using traditional fuels and thus increased the cost effectiveness—and thus the demand for—the novel alternatives in which Enron was invested.[102]

IV. IMPLICATIONS OF INTEREST GROUP THEORY FOR THE STUDY OF LAW

Interest group theory raises profound questions for the study of law. These include foundational questions that concern many of the Supreme Court's most famous and familiar constitutional decisions. In this section, we reexamine a few such cases from the perspective of public choice. We invite you to consider the extent to which, if any, insights from interest group theory affect the manner in which you now view the underlying issues that these cases present. In addition, consider more generally whether the analysis informs your understanding of the proper role that judges play, or should play, within our constitutional system of governance when construing constitutional challenges of the sort presented in the cases described below. In the final section, we will then introduce more broadly two important normative critiques of public choice that will further encourage reconsideration of these and other issues presented throughout this course.

A. LOCHNER v. NEW YORK

In *Lochner v. New York*,[103] the Supreme Court, with Justice Peckham writing, confronted a constitutional challenge under the Fourteenth Amendment Due Process Clause to a New York statute known as the Labor Law of New York, which prohibited bakers from working more than sixty hours per week, and more than ten hours per day. The case arose at the intersection of the relatively broad understanding concerning the scope of state police powers and a substantive reading of the Due Process Clause to protect certain economic liberties, including the right to contract. The specific question the case raised was whether in the exercise of the state's police powers, the state could effectively prohibit private contracting in this employment setting. Thus, Justice Peckham framed the inquiry as follows:

> If the contract be one which the State, in the legitimate exercise of its police power, has the right to prohibit, it is not prevented from prohibiting it by the Fourteenth Amendment. Contracts in violation of a statute, either of the Federal or state government, or a contract to let one's property for immoral purposes, or to do any other unlawful act, could obtain no protection from the Federal Constitution, as coming under the liberty of person or of free contract. Therefore, when the State, by its legislature, in the assumed exercise

102. *See* Bruce Yandle & Stuart Buck, *Bootleggers, Baptists, and the Global Warming Battle*, 26 HARV. ENVTL. L. REV. 177 (2002) (applying Yandle's theory of Baptists and bootleggers to explain the political support for the Kyoto Protocol).

103. 198 U.S. 45 (1905).

> of its police powers, has passed an act which seriously limits the right to labor or the right of contract in regard to their means of livelihood between persons who are *sui juris* (both employer and employé), it 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.[104]

While the state defended the regulation, claiming that regulating the hours of bakers was necessary to promote the general health and safety, as well as that of the bakers themselves, Justice Peckham found the argument attenuated:

> The mere assertion that the subject relates though but in a remote degree to the public health, does not necessarily render the enactment valid. . . .
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> . . . .
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> . . . There must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty. 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 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. No trade, no occupation, no mode of earning one's living, could escape this all-pervading power, and the acts of the legislature in limiting the hours of labor in all employments would be valid, although such limitation might seriously cripple the ability of the laborer to support himself and his family.[105]

Justice Peckham then specifically addressed whether bakers were in need of unique legislative protection, as urged by the state:

> [We] think that such a law as this, although passed in the assumed exercise of the police power, and as relating to the public health, or the health of the employés named, is not within that power, and is invalid. The act is not, within any fair meaning of the term, a health law, but is an illegal interference with the rights of individuals, both employers and employés, to make contracts regarding labor upon such terms as they may think best, or which they may agree upon with the other parties to such contracts. Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and

104. *Id.* at 53–54.

105. *Id.* at 57, 59.

> upon the subject of the health of the individual whose rights are interfered with, unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health or to the health of the employés, if the hours of labor are not curtailed.
>
> . . . .
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> . . . Adding to [a legitimate series of bakery inspection requirements] a prohibition to enter into any contract of labor in a bakery for more than a certain number of hours a week, is, in our judgment, so wholly beside the matter of a proper, reasonable and fair provision, as to run counter to that liberty of person and of free contract provided for in the Federal Constitution.[106]

Justice Peckham concluded that ''Under such circumstances the freedom of master and employé to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution.''[107]

In his dissenting opinion, Justice Harlan challenged both the premises of Peckham's analysis and the Court's application on its own terms. Justice Harlan began by discussing the Supreme Court's role in assessing the proper scope of the state's exercise of police powers:

> It is plain that this statute was enacted in order to protect the physical well-being of those who work in bakery and confectionery establishments. It may be that the statute had its origin, in part, in the belief that employers and employees in such establishments were not upon an equal footing, and that the necessities of the latter often compelled them to submit to such exactions as unduly taxed their strength. Be this as it may, the statute must be taken as expressing the belief of the people of New York that, as a general rule, and in the case of the average man, labor in excess of sixty hours during a week in such establishments may endanger the health of those who thus labor. Whether or not this be wise legislation it is not the province of the court to inquire. Under our systems of government the courts are not concerned with the wisdom or policy of legislation.[108]
>
> . . . What the precise facts are it may be difficult to say. It is enough for the determination of this case, and it is enough for this court to know, that the question is one about which there is room for debate and for an honest difference of opinion. There are many reasons of a weighty, substantial character, based upon the experience of mankind, in support of the theory that, all things considered, more than ten hours' steady work each day, from week to week, in a bakery or confectionery establishment, may endanger the health, and shorten the lives of the workmen, thereby diminishing their physical and

106. *Id.* at 61–62.

107. *Id.* at 64.

108. *Id.* at 69 (Harlan, J., dissenting).

> mental capacity to serve the State, and to provide for those dependent upon them.
>
> If such reasons exist that ought to be the end of this case, for the State is not amenable to the judiciary, in respect of its legislative enactments, unless such enactments are plainly, palpably, beyond all question, inconsistent with the Constitution of the United States. We are not to presume that the State of New York has acted in bad faith. Nor can we assume that its legislature acted without due deliberation, or that it did not determine this question upon the fullest attainable information, and for the common good.[109]

In arguing that the law should be upheld as a proper exercise of the state's police powers, Justice Harlan relied upon several studies discussing the safety conditions for bakers:

> Professor Hirt in his treatise on the ''Diseases of the Workers'' has said: ''The labor of the bakers is among the hardest and most laborious imaginable, because it has to be performed under conditions injurious to the health of those engaged in it. It is hard, very hard work, not only because it requires a great deal of physical exertion in an overheated workshop and during unreasonably long hours, but more so because of the erratic demands of the public, compelling the baker to perform the greater part of his work at night, thus depriving him of an opportunity to enjoy the necessary rest and sleep, a fact which is highly injurious to his health.'' Another writer says: ''The constant inhaling of flour dust causes inflammation of the lungs and of the bronchial tubes. The eyes also suffer through this dust, which is responsible for the many cases of running eyes among the bakers. The long hours of toil to which all bakers are subjected produce rheumatism, cramps and swollen legs. The intense heat in the workshops induces the workers to resort to cooling drinks, which together with their habit of exposing the greater part of their bodies to the change in the atmosphere, is another source of a number of diseases of various organs.'' . . . The average age of a baker is below that of other workmen, they seldom live over their fiftieth year, most of them dying between the ages of forty and fifty.[110]

Finally, consider the following passage from Justice Oliver Wendell Holmes's dissenting opinion:

> This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. . . . The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. . . . [A] constitution is not intended to em-

109. *Id.* at 72–73.

110. *Id.* at 70–71.

> body a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*.[111]

Does public choice provide a means of assessing the various opinions in *Lochner*? One possible answer is that the case turns strictly on a matter of the substantive interpretation of the Fourteenth Amendment Due Process Clause. While that view might help to explain Chief Justice Holmes's dissent, it does not explain the extent to which Justices Peckham, for the majority, and Harlan, in dissent, relied heavily on their own understandings of both the factual nature of the baking profession and their understandings of the wisdom, or lack thereof, of the legislative processes that resulted in the challenged law.

Do the analyses that Justices Peckham and Harlan offer turn on assumptions concerning the effectiveness of the political process in New York in reflecting the popular will or wisdom of legislative policy? Does the majority's analysis rest upon a notion of political market failure? If so, what is that intuition based upon? Does Harlan's discussion of the studies concerning the safety of the baking industry overcome such claims? Why or why not? In another passage, the majority asserts: ''It is impossible for us to shut our eyes 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.''[112] What does this mean? What does Justice Harlan mean when he asserts, ''It is plain that this statute was enacted in order to protect the physical well-being of those who work in bakery and confectionery establishments,'' and that ''We are not to presume that the State of New York has acted in bad faith.''[113] Does Harlan believe that legislators are invariably sincere in their motives? Should it matter if public choice theory, or available empirical evidence, demonstrates this assumption to be false, or at least suspect?

Professor Bernard Siegan provides an interest-group analysis of the statute under review in *Lochner*.[114] Siegan questions the dissent's assumption that the motivation for the law, as was claimed, was to protect the physical and economic well-being of the bakers. For example, he observes that the bakers' pay might be reduced along with the reduction in hours, making it more difficult for the bakers to support themselves and their families. In addition, he suggests that the law might not be the product of a benign motivation to protect bakers from the potential health risks associated with long hours, but rather to protect bakers working at larger industrial bakeries that already complied with the various safety and hours regulations reflected in the New York law, at the expense of smaller, often immigrant-owned bakeries, that did not. Siegan explains:

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111. *Id.* at 75 (Holmes, J., dissenting).

112. *Id.* at 64 (majority opinion).

113. *Id.* at 69, 73 (Harlan, J., dissenting).

114. BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 113–20 (1980).

> In New York, as elsewhere, the baking industry was split between sizable bakeries whose plants had been specifically built or fully converted for such purposes, and small bakeries, operating out of limited, often subterranean quarters not originally intended for such use. . . . The New York trend was also toward bigger operations. . . .
>
> Contemporary articles in the *New York Times* reported that sanitary, health, and working conditions in the small bakeries were far below those in the large ones. . . .
>
> Working hours were [also] much longer in the small bakeries than in the large ones, and the maximum hours provision hit employers and employees of the former much more. . . . [W]orkers in some small bakeries . . . remained on the business premises (if not actually on the job) from twelve to as many as twenty-two hours a working day. The workday in the larger firms . . . met or was close to the statutory maximum of ten hours.
>
> . . . [The] restrictions on working hours meant higher labor costs for the small bakers, who, due to competition from the corporate bakers, were limited in the amount they could pass on in the form of higher prices. A number of the small bakers would have to terminate their businesses.
>
> The effect on the larger bakeries would be far less adverse. They were much closer to the hour standard, and unlike the small bakeries, they might sustain a modest increase in costs if they had to hire more workers. However, extra production costs would be offset by the lessened competition from the small bakeries, which would lead to higher prices.[115]

Also consider Professor David Bernstein's complementary analysis,[116] which posits that larger corporate bakeries also had unionized work forces, whereas smaller, immigrant-owned bakeries did not:

> The larger New York bakeries tended to be unionized, and were staffed by bakers of Anglo–Irish and (primarily) German descent; the latter group came to dominate the Bakery and Confectionery Workers' International Union. . . . The smaller bakeries employed a hodgepodge of ethnic groups, primarily French, Germans, Italians, and Jews, usually segregated by bakery and generally working for employers of the same ethnic group. Employees of smaller bakeries were generally not unionized, especially among the non-Germans.
>
> By the mid–1890s, bakers in large bakeries rarely worked more than ten hours per day, sixty hours per week. However, these bakers were concerned that their improved situation was endangered by competition from small, old-fashioned bakeries, especially those that employed Italian, French, and Jewish immigrants. These old-fash-

115. *Id.* at 116–18.

116. *See* David E. Bernstein, Lochner v. New York: *A Centennial Retrospective*, 83 WASH. U. L.Q. 1469 (2005).

> ioned bakeries were often located in the basement of tenement buildings to take advantage of cheap rents and floors sturdy enough to withstand the weight of heavy baking ovens. Unlike the more modern ''factory'' bakeries, which operated in shifts, the basement bakeries often demanded that workers be on call twenty-four hours a day, with the bakers sleeping in or near the bakery during down times. Workers in such bakeries often worked far more than ten hours per day.
>
> Union bakers believed that competition from basement bakery workers drove down their wages.[117]

Professor Bernstein sees the eventual law as the outcome of a coalition that included reformers concerned about public health and the bakers' union, which wanted to put small basement bakeries that generally failed to meet the new sanitary standards, out of business. Bernstein claims that the bakers' union, which was well-organized at the time, as opposed to the baking industry, which was less well organized, provided the impetus behind the law. Eventually, the bakery owners became better organized and decided to fund Mr. Lochner's challenge to the maximum hours provisions of the Labor Law of New York in part because they believed that those provisions were only being enforced against nonunion bakeries. While Bernstein claims that large corporate bakeries were supporters of the provisions of the law that gave them a comparative advantage in the market over smaller rivals, he also observes that a coalition of organized labor and public health reformers procured the challenged labor law.[118]

How, if at all, do the analyses by Professors Siegan and Bernstein affect your thinking about the relative merits of the various *Lochner* opinions? Assuming that these commentators are correct that the New York law was largely motivated by the desire of larger, unionized bakeries to limit competition by smaller bakeries, does this provide a normative justification for striking the law down? How, if at all, might this analysis change if, as Bernstein contends, the challenged law arose from a Baptist and Bootleggers coalition that was at least partly motivated by concerns for public health and safety? Does the federal judiciary have the institutional competence to make appropriate assessments concerning the political forces that support or oppose a given piece of legislation? Should the answer to the prior question affect the how the Supreme Court analyzes cases like *Lochner*? Why or why not? Does the analysis suggest that conventional presentations that pit the interests of ''management'' against the interests of ''labor'' fail to recognize that often the relevant competition giving rise to protectionist laws is labor against labor or management against management? If so, should this affect the judicial approach to cases like *Lochner*?

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117. *Id.* at 1476–77 (footnotes omitted).

118. *See* DAVID E. BERNSTEIN, REHABILITATING LOCHNER (forthcoming).