



School of Law

**INTRODUCTION, *REHABILITATING
LOCHNER: DEFENDING INDIVIDUAL RIGHTS
AGAINST PROGRESSIVE REFORM***

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INTRODUCTION

If you want to raise eyebrows at a gathering of judges or legal scholars, try praising the Supreme Court's 1905 decision in *Lochner v. New York*. *Lochner* invalidated a state maximum hours law for bakery workers. The Court held that the law violated the right to "liberty of contract," a right implicit in the Fourteenth Amendment's ban on states depriving people of liberty without "due process of law."

Lochner is likely the most disreputable case in modern constitutional discourse. It competes for that dubious distinction with *Scott v. Sandford*, the "*Dred Scott Case*."¹ Chief Justice Roger Taney's opinion in *Dred Scott* concluded that persons of African descent could not be American citizens because the Constitution's framers believed that Blacks "had no rights which the white man was bound to respect." Taney added that Congress may not ban slavery in federal territories, helping to precipitate the Civil War.

That's rather ignominious company for *Lochner*, which had the much more modest effect of prohibiting New York State from imprisoning bakery owners whose employees worked more than ten hours in a day or sixty hours in a week. *Lochner*, moreover, was an outlier opinion from a Supreme Court that generally deferred to legislative innovation. The Court quickly limited *Lochner* to its facts in 1908 when it upheld a maximum hours law for women, and then ignored *Lochner* in 1917 when it approved an hours law that covered all industrial workers. For three decades, the liberty of contract doctrine impeded the growth of the regulatory state to a limited degree, but federal and state government power and authority nevertheless grew apace.²

Lochner has since become shorthand for all manner of constitutional evils, and has even had an entire discredited era of Supreme Court jurisprudence named after it. Over one

hundred years after their predecessors issued the decision, Supreme Court Justices of all ideological stripes use *Lochner* as an epithet to hurl at their colleagues when they disapprove of a decision declaring a law unconstitutional. Even Barack Obama has found occasion to publicly denounce *Lochner*, pairing it with *Dred Scott* as examples of egregious Supreme Court error.³ And *Lochner's* infamy has spread internationally, to the point where it plays an important role in debate over the Canadian constitution.⁴

The origin of today's widespread enmity to *Lochner* lies in Progressive Era legal reformers' hostility to liberty of contract. Progressive* critics contended that the Court's occasional invalidation of reformist legislation was a product of unrestrained judicial activism, politicized judicial decisionmaking, and the Supreme Court's favoring the rich over the poor, corporations over workers, and abstract legal concepts over the practical necessities of a developing industrial economy.

The Supreme Court withdrew constitutional protection for liberty of contract in the 1930s. Since then, a hostile perspective inherited from the Progressives has virtually monopolized scholarly discussion of the Court's liberty of contract decisions. From 1940 until the publication of Bernard Siegan's *Economic Liberties and the Constitution* forty years later, only one law review article expressed even mild support for constitutional protection of liberty of contract.⁵

* This book refers to the post-*Lochner*, pre-New Deal opponents of liberty of contract, and other pre-New Deal proponents of government activism, as "Progressives," and their ideology as "Progressivism," with capital "Ps." To the extent that "Progressive" is a less-than-precise descriptive term, it hopefully makes up for that lack of precision in consistency and brevity. Confusion sets in, of course, because many on the modern liberal-left choose to call themselves progressives, and refer to their preferred policies as progressive. To avoid this confusion the book refers to those on the post-New Deal liberal-left as "liberals," and their ideology as modern "liberalism." "Liberalism" is also used to describe the values of tolerance, racial and gender egalitarianism, and individual rights protected by law, in whatever era. Opposition to racial segregation, for example, constitutes racial "liberalism," regardless of the source of that opposition.

Lochner has come to exemplify the liberty of contract cases, though the opinion did not always attract such disproportionate attention. Starting in the late 1930s, *Lochner* languished in obscurity, cited almost exclusively as just one in a line of discredited cases invalidating legislation for infringing on freedom of contract. *Lochner's* notoriety increased dramatically when both the majority and dissent in *Griswold v. Connecticut*—a high-profile, controversial case decided in 1965—used it as a foil. *Lochner* has since loomed ever larger in American constitutional debate. By the late 1980s, *Lochner* was perhaps the leading case in the constitutional “anti-canon,” the group of wrongly decided cases that help frame the proper principles of constitutional interpretation.

Just as *Lochnerphobia* was hitting its stride, historians began to discredit some elements of the dominant narrative about liberty of contract inherited from the Progressives. In particular, scholars showed that the Supreme Court Justices who adopted the liberty of contract doctrine did not have the cartoonish reactionary motives attributed to them by Progressive and New Dealer critics.⁶ Rather, the Justices, faced with constitutional challenges to novel assertions of government power, sincerely tried to protect liberty as they understood it, consistent with longstanding constitutional doctrines that reflected the notion that governmental authority had inherent limits.⁷

This book takes the revisionist project significantly further. It provides the first comprehensive modern analysis of *Lochner* and its progeny, free from the baggage of the tendentious accounts of Progressives, New Dealers, and their successors on the left and, surprisingly, the right.⁸ *Lochner* must be fundamentally reassessed in part because much of our *Lochner*-related mythology is just that, with little if any basis in the actual history of the liberty of contract doctrine. *Lochner* is also due for reconsideration because modern

sensibilities diverge significantly from those of the Progressives who created the orthodox understanding of the liberty of contract era.

This book shows that the liberty of contract doctrine was grounded in precedent and the venerable natural rights tradition.⁹ The Supreme Court did not use the doctrine to enforce “laissez-faire Social Darwinism,” as the traditional narrative asserts. Rather, the Supreme Court upheld the vast majority of the laws challenged as infringements on liberty of contract. The Court’s decisions that did vindicate the right to liberty of contract often had ambiguous, or even clearly “pro-poor,” distributive consequences. The bakers’ maximum hours law invalidated in *Lochner*, like much of the other legislation the Court condemned as violations of liberty of contract, favored entrenched special interests at the expense of competitors with less political power.¹⁰

This book also considers the available contemporary alternative to liberty of contract, the extreme pro-government ideology of liberty of contract’s opponents among the Progressive legal elite, including such luminaries as Louis Brandeis, Roscoe Pound, Felix Frankfurter, and Learned Hand.¹¹ Progressive jurists generally opposed not just *Lochner’s* defense of economic liberty, but any robust constitutional protection of individual or minority rights.

In sharp contrast to modern constitutional jurisprudence, neither Progressives nor their opponents typically recognized a fundamental distinction between judicial protection for civil rights and civil liberties, and judicial protection of economic liberties. Rather, both sides thought that Fourteenth Amendment due process cases raised three primary issues: whether the party challenging government regulatory authority had identified a legitimate right deserving of judicial protection; the extent to which the courts should or should not presume that the government was acting within its inherent “police power”; and, finally, taking the decided-upon presumption into account, whether any infringement on a

recognized right protected by the Due Process Clause was within the scope of the states' police power, or whether instead it was an arbitrary, and therefore, unconstitutional, infringement on individual rights.

Leading Progressive lawyers believed in strong interventionist government run by experts and responsive to developing social trends, and were hostile to countervailing claims of rights-based limits on government power. Progressive legal elites also were extremely suspicious of the judiciary's competence and integrity in policing the scope of the government's authority to regulate. Progressive legal commentators therefore urged the courts to interpret the police power as sufficiently flexible to permit state-imposed racial segregation, sex-specific labor laws, restrictions on private schooling, and coercive eugenics.¹²

Many Progressives, products of their prejudiced times, actively sympathized with the racism, the paternalistic and often dismissive or condescending attitudes toward women, and the hostility to immigrants and Catholics that motivated these laws. But even unusually liberal Progressive jurists—and elite attorneys tended to be more liberal-minded than other Progressive intellectuals—generally opposed judicial intervention to support any given rights claim brought under the Due Process Clause. Progressive lawyers argued that the benefits of such intervention would likely be substantially outweighed by the damage additional constitutional limits on the government's police power might ultimately cause to their core agenda of supporting economic—especially labor—regulation.

Meanwhile, advocates of liberty of contract believed that the Fourteenth Amendment set inherent limits on the government's authority to regulate the lives of its constituents. While this belief initially was adopted by the courts in the context of economic regulation, as early as 1897 the Supreme Court announced that the Fourteenth Amendment's Due Process

Clause protected an individuals' right to be "free in the enjoyment of all his faculties [and] to be free to use them in all lawful ways."¹³ Through the early 1920s, however, with the exception of a few outlier decisions like *Lochner*, the Supreme Court's majority was generally cautious about limiting the scope of the states' police power via the Due Process Clause.

But as with their Progressive critics, "conservative" Supreme Court Justices' views on the scope of the government's power to infringe on constitutional protections for civil rights and civil liberties were generally consistent with their views on the government's power to interfere with liberty of contract.¹⁴ Once the Court in the 1920s became more aggressive about reviewing government regulations in the economic sphere, the Justices naturally began to acknowledge the broader libertarian implications of *Lochner* and other liberty of contract cases and to enforce limits on government authority more generally.

Indeed, the Court's liberty of contract advocates were sufficiently committed to the notion of inherent limits on government power and a limited police power that they voted for liberal results across a wide range of individual and civil rights cases. The *Lochner* line of cases pioneered the protection of the right of women to compete with men for employment free from sex-based regulations; the right of African Americans to exercise liberty and property rights free from Jim Crow legislation; and civil liberties against the states ranging from freedom of expression to the right to choose a private school education for one's children.¹⁵

Even Justices who lacked sympathy for the individuals and groups that were challenging government actions often voted in their favor out of libertarian commitment; the unabashed racist James McReynolds, for example, voted to invalidate a residential segregation law, and wrote an opinion protecting the right of Japanese parents in Hawaii to send their children to private Japanese-language schools. Some of the other Justices had equalitarian reasons for

their votes. George Sutherland's strongly expressed his longstanding support for women's legal equality in a 1923 opinion he wrote invalidating a women-only minimum wage law as a violation of liberty of contract. And sometimes, a commitment to limited government seems to have led some jurists to a newfound empathy for groups suffering from what they saw as government overreaching.

With the triumph of the New Deal, the Progressives won the battle over whether the Supreme Court would engage in meaningful review of economic regulation. In that sense, modern Fourteenth Amendment jurisprudence is a product of Progressive ideology. But the New Deal Court and its successors did not fully adopt the Progressives' pro-government, anti-judiciary views. The Justices instead chose to divide the Old Court's due process opinions into two categories; the Court disavowed precedents that protected economic rights, but elaborated upon, reinterpreted, and most importantly preserved and expanded its civil rights and civil liberties precedents.

Some of the old due process cases were reincarnated during and just after the New Deal as "incorporation" cases applying the Bill of Rights against the states, or as Equal Protection cases. In later years, the Court revived some of the old cases as pure due process cases. The Court emphasized these cases' protection of "fundamental" unenumerated rights such as privacy, and ignored their close ties to the liberty of contract cases. Many post-New Deal liberal developments in Fourteenth Amendment jurisprudence can therefore trace their origins to *Lochner* and its progeny.

More generally, modern Fourteenth Amendment jurisprudence owes at least as much to the liberty of contract proponents' libertarian values as to its pro-regulation Progressive opponents.¹⁶ Modern liberal jurists overwhelmingly reject the Progressives' hostility to using the Fourteenth Amendment to protect individual liberty and minority rights from

government overreaching. Meanwhile, conservative jurists often favorably cite Progressive heroes like Frankfurter and Justice Oliver Wendell Holmes in support of “judicial restraint,” but judicial conservatives like Justices Scalia and Thomas have refused to adopt anything approaching the sort of near-absolute judicial deference to the legislature advocated by elite Progressive lawyers.

While this book is an effort to correct decades of erroneous accounts of the so-called “*Lochner* era,” even the soundest history cannot provide a theory of constitutional interpretation, nor can it dictate one’s understanding of the proper role of the judiciary in the American constitutional system. History alone cannot tell us, therefore, whether *Lochner* was correctly decided; whether liberty of contract jurisprudence more generally was based on a sound theory of judicial review and constitutional interpretation; and whether *Lochner* or other cases protecting economic rights should be revived.

History is also inherently agnostic on the soundness of such modern outgrowths of *Lochner* and other liberty of contract cases as the incorporation of most of the Bill of Rights against the states via the Due Process Clause, the protection of unenumerated individual rights in cases like *Griswold* and *Lawrence v. Texas*, or other manifestations of what is known today as substantive due process.¹⁷ I do not, therefore, reach any conclusions on these issues, but leave it to interested readers to apply the history presented here to their own understandings of proper constitutional interpretation and construction.

What history can tell us is that the standard account of the rise, fall, and influence of the liberty of contract doctrine is inaccurate, unfair, and anachronistic. *Lochner* has been treated as a unique example of constitutional pathology to serve the felt rhetorical needs of advocates for various theories of constitutional law, not because the decision itself was so extraordinary, its consequences so bad, or its anti-statist presumptions so clearly expelled

from modern constitutional law. The history of the liberty of contract doctrine should be assessed more objectively and in line with modern sensibilities, and *Lochner* should be removed from the anti-canon and treated like a normal, albeit controversial, case. That these rather modest propositions require an entire book in their defense is an indication of *Lochner's* remarkable status in constitutional debate, one that leaves plenty of room for rehabilitation.

¹ Barry Friedman, for one, posits that *Lochner* has a *worse* reputation than *Dred Scott*. Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* 167 (2009).

² See Victoria F. Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 Cal. L. Rev. 751, 754 (2009).

³ Senator Barack Obama, Speech re the Nomination of Justice Janice Rogers Brown to the D.C. Circuit Court of Appeals, June 8, 2005, available at http://www.barackobama.com/2005/06/08/remarks_of_us_senator_barack_o_1.php.

⁴ See Sujit Choudhry, *Worse than Lochner?*, in *Access to Care, Access to Justice: The Legal Debate Over Private Health Insurance in Canada* 75 (Collen M. Flood, et al. eds, 2005); Sujit Choudhry, *The Lochner Era and Comparative Constitutionalism*, 2 Int'l J. Const. L. 1, 15 (2004).

⁵ See Guy Miller Struve, *The Less-Restrictive-Alternative Principle and Economic Due Process*, 80 Harv. L. Rev. 1463 (1967).

⁶ See generally James W. Ely, Jr., *Economic Due Process Revisited*, 44 Vand. L. Rev. 213, 213 (1991). For recent reiteration of the traditional myth, see James MacGregor Burns, *Packing the Court: The Rise of Judicial Power and the Coming Crisis of the Supreme Court* (2009).

⁷ See Michael J. Phillips, *The Lochner Court, Myth and Reality: Substantive Due Process from the 1890s to the 1930s*, at 115 (2000); Jack M. Balkin, “*Wrong the Day it was Decided*”: *Lochner and Constitutional Historicism*, 85 B.U. L. Rev. 677, 713 (2005); Nourse, *supra* note 2, at 756; *cf.* Lawrence M. Friedman, *American Law in the 20th Century* 24 (2002).

⁸ See ch. 7.

⁹ See ch. 1.

¹⁰ See ch. 2.

¹¹ See ch. 3.

¹² See chs. 3-6.

¹³ *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897).

¹⁴ Howard Gillman, *Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties Jurisprudence*, 47 Pol. Res. Q. 623, 640 (1994).

¹⁵ See chs. 4-6.

¹⁶ See ch. 7.

¹⁷ Readers looking for a full-throated defense of libertarian constitutional jurisprudence will need to look such works as Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (2003); Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985); Tim Sandefur, *The Right to Earn a Living* (2010); Bernard H. Siegan, *Economic Liberties and the Constitution* (1980).