court opinion that restricted the power of local officials to quarantine citizens in their homes unless they consented to vaccination.[57] Granting a writ of habeas corpus, the court ruled that there was no authority under the public health law to order a quarantine unless "the parties were either infected with, or had been actually exposed to, the disease of smallpox."[58] Stressing that a

52. 18 N.E. 245 (N.Y. 1888).

53. 12 N.E. 286 (N.Y. 1887).

54. *Id.* at 289.

55. *Id.* at 291.

56. *See* JAMES COLGROVE, STATE OF IMMUNITY: THE POLITICS OF VACCINATION IN TWENTIETH-CENTURY AMERICA 1–38 (2006) (discussing vaccination, public health, and legal issues at the turn of the twentieth century).

57. *In re* Application of Smith, 40 N.E. 497 (N.Y. 1895).

58. *Id.* at 499.

quarantine restrained both personal liberty and the right to pursue lawful vocations, the court concluded that the health officials could not isolate all persons who simply refused to be vaccinated. The opinion concluded: "Like all enactments which may affect the liberty of persons, this one must be strictly construed . . . ."[59] His vote in this case anticipated Peckham's position when a similar issue reached the Supreme Court years later.

III. SUPREME COURT APPOINTMENT

Peckham's path to the Supreme Court provides a glimpse into Gilded Age patronage politics. President Cleveland and Senator David B. Hill were locked in a struggle over control of the New York Democratic Party. In 1894, Cleveland nominated William B. Hornblower, a leading New York City attorney, to fill a vacancy on the Supreme Court. Hornblower had conducted an investigation into judicial election irregularities and in so doing antagonized then-Governor Hill. In retaliation, Hill successfully urged the Senate to reject Hornblower's nomination. Cleveland then turned to Wheeler H. Peckham, the brother of Rufus. A prominent advocate of legal reform, Wheeler Peckham practiced in New York City and was not politically active. Nonetheless, Senator Hill perceived a threat, and again he invoked senatorial courtesy in persuading the Senate to vote against confirmation.[60] At this time, however, Hill praised Rufus Peckham as one who "would make a magnificent member of the Supreme Court."[61] Frustrated in finding an acceptable New York nominee, President Cleveland named Edward Douglass White, a senator from Louisiana, who was readily confirmed.

A year later there was another vacancy on the Court. Having at last mended relations with Senator Hill, Cleveland named his close friend Rufus Peckham as his final appointee to the Supreme Court in December of 1895. The nomination was received enthusiastically. The *New York Times* declared that Peckham "is admirably qualified for the place by integrity, by learning, by judicial temperament, and by judicial experience."[62] Hill endorsed the nomination, and Peckham was confirmed only a few days later with no recorded opposition.

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59. *Id.*

60. *See* Carl A. Pierce, *A Vacancy on the Supreme Court: The Politics of Judicial Appointment 1893–94*, 39 TENN. L. REV. 555, 558–609 (1972) (explaining the political factors that thwarted William Butler Hornblower's and Wheeler H. Peckham's Supreme Court nominations).

61. *Wheeler H. Peckham Named: Nominated by the President for the Supreme Court*, N.Y. TIMES, Jan. 23, 1894, at 1.

62. *Judge Peckham*, N.Y. TIMES, Dec. 4, 1895, at 4.

Peckham took his seat on the Court on January 6, 1896 and served for fourteen years.

IV. THE FULLER COURT

The Framers of the Constitution and Bill of Rights believed that respect for private property was closely linked to political liberty.[63] Echoing this view, the federal courts were long concerned with safeguarding property and contractual rights against legislative abridgement.[64] In the late nineteenth century the Supreme Court, under the leadership of Chief Justice Melville W. Fuller (1888-1910), afforded heightened scrutiny to the rights of property owners in the face of the nascent regulatory state.[65] Justice Stephen J. Field cogently explained the guiding idea of the Court: "It should never be forgotten that protection to property and to persons cannot be separated. Where property is insecure, the rights of persons are unsafe. Protection to the one goes with protection to the other; and there can be neither prosperity nor progress where either is uncertain."[66]

Accordingly, before Peckham's appointment, the Fuller Court had invoked a substantive reading of due process to establish judicial review of state rate regulations,[67] strengthened the position of property owners under the Takings Clause of the Fifth Amendment,[68] struck down state laws that interfered with trade among the states,[69] invalidated the 1894 income tax as an unconstitutional "direct tax,"[70] and limited the reach of the Sherman Act of 1890.[71]

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63. *See* JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 43 (3d ed. 2008) (observing that the notion of property rights as "essential for the enjoyment of liberty had long been a fundamental tenet of Anglo-American constitutional thought"); Stuart Bruchey, *The Impact of Concern for the Security of Property Rights on the Legal System of the Early American Republic*, 1980 WIS. L. REV. 1135, 1136 (emphasizing the Founding Fathers' high regard for the security of property rights).

64. *See generally* ELY, *supra* note 63, at 42–105 (chronicling the evolution of property rights from 1791 to the early 1900s).

65. *See* ELY, *supra* note 6, at 83–126 (discussing Chief Justice Fuller's Court).

66. Stephen J. Field, *The Centenary of the Supreme Court* (Feb. 4, 1890), *reprinted in* 134 U.S. 729, 745.

67. ELY, *supra* note 6, at 83–90.

68. *See* James W. Ely, Jr., *The Fuller Court and Takings Jurisprudence*, 2 J. SUP. CT. HIST. 120–35 (1996) (focusing on the contribution of the Fuller Court to the development of Fifth Amendment Takings Clause jurisprudence).

69. *See* ELY, *supra* note 6, at 140–48 (discussing Fuller Court cases invoking the dormant commerce doctrine).

70. Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895), *reconsidered and amended by* 158 U.S. 601 (1895).

71. United States v. E.C. Knight Co., 156 U.S. 1 (1895).

In many respects, therefore, Peckham joined a Supreme Court on which the dominant outlook was congenial to his own convictions. He helped to cement trends already evident on the Fuller Court, and at the same time he moved the Court in some new directions. Peckham wrote more than 300 majority opinions, but only seven dissents. However, he dissented without opinion in 139 cases and compiled a dissent rate of 4.9 percent.[72] Although Peckham was one of the more prolific dissenters on the Fuller Court, his dissent rate is quite low when compared to current dissent behavior.

V. LIBERTY OF CONTRACT

Peckham is closely associated with the liberty of contract doctrine, and indeed he played a key role in the Court's somewhat cautious endorsement of this principle. Americans of the nineteenth century assigned a high value to contractual rights.[73] The law generally left parties free to promote their own interests through contractual arrangements. Exploring the origins of the liberty of contract doctrine, which can be traced to several sources, is beyond the scope of this Article. Suffice it to say that by the late nineteenth century, state courts began to strike down some workplace regulations as infringements of the constitutional right to enter agreements.[74] In fact, the Supreme Court was relatively slow to adopt the liberty of contract norm. That started to change with Peckham's landmark opinion in *Allgeyer v. Louisiana* (1897).[75]

In *Allgeyer*, Peckham, speaking for a unanimous Court, gave a broad reading to the scope of "liberty" protected by the Due Process Clause of the Fourteenth Amendment and for the first time embraced freedom of contract as a constitutional principle. At issue in the case was a state law that prohibited an individual within Louisiana from entering an insurance contract with an out-of-state company not

72. SHELDON GOLDMAN, CONSTITUTIONAL LAW: CASES AND ESSAYS 87 tbl. 4.7 (2d ed. 1991) (listing dissent rates of Justices on the Fuller Court); WILLARD L. KING, MELVILLE WESTON FULLER: CHIEF JUSTICE OF THE UNITED STATES 1888–1910 app. 1, at 341 (1950) (displaying data on dissents without opinion).

73. James W. Ely, Jr., *"To Pursue Any Lawful Trade or Avocation": The Evolution of Unenumerated Economic Rights in the Nineteenth Century*, 8 U. PA. J. CONST. L. 917, 947–48 (2006); David N. Mayer, *The Myth of "Laissez-Faire Constitutionalism": Liberty of Contract During the* Lochner *Era*, 36 HASTINGS CONST. L.Q. 217, 234–37 (2009).

74. *See* LAWRENCE M. FRIEDMAN, AMERICAN LAW IN THE TWENTIETH CENTURY 25 (2002) ("[T]here were important forerunners of *Lochner* on the state level. It was in the state supreme courts that some important doctrines of constitutional law first saw the light of day—doctrines of due process, or liberty of contract."); Ely, *supra* note 73, at 947–49 (discussing the rise of liberty of contract).

75. 165 U.S. 578 (1897).

qualified to do business in Louisiana. Allgeyer, a Louisiana resident, was convicted of notifying a New York insurance company of a shipment of cotton covered by a marine insurance policy obtained in New York. Peckham reversed the conviction and vigorously declared:

> The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.[76]

He then linked the freedom of contract to "the privilege of pursuing an ordinary calling or trade and of acquiring, holding and selling property."[77]

Several comments are in order with respect to the outcome of *Allgeyer*. Peckham did not bar any role for the states in governing contractual freedom. He remarked that, pursuant to state police power, contracts could be "regulated and sometimes prohibited" when they conflicted with state policy articulated in a statute.[78] The *Allgeyer* holding was also complicated by the fact that the challenged statute had direct implications for business activity across state lines.[79] Peckham pointedly noted that state power did not extend to prohibiting contracts made outside the jurisdiction.[80] The Supreme Court had long sought to guard the national market from state interference,[81] and *Allgeyer* must be partially seen in this light. Finally, the *Allgeyer* case contradicts the misleading hypothesis fashioned by the Progressives that the Supreme Court adopted the liberty of contract principle to aid the propertied and business

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76. *Id.* at 589.

77. *Id.* at 591.

78. *Id.*; *see* Mayer, *supra* note 73, at 259 (observing that "[t]he scope of the right protected by liberty of contract was given its classic definition by Justice Peckham in *Allgeyer v. Louisiana*," but cautioning that "this liberty right was not unlimited").

79. HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836–1937, at 178 (1991) ("The legislature probably enacted the statute in *Allgeyer* to protect in-state insurance companies from out-of-state competitors.").

80. *See Allgeyer*, 165 U.S. at 591 (discussing the extrajurisdictional effects of the state law); Michael G. Collins, *October Term, 1896—Embracing Due Process*, 45 AM. J. LEGAL HIST. 70, 82–87 (2001) (suggesting that "the real problem in *Allgeyer* was that the regulation at issue exceeded the permissible powers of the state, not that contractual freedom was somehow generally immune from regulation").

81. DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888, at 403–16 (1985) (discussing protection of interstate commerce from state interference during the Waite era); JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES 44, 50 (1956) (explaining the Court's role in economic federalism and protection of national markets).

interests.[82] "The distributional effect of the decision," as Kermit L. Hall and Peter Karsten have pointed out, "was hardly to protect the rich from the poor, because the measure opened to citizens of the state the opportunity to engage an effective competitor to insurance companies within the state."[83]

In any event, most of Peckham's colleagues did not share his devotion to the liberty of contract doctrine. Despite the potentially sweeping reach of the doctrine, the Supreme Court did not apply this principle again for a number of years. In a series of cases, the Justices rejected the contention that state laws regulating the terms and conditions of employment abridged contractual liberty. Thus, the Court upheld a state law limiting employment in mines to eight hours a day,[84] sustained a state law requiring employers to pay workers in money not script,[85] and validated a statute limiting hours of work on state and municipal projects.[86] So intense was Peckham's commitment to liberty of contract that he dissented, albeit without opinion, in each of these cases.

The Court was similarly reluctant to apply the liberty of contract doctrine in cases involving regulation of business enterprise. For example, it brushed aside a liberty of contract argument and sustained a state mechanics' lien law.[87] The Justices also held that states could require grain elevators and warehouses on railroad lines to obtain a license to do business.[88] Peckham evidently had no quarrel with these outcomes and did not dissent.

By 1905 it appeared at first blush that Peckham's dogged efforts to fashion constitutional protection for contractual freedom under due process had produced a meager result. The idea of a constitutional right to make contracts free of state oversight seemingly received little more than lip service from the Fuller Court.

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82. *See* Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293, 293–95 (1985) (describing the theory that the era of laissez-faire constitutionalism was motivated by the desire to protect businesses from government intervention); David E. Bernstein, Lochner *and Revisionism, Revised:* Lochner *and the Origins of Fundamental Rights Constitutionalized*, 92 GEO. L.J. 1, 2–9 (2003) (undermining the Progressive theory that *Lochner* era judges sought to impose their laissez-faire views through their opinions).

83. KERMIT L. HALL & PETER KARSTEN, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 257 (2d ed. 2009).

84. Holden v. Hardy, 169 U.S. 366, 398 (1898). For a discussion of Peckham's likely thinking in *Holden*, see HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF *LOCHNER* ERA POLICE POWERS JURISPRUDENCE 123–24 (1993).

85. Knoxville Iron Co. v. Harbison, 183 U.S. 13, 22 (1901).

86. Atkin v. Kansas, 191 U.S. 207, 224 (1903).

87. Great S. Fire Proof Hotel Co. v. Jones, 193 U.S. 532, 550 (1904).

88. W.W. Cargill Co. v. Minnesota, 180 U.S. 452, 470 (1901).

Still, the Justices increasingly treated liberty of contract as a constitutional baseline and expected the states to justify legislative restrictions on this right. The freedom to make agreements could only be curtailed to advance the health, safety, and morals of the community.

Peckham's dedication to the liberty of contract eventually bore fruit with his famous and much-maligned decision in *Lochner v. New York* (1905).[89] The case has been treated extensively elsewhere, so it will receive just brief attention here. *Lochner* involved a challenge to a state law that limited work in bakeries to ten hours a day or sixty hours a week. Writing for a 5-4 majority, Peckham struck down the measure as an infringement of contractual freedom. He maintained: "The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution."[90] Peckham conceded that a state could impose "reasonable conditions" on the enjoyment of both liberty and property. He further agreed that the state could inspect bakeries and enact measures to improve workplace conditions. Peckham drew the line, however, at regulations governing working hours. He was not persuaded that baking was an unhealthy trade, and he could see no relationship between hours of work and the health of bakers. Consequently, Peckham asserted that the "real object and purpose" of the law was to regulate labor relations, not to achieve the purported goal of safeguarding either public or employee health.[91] In other words, he viewed the hours limitation as promoting a class interest rather than a traditional police power concern with health and safety. "It is impossible for us to shut our eyes," Peckham lectured, "to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives."[92] Declaring that bakers were capable of looking out for their own interests, he characterized maximum-hours statutes as "mere meddlesome interferences with the rights of the individual."[93]

89. 198 U.S. 45 (1905).
90. *Id.* at 53.
91. *Id.* at 64.
92. *Id.*
93. *Id.* at 61.

At first, the *Lochner* decision aroused little public interest.[94] Prominent figures in the Progressive Movement of the early twentieth century, however, came to see the ruling as a barrier to their agenda of legislative reform of working and social conditions.[95] So notorious did the decision eventually become that scholars have coined the misleading phrase "*Lochner* era" to characterize an entire period of Supreme Court history.

Among other problems, the notion of a *Lochner* era conveys an erroneous impression of the Supreme Court's adherence to the liberty of contract doctrine.[96] Judges of the supposed *Lochner* era, we are still frequently told, sought to impose their laissez-faire ideology on the polity. Revisionist scholarship has destroyed much of this once conventional story. Many of the stock criticisms of *Lochner* are quite wide of the mark.[97] It bears emphasis, moreover, that the *Lochner* decision was atypical and was never steadily followed by the Supreme Court.[98] Instead, the Court infrequently invoked the freedom of contract principle and found that most regulatory legislation passed constitutional muster. As Gregory S. Alexander cogently pointed out, "even during the period between 1885 and 1930, the supposed height of laissez-faire constitutionalism, the courts, federal and state, did not uniformly sustain the liberty of contract principle."[99]

In fact, the Fuller Court only invoked the liberty of contract doctrine in one additional case after *Lochner* while Peckham was on the bench. In *Adair v. United States* (1908), Justice John Marshall Harlan, writing for the majority, invalidated a congressional statute that banned so-called yellow dog contracts on railroads.[100] Such

94. PAUL KENS, JUDICIAL POWER AND REFORM POLITICS: THE ANATOMY OF *LOCHNER V. NEW YORK* 128 (1990) (observing that the "initial public reaction to the Court's ruling was very subdued"). In fact, some commentators hailed the ruling. *See* David E. Bernstein, Lochner v. New York: *A Centennial Retrospective,* 83 WASH. U. L.Q. 1469, 1502–03 (2005) (noting that some commentators endorsed the ruling).

95. James W. Ely, Jr., *The Protection of Contractual Rights: A Tale of Two Constitutional Provisions,* 1 N.Y.U. J. L. & LIBERTY 370, 391–92 (2005) (questioning the existence of the supposed *Lochner* era).

96. *Id.*

97. *See* David A. Strauss, *Why Was* Lochner *Wrong?,* 70 U. CHI. L. REV. 373, 373–86 (2003) (asserting that standard attacks on *Lochner* for aggressive judicial review and enforcing rights not found in the text of the Constitution are not persuasive in light of more recent decisionmaking by the Supreme Court).

98. *See* HALL & KARSTEN, *supra* note 83, at 264 ("The *Lochner* decision was in many ways an aberration with limited impact.").

99. Gregory S. Alexander, *The Limits of Freedom of Contract in the Age of Laissez-Faire Constitutionalism, in* THE FALL AND RISE OF FREEDOM OF CONTRACT 103, 108 (F.H. Buckley ed., 1999).

100. 208 U.S. 161 (1908).

contracts made it a condition of employment that workers not join a labor union. Invoking *Lochner*, Harlan affirmed "the general proposition that there is a liberty of contract which cannot be unreasonably interfered with by legislation."[101]

In many respects, however, the Justices began to move away from *Lochner*. In *Muller v. Oregon* (1908), for instance, they upheld a state law restricting the number of working hours for women in factories and laundries in an opinion that reflected paternalist assumptions about the place of women in society.[102] Peckham joined the opinion. A year later the Court in *McLean v. Arkansas* (1909) brushed aside a freedom of contract objection and upheld a statute requiring that miners' wages be calculated by the weight of coal mined before screening.[103] Analogizing the measure to laws preventing fraud, the Court noted that statutes mandating honest weights "have frequently been sustained in the courts, although in compelling certain modes of dealing they interfere with the freedom of contract."[104] This case, the last raising issues of contractual freedom during Peckham's tenure, found him once again dissenting without opinion.

It is evident that Peckham was more committed to the liberty of contract doctrine than most of his colleagues even on the property-conscious Fuller Court. Not only did Peckham stand out in his dedication to contractual freedom, but the Supreme Court wielded the doctrine sparingly both during his life and subsequently. Eventually, of course, the Court rejected liberty of contract as a constitutional norm.[105] This repudiation has done much to cloud Peckham's historical reputation.

Yet Peckham and *Lochner* cannot be banished so easily from our constitutional history. *Lochner*, to be sure, is regularly cast as a bogy by scholars from a wide range of ideological perspectives, although for different reasons. But its enduring significance lies elsewhere. Peckham's decision in *Lochner* remains at the heart of a continuing dialogue about the role of the judiciary in American life. To what extent are courts free to review legislative determinations? To what extent are they bound to defer to the political branches of government? In short, *Lochner* is at the center of the endless

101. *Id.* at 174.

102. 208 U.S. 412, 423 (1908).

103. 211 U.S. 539, 551 (1909).

104. *Id.* at 550.

105. *See* W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 392 (1937) (stating that the Constitution does not limit legislative power to restrict contractual freedom).

discussion over judicial activism. No matter how much some scholars may revile *Lochner*—and much of this criticism is exaggerated in my view—they cannot escape dealing with its contested legacy. Indeed, scholars have spilt an ocean of ink attempting to differentiate the judicial activism in support of civil rights and civil liberties following World War II from earlier judicial solicitude for economic rights.[106] One may well question whether there is a principled distinction, but that is a topic for another day.

VI. TAKINGS JURISPRUDENCE

During the tenure of Chief Justice Fuller, the Supreme Court came to grips in a sustained way with the takings issue for the first time. In this area Peckham invariably voted with the majority and authored several important opinions. It should be noted that in this era the Court sometimes conflated taking of property with deprivation of property without due process of law under the Fourteenth Amendment. With the notable exception of the just compensation norm,[107] the Fuller Court declined to extend the guarantees of the Bill of Rights to the states. As a result, Peckham and his colleagues analyzed some cases under the due process framework that today would likely be treated as a takings issue.

Peckham wrote three opinions that bear on the contested meaning of "public use" for the exercise of eminent domain power. Because these decisions have figured prominently in the current debate over the "public use" requirement, they deserve careful attention.[108]

At issue in *United States v. Gettysburg Electric Railway Co.* (1896) was the authority of the federal government to acquire by eminent domain parcels of land in order to preserve the Gettysburg battlefield as a park.[109] Opposing counsel primarily argued that the

106. *See, e.g.*, FISS, *supra* note 3, at 9–12 (commenting on the differences between the Warren and Fuller Courts and critiquing other scholarship on the topic); MICHAEL J. PHILLIPS, THE *LOCHNER* COURT, MYTH AND REALITY: SUBSTANTIVE DUE PROCESS FROM THE 1890S TO THE 1930S 185–91 (2001) (analyzing the "double standard" under which economic rights receive less constitutional protection than "personal" rights); Bernstein, *supra* note 94, at 1514–25 (analyzing the *Lochner* era).

107. *See* Chi., Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 255–58 (1897) (finding just compensation applicable to states in an opinion joined by Peckham). For a discussion of this case, see Collins, *supra* note 80, at 88–91.

108. *See* Kelo v. City of New London, 545 U.S. 469, 480 (Stevens, J.), 515–16 (Thomas, J., dissenting) (interpreting the Public Use Clause); *see also* Gideon Kanner, *The Public Use Clause: Constitutional Mandate or "Hortatory Fluff"?*, 33 PEPP. L. REV. 335, 376–78 (2006) (discussing Justice Peckham's influence on eminent domain jurisprudence).

109. 160 U.S. 668 (1896).

powers of the national government did not encompass the preservation of historic sites. Peckham, speaking for a unanimous Court, had no difficulty in concluding that the proposed use of land was of national importance and therefore within the powers of Congress. Of course, the historic park would be open to the public and would satisfy the most stringent definition of "public use." Nonetheless, Peckham offered some brief comments about the exercise of eminent domain. Pointing out that "the full value of the property taken" must be paid by the public through taxation, he optimistically asserted that there was little danger of governmental abuse of this power. Peckham, however, adopted a more cautious approach when eminent domain was delegated to a private enterprise. "In that case," he observed, "the presumption that the intended use for which the corporation proposes to take the land is public, is not so strong as where the government intends to use the land itself."[110]

A few months later, in *Fallbrook Irrigation District v. Bradley* (1896), Peckham had an opportunity to amplify his understanding of the "public use" norm.[111] In fact, *Fallbrook* was really not an eminent domain case.[112] Rather, it involved a lawsuit by a landowner in California contesting an assessment imposed on her land by an irrigation district for the purpose of providing water for arid lands. The federal circuit court enjoined the irrigation district's collector from selling the plaintiff's land for nonpayment of the assessment. The plaintiff premised her objection on the notion that irrigation was not a public purpose, and hence the assessment constituted a deprivation of property without due process of law under *Loan Ass'n v. Topeka* (1874).[113] Rejecting this contention, Peckham deferred to decisions of the California courts that irrigation was a public use under the state constitution and laws. It followed that the assessment did not unconstitutionally deprive the plaintiff of property in violation of due process.

Because the challenge in *Fallbrook* was to governmental taxing authority, Peckham correctly spoke largely in terms of "public purpose." Indeed, he formulated the crucial inquiry as follows: "Is this assessment, for the non-payment of which the land of the plaintiff was to be sold, levied for a public purpose?"[114] Nonetheless, Peckham did

110. *Id.* at 680.

111. 164 U.S. 112 (1896).

112. *See* Kanner, *supra* note 108, at 376 (declaring that *Fallbrook* "was not truly an eminent domain case, and really had nothing to do with the Fifth Amendment's 'public use clause' ").

113. *See* Loan Ass'n v. Topeka, 87 U.S. 655, 664 (1875) (insisting that "there can be no lawful tax which is not laid for a *public purpose*").

114. *Fallbrook*, 164 U.S. at 158.

discuss the issue of "public use" in his somewhat rambling opinion. With no condemnation of property before the Court, however, his remarks have the character of dicta. Peckham was prepared to allow states some latitude concerning the exercise of eminent domain. "It is obvious," he observed, "that what is a public use frequently and largely depends upon the facts and circumstances surrounding the particular subject-matter in regard to which the character of the use is questioned."[115] Still, he insisted that "[t]he use for which private property is to be taken must be a public one."[116] Importantly, Peckham was persuaded that the irrigation of arid and "otherwise worthless" land was a "public use," a term that he used interchangeably with "public purpose."[117] In his mind it was not necessary that the entire community should be able to enjoy an improvement in order to render it a "public use." But Peckham emphasized that "[a]ll landowners in the district have the right to a proportionate share of the water, and no one landowner is favored above his fellow in his right to use the water."[118] He concluded that providing water to arid land was a "public purpose," the cost of which could be legitimately paid by general taxes or assessments.[119] All in all, *Fallbrook*, which focused primarily on taxation issues, is a curious case to be treated as a seminal authority in defining "public use" in the context of eminent domain.

Peckham demonstrated that he did not give a carte blanche endorsement to the taking of private property when he joined the Court's opinion in *Missouri Pacific Railway Co. v. Nebraska* (1896).[120] At issue was a Nebraska statute that authorized a state agency to compel a railroad to grant part of its land to private individuals for the purpose of erecting a grain elevator. The law was a response to agitation by farm organizations seeking to control the price of grain storage by establishing competing facilities. The Court described the proceedings as "in essence and effect, a taking of private property of the railroad corporation, for the private use of the petitioners."[121] It invalidated the statute on grounds that the taking of the private property of one person by the state for the private use of another violated the Due Process Clause of the Fourteenth Amendment. The

115. *Id.* at 159–60.
116. *Id.* at 161.
117. *Id.*
118. *Id.* at 162.
119. *Id.* at 164.
120. 164 U.S. 403 (1896).
121. *Id.* at 417.

ruling seemed to bar the exercise of eminent domain for the benefit of private parties.

Justice Peckham's third opinion dealing with the "public use" issue, *Clark v. Nash* (1905), also involved the irrigation of arid land.[122] A Utah statute empowered individuals to condemn land for the purpose of obtaining water for mining or irrigation. The plaintiff, who was entitled to use water from a nearby creek, sought to widen by one foot an already existing ditch on the defendant's contiguous land. The evidence indicated that water would reach the plaintiff's property through such an enlarged ditch. The Supreme Court of Utah defined "public use" broadly as a taking that promoted public interest and affirmed a condemnation order conditioned upon payment of $40 in compensation to the defendant. The defendant argued before the U.S. Supreme Court that this action amounted to a taking for private not public use, so the order consequently deprived the defendant of property without due process of law in violation of the Fourteenth Amendment.

Peckham began his opinion by asserting that in many states the defendant's contention would be sound but stressed that a determination of "public use" might be contingent upon unique local circumstances. Whether obtaining water was for a "public use," he observed, "may depend upon a number of considerations relating to the situation of the State and its possibilities for land cultivation, or the successful prosecution of its mining or other industries."[123] When the exercise of eminent domain was based "upon some peculiar condition of the soil or climate, or other peculiarity of the State," Peckham added, the Supreme Court was inclined to defer to the judgment of state lawmakers.[124] Having stressed the fact-dependent nature of the determination of "public use," Peckham then misleadingly stated that the earlier *Fallbrook* case turned upon the condemnation of land by a corporation to obtain a water supply. As we have seen, that case in fact involved the validity of a special tax assessment. Not surprisingly, Peckham found that allowing the plaintiff to enlarge the ditch to irrigate land "which otherwise would remain absolutely valueless" satisfied the "public use" norm.[125] Under these particular circumstances, he was evidently persuaded that the modest incursion on private property by the irrigation scheme could be justified by its overall benefit for the public as a resource.

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122. 198 U.S. 361 (1905).

123. *Id.* at 367.

124. *Id.* at 368.

125. *Id.* at 369.

It bears emphasis, however, that Peckham expressly confined the reach of *Clark* to its facts. In language often unaccountably omitted from subsequent treatment of the case, he declared: "But we do not desire to be understood by this decision as approving of the broad proposition that private property may be taken in all cases where the taking may promote the public interest and tend to develop the natural resources of the State."[126] While Peckham might be faulted for employing some imprecise language in his three eminent domain opinions, he never held that legislative determinations of "public use" were virtually conclusive or that private property could be taken for any supposed public purpose. Moreover, the factual context of *Fallbrook* and *Clark* is important. It is not difficult to distinguish taking a narrow strip of arid land, which involved no displacement of residences or business enterprises, from more recent economic development projects.[127]

VII. RATE REGULATION

One of the most protracted and vexing issues before the Supreme Court during Peckham's tenure was the extent to which state or federal governments could control the rates charged by railroads. As the principal arteries of commerce and travel among the states, railroads occupied a vital place in American life at the turn of the twentieth century. Shippers and farmers saw the carriers as wielding monopoly power and charging excessive rates. Railroads, on the other hand, asserted that rates imposed by state legislatures or governmental agencies were often unreasonably low. They argued that such regulations indirectly deprived the carriers of the value of their property, and amounted to a de facto confiscation.[128]

In a line of decisions rendered before Peckham took his place on the bench, the Fuller Court had circumscribed state regulatory authority. It established federal judicial supervision of state-imposed rates under the Due Process Clause of the Fourteenth Amendment and insisted that railroads were constitutionally entitled to charge reasonable rates for the use of their property.[129] Peckham was no doubt in full agreement with these developments. Shortly after he became a member of the Court, Peckham joined his colleagues in

126. *Id.*

127. In a recent decision, the Supreme Court of Ohio correctly noted the limited nature of the holding in *Clark* as dependent upon unique local conditions. City of Norwood v. Horney, 853 N.E.2d 1115, 1133 (Ohio 2006).

128. JAMES W. ELY, JR., RAILROADS AND AMERICAN LAW 80–96 (2001).

129. ELY, *supra* note 6, at 83–87.

holding that legislative control of tolls on a private turnpike was subject to the same constitutional limitations.[130] More importantly, he signed on to the Court's opinion in *Smyth v. Ames* (1898), in which the Justices sought to distinguish a valid rate regulation from confiscation.[131]

In *Smyth*, the Court ruled that a steep reduction in intrastate freight rates mandated by the Nebraska legislature constituted a deprivation of property without due process of law. In so doing, the Court articulated a standard for judicial review of rates, ruling that a railroad was entitled to a "fair return" upon the "fair value" of its property. Under the "fair value" rule, courts looked primarily at the current or replacement value of a company's assets as the baseline for calculating the reasonableness of imposed rates. As a consequence of *Smyth*, the federal courts became deeply involved in rate cases and state ratemaking authority was sharply restricted. Railroad companies increasingly sought federal court injunctions to restrain enforcement of state-fixed rates.

Some states were so upset at federal judicial review of intrastate rates that they attempted to deter railroads from pursuing relief in the federal courts. This set the stage for Peckham's most significant contribution to the controversy over rate regulation. At issue in the seminal case of *Ex Parte Young* (1908) was a Minnesota statute that required reductions in passenger and freight charges.[132] It also specified huge fines and severe criminal penalties on railroads and their agents for violation of the law. The obvious purpose behind these penalties was to intimidate carriers and their officers from testing the validity of the rate reductions in court. Maintaining that the mandated rates were confiscatory and unconstitutional, railroad stockholders secured a temporary injunction from the federal circuit court prohibiting Edward T. Young, the Minnesota Attorney General, from enforcing the measure. Young violated the injunction by attempting to force obedience to the new rate schedule in state court. Found guilty of contempt by the federal circuit court, Young was fined, directed to dismiss the state court proceeding, and jailed until he complied. Young then sought a writ of habeas corpus from the

130. Covington & Lexington Tpk. Rd. Co. v. Sandford, 164 U.S. 578, 598 (1896).

131. 169 U.S. 466, 546–47 (1898).

132. 209 U.S. 123, 127 (1908). For extensive examination of *Young* and Peckham's opinion, see RICHARD C. CORTNER, THE IRON HORSE AND THE CONSTITUTION: THE RAILROADS AND THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 181–208 (1993); William F. Duker, *Mr. Justice Rufus W. Peckham and the Case of* Ex Parte Young: *Lochnerizing* Munn v. Illinois, 1980 BYU L. REV. 539, 539–58.

Supreme Court, arguing that the federal lawsuit was in reality against the state in violation of the Eleventh Amendment.

Speaking for the Court, Peckham ruled that the penalty provisions were unconstitutional on their face because they effectively denied access to the federal courts to determine the adequacy of imposed rates. He tellingly observed:

> [W]hen the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights.[133]

Rejecting the Eleventh Amendment defense, Peckham insisted that when a state official took steps to enforce an unconstitutional law "he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct."[134] Peckham's distinction between suits against states and suits against state officials alleged to be acting unconstitutionally relied on a legal fiction that permitted circumvention of the Eleventh Amendment. *Young* has endured as a foundational decision for Eleventh Amendment jurisprudence because the power to enjoin state officials from violating national laws proved essential for maintaining the federal scheme of government.[135]

Our concern, however, is less with the intricacies of Eleventh Amendment jurisprudence than with what the *Young* opinion reveals about Peckham's thinking. Peckham was surely influenced by his suspicion of state railroad regulations and his desire to protect the property rights of the carriers from confiscatory rates. To this end, he emphasized that railroads should not be required to risk severe penalties in order to obtain federal judicial review of state-imposed rates.

Thus, *Young* provides a jurisdictional counterpart for *Smyth*. It was vital to preserve access to a federal forum in order to guarantee that regulated industries received a "fair return" on their investments. Aside from his dedication to the rights of property owners, Peckham was influenced by utilitarian considerations. Protection of investment capital was an important feature of the work of the Fuller era, an attitude that Peckham shared. Security of private property was linked with a continued flow of investment capital and with economic growth. "Over eleven million dollars, it is estimated, are invested in railroad

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133. *Young*, 209 U.S. at 147.

134. *Id.* at 160.

135. JOHN V. ORTH, THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY 121–35 (1987).

property, owned by many thousands of people who are scattered over the whole country from ocean to ocean," Peckham pointedly commented in *Young*, "and they are entitled to equal protection from the laws and from the courts, with the owners of all other kinds of property, no more, no less."[136]

Peckham's skepticism about rate regulation was also manifest in a series of cases that narrowly construed the authority of the newly created Interstate Commerce Commission ("ICC").[137] He repeatedly joined his colleagues in limiting the agency's power to control railroad charges. The Interstate Commerce Act did not expressly empower the ICC to fix rates, but the Commission assumed that its express authority to review the reasonableness of rates included by implication such power. The Supreme Court halted this practice in *ICC v. Cincinnati, New Orleans & Texas Pacific Railway Co.* (1897), reasoning that a ratemaking power could not be implied.[138] The ICC was thus compelled to stop its efforts to set rates for railroads. Even more telling was the Court's interpretation of the long-haul, short-haul clause of the Interstate Commerce Act. This clause was aimed at the perceived price discrimination that occurred when railroads charged more for short-haul freight shipments than for long haul. By ruling in *ICC v. Alabama Midland Railway Co.* (1897) that the existence of competing rail facilities must be considered in applying this clause, the Court effectively negated the long-haul, short-haul provision of the Act.[139]

Peckham's voting pattern in the rate regulation cases demonstrates his preference for private economic ordering and reluctance to allow broad governmental control over charges. Still, Peckham and his colleagues stopped well short of blocking all governmental supervision of railroad charges or mandating a supposed laissez-faire regime on the industry. They sought a middle ground, seeking to bar the imposition of unremunerative rates. Rates regulation was particularly suspect because it altered the working of the market economy and implicitly served to redistribute property. It also threatened the security of investments and thus potentially

136. 209 U.S. at 165. As further evidence of his utilitarian thinking, Peckham added: "It cannot be to the real interest of anyone to injure or cripple the resources of the railroad companies of the country, because the prosperity of both the railroads and the country is most intimately connected." *Id.* at 166.

137. ELY, *supra* note 128, at 93–96.

138. 167 U.S. 479, 494 (1897).

139. 168 U.S. 144, 175–76 (1897); *see also* Stephen A. Siegel, *Understanding the* Lochner *Era: Lessons from the Controversy over Railroad and Utility Rate Regulation*, 70 VA. L. REV. 187, 208–15 (1984).

hampered economic growth. Peckham and his fellow Justices hoped to rein in, not totally eliminate, legislative authority over rates.

VIII. REGULATION OF HEALTH, SAFETY, AND MORALS

Notwithstanding his dedication to economic liberty and his dislike of rate controls, Peckham upheld numerous regulations that fell within the ambit of traditional state police power to protect the health, safety, and morals of the public. He repeatedly sustained health and safety measures against challenges that such laws amounted to a deprivation of property without due process. For example, Peckham, writing for the Court, validated a Chicago ordinance requiring a license to sell cigarettes.[140] He stressed that states were free to determine what kinds of businesses ought to be licensed to preserve community health and safety. Moreover, Peckham ruled that, pursuant to the police power, states could seize and destroy unwholesome food without providing the owner a prior hearing. Emphasizing "the right and duty of the State to protect and guard . . . the lives and health of its inhabitants," he declared that food unfit for human consumption was "a nuisance of the most dangerous kind."[141]

In an age before comprehensive zoning, Peckham was prepared to sustain legislation requiring owners to incur expenses in order to comply with health and safety regulations. In 1906 he joined the Court in upholding a New York law directing tenement owners to install modern sanitary facilities.[142] Peckham's vote here was not surprising given his opinion as a New York judge in *Rector of Trinity Church* upholding earlier tenement reform legislation.

Peckham was also sympathetic to fledgling land use controls. In *Welch v. Swasey* (1909), writing for the Court, he affirmed the validity of statutes limiting the height of buildings.[143] Stressing the importance of local circumstances, Peckham ruled that it was reasonable to distinguish between the height of buildings in residential and commercial districts. He justified this classification by explaining that taller buildings in commercial areas posed less danger in the event of fire. In this context, Peckham was inclined to defer to

140. Gundling v. Chicago, 177 U.S. 183, 189 (1900).

141. N. Am. Cold Storage Co. v. Chicago, 211 U.S. 306, 315 (1908).

142. Moeschen v. Tenement House Dep't of N.Y., 203 U.S. 583, 583 (1906), *aff'g* Tenement House Dep't of N.Y. v. Moeschen, 72 N.E. 231 (N.Y. 1904). For the background of this case, see Judith A. Gilbert, *Tenements and Takings:* Tenement House Department of New York v. Moeschen *as a Counterpoint to* Lochner v. New York, 18 FORDHAM URB. L.J. 437, 437–505 (1991).

143. 214 U.S. 91, 107–08 (1909).

the judgment of the state courts that the statutes promoted public safety. By implicitly recognizing that the enjoyment of land by private owners could negatively impact third-party owners, he paved the way for more intensive land use controls.

Railroading was an especially hazardous enterprise, posing dangers to adjacent landowners and employees. As a result, both the federal and state governments in the nineteenth century imposed safety standards on the carriers. Peckham regularly voted to affirm the validity of such measures. He agreed, for example, that states could make railroads absolutely liable for damages from fires caused by railroad operations.[144] Likewise, Peckham voted to construe broadly and enforce vigorously the Safety Appliance Act, which required railroads in interstate commerce to use air brakes and automatic couplers.[145] The Act also banned the assumption of risk defense for injuries arising from violations of the statute.

Yet there were limits to how far Peckham was prepared to modify common law tort rules in the context of railroad accidents. He joined the dissenters when the Court held that the statutory abolition of assumption of risk by the Safety Appliance Act also operated to relieve employees from liability for contributory negligence.[146] The dissenters argued that contributory negligence was a distinct defense from assumption of risk, and that the Act did not set aside the ordinary rules of contributory negligence. Moreover, in cases arising under diversity jurisdiction, Peckham consistently voted to invoke the fellow servant doctrine to deny recovery to injured or killed railroad employees.[147]

Nor was he receptive to congressional attempts to abolish the fellow servant rule with respect to common carriers. In the *Employers' Liability Cases* (1908), the Supreme Court ruled that the Federal Employers' Liability Act was unconstitutional because it covered railroad employees engaged in intrastate as well as interstate commerce.[148] The Court pointed out, however, that Congress could regulate employment relationships within interstate commerce. In a concurring opinion, Peckham, joined by two other Justices, agreed that the Act was unconstitutional because it reached injuries

144. St. Louis & San Francisco Ry. v. Mathews, 165 U.S. 1, 22–23 (1897).

145. St. Louis, Iron Mountain & S. Ry. Co. v. Taylor, 210 U.S. 281, 295 (1908); Johnson v. S. Pac. Co., 196 U.S. 1, 17 (1904).

146. Schlemmer v. Buffalo, Rochester & Pittsburg Ry. Co., 205 U.S. 1, 14–20 (1907) (Brewer, J., dissenting).

147. N. Pac. Ry. Co. v. Dixon, 194 U.S. 338, 346 (1904); New England R.R. v. Conroy, 175 U.S. 323, 329 (1899).

148. 207 U.S. 463 (1908).

occurring in intrastate traffic. But he pointedly refused to accept "all that is stated as to the power of Congress to legislate upon the subject of the relations between master and servant."[149] Evidently Peckham questioned the power of Congress to regulate issues relating to employment at all. It is fair to conclude that Peckham was slow to realize that, in an age of dangerous equipment and a complex workplace, the fellow servant rule was an unsuitable doctrine to address work-related injuries. Instead, he clung to the notion that individuals were free agents who had to accept responsibility for their own carelessness. Fault was the only legitimate basis on which to impose liability for accidents.

Public health regulations also raised difficult issues. By the late nineteenth century public health authorities sought to check smallpox epidemics by compulsory vaccination.[150] Efforts to protect the community with such programs pitted exercise of the police power against claims of individual liberty. This conflict occurred in a climate in which much of the public remained fearful of vaccination and disliked governmental intrusion in what were seen as private health decisions. In 1902, confronted with a smallpox epidemic in Massachusetts, the Cambridge Board of Health, pursuant to state law, required all residents not recently vaccinated to submit to the procedure. Reverend Henning Jacobson, an outspoken opponent of vaccination, refused to be vaccinated and was fined $5. Massachusetts courts dismissed Jacobson's challenge to the constitutionality of the compulsory vaccination law, and he petitioned the Supreme Court.[151]

In *Jacobson v. Massachusetts* (1905), the Supreme Court, by a vote of 7-2, broadly upheld state authority to enact "health laws of every description" to safeguard the public.[152] The Court reasoned that the common good must prevail over claims of individual liberty. It conceded, however, that there could be situations where public health measures were "sufficiently arbitrary and oppressive . . . as to justify the interference of the courts." Peckham, joined by Justice Brewer, dissented without opinion. He apparently felt that requiring a healthy adult to undergo vaccination violated the liberty of individuals and exposed them to unjustified risks. This attitude was consistent with his earlier vote on the New York Court of Appeals to limit the power to impose smallpox quarantines. Peckham's dissent exemplified his attachment to individualism, a principle that in *Jacobson* found

149. *Id.* at 504.

150. COLGROVE, *supra* note 56, at 33–38.

151. *Id.* at 38–44.

152. 197 U.S. 11, 25 (1905).

expression in an area other than economic rights. Moreover, Peckham's libertarian position was not entirely out of step with public opinion. Compulsory vaccination of adults became increasingly rare, and public health programs focused instead on vaccination as a school entry requirement.[153]

IX. ANTITRUST

Clearly a central theme of Peckham's jurisprudence was defense of individual liberty, and especially economic freedom, from statist interference. Yet Peckham was also alert to safeguard the entrepreneurial freedom of small business from private incursions. This was made evident in a line of decisions by Peckham construing the Sherman Anti-Trust Act to protect competition. Growing anti-monopoly sentiment became a central part of American political life in the late nineteenth century. Fear of business combinations and predatory behavior motivated the passage of the Sherman Act and litigation challenging business conduct.[154] Yet the purpose of the antitrust laws has long been the subject of debate.[155]

In *United States v. E. C. Knight Co.* (1895), a case decided before Peckham joined the bench, the Supreme Court ruled that congressional authority under the Commerce Clause was confined to traffic between states and did not extend to manufacturing, which was seen as local in nature.[156] This ruling obviously circumscribed the reach of the Sherman Act. Peckham had no quarrel with this distinction between manufacturing and interstate trade.

Where the power of Congress was free from doubt, however, Peckham favored vigorous enforcement of the antitrust laws. In *United States v. Trans-Missouri Freight Ass'n* (1897) Peckham, writing for a majority of five, invalidated a price-fixing arrangement among western railroads.[157] He first determined that the Sherman Act applied to common carriers engaged in transportation among the states. Peckham brushed aside the argument that the Act did not cover railroads because they were already governed by the Interstate Commerce Act. Next, he insisted that the statutory language banning "every contract, combination . . . in restraint of trade or commerce" encompassed all contracts that restrained freedom of trade. Peckham

153. COLGROVE, *supra* note 56, at 65–74.

154. HALL & KARSTEN, *supra* note 83, at 225–26.

155. James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880–1918*, 50 OHIO ST. L.J. 257, 283–300 (1989).

156. 156 U.S. 1, 16–18 (1895).

157. 166 U.S. 290, 343 (1897).

rejected the contention that the Sherman Act only made illegal those restraints of trade unreasonable at common law. He was not persuaded that Congress intended to exempt the rail industry from the Sherman Act, and he stressed that the impact of competition on railroad rates was a policy matter for Congress. "Competition, free and unrestricted," he revealingly noted, "is the general rule which governs all the ordinary business pursuits and transactions of life."[158]

In reaching this result, Peckham spoke in broad terms about the nature of antitrust concerns. He warned that business combinations might drive out "small dealers and worthy men,"[159] to the ultimate detriment of the public. Peckham recognized that changes in the economy could produce painful adjustments for labor and business. But in his mind, different considerations pertained with respect to combinations and trusts. Peckham voiced apprehension that combinations of capital might reduce prices, which "would be dearly paid for by the ruin of such a [small business] class, and the absorption of control over one commodity by an all-powerful combination of capital."[160] Enlarging upon this, he significantly declared:

> In this light it is not material that the price of an article may be lowered. It is in the power of the combination to raise it, and the result in any event is unfortunate for the country by depriving it of the services of a large number of small but independent dealers who were familiar with the business and who had spent their lives in it, and who supported themselves and their families from the small profits realized therein. Whether they be able to find other avenues to earn their livelihood is not so material, because it is not for the real prosperity of any country that such changes should occur which result in transferring an independent business man, the head of his establishment, small though it might be, into a mere servant or agent of a corporation for selling the commodities which he once manufactured or dealt in, having no voice in shaping the business policy of the company and bound to obey orders issued by others.[161]

To Peckham, the antitrust laws were a means to protect competition rather than enhance economic efficiency.

In *Trans-Missouri Freight*, Peckham formulated a categorical standard that the Sherman Act banned all combinations directly restraining interstate commerce.[162] He rejected any notion of a balancing test that weighed the actual impact of restraints. In contrast, Justice Edward D. White took the position that the Act only

158. *Id.* at 337.
159. *Id.* at 323.
160. *Id.*
161. *Id.* at 324.
162. *Id.* at 309–10.

outlawed unreasonable restraints of trade,[163] a position that allowed courts to determine the reasonableness of private economic conduct. This difference between Peckham and White over the interpretation of the Sherman Act framed the larger debate over antitrust policy for the next decade. Although Peckham's formulation prevailed at first, the Court ultimately adopted White's views after Peckham's death.[164]

In 1898, Peckham, again speaking for the Court in *United States v. Joint Traffic Ass'n*, struck down a similar agreement to fix rates among railroads providing transportation between Chicago and the Atlantic coast.[165] He was unimpressed with the novel argument that the Sherman Act, as construed by the Court, interfered with the liberty of contract. As we have seen, Peckham was usually a champion of contractual freedom. But here he explained that individuals only had a right to make lawful contracts, and that Congress or state legislatures could prohibit certain types of contractual arrangements. "There are many kinds of contracts," Peckham asserted, "which, while not in themselves immoral or mala in se, may yet be prohibited by the legislation of the States."[166] There was no liberty of contract to eliminate competition between the parties. Peckham finally maintained that the "alleged baneful effects of competition" on railroads was a question for Congress to decide.[167]

In *Addyston Pipe and Steel Co. v. United States* (1899), Peckham further demonstrated his propensity to enforce the Sherman Act when the transaction involved was within the scope of congressional authority under the Commerce Clause.[168] At issue was an agreement among cast-iron pipe manufacturers to fix prices and divide markets. Speaking for a unanimous Court, Peckham ruled that agreements to control prices that directly restrained competition in interstate commerce violated the Act. In response to a liberty of contract argument advanced by the defendants, Peckham tellingly observed:

> The power of Congress over this subject seems to us much more important and necessary than the liberty of the citizen to enter into contracts of the nature above mentioned, free from the control of Congress, because the direct results of such contracts

163. *See* HOVENKAMP, *supra* note 79, at 294 (observing that Justice White argued that "[t]he Sherman Act would violate constitutional liberty of contract if it deviated from the common law rule of reason and condemned certain restraints as illegal per se").

164. Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 80–82 (1911) (finding the Sherman Act covered only "unreasonable" restraints of trade).

165. 171 U.S. 505, 568–69 (1898).

166. *Id.* at 571–73.

167. *Id.* at 576.

168. 175 U.S. 211 (1899).

> might be the regulation of commerce among the States, possibly quite as effectually as if a State had passed a statute of like tenor as the contract.[169]

Peckham emphatically maintained that the right of individuals to enter contracts was limited by the power of Congress to regulate commerce among the states. As Herbert Hovenkamp observed, Peckham's opinion in *Addyston Pipe* "completely disassociated the classical concern with liberty of contract from the Sherman Act's concern about elimination of competition."[170]

Yet Peckham acknowledged that there were limits to the reach of the Sherman Act. He adhered to the view that not every business enterprise was so linked to commerce among the states as to fall within the regulatory power of Congress. In *Hopkins v. United States* (1898), Peckham determined that an association of merchants buying and selling livestock on commission at the Kansas City stockyards was local in nature and therefore not within the purview of interstate commerce.[171] The rules of the association fixed sales commissions and barred members from doing business with non-members. Such provisions unquestionably constituted a restraint. Peckham insisted, however, that charges for local services did not have a direct impact upon interstate trade and that association members were not engaged in interstate commerce. He affirmed "the distinction between a regulation which directly affects and embarrasses interstate trade or commerce and one which is nothing more than a charge for a local facility provided for the transaction of such commerce."[172]

Peckham adhered to his position that there were limits on congressional power over commerce in the famous case of *Northern Securities Co. v. United States* (1904).[173] A splintered majority of five Justices voted to invalidate the formation of a holding company that controlled the stock of competing railroads in the Pacific Northwest under the Sherman Act. A plurality of four Justices held that all mergers that directly restrained interstate trade were illegal per se.[174] Justice Brewer concurred on different grounds, insisting that the

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169. *Id.* at 230.

170. HOVENKAMP, *supra* note 79, at 295. Other scholars share this view. *See, e.g.*, MARTIN J. SKLAR, THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM 132–33 (1988) (finding that Peckham saw congressional commerce power as curtailing liberty of contract). It should be noted that there is a different interpretation of Peckham's thinking about the relationship between contractual freedom and the Sherman Act. *See* Meese, *supra* note 26, at 53–67 (concluding that Peckham did not subordinate liberty of contract generally to the commerce power, but only ruled that "direct restraints" on commerce were unprotected by freedom of contract).

171. 171 U.S. 578, 589–90 (1898).

172. *Id.* at 597.

173. 193 U.S. 197 (1904).

174. *Id.* at 331–32.

Sherman Act only banned unreasonable restraints of trade.[175] Peckham dissented, joining the opinions of Justices White and Oliver Wendell Holmes, Jr. Both of these dissents, and especially the opinion by Justice White, stressed that the power of Congress was confined to traffic between the states.[176] White reasoned that congressional regulatory authority did not extend to the ownership of railroad stock, which he did not deem to be commerce at all. He characterized the ownership of stock as a form of constitutionally protected property rather than commerce, and thus stock ownership was beyond the reach of Congress.

The *Northern Securities* case also marked what seemed to be a shift by Peckham away from a literal reading of the Sherman Act and toward the rule of reason espoused by Justices Brewer and White. Peckham's thinking can perhaps best be explained in terms of the novel legal issues presented. *Trans-Missouri Freight Ass'n* and *Joint Traffic Ass'n* involved price-fixing agreements that undercut competition as the arbiter of fair prices. The railroad merger in *Northern Securities*, on the other hand, implicated the right of property owners to sell a business. Peckham doubtless shared White's view that "the principle that the ownership of property is embraced within the power of Congress to regulate commerce, whenever that body deems that a particular character of ownership . . . may restrain commerce . . . , is in my opinion, in conflict with the most elementary conceptions of rights of property."[177] In short, to the dissenters, considerations of federalism dovetailed with protection of property rights. Under these circumstances, Peckham may well have reasoned that a per se illegality rule was appropriate to protect competition against price-fixing, but that mergers should be evaluated under the more flexible rule of reason.[178]

How should we assess Peckham's record with respect to antitrust enforcement? Two points warrant emphasis. First, Peckham was motivated to protect small independent entrepreneurs against illicit corporate combinations. As James May cogently noted, "Justice Peckham's antitrust opinions reflected his complementary antipathy to nongovernmental threats to individual liberty and property."[179]

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175. *Id.* at 360–63 (Brewer, J., concurring) (finding that the Northern Securities Company unreasonably restrained interstate commerce).

176. *Id.* at 364–400.

177. *Id.* at 370 (White, J., dissenting).

178. *See* Rudolph J. Peritz, *A Counter-History of Antitrust Law*, 1990 DUKE L.J. 263, 277 (discussing the tension between competition and property rights in Peckham's antitrust thinking).

179. May, *supra* note 155, at 304.

This calls into question the common stereotype of Peckham as a one-sided defender of business interests. In fact, he was instrumental in vitalizing, within limits, governmental power to combat monopoly. Without losing sight of federalism concerns as expressed in *Hopkins*, Peckham did much to strengthen early antitrust doctrine.[180] Second, despite his commitment to contractual freedom, Peckham never took the position that liberty of contract was an absolute right. Some legislative restraints on individual contractual rights could be justified. Foremost among these were congressional efforts to preserve competition and protect small business.

X. FEDERAL POLICE POWER

In accordance with his attachment to a limited national government, Peckham was hostile to the gradual movement toward a federal police power. It was a generally accepted constitutional norm in the nineteenth century that the federal government did not possess authority to regulate public health, safety, and morals. Police power was seen as a function of the states. At the start of the twentieth century, however, Congress began to make novel use of the Commerce Clause and taxing power to control indirectly matters not within its enumerated powers.[181] For instance, Congress sought to ban the transportation of lottery tickets from state to state. Although the obvious purpose of the statute was to suppress lotteries, not to protect interstate trade, a sharply divided Court upheld the measure in *Champion v. Ames* (1903).[182]

Peckham disagreed. He joined Chief Justice Fuller's dissenting opinion, which argued that Congress was in effect exercising a police power to guard public morals.[183] Doubtless Peckham shared Fuller's view that the majority opinion in *Champion* was inconsistent with the intention of the Framers and threatened to overturn the constitutional balance between the federal and state governments.

In the same vein, Peckham expressed unhappiness when Congress resorted to taxation to prohibit activities that it could not reach directly. He dissented without opinion in *McCray v. United*

180. Peckham joined two other opinions applying the Sherman Act to local enterprises that were an integral part of the flow of commerce among the states. Loewe v. Lawlor, 208 U.S. 274, 297 (1908) (applying the Sherman Act to a nationwide boycott by a union against dealers in hats to support unionization efforts at factory manufacturing hats); Swift & Co. v. United States, 196 U.S. 375, 396 (1905) (applying the Sherman Act to buying and selling cattle in stockyards).

181. ELY, *supra* note 6, at 138–39.

182. 188 U.S. 321, 354 (1903).

183. *Id.* at 364–75.

States (1904), in which the Court upheld a prohibitory tax on oleomargarine.[184] This ruling seemingly opened the door for Congress to use the taxing power to regulate indirectly all aspects of the economy. Such a broad reading of the taxing power was clearly at odds with Peckham's commitment to a limited national government.

XI. DORMANT COMMERCE POWER

By the time Peckham arrived on the Supreme Court, it had long taken the position that the Commerce Clause impliedly restricted the power of the states to interfere with interstate commerce.[185] Under Fuller, the Court forcefully wielded this dormant commerce doctrine to bar state-imposed obstacles to trade across state lines.[186] Peckham regularly joined his colleagues in protecting the national market for goods. He voted, for example, to strike down state laws directed against the interstate shipment of alcoholic beverages and cigarettes.[187] Peckham also authored two opinions affirming the right to sell margarine as an article of commerce. Invalidating a state ban on the importation of margarine in *Schollenberger v. Pennsylvania* (1898), Peckham proclaimed: "The general rule to be deduced from the decisions of this court is that a lawful article of commerce cannot be wholly excluded from importation into a State from another State where it was manufactured or grown."[188] In a parallel case, he ruled that a New Hampshire requirement that margarine sold in the state be colored pink effectively hampered sales and amounted to a prohibition in violation of the Commerce Clause.[189]

Similarly, Peckham wrote opinions that curbed state regulation of railroads as an interference with interstate commerce. He looked skeptically at state laws that required interstate trains to stop at local stations if there was already adequate local service.[190] In the same

184. 195 U.S. 27, 63–64 (1904).

185. *See* sources cited *supra* note 81.

186. ELY, *supra* note 6, at 140–48.

187. Austin v. Tennessee, 179 U.S. 343, 364–88 (1900) (Peckham, J., joining Brewer, J., dissenting) (declaring that states could not bar importation and sale of cigarettes); Rhodes v. Iowa, 170 U.S. 412, 425–26 (1898); Scott v. Donald, 165 U.S. 58, 99–100 (1897).

188. 171 U.S. 1, 12 (1898).

189. Collins v. New Hampshire, 171 U.S. 30, 34 (1898).

190. Miss. R.R. Comm'n v. Ill. Cent. R.R., 203 U.S. 335, 344–45 (1906). As in his antitrust opinions, Peckham stressed the importance of competition in the rail industry. He observed:

> The transportation of passengers on interstate trains as rapidly as can with safety be done is the inexorable demand of the public who use such trains. Competition between great trunk lines is fierce and at times bitter. Each line

vein, Peckham ruled that the enforcement of Kentucky's long-haul, short-haul provision amounted to an unconstitutional regulation of interstate commerce when applied to shipments from outside the state.[191]

XII. INSULAR CASES

The insular cases were a cluster of decisions that addressed the constitutional status of the overseas territories acquired by the United States following the Spanish-American War.[192] Although nearly forgotten today, the insular cases were at the center of an intense controversy over the emergence of American imperialism. A pivotal issue was whether the Constitution and Bill of Rights applied to the inhabitants of the new territories. In *Downes v. Bidwell* (1901), the most important of the insular cases, a fragmented Court majority determined that the Constitution did not extend to the newly acquired possessions without congressional action.[193] In effect, the decision permitted Congress to exercise virtually plenary authority over the territories.

Peckham would have none of this.[194] He wrote only one brief concurring opinion in an insular case, but he rather consistently adhered to the position that the Constitution applied by its own force to the new possessions. In the language of the day, he felt that the Constitution followed the flag. Contemporaries classed Peckham as one of the "anti-imperialist" Justices.[195] Since Peckham never explained his thinking about the overseas territories, any analysis requires a degree of conjecture. Several points warrant mention. First, Peckham's voting pattern in the insular cases was consistent with his commitment to a limited national government and a strict construction of federal power. Second, his behavior closely tracked the

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> must do its best even to obtain its fair share of the transportation between states, both of passengers and freight.

Id. at 346; *see also* Atl. Coast Line R.R. v. Wharton, 207 U.S. 328, 331 (1907) (Peckham, J.) ("[A]ny command of a state, whether made directly or through the instrumentality of a railroad commission, which orders, or the necessary effect of which is to order, the stopping of an interstate train at a named station or stations, if it directly regulated interstate commerce, is void.").

191. Louisville & Nashville R.R. v. Eubank, 184 U.S. 27, 35–36 (1902).

192. *See generally* FISS, *supra* note 3, at 225–56 (discussing how the Court responded to the issues concerning governance of overseas territories through the series of decisions referred to as the *Insular Cases*); BARTHOLOMEW H. SPARROW, THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE 15–255 (2006).

193. 182 U.S. 244, 287 (1901).

194. *Id.* at 347–75 (Peckham, J., joining Fuller, C.J., dissenting).

195. *See* SPARROW, *supra* note 192, at 109–10.

anti-imperialist views expressed by national leaders of the Democratic Party, including Grover Cleveland. As we have seen, Peckham was not partisan in his approach to judicial questions, but he was a loyal Cleveland Democrat. Finally, it should be noted that many of the insular cases, including *Downes*, concerned the validity of tariffs on goods shipped to and from overseas territories. Democrats in the Gilded Age were generally opposed to protective tariffs, and this sentiment may have influenced Peckham.[196]

Given his general outlook on the relationship between the new territories and the United States, Peckham's concurring opinion in *United States v. Dorr* (1904) has puzzled historians.[197] In *Dorr*, the Court held that, absent congressional action, the Constitution did not confer the right of trial by jury in criminal cases in the Philippine Islands.[198] Peckham, speaking for two other Justices, concurred in the result in a short opinion that casts little light on his thinking.[199] He expressly rejected *Downes* as controlling authority, once more declining to adopt the incorporation theory. Yet Peckham failed to make clear his own position, which was seemingly at odds with his previous voting pattern in insular cases.

Again, some speculation may be in order. *Dorr* involved criminal procedure not commerce or property. Peckham may have been persuaded by the majority's contention that trial by jury was simply not feasible as a practical matter for the inhabitants of the Philippines at that time. The majority opinion, moreover, emphasized that congressional authority in the territories was confined by inherent principles of free government. Such limiting language may have persuaded Peckham to focus on the narrow question of jury trials rather than the larger issue of the scope of congressional power.

XIII. CIVIL RIGHTS AND CIVIL LIBERTIES

Consistent with the prevailing racial and political attitudes at the turn of the twentieth century, the Fuller Court demonstrated little concern for the civil rights of racial minorities.[200] In a line of cases

196. *See* MORTON KELLER, AFFAIRS OF STATE: PUBLIC LIFE IN LATE NINETEENTH CENTURY AMERICA 378–80 (1977) (pointing out that President Cleveland and the Democratic Party stressed tariff reductions and free trade).

197. United States v. Dorr, 195 U.S. 138, 178–83 (1904) (Peckham, J., concurring).

198. *Id.* at 149.

199. *Id.* at 153–54.

200. JOHN BRAEMAN, BEFORE THE CIVIL RIGHTS REVOLUTION: THE OLD COURT AND INDIVIDUAL RIGHTS 121 (1988) (observing that the "Fuller Court's acquiescence in the relegation of the Negro to second-class citizenship represented accommodation to the facts of life in turn-of-the-century America"); ELY, *supra* note 6, at 155–60.

starting with *Plessy v. Ferguson* (1896), the Court affirmed state laws imposing racial segregation in the South.[201] In sharp contrast to his keen regard for economic liberty, Peckham was unimpressed with claims of equality and consistently deferred to state authority over race relations. He repeatedly joined decisions that upheld racial segregation in public and private facilities[202] and allowed southern states to restrict black political participation.[203] Even more revealing was Peckham's dissent when the Fuller Court confronted lynching and mob violence. In *United States v. Shipp* (1909), the Court majority of five found a sheriff, a deputy, and members of a mob guilty of contempt for lynching a black man convicted of rape while his appeal to the Supreme Court was pending.[204] Speaking for the four dissenters, Peckham denounced the criminal behavior of the crowd: "I take it that all intelligent and respectable citizens who are cognizant of the facts agree that it was murder, without one extenuating circumstance to relieve its atrocious character."[205] Still, he maintained that the evidence did not establish that the sheriff conspired with the mob to lynch the prisoner.[206]

Peckham was similarly disinclined to question legislative policy with respect to Indians. For example, he joined the opinion in *Lone Wolf v. Hitchcock* (1903), which sustained plenary congressional authority over tribal lands.[207] Still, Peckham voted in several cases for a rule that ambiguities in Indian treaties should be construed in favor of the Indians.[208]

On the other hand, Peckham demonstrated considerable sensitivity to Chinese immigrants who faced steadily increasing restrictions on entry into the United States. In 1882 Congress passed the Chinese Exclusion Act, which suspended the immigration of

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201. 163 U.S. 537, 551–52 (1896); *see* CHARLES A. LOFGREN, THE *PLESSY* CASE: A LEGAL-HISTORICAL INTERPRETATION 196–98 (1987) (noting that *Plessy* "embodied conventional wisdom").

202. Berea Coll. v. Kentucky, 211 U.S. 45, 57–58 (1908); Cumming v. Richmond County Bd. of Educ., 175 U.S. 528, 544–45 (1899).

203. Giles v. Harris, 189 U.S. 475, 487–88 (1903); Williams v. Mississippi, 170 U.S. 213, 225 (1898).

204. 214 U.S. 386, 419–20 (1909). For an analysis of the *Shipp* case, which gives brief attention to Peckham's role, see MARK CURRIDEN & LEROY PHILLIPS, JR., CONTEMPT OF COURT: THE TURN-OF-THE CENTURY LYNCHING THAT LAUNCHED 100 YEARS OF FEDERALISM 169–336 (2001).

205. *Shipp*, 214 U.S. at 426.

206. *Id.* at 430–38.

207. 187 U.S. 553, 564 (1903).

208. Winters v. United States, 207 U.S. 564, 576–78 (1908); Jones v. Meehan, 175 U.S. 1, 32 (1899).

Chinese laborers for ten years.[209] Other Chinese citizens, such as officials, students, and merchants, were exempt from this ban and allowed to enter with a certificate as to their occupation.[210] Subsequent legislation tightened the regulations to halt evasion of the ban on laborers and vested immigration officials with broad discretion to determine the status of Chinese aliens.[211] Before Peckham joined the Supreme Court, the Justices upheld the authority of Congress to curtail Chinese immigration despite contrary treaty provisions and to expel Chinese laborers already in the country who could not prove they were lawful immigrants by obtaining a federal certificate of residence.[212]

In sharp contrast to this record of judicial deference to congressional and administrative enforcement of racially based immigration laws, Peckham repeatedly voted to secure the rights of Chinese immigrants and was among the Justices most sympathetic to their plight.[213] For example, he sided with the Court majority in holding that children born in the United States of Chinese parents were citizens of the United States.[214] In addition, Peckham joined Justice Brewer in vigorous dissents when the Court denied judicial review to administrative determinations of the right to enter the country.[215]

In *United States v. Gue Lim* (1900), Peckham, speaking for a unanimous Court, held that the wife and minor children of a Chinese merchant residing in the United States were entitled to enter without certificates.[216] Rejecting a literal reading of the exclusion laws, he

209. Act of May 6, 1882, ch. 126, 22 Stat. 58, *amended by* Act of July 5, 1884, ch. 220, 23 Stat. 115.

210. *Id.*

211. Act of May 5, 1892, ch. 60, 27 Stat. 25; Act of Oct. 1, 1888, ch. 47, 25 Stat. 47; Act of July 5, 1884, ch. 220, 23 Stat. 115.

212. Fong Yue Ting v. United States, 149 U.S. 698, 738 (1893); Chinese Exclusion Cases, 130 U.S. 581, 610–11 (1889).

213. *See* Gabriel J. Chin, *The First Justice Harlan by the Numbers: Just How Great Was "The Great Dissenter?"*, 32 AKRON L. REV. 629, 652–55 (1999) (finding that Peckham's voting record in cases involving Chinese litigants ranked him at the top of Justices in supporting rights for Chinese immigrants).

214. United States v. Wong Kim Ark, 169 U.S. 649, 705 (1898).

215. United States v. Ju Toy, 198 U.S. 253, 264–80 (1905) (Brewer & Peckham, JJ., dissenting); United States v. Sing Tuck, 194 U.S. 161, 170–82 (1904) (Brewer & Peckham, JJ., dissenting); *see also* John E. SEMONCHE, CHARTING THE FUTURE: THE SUPREME COURT RESPONDS TO A CHANGING SOCIETY, 1890–1920, at 234 (1978) (observing that "in cases dealing with Chinese persons [Peckham] often dissented from the Court's tendency to rubber stamp administrative procedures").

216. 176 U.S. 459, 468–69 (1900); *see* LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW 43 (1995) ("If the Chinese

reasoned that the certificate requirements were aimed at laborers and were not intended to exclude the wife or minor children of a merchant lawfully residing in the country.[217] Since a wife and children did not qualify for a certificate in their own right, Peckham implicitly linked their status to that of the merchant who was exempt from the exclusion laws. Peckham's opinion flew in the face of the statutory language—there was no provision for wives and minor children—but he struck a blow for family unity. Moreover, in the words of one scholar, his "decision proved a beachhead for subsequent Chinese husbands to argue for their rights as men in American society."[218] In decisions such as *Gue Lim*, Peckham's commitment to individual liberty was again evident. Historians generally have not adequately recognized Peckham's willingness to attack discriminatory treatment of Chinese immigrants.

Review of state criminal proceedings did not bulk large in the work of the Fuller Court. The central reason for this was the Court's refusal to apply the procedural guarantees of the Bill of Rights to state criminal proceedings. Instead, the Justices permitted the states great leeway over the conduct of criminal trials.[219] This view was exemplified by Peckham's opinion in *Maxwell v. Dow* (1900).[220] In *Dow*, a criminal challenged his conviction for robbery because it was based on an information rather than indictment by a grand jury and because he was tried by an eight-person jury instead of the common law jury of twelve. Brushing aside these arguments, Peckham adhered to the established position that the Privileges or Immunities Clause of the Fourteenth Amendment did not necessarily include all the rights protected by the Bill of Rights against the federal government. Accordingly, neither a conviction based on an information nor a trial before a jury of only eight members abridged the defendant's privileges and immunities. Peckham also insisted that trial by jury was not a requisite element of due process guaranteed by the Fourteenth Amendment. Rather, the states could decide for themselves the form of procedure in criminal trials. Evincing his

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exclusion laws exempted the husband, the wife and child could also enter upon showing that they were the family of the exempt Chinese.").

217. *Gue Lim*, 176 U.S. at 464–68.

218. Todd Stevens, *Tender Ties: Husbands' Rights and Racial Exclusion in Chinese Marriage Cases, 1882–1924*, 27 LAW & SOC. INQUIRY 271, 286 (2002).

219. ELY, *supra* note 6, at 165–68; *see also* William F. Duker, *The Fuller Court and State Criminal Process: Threshold of Modern Limitations on Government*, 1980 BYU L. REV. 275, 275 (1980) (stating that in the area of "criminal cases coming from the state courts" the Fuller Court was "a model of self-restraint").

220. 176 U.S. 581, 616–17 (1900).

confidence in state administration of criminal justice, Peckham stated that "there can be no just fear that the liberties of the citizen will not be carefully protected by the States respectively. It is a case of self-protection, and the people can be trusted to look out and care for themselves."[221]

XIV. PECKHAM'S LEGACY

It remains to briefly assess Peckham's jurisprudence and to consider his legacy. The central tenet of Peckham's constitutionalism was a deep attachment to liberty, a concept that he defined largely in terms of economic freedom and limited government. He therefore sought to protect the rights of property owners and the autonomous role of the states within the federal system. Conversely, Peckham was hostile to what he perceived as class legislation and schemes to redistribute wealth. As Hovenkamp explains, conservative jurists like Peckham "perceived the new interventionist politics of the Progressive Era as the greatest threat to liberty."[222] To Peckham, liberty clearly trumped equality as a constitutional norm. In general terms, he echoed the attitudes of the Framers of the Constitution, who closely linked respect for property rights with liberty.[223]

Like most of the other Justices on the Fuller Court, Peckham was not shy about invoking judicial review to safeguard economic rights. In general, he certainly did not defer to legislative judgments. On the contrary, as John E. Semonche notes, Peckham was a "believer in the need for an active Court sensitive to the task of guarding property and contractual rights."[224] Peckham's libertarian inclinations led him to reject the nascent doctrine of judicial deference promoted by Progressives of the early twentieth century in order to encourage the emerging regulatory state.

Peckham does not fit the cartoonist image fashioned by the Progressive historians and their progeny of a one-sided champion of large-scale business interests. To be sure, the business community

221. *Id.* at 605.

222. HOVENKAMP, *supra* note 79, at 77.

223. Walter Dellinger, *The Indivisibility of Economic Rights and Personal Liberty,* 2003–04 CATO SUP. CT. REV. 9, 19 ("Economic rights, property rights, and personal rights have been joined, appropriately, since the time of the founding."). Not until the mid-twentieth century did judges and commentators differentiate civil liberties from economic rights. *See* Stephen A. Siegel, Lochner *Era Jurisprudence and the American Constitutional Tradition,* 70 N.C. L. REV. 1, 33 n.154 (1991) ("Civil liberties encompass both personal and property rights. Indeed, in nineteenth-century America, property was considered among the most important civil liberties.").

224. SEMONCHE, *supra* note 215, at 234.

may have benefited incidentally from the course of Peckham's decisions, but such a result was not his primary goal. Instead, Peckham's concern was to protect small, self-sufficient entrepreneurs—the "small dealers and worthy men"—from both excessive governmental regulation and exploitation by concentrated private power.[225] He indulged no presumption about the legitimacy of legislation that seemed to abridge marketplace rights. In these situations, Peckham expected lawmakers to show that regulation served traditional police power ends of public health, safety, and morals. In his mind, legislative assertions that regulation was necessary could not be taken as final because lawmakers could then circumvent constitutional limits and effectively destroy private property and contractual freedom in the guise of asserting the police power.

For all his devotion to economic liberty, Peckham was not a legal theorist or a doctrinaire adherent of laissez-faire principles.[226] He was prepared to uphold measures safeguarding public health and safety. He was also receptive to early land use controls and, within bounds, the exercise of eminent domain. Further, he wrote the first important opinions applying the Sherman Anti-Trust Act and favored a strict interpretation of the law.

An evaluation of the influence and lasting significance of Peckham's jurisprudence must proceed with care. Undoubtedly, he was a stalwart member of the Fuller Court and authored a number of leading opinions. But, as frequent dissents demonstrate, he did not intellectually dominate his colleagues. Consider his signature issue—the liberty of contract. Peckham was never able to secure a consistent majority to strike down statutes infringing on contractual freedom. His record of success in this area was decidedly mixed.

It is unclear how much of Peckham's legal philosophy retains any vitality in the modern age. His historical reputation is inevitably tied to the constitutional values of the late nineteenth century. For better or worse, our nation has moved far from a constitutional order grounded on a limited national government, states' rights, and a high regard for the rights of property owners and private market ordering.

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225. KELLER, *supra* note 196, at 367–68.

226. Lawrence M. Friedman has aptly characterized Peckham's generation of jurists: "In short, the justices, and judges in general, were cautious and incremental. They did not consistently adhere to any economic philosophy. They simply reacted in the way that respectable, moderate conservatives of their day would naturally react." FRIEDMAN, *supra* note 74, at 24; *see also* Mayer, *supra* note 73, at 265 ("Peckham's opinion for the Court [in *Lochner*] was not based, either explicitly or implicitly, upon Herbert Spencer's *Social Statics* or any other laissez-faire work, still less upon any particular 'economic theory.' ").

The Progressive critique of constitutionalized property in the early years of the twentieth century came to fruition with the statist liberalism of the New Deal and the rise of activist government.[227] To legitimatize New Deal constitutionalism, many scholars disparaged both the decisions and the jurists of the Fuller era.[228] They took particular aim at *Lochner* and Peckham.[229]

One dubious (but popular) thesis is that jurists of Peckham's age adhered to a mechanistic conception of law and decided cases without regards to policy considerations.[230] This notion of legal formalism was promoted by critics of the Supreme Court's jurisprudence of the late nineteenth and early twentieth centuries, and it was largely motivated by political concerns.[231] Even a glance at Peckham's opinions makes it evident that he was not engaged in abstract deduction from legal principles and precedents. Instead, Peckham championed what he regarded as socially desirable outcomes in defense of property rights and contractual freedom. Peckham cannot fairly be described as a legal formalist.

Rather than accept Peckham's judicial decisions as a principled expression of his legal beliefs, scholars steeped in Progressive ideology have too often attributed to him dark motives. We are still frequently told that the Supreme Court of the Fuller era was simply defending big business or protecting economic privilege.[232] I submit that this interpretation is wide of the mark and obscures rather than

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227. Paul, *supra* note 9, at 569 ("The statist ideologies of the Progressives and then of the New Dealers were at odds with the founders' strongly held individualism and belief in the centrality of property rights.").

228. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 7 (1992) ("[B]y seeking to stigmatize the *Lochner* era, Progressive historians lost sight of the basic continuity in American constitutional history before the New Deal.").

229. *Id.* at 158 (pointing out that the Progressive focus on the supposed rise of substantive due process was "designed to delegitimate the *Lochner* court by arguing that it had taken a completely unprecedented turn in the late nineteenth century").

230. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 288 (3d ed. 2005); HALL & KARSTEN, *supra* note 83, at 243–44. *But see* ELY, *supra* note 6, at 72–75 (asserting that Justices on the Fuller Court were innovative and not legal formalists).

231. Tamanaha, *supra* note 4, at 80–81 (questioning whether an age of legal formalism ever existed, and declaring that "[t]he 'formalist' label was a kind of group ad hominem slung by critics that has since been accepted as a descriptively accurate account of the beliefs of those saddled with the label").

232. *E.g.*, ARTHUR S. MILLER, THE SUPREME COURT AND AMERICAN CAPITALISM 60–61 (1968); ARNOLD M. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887–1895, at 185–221 (1960); BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 174–202 (1993); WILLIAM M. WIECEK, LIBERTY UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE 115 (1988).

illuminates Peckham's constitutional philosophy. Historians could more profitably address different questions.

For instance, should Peckham's judicial career be best understood as a sincere if ultimately futile rear guard action in defense of a world that was vanishing? Or are other perspectives more compelling? To the extent that private property and economic freedom continue to play a role in the American polity, Peckham cannot be simply erased from constitutional dialogue. Indeed, one might even argue that the current debate over *Lochner* and the scope of due process underscores the continuing significance of Peckham. David Bernstein forcefully argues that discussion over the extent to which due process protects unenumerated rights "is a testament to the ultimate triumph of Peckham's vision of the due process clause as a source of the Court's power to act as defender of last resort of individual liberties against the states, if not of his specific views on the scope of that clause."[233] In short, so long as courts persist in a substantive reading of the due process guarantee—a propensity that shows no sign of abating—it is impossible to escape the legacy of Rufus W. Peckham.

233. Bernstein, *supra* note 94, at 1525.