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Preaching the Constitution

William E. Wiethoff

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by WILLIAM E. WIETHOFF*

Aftershocks of *Lochner v. New York*[1] have yet to subside.[2] The case is more about enduring issues in jurisprudence and constitutional interpretation, and the relationship between masters and servants,[3] than it is about specific statutes and parties.[4] "If we have learned anything in this century," a historian of the Court has declared, "it is that judges should not substitute their economic judgments for those of the legislature."[5] In the following pages, I argue that we have learned also of selected judges' pious or impious devotion to the law as revealed in the rhetorical amplification of their arguments.

I. Homiletic Form

The idea of reading the majority and dissenting opinions in *Lochner* as homilies on the Fourteenth Amendment is consistent with the American religious tradition of promoting a faith based on human reason,[6] and the twentieth-century search for "secularized soteriologies."[7] Oliver Wendell Holmes, Jr., the most notorious voice in *Lochner*, was steeped in the Puritan tradition of civil religion and active in a "Metaphysical Club" of logical positivists.[8] Other voices welled up

* Professor, Department of Speech Communication, Indiana University.

1. 198 U.S. 45 (1905).

2. *See, e.g.*, Matthew S. Bewig, *Lochner v. The Journeymen Bakers of New York: The Journeymen Bakers, Their Hours of Labor, and the Constitution*, 38 AM. J. OF LEGAL HIST. 413 (1994).

3. *See, e.g.*, HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE (1993) [hereinafter CONSTITUTION BESIEGED].

4. Stephen A. Siegel, Lochner *Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1 (1991).

5. BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 202 (2d ed. 1993).

6. A DOCUMENTARY HISTORY OF RELIGION IN AMERICA, (E.S. Gaustad, ed. 1982); CHURCH AND STATE IN AMERICAN HISTORY (John F. Wilson & Donald Drakeman, eds., 2d ed. 1965).

7. PETER L. BERGER, THE SACRED CANOPY 125 (1967).

8. 3 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969: THEIR LIVES AND MAJOR OPINIONS 1756 (Leon Friedman & Fred L. Israel, eds. 1969).

from other traditions of faith. John Harlan, for example, was a Presbyterian elder.[9]

A homiletic reading illuminates judicial claims to authority and the hallowed character of the Constitution in an ingenious if subconscious argumentative strategy. Homiletic form varies depending on time, place, and custom.[10] Additionally, from the early Middle Ages this sermonic discourse has featured rhetorical amplification based on the four senses of scripture: literal, allegorical, tropological, and anagogical.[11] When expounding the literal sense, a homilist cites real examples of the theme being addressed. When the allegorical sense is emphasized, hypothetical examples are cited. Emphasizing the tropological sense leads to moral exhortation, and expounding the anagogical sense underscores the effects of the tropology.[12]

Homilists themselves enact the role of priestly exegetes in their communication: they have been ordained to speak efficaciously so long as they perform their office in an orthodox manner. The text they expound is sacred in both origin and design. Moreover, if a homilist addresses all four senses in the order defined above, then the homily leads pious members of the congregation from fact, through imagination and conscience, to a new and better state of communion with virtuous ideals.

For example, one could do worse than read Philip Melanchthon's 1550 sermon, "The Safety of the Virtuous," in which he amplifies the meaning of John 10:28.[13] When he says:

> "No man shall pluck my sheep out of my hand," he indicates that he is "no idle spectator of our woe, but that mighty and incessant strife is going on .... But the son of God, who holds in his hands, as it were, the congregation of those who call upon his name, hurls back the devils by his infinite power .... The godly, ... enjoy the beginning of eternal life and obtain mitigation of the general distress."[14]

Literally speaking, sheep are protected. Allegorically, of course, humans enjoy divine protection if they—in a tropological sense—pray

9. MELVIN I. UROFSKY, THE SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY 208 (1994).

10. *See generally* JAMES J. MURPHY, RHETORIC IN THE MIDDLE AGES (1974).

11. READINGS IN MEDIEVAL RHETORIC 170-71 (J.M. Miller et al., eds. 1973).

12. William M. Purcell, *Eberhard the German and the Labyrinth of Learning: Grammar, Poetry, Rhetoric and Pedagogy in* Laborintus, 11 RHETORICA 95, 114 (1993).

13. 1 THE WORLD'S BEST ORATIONS 3007-12 (D.J. Brewer, ed. 1990) (quoting Melanchthon's 1550 sermon).

14. *Id.*

for deliverance. Ultimately and anagogically, humans enjoy eternal life.

My curt analysis of Melanchthon's preaching obscures formal properties such as the amount of discourse he dedicated to expounding each of the scriptural senses, and I have not assessed the homilist's claim to authority or his claim about the character of his text. In my assessment of *Lochner*, I explain and illustrate more fully these types of claims in judicial discourse.

A. Homiletic Form in *Lochner*

The critical approach to analyzing rhetorical amplification based on the four senses of scripture can be adapted to examine *Lochner* as a collection of three jurisprudential homilies. Though unusual, this approach is preferable to viewing the case as a "three-ring circus."[15] The apparent trinity of jurisprudential arguments represents a range of orthodox, heretical, and apostate opinions that P. T. Barnum would not have appreciated.

B. Literal Sense

Writing for the majority, Justice Peckham not only recited the facts of the case but also recited the tension between the state power to police contracts and the liberty interests of the individual worker.[16] In a literal sense, he expounded the law to the reader: "The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words."[17] In fact, he explained, the real controversy involved "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."[18] In the mind of the majority, "the limit of the police power" was exceeded by New York's attempt to limit bakers' working hours, which the state justified based on its need "to safeguard the public health or the health of the individuals who are following the trade of a baker."[19]

Justice Peckham began with a literal exegesis of the Constitution, devoting more than half of his opinion to this effort. In an ideally legal culture, he noted, a literal interpretation would have been suffi-

15. Thomas C. Marks, Jr., Three Ring Circus *Revisited: The Drift Back to* Lochner *Continues*, 19 STETSON L. REV. 571 (1990).
16. *Lochner*, 198 U.S. 45, 52-58 (1905).
17. *Id.* at 57.
18. *Id.*
19. *Id.* at 58.

cient.[20] That interpretation would reflect the "judgment" of the law's most prominent acolytes and express the perfectly "reasonable" standards of the Constitution.[21] In Justice Peckham's opinion, the Court's decision should have satisfied the lesser beings not occupying the Supreme Court bench who mucked about in a state of impaired intellect. His opinion literally puts these legal suppliants in touch with reality.

Yet to the dismay of Justice Peckham, his fellow "priest," Justice Harlan, dissented and was joined in this heresy by Justices White and Day. These three schismatics were especially pernicious because they also began their exegesis with a literal interpretation, devoting almost three-quarters of their homily to expounding reality.[22] Worse yet, they inferred reality, the reality that "this statute was enacted in order to protect the physical well-being of those who work in bakery and confectionery establishments,"[23] not only from legal precedents but also from professorial opinions and bureaucratic statistics.[24] From this heretical viewpoint, supreme acolytes such as Justice Peckham mistakenly performed the rites of law for devout but ignorant worshippers of that law. However, the Constitution survives even the blasphemy of its high priests because it is the perfection of reason.

But there was also apostasy. Like his brethren, Justice Holmes began his dissent with a literal interpretation, devoting the bulk of his brief homily to debunking the notions of judicial otherness and rationality.[25] His argument is substantively clear, but its amplified form renders more vital this apostate's retreat from the true faith. He cites precedent, but these cases upheld laws about whose constitutionality judges disagree because of their various "convictions or prejudices."[26] Thus, the high priests are no more elevated than the congregational masses, or the Constitution itself is not perfectly reasonable, or both propositions are true.

The primacy and scope of literal amplification suggests that the Court saw redemption simply in attending to the facts. But the orthodox believers, heretics, and apostate disagreed whether the facts relating to baking bread could be appreciated only in the light of legal precedent and police power. The heretics did not share the orthodox

20. *Id.*
21. *Id.*
22. *Id.* at 65-71 (Harlan, J., dissenting).
23. *Id.* at 69.
24. *Id.* at 70-71.
25. *Id.* at 74-76 (Holmes, J., dissenting).
26. *Id.* at 75.

appreciation of the facts, yet these brethren did not dispute the jurisprudential means of appreciation. The apostate rejected the very means of appreciating these facts because he could not rule out judicial prejudice toward an "economic theory."[27]

Litigation is about winning and losing. In *Lochner*, the orthodox view prevailed over the degraded faith of lesser acolytes in New York. However, both the orthodox believers and the heretics won a larger victory. Their victory, gained largely from literal interpretation, sustained the worship of an unbiased judiciary and a perfectly reasonable Constitution. On the losing side, like the ancient prophets who assailed the popular conscience of Israel, the voice of Justice Holmes was a cry in the wilderness.

C. Allegorical Sense

Justice Peckham amplified his orthodoxy allegorically by denigrating legislative attempts to interfere with "the trade of a baker" on the basis of protecting public health:

> But are we all, on that account, at the mercy of legislative majorities? A printer, a tinsmith, a locksmith, a carpenter, a cabinet-maker, 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.[28]

Peckham must have known that his argument was rhetorical rather than logical. Note, for example, his use of rhetorical question, invective, anaphora, and several subspecies of figures as well as light/dark imagery. But preachers are ordained to exhort congregations as well as instruct them about the true faith. They are permitted to allegorize about "extreme cases" when the faithful are being lured by "invalid" appeals.[29]

Justice Harlan, dissenting from the orthodox conclusion but not from Justice Peckham's method of analysis, allegorized about the constitutionality of a statute prohibiting bakers from working more than eighteen hours a day for reasons of public health, rather than the ten-hour limit at issue in the case. "No one," he surmised, "could dispute the power of the State to enact such a statute."[30] Again in a sheerly rhetorical mode (he cited no precedent or legal argument, but took judicial notice of "serious consideration among civilized peoples"),[31]

27. *Id.* at 74.
28. *Id.* at 59.
29. *Id.* at 61.
30. *Id.* at 71 (Harlan, J., dissenting).
31. *Id.* at 72.

Justice Harlan, the heretic, denied that his doctrine was "extreme or exceptional."[32]

Similar to Justice Harlan's technique, Justice Holmes amplified his apostasy allegorically by speculating on the range of "opinions," or prejudices, that might be found "natural and familiar or novel and even shocking" by his brethren.[33] Hypothetically, he concluded, the "accident of our finding certain opinions" unpalatable should have nothing to do with constitutional scrutiny of statutes that happen to embody these opinions.[34]

The homiletic or rhetorical tenor of allegorical interpretation may escape the notice of casual listeners and readers who are not conversant with terms of art such as "judicial notice" and who do not expect Supreme Court justices to engage in factual speculation. But the type of allegory found in *Lochner* is commonplace. Constitutional acolytes commonly use it to emphasize the absurd results of failing to accept their interpretation of reality. For example, in *Planned Parenthood v. Casey*,[35] Justice O'Connor wrote of the criticism, ostracism, or violence that may befall those judges who are closely identified with watershed decisions.[36] Moreover, allegorical interpretation in a judicial opinion prepares the legal congregation for tropology by arousing feelings of indignation.

C. Tropological Interpretation

A homiletic tropology is an exhortation to morality. In *Lochner*, only the opinion of Justice Holmes fits this affirmative mold. The other opinions contain warnings to avoid immorality.

Justice Peckham insisted that the New York legislature enacted "an illegal interference with the rights of individuals, both employers and employ[ee]s, to make contracts regarding labor."[37] The act belonged to that class of laws that are "meddlesome interferences with the rights of the individual."[38] The New York law ran "counter to that liberty of person and of free contract provided for in the Federal Constitution."[39] Because Peckham read the Constitution as the perfection of reason, he felt that the impious and blasphemous New York legisla-

32. *Id.*
33. *Id.* at 76 (Holmes, J., dissenting).
34. *Id.*
35. 505 U.S. 833 (1992).
36. *Id.* at 867.
37. *Lochner*, 198 U.S. at 61.
38. *Id.*
39. *Id.* at 62.

ture was diverting employers and employees from the right path. Thus it was necessary to strike down the statute in order to abjure irrational constraints on personal liberty.

The heretics most clearly defined their heresy on this tropological level. Justice Harlan insisted that the Constitution left "room for debate and for an honest difference of opinion" on the issue at hand:

> What is the true ground for the State to take between legitimate protection, by legislation, of the public health and liberty of contract is not a question easily solved, nor one in respect of which there is or can be absolute certainty.[40]

According to Justice Harlan, the legislature of New York was in the best position, a constitutionally permissible position, to determine whether the statutory limits protected a baker's "physical and mental capacity to serve the State."[41] Moreover, the brethren should not "presume that the State of New York has acted in bad faith."[42] Rather, it was the brethren's duty "to sustain the statute as not being in conflict with the Federal Constitution, for the reason—and such is an all-sufficient reason—it is not shown to be plainly and palpably inconsistent with that instrument."[43]

The path to perfect jurisprudence is not the straight and narrow way identified by Justice Peckham. From the heretical perspective, the Constitution embodies perfect reason but not all that is perfectly reasonable. It does not exhaustively and exclusively provide for liberty of person and of free contract as claimed by the orthodox believers. It merely aids its acolytes in discovering what is reasonable and thus provides a broad and winding path to jurisprudential perfection.

Preaching apostasy, Justice Holmes argued even more radically. He insisted that the Constitution was altogether useless in this instance:

> I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.[44]

In essence, Justice Holmes insisted tropologically that *Lochner* should be decided on the basis of opinion that has become authorita-

40. *Id.* at 73 (Harlan, J., dissenting).
41. *Id.* at 72.
42. *Id.*
43. *Id.* at 73.
44. *Id.* at 76 (Holmes, J., dissenting).

tive by tradition rather than on the basis of truth that is authoritative by revelation. His justification is appealing because he stressed rationality and fairness, qualities of eminently moral people. However, the humane source of these qualities was unpalatable to both the orthodox believers and the heretics who revered respectively the Constitution as a normative or instrumental document.

The hortatory tone of these passages in *Lochner* is unmistakable. As in Puritanism, the Justices preached a civil religion based on the worship of reason. Whether substantive and immutable, in the orthodox view, or instrumental and versatile as the heretics believed, the Constitution illuminated what is perfectly reasonable in every case. For the apostate Justice Holmes, rational answers were instead to be found within human experience and the opinions that naturally dominate that realm.

D. Anagogical Interpretation

Identifying the outcome of treading a moral path—or, in the case of most judicial discourse in *Lochner*, the outcome of losing one's way—was the predictable conclusion of each homily. Justice Peckham concluded with a comparatively lengthy indictment of what could happen if his brethren did not strike down the statute at issue. He predicted that "[t]he State . . . would assume the position of a supervisor, or *pater familias*, over every act of the individual" in a blatantly "unreasonable and entirely arbitrary" violation of the Fourteenth Amendment.[45] Justice Peckham also warned that "[t]his interference on the parts of the legislatures of the several States with the ordinary trades and occupations of the people seems to be on the increase," and cited analogous instances in Washington, Illinois, and New York.[46] He further pleaded for wide understanding of the true believers' labors, stating that it was "impossible for us to shut our eyes" to the unreasonable, that is, the constitutionally impermissible motives of state legislatures.[47] The "natural . . . effect" of related statutes, he exhorted, called for the type of protective effort being expended by the *Lochner* majority.[48] And then, in jurisprudential cant, he reversed and remanded the case.

Decrying the orthodox conclusion but not its jurisprudential method, the heretics explicitly diverged from legal logic ("I take leave

45. *Id.* at 62.
46. *Id.* at 63.
47. *Id.* at 64.
48. *Id.*

to say," wrote Justice Harlan[49]), and insisted that the statute "cannot be held to be in conflict with the Fourteenth Amendment, without enlarging the scope of the Amendment far beyond its original purpose" and without usurping the proper authority of state legislatures.[50] This aberration would "involve consequences of a far-reaching and mischievous character," crippling the care of their citizens by the states.[51] Indeed, the heretics reported with grave concern that the Court had previously held a Kansas statute of the same type to be constitutional.[52]

The outcome predicted by the apostate Justice Holmes was rhetorically as irritating as his tropology. He simply observed that reasonable people will hold different views of "inequality"[53] no matter which conclusion, orthodox or heretical, was pronounced by the court. In Justice Holmes' view, the Constitution provided no guidance, and the outcome of any dispute related to the Fourteenth Amendment would always remain in doubt unless the Supreme Court acolytes prejudicially adopted a particular economic theory.

Whether orthodox or heretical, the corresponding anagogical interpretations were more comforting and palatable in the dominant culture of the *Lochner* era than was Justice Holmes' apostasy. The same is true today. The belief system of the dominant culture affirms access to equality for all Americans because of a clear formula expressed in the Constitution. No jurisprudential homily would ring true in this culture unless the homilist preached a sure and certain code on the order of the Ten Commandments. For Justice Holmes and all apostates, the search for justice remains more unsettled than consulting a code or a commandment. Reason may also flourish in the opinions that rise and fall as time and place change.

II. Conclusion

The *Lochner* arguments may be analyzed in uncommon ways because Supreme Court Justices wield extraordinary power and exercise this power through various rhetorical means. One of these methods is homiletic amplification. Wrapping their arguments in a homily implicates the high-priestly role of the Justices and leads readers from fact, through imagination and conscience, to idealism. Homiletic amplifi-

49. *Id.* at 73 (Harlan, J., dissenting).
50. *Id.*
51. *Id.*
52. *Id.* at 74.
53. *Id.* at 76.

cation induces belief in the justice of an opinion as well as its legal validity.

In a perfect legal culture, according to Justices Peckham, Harlan, and Holmes, the court would need only literal amplification. Judicial recitation of facts would be sufficient to persuade readers of the justice in an opinion. However, because of human society's flawed capacity to appreciate judicial and therefore pristine reasoning, Justices also resort to allegorical and tropological amplification. These interpretations of facts probe the conscience of readers who might otherwise sin against justice, and fire the imagination, especially when the results of ignoring or resisting the decision would be absurd and ugly. Ultimately, the lowly beings served by high priests of the law need to appreciate the effects of their legal and illegal conduct, virtue, and vice. Anagogical amplification highlights these effects while affirming the interpretive authority of the Justices and the impeachable rationality of their dogma. In *Lochner*, the dogma was the Fourteenth Amendment.

Thus both the form and content of argument demand critical attention. When attending to the homiletic form in particular, critics of argument are faced with rhetorical tactics including embedded claims to authority and to legitimacy. Moreover, homiletic amplification features claims to piety in the performance of law that may be express or implied. The melange of claims and their variable degrees of expression challenge the most attentive of critics to account for argumentation that, in addition, invites the readers of the law to link legal and moral norms.