2012

Cluster Introduction: The Great Recession and the Politics of Economics: Lochner Redux

Nancy Ehrenreich

Follow this and additional works at: http://scholarship.law.berkeley.edu/blrlj

Recommended Citation

Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z384X0N

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley La Raza Law Journal by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
The more closely one looks at the free market rhetoric served up to justify the policies that led to the Great Recession, the more one gets a sense of déjà vu. As Professor Martha McCluskey details in the first piece of this cluster of articles, economic and legal analysts have refashioned the lax oversight and predatory lending that produced the current economic crisis as the unfortunate effects of an overregulation of the economy. According to this story, the radical upward redistribution effected by the current economic crisis was not a product of unprosecuted fraud and misdealing by bankers and investment companies, but was instead an “unintended consequence” of fruitless efforts to constrain self-interested economic behavior. As McCluskey points out, this modern “invisible hand” thinking is strikingly reminiscent of the laissez faire discourse of the Lochner era. Its resurgence (albeit in new clothes) makes the familiar aphorism about history repeating itself disturbingly relevant.

Perhaps it should not be surprising that the current era is witnessing a return to the anti-labor discourse and policies of the early 1900s, when the U.S. Supreme Court struck down over 200 economic regulations. Many of those regulations were protective labor laws, stricken on the grounds that (for instance) workers had a constitutional right to agree to work 80 hours or more per week for just a few dollars a day. As acute as wealth inequality was during the era of the robber barons, it is
even more extreme today. While the data about the early twentieth century are incomplete, it is not unreasonable to speculate that in 1905, the year *Lochner* was decided, the top 1% of Americans owned approximately 25% of the nation’s wealth.\(^7\) In 2001, nearly a hundred years later, the top 1% of Americans owned 38% of U.S. wealth.\(^8\) (The bottom 40% owned less than 1%.\(^9\))

Wealth differences diminished somewhat in the 1970s, with the share held by the top 1% dropping from 29% in 1972 to 19% in 1976.\(^10\) But the Republican presidential victory in 1980, and the neoliberal economic policies that it ushered in marked the beginnings of even greater wealth inequality.\(^11\) The 1% figure has been consistently above 33% since 1983.\(^12\)

Recent trends in wealth inequality have been particularly startling. The top 1% of wealth owners owned nearly 40% of net worth and nearly 50% of financial assets in the late 1980s and 1990s. During this same time period, however, the top 1% also enjoyed two-thirds of all increases in household financial wealth and the movement into the top segments of distribution was nearly non-existent. Moreover, while inequalities of wealth were consistently more extreme throughout Europe for many decades, by the early 1990s, the United States had surpassed all industrial societies with respect to the extent of inequality of family wealth.\(^13\)

Not only did the rich get richer during these decades, but the poor got poorer, with the bottom 80% group’s share of the nation’s wealth dropping from 18.7% in 1983 to 16.4% six years later.\(^14\) As one analyst noted, “Levels of wealth inequality are so extreme that most people register hardly any wealth at all, yet wealth is one of the most central indicators of financial well-being and security.”\(^15\)

As 10,000-square-foot “McMansions” dot the nation’s landscape and foreclosures of middle-class homes proliferate,\(^16\) it is perhaps useful to briefly review the anti-labor rulings and rhetoric of the *Lochner* era. Well-remembered, of course, is the reliance placed by Justice Peckham and his supporters upon a formalistic understanding of liberty. The liberty interest that the Court found to have been violated by the maximum hour statute at issue in *Lochner* was not only that of the employers the law was passed to regulate, but also that of the employees they exploited: “the right of the individual to labor for such time as he may choose.”\(^17\) To the *Lochner* Court, workers’ “rights” to accept extreme and exploitative working

---

7. While researchers lack the data to determine the exact figure for 1905, Williamson & Lindert, *id.* at 73, we know that in 1890 1% of the population owned nearly 26% of the nation’s wealth, and that “[i]n the half-century after 1870 . . . [t]he inequality persisted at very high levels.” *Id.* Thus it is not unreasonable to estimate that the figure in 1905 was at least twenty-five percent.


9. *Id.*


11. “Wealth inequality began to rise considerably after 1979, a trend that continued throughout the 1980s.” *Id.* at 68.

12. *Id.* at 69.

13. *Id.* at 63.

14. *Id.* at 69.

15. *Id.* at 76.


conditions trumped the legislature’s concern with protecting the workers from that exploitation. The Court’s formalistic definition of contractual freedom and its implicit embrace of *laissez faire* economic thinking are, of course, what prompted Justice Holmes in his dissent to write his famous rejoinder: “The Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics…. [A] Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*.”

But *laissez faire* was the theory of the day, and intervention in economic agreements was seen by many at the time as a futile effort that would inevitably be overturned by the “natural” operation of market forces.

In the early decades of the twentieth century, the American Legal Realists made a cottage industry of deconstructing the logic of Peckham and his compatriots. In some of the most trenchant and piercing law review articles to date, the Realists took classical legal thinkers to task for engaging in formalistic doctrinal analysis that obscured rather than elucidated the factual assumptions, policy judgments, and ethical choices that actually accounted for the holdings of cases. They condemned classical legal theorists for favoring negative definitions of liberty over positive and abstract logic over practical results, for using outdated legal concepts that were inapplicable to the industrial context, and for putting form over substance. Because doctrinal analysis was indeterminate, the Realists concluded, legal rules merely restated the results of cases; they did not determine them. Doctrinal analysis was the “after-the-fact” justification given for decisions based on other, usually unarticulated, considerations.

But the most important (though later rather neglected) strain of Realist analysis, sometimes called Critical Realism, went still further. It attacked the public/private dichotomy upon which classical legal thought was based—and which still functions in modern constitutional law. Critical Realism showed that the

18. Id. at 76.
22. Morris Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 587 (1933) (“Regulations, therefore, involving some restrictions on the freedom to contract, are as necessary to real liberty as traffic restrictions are necessary to assure real freedom in the general use of our highways.”).
24. For example, Roscoe Pound indicted classical thinkers for treating employers and employees in industrial workplaces like “farmers haggling over sale of a horse.” Id. at 477.
25. Id. at 462.
26. See, e.g., Pound, *supra* note 23, at 484 (any working conditions that seriously approximated slavery should be understood to be just as regulable as slavery itself); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. QTRLY 470, 471 (1923) (notions such as duress should include any “influence indistinguishable in its effects” from legally recognized coercion).
28. Id. at 1222.
distinction between public regulation and private ordering upon which that dichotomy is based was incoherent. Determining whether a choice was coerced or freely made was not a matter of logic, but of ethics, values and policy. Moreover, the private choices that cases like Lochner purported to protect (by prohibiting governmental interference in the free market or other areas of private freedom) were themselves affected by governmental power. The background rules that created the conditions in which particular choices were made could themselves be indicted as governmental intervention into the private. Ultimately, since the market itself was a creation of the state, the laissez faire norm was a false ideal—and one that obscured the pro-business slant in the Lochner line of cases.

Martha McCluskey's piece on the current economic crisis, "How the 'Unintended Consequences' Story Promotes Unjust Intent and Impact," vividly illustrates the continuing relevance of these insights. In a creative and insightful modern application of Critical Realist analysis, McCluskey shows how neoliberal economic discourse constructs the economy as an uncontrollable system that government simply cannot effectively regulate. Through a discourse of "unintended consequences," mainstream economists and legal analysts treat the Great Recession as the unfortunate result of good policies turned bad. The lesson to be learned from recent events, this discourse implies, is that regulation often produces harmful, unanticipated results. And, since trying to insert incentives or penalties into the financial markets will often just cause people to find new ways to pursue their self-interest, the better course (this discourse implies) is to refrain from interfering in this sector of the economy altogether. Does this sound familiar? As McCluskey puts it, "[T]he concept of 'unintended consequences' helps repackage and revive the naturalized view of inequality embedded in much of the jurisprudence of the Lochner era."

McCluskey deftly demonstrates, however, that the distinction between interference and noninterference in the market is still manipulable, and still has the effect of legitimating unequal and unfair policies. Thus, she argues, a double standard prevails in the discourse of those opposing governmental interference in the financial markets. Just as the Lochner Court failed to see the coercion in industrial labor contracts, so these analysts fail to acknowledge the "rampant fraud" in the mortgage practices that preceded the bursting of the housing bubble. Similarly, just as classical legal theorists condemned protective labor regulation, but not usury or

founded upon the public/private dichotomy).

30. Coercion by the government constituted illegitimate interference in private freedoms; coercion by a third party legitimated governmental intervention into the private in order protect other individuals from a loss of freedom.
31. See generally Hale, supra note 26.
32. M. Cohen, supra note 22, at 587. (“To put no restrictions on freedom to contract would logically lead, not to a maximum of individual liberty, but to contracts of slavery, into which, experience shows, men will ‘voluntarily’ enter under economic pressure – a pressure that is largely conditioned by the laws of property.”).
33. McCluskey, supra note 1.
34. Id. at 13.
35. Id. at 14.
36. Id. at 8.
neoliberal writers today oppose only some forms of market interference but not others. Embracing "non-interference" in a government-created economic status quo that favors the rich, they simultaneously reject changes in market regulations (such as foreclosure relief⁴⁹) that favor consumers. Contracts that were fraudulent to begin with should be enforced because modifying them in recognition of that fraud (and the systemic nature of the resulting mortgage failures) would merely constitute an unhelpful interference in the market. According to McCluskey, the substantive effect of this ideology is to "make . . . unethical and illegal behavior seem to be the normal and necessary result of vague, but scientific 'incentive effects'" on market behavior.⁴⁰ Once again, pro-corporate legal rules are being justified as necessitated by "natural" laws of a pre-existing market. *Lochner redux.*

Just as McCluskey emphasizes how prevailing neoliberal discourse "naturalizes" fraudulently produced conditions of economic inequality, making them seem innate and unavoidable, "Is the Color of the Economic Crisis the Color of Presidential Fear?"⁴¹ by Justin Townley underscores the role of a discourse of fear in justifying and obscuring the true nature of governmental policies in foreign affairs and civil rights areas. Noting the long historical tradition of what he calls "fear-mongering," Townley briefly reviews U.S. President Franklin Delano Roosevelt's use of fear of "aliens" to justify the Japanese and Japanese-American internment camps during World War II; the fear rhetoric used by U.S. President Lyndon B. Johnson to justify his escalation of the Vietnam War; and U.S. President George W. Bush's invocation of the nation's post-9/11 fears to elicit support for his invasion of Iraq. Such fear discourse, Townley notes, is sometimes successfully deployed not only to elicit popular support for particular policies, but also to expand executive powers.⁴²

In discussing the presidency of Barack Obama, Townley suggests that fear can also be used in an appropriate, positive way—as a mechanism for motivating the populace to support beneficial policies.⁴³ Obama emphasized the seriousness of the economic crisis and current health care inadequacies, for example, in an effort to marshal support for his reform efforts in those areas. But this effort backfired, Townley contends, when the Republican Party politicians played on those same fears to turn voters against Obama's policies, resulting in Democratic defeats at the polls during the midterm elections of 2010.⁴⁴

Both of these articles, in different ways, draw attention to the importance of free and open access to information in a democratic society. The discourses that McCluskey and Townley describe only have traction in a society where alternative views and information are not readily accessible. While neither of these articles

---

39. Foreclosure relief is a good example. *Compare* Home Building & Loan Assn. v. Blaisdell, 290 U.S. 398 (1934) (upholding as constitutional Minnesota's extension of time available to redeem mortgages (and thereby avoid foreclosure) during the Great Depression).
42. *Id.* at 38.
43. *Id.* at 49.
44. *Id.* at 49-51.
focuses on it, both nevertheless highlight the vital importance of independent, unbiased media in a democracy. Without independent, non-corporate, and easily-accessible information sources, biased and harmful domestic and foreign policies can be "sold" to the public as smart, necessary responses to "known" facts. Perhaps a future LatCrit Annual Conference can consider media reform, and the relationship among independent media, information dissemination, and democracy.