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## Lochner v. New York: A Centennial Retrospective

David E. Bernstein

*George Mason University School of Law*

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# LOCHNER v. NEW YORK: A CENTENNIAL RETROSPECTIVE

DAVID E. BERNSTEIN\*

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One hundred years after the Supreme Court invalidated a law regulating bakers' working hours as a violation of liberty of contract in *Lochner v. New York*,<sup>1</sup> the case and its legacy are at the forefront of debate over the Constitution.

Justice Antonin Scalia, dissenting in *Lawrence v. Texas*,<sup>2</sup> argued that the Fourteenth Amendment no more protects the right to engage in homosexual sodomy than it protects the right to work "more than 60 hours per week in a bakery."<sup>3</sup> Conservative scholar Robert George, attacking the majority opinion in *Lawrence* and the Massachusetts Supreme Court

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\* Professor, George Mason University School of Law; email: DavidEBernstein@aol.com. The author thanks Michael Abramowicz, Barry Cushman, Michal Dorf, Jim Ely, Richard Friedman, and Timothy Zick for helpful comments. A preliminary, much shorter version of this paper was published as David E. Bernstein, *The Lochner Story: Impediment to the Growth of the Regulatory State*, in *Constitutional Law Stories* (2003). The Law and Economics Center at George Mason University provided funding for this Article.

1. 198 U.S. 45 (1905).  
2. 539 U.S. 558 (2003).  
3. *Id.* at 592 (Scalia, J., dissenting).

opinion recognizing a right to same-sex marriage, asserts that “it is important to make clear that what is going on in the state and federal courts is *Lochnerizing* on a massive scale.”<sup>4</sup>

In *United States v. United Foods*,<sup>5</sup> Justice Stephen Breyer, dissenting, criticized the majority for finding that the First Amendment imposes limits on government-coerced commercial speech. Breyer, citing *Lochner*, wrote: “I do not believe the First Amendment seeks to limit the Government’s economic regulatory choices in this way—any more than does the Due Process Clause.”<sup>6</sup> Meanwhile, liberal legal commentators and scholars including Nat Hentoff,<sup>7</sup> Jeffrey Rosen,<sup>8</sup> Cass Sunstein,<sup>9</sup> and Lincoln Caplan,<sup>10</sup> warn the public that a purported “Constitution in Exile” movement<sup>11</sup> that wants to revive *Lochner* is growing increasingly influential in conservative legal circles. Unless citizens are vigilant, they warn, President Bush will appoint *Lochner* sympathizers to the Supreme Court.<sup>12</sup>

Demonization of *Lochner* and its “economic substantive due process” progeny is nothing new. According to the prevailing myth propagated by Progressives and New Dealers—and widely accepted even today<sup>13</sup>—Supreme Court Justices of the *Lochner* period, influenced by pernicious Social Darwinist ideology, sought to impose their laissez-faire views on

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4. Robert P. George, *Judicial Usurpation and the Constitution: Historical and Contemporary Issues*, HERITAGE FOUND. REP., Apr. 11, 2005, at 5.

5. *United States v. United Foods, Inc.*, 533 U.S. 405, 429 (2001) (Breyer, J., dissenting).

6. *Id.*

7. Nat Hentoff, *Whose Constitution Wins?*, VILLAGE VOICE, May 10, 2005, at 28.

8. Jeffrey Rosen, *The Unregulated Offensive*, N.Y. TIMES, Apr. 17, 2005, at 42.

9. Cass R. Sunstein, *What if He Wins? Implications of George W. Bush’s Reelection: Hoover’s Court Rides Again*, WASH. MONTHLY, Sept. 1, 2004, at 27.

10. Lincoln Caplan, *Four More Years: The Constitution in Exile*, HARTFORD COURANT, Nov. 7, 2004, at C1.

11. For criticism of the idea that there is any such movement, see, for example, David E. Bernstein, *Barnett and Sunstein on the “Constitution in Exile” (Among Other Things)*, Volokh Conspiracy, Jan. 9, 2006, [http://volokh.com/archives/archive\\_2006\\_01\\_08-2006\\_01\\_14.shtml#1136844943](http://volokh.com/archives/archive_2006_01_08-2006_01_14.shtml#1136844943).

12. As it turned out, President Bush’s initial two appointees, John Roberts and Samuel Alito, appear to be establishment conservatives who are unlikely to have any particular regard for *Lochner*. In fact, Roberts specifically condemned *Lochner* during his confirmation hearing. He said:

You go to a case like the *Lochner* case, you can read that opinion today and it’s quite clear that they’re not interpreting the law, they’re making the law. The judgment is right there.

They say, We don’t think it’s too much for a baker to work—whatever it was—13 hours a day. We think the legislature made a mistake in saying they should regulate this for their health. We don’t think it hurts their health at all.

That’s right there in the opinion. You can look at that and see that they are substituting their judgment on a policy matter for what the legislature had said.

Sept. 13, 2005, Transcript, <http://www.veiled-chameleon.com/weblog/archives/000205.html>.

13. See Rosen, *supra* note 8, for a recent uncritical rehashing of this myth.

the American polity through a tendentious interpretation of the Due Process Clause of the Fourteenth Amendment.<sup>14</sup> The Justices, infected with class bias and infused with reactionary hatred of emerging social movements that sought to aid workers and the poor, were untroubled that their decisions favored large corporations and harmed working people.<sup>15</sup> Indeed, they allowed their prejudices to infect their broader constitutional jurisprudence as well as manifested in the Court's invalidation of several major components of the New Deal.<sup>16</sup> Heroic Progressive judges, legal scholars, and activists challenged these miscreants until Franklin Roosevelt and popular support for his New Deal regulatory program finally vanquished them.<sup>17</sup>

This morality tale was contrived by Progressive and New Deal commentators<sup>18</sup> who were far from unbiased observers in the debate over constitutional jurisprudence.<sup>19</sup> The tale persisted in historical

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14. See, e.g., FRANK R. STRONG, *SUBSTANTIVE DUE PROCESS OF LAW: A DICHOTOMY OF SENSE AND NONSENSE* 95 (1986) ("The Justices of the [*Lochner* Court], steeped in the economics of Adam Smith and the sociology of Herbert Spencer, unabashedly read their philosophy into the Constitution.").

15. See, e.g., ARCHIBALD COX, *THE COURT AND THE CONSTITUTION* 135 (1987) (claiming the Supreme Court engaged in a "willful defense of wealth and power"); ALFRED H. KELLY & WINFRED A. HARBISON, *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* 498 (4th ed. 1970) (arguing that *Lochner* era judges were "concerned primarily with protecting the property rights and vested interests of big business," which manifested itself in the doctrine of freedom of contract). See generally James W. Ely, Jr., *Economic Due Process Revisited*, 44 VAND. L. REV. 213, 213 (1991) ("In many constitutional histories the presentation of economic issues between 1880 and 1937 resembles a Victorian melodrama. A dastardly Supreme Court is pictured as frustrating noble reformers who sought to impose beneficent regulations on giant business enterprises.").

16. E.g., A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (invalidating the National Industrial Recovery Act).

17. See, e.g., Melvin I. Urofsky, *Myth and Reality: The Supreme Court and Protective Legislation in the Progressive Era*, 1983 SUP. CT. HIST. SOC'Y Y.B. 53, 58 (stating that Justice Holmes's dissent in *Lochner* "raised the spirits of the faithful and kept them hoping for a better day and a Court more attuned to contemporary realities").

18. E.g., EDWARD S. CORWIN, *THE TWILIGHT OF THE SUPREME COURT: A HISTORY OF OUR CONSTITUTIONAL THEORY* (1935); ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* (1941); DREW PEARSON & ROBERT S. ALLEN, *THE NINE OLD MEN* (1936); FRED RODELL, *NINE MEN, A POLITICAL HISTORY OF THE SUPREME COURT FROM 1790 TO 1955* (1955); BERNARD SCHWARTZ, *THE SUPREME COURT, CONSTITUTIONAL REVOLUTION IN RETROSPECT* (1957).

19. See David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 4–5 (2003) [hereinafter Bernstein, *Lochner Era Revisionism, Revised*] (discussing how myths about the history of *Lochner* developed); Joseph F. Wall, *Lochner v. New York: A Study in the Modernization of Constitutional Law*, in *AMERICAN INDUSTRIALIZATION, ECONOMIC EXPANSION, AND LAW* 113, 132 (Joseph R. Frese & Jacob Judd eds., 1978) ("The difficulty with this Social Darwinistic interpretation is that it was based upon no substantiating evidence."); see also Nathan N. Frost et al., *Courts Over Constitutions Revisited: Unwritten Constitutionalism in the States*, 2004 UTAH L. REV. 333, 378 ("Any true student of the history of state constitutional law could have told us that substantive due process was not an invention of the late nineteenth century, did not have its roots in social Darwinism, and was not centrally

consciousness because it also played to, and to some extent confirmed, the political and ideological prejudices in favor of the modern regulatory state held by post-World War II constitutional scholars.<sup>20</sup>

As Jack Balkin explains:

The *Lochner* narrative that we have inherited from the New Deal projects on to the Supreme Court between 1897 to 1937 a series of undesirable traits—the very opposite of those characteristics that supporters of the New Deal settlement wanted to believe about themselves. The Old Court’s vices were the virtues of the New Deal settlement inverted. Thus, during the “*Lochner* Era” courts employed a rigid formalism that neglected social realities, while the New Deal engaged in a vigorous pragmatism that was keenly attuned to social and economic change. The *Lochner* Era Court imposed laissez-faire conservative values through its interpretations of national power and the Due Process Clause, while the New Deal brought flexible and pragmatic notions of national power that were necessary to protect the public interest. Finally, the Justices during the *Lochner* Era repeatedly overstepped their appropriate roles as judges by reading their own political values into the Constitution and second guessing the work of democratically elected legislatures and democratically accountable executive officials, while the New Deal revolution produced a new breed of Justices who believed in judicial restraint and appropriate respect for democratic processes in ordinary social and economic regulation.<sup>21</sup>

A polemical argument with little factual basis therefore became the standard explanation of the Court’s liberty of contract decisions.

The *Lochner* case itself initially played only a relatively minor role in this melodramatic tale. As discussed below,<sup>22</sup> judges and legal scholars routinely heaped praise on Justice Holmes’s famous *Lochner* dissent calling for judicial deference to the legislature in reviewing economic regulations, but paid only passing attention to the majority opinion until

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designed to aid business in avoiding any and all forms of social regulation.”).

20. E.g., RICHARD HOFSTADER, *SOCIAL DARWINISM IN AMERICAN THOUGHT* 5–6 (rev. ed. 1955); ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* (1960); ROBERT G. MCCLOSKEY, *AMERICAN CONSERVATISM IN THE AGE OF ENTERPRISE, 1865–1910*, at 26–30 (1951); FRED RODELL, *NINE MEN* (1955); BERNARD SCHWARTZ, *THE SUPREME COURT, CONSTITUTIONAL REVOLUTION IN RETROSPECT* (1957).

21. Jack M. Balkin, “*Wrong the Day it Was Decided*”: *Lochner* and Constitutional Historicism, 85 B.U. L. REV. 677, 686 (2005).

22. See *infra* notes 274 to 330 and accompanying text.

the 1960s. *Lochner* was treated as having no more significance than other well-known liberty of contract cases.

Starting with debate over *Lochner's* legacy by several Supreme Court Justices in *Griswold v. Connecticut*,<sup>23</sup> however, *Lochner's* prominence gradually rose, until, by the 1980s, it became a leading case in the “anti-canon,” the group of wrongly decided cases that help frame what the proper principles of constitutional interpretation should be.<sup>24</sup> Along with *Dred Scott v. Sanford*<sup>25</sup> and *Plessy v. Ferguson*,<sup>26</sup> *Lochner* has become one of the most reviled Supreme Court cases of all time. An entire period of discredited constitutional jurisprudence is now known as “the *Lochner* era”—a phrase that, as we will see, was virtually unknown until 1970.

While the traditional Progressive *Lochner* morality tale continues to dominate constitutional debate, over the last two decades or so revisionist scholars have thoroughly debunked the tale's historical underpinnings. Revisionists have successfully challenged conventional wisdom ranging from the Court's purported Social Darwinist inclinations to the claim that Lochnerian liberty of contract cases clearly benefited the strong and powerful over the weak and helpless.<sup>27</sup>

This Article, prepared for *Lochner's* centennial, discusses two aspects of *Lochner's* history that have not yet been adequately addressed by the scholarly literature on the case. Part I of the Article discusses the historical background of the *Lochner* case. The Article pays particular attention to the competing interest group pressures that led to the passage of the sixty-hour law at issue; the jurisprudential traditions that the parties appealed to in their arguments to the Court; the somewhat anomalous nature of the

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23. 381 U.S. 479 (1965).

24. See David E. Bernstein, *Lochner's Legacy's Legacy*, 82 TEX. L. REV. 1 (2003) (discussing *Lochner's* anticanonical status) [hereinafter Bernstein, *Lochner's Legacy's Legacy*]; Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243 (1998) (describing the anti-canon).

25. 60 U.S. (19 How.) 393 (1857).

26. 163 U.S. 537 (1896).

27. See, e.g., DAVID E. BERNSTEIN, ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL (2001) (contending that liberty of contract jurisprudence benefited disenfranchised African Americans); BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT (1998) (arguing that the seeds of the abandonment of *Lochner* by the New Deal era Court were sown by weaknesses and concessions in *Lochner* era decisions concerning the scope of the states' police powers); HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE (1993) (locating *Lochner's* origins in traditional judicial hostility to class legislation); MICHAEL J. PHILLIPS, THE LOCHNER COURT, MYTH AND REALITY: SUBSTANTIVE DUE PROCESS FROM THE 1890S TO THE 1930S (2000) (finding that the *Lochner* era Court rarely invalidated economic regulations on “substantive due process” grounds, and that when it did, its decisions usually had positive economic consequences).

Court's invalidation of the law; and how to understand the Court's opinion on its own terms, shorn of the baggage of decades of careless and questionable historiography. In short, Part I places the *Lochner* opinion firmly in its historical context.

Part II of this Article explains how *Lochner*, which existed in relative obscurity for decades, became a leading anti-canonical case. As discussed in Part II, *Lochner*'s modern notoriety arose largely because although the Roosevelt Supreme Court abandoned *Lochner* with regard to judicial review of economic legislation, it preserved the *Lochnerian Meyer v. Nebraska*<sup>28</sup> and *Pierce v. Society of Sisters*.<sup>29</sup> *Meyer*, in particular, later became an important basis for the Warren and Burger Courts' substantive due process jurisprudence in the landmark cases of *Griswold* and *Roe v. Wade*.<sup>30</sup> Not surprisingly, critics of those opinions attacked the Court for following in *Lochner*'s footsteps.

Recently, the ghost of *Lochner* has been kept very much alive by Justices Kennedy, O'Connor, and Souter, each of whom has praised *Meyer* and *Pierce* as engaging in appropriately aggressive due process review of police power regulations, while straining to distinguish those opinions from *Lochner*.<sup>31</sup> Meanwhile, a revival of limited government ideology on the legal right, most notably in the Rehnquist Court's federalism opinions has raised (perhaps exaggerated) fears on the legal left that the conservatives seek to return, in spirit if not in letter, to the discredited jurisprudence of the *Lochner* era.<sup>32</sup> Yet virtually no one, on either the right or the left, challenges what may be the strongest evidence of *Lochner*'s influence on modern jurisprudence: the Supreme Court's use of the Fourteenth Amendment's Due Process Clause to protect both enumerated and unenumerated individual rights against the states.

## I. HISTORICAL BACKGROUND

For such an important decision, the *Lochner* case had inauspicious origins. The story of *Lochner* begins in the late nineteenth century with agitation by unionized New York bread bakers who sought to limit their working hours to ten hours per day and sixty hours per week. Bakers favored shorter hours because they wanted more leisure time, and because

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28. 262 U.S. 390 (1923).

29. Brief for appellee, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (No. 496).

30. 410 U.S. 113 (1973).

31. See *infra* Part II.

32. See Rosen, *supra* note 8.

they were typically paid by the day. If bakers were paid two dollars a day for twelve hours of work, they expected to get paid the same two dollars for ten hours a day of work (though employers would obviously try to switch to hourly pay schedules). Also, many bakers apparently believed that shorter hours would eventually lead to *higher* wages, though it is not clear by what mechanism they thought this would occur.<sup>33</sup> Bakers' demands for a ten-hour day increased in periods of economic hardship, when many bakers could not find work. Bakers thought that limiting the hours of labor would result in jobs being spread among more bakers, thereby reducing unemployment and want among them.<sup>34</sup>

Bakers also sought shorter hours because baking was an unpleasant and, many believed, an unhealthful profession. Bakers were exposed to flour dust, gas fumes, dampness, and extremes of hot and cold. On the other hand, unlike many other workers, bakers faced almost no risk of sudden death or catastrophic injury.<sup>35</sup> The bakers' primary health complaint was that they believed themselves to be at increased risk of developing "consumption," an ill-defined catch-all for lung diseases.<sup>36</sup> The most common form of consumption was tuberculosis. Even though late nineteenth century scientists knew that tuberculosis was caused by contagious bacteria and not by lifestyle and environment, many bakers and their reformist allies insisted that long hours of exposure to various airborne particles caused the disease.<sup>37</sup>

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33. *Unconstitutional*, BAKER'S J., May 6, 1905, at 1 ("Those who know their economics, and those who are acquainted with the history of wages in this state, are aware that the shorter work day eventually results in increased wages . . ."); *Bakeshop Legislation*, BAKER'S J., Sept. 1, 1897, at 52 (stating that it is a "well established fact that the workmen who work longest receive the lowest wages.").

34. *Now for the Ten-Hour Day*, BAKER'S J., Apr. 20, 1895, at 1. See also Matthew S. Bewig, *Lochner v. The Journeymen Bakers of New York: The Journeymen Bakers, Their Hours of Labor, and the Constitution—A Case Study in the Social History of Legal Thought*, 38 AM. J. LEGAL HIST. 413, 440 (1994) (stating that this was the "primary argument" advanced by bakers for shorter hours).

35. PAUL KENS, *JUDICIAL POWER AND REFORM POLITICS: THE ANATOMY OF LOCHNER V. NEW YORK* 9 (1990).

36. *Id.*

37. *Id.* at 9–11. For an argument that the bakers' health concerns were at least consistent with mainstream contemporary medical views that working conditions and general well-being could affect susceptibility to consumption, see Matthew S. Bewig, *Laboring in the "Poisonous Gases": Consumption, Public Health, and the Lochner Court*, 1 NYU J. L. & LIB. 476, 484 (2005).

A. *The Sixty Hours Law: A Health Law or a Study in Interest Group Conflict?*

By 1887 unionized New York bakers had grown frustrated with efforts to obtain a uniform ten-hour day through negotiation, and therefore drafted a bill for submission to the legislature limiting bakers' hours to ten per day. The bill was defeated in the state assembly by a vote of fifty-six to forty-five.<sup>38</sup> The labor market, however, began to address the hours issue. As American living standards improved because of economic growth and increases in productivity, working conditions gradually improved for bakers. Modern, sanitary, and efficient bread bakeries increased their market share at the expense of traditional smaller bakeries. The larger New York bakeries tended to be unionized, and were staffed by bakers of Anglo-Irish and (primarily) German descent;<sup>39</sup> the latter group came to dominate the Bakery and Confectionery Workers' International Union ("the bakers' union").<sup>40</sup> 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.<sup>41</sup>

By the mid-1890s, bakers in large bakeries rarely worked more than ten hours per day, sixty hours per week.<sup>42</sup> However, these bakers were concerned that their improved situation was endangered by competition from small, old-fashioned bakeries, especially those that employed Italian,

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38. *The Demonstrations of the Bakers of New York and Brooklyn*, BAKER'S J., Apr. 27, 1895, at 1. Bakers' unions in Philadelphia, Boston, and Washington, D.C. also failed in their attempts to promote bakery legislation around this time. STUART BRUCE KAUFMAN, A VISION OF UNITY: THE HISTORY OF THE BAKERY AND CONFECTIONERY WORKERS INTERNATIONAL UNION 31 (1986).

39. See DOROTHEE SCHNEIDER, TRADE UNIONS AND COMMUNITY: THE GERMAN WORKING CLASS IN NEW YORK CITY, 1870–1900, at 204 (1994); Dorothee Schneider, *The German Bakers of New York City: Between Ethnic Particularism and Working-Class Consciousness*, in THE POLITICS OF IMMIGRANT WORKERS 49, 62 (Camille Guein-Gonzales & Carl Strikwerda eds., 1993). Given that the bakers' union later called for a complete ban on small, less modern basement bakeries, it seems safe to assume that most of their members did not work in such bakeries. See *infra* text accompanying notes 91–92.

40. As late as May 1903, the editors of the *Baker's Journal* estimated that at least half of the union members nationwide were fluent in German and not English. *Two Journals*, BAKER'S J., May 30, 1903, at 1.

41. SCHNEIDER, *supra* note 39, at 204–05.

42. TENTH ANNUAL REPORT OF THE FACTORY INSPECTORS OF THE STATE OF NEW YORK 42 (1896) [hereinafter FACTORY INSPECTORS' REPORT]; *Employees Alone Benefited*, BROOKLYN EAGLE, May 17, 1896, at 5 (quoting a "wholesale baker" as stating that in bakeries such as his, the ten-hour law would have no effect, because unlike in small bakeries, in wholesale bakeries the work is done in approximately ten-hour shifts).

French, and Jewish immigrants. These old-fashioned 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.<sup>43</sup> 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.<sup>44</sup>

Union bakers believed that competition from basement bakery workers drove down their wages.<sup>45</sup> An article in the bakers’ union’s weekly newspaper, the *Baker’s Journal*,<sup>46</sup> condemned “the cheap labor of the green hand [a euphemism for recent immigrants] from foreign shores” that, along with long hours and competition from underpaid apprentices, “has driven countless numbers of journeymen [bakers] into other walks of life, into the streets, the hospitals, alms houses, insane asylums, penitentiaries and finally death through poverty and desperation.”<sup>47</sup> A ten-

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43. KENS, *supra* note 35, at 8; Paul Brenner, *The Formative Years of the Hebrew Bakers’ Unions, 1881–1914*, 18 YIVO ANN. OF JEWISH SOC. SCI. 39, 41 (1983). Jewish bakers did not compete directly with German bakers because the Jewish-owned bakeries supplied the kosher market, a market the German bakers could not supply. However, while observant Jews could not eat non-kosher bread, non-Jews could eat kosher bread, so there was a danger that Jewish bakers would come to dominate the general New York bread market. See Brenner, *supra*, at 55–56 (“Faced with the prospect of having its overwhelmingly German membership literally driven out of the New York labor market, the Union had a substantial incentive to reduce existing wage-and-hour disparities by lifting the standards of Jewish workers.”).

44. Dennis Hanlon, *Inspection of Bake-Shops*, in NINTH ANNUAL CONVENTION OF THE INTERNATIONAL ASSOCIATION OF FACTORY INSPECTORS OF NORTH AMERICA 14–15 (1895) (stating that bakers’ lodging often involved sleeping in bakeries, sometimes in bakerrooms); Brenner, *supra* note 43, at 42 (noting that for Jewish bakers on the day before the Sabbath “[r]est was available only while the batches of dough were rising” and that bakers “were usually required to board and lodge with their employers”); *Complaints of the Bakers*, N.Y. TIMES, Nov. 21, 1895, at 9 (“The majority of the men board with the ‘bosses’ and sleep in the bakeshop. They work fifteen or sixteen hours a day . . . .” (quoting Charles Iffland, manager of the bakers’ union)).

45. FACTORY INSPECTORS’ REPORT, *supra* note 42, at 42–43.

46. From 1885 to 1895, the bakers’ union’s primary publication was the German-language *Baecher-Zeitung*, with English-language *Baker’s Journal* providing a summary of the German contents starting in 1887. In mid-1895, the union began publishing a combined journal, half in English and half in German, with both titles.

47. *Now for the Ten-Hour Day*, *supra* note 34. See also *For the Abolition of Saturday-Night and Sunday Work*, BAKER’S J., Oct. 15, 1897, at 102 (discussing the reluctance of French bakers to unionize, and the negative effect this reluctance had on the movement to abolish work on Saturday nights and Sundays); *Non-Union Bakeries*, BAKER’S J., Aug. 19, 1905, at 1 (“We also wish to call your attention to the fact that all French and Italian bread is non-union. All of your efforts to unionize their bakers have been so far in vain, having met with the severest opposition by both employers and employees.”); *The Jewish Bakers Strike in New York*, BAKER’S J., Sept. 23, 1905, at 1 (stating that Jewish bakers were mostly unorganized, but did organize for a strike in 1905).

For a discussion of the on-again off-again unionization of Jewish bakers, see generally Brenner,

hour day law would not only aid those unionized bakers who had not successfully demanded their hours be reduced, but would also help reduce competition from nonunionized workers.<sup>48</sup>

Immigrant bakers who were not part of the established German group, especially the French, were notoriously difficult to unionize, and remained largely oblivious to pleas from the bakers' union.<sup>49</sup> Evidently, other bakers believed that the union primarily served the interests of their German rivals. The bakers' union, for example, organized a Jewish section in New York City in 1893, but it attracted almost exclusively "German-speaking Jews, who would probably have joined the unions even if separate Jewish sections had not existed."<sup>50</sup> Yiddish-speaking Jews, the overwhelming majority of Jewish bakers, were not interested. Even native-born English-speaking bakers, who had once been active in the defunct bakers' union associated with the Knights of Labor, rarely joined the newly powerful and German-dominated Bakery and Confectionery Workers' International Union.<sup>51</sup> In any event, the union expended relatively little effort in organizing non-Germans, preferring to spend their energies lobbying for favorable legislation instead.<sup>52</sup>

The bakers' union's political fortunes grew under the leadership of Henry Weismann, a German immigrant who came to the United States as a young adult. He initially settled in California, where he was active in the union-sponsored Anti-Coolie League of California, which was violently opposed to the presence of Chinese workers in the U.S.<sup>53</sup> After a jail term for possession of explosives, Weismann, who had anarchist sympathies,<sup>54</sup> became involved in organizing for the bakers' union. He moved to New York in 1890 to become editor of the *Baker's Journal*. By 1894 he was the

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*supra* note 43. Unionization did not take strong hold among the Jewish bakers until 1909. *Id.* at 97–101.

48. See *Now for the Ten-Hour Day*, *supra* note 34.

49. *For the Abolition of Saturday-Night and Sunday Work*, *supra* note 47. See also *Non-Union Bakeries*, BAKER'S J., Aug. 19, 1905, at 1 ("[W]e also wish to call your attention to the fact that all French and Italian bread is non-union. All of your efforts to unionize their bakers have been so far in vain, having met with the severest opposition by both employers and employees.").

50. Brenner, *supra* note 43, at 63.

51. See SCHNEIDER, *supra* note 39, at 195 (stating that the union "entirely ignored" English-speaking bakers); *Anything Needed*, BAKER'S J., Apr. 26, 1896, at 1 (noting the relative absence of English-speakers in the union); *The English Speaking Bakers*, N.Y. TIMES, July 15, 1893, at 1.

52. SCHNEIDER, *supra* note 39, at 205.

53. KENS, *supra* note 35, at 47–48.

54. See Frank H. Brooks, *Ideology, Strategy, And Organization: Dyer Lum and the American Anarchist Movement*, 34 LAB. HIST. 57 (1993); Editorial, LIBERTY, Jan. 1899, at 5.

union's unofficial leader and spokesperson and led a new campaign for a ten-hour law in New York.<sup>55</sup>

While the bakers' union focused on lobbying for a ten-hour law, others grew concerned with the sanitary conditions in basement bakeries, and the effects those conditions could have on both the public health and the health of bakers. In 1894, a dying Jewish baker was carried from a cellar bakery on the Lower East Side. Weismann publicized the incident, and demanded an investigation into the health and sanitary conditions in cellar bakeries in Brooklyn and Manhattan.<sup>56</sup> Weismann persuaded the *New York Press* to send a team of reporters—accompanied by union bakers who were familiar with the worst bakeries—to investigate.<sup>57</sup> The result was an exposé by muckraking reporter Edward Marshall detailing unsanitary conditions in bakeries, as well as poor working conditions, and calling for legislative intervention.<sup>58</sup>

As with Upton Sinclair's *The Jungle*, a famous muckraking work on the meatpacking industry, the public was more interested in sanitary conditions that could impact their health than in working conditions. Marshall's story included tales of cockroaches on the walls and on baking utensils, flour mixed in a tub that had been used to wash a sick child's clothes, and graphic illustrations of other unsanitary conditions.<sup>59</sup> The specifics of Marshall's reporting—or at least how representative his findings were of cellar bakeries in general—are a bit suspect, because he was known for his reformist sympathies, his article was researched at the urging and with the cooperation of Weismann, and the piece was timed to coincide with the bakers' union's campaign for a ten-hour law.<sup>60</sup>

Nevertheless, the gist of Marshall's article is supported by a state factory inspectors' report issued two years later, based on inspections conducted in 1895.<sup>61</sup> The inspectors found “[l]eaky pipes, open sewers, filthy closets and untrapped sinks.” They ordered the removal of hundreds

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55. KENS, *supra* note 35, at 47–48.

56. Brenner, *supra* note 43, at 64–65.

57. Edward Marshall, *Bread and Filth Cooked Together*, N.Y. PRESS, Sept. 30 1894, § 4, at 1.

58. KENS, *supra* note 35, at 50–51. Similar stories were published in the *New York Recorder* at the urging of the English-speaking New York Local 80. KAUFMAN, *supra* note 38.

59. Marshall, *supra* note 57.

60. The union's primary interest was in limiting working hours, a provision that could be piggybacked on to a sanitary law. But the union also supported the regulation or closure of basement bakeries. See *The English Speaking Bakers*, *supra* note 51; *The Movement for Sanitary Bakeshops*, BAKER'S J., Mar. 23, 1895, at 1. Marshall later spoke at a rally in favor of union-sponsored legislation, and promised to aid the union in this matter in any way he could. See *Brilliant and Imposing Demonstration of the Journeyman Bakers of New York*, BAKER'S J., May 25, 1895, at 1.

61. For a contemporaneous report on the ongoing inspections, see *Inspecting Bakeries in the State*, N.Y. TIMES, July 25, 1895, at 6.

of water closets, often in disgusting condition, from their locations in bake rooms or rooms contiguous to bake rooms.<sup>62</sup> The worst conditions for bakers were found in the stuffy and unventilated tenement basement bakeries in Manhattan and Brooklyn.<sup>63</sup> Moreover, the sanitary conditions in those bakeries threatened the public health:

Cockroaches and other insects, some of them the peculiar development of foul bakeries and never seen elsewhere, abounded, and as chance willed became part of the salable products. Rats, which seemed not to fear the human denizens of these catacombs, ran back and forth between the piled up bread and their holes.<sup>64</sup>

The inspectors added that the bakers who lived in their bakeries (forty-six percent of them)<sup>65</sup> “hardly ever get out of their baking clothes, that they, as well as their bedding, are in a nauseatingly filthy condition, totally unfitted to serve as chief factors in the production of the staff of life.”<sup>66</sup>

In any event, the attention garnered by Marshall’s article led to public calls for a bakery reform law. A proposed act consisting of a series of sanitary reforms for “biscuit, bread, and cake factories” was introduced in the legislature, and gathered the support of many leading reformers,

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62. FACTORY INSPECTORS’ REPORT, *supra* note 42, at 45.

63. *Id.* at 46.

64. *Id.*

65. *The Statistics of the Journeymen Bakers of the State of New York, VII*, BAKER’S J., Aug. 12, 1896, at 1.

66. *Id.* at 56. On the other hand, in May 1896 Dr. Charles G. Purdy inspected Brooklyn bakeries and wrote the following in a report to Z. Taylor Emery, the Brooklyn Commissioner of Health:

The people who are so anxious to have special bake shop laws passed are evidently inspired by something else that their desire to advance the public welfare. They make loud complaint to the effect that the bakeries occupy cellars, that chickens are kept in them, that swarms of vermin are generally to be found, that the atmosphere is unhealthy, that the hours of labor are too long and that hundreds of men sleep on the floor. All of this I find to be greatly exaggerated and most of it absolutely false.

*The Bakeries Are All Right*, BROOKLYN EAGLE, May 12, 1896, at 4. Purdy added that he inspected one of the bakeries described by Marshall as “filthy in the extreme and overrun with vermin” and was unable to “find even a water bug.” *Id.* One of the bakery employees told him that when Marshall visited, there were no vermin in the bakery. *Id.* Purdy also claimed that public health concerns about bakery products were misplaced, because the high heat involved in the baking process rendered all bake shop products sterile when they left the ovens. *Id.*

Weismann responded that the Brooklyn health board was under the influence of the “cellar bakers,” and attempted to rebut Purdy’s conclusions with specific examples of unsanitary bakeries and with scientific authorities stating that baking does not destroy all “microorganisms.” *A Sharp Reply to Dr. Purdy*, BROOKLYN EAGLE, May 14, 1896, at 14.

Overall, Purdy’s report does not seem credible. A *Brooklyn Eagle* reporter visited twelve small bakeshops in February 1896 and found two of them so thick with roaches that “one of the bakers said he never dared to go to sleep in the cellar.” *Big Bakers Back Audett*, BROOKLYN EAGLE, Feb. 23, 1896, at 22. The reporter also found that sleeping in the “small shops is a common thing for the bakers.” *Id.*

including American Federation of Labor president Samuel Gompers, philanthropist and founder of the Ethical Culture Society Felix Adler, prominent Episcopal pastor Rev. William Rainsford, and Civil War hero and prominent German-American General Franz Sigel.<sup>67</sup> Prejudice against certain immigrant groups likely also contributed to support for the law, as the following comment from a factory inspector's report suggests: "it is almost impossible to secure or keep in proper cleanly condition the Jewish and Italian bakeshops. Cleanliness and tidiness are entirely foreign to these people, and their bakeshops are like their sweatshops, for like causes produce like effects."<sup>68</sup>

The Bakeshop Act, as it came to be known, was modeled on England's Bakehouse Regulation Act of 1863.<sup>69</sup> The sanitary provisions in the proposed New York law were similar to those in the English law, but the New York proposal included a maximum hours provision—tacked on at the urging of the bakers' union—that limited biscuit, cake, and bread bakers' hours of labor to ten per day and sixty per week.<sup>70</sup> The hours provision received an important endorsement from state Health Commissioner Cyrus Edson, who wrote, "The provision limiting the hours of worktime of the men is especially good from a sanitary standpoint. There is unmistakable evidence that these men are overworked, and that, in consequence of this, they are sickly and unfit to handle an article of food."<sup>71</sup>

Not surprisingly, the Bakeshop Act also received the strong support of the bakers' union. The union's official rationale for supporting the Act was that it was "a sanitary measure solely" and therefore "will stand the closest scrutiny of constitutional lawyers and the courts."<sup>72</sup> However, the union also believed that the Act, especially its hours provision, would benefit its members for reasons beyond improved sanitary conditions. An editorial in the same issue of the *Baker's Journal* promised that the ten-hour workday would solve all of the problems faced by (unionized) bakers, including "[t]he lack of work, increased numbers of apprentices, cheap labor, insane competition among employers, [and] the era of 3-cents

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67. *The Bakers' Bill Progressing*, BAKER'S J., Mar. 30, 1895, at 1.

68. TWELFTH ANNUAL REPORT OF THE CHIEF FACTORY INSPECTOR OF THE STATE OF NEW YORK, quoted in *Bakeshop Inspection*, BAKER'S J., Aug. 1, 1898, at 19, 20 [hereinafter TWELFTH ANNUAL REPORT].

69. See *People v. Lochner*, 69 N.E. 373, 382 (N.Y. 1904).

70. *Id.* See also KENS, *supra* note 35, at 44–59.

71. *The Bakers' Bill Progressing*, *supra* note 67.

72. *The Bakers' Bill to be Signed by Governor Morton*, BAKER'S J., Apr. 20, 1895, at 2.

loaves of bread.”<sup>73</sup> “The weapon of a timely and popular law is about to be placed into our hands,” the editorial continued, “Will the journeymen bakers of New York use it?”<sup>74</sup>

As submitted to the New York legislature, the first section of the Bakeshop Act contained the hours provision. The next three sections contained various sanitary regulations, such as prohibiting domestic animals in bakeries and prohibiting workers from sleeping in a bake room. The final two provisions provided for enforcement by the state factory inspector.<sup>75</sup> The Bakeshop Act passed unanimously in both houses of the legislature.<sup>76</sup> At the last minute, the bill was amended to prohibit only employees from working more than ten hours a day; employers were permitted to work as many hours as they saw fit.<sup>77</sup> This change was made to aid owners of small bakeries, some of whom were sole proprietors. It was supported by the bakers’ union because, as Weismann wrote, “our aim [is] principally to protect the employee.”<sup>78</sup> That change was approved unanimously by both houses, and Governor Levi P. Morton signed the Act into law on May 2, 1895.<sup>79</sup> Weismann wrote in the *Bakers’ Journal* that this day “will stand forth as one of the most memorable days in the history of the great struggle of American bakers for better and more humane conditions.”<sup>80</sup> A year later, the law was amended to effectively close down certain basement bakeries, prohibit the establishment of new ones, and establish whistleblower protection for employees.<sup>81</sup>

A mystery in the history of *Lochner* has been how the Bakeshop Act managed to gain unanimous support. Several factors appear to have been at work. Bakery owners were not politically organized at this time, while the bakers’ union was well-represented in Albany.<sup>82</sup> To the extent the bakery owners did have political clout, it was divided between the owners of large bakeshops and smaller, but relatively well-established (and predominantly German-owned) bakeshops. These groups shared an

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73. *Now for the Ten-Hour Day*, *supra* note 34.

74. *Id.*

75. N.Y. Laws ch. 415 § 110–115 (1897).

76. Paul Kens, *Lochner v. New York: Rehabilitated and Revised, But Still Reviled*, 1995 J. SUP. CT. HIST. 31, 34. *See also* KENS, *supra* note 35, at 59.

77. *The Baker’s Bill to be Signed by Governor Morton*, *supra* note 72.

78. *Id.*

79. BAKER’S J., May 11, 1895, at 11.

80. *Id.*

81. *The Amendments to the Baking Inspection Law of New York*, BAKER’S J., Jan. 22, 1896, at 1 (reviewing the provisions).

82. *National Association of Master Bakers*, BAKERS’ REV., Sept. 15, 1903, at 31, 39 (“The labor union has twenty-five men to lobby . . . the master bakers not one.”).

interest in driving the bakeshops owned by recent Jewish, Italian, and French immigrants—bakeshops that tended to have the worst sanitary and working conditions—out of business. Moreover, the sanitary provisions of the law would improve the reputation and thus the profit potential of the baking industry, which competed with home-baked goods.<sup>83</sup> Many of the dominant German-owned bakeries already adhered to a ten-hour day, or close to it,<sup>84</sup> and were more than content to have that standard imposed on their competitors.<sup>85</sup> Owners of large Brooklyn bakeries were “heartily in favor” of bakeshop legislation, and some explicitly lobbied in favor of amendments to strengthen the law.<sup>86</sup>

Progress in enforcing the New York Bakeshop Act was slow.<sup>87</sup> State factory inspectors found that many small tenement basement bakeries

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83. See *A Voice in Favor of Bake Shop Laws in the Interest of the Baking Industry*, BAKER'S J., June 15 1895, at 3 (quoting the *Baker's Helper*, a trade magazine, as favoring bakeshop legislation like the New York law because sanitary laws would increase the consumption of bakery bread).

84. *Big Bakers Back Audett*, BROOKLYN EAGLE, Feb. 23, 1896, at 22 (“The men who conduct the large establishments are heartily in favor of the [amended bakeshop bill] claiming that they are already conforming with all its requirements and can see no good reason why the owners of the small bake shops should not do the same”). See also *The Ten-Hour Decision*, BAKERS REV., May 15, 1905, at 33 (“Even with the laughable pretense of the unhealthfulness of the baking trade, the measure would have been accepted by the master bakers, who had long before realized that a ten-hour workday was entirely sufficient. . .”). According to the *Baker's Journal*, before the law was passed, less than twenty percent of bakers worked sixty hours weekly or less, but another twenty-five percent worked between sixty-one and seventy hours. *The Statistics of the Journeyman Bakers of the State of New York*, BAKER'S J., June 3, 1896, at 1. According to a New York Factory Inspectors' report, and an article in the *Brooklyn Eagle*, most bakers working in large bakeries worked sixty hours or less. FACTORY INSPECTORS' REPORT, *supra* note 42; *Employees Alone Benefited*, *supra* note 42.

85. BAKERS REV., June 1, 1905, at 31 (“In New York City and other places in the country the Hebrew journeymen bakers went on strike against the master bakers of their faith to gain the ten-hour day, having been compelled to work twelve and fourteen hours a day regularly; we are glad to state in all cases of such a nature the journeymen have won.”); *The Ten-Hour Decision*, *supra* note 84, at 33, 38 (“The master bakers do not object to the ten-hour day; they do not intend to compel their employees to work fourteen or sixteen hours, as has been intimated by so-called labor leaders.”); *The Strike Situation*, BAKERS REV., June 1905, at 33 (“Similar to their co-religionists in New York, the Hebrew journeymen bakers of Baltimore, Md., have gone on strike to enforce the ten-hour workday. They are tired of working twelve or fourteen hours a day. We cannot blame them and hope they will be completely successful.”). The owner of a large bakeshop denied that wholesale bakers lobbied for the law. See *Employees Alone Benefited*, *supra* note 42.

86. See *Big Bakers Back Audett*, *supra* note 68; see also FOURTH ANNUAL CONVENTION NATIONAL ASSOCIATION OF MASTER BAKERS [Souvenir Program] 94–95 (1901) (explaining that one of the first acts of the Master Bakers' Association was to endorse “sanitary laws relating to bakeries”).

87. See Brenner, *supra* note 43, at 68 (noting that only eight arrests were made in New York City in 1896, despite widespread flouting of the law); *Our Protective Law—How to Use It*, BAKER'S J., Sept. 1, 1897, at 53, 54 (“The enforcement of the 60-hours provision . . . is the most difficult of all, because the journeymen can in very few cases be had to testify against their employers as long as they work for them”); *Wages and Hours of Labor of the Journeymen Bakers of New York State*, BAKER'S J., Oct. 1, 1898, at 84 (“After three years' operation of the ten-hour law for the bakeries, there is every reason to believe that the hours of labor of the journeymen bakers have not in the least been influenced by it.”).

ignored both the sanitary provisions and the hours provisions of the law. The inspectors received many anonymous complaints about working hours in basement bakeries, but few workers were willing to sign affidavits that they had been asked to work more hours than the law allowed. Because in many instances the bakery was not only the employees' workplace, but also where they lived, a vengeful employer might not only fire them, but evict them as well.<sup>88</sup> In the early years, at least, most complaints for violations of the Bakeshop Act were filed by competitors, not employees, of the offending bakeries.<sup>89</sup> Some employees, likely those whose employers' livelihoods were threatened by enforcement of the sixty-hour law, not only refused to cooperate in enforcing the law, but actually helped their employers evade the law.<sup>90</sup> The inspectors recommended that the Bakeshop Act be amended to abolish basement bakeries entirely, as that was the only way that the abuses targeted by the Bakeshop Act would ever be ended.<sup>91</sup> The bakers' union also called for a ban on basement bakeries.<sup>92</sup> Attempts to pass such legislation failed, as did attempts by a coalition of owners of small bakeries, tenement house landlords, and flour dealers to weaken the original law.<sup>93</sup>

Meanwhile, the executive committee of the bakers' union, pleased by Weismann's success in promoting the Bakeshop Act, had elected him to the union's highest office, international secretary.<sup>94</sup> Weismann, however, resigned in 1897 amid allegations that he had received kickbacks from the company that printed the *Bakers' Journal* and had embezzled advertising money.<sup>95</sup> Weismann soon opened a bakery of his own, while studying law and passing the New York bar exam.<sup>96</sup> He also became active in both Republican politics<sup>97</sup> and the New York Association of Master Bakers,

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88. FACTORY INSPECTORS' REPORT, *supra* note 42, at 43, 46.

89. TWELFTH ANNUAL REPORT, *supra* note 68, at 19, 20. *But see* Henry Weismann, Letter to the Editor, *Inspections of Bakeries*, BROOKLYN EAGLE, May 21, 1896, at 8 (claiming that he knows of several instances in which bakers lost their jobs after reporting violations of the Bakeshop Act).

90. Dennis J. Hanlon, *The Work of Factory Inspection*, BAKER'S J., Sept. 15, 1897, at 65.

91. *Id.* at 47.

92. *Complaints of the Bakers*, *supra* note 44.

93. KENS, *supra* note 35, at 60–61; *The New York Boss Bakers' Bill Dead*, BAKER'S J., Apr. 15, 1898, at 292; *To Pillory With the Rascals*, BAKER'S J., Apr. 1, 1898, at 276. Among other things, the bill would have exempted "foremen and other subordinates" from the law, and would have required the inspection of groceries and other stores that sold bread, thus diverting resources from the inspection of small bakeshops, and imposing costs on groceries that bought bread almost exclusively from large "factory bakeries." *Id.*

94. KENS, *supra* note 35, at 98.

95. *Id.*

96. *Made the 10-Hour Law, Then Had it Unmade*, N.Y. TIMES, Feb. 27, 1904, at 5.

97. Editorial, LIBERTY, Jan. 1899, at 5.

which represented primarily small, New York bakeshop owners of German descent,<sup>98</sup> and came to oppose the ten-hour law. Weismann later wrote that as a master baker, he underwent “an intellectual revolution, saw where the law which I had succeeded in having passed was unjust to the employers.”<sup>99</sup>

Over time, opposition to the ten-hour provision of the law among bakeshop owners grew. The newly organized New York Association of Master Bakers claimed that the bakers’ union was using the law as a bludgeon to attack nonunion bakeshops. The *Bakers Review*, the Association’s publication, consistently noted “that there are occasions when overtime work in a bakery is an absolute necessity.”<sup>100</sup> The bakers’ union, in fact, recognized this reality; despite the ten-hour law’s ban on overtime work, union contracts proposed and signed after the law’s passage provided for overtime work for additional pay.<sup>101</sup>

According to the *Bakers Review*, the union nevertheless used the ten-hour provision to its advantage by threatening bakery owners who refused to sign union contracts with prosecution. Moreover, a disgruntled employee or former employee could also use the law to take revenge against a bakery owner.<sup>102</sup> Because all bakeshops occasionally needed

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98. See *Two Master Bakers’ Conventions*, BAKER’S J., Oct. 12, 1901, at 4 (discussing a convention of owners of small bakeries, including representatives of the New York Master Bakers’ Association, at which opposition to bakeshop laws was voiced, and noting the existence of a separate organization of owners of large bakeries); *Why All This Quarrel?*, BAKER’S J., Nov. 2, 1901, at 1 (referring to the convention of owners of bakeries and their opposition to New York’s ten-hour law). At a banquet celebrating the Association’s victory in *Lochner*, the treasurer of the association gave an address mostly in German. *Celebration of Victory*, BAKERS REV., June 1905, at 41, 42.

99. *Henry Weismann*, BAKER’S J., May 27, 1905, at 1; see also *The Traitors at Their Dirty Work in the Country Towns*, BAKER’S J., Apr. 1, 1898, at 5.

100. *The Ten-Hour Decision*, supra note 84, at 33; *National Association of Master Bakers*, supra note 82, at 39 (“sometimes the exigencies of his employer’s business are such as to require overtime work, in which case it is preposterous to consider it a criminal offense”); *The Ten-Hour Law*, BAKERS REV., Feb. 15, 1904, at 31 (“In the bakery trade as in any other trade there are occasions when it is impossible to avoid working a little overtime. . .”).

101. *The Ten-Hour Decision*, supra note 84, at 33; *National Association of Master Bakers*, supra note 82, at 39 (“The inconsistency of this law is shown by the contracts of the union, which name a scale of wage for overtime work.”); *Celebration of Victory*, supra note 98 (“The journeymen themselves, who opposed our efforts to have the law set aside, in submitting to you contracts for two more hours’ overtime when necessary, regard the law in the aforesaid sense to be arbitrary, and, in a business such as baking, to be inoperative, and yet they have consistently opposed every attempt at a change.”). At least one such agreement was reported in the *Baker’s Journal*. See *More Agreements*, BAKER’S J., Apr. 15, 1902, at 1 (mentioning a Buffalo agreement that provided for overtime). New Jersey’s bakeshop law, passed in 1896, also had a sixty-hours rule, but had a provision allowing for two hours daily of emergency overtime for extra pay. *New Jersey*, BAKER’S J., Apr. 22, 1896, at 1.

102. *The Ten-Hour Law*, supra note 100, at 31 (“It makes no difference whether the master baker is willing to pay extra for the extra time worked, and the journeyman willing to perform the task; is that particular master baker has a scoundrel among his workmen or has ever made any journeyman

their employees to work overtime, all bakery owners were subject to this “blackmail.”<sup>103</sup> The *Bakers Review* expressed its opposition to the law as follows:

We can not state it here too plainly that the master bakers are *not* opposed to limiting the hours of work in their bakeshops to sixty hours per week. They are entirely willing to conform with the law in that respect, though they can not see why the matter of settling hours of work should not be left to employers and employees in the baking trade, in the same way as it has to be settled in any other trade. But the master bakers strongly protest to be made the victims of the blackguards.<sup>104</sup>

Weisman later stated: “I’ve been personally identified to some extent with the enactment of the law . . . no one, at the time, thought that the act would be employed as a means of black mail exclusively, and as in force and where ever attempted would prove that is impossible in its application to the bakery business.”<sup>105</sup>

At its 1901 and 1902 conventions, the New York Master Bakers Association resolved to find an appropriate test case, and challenge the ten-hour provision all the way to the Supreme Court.<sup>106</sup> Advocates of the challenge overcame the opposition of supporters of the ten-hour provision<sup>107</sup>—likely those who owned large wholesale bakeries where overtime work was relatively rare, the ten-hour day standard, and unionization common.<sup>108</sup>

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feel bitter toward him, his dollars to donuts that some such miscreant will inform on him and he will have to pay the fine or go to jail.”)

103. *The Ten-Hour Decision*, *supra* note 84, at 33; *National Association of Master Bakers*, *supra* note 82, at 39 (“the door for the blackmailers among the journeymen now stands ajar, and no boss baker who by insuperable conditions now and then is obliged to permit his men to work over ten hour, and against the malicious charge of a discontented or discharged journeyman, that he violated the ten-hour law”); *The Ten-Hour Law*, *supra* note 100 (“To speak plainly about it, this whole overtime-prohibiting-business is a blackmailing scheme, pure and simple . . .”).

104. *The Ten-Hour Law*, *supra* note 100 (noting the relative rarity of overtime work in large wholesale bakeries).

105. *Quoted in Celebration of Victory*, *supra* note 98. The view of the Master Bakers is perhaps supported by the fact that one of the four factory inspectors appointed to enforce the law was Dennis Hanlon, president of bakers’ union Local 80. KAUFMAN, *supra* note 38, at 32.

106. *The Ten-Hour Law*, *supra* note 100.

107. *The Ten-Hour Decision*, *supra* note 84.

108. *The Ten-Hour Law*, *supra* note 100, at 31 (noting the relative rarity of overtime work in large wholesale bakeries); *see also* KAUFMAN, *supra* note 38, at 50 (explaining that the owners of large modern bakeries supported enforcement of the Bakeshop Act from the beginning, and that workers in such bakeries worked in ten-hour shifts).

### B. *The Legal Background*

The Association soon found such an appropriate case, involving the prosecution of Utica baker Joseph Lochner for violating the ten-hour law. Lochner emigrated from Bavaria at age twenty in 1882, and worked for eight years in a bakery in Utica, New York, before opening a bakeshop of his own in that city.<sup>109</sup> Lochner consistently refused to sign a union contract.<sup>110</sup> The union therefore reported him to the Factory Inspector for violating the ten-hour provision of the Bakeshop Act law, apparently when he permitted an employee to work extra hours to learn cakemaking.<sup>111</sup> He was prosecuted and fined twenty-five dollars.<sup>112</sup>

In April 1902, Lochner was again arrested. He had allegedly employed a worker named Aman Schmitter for more than sixty hours in one week. The union once again persuaded the factory inspectors to file a complaint against him.<sup>113</sup>

The Utica Master Bakers Association, of which Lochner was a member, appealed to the State Association to take up his defense and challenge the law, which it agreed to.<sup>114</sup> A grand jury indicted Lochner in October. At a pretrial hearing, his attorney, William S. Mackie, of local law firm Lindsley & Mackie, unsuccessfully requested dismissal on technicalities. At trial in February 1903, Lochner refused to plead guilt or innocence, and offered no defense, assumedly to allow the case to proceed as a test case. The court found Lochner guilty, and he was sentenced to pay a fifty dollar fine or spend fifty days in jail.<sup>115</sup>

The Master Bakers Association had some reason to hope for a positive outcome to its legal challenge. State courts had invalidated labor legislation under two theories. First, courts closely scrutinized legislative classifications to ensure that they were reasonable and had a valid public purpose. If the court found that a classification was unreasonable or arbitrary, the underlying legislation constituted “class legislation,”

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109. Hadley Arkes, *Lochner v. New York and the Cast of Our Laws*, in *GREAT CASES IN CONSTITUTIONAL LAW* 94, 104 (Robert P. George ed., 2000).

110. Note, *Bakery Law of New York Unconstitutional*, 39 AM. L. REV. 450, 450 (1905); *The Ten-Hour Decision*, *supra* note 84, at 33.

111. Note, *supra* note 110.

112. *Id.*; *Decision Given in Labor Case*, *UTICA HERALD DISPATCH*, Apr. 17, 1905, at 2; Morris Hillquit, *The Decision of the United States Supreme Court on the Ten-Hour Law for Employees of Bakeries—The Passage and Provisions of the Law*, *BAKER'S J.*, May 13, 1905, at 1.

113. *KENS*, *supra* note 35, at 79.

114. *The Ten-Hour Decision*, *supra* note 84.

115. *KENS*, *supra* note 35, at 80–81.

legislation that illegitimately favored or disfavored particular groups.<sup>116</sup> Opposition to class legislation had been a constant in American politics since at least the Jacksonian era, and arguably since the Founding.<sup>117</sup> After the Civil War, courts gradually concluded that class legislation was unconstitutional under the Fourteenth Amendment's Equal Protection Clause and state equivalents.<sup>118</sup>

Regulatory laws that applied only to certain industries, like the hours provision of the Bakeshop Act, were especially vulnerable to the charge of class legislation,<sup>119</sup> although the outcome to challenges to various regulations very much depended on the jurisdiction in which the challenges were brought. The many state decisions invalidating laws on class legislation grounds led treatise writer Ernst Freund to conclude in 1904 that the ban on unequal laws is "one of the most effectual limitations upon the exercise of the police power," the states' power to regulate on behalf of the health, safety, and welfare of the public.<sup>120</sup> The impact on protective labor legislation was particularly stark—the prohibition on class legislation was seen as the greatest constitutional barrier to regulation of the labor market.

Another strand of state constitutional case law suggested that any regulation of contractual relations that lacked a valid police power rationale was arbitrary and unreasonable, and therefore unconstitutional.<sup>121</sup> The right to be free from arbitrary or unreasonable regulation had deep roots in Anglo-American natural rights thinking. The only question was whether judges had the constitutional authority to enforce this right. While objections to labor legislation as class legislation were mainly addressed under the Fourteenth Amendment's Equal Protection Clause, postbellum judges located the constitutional source of the more general right to be free from arbitrary or unreasonable regulations in the Due Process clauses of the Fourteenth Amendment and state constitutions.<sup>122</sup> Courts were especially vigilant in their review of labor regulations, which they saw as potentially violating the fundamental right to "free labor," a right that had been an explicit ideological basis of the Civil War. Several courts consistently rejected state claims that novel labor regulations had valid

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116. See generally GILLMAN, *supra* note 27.

117. *Id.*

118. *Id.*

119. See Bernstein, *Lochner Era Revisionism, Revised*, *supra* note 19.

120. ERNST FREUND, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* § 682, at 705 (1904).

121. See Bernstein, *Lochner Era Revisionism, Revised*, *supra* note 19.

122. *Id.*

police power purposes, but other courts were more willing to defer to the legislature.<sup>123</sup>

The New York Court of Appeals had issued some of the leading opinions invalidating regulations, especially regulations that the court saw as interfering with the right to pursue an occupation. Most famously, in 1885 the court invalidated a law banning cigar manufacturing in tenement apartments as a violation of due process rights.<sup>124</sup> Even more propitious for *Lochner* was a 1901 decision invalidating a requirement that state contractors pay their workers the “prevailing wage.”<sup>125</sup> In that case, the Court of Appeals explicitly endorsed a wide range of state court decisions invalidating various types of “paternal” labor regulations that were found to have no valid health or safety rationale. On the other hand, the Court of Appeals had also issued several opinions upholding regulations, including labor regulations, as within New York’s police power.<sup>126</sup>

Armed with at least some favorable class legislation and due process precedents, *Lochner* appealed to a New York Appellate Division court. The court split 3-2 in favor of upholding the hours law.<sup>127</sup> Judge John M. Davy wrote the rather cryptic majority opinion. Davy stated that the hours law was a valid police power measure, with the goal of improving public health. He found that the law was not class legislation because it was “directed to all persons engaged in the bakery business” and “neither confers special privileges, nor makes unjust discrimination.”<sup>128</sup> Davy added that the hours law did not infringe on the fundamental right to pursue an occupation because it was not prohibitory, but merely regulatory.<sup>129</sup>

*Lochner* appealed the Appellate Division’s decision to the Court of Appeals.<sup>130</sup> He lost once again, this time in a 4-3 decision. Chief Judge Alton B. Parker wrote the majority opinion. Parker stated that it was “beyond question” that the public had an interest in having clean bakeries.<sup>131</sup> Therefore, it was within the power of the legislature to

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123. *See id.*

124. *See In re Jacobs*, 98 N.Y. 98 (N.Y. 1885).

125. *People ex rel. Rodgers v. Coler*, 59 N.E. 716 (N.Y. 1901).

126. *See generally* Felice Batlan, *A Reevaluation of the New York Court of Appeals: The Home, the Market, and Labor, 1885–1905*, 27 *LAW & SOC. INQUIRY* 489 (2002) (reviewing New York Court of Appeals decisions and concluding that it was far less of a “laissez-faire” court than many have presumed).

127. *People v. Lochner*, 76 N.Y.S. 396 (N.Y. App. Div. 1902).

128. *Id.* at 401–02.

129. *Id.* at 401.

130. *See People v. Lochner*, 69 N.E. 373 (N.Y. 1904).

131. *Id.* at 379.

regulate the conduct of business so as to provide for and protect the health of people. Parker added that the Bakeshop Act as a whole was clearly intended to promote public health, with the hours provision a part of the overall plan to improve bakery sanitation. After all, Parker contended, a worker would be more likely to be careful and clean when not overworked than when exhausted with fatigue. Even assuming *arguendo* that the statute was not meant to protect public health, Parker continued, the law still operated to protect the health of bakers and was therefore within the police power.<sup>132</sup>

Judge John Clinton Gray wrote a concurring opinion. While Gray believed that the sixty-hour workweek restriction might be invalid as an infringement of liberty of contract if considered alone, when read *in pari materia* with the rest of the Bakeshop Act its connection to health regulation was plain. Gray emphasized that the only appropriate rationale for upholding the law was that it protected *public* health and not just the health of bakers.<sup>133</sup>

Judge Irving Vann also concurred. He stated that the hours law could be upheld only if “from common knowledge” the court could say that working in a bakery was unhealthful.<sup>134</sup> Vann stated that in resolving that factual issue, the court “may resort to such sources of information as were open to the legislature.”<sup>135</sup> He then quoted books and articles discussing the negative effect of flour and sugar particles and excess heat on bakers, which purportedly left bakers vulnerable to consumption. He also cited statistics showing a higher mortality rate for bakers than for other industrial workers. Exactly where Vann came across these data is not clear; none of the studies he cites were mentioned in either party’s brief. Vann found that the evidence “leads to the conclusion that the occupation of a baker or confectioner is unhealth[ful], and tends to result in disease of the respiratory organs.”<sup>136</sup>

Judge Denis O’Brien dissented. He argued that the hours provision was unduly paternal, and therefore illicitly infringed on the liberty and property rights of citizens. O’Brien also contended that the hours provision was class legislation that discriminated in favor of one person against another, as it applied only to a very small class of bakers and confectioners, but not

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132. *Id.* at 379–81.

133. *Id.* at 381 (Gray, J., concurring).

134. *Id.* at 382 (Vann, J., concurring).

135. *Id.*

136. *Id.* at 382–84.

other occupations.<sup>137</sup> O'Brien conceded that the hours provision would still be valid if it were a legitimate exercise of police power, but he contended that the hours provision could not be so construed because it was "quite impossible to conceive" its relation to the production of healthful bread.<sup>138</sup>

Moreover, O'Brien claimed the hours provision could not be justified as a measure aimed at protecting the health of bakers. Baking was not known to be unhealthful, O'Brien wrote, and the law allowed self-employed bakers to work as many hours as they wished, providing further evidence that the hours provision was a "labor law," not a health law.<sup>139</sup> O'Brien also pointed out the hours provision was codified in the Labor section and not the Health section of the New York Code.<sup>140</sup> Dissenting judge Edward Bartlett echoed O'Brien's contention that there was no evidence that baking was unhealthful. He found the hours provision to be "paternal[istic]" and argued that it should be invalidated.<sup>141</sup>

Union supporters were pleased with the victory, but were unhappy with how close and difficult the case was. For example, the *South Dakota Herald* proclaimed,

What a Victory! This has become the richest country on earth, and we boast of being the most civilized, and yet with all our wealth, with all our civilization, ten hours is now hailed by the toilers as a shortened workday. Why, eighteen years ago the organized workers of this country were agitating for an *eight* hour work day.<sup>142</sup>

Meanwhile, the New York Association of Master Bakers met in February 1904 and decided to levy an assessment of one dollar on each member to pay for an appeal of the case to the Supreme Court.<sup>143</sup> Attorney Mackie declined to continue to represent the Master Bakers; he informed the organization that its planned Supreme Court appeal was hopeless, and stated that the Association should not waste its money.<sup>144</sup> The Executive Committee of the Association then considered a list of names, and settled on Henry Weismann, who was thought to be "not only an able barrister,

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137. *Id.* at 385–87 (O'Brien, J., dissenting).

138. *Id.* at 387.

139. *Id.* at 388.

140. *Id.* at 387–89.

141. *Id.* at 389 (Bartlett, J., dissenting).

142. *Opinion of Others*, BAKER'S J., Feb. 27, 1904, at 1 (quoting the *South Dakota Herald*).

143. *Down With Ten-Hour-Law! Is the War-Cry of the Boss Bakers*, BAKER'S J., Feb. 27, 1904, at 1.

144. *Celebration of Victory*, *supra* note 98.

but had been, in his early career, a practical baker, [and] to possess absolute knowledge of existing conditions, instead of abstract theories.”<sup>145</sup> Weismann was teamed with prominent Brooklyn attorney Frank Harvey Field.<sup>146</sup>

Weismann told the *New York Times* that while he understood opposition to a system that required bakers to be on call at all hours for a daily salary, the hours provision unreasonably prohibited bakers from working a standard ten-hour day and then being paid a double wage for overtime.<sup>147</sup> The *Bakers’ Journal*, in contrast, stated:

Every time the boss bakers appeal to have the ten-hour law declared unconstitutional, they show themselves in a stronger light as the most bitter and irreconcilable enemies of every improvement of the condition of the worker, they show themselves as brutal exploiters without conscience, who do not care a continental for the existence of a happy life of the families of their employees. They show themselves in their true light as men who would sooner sacrifice the health and life of thousands of workmen than to comply at least with the smallest demands of the workers.<sup>148</sup>

With regard to the Master Bakers’ appeal to the Supreme Court, the *Journal* stated: “[W]e have no reason at all to become excited on account of an eventual appeal to the Supreme Court of the United States.”<sup>149</sup> The opinion of Judge Parker, the *Journal* editorialized, “provides indelible evidence that conditions exist in the bakery trade which undermine the health of the bakery workers and absorb their intellectual and physical powers.”<sup>150</sup>

### C. *The Supreme Court Case*

With *Lochner’s* appeal pending before the Supreme Court, the New York Association of Master Bakers hedged its bet by having its legislative representative promote a bill that would amend the ten-hour provision of the Bakeshop Act to permit overtime.<sup>151</sup> Meanwhile, the State Factory Inspector purportedly had a list, comprising more than half the master

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145. *Id.*

146. *Made the 10-Hour Law, Then Had it Unmade*, *supra* note 96.

147. *Master Bakers Keep Up Fight*, N.Y. TIMES, Feb. 27, 1904, at 5.

148. *Boss Bakers Will Appeal Again*, BAKERS’ J., Feb. 20, 1904, at 1.

149. *Id.*

150. *Id.*

151. *Association News: New York State Association*, BAKERS REV., Mar. 15, 1905, at 45.

bakers in New York, of master bakers who had violated the ten-hour provision.<sup>152</sup> If the law was held to be constitutional, he would commence action against them.

The prospects for *Lochner*'s appeal did not seem promising. The Supreme Court had acknowledged that illicit class legislation violated the Fourteenth Amendment's Equal Protection Clause, but had a very narrow conception of what constituted illicit class legislation.<sup>153</sup> *Lochner* could take some comfort from the fact that the Court had recently invalidated several laws applying only to certain industries as blatant class legislation.<sup>154</sup> However, the Court had consistently upheld laws regulating labor relations, most prominently in *Holden v. Hardy*,<sup>155</sup> in which the Court upheld a maximum hours law that applied only to underground miners. Over the next several years, the Court upheld three additional labor statutes challenged as class legislation, with the dissenters never getting more than three votes.<sup>156</sup>

A class legislation/equal protection claim was thus a longshot, as was the other possible ground for *Lochner*'s appeal—that the hours provision of the Bakeshop Act violated the right of *Lochner* and his workers to “liberty of contract.”<sup>157</sup> True, the Court was growing increasingly aggressive in its due process jurisprudence;<sup>158</sup> in 1898, for example, it invalidated a confiscatory state utility price regulation as a violation of the Due Process Clause's protection of property rights.<sup>159</sup> And the Court had recently recognized in dicta that liberty of contract was a fundamental right protected by the Due Process Clause of the Fourteenth Amendment.<sup>160</sup> However, by the time of *Lochner*'s appeal, the Court had

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152. *Id.*

153. See Bernstein, *Lochner Era Revisionism, Revised*, *supra* note 19.

154. *E.g.*, *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540 (1902).

155. 169 U.S. 366 (1898).

156. *Atkin v. Kansas*, 191 U.S. 207 (1903); *St. Louis Consol. Coal Co. v. Illinois*, 185 U.S. 203, 207 (1902); *Knoxville Iron Co. v. Harbison*, 183 U.S. 13, 22 (1901).

157. Perhaps the first scholarly treatment of the subject was Frederick N. Judson, *Liberty of Contract Under the Police Power*, 25 AM. L. REV. 871 (1891).

158. See Michael G. Collins, *October Term, 1896—Embracing Due Process*, 45 AM. J. LEGAL HIST. 71 (2001).

159. *Smyth v. Ames*, 169 U.S. 466 (1898). *Smyth* was the leading precedent in a separate line of *Lochner* era due process cases from the line discussed in this Article. The *Smyth* cases reviewed state rate regulation to ensure that it didn't “take from A to give to B.” Unlike the *Lochner* line of cases, these cases primarily focused on the property, and not liberty, protections of the Due Process Clause.

160. *N. Sec. Co. v. United States*, 193 U.S. 197, 351 (1904); *Patterson v. Bark Eudora*, 190 U.S. 169, 173–75 (1903); *United States v. Joint Traffic Ass'n*, 171 U.S. 505, 572–73 (1898); *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897).

consistently refused to invalidate purported police power regulations of labor as violations of liberty of contract.<sup>161</sup>

Faced with limited and unattractive options, *Lochner* attorneys Field and Weismann apparently decided that their strongest argument was that the hours provision was illicit class legislation, and they emphasized this point in their brief. First, they argued that the hours provision was class legislation because it applied to some bakers and not to others.<sup>162</sup> According to *Lochner*'s brief, the hours provision did not cover at least one-third to one-half of people in the baking business because they worked not in the biscuit, bread, or cake bakeries covered by the law, but in pie bakeries, hotels, restaurants, clubs, boarding houses, or for private families. The brief alleged that working conditions for these bakers were actually less sanitary and healthful than those of the modern bakery.<sup>163</sup>

What most of the unregulated workers had in common was that their work was seasonal and often involved long hours in season. The legislature exempted these workers not because the health risks to them were small compared to the health risks to other bakers, but because the legislature chose to exempt one class of workers for the benefit of their employers.<sup>164</sup> The hours provision, moreover, allowed bakery owners to work as many hours as they chose. This meant that the more than one-half of all bakeries in New York that were owner- or family-operated were not covered by the law.<sup>165</sup> The meager and inconsistent coverage of the hours provision, the brief argued, showed that the law was unconstitutional class legislation.

The next part of the brief argued that the hours law was not within the police power because there was no reason to single out bakers for special regulation. The brief argued that unlike mining, the subject of *Holden v. Hardy*, baking was a generally healthful occupation. Allowing baking to be subject to the police power "would mean that all trades will eventually be held within the police power."<sup>166</sup> The brief included an appendix compiling further evidence of the relative healthfulness of baking.<sup>167</sup>

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161. *Atkin*, 191 U.S. 207, 220–24 (1903); *Knoxville Iron Co.*, 183 U.S. 13, 18–22 (1901); *Holden*, 169 U.S. 366, 388–98 (1898).

162. Brief for Plaintiff in Error at 7–8, *Lochner v. New York*, 198 U.S. 45 (1905) (No. 292), reprinted in 14 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 653 (P. Kurland & G. Casper eds., 1975).

163. *Id.* at 10–11.

164. *Id.* at 10, 12.

165. *Id.* at 8, 15.

166. *Id.* at 34.

167. See *infra* notes 170–72 and accompanying text.

After a thorough (but not especially persuasive) discussion of relevant precedents, the brief tried to show that the hours provision of the Bakeshop Act was not within the state's police power because it was not a health measure. The brief noted that the law at issue seemed modeled on England's Bakehouse Regulation Act of 1863, except that the English law did not regulate adult working hours.<sup>168</sup> Meanwhile, the demand from the bakers' union for shorter hours was independent of health considerations. The brief explained that the first ten-hour day bill for bakers, introduced in 1887, contained no sanitary provisions. Moreover, in 1897, when the New York legislature consolidated the laws of the state into various categories, it put the hours provision of the Bakeshop Act into the Labor Law category, while the rest of the Act was placed in the Health Law category.<sup>169</sup>

The most interesting and influential part of the brief was the appendix, referred to by one scholar as "an incipient 'Brandeis Brief.'"<sup>170</sup> Perhaps inspired by Judge Vann's opinion below stating that baking was unhealthful, the appendix provided statistics about the health of bakers. According to mortality figures from England from 1890 through 1892, bakers had a mortality rate of 920, somewhat below the average of 1,000 for all occupations. The appendix next cited articles from various medical journals that recommended sanitary and ventilation reforms to aid the health of bakers, but did not advocate shorter hours. Indeed, one article in the British medical journal *The Lancet* mentioned that shorter hours had not alleviated the problem.<sup>171</sup> The appendix also cited the *Reference Handbook of Medical Sciences*, which stated that out of twenty-one occupations, bakers had the eleventh-highest mortality rate, very similar to those of cabinet makers, mason and brick layers, blacksmiths, clerks, and other mundane occupations. An expert at the British Home Office, meanwhile, found that bakers ranked eighteenth out of twenty-two occupations for mortality, and they had the lowest rates of pulmonary disease.<sup>172</sup>

In contrast to *Lochner's* lengthy and reasonably thorough brief, New York's brief was only nineteen pages long, and contained very few citations to precedents. Perhaps New York's Attorney General thought

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168. Brief for the Plaintiff in Error, *supra* note 162, at 46; *see also* *People v. Lochner*, 69 N.E. 373, 382 (N.Y. 1904).

169. Brief for the Plaintiff in Error, *supra* note 162, at 41.

170. Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 19 n.77 (1991).

171. Brief for the Plaintiff in Error, *supra* note 162, at 57–58.

172. *Id.* at 60.

*Lochner* was an easy case governed by *Holden*, and therefore was not worth wasting resources on. Or perhaps he was distracted by the more pressing—and at the time more controversial—*Franchise Tax Cases*, another Supreme Court appeal he was working on that would determine the constitutionality of New York’s special franchise tax on streetcar lines, gas works, and other public utilities.<sup>173</sup> Regardless, New York’s brief made three points: first, that the burden was on *Lochner* to show that the law was unconstitutional; second, that the Bakeshop Act’s purpose was to safeguard both the public health and the health of bakers; and third, that the law was within the police power because it was a health law.<sup>174</sup> The brief also acknowledged that the law targeted immigrant bakers, arguing that the law was justified because “there have come to [New York] great numbers of foreigners with habits which must be changed. . . .”<sup>175</sup>

The Supreme Court heard oral arguments on February 23, 1905, and issued its ruling on April 17, 1905. Much to almost everyone’s surprise, *Lochner* won, in a 5-4 ruling.<sup>176</sup> As expected, Justices David Brewer and Rufus Peckham, who rarely saw a labor law they thought was constitutional, voted in *Lochner*’s favor. So did Chief Justice Melville Fuller, who had dissented with Brewer and Peckham in the Court’s most recent major labor regulation case.<sup>177</sup> The majority also managed to pick up the votes of Justices Henry Brown and Joseph McKenna, neither of whom had previously voted to invalidate a state labor regulation for infringing Fourteenth Amendment rights.

*Lochner*’s victory may have been a very close call, as some evidence suggests that Justice Peckham’s majority opinion was originally written as a dissent, and that Justice John Marshall Harlan’s dissenting opinion was originally the opinion of the Court.<sup>178</sup> Whether one of the Justices indeed

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173. KENS, *supra* note 35, at 113.

174. Brief for Defendants in Error, *Lochner v. New York*, 198 U.S. 45 (1905) (No. 292), reprinted in 14 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 729 (Philip B. Kurland & Gerhard Casper eds., 1975).

175. *Id.* at 14.

176. *Lochner v. New York*, 198 U.S. 45 (1905).

177. See *Atkin v. Kansas*, 191 U.S. 207, 224 (1903).

178. See CHARLES HENRY BUTLER, A CENTURY AT THE BAR OF THE SUPREME COURT OF THE UNITED STATES 172 (1942) (asserting that John Maynard Harlan, the Justice’s son, stated that his father told him that Harlan’s opinion was originally the majority opinion); JOHN E. SEMONCHE, CHARTING THE FUTURE: THE SUPREME COURT RESPONDS TO A CHANGING SOCIETY, 1890–1920, at 181–82 (1978) (arguing that the internal construction and style of the dissent arguably indicates it was intended to be a majority opinion); Alan F. Westin, *The Supreme Court and Group Conflict: Thoughts on Seeing Burke Put Through the Mill*, 52 AM. POL. SCI. REV. 665, 667 n.3 (1958) (stating that Justice Harlan’s papers show that he originally wrote a majority opinion for five Justices, but that one Justice changed his mind between conference and the final vote).

switched his vote at the last minute, and if so why, remains a mystery. As for the unusual votes of Brown and McKenna, they can most plausibly be attributed to the creativity of Lochner's brief in presenting a statistics-filled appendix showing that baking was not an especially unhealthy profession, combined with the singularly ineffective brief filed by New York.<sup>179</sup>

Also surprising, given the Lochner brief's focus on class legislation, Peckham's majority opinion largely ignored that issue in favor of a fundamental rights/due process analysis.<sup>180</sup> Peckham began by finding that the hours provision of the Bakeshop Act statute clearly interfered with the right of contract, a right the Court had recognized in *Allgeyer v. Louisiana* as part of the liberty guaranteed by the Due Process Clause of the Fourteenth Amendment.<sup>181</sup>

Under *Holden v. Hardy*,<sup>182</sup> liberty of contract could be infringed to protect "necessitous" workers or to preserve the health of either bakers or the public at large. The presumption was in favor of liberty of contract. This presumption could be overcome if the law was a "labor law" and was needed to redress some deficiency in the bakers' ability to negotiate their contracts, or if the law was a "health law." Either way, the law would be within the state's police power. Peckham rejected out of hand the idea that public health was an adequate rationale for the law. He noted that the sanitary provisions of the Bakeshop Act were not at issue, and stated that "[c]lean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week."<sup>183</sup>

Peckham also concluded that bakers did not need special aid from the state in negotiating their contracts. Peckham argued that unlike women, children, and to some extent "necessitous" miners, bakers are "in no sense

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179. The *American Federationist*, in an understated postmortem, noted, "[W]e have reason to believe that the case as presented on behalf of the state of New York might possibly have been improved on, and perhaps with a different result." AM. FEDERATIONIST, June 1905, at 363–64.

Barry Cushman suggests that despite the majority opinion's focus on liberty of contract, McKenna might have been swayed by the argument that the sixty hours law was class legislation. Cushman's theory would explain McKenna's seemingly wildly inconsistent votes in liberty of contract cases over a twenty-year period, and deserves further study. Barry Cushman, *Some Varieties and Vicissitudes of Lochnerism*, 85 B.U. L. REV. 881, 937 (2005). It seems clear that Peckham's vigorous pro-liberty of contract views, as expressed in *Lochner*, were not shared by all members of the *Lochner* majority. See Brian Frye, *The Accidental Liberty: Chance in Lochner v. New York* (2005) (unpublished manuscript on file with author).

180. For further discussion of this point, see Bernstein, *Lochner Era Revisionism, Revised*, *supra* note 19.

181. *Lochner*, 198 U.S. at 53 (citing *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897)).

182. 169 U.S. 366 (1898).

183. *Lochner*, 198 U.S. at 57.

wards of the state.”<sup>184</sup> Thus, unless the hours provision, which “interfer[ed with bakers’] independence of judgment and of action,” was intended to redress particular health effects of baking, it was unconstitutional as a violation of the fundamental right to liberty of contract protected by the Due Process Clause.<sup>185</sup>

To determine whether the hours provision was indeed a health law, Peckham first ascertained whether baking was known to be an unhealthful profession. He concluded that baking was an ordinary trade, not generally known to be unhealthful.<sup>186</sup> Next, Peckham found that the available scientific evidence suggested that baking was not an especially unhealthful profession.<sup>187</sup> For this conclusion, he clearly relied on—but, to the detriment of his reputation, did not explicitly cite—the studies discussed in the appendix to *Lochner*’s brief showing bakers had similar mortality rates to many ordinary professions that the legislature did not regulate.<sup>188</sup> Given, in Peckham’s view, the absence of any sound reason to believe that the maximum hours law was in fact a health law, it was not a valid police power measure, but a “mere meddlesome interference[] with the rights of the individual,”<sup>189</sup> and an unconstitutional violation of liberty of contract.

Peckham concluded that

[t]he 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 employees, 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.<sup>190</sup>

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184. *See id.*

185. *Id.*

186. *Id.* at 58–59 (“To the common understanding the trade of a baker has never been regarded as an unhealthy one.”); *cf. id.* at 63 (criticizing increased legislative interference with the “ordinary trades”).

187. *Id.* at 58 (finding “no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health or the health of [bakers]”).

188. *Id.* at 59–61 (comparing bakers to a wide range of other occupations, shown by *Lochner*’s brief to be approximately as healthful as baking, that could also be regulated if the bakers’ law was upheld, but never noting any reliance on data from the brief). For strong criticism of Peckham’s reasoning, see Bewig *supra* note 37. Bewig criticizes Peckham on two grounds: first, he criticizes the use of mortality tables, which ignore morbidity, and some evidence suggested that bakers were less healthy than other workers. *Id.* at 494. Second, Bewig argues that Peckham’s reasoning suggested that members of a particular class of employees could never seek ameliorative health legislation unless their health was worse than average—even if the legislation in question would significantly improve their health. *Id.* at 494–95.

189. *Lochner*, 198 U.S. at 61.

190. *Id.*

Peckham noted that the other provisions of the act, which related to sanitary concerns, might be valid, but the sixty-hour workweek was not.<sup>191</sup>

Finally, Peckham noted that the incidences of legislative interference in the workplace under the guise of health regulation had been increasing.<sup>192</sup> In examining purported health laws,

[t]he purpose of a statute must be determined from the natural and legal effect of the language employed; and whether it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose.<sup>193</sup>

Justice John Marshall Harlan, joined by Justices Edward White and William Day, wrote the main dissent. Harlan argued that the state police power extends “at least to the protection of the lives, the health and the safety of the public against the injurious exercise by any citizen of his own rights,” and that the Fourteenth Amendment was not intended to interfere with this police power.<sup>194</sup> Thus, Harlan said, while there exists a clear right to liberty of contract, it may be subordinated to a lawful exercise of police power.<sup>195</sup> According to Harlan, the Court should only invalidate a purported health or safety law if the law had “no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law.”<sup>196</sup> Any doubts should be resolved in favor of the statute.

Harlan then asserted that the purpose of the hours provision of the Bakeshop Act was at least in part to protect bakers’ health. Harlan quoted medical treatises and statistics that supported the claim that work done by bakers was unhealthful.<sup>197</sup> Where he came across these data is unclear, because they do not appear in New York’s brief.<sup>198</sup> Harlan argued that it was reasonable for New York to presume that labor in excess of ten hours per day in a bakery “may endanger the health, and shorten the lives of the workmen, thereby diminishing their physical and mental capacity to serve the State, and to provide for those dependent upon them.”<sup>199</sup> Because the

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191. *Id.* at 61–62.

192. *Id.* at 63–64.

193. *Id.* at 64.

194. *Id.* at 65 (Harlan, J., dissenting).

195. *Id.* at 65–66.

196. *Id.* at 68.

197. *Id.* at 70–71.

198. See Brief for Defendants, *supra* note 174.

199. *Lochner*, 198 U.S. at 72.

statute was not “plainly and palpably” inconsistent with the Fourteenth Amendment, it should be upheld.<sup>200</sup>

Justice Oliver Wendell Holmes filed a lone dissent, one of the most celebrated dissenting opinions in American constitutional history. Holmes asserted that the majority’s opinion was based on “an economic theory which a large part of the country does not entertain.”<sup>201</sup> He contended that the state’s power to interfere with the right to contract in ways that could not easily be distinguished from the bakers’ hours law, including such ancient laws as those against usury and work on Sundays, was well established.<sup>202</sup> “[A] Constitution,” Holmes wrote, “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*.”<sup>203</sup> “The Fourteenth Amendment,” he added, “does not enact Mr. Herbert Spencer’s *Social Statics*,” a famous book by an English sociologist advocating *laissez-faire*.<sup>204</sup> After all, noted Holmes, the Supreme Court had, over the years, permitted many interferences with *laissez-faire* challenged under the Fourteenth Amendment. Moreover, according to Holmes the term “liberty” is perverted whenever it is “held to prevent the natural outcome of a dominant opinion,” save when everyone could agree that a challenged statute “would infringe fundamental principles as they have been understood by the traditions of our people and our law.”<sup>205</sup> He argued that a reasonable person could find the hours provision to be a valid health measure, and therefore the law should be upheld.

#### D. *The Reaction to Lochner*

The initial reaction of the *Baker’s Journal* to the *Lochner* decision was surprisingly muted. The *Journal* editorialized on April 22, 1905 that the decision just showed that “under the present conditions [bakers’] rights

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200. *Id.* at 73.

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

202. *Id.*

203. *Id.*

204. *Id.* (emphasis added). This remark by Holmes seems to be the basis for the decades-old claim that the *Lochner* majority was motivated by Social Darwinism, as many people consider Spencer to have been a leading Social Darwinist. However, in context it is clear that Holmes is using Spencer as an example of a believer in extreme *laissez-faire* libertarianism, and is not accusing the majority of Social Darwinism. Holmes may have chosen Spencer because Holmes was a master of the flip aphorism, and *Spencer’s Social Statics* is a memorable alliteration. The source of the continuing confusion about Social Darwinism seems to be that, as an informal survey I took suggests, the vast majority of constitutional law professors have no idea what *Social Statics* is, but do know that Spencer is reputed to have been a Social Darwinist.

205. *Id.* at 76.

and their interest will only be preserved and defended by their own organization and power.”<sup>206</sup> As the decision sank in, however, the *Journal*’s editorials grew far harsher. A May 20, 1905, *Journal* column stated that *Lochner* was the “hardest blow ever dealt by the courts of this country to organized labor.”<sup>207</sup> A week later, the *Journal* editor wrote that “[t]he bakery workers die like flies, of consumption, rheumatism and other physical punishments for the breaking of nature’s laws. But what do the *learned* justices care for the laws of nature? Capitalist laws are alone sacred to them! What are wage workers for but to be exploited!”<sup>208</sup> The union threatened a massive strike on May 1st, but that threat came to naught.<sup>209</sup>

Ultimately, however, the bakers’ union had little reason to complain about the *Lochner* ruling, if actual hours worked by bakers—as opposed to giving the union a bargaining tool against recalcitrant bakery owners—was the relevant issue. In the ten years since the Bakeshop Act had become law, productivity and working conditions had improved throughout the United States as the nation grew richer. Shorter hours were becoming the norm nationwide, including in the baking industry.<sup>210</sup> By 1909, less than nine percent of bakers nationwide worked more than ten hours a day, and, by 1919, eighty-seven percent of bakers worked nine hours a day or less and only three percent of bakers worked more than ten hours a day.<sup>211</sup> The practical effect of *Lochner* on bakers’ hours was very small.

Meanwhile, the master bakers who had fought the law were jubilant. On May 16th, they held a banquet in honor of Henry Weismann, who effused:

Another of our guaranteed liberties, which has come down to loss from the days of Magna Charta, and the petition rights has been safeguarded anew, and the vast conservative business interests of the land on April 17, 1905, were permitted to breathe a sigh of relief

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206. *Bake Shop Law of the State of New York Prescribing Ten Hours a Day and Sixty Hours Week for Labor in Bakeries Declared Unconstitutional by United States Supreme Court*, BAKER’S J., Apr. 22, 1905, at 1.

207. *The Decision of the United States Supreme Court on the Ten-Hour Law for Employees of Bakeries—The Passage and Provisions of the Law*, BAKER’S J., May 20, 1905, at 1.

208. *The Decision of the Supreme Court*, BAKER’S J., May 27, 1905, at 2.

209. *The Strike Situation*, BAKERS REV., June 1905, at 33.

210. *See Less Hours of Labor*, BAKER’S J., Nov. 10, 1900, at 1 (stating that a ten-hour day has been established nationwide in bread factories and wherever the union is strong, but not in cellar bakeries).

211. HAZEL KYRK & JOSEPH STANCLIFFE DAVIS, *THE AMERICAN BAKING INDUSTRY* 60–61, 108 (1925).

when this decision was flashed over the wires, a warning to the Radicals and Socialists, who would subvert individual liberties to the paternal sway of the State, and an inspiration to those who still believe in the old-time doctrines of Americanism, that every man shall be allowed to employ in honest and legitimate labor, all the genius in force within him, to acquire property, comfort, and, if you please, such wealth as may serve to place him above the cares and trials of want and poverty.<sup>212</sup>

The state Master Bakers' Association gave Weismann a "valuable diamond ring" as a token of its thanks, and the Confectioners' Association presented Weismann with a check for two hundred dollars.<sup>213</sup>

John Rausch, vice-president of the Bakers' Association, not only celebrated the victory, but also struck a conciliatory note with regard to the journeymen bakers, if not their unions:

Gentlemen, while we are at this hour celebrating and rejoicing over our victory, which so rightfully belonged to us, I want to say to you, do not let us become intoxicated with joy. Remember that we have only won the battle, while the war is still going on. So, whatever you do with our conquered fellow-men, I would say, treat them the same as you would if the ten-hour law was still in force. Do not take any advantage of them, because we have won. Convince your journeymen bakers that we are not as bad as they paid us; convince them that you are their friends and not tyrants, as we are commonly called. Convince them that they were misled, and misguided by some discontented and disheartened agitator, and if we succeed convincing our friends of what I say, let us hope that the war will soon be over an employer and employee will again work harmoniously side by side, same as in the good olden time.<sup>214</sup>

Of course, interested observers understood that the ramifications of the *Lochner* decision could reach well beyond the issue of bakers' hours, and the decision provoked strong reactions from various commentators. The few libertarian periodicals of the day hailed *Lochner*, seeing it as a blow against labor union tyranny. *The Nation*, for example, editorialized that the main effect of the decision "will be to stop the subterfuge by which, under the pretext of conserving the public health, the unionists have sought to

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212. See *Celebration of Victory*, *supra* note 98.

213. *Id.*

214. *Id.* at 42.

delimit the competition of non-unionists, and so to establish a quasi-monopoly of many important kinds of labor.”<sup>215</sup>

Editorials in some major newspapers also applauded the decision. *The New York Times* praised the Supreme Court for refusing to enforce “any contracts which may have been made between the demagogues in the Legislature and the ignoramuses among the labor leaders in bringing to naught their combined machinations.”<sup>216</sup> *The Washington Post* initially noted that the opinion allowed for reasonable police power regulation.<sup>217</sup> *The Post*, defending the Court from its critics, later added that the liberty of contract between employer and employee protected in *Lochner* “is a principle older than the Constitution or the statutes. Its maintenance is indispensable to the preservation of liberty.”<sup>218</sup> *The Los Angeles Times* published two editorials praising *Lochner*.<sup>219</sup> *The Literary Digest* reported that the *Brooklyn Eagle*, *New York Press*, *Brooklyn Standard Union*, *Baltimore Sun*, and *Baltimore News* all praised the decision.<sup>220</sup>

Some law review commentary also favored *Lochner*. An author wrote in the *American Law Review*, “[i]f a Constitution is to be interpreted to mean whatever the dominant opinion of a legislature or a State may entertain for the time being, what is the use of having any constitution?”<sup>221</sup>

In contrast, the *Lochner* ruling met with immediate condemnation in Progressive and labor union circles,<sup>222</sup> and in some mainstream newspapers.<sup>223</sup> According to one historian, “[n]ot since the debacle of 1895 [when the Supreme Court invalidated the federal income tax and upheld an injunction against Eugene V. Debs’s American Railway Union strike] had a case stirred as much protest in the popular press and professional journals. What was at issue was not simply the law in the case but a nationwide movement to use government to redress imbalances in

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215. Editorial, *A Check to Union Tyranny*, 80 NATION 346, 347 (1905).

216. Editorial, *Fussy Legislation*, N.Y. TIMES, Apr. 19, 1905, at 10.

217. *Regulating Hours of Labor*, WASH. POST, Apr. 19, 1905, at 6.

218. Editorial, *Reckless Criticism*, WASH. POST, Aug. 12, 1905, at 6.

219. Editorial, *Bakeshop Law Knocked Out*, L.A. TIMES, June 11, 1905, at 7; Editorial, *Stands by the Constitution*, L.A. TIMES, May 14, 1905, at 7.

220. *Supreme Court on the Ten-Hour Law*, LITERARY DIGEST, Apr. 29, 1905, at 613.

221. Note, *supra* note 110, at 453.

222. *See Labor Press on the Ten-Hour Law*, LITERARY DIGEST, May 6, 1905, at 654.

223. *The Brooklyn Times*, *Brooklyn Citizen*, and *Philadelphia Press* criticized the decision. *See id.* Theodore Roosevelt was among those upset by *Lochner*, and he raised the case as a campaign issue in 1912. Theodore Roosevelt, *Judges and Progress*, 100 OUTLOOK 40, 43 (1912) (criticizing the “Bakeshop case”); Theodore Roosevelt, *Workman’s Compensation*, 98 OUTLOOK 49, 53 (1911) (arguing that courts should not be allowed to “shackle” legislatures as they did in *Lochner* and other cases); Theodore Roosevelt, *Address at Carnegie Hall: The Right of the People to Rule*, New York City, Mar. 20, 1912, available at <http://www.theodore-roosevelt.com/trrotpr.html>.

the industrial society.”<sup>224</sup> Progressives and labor activists had railed for years against “reactionary” state court decisions invalidating labor regulations, but had taken comfort in the fact that the United States Supreme Court had consistently voted to uphold labor reforms. Now, however, the Supreme Court, in issuing its first decision holding a state labor law void, had seemingly gone over to the dark side.<sup>225</sup>

Progressive legal scholars joined the chorus of condemnation. Somehow overlooking both the appendix to *Lochner*’s brief and Justice Peckham’s blunt statement that his view of the relative healthfulness of baking was informed by “looking through statistics regarding all trades and occupations,”<sup>226</sup> legal scholars such as Roscoe Pound, Ernst Freund, and Learned Hand accused the *Lochner* majority of engaging in “mechanical jurisprudence,” or abstract reasoning, instead of relying on modern scientific knowledge about the health effects of long hours on bakers.<sup>227</sup> Hostility to *Lochner*’s purported formalism<sup>228</sup> directly led to the development of what became known as sociological jurisprudence. Sociological jurisprudence held that the purpose of law is to achieve social aims, and that legal rules, including constitutional rules, cannot be deduced from first principles.<sup>229</sup> Accordingly, abstract notions of rights should not bind judges.<sup>230</sup> Instead, judges should consider the public interest and modern social conditions or “social facts” when interpreting the Constitution. Sociological jurisprudence came to dominate the leading law schools and had significant impact on one of the most important innovations in legal thought in the twentieth century, legal realism.<sup>231</sup>

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224. SEMONCHE, *supra* note 178, at 184.

225. Ernst Freund, *Limitation of Hours of Labor and the Federal Supreme Court*, 17 GREEN BAG 411, 413 (1905).

226. *Lochner v. New York*, 198 U.S. 45, 59 (1905).

227. See, e.g., Freund, *supra* note 225; Learned Hand, *Due Process of Law and the Eight-Hour Day*, 21 HARV. L. REV. 495, 501–08 (1908); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 615–16 (1908).

228. Such hostility continues to the present day. See Laura Kalman, *Eating Spaghetti With a Spoon*, 49 STAN. L. REV. 1547, 1549 (1997); R. Randall Kelso, *Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History*, 29 VAL. U. L. REV. 121, 191 (1994); Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 511 (1988) (“Few decisions are charged with formalism as often as *Lochner v. New York*.”); Steve Sheppard, *The State Interest in the Good Citizen: Constitutional Balance Between the Citizen and the Perfectionist State*, 45 HASTINGS L.J. 969, 972 n.12 (1994).

229. See Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 464 (1909).

230. See Louis D. Brandeis, *The Living Law*, 10 ILL. L. REV. 461, 467 (1916).

231. See G. Edward White, *From Sociological Jurisprudence to Legal Realism: Jurisprudence and Social Change in Early Twentieth Century America*, 58 VA. L. REV. 999 (1972).

Many advocates of sociological jurisprudence saw attorney Louis Brandeis's Supreme Court brief in *Muller v. Oregon*<sup>232</sup> in 1908 as a successful attempt to put principles into practice. The brief contained only a short legal argument, but it provided the Court with many pages of sociological reports and data supporting maximum hours laws for women.<sup>233</sup> Brandeis's brief was less radical than it seemed; he knew that Oregon was filing a traditional brief in the case so he did not need to reiterate the state's arguments.<sup>234</sup> Moreover, the idea of presenting relevant data to the Court was actually pioneered not by Brandeis but by Field and Weismann in the appendix to their *Lochner* brief.<sup>235</sup> Brandeis was likely motivated to write a "sociological" brief by Peckham's assertion in *Lochner* that he had relied on statistics demonstrating the relative healthfulness of baking. Nevertheless, the brief received a mention in the Court's opinion upholding the law at issue (although, many have failed to notice, only for reinforcing what the Justices said they already knew from "common sense"), and the so-called "Brandeis Brief" became a staple of constitutional argument over Progressive reforms.<sup>236</sup>

## II. HOW *LOCHNER* BECAME PART OF THE ANTI-CANON

### A. *Lochner's Early Influence*

Despite all this ferment, *Lochner* turned out to be neither the stuff of libertarian dreams nor of Progressive nightmares; rather, for almost two decades *Lochner* turned out to be an aberration. Not that the Court always upheld challenged regulations. Indeed, a few of its rulings invalidating state laws had significant impacts on American life. Following *Lochner*, the Court invalidated as violations of liberty and property rights protected by the Due Process Clauses of the Fifth and Fourteenth Amendments laws that prohibited employers from forbidding their employees to join labor unions.<sup>237</sup> These rulings likely inhibited the growth of labor unions. The Court also invalidated a Louisville law requiring residential segregation, a decision that helped prevent the spread of South African-style apartheid in the American South and, by preventing rigid racial zoning, allowed

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232. 208 U.S. 412 (1908).

233. See David E. Bernstein, *Lochner's Feminist Legacy*, 101 MICH. L. REV. 1960 (2003) (book review).

234. *Id.*

235. See *supra* text accompanying note 170.

236. Bernstein, *Lochner's Feminist Legacy*, *supra* note 233.

237. *Coppage v. Kansas*, 236 U.S. 1, 26 (1915); *Adair v. United States*, 208 U.S. 161, 180 (1908).

hundreds of thousands of African Americans to leave impoverished rural plantations for a better life in cities.<sup>238</sup> Finally, in other lines of cases often associated with the same aggressive attitude toward judicial review of economic regulation under the Fourteenth Amendment as *Lochner*, the Court reviewed state regulation of utility rates to ensure the regulations didn't arbitrarily deprive the utilities of property, and also reviewed state tax laws to ensure that they didn't rely on arbitrary classifications.<sup>239</sup>

The most controversial issue of the day, however, was the status of labor reform, and at least through the early 1920s the Court rarely interfered with labor or health regulations claimed to be within the states' police power.<sup>240</sup> In the decade after *Lochner*, the Court upheld almost every state labor reform law that came before it, including laws banning child labor;<sup>241</sup> regulating the hours of labor of women;<sup>242</sup> making mining companies liable for their willful failure to furnish a reasonably safe place for workers;<sup>243</sup> and mandating an eight-hour day for federal workers or employees of federal contractors,<sup>244</sup> as well as many others. Congress altered the Supreme Court's jurisdiction in 1914 to allow the Court to review judgments from state courts invalidating state statutes as violations of federal constitutional rights.<sup>245</sup> Congress did so because it saw the Court, with its consistent willingness to uphold reformist legislation, as a check on state courts that were invalidating Progressive legislation, especially labor legislation.

By 1917, *Lochner* seemed to be dead and buried for good. In that year the Court upheld four very controversial labor reforms: workers'

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238. *Buchanan v. Warley*, 245 U.S. 60 (1917); see generally David E. Bernstein, *Philip Sober Controlling Philip Drunk: Buchanan v. Warley in Historical Perspective*, 51 VAND. L. REV. 797 (1998); David E. Bernstein & Ilya Somin, *Judicial Power and Civil Rights Reconsidered*, 114 YALE L.J. 591, 626–40 (2004) (book review).

239. See Cushman, *supra* note 179. Cushman presents these cases as evidence that *Lochner* era Fourteenth Amendment jurisprudence was based primarily on "class legislation" and not individual rights considerations. In my view, there were separate lines of cases, and the *Lochner* line of cases primarily focused on individual rights considerations, while the rate regulations cases (associated with *Smyth v. Ames*, not *Lochner*, and focusing on the property, not liberty language in the Due Process Clause) and the tax cases (decided primarily as equal protection, not due process cases) were separate lines of cases.

240. See Bernstein, *Lochner era Revisionism, Revised*, *supra* note 19.

241. *Sturges & Burn Mfg. Co. v. Beauchamp*, 231 U.S. 320, 325–26 (1913).

242. *Bosley v. McLaughlin*, 236 U.S. 385, 392–95 (1915); *Miller v. Wilson*, 236 U.S. 373, 380–82 (1915); *Riley v. Massachusetts*, 232 U.S. 671, 679–81 (1914); *Muller v. Oregon*, 208 U.S. 412, 418–23 (1908).

243. *Wilmington Star Mining Co. v. Fulton*, 205 U.S. 60, 70–74 (1907).

244. *Ellis v. United States*, 206 U.S. 246, 254–56 (1907).

245. Act of Dec. 23, 1914, Pub. L. No. 63-224, 38 Stat. 790 (1914).

compensation laws,<sup>246</sup> a federal law that not only limited railroad workers to an eight-hour day but also fixed wages at the level the workers had received when working longer hours,<sup>247</sup> a minimum wage law for women,<sup>248</sup> and a maximum hours law for all industrial workers.<sup>249</sup> The latter ruling seemed to directly contradict *Lochner* and therefore overruled its specific holding *sub silentio*.<sup>250</sup>

*Lochner*, however, underwent a surprising renaissance in the 1920s when the more aggressively *Lochnerian* wing of the Court, bolstered by four appointments by President Warren Harding, took firm control. With a strong *Lochnerian* majority in place, led by Chief Justice (and former president) William Howard Taft, the Court both reviewed economic regulation much more aggressively than it had in the past and also applied *Lochnerian* jurisprudence outside the economic realm.

The Court froze and formalized various doctrinal exceptions to liberty of contract, such as the government's virtual *carte blanche* to regulate businesses "affected with a public interest." In *Chas. Wolff Packing Co. v. Court of Industrial Relations*,<sup>251</sup> the Court unanimously held that states could not require industrial disputes to be settled by government-imposed mandatory arbitration. The state claimed that the industries in question were "clothed with a public interest," which led the Court, in an opinion by Chief Justice Taft, to spell out the various categories of businesses affected with a public interest.<sup>252</sup> By doing so, Taft ensured that the "affected with a public interest" doctrine would be limited to those categories, and would no longer be expanded on a case-by-case basis.

In *Adkins v. Children's Hospital*, a 5-3 majority of the Court explicitly revived *Lochner* while invalidating a minimum wage law for women.<sup>253</sup> The *Adkins* Court announced that "freedom of contract is . . . the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional

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246. *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917); *Hawkins v. Bleakly*, 243 U.S. 210 (1917); *N.Y. Cent. R.R. Co. v. White*, 243 U.S. 188 (1917).

247. *Wilson v. New*, 243 U.S. 332 (1917).

248. *Simpson v. O'Hara*, 243 U.S. 629, 629-30 (1917). This was actually a 4-4 decision. Justice Brandeis recused himself because he had worked on the case before being appointed to the Supreme Court, but he clearly would have cast the fifth vote for upholding such laws.

249. *Bunting v. Oregon*, 243 U.S. 426 (1917).

250. *See, e.g., Adkins v. Children's Hosp.*, 261 U.S. 525, 564 (1923) (Taft, C.J., dissenting) ("It is impossible for me to reconcile the *Bunting Case* and the *Lochner Case* and I have always supposed that the *Lochner Case* was thus overruled *sub silentio*.").

251. 262 U.S. 522 (1923).

252. *Id.* at 535.

253. 261 U.S. 525.

circumstances.”<sup>254</sup> The Court acknowledged that government regulation could be used for traditional police power purposes. Beyond that, the Court asserted that precedent limited interference with liberty of contract in the labor context to cases involving the following issues: (1) “[t]hose dealing with statutes fixing rates and charges to be exacted by businesses impressed with a public interest;” (2) “[s]tatutes relating to contracts for the performance of public work;” (3) “[s]tatutes prescribing the character, methods and time for payment of wages;” and (4) “[s]tatutes fixing hours of labor” to preserve the health and safety for workers or the public at large.<sup>255</sup> Thus, during the Taft Court era the exceptions to liberty of contract created by prior Court decisions were retained, but they were categorized and applied narrowly to prevent what the Court saw as further erosion of individual liberty.

It was only after *Adkins* that *Lochner* was no longer an anomaly. The next decade or so was the only time in Supreme Court history in which the Court did not apply a strong presumption of constitutionality to economic regulation. Even so, the Taft Court upheld most of the laws that came before it, including such far-reaching regulatory innovations as exclusionary zoning<sup>256</sup> and massive regulation of the railroad labor market.<sup>257</sup>

Often overlooked in histories of the Supreme Court in the 1920s is that the Court not only revived *Lochner*’s protection of liberty of contract, but also began to protect what today we call civil liberties. The Court also resolved the ongoing ambiguity over whether the Due Process Clause protected non-economic rights. In the wake of abuses by the Wilson Administration during and after World War I and by state governments overcome with nativist hysteria after the War—abuses that included Palmer Raids, imprisonment of antiwar dissidents, and Ku Klux Klan-inspired laws intended to shut down Catholic schools—the Court broadly expanded protection under the Due Process Clause beyond economic liberties.<sup>258</sup>

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254. *Id.* at 546.

255. *Adkins*, 261 U.S. at 546–48.

256. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

257. *Texas & New Orleans R.R. Co. v. Bhd. of Ry. & S.S. Clerks*, 281 U.S. 548 (1930).

258. *See generally* M.B. Carrott, *The Supreme Court and Minority Rights in the Nineteen-Twenties*, 41 N.W. OHIO Q. 144 (1969) (reviewing these decisions and suggesting that the Court was motivated in part by a desire to win political support from African Americans, Catholics, and other groups).

The expansion of *Lochnerian* due process jurisprudence to civil liberties began with *Meyer v. Nebraska*,<sup>259</sup> in which the Court invalidated a Nebraska law that banned the teaching of German in private schools or by private tutors. Arch-*Lochnerian* Justice James McReynolds wrote a sweeping opinion holding that the Due Process Clause protects a wide range of freedoms, including not only the “right of the individual to contract,” and “to engage in any of the common occupations of life,” but also “to acquire useful knowledge, to marry, establish a home and bring up children, [and] to worship God according to the dictates of his own conscience,” along with other “privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”<sup>260</sup>

Two years later in *Gitlow v. New York*,<sup>261</sup> the Court stated that it assumed that freedom of expression was protected against the states by the Fourteenth Amendment. Decisions that followed invalidated laws banning private schools,<sup>262</sup> forbidding private Japanese language schools,<sup>263</sup> and banning display of the Communist flag.<sup>264</sup> All of these cases were decided on the ground that they involved fundamental liberties protected by the Due Process Clause.<sup>265</sup>

### B. *The Fall of the House of Lochner*

As it turned out, however, the 1920s and the Taft Court represented the last gasp of classical liberal principles in American public life for decades to come. By the 1920s, libertarian views, especially on economics, had already been marginalized among American intellectuals,<sup>266</sup> but they retained a tenuous foothold in elite legal circles despite the onslaught of

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259. 262 U.S. 390 (1923).

260. *Id.*

261. 268 U.S. 652, 666 (1925) (“For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.”). *See also* *Stromberg v. California*, 283 U.S. 359, 368 (1931) (“It has been determined that the conception of liberty under the due process clause of the Fourteenth Amendment embraces the right of free speech.”); *Fiske v. Kansas*, 274 U.S. 380 (1927) (unanimously invalidating a criminal conviction as a violation of the right to freedom of speech).

262. *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925).

263. *Farrington v. Tokushige*, 273 U.S. 284 (1927).

264. *Stromberg*, 283 U.S. at 359.

265. *Gitlow* is often incorrectly treated as an “incorporation” case. *See, e.g.*, Akhil Reed Amar, *Constitutional Rights in a Federal System: Rethinking Incorporation and Reverse Incorporation*, in BENCHMARKS: GREAT CONSTITUTIONAL CONTROVERSIES IN THE SUPREME COURT 71, 73 (Terry Eastland ed., 1995).

266. *See generally* ARTHUR EKIRCH, *THE DECLINE OF AMERICAN LIBERALISM* (1960).

sociological jurisprudence and legal realism.<sup>267</sup> The classical liberal foundations of *Lochnerian* jurisprudence, however, could not survive the strains of the Great Depression. With almost no support among the intellectual class, with the unemployed and underemployed clamoring for government intervention, and with statism ascendant across the globe in the forms of fascism, communism, and social democracy—each of which had its share of admirers in the United States—the Court’s commitment to limited government seemed outlandishly reactionary to much of the public.<sup>268</sup> The Court’s *Lochnerian* position that libertarian presumptions were fundamental to Anglo-American liberty became untenable as the Depression wore on, with many Americans blaming the purported *laissez-faire* policies of previous administrations for the continuing economic crisis.<sup>269</sup>

Given the lack of intellectual and public support for *Lochnerism*, its demise was inevitable, but still required a change of personnel on the Court. President Hoover, a Progressive Republican, put the first nails into *Lochner*’s coffin by appointing to the Court Justices Charles Evan Hughes, Owen Roberts, and Benjamin Cardozo, each of whom had views well to the left of the conservatives who dominated the Court in the 1920s. By 1934, a majority had formed willing to broadly expand the “affected with a public interest” doctrine to the point where just about any regulation of prices was constitutional.<sup>270</sup> After a short period of resistance to the more extreme aspects of the New Deal, in 1937 the Court reversed *Adkins* and upheld a minimum wage law for women.<sup>271</sup> A majority of the Court was still willing to review economic legislation to ensure it was not an arbitrary violation of liberty of contract, albeit on a more forgiving basis than previously.<sup>272</sup> However, President Franklin Roosevelt sealed *Lochner*’s fate by appointing a series of New Dealers and other political

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267. See, e.g., William Howard Taft, *Mr. Wilson and the Campaign*, 10 YALE REV. 1, 19–20 (1921). “There is no greater domestic issue in the election than the maintenance of the Supreme Court as the bulwark to enforce the guaranty that no man shall be deprived of his property without due process of law.”)

268. Bernstein, *Lochner Era Revisionism, Revised*, *supra* note 19, at 50.

269. *Id.* at 50–51.

270. See *Nebbia v. New York*, 291 U.S. 502, 533 (1934) (defining “affected with a public interest” as “subject to the exercise of the police power”).

271. See *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

272. See generally Alan J. Meese, *Will, Judgment, and Economic Liberty: Mr. Justice Souter and the Mistranslation of the Due Process Clause*, 41 WM. & MARY L. REV. 3, 56 (1999) (noting that *West Coast Hotel* did not “overrule *Lochner* or any liberty of occupation case not involving an attempt to require [employers to pay] a subsistence wage”).

allies to the Court, who soon declared that economic legislation was subject only to the most minimal constitutional scrutiny.<sup>273</sup>

### C. *The Wilderness Years*

For several decades after the triumph of the New Deal, *Lochner* itself was cited by the courts and by legal scholars primarily for Justice Holmes' dissent, which reflected the post-New Deal consensus that the courts should not interfere with economic legislation. Holmes' claim that the *Lochner* Court had erred in reading its own values into the Constitution became the dominant critique of *Lochnerian* jurisprudence, and his quip about "Mr. Herbert Spencer's *Social Statics*" led many scholars to wrongly conclude that the Court was motivated by Spencerian Social Darwinism.<sup>274</sup>

The *Lochner* majority opinion, while recognized as a significant victory for "economic substantive due process,"<sup>275</sup> did not yet have the symbolic resonance that it later acquired. Legal scholars and commentators, if they mentioned *Lochner* at all, generally lumped *Lochner* in with other cases invalidating economic regulations,<sup>276</sup> and the Supreme Court only once singled *Lochner* out for special attention.<sup>277</sup>

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273. This line of jurisprudence started in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

274. See *supra* note 227.

275. "Substantive due process" was itself something of a neologism, rarely used during the *Lochner* era, and never in a Supreme Court opinion. See G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* 245 (2000) (explaining that it was not until the 1950s that jurisprudence under the Due Process Clause was separated by courts and legal scholars into "substantive" and "procedural" categories).

276. E.g., SIDNEY FINE, *LAISSEZ FAIRE AND THE GENERAL WELFARE STATE* 159 (1956). There were occasional exceptions. See, e.g., Westin, *supra* note 178.

277. *Fed. Hous. Admin. v. Darlington, Inc.*, 358 U.S. 84, 92 (1958) ("to protect the rights asserted here would make the ghost of *Lochner v. New York* walk again" (citations omitted)). Cf. *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963) ("In this manner the Due Process Clause was used, for example, to nullify laws prescribing maximum hours for work in bakeries, *Lochner v. New York*, outlawing "yellow dog" contracts, *Coppage v. Kansas*, setting minimum wages for women, *Adkins v. Children's Hospital*, and fixing the weight of loaves of bread, *Jay Burns Baking Co. v. Bryan*." (citation omitted)); *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952) ("The liberty of contract argument pressed on us is reminiscent of the philosophy of *Lochner v. New York*, which invalidated a New York law prescribing maximum hours for work in bakeries; *Coppage v. Kansas*, which struck down a Kansas statute outlawing "yellow dog" contracts; *Adkins v. Children's Hospital*, which held unconstitutional a federal statute fixing minimum wage standards for women in the District of Columbia, and others of that vintage." (citations omitted)); *Lincoln Fed. Labor Union v. Nw. Iron & Metal Co.*, 335 U.S. 525, 535 (1949) ("The *Allgeyer-Lochner-Adair-Coppage* constitutional doctrine was for some years followed by this Court. It was used to strike down laws fixing minimum wages and maximum hours in employment, laws fixing prices, and laws regulating business activities.")

*Lochner* makes only the briefest of cameo appearances in the leading post-New Deal postmortem on judicial review of economic regulation.<sup>278</sup>

*Lochnerian* fundamental rights analysis, however, lived on. The Court, while largely abandoning review of economic regulations under the Due Process Clause, gradually incorporated most of the rights protected by the Bill of Rights into the Fourteenth Amendment's Due Process Clause, thereby continuing to enforce fundamental rights against the states via what came to be known as "substantive due process." The incorporation doctrine on the one hand limited the scope of judicially enforceable fundamental rights by associating them with the text of the Bill of Rights, rather than basing them simply on the Justices' own understanding of fundamental rights—though the Justices retained some flexibility because incorporation was only applied to selected rights.<sup>279</sup> On the other hand, incorporation expanded the scope of fundamental rights by providing federal protection against the states for the Bill of Rights' criminal procedure provisions, which had been rejected during the *Lochner* period.<sup>280</sup>

The post-*Lochner* reincarnation of fundamental rights began in 1937 in *Palko v. Connecticut*, with all of the "Progressive" Justices joining a Cardozo opinion stating that the Fourteenth Amendment protects against the states all rights "implicit in the concept of ordered liberty."<sup>281</sup> The Court also expressed its reluctance to entirely abandon judicial review of purported police power regulations in the famous Footnote Four of the 1938 *Carolene Products* case.<sup>282</sup> The Court suggested that "[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth."<sup>283</sup>

Footnote Four also suggested that the Court was willing to preserve the *Lochnerian* civil liberties decisions of the 1920s and 1930s by reinterpreting them as decisions protecting "discrete and insular

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278. Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 44 (quoting *Lincoln Fed. Labor Union*, 335 U.S. at 535, as decrying "the *Allgeyer-Lochner-Adair-Coppage*" doctrine).

279. See Kurt T. Lash, *The Constitutional Convention of 1937: The Original Meaning of the New Jurisprudential Deal*, 70 FORDHAM L. REV. 459, 459–66 (2001).

280. See *Twining v. New Jersey*, 211 U.S. 78 (1908).

281. 302 U.S. 319, 325 (1937).

282. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

283. *Id.*

minorities.”<sup>284</sup> Cases cited by the Court in Footnote Four, including the civil liberties decisions of the 1920s, were reinterpreted as decisions invalidating statutes because the (facially-neutral) laws in question were “directed at particular religious, or national, or racial minorities.”<sup>285</sup> Laws that threaten such groups “may call for a correspondingly more searching judicial inquiry.”<sup>286</sup> Protection of discrete and insular minorities from hostile legislation by an equal protection analysis is a limited, modern liberal version of the older prohibition against class legislation, with the caveat that the modern version allows, and in some cases requires, the Court to inquire into the legislative intent of facially-neutral laws.<sup>287</sup>

Protection of non-textual rights under the Due Process Clause largely disappeared for a couple of decades.<sup>288</sup> An exception was *Bolling v. Sharpe*,<sup>289</sup> a companion case to *Brown v. Board of Education*<sup>290</sup> that arose in the District of Columbia.<sup>291</sup> Because *Bolling* was a federal case, it had to be decided under the Fifth Amendment’s Due Process Clause, not the Fifth Amendment’s Equal Protection Clause.

In subsequent opinions, the Supreme Court interpreted *Bolling* as an equal protection case,<sup>292</sup> and eventually held that the Fifth Amendment’s Due Process Clause contains an equal protection guarantee precisely equivalent to that of the Fourteenth Amendment’s Equal Protection Clause.<sup>293</sup> However, a close reading of *Bolling* reveals that while dicta in *Bolling* states that the concept of due process overlaps to some extent with the concept of equal protection, the ultimate holding of the Court is based

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284. *Id.* at 249.

285. *Id.* (citations omitted).

286. *Id.*

287. See *Washington v. Davis*, 426 U.S. 229, 239 (1976) (holding that laws with discriminatory effects are generally unconstitutional only if they also had discriminatory intent).

288. For example, in 1942 in *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), Justice Douglas, for the Court, declined to address whether a statute requiring sterilization of criminals violated due process as beyond the police power, and instead focused his opinion on equal protection. Only Justices Stone and Jackson were willing to hold that the law violated due process.

289. 347 U.S. 497 (1954).

290. 347 U.S. 483 (1954).

291. For a discussion, see David E. Bernstein, *Bolling, Equal Protection, Due Process and Lochnerphobia*, 93 *GEO. L.J.* 1253 (2005).

292. *E.g.*, *Schneider v. Rusk*, 377 U.S. 163, 168 (1964) (“[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is ‘so unjustifiable as to be violative of due process.’” (quoting *Bolling v. Sharpe*, 347 U.S. 457, 499 (1954))).

293. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) (“This Court’s approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.”). As we shall see, the statement in this parenthetical is incorrect, but it does reflect the state of the law from 1975 until today.

on the traditional due process concern that the government not engage in arbitrary deprivations of liberty.<sup>294</sup>

*Bolling* concluded that the federal government had no legitimate government interest in requiring segregated education that could overcome blacks' contrary liberty interest not to be relegated to Jim Crow schools.<sup>295</sup> The initial draft opinion by Chief Justice Earl Warren cited *Meyer* and *Pierce* in support of the ruling, but those citations were ultimately deleted to satisfy hardcore anti-*Lochnerian* Justice Black.<sup>296</sup> The final opinion, however, retained a reference to the most significant *Lochner* era due process case to overturn a racially discriminatory law, *Buchanan v. Warley*.<sup>297</sup>

#### D. *Lochner's Growing Significance To Constitutional Debate: 1960s*

In the 1960s, with the unanimity Warren desired for the segregation opinions no longer imperative, some Justices grew less shy about citing *Lochnerian* precedents. A turning point came in *Griswold v. Connecticut*.<sup>298</sup> Thomas Emerson, arguing for the plaintiffs, asked the Court to rely on the broad understanding of due process articulated by Justice McReynold in *Meyer v. Nebraska*, and also favorably cited *Pierce v. Society of Sisters*.<sup>299</sup>

At oral argument, the Court questioned Emerson about his due process argument:

THE COURT: But you expect us to determine whether, it's sufficiently shocking to our sense of what ought to be the law, because this applies to married people only?

MR. EMERSON: Yes, Your Honor. But it is not broad due process in the sense in which the issue was raised in the 1930's. In the first place, this is not a regulation which deals with economic or commercial matters. It is a regulation that touches upon individual rights: the right to protect life and health, the right of advancing scientific knowledge, the right to have children voluntarily. And

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294. See Bernstein, *supra* note 291.

295. *Nomination of David H. Souter to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 101st Cong. 305 (1990) (statement of J. Souter).

296. See Bernstein, *supra* note 291.

297. 245 U.S. 60 (1917).

298. 381 U.S. 479 (1965).

299. Brief for Appellant at 14, 17, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (No. 496).

therefore, we say we are not asking this Court to revive *Lochner against New York*, or to overrule *Nebbia* or *West Coast Hotel*.

THE COURT: It sounds to me like you're asking us to follow the constitutional philosophy of that case.

MR. EMERSON: No, Your Honor. We are asking you to follow the philosophy of *Meyer against Nebraska* and *Pierce against the Society of Sisters*, which dealt with—*Meyer against Nebraska*—

THE COURT: Was the one that held it was unconstitutional, as I recall it, for a state to try to regulate the size of loaves of bread—

MR. EMERSON: No, no, no.

THE COURT: —because people were being defrauded; was that it?

MR. EMERSON: That was the *Lochner* case [sic, it was *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504], Your Honor. *Meyer against Nebraska* held that it was unconstitutional for a state to enact a law prohibiting the teaching of the German language to children who had not passed the eighth grade. And *Pierce against the Society of Sisters* held that it was unconstitutional for a state to prevent the operation of private schools in a state. And those were b[o]th due process cases, were decided as due process cases. And the *Aptheker* case—well, I would bring within this rule the *Schwartz* case, *Schwartz* against the Board of Bar Examiners, and the *Aptheker* case most recently. All were due process cases which related to individual rights and liberties, and we distinguish those from the cases which involved commercial operations like *Lochner against New York* and *West Coast Hotel against Parrish*. We make that very definite distinction.<sup>300</sup>

Emerson's argument was highly persuasive. Justice Douglas's plurality opinion for the Court relied in part on *Meyer* and *Pierce* for the proposition that the Due Process Clause protects a fundamental unenumerated right to privacy.<sup>301</sup> Douglas denied, however, that he was turning *Lochnerian*. He wrote: "Overtones of some arguments suggest that *Lochner v. State of New York* should be our guide. But we decline that

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300. Transcript of Oral Argument at 7–8, *Griswold v. Connecticut*, 381 U.S. 479 (No. 496), available at <http://members.aol.com/abtrbng2/oa/griswoldoa.htm>.

301. Douglas, though, treated *Meyer* and *Pierce* as First Amendment cases, a huge stretch to say the least. *Griswold*, 381 U.S. at 482–83.

invitation. . . . We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.”<sup>302</sup> Douglas, moreover, claimed that he was not relying on “substantive due process,” but on the “penumbras, formed by emanations” of the First, Third, Fourth, Fifth and Ninth amendments.<sup>303</sup>

Justice Goldberg’s concurring opinion for three Justices, while most famous for its discussion of the Ninth Amendment, actually relies on *Meyer* for the proposition that the Fourteenth Amendment’s Due Process Clause protects rights not enumerated in the Bill of Rights.<sup>304</sup> Goldberg’s Ninth Amendment discussion is used to merely support the idea that when interpreting the Fourteenth Amendment, the Court may go outside the Bill of Rights in figuring out which rights should be deemed “fundamental” and thus worthy of constitutional protection.<sup>305</sup>

Justice Harlan’s lone concurrence, meanwhile, stated that “the proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values ‘implicit in the concept of ordered liberty.’”<sup>306</sup> Harlan referred readers to his dissent in *Poe v. Ullman*, which itself relied generally on a host of *Lochner* era cases for the proposition that police power concerns need to be balanced against liberty interests.<sup>307</sup> In *Poe*, Harlan directly relied on *Meyer* and *Pierce* to support his view that the right of a married couple to use contraceptives was protected by the Fourteenth Amendment.<sup>308</sup> Justice White, meanwhile, wrote in his *Griswold* concurrence that “[s]uffice it to say that this is not the first time this Court has had occasion to articulate that the liberty entitled to protection under the Fourteenth Amendment includes the right ‘to marry, establish a home and bring up children,’ *Meyer v. State of Nebraska* and

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302. *Id.* at 481–82 (citation omitted).

303. *Id.* at 484–85.

304. *Id.* at 488 (Goldberg, J., concurring).

305. Goldberg wrote:

I do not mean to imply that the Ninth Amendment is applied against the States by the Fourteenth. Nor do I mean to state that the Ninth Amendment constitutes an independent source of rights protected from infringement by either the States or the Federal Government. Rather, the Ninth Amendment shows a belief of the Constitution’s authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive.

*Id.* at 492.

306. *Id.* at 500 (Harlan, J., concurring).

307. *Id.* (citing *Poe v. Ullman*, 367 U.S. 497, 522 (1962) (Harlan, J., dissenting)).

308. *Poe*, 367 U.S. at 543–44.

‘the liberty \* \* \* to direct the upbringing and education of children,’  
*Pierce v. Society of Sisters*. . . .”<sup>309</sup>

As Jed Rubenfeld notes, cases like *Pierce* and *Meyer* are “the true parents of the privacy doctrine,” and thus of the Supreme Court’s decisions on the right to use contraception, to terminate pregnancy, and to engage in private consensual sex.<sup>310</sup> By resurrecting the *Lochnerian* notion that due process protects fundamental unenumerated rights, the *Griswold* Court ensured that these and other constitutional issues would be decided as Due Process cases, rather than being decided based on notions of equality under the Equal Protection Clause<sup>311</sup> or even left to the political branches to sort out.

Justice Black, dissenting, accused his colleagues of resurrecting *Lochnerian* jurisprudence. He noted that they failed to cite *Lochner* and a few other discredited cases that would support their decision.<sup>312</sup> Black added:

The two they do cite and quote from, *Meyer v. Nebraska*, and *Pierce v. Society of Sisters*, were both decided in opinions by Mr. Justice McReynolds which elaborated the same natural law due process philosophy found in *Lochner v. New York*, one of the cases on which he relied in *Meyer*, along with such other long-discredited decisions as, e.g., *Adams v. Tanner* and *Adkins v. Children’s Hospital*.<sup>313</sup>

The discussion of *Lochner* by Douglas and Black in *Griswold* seems to have provoked a greater focus on the case.<sup>314</sup> Legal scholars increasingly

309. *Griswold*, 381 U.S. at 502 (White, J., concurring) (citations omitted).

310. Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 743 (1989); see generally KEN I. KERSCH, *CONSTRUCTING CIVIL LIBERTIES* (2004) (explaining that until the post-World War II era, it was the “conservatives” who typically supported constitutional privacy rights, and “Progressives” who typically were opposed.).

311. John Hart Ely, serving as Earl Warren’s clerk, argued that the *Griswold* opinion should rely on an equal protection argument that the Connecticut statute in question prevented the operation of birth control clinics for the poor, while better-off patients were able to receive contraceptives from private physicians. LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 45 (1996).

312. *Griswold*, 381 U.S. at 514–15 (Black, J., dissenting). The other cases he cited are *Coppage v. Kansas*, 236 U.S. 1, *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, and *Adkins v. Children’s Hospital*, 261 U.S. 525. *Id.* at 515.

313. *Id.* at 516 (citations omitted).

314. E.g., Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 155 (“It is difficult for me to escape the conclusion that under a thin veil of constitutional history, the Golberg-Warren-Brennan interpretation of the Ninth Amendment is, as Mr. Justice Black asserts, little more than a way of returning to an open-ended concept of substantive due process after *Lochner*.”); *Id.* at 158 (singling out *Lochner* once again); Robert. G. McCloskey, *Reflections on the Warren Court*, 51 VA. L. REV. 1229, 1269 (1965) (referring to the “*Lochner* doctrine” of “constitutional supervision in

cited *Lochner* as the paradigmatic police powers case of the pre-New Deal era,<sup>315</sup> and critics often charged the Warren Court with *Lochnerian* judicial activism.<sup>316</sup> With liberals in the majority, however, the Court and its defenders mostly brushed off such criticism.

*E. The Tipping Point: Roe v. Wade, the Tribe Treatise, and the 1970s*

While *Lochner* era due process jurisprudence always had its severe critics, *Lochner* itself did not become a common negative touchstone until the early 1970s. Indeed, use of the phrase “*Lochner* era” to describe the Court’s due process jurisprudence of the pre-New Deal period was virtually unknown until 1970, when the phrase appeared several times in Gerald Gunther’s popular constitutional law casebook.<sup>317</sup> Over the next several years, the phrase made sporadic appearances in the law review literature,<sup>318</sup> including in *Harvard Law Review* forewords by Gunther<sup>319</sup> and Laurence Tribe.<sup>320</sup>

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the economic field”). Note that McCloskey had recently written an article on “economic substantive due process” in which he ignored *Lochner*. See McCloskey, *supra* note 278.

315. I base this conclusion on a search of Hein-on-Line of law review articles containing the text “*Lochner v. New York*.” See also ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 21 (1970) (using *Lochner* in this way).

316. See 8 OWEN M. FISS, *HISTORY OF THE SUPREME COURT OF AMERICA: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910*, at 10 (1993) (“[C]omparisons with *Lochner* were frequently made to reproach the Warren Court”).

317. GERALD GUNTHER & NOEL T. DOWLING, *CONSTITUTIONAL LAW: CASES AND MATERIALS* 982–84 (8th ed. 1970). By contrast, a survey of other constitutional law textbooks published between 1965 and 1973 reveals that none of them used the phrase “*Lochner* era.” EDWARD L. BARRETT, JR. ET AL., *CONSTITUTIONAL LAW: CASES AND MATERIALS* 621–22, 665–70 (3d ed. 1968) (utilizing *Lochner* as a “main case” and referring to it as the “high water mark” of an era in which the Court gave “wide protection for freedom of economic enterprise”); SHERMAN L. COHN, *MATERIALS IN CONSTITUTIONAL LAW: THE FEDERAL JUDICIARY AND THE FEDERAL-STATE CONCEPT* (1968) (ignoring *Lochner*); 2 PAUL A. FREUND ET AL., *CONSTITUTIONAL LAW: CASES AND OTHER PROBLEMS* 1608–1615 (3d ed. 1967) (reprinting *Lochner* among several cases in a section on “regulations of business activity”); PAUL G. KAUPER, *CONSTITUTIONAL LAW: CASES AND MATERIALS* 902–05 (3d ed. 1966) (citing *Lochner* as a “note case”); PAUL KAUPER, *CONSTITUTIONAL LAW: CASES AND MATERIALS* 623, 1333 (4th ed. 1972) (characterizing *Lochner* as protecting economic liberty against arbitrary government restrictions); WILLIAM LOCKHART ET AL., *THE AMERICAN CONSTITUTION: CASES AND MATERIALS* 313–17 (3d ed. 1970) (utilizing *Lochner* as a “main case” and criticizing the Court for substituting its judgment for legislative judgment); WILLIAM LOCKHART ET AL., *THE AMERICAN CONSTITUTION: CASES AND MATERIALS* 324–30 (2d ed. 1967) (same); JOHN HOWARD VANDERZELL, *THE SUPREME COURT AND AMERICAN GOVERNMENT* (1968) (ignoring *Lochner*).

318. A Hein-on-Line search for “*Lochner* era” in the “most-cited law reviews” finds four uses between 1970 and 1972, and another six uses in 1973 and 1974, in the wake of *Roe*.

319. Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 11 (1972).

320. Laurence Tribe, *The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 7 n.35, 8 n.39, 12, 31, 45 & 52 (1973).

In 1973, *Lochner* received new prominence in the wake of *Roe v. Wade*.<sup>321</sup> In *Roe*, the majority relied on the Due Process Clause to invalidate restrictions on abortion. The Court rejected both a Ninth Amendment argument and Douglas's "penumbras and emanations" theory, and instead located the "right to privacy" "in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action."<sup>322</sup> The opinion the Court cited in favor of its understanding of the Fourteenth Amendment was none other than *Meyer v. Nebraska*.<sup>323</sup> The Court denied that it was engaging in illegitimate judicial activism, and favorably cited Holmes's *Lochner* dissent.<sup>324</sup> Justice Rehnquist responded:

While the Court's opinion quotes from the dissent of Mr. Justice Holmes in *Lochner v. New York*, the result it reaches is more closely attuned to the majority opinion of Mr. Justice Peckham in that case. As in *Lochner* and similar cases applying substantive due process standards to economic and social welfare legislation, the adoption of the compelling state interest standard will inevitably require this Court to examine the legislative policies and pass on the wisdom of these policies in the very process of deciding whether a particular state interest put forward may or may not be 'compelling.' The decision here to break pregnancy into three distinct terms and to outline the permissible restrictions the State may impose in each one, for example, partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment.<sup>325</sup>

The *Roe* majority opinion also inspired a famous critique by John Hart Ely. Ely spent a significant portion of an article analogizing *Roe* to *Lochner*.<sup>326</sup> Meanwhile, the 1975 edition of Gunther's casebook spent seven pages following an excerpt of *Lochner* discussing "What was wrong with *Lochner*";<sup>327</sup> the previous edition had limited its commentary on

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321. 410 U.S. 113 (1973).

322. *Id.* at 153.

323. Arguably, the transition from a partially text-based *Griswold* to a *Lochnerian* *Roe* was signaled by the Court's opinion in *Eisenstadt v. Baird*, 405 U.S. 438 (1972). See H. JEFFERSON POWELL, *THE MORAL TRADITION IN AMERICAN CONSTITUTIONALISM* 173–79 (1993).

324. *Roe*, 410 U.S. at 118.

325. *Id.* at 174 (Rehnquist, J., dissenting) (citations omitted).

326. John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *YALE L.J.* 920, 935–46 (1973).

327. GERALD GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 564–70 (9th ed. 1975).

*Lochner* to one page.<sup>328</sup> The *Lochner* material appeared in a chapter entitled “Substantive Due Process: Rise, Decline, Revival,” which, as the title suggests, also included material on *Griswold* and *Roe*. Gunther presented these cases as substantive due process cases in the same jurisprudential tradition, as he attempted to discredit the latter cases.<sup>329</sup>

As *Lochner* became more notorious, use of the phrase “*Lochner* era” continued to gradually expand.<sup>330</sup> Gunther titled his casebook’s subsection on pre-New Deal liberty of contract jurisprudence “The *Lochner* Era: Judicial Intervention and Economic Regulation.”<sup>331</sup> The phrase “*Lochner* era” first appeared in a judicial opinion in Supreme Court Justice Lewis Powell’s plurality opinion in *Moore v. City of East Cleveland* in 1977, citing Gunther.<sup>332</sup>

However, the most important event in establishing *Lochner* as the paradigmatic anti-canonical economic substantive due process case, and in establishing the phrase and concept “*Lochner* era” in the legal community’s consciousness, was almost certainly publication of Laurence Tribe’s treatise on constitutional law in 1978.<sup>333</sup> Tribe defined the *Lochner* era as lasting between 1897 and 1937, and spent over twenty pages explaining why he believed that *Lochner* and its progeny were wrongly decided, consistently using “*Lochner*” as shorthand for all of the Supreme Court’s liberty of contract jurisprudence.<sup>334</sup> Tribe also pioneered a modern liberal interpretation of *Lochner* as a case that properly adopted a strong role for the judiciary in protecting individual rights, but that failed to understand that “economic liberty” was no longer a viable concept in the

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328. GUNTHER & DOWLING, *supra* note 317, at 963.

329. Randy E. Barnett, *Justice Kennedy’s Libertarian Revolution: Lawrence v. Texas*, 2003 CATO SUP. CT. REV. 21 (discussing Barnett’s correspondence with Gunther on this point).

330. A Hein-on-Line search for “*Lochner* era” in the “most-cited law reviews” finds thirteen uses of the phrase between 1975 and 1978.

331. GUNTHER, *supra* note 327, at 557 (9th edition).

332. *Moore v. City of E. Cleveland*, 431 U.S. 494, 502 (1977) (citing G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 550–96 (9th ed. 1975)) (“As the history of the *Lochner* era demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court.”). The first use of “*Lochner* era” in a Supreme Court brief was Petitioner’s brief, *Dicks v. Naff*, 415 U.S. 958 (1974) (No. 73-1128).

333. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (1978). Indeed, an essay published on the “Constitution and Economic Rights” just as Tribe’s treatise was coming out never uses the phrase “*Lochner* era,” and indeed (and notably for an essay on this particular topic) barely mentions *Lochner*. Martin Shapiro, *The Constitution and Economic Rights*, in ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 74 (M. Judd Harmon ed. 1978).

334. *Id.* at 434–55.

wake of the industrial revolution. Following publication of Tribe's treatise, use of the phrase "*Lochner* era" in the law review literature skyrocketed.<sup>335</sup>

#### F. *Lochner* Today

By the late 1980s, many constitutional law scholars grew unhappy with the traditional critique of *Lochner*, which, following Justice Holmes, criticized the *Lochner* Court for illegitimate judicial intervention with lawmaking by the legislature. With the ascendancy of a conservative majority on the Supreme Court, liberals recognized that some of their most cherished Warren and Burger Courts substantive due process decisions—not least, *Roe v. Wade*<sup>336</sup>—were vulnerable to being overruled as *Lochnerian*.<sup>337</sup>

Professor Barbara Fried notes that "[i]t has been a perennial problem for left liberal political theorists over the past forty years. . . to explain why the Court is not merely engaged in that most dread of all pursuits, 'Lochnerizing'. . . when, for example, it overturns state anti-abortion laws or mandates school desegregation."<sup>338</sup> As conservative Hadley Arkes puts it, "[t]he devotees of modern liberal jurisprudence may not find *Lochner* congenial, but it is not clear that they can assemble any moral argument against it."<sup>339</sup>

Growing discomfort with the traditional critique of *Lochner* led to something of a cottage industry of *Lochner* reinterpretation among constitutional law scholars. While conservatives argue that the current

335. A Hein-on-Line search for "*Lochner* era" in the "most-cited law reviews" finds over sixty uses of that phrase between 1979 and 1985. The growing prominence of *Lochner* in the 1970s is illustrated by concurrent editions of a book by Alpheus Thomas Mason. Mason's 1968 *The Supreme Court from Taft to Warren* contains only one reference to *Lochner*. Mason's 1979 *The Supreme Court from Taft to Burger* contains five references to *Lochner*. ALPHEUS THOMAS MASON, *THE SUPREME COURT FROM TAFT TO BURGER* (1979); ALPHEUS THOMAS MASON, *THE SUPREME COURT FROM TAFT TO WARREN* (1968).

336. 410 U.S. 113 (1973).

337. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 31–32 (1990) (criticizing *Roe* as *Lochnerian*). Martin Shapiro had warned a decade earlier that

those liberal commentators who applaud the activism of the Warren Court would do well to remember that the economic theories of the turn-of-the-century Court were as public interest-oriented, more clearly articulated, better scientifically grounded, and show greater survival value than the sociological, psychological, and criminological theories that shimmered just below the surface of much of what the Warren Court did.

Shapiro, *supra* note 333, at 80.

338. BARBARA H. FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* 207 (1998).

339. Arkes, *supra* note 109, at 125.

Court should reassess its endorsement of *Griswold*, *Roe*, and other cases recognizing implicit fundamental rights under the Due Process Clause because they are in the same tradition as *Lochner*,<sup>340</sup> many liberal constitutional law scholars demur.

Some scholars have argued that *Lochner* and *Roe* are not really in the same tradition,<sup>341</sup> but, as intimated by Justice Potter Stewart in his concurrence in *Roe*,<sup>342</sup> their claims are not persuasive.<sup>343</sup> Indeed, the recognition that *Lochner* and *Roe* are in the same fundamental rights tradition has caused other contemporary liberal scholars to reassess their understanding of *Lochner*. Following in the pioneering footsteps of John Hart Ely<sup>344</sup> and Laurence Tribe, they argue that the *Lochner* era Court chose an appropriate role for the Court—defender of last resort of fundamental rights—but simply chose the wrong rights to emphasize; the *Lochner* Court myopically focused on liberty of contract, a right that had become anachronistic in a modern industrial economy. Instead, the Court should have focused on the civil liberties necessary for a properly-functioning modern liberal democracy.<sup>345</sup> These liberal scholars argue that the Court eventually got it right, and *Lochner*, perhaps, should be recognized as a misstep on an otherwise sound path, not an irredeemable mistake. Their revisionist view of *Lochner* has found support in a burgeoning literature from legal historians that has effectively debunked the traditional view that *Lochnerian* jurisprudence was based on Social Darwinist ideology.<sup>346</sup> More recent (and better) scholarship has shown

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340. See, e.g., BORK, *supra* note 337.

341. E.g., GILLMAN, *supra* note 27, at 1–18 (attributing *Lochner* to opposition to class legislation); Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 873–75 (1987) (attributing *Lochner* to the Court's desire to constitutionalize common law rules and entitlements). For criticism from an alternative revisionist perspective, see Bernstein, *Lochner's Legacy's Legacy*, *supra* note 24, and Bernstein, *Lochner Era Revisionism, Revised*, *supra* note 18, respectively.

342. “[I]t was clear to me then, and it is equally clear to me now, that the *Griswold* decision can be rationally understood only as . . . one in a long line of pre-*Skrupa* cases decided under the doctrine of substantive due process, and I now accept it as such.” *Roe v. Wade*, 410 U.S. 113, 167–68 (1973) (Stewart, J., concurring).

343. As Markus Dubber notes, “*Roe* and its predecessors came to be thought of as something completely new, having to do with novel notions like ‘penumbras’ of enumerated rights and ‘the right to privacy’, rather than as a continuation of the struggle to define and limit state power, and the power to police in particular.” MARKUS DIRK DUBBER, *THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT* 203 (2005) (internal citation omitted).

344. JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

345. A position along these lines has been advocated by Ackerman and Fiss. See 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 255–78 (1998); FISS, *supra* note 316, at 9–21.

346. See *supra* note 27 (citing Bernstein, Cushman, Gillman, etc.)

that, as discussed previously, *Lochner* had its roots in natural rights ideology and opposition to class legislation.<sup>347</sup>

The modern liberal interpretation of *Lochner* was adopted by the Supreme Court's plurality per curiam opinion in *Planned Parenthood v. Casey*, in a section attributed to Justice O'Connor.<sup>348</sup> O'Connor, discussing why overruling *Lochner* was appropriate in 1937, but overruling *Roe* would not be appropriate in 1992, explained that with regard to *Lochner*,

[T]he Depression had come and, with it, the lesson that seemed unmistakable to most people by 1937, that the interpretation of contractual freedom protected in *Adkins* rested on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare.<sup>349</sup>

Thus, *Lochner's* error was not the somewhat aggressive use of substantive due process to protect unenumerated individual rights, but the Court's choice to protect liberty of contract.

Since *Casey*, Justices Souter and Kennedy have grown increasingly bold about associating their substantive due process jurisprudence with the jurisprudence of the *Lochner* era, and even, to some degree, *Lochner* itself. Justice Souter has argued that *Lochner* was correct to apply the Due Process Clause to prohibit arbitrary legislation, but was wrong to apply a version of review that he thinks was reminiscent of *Dred Scott v. Sandford*<sup>350</sup> in its "absolutist implementation of the standard they espoused."<sup>351</sup> By contrast, Souter contends that *Meyer* and *Pierce* properly applied heightened scrutiny to truly important interests.<sup>352</sup>

Souter is nevertheless still willing to use *Lochner* as an epithet when he disagrees with his colleagues' federalism opinions.<sup>353</sup> Indeed, to Justices on the "left" of the Rehnquist Court, the majority's decisions expanding the scope of the Eleventh Amendment<sup>354</sup> and limiting the scope of the Commerce Clause<sup>355</sup> are reminiscent of *Lochner*. In these Justices' minds,

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347. See GILLMAN, *supra* note 27; Bernstein, *supra* note 291.

348. 505 U.S. 833, 861–62 (1992).

349. *Id.*

350. 60 U.S. (19 How.) 393 (1856).

351. *Washington v. Glucksberg*, 521 U.S. 702, 761 (1997) (Souter, J., concurring).

352. *Id.* at 761–62. See generally David D. Meyer, *Lochner Redeemed: Family Privacy After Troxel and Carhart*, 48 U.C.L.A. L. REV. 1125 (2001) (noting the influence of *Meyer* and *Pierce* on modern substantive due process jurisprudence in family privacy cases).

353. *Alden v. Maine*, 527 U.S. 706, 814 (1999) (Souter, J., dissenting).

354. *E.g., id.*

355. *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549

the majority is repeating *Lochner's* error in allowing limited-government ideology to blind itself to the negative consequences of involving itself in limiting the government's ability to regulate on behalf of the social good.

Justice Kennedy's opinion in *Lawrence v. Texas*, meanwhile, enthusiastically and unabashedly cites *Meyer* and *Pierce* as "broad statements of the substantive reach of liberty under the Due Process Clause."<sup>356</sup> Unlike prior modern substantive due process cases, in which the Court adhered to a strict division between due process rights deserving "strict scrutiny" and those deserving only "rational basis" scrutiny, *Lawrence* does not make this distinction, giving the case a much more *Lochnerian* feel. Kennedy's opinion in *State Farm v. Campbell*,<sup>357</sup> which placed strict substantive due process limitations on state punitive damages awards, suggests that unlike the Warren Court, the current Court does not necessarily disavow meaningful review of government action that affects "mere" economic rights, though it is hardly about to revive full-fledged *Lochnerism*.<sup>358</sup>

Conservative judges and scholars, for their part, still for the most part condemn *Lochner* for improper "judicial activism."<sup>359</sup> But *Lochner's* reputation has been sufficiently polished that some leading legal scholars, albeit from the libertarian minority, forcefully argue that *Griswold* and *Lochner* were *both* correctly decided.<sup>360</sup> Scholars from across the political spectrum increasingly argue that in completely abandoning *Lochner*, the Court has left important economic rights vulnerable to government overreaching.<sup>361</sup>

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(1995).

356. 539 U.S. 558, 564 (2003).

357. 538 U.S. 408 (2003).

358. See also *E. Enter. v. Apfel*, 524 U.S. 498, 539 (1998) (Kennedy, J., concurring) (casting the deciding vote invalidating an economic regulation on substantive due process grounds).

359. See, e.g., A. Raymond Randolph, Barbara K. Olson Memorial Lecture, Federalist Society, Nov. 11, 2005, <http://www.fed-soc.org/Publications/Transcripts/randolphBKO.pdf> (criticizing recent Supreme Court cases for reviving *Lochnerian* activism).

360. See, e.g., Richard A. Epstein, *Liberty, Equality, and Privacy: Choosing a Legal Foundation for Gay Rights*, 2002 U. CHI. LEGAL F. 73, 84–93 ("[T]he traditional *Lochner* framework supports *Griswold's* outcome without its messy resort to penumbras in the desperate effort to distance itself from *Lochner*."); see also Barnett, *supra* note 329 (defending *Lochner* and praising Justice Kennedy's extension of *Griswold* in *Lawrence*); Ellen Frankel Paul, *Freedom of Contract and the "Political Economy" of Lochner v. New York*, 1 NYU J.L. & LIB. 515 (2005) (concluding that the primary problem with the Court's *Lochnerian* jurisprudence was that it was too timid and wishy-washy).

361. See, e.g., Meese, *supra* note 272, at 3–11 (suggesting that the Court was wrong to abandon *Lochner* completely); Michael J. Phillips, *Entry Restrictions in the Lochner Court*, 4 GEO. MASON L. REV. 405, 405–06 (1996) (contending that *Lochnerian* decisions prohibiting monopolization of certain occupations were correct); Roger Pilon, *How Constitutional Corruption Has Led to Ideological Litmus Tests for Judicial Nominees*, 7 Cato Policy Analysis No. 446 (Aug. 8, 2002), available at

In any event, despite the debate among conservatives, libertarians, and liberals over *Lochner*, *Lochnerism* is firmly entrenched in American jurisprudence by the Court's "incorporation" of most of the substantive rights contained in the Bill of Rights into the Fourteenth Amendment's Due Process Clause. With his focus on an expansive liberty-protective interpretation of the Clause in *Lochner* (and *Allgeyer*), Justice Peckham's opinions opened the door for Justice McReynolds' even more expansive opinion in *Meyer*, which in turn continues to serve as the "constitutional foundation of innumerable substantive rights that have been proclaimed by the Supreme Court in the twentieth century."<sup>362</sup> That the current constitutional debate is only over the scope of the Due Process Clause's protection of rights not enumerated in the Bill of Rights, and not over whether the Due Process Clause protects substantive rights in the first instance, or even whether unenumerated rights are ever protected by the Clause, is a testament to the ultimate triumph of Peckham's vision of the Due Process Clause as the source of the Court's power to act as defender of last resort of individual liberties against the states, if not of his specific views on the scope of that clause.

#### CONCLUSION

This *Lochner* retrospective shows that the history of the *Lochner* case has been consistently distorted. The decades-long treatment of *Lochner* as "formalist" served the interests of liberal advocates of sociological jurisprudence and legal realism, but was directly contradicted by the history (and text!) of the *Lochner* decision. Moreover, the *Lochner* decision has often been portrayed as an example of the Court clearly

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<http://www.cato.org/pubs/pas/pa-446es.html>. David Strauss has recently argued that the *Lochner* Court was correct to protect liberty of contract, but that it interpreted the doctrine too broadly. David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373, 375 (2003). For a similar analysis, see Walter Dellinger, *The Indivisibility of Economic Rights and Personal Liberty*, 2003-04 CATO SUP. CT. REV. 9. By contrast with this recent outpouring of sympathy for *Lochner*, between 1937 (and perhaps earlier) and the late 1970s, there were extremely few published scholarly works expressing sympathy for *Lochner*. See, e.g., Albert A. Mavrinac, *From Lochner to Brown v. Topeka: The Court and Conflicting Concepts of the Political Process*, 52 AM. POL. SCI. REV. 641 (1958); Guy Miller Struve, *The Less-Restrictive-Alternative Principle and Economic Due Process*, 80 HARV. L. REV. 1463 (1967). The most significant work signaling a revival in sympathetic attention to *Lochnerian* jurisprudence was BERNARD SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* (1980); see also William Letwin, *Economic Due Process in the American Constitution and The Rule of Law, in LIBERTY AND THE RULE OF LAW* (Robert L. Cunningham ed. 1979); Eric Mack, *In Defense of 'Unbridled' Freedom of Contract*, AM. J. ECON. & SOCIOLOGY 1 (Jan. 1980).

362. Donald Drakeman, *The Substance of Process: Lochner v. New York, in GREAT CASES IN CONSTITUTIONAL LAW* 130, 131 (Robert P. George ed., 2000).

favoring the interests of the rich and powerful over those of the poor and helpless. In fact, as we have seen, *Lochner* involved a local dispute between small-time bakery owners, mostly former bakery employees themselves, who felt put-upon by the bakers' union, and a bakers' union dominated by individuals of German descent struggling mightily to combat competition from workers from other ethnic groups. That this dispute has taken on mythic proportions as a battle between "capital" and "labor" bespeaks the tendency of academics to write their own ideological preoccupations into constitutional history.

Moreover, the history of *Lochner* shows that the academic community—including historians, political scientists, and law professors—can distort the origins and history of an entire line of cases for decades before revisionist scholarship finally begins to correct the errors. The academic community should be ashamed that for so many years scholarly works routinely stated that *Lochnerian* jurisprudence had its origins in "Social Darwinism" without any meaningful supporting evidence beyond a misinterpreted line from Holmes's *Lochner* dissent. Moreover, the more general notion that pre-New Deal due process jurisprudence was rooted in radical laissez-faire ideology should have been self-refuting to anyone familiar with the relevant cases.

*Lochner* also teaches us that the importance the legal community places on a particular case may be largely unrelated to the perceived importance of the case both at the time it was decided, and for many decades thereafter. *Lochner* was certainly a significant case, but it never achieved anti-canonical prominence until the 1970s, when it became a foil for debate over *Griswold* and especially *Roe*. Ironically, despite attempts of *Roe* opponents to discredit *Roe* by associating it with *Lochner*, during the Rehnquist Court substantive due process jurisprudence has become increasingly and explicitly *Lochnerian* (in a broad sense) in cases such as *Casey* and *Lawrence*.

Largely because of its *Lochnerian* origins, modern substantive due process jurisprudence has been, and remains, doctrinally unstable. Its roots lie in *Meyer v. Nebraska*, but *Meyer* itself is in the same tradition as, and built upon, *Lochner*. The current Justices who support the protection of unenumerated constitutional rights through substantive due process have not successfully explained why economic regulation is nearly exempt from serious due process scrutiny. Most likely, due process will either expand to cover some forms of economic regulation or it will die; as *State Farm* and other rulings suggest, relatively conservative Justices such as Kennedy are unlikely to support a doctrine of substantive due process that completely ignores overreaching government economic regulation. Moreover, with

the controversy over the New Deal fading into memory, the growing influence of public choice theory,<sup>363</sup> and the resurgence of anti-statist economic thought,<sup>364</sup> the idea of reviving some limits on government regulatory power no longer seems absurd and reactionary.

Finally, while *Lochner* seems to be gradually losing the anti-canonical status it achieved in the 1970s,<sup>365</sup> *Lochner*'s important role in the debate over American constitutionalism is likely to continue for some time. As Hadley Arkes notes,

today we live firmly within the case of *Lochner*. That case is ridiculed, derided, by the right as well as the left, and yet the structure of jurisprudence marked by the case is the structure that our judges, left and right, choose again, choose anew, whenever they are faced with the need to choose.<sup>366</sup>

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363. See, e.g., GORDON TULLOCK ET AL., *GOVERNMENT FAILURE : A PRIMER IN PUBLIC CHOICE* (2002).

364. For a lively history of modern economics, emphasizing the free-market branch, see MARK SKOUSEN, *THE MAKING OF MODERN ECONOMICS* (2001).

365. See Howard Gillman, *De-Lochnerizing Lochner*, 85 B.U. L. REV. 859, 865 (2005) (musing over whether there is "anything remaining of *Lochner* that raises especially interesting questions for American constitutional theory").

366. Arkes, *supra* note 109, at 101.