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Presence and Absence in *Lochner*: Making Rights Real

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Judicial rhetoric is one of the most complex types of public argument in the United States. No one questions the right of the executive and legislative branches to engage in political, deliberative argumentation. However, the judicial branch, specifically the United States Supreme Court, continually engages in a dance between a desire for stability and a perceived need for change, between what the law "is" and what the law "ought to be." In classical rhetoric terms, the Court attempts to maintain its appearance as the consumer of forensic rhetoric while engaging in deliberative rhetoric.

I have argued elsewhere that the focus on the Court's actual adjudicative process is futile, and a more useful focus is on the sufficiency of the Court's argumentation in justifying its decision.[1] This is especially true in modern constitutional discourse since the Court has moved from stating bright-line tests toward a discourse of balancing governmental and individual rights.[2] Others have attempted to quantify the balancing process, using algebraic formulas[3] or economic models.[4] Yet at bottom, the Court's decision to balance governmental justifications against individual liberty interests in deciding constitutionality is the selection of an argumentative strategy.

However, the balancing strategy, itself a metaphor, causes rhetorical problems for the Court. How does one "measure" various rights or interests and "weigh" them against each other? Or, as Justice Scalia has asked, how does one compare the length of a line to the weight of a rock?[5] This Essay uses the majority opinion in *Lochner v.*

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1. *See* Eileen A. Scallen, *Judgment, Justification and Junctions in Rhetorical Criticism of Legal Texts*, 60 S. COMM. J. 68 (1994).

2. *See generally* David L. Faigman, *Measuring Constitutionality Transactionally*, 45 HASTINGS L.J. 753 (1994).

3. *Id.* at 765.

4. *See generally* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE (1990).

5. Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring).

New York,[6] one of the Court's most infamous attempts to balance the will of the majority against individual liberty interests, to illustrate the problems resulting from the Court's decision to balance rights and governmental interests.

The central issue in *Lochner* was the constitutionality of a New York law limiting the number of hours a baker could work to sixty per week or ten per day.[7] The majority held the law unconstitutional under the Fourteenth Amendment because it unreasonably interfered with the liberty to contract between employer and employee.[8] *Lochner* is a landmark Supreme Court case for two central reasons. First, *Lochner* demonstrated the Court's acceptance of economic substantive due process, the notion that economic legislation that unreasonably infringes individual liberty is unconstitutional. Economic substantive due process requires that legislation have a reasonable relation to a legitimate governmental interest.[9] Second, the opinions in *Lochner* represented different views of the Court's role vis-à-vis the legislature. Justice Peckham's majority opinion expressed the willingness of the Court to second-guess a legislative decision in order to protect freedom of commerce.[10] In his famous dissent, Justice Holmes argued for judicial restraint, as illustrated by his stinging aphorism, "[t]he 14th Amendment does not enact Mr. Herbert Spencer's Social Statics."[11] Also dissenting, Justice Harlan, whose opinion more accurately reflects the current law on economic substantive due process, criticized the majority's eagerness to substitute its judgment for that of the legislature.[12] Today, to say that the Court has engaged in "Lochnerizing," is another way of accusing the Court of engaging in judicial activism.

When balancing rights, the Court must attempt to make the interests come alive. The prevailing side's interest must appear stronger or weightier than that of the competition. Justice Peckham attempted to develop the relative weight of the competing interests by orchestrating their "presence" through the use of repetitive structure, dominating metaphor clusters, and "slippery slope" arguments resting on parallel-

6. 198 U.S. 45 (1905).
7. *Id.* at 53.
8. *Id.* at 53-54.
9. JOHN E. NOWAK, CONSTITUTIONAL LAW 398-401 (1978). The modern Supreme Court has taken a very different approach to substantive due process objections to legislation that affects civil rights or individual liberties. The Court shows far less deference to the legislature in these noneconomic areas. *Id.*
10. 198 U.S. at 52-65.
11. *Id.* at 75.
12. *Id.* at 72-73.

ism, anaphora, and alliteration for their force.[13] However, the *Lochner* majority opinion provides a perfect illustration of the downside of balancing: the temptation to make the scales tip too easily.

The structure of Justice Peckham's opinion resembles a top-forty pop song with a few verses and a refrain. The refrain was his repeated assertion that there is no basis for finding that this is a law intended to protect the public health or the health of individual bakers. As in a top-forty pop song, this repetition becomes numbing.

The first verse dealt with an issue of statutory interpretation. Justice Peckham argued that the statute necessarily implicated the constitutional right to liberty of contract by limiting the number of hours an employee could choose to work.[14] By selecting this starting point, Justice Peckham shifted the focus of the balancing and compared the state's interest in health and safety with the employee's right to work, a far more appealing image than the employer's right to contract. He painted the hardship created by the statute:

> The employee may desire to earn the extra money which would arise from his working more than the prescribed time, but this statute forbids the employer from permitting the employee to earn it.[15]

The next verse attempted to demonstrate Justice Peckham's reasonableness by acknowledging that, in exercising its police powers, the state has some limited right to regulate "the safety, health, morals, and general welfare of the public."[16] However, he did not discuss the possibilities for defining the scope of the "police powers" and the degree to which the statute promoted those governmental interests. Instead, in the next few lines, Justice Peckham structured the remainder of the opinion as a clash of diametrically opposed interests. He stated:

> [I]t becomes of great importance to determine which shall prevail—the right of the individual to labor for such time as he may choose, or the right of the State to prevent the individual from laboring or from entering into any contract to labor, beyond a certain time prescribed by the State.[17]

In subsequent verses he repeats this antithesis:

> Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his per-

13. *See generally* CHAIM PERELMAN & LUCIE OLBRECHTS-TYTECA, THE NEW RHETORIC: A TREATISE ON ARGUMENTATION (John Wilkinson & Purcell Weaver, trans. 1969).

14. 198 U.S. at 53.

15. *Id.* at 52-53.

16. *Id.* at 53.

17. *Id.* at 54.

> sonal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family?[18]

With this rhetorical question, Justice Peckham solidified the structure of his argument. The verses roll on:

> It is a question of which of two powers or rights shall prevail—the power of the State to legislate or the right of the individual to liberty of person and freedom of contract.[19]

To support this structure, Justice Peckham used a dominant cluster of metaphors. He cast the state as an arbitrary parent, cruel to the point where it would "cripple" its child, the laborer, in his effort "to support himself and his family."[20] Justice Peckham writes sarcastically of the legislature's exercise of its "paternal wisdom"[21] and its desire to "assume the position of a supervisor, or *pater familias*, over every act of the individual."[22] After creating it, Justice Peckham disparaged this image:

> There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State, interfering with their independence of judgment and of action. They are in no sense wards of the state.[23]

Through his use of structure and style, Justice Peckham framed this case not under the image of the scales of justice where gradations are possible, but as a see-saw with a bullying adult on one end and a child on the other.

Justice Peckham's other key strategy was "slippery slope" argumentation. Several times in the opinion, he used a parade of horribles to accentuate the harm that would result from allowing the state to legislate restrictions on a laborer's hours and work environment:

> It is unfortunately true that labor, even in any department, may possibly carry with it the seeds of unhealthiness. But are we all, on that account, at the mercy of legislative majorities? A printer, a tinsmith, a locksmith, a carpenter, a cabinetmaker, a dry goods clerk, a bank's, a lawyer's or a physician's clerk, or a clerk in almost any kind of business, would all come under the power of the legislature, on this assumption. No trade, no occu-

18. *Id.* at 56.
19. *Id.* at 57.
20. *Id.* at 59.
21. *Id.* at 60.
22. *Id.* at 62.
23. *Id.* at 57.

> pation, no mode of earning one's living, could escape this all-pervading power.[24]

The rhythm of this cascade carries one down a slippery slope and erodes any restraining force the state's interest might have had. But, as with his use of imagery, Justice Peckham cannot seem to stop midway. He later repeats this argument ad terrorem, combining its rhythm with the power of alliteration:

> Not only the hours of employ[ee]s, but the hours of employers, could be regulated, and doctors, lawyers, scientists, all professional men, as well as athletes and artisans, could be forbidden to fatigue their brains and bodies by prolonged hours of exercise, lest the fighting strength of the State be impaired.[25]

Justice Peckham thus chose to portray the decision as an either/or proposition: the state can run wild, or the individual's liberty can be respected.

The problem here is that the test of substantive due process invited a more complex discourse, one that acknowledged the subtleties involved in defining state police powers and individual liberty interests. Justice Peckham made the presence of the governmental interest and the liberty right vivid, but in an exaggerated way. He went over the top, leaving the reader with the feeling that something, possibly the middle ground or an appreciation of the complexity of the problem, was absent. Although Justice Peckham's opinion carried the day, the Court eventually abandoned his approach and adopted a more deferential approach to the legislature in reviewing economic legislation. This approach was represented in *Lochner* by Justice Harlan's dissent.[26]

The problems with Justice Peckham's legal rhetoric are not confined to judicial rhetoricians of his time or his particular political or economic philosophy. The current Court is smitten with the image of the scales of justice. One commentator has criticized the Court's balancing approach by suggesting the Court is comparing apples and oranges.[27] Another commentator has argued that the entire structure of rights-based discourse needs to be replaced because of its potential polarizing effect.[28] This may be the best route to stronger constitutional adjudication and justification, but the law evolves slowly and

24. *Id.* at 59.
25. *Id.* at 60.
26. NOWAK, *supra* note 9.
27. T. Alexander Aleinikoff, *Constitutional Law and the Age of Balancing*, 96 YALE L.J. 943, 972 (1987).
28. *See generally* M.A. GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991).

has never been easily amenable to reconceptualization. In the meantime, the balancing strategy could be improved if the Court were to create weighty images for the position that it supports without giving in to the temptation of making the outcome appear inevitable. The Court must balance in a way that helps us feel the presence of the rights involved, but that does not leave us with a feeling of emptiness, a feeling that something is being suppressed or ignored. How well the Court or a particular Justice does this is the material for critics of argument in the future.