Lochner v. New York

A LAW AND ECONOMICS REEXAMINATION THROUGH MODERN CIVIL LIBERTIES CASES AND CONTRACT CLAUSE INTERPRETATION

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No case heard in the Supreme Court is held in such contempt by conservative and liberal justices and constitutional scholars but remains so deeply embedded in jurisprudence as the economic liberty case *Lochner v. New York*. In *Lochner*, the Court examined the constitutionality of the New York Bakeshop Act of 1895. The law established minimum sanitation requirements and set a ceiling on the hours bakers could legally work in a day and week. Joseph Lochner was arrested for violating the maximum-hour regulations and appealed to the Supreme Court, arguing that the law abridged his economic liberty protected under the 14th Amendment's due process clause.

The Court ruled in favor of Lochner, overturning the maximum-hours provision in the Bakeshop Act. Since the decision, journalists, scholars, lawyers, and judges have criticized *Lochner*.

Although no justice would directly refer to the anticanonical[1] *Lochner* in an opinion (except perhaps to degrade the opposition's arguments or differentiate their opinion from *Lochner*), the practice exhibited in *Lochner* of invoking substantive due process to secure a right undergirds modern cases such as *Roe v. Wade* for the right to privacy and *Obergefell v. Hodges* for the right to marry. In a time when the conservative-majority Court considers overturning *Roe v. Wade*, *Lochner* is ripe for reexamination.

This report contextualizes these modern discussions by describing the background and influence of *Lochner* and outlining and analyzing the scholarship surrounding the case through an originalist constitutional paradigm. It then proffers an alternative path for examining *Lochner* by applying Richard Epstein's framework from the 1984 article "Toward a Revitalization of the Contract Clause." When applied to *Lochner*, Epstein's framework supports a contract clause defense of the liberty-to-contract question asked in *Lochner*, turning the liberty to contract from an unenumerated right assumed under the 14th Amendment's due process clause to an enumerated right enshrined in Article I, Section 10.[2]

As an enumerated right, the Court should approach the liberty of contract differently than it has in the past: assuming the liberty except in stringent circumstances, rather than requiring the individual claiming protection to demonstrate the liberty overcomes the state's police power. This report seeks to contribute context to the modern debates regarding whether to repeal *Roe v. Wade* and whether the contract clause needs reinterpretation, as Justice Neil Gorsuch motioned for in *Sveen v. Melin*.[3]

Lochner Background and Case

Before analyzing the *Lochner* decision, it is necessary to briefly set the case's background by sketching the legislative and labor environments in which the *Lochner* case originated and to elaborate on who Joseph Lochner was, the case's facts, the details of the Court's ruling, and the public's response to the ruling.

The Conditions of New York Bakeries and the Bakeshop Act of 1895. In the late 19th century and early 20th century, bakeries were crippled by labor-intensive processes without mass production capacity and with few methods to improve efficiency.[4] As a result, bakery owners resorted to cutting costs elsewhere to maintain what profit margins they could. They often rented cellars or basements of tenement buildings around the city, which offered cheap rent costs but poor working conditions.

In New York City, roughly 87 percent of bakers worked in cellar bakeries during this time.[5] According to union-sponsored reporters, the cellars were not made for cleanliness and often had unsatisfactory sanitation conditions.[6] Ceilings were often just six to 10 feet from sewage-soaked dirt floors, and the absence of windows created stuffy, cramped working conditions.[7]

In 1895, the Bakery and Confectionery Workers International Union of America in New York introduced the New York Bakeshop Act to the New York State Assembly. The salient provision from the act stated bakers could work only 10 hours a day and 60 hours per week. Although the act's expressed purpose was to improve the condition of cellar bakeries for workers and, by extension, the goods produced in those bakeries, the act functioned as anticompetitive legislation that suppressed small bakeries. These bakeries could not afford to operate under the same conditions as the large unionized bakeries that pushed for the act's passage. In his book *Rehabilitating Lochner: Defending Individual Rights Against Progressive Reforms*,[8] David E. Bernstein notes the unions' support for the bill included both economic and racial motives.

> The bakers' union conceived of and promoted the hours legislation not simply to address health concerns, but also to drive small bakeshops that employed recent immigrants out of the industry. The Union also encouraged selective enforcement of the law against nonunion bakeries. Large corporate bakeries, meanwhile, *supported* and also benefited from the maximum-hours legislation invalidated in *Lochner*.[9]

Racial and ethnic tensions exacerbated the selective enforcement. Unlike the unionized bakeries constituted primarily of German and Anglo-Irish bakers, the small cellar bakeries employed a workforce of mostly ethnic minorities, especially Italians, French, and Jews.

Bernstein cites the 1896 Annual Report of the Factory Inspectors of the State of New York to demonstrate unionized workers rarely worked more than 10 hours a day or 60 hours per week before the legislation passed.[10] Conversely, smaller bakeries required almost around-the-clock attention. As a result, the legislation disproportionately affected small bakeries and forced some out of business. The act was a nonbinding hours ceiling law for unionized workers but a binding limit for smaller bakeries and nonunion workers.

As the 1895 bill worked its way through the legislature, bakers from the East Side of New York went on strike, demanding better working conditions.[11] However, organized labor alone lacked political muscle at the time, representing just 5.5 percent of the workforce in 1897. Despite politically weak labor unions, Henry Weismann,[12] the general secretary of the bakers' union and editor of a bakers' labor union magazine, increased popular support for the Bakeshop Act.[13]

Weismann persuaded Cyrus Edson and Edward Marshall to write stories about the dreadful conditions of cellar bakeries and use the media to garner support for the Bakeshop Act. Weismann obviated objective reporting; instead, he hired unionized bakers familiar with the worst cellar bakeries to take reporters to an unrepresentative sample that Weismann hoped would generate a skewed story.

Indeed, Charles G. Purdy wrote to Z. Taylor Emery, the Brooklyn commissioner of health, and dubbed the resulting stories "greatly exaggerated and most of [them] absolutely false."[14] Although the descriptions of the horrible working conditions were true in some cases, the union's anticompetitive motivation colored reporting and inveigled the public and legislature to pass the Bakeshop Act on the pretext of promoting bakers' health and public safety.

The Facts of the Case. The *Lochner* case arose because small bakeries wanted exceptions from the maximum-hour legislation for overtime, but the act strictly prohibited working above the maximum under any circumstances. Small bakeries desired to test the legislation's soundness in court and pushed the New York State Bakers Association, an association of small bakeries, to challenge the legislation. The association believed Joseph Lochner, an association member, presented the perfect opportunity for such a protest.[15]

Bernstein records that Lochner was a Bavarian immigrant who owned and operated a bakery in Utica, New York.[16] The unions brought Lochner to court for allowing one of his workers, Aman Schmitter, to voluntarily work more than 60 hours in a week because Schmitter wanted to learn cake baking. The state court's ruling deemed the voluntary nature of the arrangement inconsequential, and Lochner was fined.

Rather than paying the fine, Lochner appealed to the Supreme Court. The Court faced the question: Does the provision limiting the number of hours a person can lawfully work to 10 in a day and 60 in a week violate the due process clause of the 14th Amendment that protects the liberty of contract?[17]

The Supreme Court's Decision and Reasoning. In a 5–4 ruling, the Court held the Bakeshop Act's maximum-hours provision violated the 14th Amendment's due process clause. Justice Rufus W. Peckham, who delivered the majority's opinion, began by referencing two cases.

First, he cited the *Allgeyer v. Louisiana* decision. *Allgeyer* secured the liberty to contract by establishing that the right to sell one's labor falls within the right to property protected by the 14th Amendment except in certain circumstances—namely, when the state's police power that extends to securing the public safety, health, morals, and general welfare overcomes the liberty in question. If the contract violates a statute, has an immoral purpose, or commits any other unlawful act, it is not protected by the Constitution.

Peckham also referenced *Holden v. Hardy*, a case in which the Court upheld maximum-hours legislation because it deemed mining an unhealthful occupation.[18] However, the Utah statute allowed for a breach of the hour ceiling in cases of emergency, whereas the New York Bakeshop Act did not allow for any violations, whether through voluntary employee action or employer requirement.

In light of these two cases, Peckham acknowledged the balance between the liberty to contract and the state's police power, but he wrote the police power must be bounded.

> The question necessarily arose: is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family?[19]

To answer this question, Peckham noted the Bakeshop Act did not secure the public health because "clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week."[20] Using statistics, logic, and evidence from physicians, Peckham asserted a baker's trade is in no way unhealthful. He further dismissed the state's argument that if a baker works fewer hours, then he and his work will benefit.

Peckham concluded that the law neither protects morals nor the public health and safety. Therefore, it must have other motives, and those motives are to prohibit or interfere with the freedom of contract between employer and employee. Therefore, the Bakeshop Act's maximum-hours provision is an overextension of the police power and violates the 14th Amendment's due process clause.

The case has two dissents: one by Justice John Marshall Harlan, joined by three justices, and the other by only Justice Oliver Wendell Holmes. Although Harlan engaged more directly with the majority's arguments, Holmes wrote the dissent that lasts in the public's memory and stands among the most famous dissents in Supreme Court history. Harlan's dissent accepted many of the majority's arguments, including the right to liberty of contract. Harlan disagreed only with the majority's analysis of the motivation for the act. He suggested the act was clearly intended to protect bakers' well-being. He cited a few professors and writers stating that baking is a labor-intensive occupation and notes that other countries had lower average work time for bakers than the United States did.

Holmes' dissent does not substantively engage with the arguments offered by either the majority or his fellow dissenters. Nevertheless, Holmes defined the modern reception of the *Lochner* decision and predicted the direction of the New Deal–era Court. Holmes made two primary claims. First, the court asserted its own economic ideology, superimposing its preference for laissez-faire economics onto an otherwise neutral Constitution. Second, the democratic decision of the people should decide questions not expressly answered in the Constitution.

Although originalists often adopt a similar standpoint about unenumerated subjects in the Constitution, Holmes' approach disregards natural law. Originalists generally acknowledge the "original public meaning" and the common law that undergirds that, including natural law. However, Holmes disregarded natural law in favor of legal positivism. Francis Biddle cites a letter Holmes wrote to Harold J. Laski in 1926 in which Holmes rejects the common law, considering it a "mystic overlaw, not a law in any true sense."[21]

Thus, Holmes jettisoned the natural rights basis by which the original public meaning of the text can often be determined. Without the natural rights basis, the liberty of contract doctrine adopted previously holds no basis. Conversely, if the Court uses the natural rights approach (as outlined by Barnett) to determine whether the Constitution speaks on a subject through its original public meaning, Holmes' claim is unfounded.[22]

Although provocative, Holmes' dissent is not supported by (nor does it accurately represent) the case's facts. Instead, Holmes appears to rely on what he believes to be two self-evident claims. Guided by his procedural rather than moral understanding of law, Holmes suggests the police power should extend as far as the people wish and that the Constitution is procedural only, with no implied or inherent morals tethered to the document's meaning.

While some, such as Justice Harlan, accept the existence of a liberty of contract but consider it a subordinate right, others altogether deny that the due process clause protects the liberty of contract, ranking it a fabricated right.[23] Some criticism occurs in the Supreme Court itself. For example, the majority opinion in *Griswold v. Connecticut* makes sure to distinguish the *Lochner* decision from the *Griswold* decision. Although the economic right to liberty of contract and the civil liberty of the right to privacy seem like two entirely different categories, they both stem from the same justification: substantive due process and the 14th Amendment. Indeed, the bulk of attention paid to *Lochner* does not relate to the economic freedoms or theories discussed within, but rather either criticizes or praises the Court's use of substantive due process and focuses on whether it properly applied the due process clause.

Literature Review

Before engaging in a reexamination of a new method for defending the *Lochner* decision, I outline the various interpretations posited by scholars in the past few decades. Therefore, this section encapsulates the thoughts of myriad scholars from both the pro- and anti-*Lochner* camps. The anti-*Lochner* scholars adopt a wide range of critiques, from the *Lochner* Court illegitimately protecting an unenumerated right to granting the existing right of liberty of contract too much protection and usurping the legislature's role by protecting liberty of contract. The pro-*Lochner* scholars connect the liberty-of-contract

doctrine to pre-political Lockean rights, claiming the freedom to contract stems naturally and irrevocably from these rights.

Lochner's Critics. In a 1976 article, "The Supreme Court and Constitutional Change: *Lochner v. New York* Revisited," D. Grier Stephenson Jr. argues *Lochner* stands as an example of the judiciary deciding a case in the middle of a change in public policy outlook—from laissez-faire principles to the more regulated New Deal economy. Stephenson suggests the Bakeshop Act violated the tradition of the time: a free market in which the judiciary protected economic actors' rights. Part of why the Court had difficulty accepting the constitutional change of the time, Stephenson argues, is because the arguments presented to them painted the maximum-hours regulation as a violation of individual liberty, rather than a provision to protect the workers from unhealthful and dangerous occupations.

However, Stephenson depicts the justices as unwilling to abandon the free-market tradition in the face of political change.[24] He concludes the justices ruled in favor of Lochner and overturned the maximum-hours legislation because they did not realize how persistent or lasting the wave of New Deal regulation would be. Stephenson suggests the Court should have demonstrated more foresight as it attempted to balance the norms and tradition of constitutional interpretation and the public policy changes growing in the early 1900s that would eventually lead to the New Deal.

In a 2005 article, "The Art of Reading *Lochner*," Rebecca L. Brown provides an example of a more hostile approach to the *Lochner* decision.[25] Brown assumes the majority's opinion is justly reviled by constitutional scholars. This assumption undergirds her expressed purpose for the article: to explore why the *Lochner* decision is wrong and clarify for constitutional scholars and judges alike who seek to avoid repeating the *Lochner* majority's sins. Brown labels the somewhat elusive reason for the *Lochner* rejection as the "repudiation," a term she proceeds to define. Generally, the term levels three critiques at the *Lochner* opinion: "(1) it was incorrect as constitutional doctrine; (2) it was illegitimate as judicial behavior; and (3) it was fueled by inappropriate motivations."[26]

Although the widespread rejection of *Lochner*ian reasoning stands plain, the rejection's origin remains somewhat uncertain. Brown dismisses the oft-suggested claim that the New Deal Court began the critique of the *Lochner* decision, instead preferring to accept a conglomeration of politicians, scholars, commentators, and the public as the original propagators.

David A. Strauss takes a more overtly negative opinion of *Lochner* in the 2003 article "Why Is Lochner Wrong?" He asserts *Lochner* holds the title of the most reviled standing Supreme Court decision in history. Strauss detects the myriad and disparate sentiments among scholars for why *Lochner* deserves its anticanonical title.[27] He attributes some variation to the developments in constitutional law since *Lochner* was decided. Cases since *Lochner* rely on similar reasoning to that employed to overturn the maximum-hours legislation, meaning defenders of modern decisions must differentiate themselves from *Lochner*.

Adding some cohesion between the substantive due process reasoning in modern constitutional law and the profuse criticism of *Lochner*, Strauss writes:

> My conclusion, in a word, is that the Lochner-era Court acted defensibly in recognizing freedom of contract but indefensibly in exalting it. Freedom of contract, judged by the standards that developed in the last half of the twentieth century, is a plausible constitutional right. It might merit careful, case-by-case enforcement, undertaken with sensitivity to the limitations of the right as well as its value. The Lochner-era Court went far beyond that. It treated freedom of contract as a cornerstone of the constitutional order and systematically undervalued reasons for limiting or overriding the right.[28]

Strauss further posits a market founded on freedom of contract does not stem from the pre-political state and is thus a governmental choice, just like heavy regulation. The *Lochner* majority treated it

as a pre-political right and therefore afforded it too much protection.

Strauss also suggests the Court did not hold a nuanced understanding of the freedom of contract. In some instances, the freedom of contract should be overruled because the contract in question does not uphold the essential values of the freedom of contract. Illustrating his point, Strauss outlines a scenario in which an employee possesses imperfect information (especially concerning risks to health or safety) or in situations in which asymmetrical bargaining power produces disadvantageous contracts.[29] In these instances and others, impairing the liberty of contract would serve a more important end or value. Strauss notes the Court might be ill prepared to engage in such analysis, meaning the legislature should bear the responsibility of protecting the liberty of contract, a sentiment similar to that of Holmes. Put simply, Strauss believes a lack of humility in how to apply the right to contract explains the problem in the *Lochner* Court's decision.

Victoria F. Nourse writes in "A Tale of Two *Lochner*s: The Untold History of Substantive Due Process and the Idea of Fundamental Rights" that the *Lochner* decision bears its reputation because of an anachronistic application of fundamental rights.[30] Whereas modern courts emphasize rights over general welfare, the courts in 1905 emphasized the general welfare over rights. Therefore, using a 1905 calculus, the Court should have ruled in favor of the Bakeshop Act, not Lochner.

Nourse also differentiates *Lochner* from modern substantive due process and fundamental rights decisions such as *Roe* and *Griswold*. Her reasoning rests on the contention that the modern understanding of substantive due process did not exist when *Lochner* was decided; therefore, the *Lochner* decision is dissimilar to *Roe* and *Griswold*.[31] She concludes that the modern assumption of strong rights, an idea developed decades after *Lochner*, frees substantive due process from any relevant criticism by *Lochner*ian comparison.

In his book *Lochner v. New York: Economic Regulation on Trial*, Paul Kens sketches *Lochner* and the surrounding economic, political, and social environments. He provides a Holmesian opinion of *Lochner*.

> The *Lochner* decision was, and remains, important because it signaled the Court's adoption of one of these competing ideals, *laissez faire*-social Darwinism, at a time when attachment to that philosophy was waning . . . as a matter of fundamental law, the Court had rejected the beliefs and goals of a large and influential group of mainstream Americans.[32]

Kens criticizes Peckham's majority opinion, writing Peckham made no "obvious effort to weigh available evidence" and "the *Lochner* case afforded Peckham an opportunity to express disdain for what he perceived to be a trend toward paternalistic legislation."[33]

To Kens, the *Lochner* decision has little to do with labor regulation. Instead, it represents two competing ideals of the time: the majority's "laissez-faire-social Darwinian interpretation of the Constitution" and the dissenters' preference that "the Court start from a presumption that the legislature's act was valid."[34] Holmes operated from the stance that "no statute should be declared unconstitutional unless a rational person would necessarily admit that it would infringe upon fundamental principles as understood by American laws and traditions."[35] Far more fell in the balance than whether bakers could work more than 10 hours a day and 60 hours a week. The judicial skirmish surrounding the relatively insignificant law represented a constitutional conception of economic theory, government, natural rights, and social contract theory. For this reason, Kens suggests *Lochner* lingers as an uncomfortable shadow over the American legal framework. As the Court decides cases regarding constitutional rights to privacy, abortion, or marriage, *Lochner* remains the immovable backdrop, despite attempts to erase it from legal memory.

Lochner's Advocates. Despite such strong opposition throughout the years, a small group of scholars is beginning to defend *Lochner*. David Bernstein functions as perhaps the best-known authority in the pro-*Lochner* argument. In his 2011 book, *Rehabilitating Lochner: Defending Individual Rights Against*

Progressive Reform, Bernstein writes a detailed account of the history and constitutional precedent surrounding *Lochner*.[36] He contends Anglo-American principles that the government's power is finite and cannot abridge certain inherent rights support the *Lochner* decision because, according to these principles, the due process clause "regulates the substance of legislation as well as judicial procedure."[37] Moreover, he argues the liberty-of-contract doctrine "evolved from long-standing American intellectual traditions that held the government had no authority to enforce arbitrary 'class legislation' or to violate the fundamental natural rights of the American people."

To prove these statements, Bernstein traces the rise of substantive due process and the limits on police power.[38] He argues the rise of substantive due process and a limited police power contributed to the liberty-of-contract doctrine, a doctrine that began in the state courts and percolated to the Supreme Court. The liberty-of-contract doctrine contemporaneous with *Lochner* relied on natural rights. Both the Supreme Court in the *Slaughterhouse* cases[39] and the New York State Court of Appeals[40] argued liberty extended to the right of pursuing a lawful occupation.

The Supreme Court built on this foundation in *Allgeyer v. Louisiana*, the case that formalized the liberty of contract. The formalized doctrine rested on an understanding of natural rights predating the American experiment and an application of the due process clause that protected those natural rights. Therefore, the *Lochner* majority did not engage in judicial activism but protected a liberty of contract assumed in jurisprudence before and after *Lochner* until it fell to the tide of progressive reforms at the height of the New Deal.[41]

Randy Barnett stands as another well-known defender of the *Lochner* decision. In the 2018 article "After All These Years, Lochner Was Not Crazy—It Was Good," Barnett examines the original drafts of the due process of law clause and the privileges and immunities clause to argue the *Lochner* court not only possessed reasonable ground for its decision but also followed closely the intent of the framers and the 14th Amendment.[42] He begins the article by discrediting the claim that *Lochner* applies substantive due process. The modern understanding of substantive due process often identifies an unenumerated right as "fundamental," gives a special status to that right, and subjects laws subversive to that right to strict scrutiny.[43]

Indeed, Barnett contends the term "substantive due process" was first used as a derogatory label by progressives to criticize the Supreme Court's use of the due process clause. Barnett prefers referring to the due process clause as the "due process of law clause" to emphasize the clause's relation to the requirement that the clause must be applied only to valid law.[44]

This emphasis connects to the privileges or immunities clause because, for a law to truly be a law, it must not abridge the privileges and immunities of US citizens. Therefore, the clause necessitates a definition of citizens' privileges and immunities to define a law. For a definition, Barnett cites Justice Bushrod Washington's definition of the privileges or immunities clause in Article IV of the Constitution in *Corefield v. Coryell*: "Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety."[45] Barnett chose Washington's description because it formed the basis of the framers' understanding of privileges and immunities when they drafted and signed the 14th Amendment.

Finally, Barnett references the Civil Rights Act of 1866, which explicitly mentioned the right "to make and enforce contracts, to sue, to be parties and give evidence, to inherit, to purchase, to lease, to sell, and to hold and convey real and personal property."[46] Because some in the legislature bore concern that the act could be deemed illegitimate or overturned, they passed the 14th Amendment to secure the same rights enumerated in the Civil Rights Act of 1866. Therefore, Barnett concludes the 14th Amendment all but explicitly defends the right (i.e., the liberty of contract) that the majority opinion recognized in the *Lochner* opinion.

Ellen Frankel Paul defends the natural rights argument with *Lochner* in the article "Freedom of Contract and the 'Political Economy' of *Lochner v. New York*." Paul's suggested "alternative" defense

of *Lochner* rests on Lockean principles that undergird the Constitution.[47] She cites Justice Joseph P. Bradley's dissent in *Slaughterhouse* as an illustration of how these principles have been treated in constitutional law in the past. Bradley's dissent referenced the fundamental rights (enjoyed by Englishmen) that were commutative to those secured in the Declaration of Independence and US Constitution. Among these rights, Bradley identified the right to pursue an occupation in which one finds happiness.

Paul continues by elaborating on Justice Stephen Johnson Field's concurrence in *Butchers' Union v. Crescent City*, in which Field expands on Bradley's arguments from *Slaughterhouse*. Field references the inherent rights enumerated in the Declaration of Independence. By citing these opinions, Paul indicates she would support the *Lochner* decision by appealing to the pre-political rights protected by the Constitution implicitly.[48]

James W. Ely Jr. wrote "The Constitution and Economic Liberty," an article examining the merit of Justice Holmes' assertion that the Constitution does not ascribe to any particular economic theory. Ely begins by suggesting the US has never espoused an entirely laissez-faire system, but he disputes Holmes' claim that the founders imputed no economic beliefs to the Constitution. Economic circumstances largely motivated the Constitution's formation, and the Constitution was meant to establish a government capable of protecting private property.[49]

Like Paul, Ely identifies the strong Lockean influence on the founders. Property rights form a key aspect of John Locke's beliefs. Thus, because Lockean thought molded the framers' thoughts, property rights form an assumed underpinning. Ely notes the framers' pre-constitutional writings reveal an emphasis on private property. For example, Ely cites the Virginia Declaration of Human Rights, written by George Mason. The Constitution's text explicitly reveals the importance of economic values for the framers. In Article I, Section 10, the Constitution clearly prohibits the impairment of contracts. The Bill of Rights secures property from government seizure without the due process of law or just compensation. Ely cites Charles A. Beard, who wrote in 1913, "The Constitution was essentially an economic document based upon the concept that the fundamental private rights of property are anterior to government and morally beyond the reach of popular majorities."[50] Therefore, although the framers did not explicitly mention a preferred economic system, they did intend a substantially free market predicated on private property.

Analysis of the Literature Review

The scholarly debate surrounding *Lochner* begs the question of whether the decision deserves the anticanonical title. Although seemingly guardians against the superimposition of extraconstitutional ideologies into the American legal system, *Lochner*'s detractors create a straw-man opinion against which to release rhetorical arrows. Some even commit the same crime they criticize: They fabricate rights from vague, unenumerated principles that confirm an ideology or social theory. For example, the majority opinion in *Griswold* begins by differentiating the opinion from *Lochner*, stating that the intimate relations between husband and wife and the physician's role in those relations are categorically different than economic liberty because civil liberties are more fundamental than economic liberties. The Court attempts to prove the validity of the claim by identifying various rights protected but not explicitly stated in the Constitution. The Court then notes that the First Amendment has a "penumbra" (as Justice William O. Douglas wrote) of the right to privacy.

Moreover, the Court found a similar implied right to privacy in the Third Amendment's prohibition on the quartering of troops, the Fourth Amendment's right against search and seizure, the Fifth Amendment's self-incrimination clause, and the Ninth Amendment's securing of other unenumerated rights. However hard the Court might try to distance this reasoning from *Lochner*, it remains decidedly *Lochner*ian in nature. The only true difference between the reasonings in *Lochner* and *Griswold* is the reception.

Nourse attempts to salvage the *Lochner-Griswold* distinction by demonstrating a change in the meaning

of rights, from the general welfare trumping rights in the early 1900s to rights trumping general welfare in the modern era. In her article, Nourse states the Court acknowledged the right to liberty of contract.[51] Therefore, even if Nourse's distinction stands, her thesis simply elevates the constitutional soundness of *Lochner* above that of *Griswold* because *Lochner* upheld an existing and pre-acknowledged right (even if the Court generally did not afford the right deference over the police power at the time). In contrast, *Griswold* introduced a new right.

More broadly, Nourse's argument fails to prove the larger point of interest. If modern constitutional law favors rights over the general welfare as Nourse contends, modern constitutional scholars should celebrate the *Lochner* decision as a rare exception to the antiquated notion that the police power trumps rights. After all, rights do not change simply because the majority views the general welfare as more or less important than those rights, and the inherent value of the rights remain despite the political attitude of the time. If rights persist in constant value regardless of the era, the modern championing of rights over general welfare should naturally resolve the *Lochner* debate and cause those in legal orthodoxy to accept *Lochner* as a ruling ahead of its time. No such sentiment exists, leaving Nourse's argument in question.

Perhaps Strauss' view that the liberty to contract should be protected but not exalted or treated as a fundamental right as it was in *Lochner* could replace Nourse's arguments.[52] Defense of Strauss' argument poses similar difficulties. The Declaration of Independence and various constitutional clauses clearly enumerate the rights to life, liberty, and property. Thus, if the right to privacy can be derived from a patchwork of constitutional clauses and granted fundamental status, an economic liberty derived from more direct means should receive at least equal, if not preferred, status.

The other anti-*Lochner* authors mentioned in the literature review follow some iteration of Holmes' dissent, simply asserting or assuming the veracity of Holmes' assertions. Because the pro-*Lochner* scholars have more ably addressed the flaws in Holmes' dissent, it will not be restated in detail here. However, as Ely argues, Holmes mischaracterized the Constitution by asserting there is no guiding economic philosophy, and he levels an accusation of activism at his fellow justices who were simply applying common constitutional interpretation and natural law theory to the *Lochner* case. Moreover, since the decision upheld a majority of the regulations in the Bakeshop Act, it is hyperbolic to suggest the justices wholeheartedly embraced or pursued laissez-faire principles via judicial activism.

However, neither the apparent hypocrisy nor the deficiencies in the anti-*Lochner* arguments add credibility to the pro-*Lochner* position. Instead, pro-*Lochner* arguments stand by their own merit. The connection between the 14th Amendment's due process clause and the protection of economic liberties is strong. For example, when the 14th Amendment was adopted, 27 of 37 state constitutions possessed Lockean provisions, which affirmed the inherent freedom enjoyed by men and the inalienable rights associated with that freedom, including the rights to life and liberty; acquiring, possessing, and protecting property; and pursuing happiness.[53] These clauses, which closely resemble those cited by Supreme Court justices and state judges when the liberty-of-contract doctrine was still nascent, reflected deeply held Anglo-American values. Peckham and the majority appealed to these values when penning the *Lochner* decision and upholding the liberty to contract.

Substantive Due Process and the Contract Clause

The *Lochner* decision can and should inform the modern approach to substantive due process cases. *Griswold* serves as a model substantive due process case in modern case law. In *Griswold*, the justices suggested the Bill of Rights has penumbras, formed by emanations of the rights therein, of the right to privacy. Thus, a loose connection was forged between the protection against search and seizure and privacy. As Justice Hugo Black noted in his dissent, the Court moved from a specific limitation in protection against search and seizure without warrant to a more general,

ill-defined right in privacy. The Court used protections in the First, Third, Fourth, Fifth, and Ninth amendments to fabricate a right to privacy that was extended to a right to an abortion in *Roe v. Wade*.

Regardless of ideology, it is evident the decision in *Griswold* relied on an extension of logic and a number of constitutional assumptions. If so many amendments could be woven together via the 14th Amendment to create a loosely connected right to privacy, it stands to reason that the contract clause can and should indicate a freedom of contract via the 14th Amendment.

Although scholars such as Bernstein and Barnett discuss the connection between the liberty of contract and the natural rights assumed by the framers, scholars have yet to argue that the contract clause offers evidence of an assumed sanctity of contracts in the Constitution. Admittedly, scholars avoid contract clause protection because the contract clause has been generally limited to retroactive impairments since *Ogden v. Saunders*.[54] However, *Ogden* neither should nor does render the contract clause impotent.

At a minimum, the contract clause describes some liberties protected by the due process clause by demonstrating the framers' interest in protecting contracts, which formed the heart of the burgeoning economy in the colonies at the time. Protecting citizens from government impairment in contracts contains the assumption citizens could enter into contracts at all. William E. Nelson described 1640s Virginia, voicing this assumption: "The hallmark doctrine of market capitalism, that individuals should be free to enter into contracts which courts would then enforce, was firmly in place."[55]

Moreover, Charles A. Beard notes in his acclaimed book, *An Economic Interpretation of the Constitution of the United States*, that the framers emphasized the role of contracts in the new country. Justice Field also describes in his *Slaughterhouse* dissent that English common law protected economic rights and that among these rights is man's ability to pursue legal occupations and trades.[56] Contracts constitute a facet of pursuing an occupation because people enter into contracts, in part, to secure a trade and compensation for labor. Therefore, the idea of contracting and freedom thereof intertwines with common-law liberties and principles. These principles undergird the contract clause and were secured by the language chosen by the framers. Therefore, if modern substantive due process rests on *Griswold*—a case in which marginally related amendments combined to acknowledge a right—the much closer the connection between the contract clause and the liberty of contract doctrine should be under the same logic.

If legal scholars began using the contract clause to validate the protection of the liberty to contract via the 14th Amendment's due process clause, *Lochner* would be plucked from the anticanonical category in which the decision has wallowed since shortly after its announcement. Moreover, acknowledging the close tie between contracts and the rights guaranteed to the citizenry in the Constitution would do one of two things for modern cases such as *Griswold*, *Roe*, and *Obergefell*. First, it might untangle the rhetorical web needed to distinguish *Griswold* and its progeny from *Lochner* because *Lochner* could be considered a reputable case worth championing in subsequent decisions. It would solidify and strengthen the acknowledgment and protection of the right to contract via the 14th Amendment.

Alternatively, tying *Lochner* and the economic liberty protected therein to an explicit and closely related constitutional clause would set a higher standard for the clarity of the right protected by the due process clause than that adopted in the *Griswold* line of cases. Rather than allowing for vague implications to constitute a right, the approach described earlier would require a more clearly protected right. With this alternate standard for analyzing substantive due process claims, reasoning like that adopted in *Griswold* would not meet the rigors demanded; penumbras and emanations would not suffice. Instead, courts seeking to enshrine an unenumerated right must justify protecting the right with a constitutional clause about, if not the same application, the same content matter (or some other more precise test for rationalizing the acknowledgment of an unenumerated right). Therefore, the modern tendency to protect rights over general welfare as Nourse recognized would be tempered by the Constitution's original text, if not in a literal

fashion like that adopted by Justice Black or even a textualist fashion like Justice Antonin Scalia, then by at least a stricter requirement for the justification of "creating" an unenumerated right while favoring rights assumed by common law and the framers.

Lochner and the Contract Clause

Barnett, Bernstein, and others craft a defense for *Lochner* via the 14th Amendment, but this section argues these scholars and Justice Peckham missed the opportunity to solidify economic liberty via the enumerated right protected in the contract clause. Instead of relying on an unenumerated right subject to criticism and the somewhat subjective works of the historian, philosopher, and lawyer, the contract clause would enable defenders of *Lochner* to eliminate the "penumbras and emanations" relied on for unenumerated rights.[57]

To formulate a contract clause–based defense of *Lochner*, the argument is divided into three sections. First, I examine the original meaning of the contract clause by referencing the text and surrounding debates at the 1787 Constitutional Convention. Second, I trace the history of how the contract clause was applied, especially during the Marshall Court (1801–35), to determine how and why the contract clause was not applied in *Lochner*. Third, I explain and apply a framework for the contract clause outlined by Epstein in 1984 to *Lochner*.

The Meaning of the Contract Clause.[58] The framers drew on preexisting ideas engrained in common law and the colonies when drafting the contract clause. In his 2016 book, *The Contract Clause: A Constitutional History*, Ely carefully notes the pre-convention attitude toward contracts, which generally reflected an attitude that government was established to protect the formation of contracts.

However, the Northwest Ordinance of 1787 serves as the most vital piece to understanding the contract clause because the ordinance inspired the wording adopted in the constitutional clause. The relevant section of the ordinance reads, "No law ought ever to be made, or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts or engagements, bona fide, and without fraud, previously formed." The contract clause reflects a condensed version of this ordinance and reads:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Although not an exhaustive list of the commentary on contracts, these quotes capture the general tone that influenced the framers who authored the contract clause.

Tucked into an assortment of seemingly unrelated limitations on state power, the contract clause received little attention in James Madison's notes from the Constitutional Convention. On August 28, Rufus King suggested a "prohibition on the States to interfere in private contracts." James Madison, George Mason, Gouverneur Morris, and James Wilson approved the suggestion, but Morris argued the prohibition was too expansive. Wilson offered a revision, suggesting only "retrospective interferences are to be prohibited." Madison queried, "Is not that already done by the prohibition of ex post facto laws, which will oblige the Judges to declare such interferences null & void?" John Rutledge offered a different revision: "nor pass bills of attainder nor retrospective laws." There ends the recorded debate. On September 14, the clause passed, notably missing any restriction to "retrospective interferences" only.

The omission of Wilson's suggestion to limit the clause to only retrospective interferences creates the fulcrum of debate surrounding the meaning of the clause. Madison's comment on August 28 questioning the necessity of a retrospective-only contract clause if the ex post facto law was already included is suggestive. To Madison, these two clauses would fulfill the same function.

To relieve the confusion, John Dickenson examined Blackstone and found the phrase "ex post facto" extends only to criminal cases. Therefore, the clause prohibiting the state from impairing the obligation of contract as a retrospective clause only is not redundant.[59] It is possible, then, that the framers included both clauses to address criminal and civil cases and that both clauses protect against retrospective impairments. However, such a reading assumes the ex post facto clause and contract clause fulfill the same purpose, which cannot be proven from the debates or constitutional text.

Alternatively, the framers might have removed the wording "retrospective interferences" because of a general assumption that the clause's context and meaning rendered the explicit enumeration of the exclusively retrospective nature redundant. The Northwest Ordinance of 1787, the clause upon which the contract clause was based, contained the language of retrospective impairment. Thus, it is entirely consistent with the contract clause's wording to interpret the retrospective nature as implicitly imputed from the ordinance. However, because the former interpretation is based on assumptions, an equally valid interpretation argues the framers weighed the option of limiting a retrospective-only contract clause and intentionally removed the wording to allow for prospective applications.

Without notes, an unequivocal interpretation is impossible. Epstein concludes neither the contract clause nor the Northwest Ordinance of 1787 provides a clear interpretation of whether the clause functions retrospectively. The ambiguity surrounding the clause's meaning produced vigorous debate in myriad Supreme Court cases that culminated in *Ogden v. Saunders*.

The Contract Clause in the Pre-*Lochner* Court. The *Ogden* decision explicitly handled the question of whether the contract clause applies prospectively. The jurisprudence surrounding the question did not begin with *Ogden*, however. In *Sturges v. Crowninshield*, the Marshall Court examined whether New York possessed the constitutional authority to pass a bankruptcy law violating previously formed contracts. The New York act liberated the debtor and discharged him from all obligations for debt contracted previously upon surrendering his property in the manner prescribed by the act.

In a unanimous opinion, Justice John Marshall stated the meaning of "obligations of contract" not only extended to property in possession at the time the contract was written but also concerned future acquisitions. Therefore, Marshall heavily implied the contract clause extends prospectively and retrospectively. More telling for the question at hand, he did not limit the clause to only retrospective application, either.

The day following the *Sturges* decision, Marshall delivered the opinion in *McMillan v. McNeil*, which clarified his interpretation of the prospective application of the contract clause. The Court struck down a Louisiana insolvency law passed before the debt was incurred. Marshall argued the timing of the debt "'made no difference in the application of the principle.' This implied that any insolvency law, with respect to either prior or future agreements, violated the Contract Clause."[60]

Decided eight years later, *Ogden* changed and now dictates the interpretation of contract clause cases. Saunders, who resided in Kentucky, sued Ogden for failing to meet a payment under a contract the two formed. When the contract was formed in 1806, Ogden lived in Louisiana but subsequently moved to New York. Ogden filed for bankruptcy and relied on a New York bankruptcy law, enacted in 1801, as his defense for not fulfilling his obligations to the contract previously formed with Saunders.

In a fractured decision, the Court held that the New York bankruptcy law was passed before the contract was signed and therefore became a part of the contract itself. Because citizens could still enter into contracts under the legislation, the Court ruled the law did not violate the contract clause. In essence, the ruling made the contract clause effective toward retroactive legislation only and did not prevent states from passing legislation impairing future contracts.[61] Moreover, the majority opinion suggested the right to contract was a government creation, not a preexisting right.

In his dissenting opinion, Marshall stated that the parties, not the government, made the contract; therefore, the preexisting law could not be part of the contract. If state law were incorporated into every future contract, it would render the contract clause "an inanimate, inoperative, unmeaning clause."[62] Furthermore, Marshall "grounded contractual rights in preexisting natural law rather than state law, reasoning that the right to contract existed 'anterior to, and independent from society.'"[63] Therefore, Marshall suggested the contract clause was prospective in nature and protected fundamental, pre-governmental rights.

Marshall's dissent languished unused by future judges, and Epstein credits *Ogden* with the rise of a substantive due process defense of the liberty to contract.[64] The *Ogden* decision, then, explains why *Lochner* relied on the due process clause rather than the contract clause. However, the question remains: How would *Lochner* have looked if Marshall wrote the majority in *Ogden* and the Court preserved the prospective application of the contract clause?

A Contract Clause Defense of *Lochner*

To answer this question, *Ogden* must be temporarily suspended. Because this report assumes an originalist interpretation of law, claiming a Supreme Court decision does not properly interpret the original public meaning of the contract clause poses no great difficulty. Suspending *Ogden* repairs the contract clause from the decisive retrospective-only interpretation and allows for prospective applications of the clause. This section explains and applies a framework for understanding the contract clause outlined by Epstein in the 1984 paper "Toward a Revitalization of the Contract Clause."[65]

Explaining Epstein's Framework. Epstein begins by acknowledging the difficulties of interpreting the contract clause. He rejects the modern tendency to treat the clause as little better than a weaker substantive due process clause while precluding a reading that prohibits all contractual legislation. In his words, "The task is to find a construction that does not inhibit legitimate legislative activities (i.e. those that provide genuine public goods), but does check the major rent-seeking effects of faction in the legislative process."[66] Epstein notes the impossibility of perfectly balancing these two interests and states the goal should be to minimize the error in each direction.

To arrive at an interpretation of the clause that neither hamstrings the government nor allows it to punitively engage in rent-seeking, Epstein separates the interpretation of the contract clause into six questions. Of those, two apply to the present question surrounding the contract clause and *Lochner*:

> (4) Does it protect only contracts that are already formed from retroactive intervention, or does it apply to contracts that may be made after the passage of some general law?
>
> (5) Is the clause subject to any implicit exceptions, and if so, how are they defined and limited?[67]

When considering the first question, Epstein dubs it the most controversial and significant question surrounding the clause. Since the convention, the prospective or retrospective-only debate has plagued the clause. Because reading the clause as protecting contracts previously and later formed creates no interpretational contradictions from the wording "impairing the obligation of contracts," no conclusive theory of application presents itself from the wording. Madison's convention notes offer little help. Therefore, the question remains unanswered from these sources, leaving any interpretive success elsewhere.

Epstein turns to the purpose of limiting state power: to prevent rent-seeking. Preventing retroactive impairments of contracts carries an obvious connection to avoiding political abuse. Epstein uses the example of two parties in which one borrows from the other.[68] The borrower would possess the political incentive to pass legislation releasing him from the value of his debt, whereas the creditor would possess an equal incentive to frustrate legislation. Regardless of whether the legislation passes,

the struggle creates a deadweight loss, and the system suffers a loss of efficiency. As a result, the clause prohibits retrospective impairments, and the legislative and economic systems benefit from prohibition.

However, Epstein extends a similar interest to preventing prospective impairments of contracts. Epstein hypothesizes a scenario in which the state passes a law preventing the formation of any contracts. He also provides less-extreme cases, such as the state passes legislation preventing a certain class or type of person from making contracts[69] or suppose the state passes a law subjecting all contracts formed to revision by the legislature at any time after their formation.

In each case, the retrospective-only reading of the contract clause permits these laws. But such laws clearly violate the concept of limited and enumerated governmental powers woven into the constitutional fabric. Suggesting that a legislature can, if it but acts quickly enough, suspend a right clearly enumerated in the Constitution because the clause in which the right is enumerated applies only retrospectively creates a clear contradiction to the republican theory the framers embraced. To avoid such a contradiction, the contract clause must apply prospectively.

If the contract clause applies prospectively, then the clause must either be infinitely protective against legislation impairing contracts not yet formed or somehow limited in what contracts it protects. This leads to Epstein's second question regarding the police power and limits on the clause. Epstein envisions a situation in which legislation preventing fraud, statutes of limitations, and other generally accepted qualifications on contracts all fall subject to constitutional inquiry, something even staunch libertarian thinkers, such as Milton Friedman, would not endorse. A scenario in which the government cannot even play umpire (as Friedman might say) to the market and contracts is equally as absurd as one in which the legislature can prevent contract formation entirely.[70]

Clearly, the contract clause must be limited somehow. The only questions remaining are what the limitations should be and when they should apply. Epstein seeks to answer these questions by identifying two broad categories of limitations: the police power and the just-compensation requirement.

Regarding the police power, Epstein suggests the primary limitation arises when two parties enter into a contract that harms a third party. During a personal interview with Epstein,[71] he referenced Vilfredo Pareto's principle of economic efficiency as a rationale for protecting against contracts that harm third parties. Pareto's efficiency states the efficient allocation of resources is such that any reallocation of those resources would not make even one person better off. If a contract harms a third party, it does not meet Pareto's efficiency standard. Thus, the legislature possesses adequate economic incentive to prevent such a contract. Although not included in Pareto's efficiency standard, clear moral incentives exist to prohibit two parties from harming a third party via contracts.

Although not as pertinent to the present conversation, the second limitation on the contract clause of just compensation also has strong Pareto underpinnings. Epstein writes, "Such a limitation allows the state to impair contracts only so long as the holder of contractual rights is left at least as well off as he was before the impairment."[72] Here, the Pareto efficiency standard is quoted almost word for word. Epstein makes other elucidating comments regarding just compensation and the scope of the contract clause and resulting similarities to eminent domain, but these extend beyond *Lochner* and the question at hand.

Ely posits another inherent limit to the contract clause. Although briefly addressed by Epstein, Ely succinctly summarizes the limitation: "The framers seemingly realized that laws violative of contracts might be necessary in some circumstances but felt that such measures should only be enacted by Congress."[73] Here, Ely contends the framers understood Congress as the limiting factor on the sanctity of contracts, not the state police power. Although Epstein rejects this claim and, in a personal interview, Ely stated his preferred interpretation of the contract clause is the retrospective-only reading, a school of thought interprets Congress as the appropriate method for preventing an all-powerful contract

clause that prevents the legislature from "playing umpire" in the marketplace.

In summary, Epstein's framework argues the contract clause must be applied retrospectively and prospectively but that the clause possesses inherent limits. Among these limits is the police power, which should protect third parties from contracts that deprive them of an acknowledged right or privilege.

Applying Epstein's Framework to *Lochner*. Although Epstein comments briefly that *Lochner* would have been a contract clause case under the interpretation he outlined, he does not explore the impact on the *Lochner* decision.[74] Therefore, I take Epstein's argument a step further by examining how such a framework would have changed *Lochner* and other substantive due process cases such as *Griswold*.

Before applying Epstein's framework to *Lochner* to see how the decision might have differed and how resulting case law might be clarified, the anticompetitive nature of the Bakeshop Act of 1895 must be revisited because the constitutional critique rests, in part, on the claim that the law acted as a pact between the government and the union to depress small bakeries. Whether the intention of the New York State Assembly was to engage in such a practice or not, the legislation's impact certainly produced the anticompetitive result. Historical records, economic theory, and modern corporate behavior combine to prove the anticompetitive nature of the legislation and the union's incentive for passing such laws.

As cited earlier, Bernstein uses the 1896 Annual Report of the Factory Inspectors of the State of New York to prove unionized workers did not work more than 10 hours a day or 60 hours per week before the legislation passed, meaning the legislation was "non-binding" on the unionized workers.[75] Smaller bakeries, however, demanded much longer hours to stay operational, and the legislation disproportionately harmed small bakeries, forcing some out of the market entirely. Thus, the act did not change labor for unionized workers; rather, it affected only nonunionized workers. Perhaps this explains why the New York State Assembly settled on the seemingly arbitrary choice of a 10-hour maximum a day rather than an eight- or 12-hour maximum. This last point is merely speculative. The anticompetitive nature of the act, however, is not.

Anticompetitive behavior arises naturally from a union's purpose. Indeed, unions vie for monopoly power as their end goal because, as the only supply of labor in a market, unions set the wage with impunity. Regarding the nature of unions, Sylvester Petro, professor of law at Wake Forest University School of Law who specialized in labor unions, wrote:

> The purpose of each of the national and international unions is to secure a monopoly of the working force in the industries or fractions of industries in which they claim 'jurisdiction.' . . . Perforce, then, the objective of the large unions is to eliminate competition. There is no other meaning to the deliberate pursuit of a monopoly of any given type of goods or services. The monopoly is sought, not as an end in itself, but because of the results which it is expected to bring about. Here, too, there is no mystery. The labor monopoly is sought as a means of gaining what economists call a monopoly price—i.e., something more than the competitive or the "free-market" price for labor.[76]

Applying Petro's analysis to the union-sponsored Bakeshop Act of 1895, the bakers' union lobbied for the act's passage because it would decrease market competition and increase the union's wage-setting power. Lochner's attorneys—among whom was Weismann, who originally gathered union support for the act—stated as much. Although Lochner's attorneys possessed ample reason to overstate the facts to produce their desired end, economic theory further supports their claim.

George Borjas, a Harvard Kennedy School professor of economics, explains Marshall's rules of derived demand. Borjas states that the union's goal was to reduce the elasticity of demand for union labor and goods. Borjas writes:

> Similarly, unions want to limit the availability of goods that compete with the output of unionized

> firms. For example, the United Auto Workers (UAW) was a strong supporter of policies that made it difficult for Japanese cars to crack into the U.S. market. If the UAW obtained a huge wage increase for its workers, the price of American-made cars would rise substantially. This price increase would drive many potential buyers toward foreign imports. If the union could prevent the entry of Toyotas, Nissans, and Hondas into the American marketplace, consumers would have few alternatives to buying a high-priced American-made car. It is in the union's interest, therefore, to reduce the elasticity of product demand by limiting the variety of goods that are available to consumers.[77]

Just like in the case of the autoworkers' union, the Journeymen Bakers Union of New York desired to reduce the elasticity of demand for its baked goods. Reducing elasticity of demand requires eliminating close or perfect substitutes (e.g., nonunion baked goods). As the supply of alternatives decreased, the elasticity of demand for the baked goods also decreased, providing the union more wage-setting power. By forcing the cellar bakeries out of business on the pretext of improving health through the Bakeshop Act, the union could increase its wage without a significant loss in quantity of goods demanded.

With this context for the union's behavior in *Lochner*, it becomes clear that the Bakeshop Act was not primarily intended to improve the health of bakers but was instead an instrument for advancing union power. The legislation acted as a sort of "class legislation" via impact rather than application. Although the legislation was not directed exclusively toward cellar bakeries, the result of the legislation made the requirements applicable to only cellar bakeries.

If, as Epstein noted, the contract clause applies prospectively by necessity if not by explicit language, then Lochner entering into a contract with his employee after the 1895 act passed is of no consequence.[78] Lochner's contractual rights should have received a presumption of liberty and protection under the contract clause unless the contract fell within one of the categories of unprotected contracts outlined earlier in Epstein's framework.

Regarding these exceptions, the question now turns to whether the legislation functioned as either a proper exercise of the police power or as just compensation. The latter limit on the prospective application of the contract clause falls immediately, as neither the Bakeshop Act nor Lochner's situation considered just compensation. Therefore, the police power remains the focus of analysis, just as it did for Justice Peckham and the Court in 1905.

As Epstein observed, the police power should limit the contract clause when two parties contract and harm a third party in the process.[79] Rather than examining whether the Bakeshop Act impaired the liberty to contract, the question becomes whether Lochner and his employee, Aman Schmitter, entered into a contract that violated the rights of a third party. Schmitter's desire to work long hours to learn his trade neither displaced a fellow worker nor decreased the wage of workers employed outside that bakery. Rather, by increasing his ability, Schmitter would improve the efficiency and output in the market, causing a net increase in total productivity and output. Thus, using Pareto's analysis, the Lochner-Schmitter contract would have increased the net effciency and should have been protected by law.

The police power could have been employed to protect Lochner and his employees rather than prosecute him. Even if the government functioned as nothing more than the unaware handler of the marionette manipulated by the union leaders, the resulting law passed by the legislature still abused the legislative process to engage in union rent-seeking. Epstein identifies this as the precise corruption the framers aimed to prevent. Therefore, rather than constituting a proper exercise of the police power to secure health, the Bakeshop Act violated the police power's purpose when applied to contracts. Moreover, as Justice Peckham argued, the means-end justification for the Bakeshop Act and improving health was fragile at best.

Applying Epstein's framework also applies the classic assumption in economics that people are rational beings who apply their rationality to maximize utility and serve their own self-interest. By balancing self-interest, the market achieves efficient contracts and agreements. Such an assumption suggests that

people are best positioned to form contractual agreements to serve their preferred ends, a right protected in the prospective application of the contract clause. Although the right is not absolute, it should be protected from legislative or judicial interference unless valid reasons exist to abridge the right. No such substantive reason was proven in *Lochner*. Therefore, Lochner's right to contract should have been (and was) upheld.

If the Court was willing to overturn the damaging precedent set in *Ogden*, it could have applied a more robust, less controversial defense to the liberty of contract by appealing to the contract clause, the clause written to enshrine the right to contract. Such a defense could have entirely altered the modern discussion surrounding *Lochner* and, quite probably, the application of substantive due process. For example, noncontract economic rights might receive stronger protection via the 14th Amendment because of the enumerated protection provided to other economic rights. Although the persistent rise of progressivism during the early 20th century would have likely overcome even the stronger reading of the contract clause, the effects on substantive due process would have remained.

Lochner Today

Although some might argue the modern political reality prevents a reinterpretation of *Lochner* from informing modern discussions, the question remains: Should *Lochner* inform the modern discussion surrounding substantive due process cases and the contract clause? *Lochner* is uniquely positioned between the two categories as an application of substantive due process to an economic liberty question.

Lochner should inform the substantive due process case by highlighting the hypocrisy in elevating the *Griswold* and *Roe* decisions while degrading *Lochner*. Both civil liberty cases and *Lochner* apply the same logic and reasoning. Therefore, the reasoning in *Griswold* and *Roe* can be accepted only if *Lochner* also is accepted. If, however, *Lochner* remains an anticanonical case, *Griswold*, *Roe*, and other civil liberty cases that apply substantive due process to consolidate the penumbras of liberties in the Bill of Rights into formal rights should also be relegated to similar status.

Regarding the modern contract clause discussion, a contract clause–based defense of *Lochner* would inform how the Court should approach economic liberty and the scope of the contract clause. Often criticized for improperly elevating an unenumerated right to contract, *Lochner*'s reputation would be entirely altered if the defense of liberty to contract were grounded in an enumerated right. Therefore, the originalists' tendency to let the legislature decide questions on unenumerated topics would not apply in the *Lochner* decision because the question of contract rights would be amply answered in Article I, Section 10. Although it would not have guaranteed a strong liberty to contract given the hostile environment that later developed during the New Deal, it would have at least slowed the encroachment of regulations and secured economic liberty more directly.

As an enumerated right, the liberty to contract would possess a more robust connection to the Constitution. Therefore, although the question remains whether the police power should supersede the liberty to contract, the enumerated nature of the contract clause–based right would provide greater deference to that right. Had the justices crafted such a defense in 1905, *Lochner* would have shed the anticanonical reputation that plagues it.

Not only would *Lochner*'s reputation be saved, but it would also provide more potency to the now withered and feeble contract clause. Justice Neil Gorsuch recognizes the gradual weakening of the contract clause over time in his dissenting opinion in *Sveen v. Melin*.[80] He records how the framers' absolute language in the contract clause afforded robust protection to existing contracts. He references *Energy Reserves Group Inc. v. Kansas Power & Light Co.* when he writes, "More recently, though, the Court has charted a different course. Our modern cases permit a state to 'substantial[ly] impai[r]' a contractual obligation in pursuit of 'a significant and legitimate public purpose' so long as the impairment is 'reasonable.'"

Although Gorsuch does not argue for a prospective application of the contract clause as contended in this report, he suggests the need for a reinvigorated contract clause. As the Court considers what the revitalization entails, the chief question is whether the contract clause should possess prospective and retrospective application. As Epstein's framework neatly portrays, the contract clause can apply to future contracts; *Lochner* demonstrates the importance of doing so.

Notes

1. "Anticanonical" is a term given to Supreme Court cases deemed "weak constitutional analysis." The legal world reserves the term for but four Supreme Court cases: *Dred Scott v. Sandford*, *Plessy v. Ferguson*, *Korematsu v. United States*, and *Lochner v. New York*. Jamal Greene, "The Anticanon," *Harvard Law Review* 125, no. 1 (2011): 379, https://scholarship.law.columbia.edu/faculty_scholarship/1684/.
2. Richard A. Epstein, "Toward a Revitalization of the Contract Clause," *University of Chicago Law Review* 703, no. 51 (1984): 703–51, https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2289&context=journal_articles.
3. *Sveen v. Melin*, 200 U.S. 321 (2018), https://www.law.cornell.edu/supremecourt/text/16-1432.
4. M. I. Urofsky, *Dissent and the Constitutional Dialogue: Its Role in the Courts History and the Nation's Constitutional Dialogue* (New York: Random House, 2015), 139.
5. Urofsky, *Dissent and the Constitutional Dialogue*.
6. David E. Bernstein, *Rehabilitating Lochner: Defending Individual Rights Against Progressive Reform* (Chicago: University of Chicago Press, 2011).
7. Urofsky, *Dissent and the Constitutional Dialogue*.
8. I draw a great deal of my inspiration from Bernstein, *Rehabilitating Lochner*.
9. Bernstein, *Rehabilitating Lochner*, 23.
10. Bernstein, *Rehabilitating Lochner*.
11. Paul Kens, *Lochner v. New York: Economic Regulation on Trial* (Lawrence, KS: University Press of Kansas, 1998).
12. Henry Weismann would eventually end up changing his views on the bakers' union and representing Joseph Lochner in the Supreme Court case.
13. Kens, *Lochner v. New York*.
14. Bernstein, *Rehabilitating Lochner*, 25.
15. Bernstein, *Rehabilitating Lochner*.
16. Bernstein, *Rehabilitating Lochner*.
17. Justice Joseph P. Bradley first advanced the liberty of contract in his *Slaughterhouse* dissent and later formalized it as a jurisprudential doctrine in the unanimous decision of *Allgeyer v. Louisiana*.
18. *Holden v. Hardy*, 169 U.S. 366 (1898), https://www.law.cornell.edu/supremecourt/text/169/366.
19. *Lochner v. New York*, 198 U.S. 45 (1905), 56, https://supreme.justia.com/cases/federal/us/198/45/.
20. *Lochner v. New York*, 57.
21. Francis Biddle, *Justice Holmes, Natural Law, and the Supreme Court* (Stuttgart, Germany: MacMillan Company, 1960), 40.
22. Randy E. Barnett, "After All These Years, Lochner Was Not Crazy—It Was Good," *Georgetown Journal of Law & Public Policy* 16, no. 2 (2018): 437–43, https://www.law.georgetown.edu/public-policy-journal/wp-content/uploads/sites/23/2018/10/16-2-After-All-These-Years-1.pdf.
23. See David A. Strauss, "Why Was Lochner Wrong?," *University of Chicago Law Review* 70, no. 1 (2003): 373–86, https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=5175&context=uclrev.
24. D. Grier Stephenson, "The Supreme Court and Constitutional Change: Lochner v. New York Revisited," *Villanova Law Review* 21, no. 2 (1976): 217–43, https://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=2089&context=vlr.
25. Rebecca L. Brown, "The Art of Reading Lochner," *New York University Journal of Law and Liberty* 1, no. 1 (2005): 570–89, http://www.law.nyu.edu/sites/default/files/ECM_PRO_060908.pdf.
26. Brown, "The Art of Reading Lochner."
27. Strauss, "Why Was Lochner Wrong?"
28. Strauss, "Why Was Lochner Wrong?"

29. Strauss, "Why Was Lochner Wrong?"
30. Victoria F. Nourse, "A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights," *California Law Review* 97, no. 3 (2009): 751–800, https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1135&context=californialawreview.
31. Nourse, "A Tale of Two Lochners."
32. Kens, *Lochner v. New York*, 5.
33. Kens, *Lochner v. New York*, 130.
34. Kens, *Lochner v. New York*, 140.
35. Kens, *Lochner v. New York*, 141.
36. Bernstein, *Rehabilitating Lochner*.
37. Bernstein, *Rehabilitating Lochner*, 9.
38. Bernstein, *Rehabilitating Lochner*.
39. See Justice Stephen Johnson Field's dissenting opinion: *Slaughter-House Cases,* 83 US 36 (1873): 132–85.
40. See *Jacobs*, In Re 98 N.Y. 98 (1885).
41. The liberty-of-contract doctrine was overturned in *West Coast Hotel Co. v. Parrish,* when the Court upheld a state minimum wage law.
42. Barnett, "After All These Years, Lochner Was Not Crazy—It Was Good."
43. Strict scrutiny requires laws to demonstrate both a compelling government interest and be narrowly tailored to meet that interest. The strict scrutiny test was first used in *Korematsu v. United States*—another anticanonical case—when the Supreme Court upheld Japanese American internment camps during World War II.
44. Barnett, "After All These Years, Lochner Was Not Crazy—It Was Good."
45. Barnett, "After All These Years, Lochner Was Not Crazy—It Was Good."
46. Barnett, "After All These Years, Lochner Was Not Crazy—It Was Good," 441.
47. Ellen Frankel Paul, "Freedom of Contract and the 'Political Economy' of Lochner v. New York," *New York University Journal of Law and Liberty* 1, no. 1 (2005): 515–69, http://www.law.nyu.edu/sites/default/files/ECM_PRO_060907.pdf.
48. Paul, "Freedom of Contract and the 'Political Economy' of Lochner v. New York."
49. James W. Ely Jr., "The Constitution and Economic Liberty," *Harvard Journal of Law and Public Policy* 35, no. 1 (2011): 27–35, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1824527.
50. Ely, "The Constitution and Economic Liberty," 32.
51. Nourse, "A Tale of Two Lochners."
52. Strauss, "Why Was Lochner Wrong?"
53. S. G. Calabresi and S. Agudo, "Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?," *Texas Law Review* 87, no. 1 (2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1114940.
54. In *Ogden v. Saunders*, the Marshall Court held in a 4–3 decision that the contract clause applies only retrospectively, meaning the states cannot impair previously made contracts. However, the clause does not protect future contracts. According to *Ogden*, contracts formed after legislation passes prohibiting an action in the contract would not be protected.
55. Ely, *The Contract Clause*.
56. *Slaughterhouse*, 83 U.S. 36 (1872), 106, https://supreme.justia.com/cases/federal/us/83/36/.
57. As discussed previously, however, these shadows are rather short when applied to economic liberty.
58. For this section, I am indebted to James W. Ely Jr. for his elucidating scholarship.
59. Epstein, "Toward a Revitalization of the Contract Clause,"
60. Ely, *The Contract Clause*, 46.
61. Ely, *The Contract Clause*.
62. 25, U.S. 399, https://www.law.cornell.edu/uscode/text/25/399.

63. Ely, *The Contract Clause*, 49.
64. Epstein, "Toward a Revitalization of the Contract Clause."
65. Epstein, "Toward a Revitalization of the Contract Clause."
66. Epstein, "Toward a Revitalization of the Contract Clause," 718.
67. Epstein, "Toward a Revitalization of the Contract Clause," 708.
68. Epstein, "Toward a Revitalization of the Contract Clause."
69. Epstein, "Toward a Revitalization of the Contract Clause."
70. Epstein, "Toward a Revitalization of the Contract Clause."
71. Richard A. Epstein (Laurence A. Tisch Professor of Law, New York University), phone conversation with the author, September 6, 2019.
72. Epstein, "Toward a Revitalization of the Contract Clause," 742–43.
73. Ely, *The Contract Clause*, 14.
74. Epstein, "Toward a Revitalization of the Contract Clause."
75. Bernstein, *Rehabilitating Lochner*.
76. Sylvester Petro, "Competition, Unions, and Antitrust," Foundation for Economic Education, 1964, https://fee.org/articles/competition-unions-and-antitrust/.
77. G. J. Borjas, *Labor Economics* (Boston, MA: McGraw-Hill/Irwin, 2010), 115.
78. Epstein, "Toward a Revitalization of the Contract Clause."
79. Epstein, "Toward a Revitalization of the Contract Clause."
80. Sveen v. Melin. 584 U.S. __, https://www.law.cornell.edu/supremecourt/text/16-1432.