

After All These Years, *Lochner* Was Not Crazy—It Was Good

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For this year's Rosenkranz Debate, we have been asked to debate the question: *Lochner v. New York*: Still Crazy After All These Years? It is my job to defend the “negative” position. My burden is not to establish that *Lochner* was correctly decided, but merely that it was not “crazy.” I intend to meet that burden and exceed it. I intend to show how *Lochner v. New York* was not at all crazy; in fact, it was a reasonable and good decision.

I am pleased that my debate partner Akhil Amar decided he was going to defend John Marshall's dissenting opinion in *Lochner v. New York* and not the egregious—and more famous—Oliver Wendell Holmes, Jr. dissenting opinion. Because Holmes's dissent is so extreme in its deference to legislative discretion, defending Marshall's far more reasonable dissent is much easier for Akhil to do. And, if he had chosen to defend Holmes's extreme opinion, then Akhil would be in the same position as Judge J. Harvie Wilkinson, with whom I debated at the Rosenkranz Debate five years ago.¹ We would just have to repeat that debate all over again, and that would be boring. So, by abandoning Holmes, Akhil has made this debate much more interesting.

I am going to approach this issue textually, as I know Akhil also likes to do. I will first talk about *Lochner* as a Due Process Clause case, and secondarily as a Privileges or Immunities Clause case. I will contend that the approach of the *Lochner* Court was a faithful application of the original meaning of these two clauses of the Fourteenth Amendment.

Everyone knows that *Lochner* applied what is today commonly called the Due Process Clause. It has been falsely characterized, however, as applying what is now called “substantive due process.” By “substantive due process,” I mean the judicial doctrine of (a) somehow identifying certain rights as “fundamental,” (b) elevating these rights to some heightened status—a very heightened status, as compared with other mere “liberty interests”—and then (c) subjecting any laws restricting the exercise of these fundamental rights to strict scrutiny, which those laws then typically do not pass.

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1. See Federalist Soc'y, *Sixth Annual Rosenkranz Debate: Courts Are Too Deferential to the Legislature*, YOUTUBE (Nov. 16, 2013), https://www.youtube.com/watch?v=evp84_XcSwY.

But this is not at all what the *Lochner* Court did. To be sure, the *Lochner* Court did talk about liberty of contract. It did not, however, apply anything resembling modern substantive due process.

The term “substantive due process” itself was a term of opprobrium generated by progressives to criticize the Supreme Court’s Due Process Clause decisions. It was not a label the Court itself used, and the Supreme Court did not adopt that label until relatively recently. I think what the Court was using in *Lochner* was the Due Process of Law Clause. (We normally call this clause the “Due Process Clause,” but it is the “Due Process of Law Clause.”) And, the Due Process of Law Clauses in both the Fifth and the Fourteenth Amendments say that no person can be deprived of “life, liberty or property” without “due process of law.” That is, the law applied must be a valid law.²

In this case, Joseph Lochner was deprived of both his property and his liberty. He was fined for violating the Bake Shop Act, thereby depriving him of his property, and then he was jailed for failing to pay the fine, depriving him of his liberty. The constitutional requirement of “due process of law” poses two questions. First, was the legislation that deprived him of his property and liberty really a “law,” or was it—as Samuel Chase said in *Calder v. Bull*—“[a]n act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact [that] cannot be considered a rightful exercise of legislative authority?”³ Second, does the “due process of law” guarantee a judicial forum in which a person can contend that this act of legislation was not truly a law?

Let us begin by asking whether the statute at issue in *Lochner* was “a rightful exercise of legislative authority.” To answer this question about a federal law like the Affordable Care Act or the Controlled Substances Act, we need to evaluate the *substance* of the law to see whether it has been authorized by an enumerated power. For example, a Commerce Clause challenge would also be a Fifth Amendment Due Process of Law Clause challenge: It is “the due process of law” that gives individual persons a *process* or procedure to challenge a law imposed upon them as being beyond Congress’s Commerce Clause power. On this account, every enumerated-powers case is a Fifth Amendment case as well, because the Due Process of Law Clause assures a *process* by which the *substance* of a law can be assessed as within or without the power of Congress to enact.

The Bakeshop Act, of course, was enacted by the legislature of the state of New York, which requires us to ask: What about the powers of states? What would make an act of a state legislature ultra vires or beyond its proper power? Well, in addition to a Due Process of Law Clause, the Fourteenth Amendment also includes the Privileges or Immunities Clause, which says that, “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of

2. Evan Bernick and I explain and defend this conception of the Due Process of Law Clauses at length in Randy E. Barnett & Evan D. Bernick, *No Arbitrary Power: An Originalist Theory of the Due Process of Law*, 60 WM. & MARY L. REV. (forthcoming 2019).

3. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (emphases added).

citizens of the United States.”⁴ To see if a law depriving a person of their life or liberty is truly a *law*, we need therefore to ask, as a textual matter, if this legislative act abridges the original meaning of privileges or immunities of citizens of the United States.

What, then, are these privileges or immunities? To address this question, we must begin with George Mason’s 1776 draft of the Virginia Declaration of Rights. I consult Mason’s draft rather than the actual version adopted two weeks later by the Virginia Provincial Convention, because the adopted version watered down Mason’s draft, and it was his draft language that was emulated by other states.⁵

Mason’s draft began: “That all men are born equally free and independent, and have certain inherent *natural rights*, of which they cannot, by any compact, deprive or divest their posterity[,] *among which are, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.*”⁶ This language soon became the canonical rendering of natural rights.

Some two weeks after it was written, Thomas Jefferson had Mason’s draft in front of him on his desk when he was composing the Declaration of Independence.⁷ Jefferson truncated the “inherent natural rights . . . of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety” to the “unalienable rights” of “life, liberty and the pursuit of happiness.”⁸ Mason’s draft was subsequently adopted in various similar formulations by the states of Massachusetts, New Hampshire, Pennsylvania, and Vermont.⁹

We know that in Massachusetts, Mason’s formulation was considered judicially enforceable, because in 1783, the Massachusetts Supreme Judicial Court used the language to hold that slavery was unconstitutional in that state. In the *Quock Walker Case*, the Court said—among other things and without resorting to implication—that “in constructing the Constitution, slavery is, in my judgment, as effectively abolished as it can be by the granting of rights and privileges wholly incompatible and repugnant to its existence,”¹⁰ referring to the very same wording that George Mason had proposed.

When it came time to draft amendments, Representative James Madison did not initially anticipate that constitutional amendments would be added as a list at the end of the Constitution; he assumed an Article V “amendment” would

4. U.S. CONST. amend. XIV, § 1.

5. See RANDY E. BARNETT, *OUR REPUBLICAN CONSTITUTION* 39–40 (2016).

6. First Draft of Virginia Declaration of Rights (ca. May 20–26, 1776) [hereinafter First Draft] (emphasis added) (spelling and capitalization altered), http://www.gunstonhall.org/georgemason/human_rights/vdr_first_draft.html [https://perma.cc/8H8L-F4BD].

7. See generally PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE*, 97–153 (1977) (detailing Declaration’s drafting).

8. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (capitalization altered).

9. BARNETT, *supra* note 3, at 40.

10. WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848*, at 47 (1977) (quoting *Commonwealth v. Jennison*).

literally “amend” or alter the original text. With that assumption in mind, Madison proposed Mason’s canonical language be added to the Preamble: “That government is instituted and ought to be exercised for the benefit of the people, which consists in *the enjoyment of life and liberty, with the right of acquiring and using property, and of generally of pursuing and obtaining happiness and safety.*”¹¹ When Madison presented his amendments to the House, he described each of the amendments he was proposing. “The first of these amendments,” he said referring to the Mason-inspired language, “relates to what may be called a bill of rights.”¹²

Akhil is one of the earliest scholars to realize that, in fact, the term “the Bill of Rights” was not initially used to describe the first ten amendments to the Constitution. The label “the Bill of Rights” was not associated with the first ten amendments until at least after the Civil War. More recent studies have shown it was not until the 1920’s or 1930’s that the first ten amendments came to be called “the Bill of Rights.”¹³ So it is significant that when Madison mentioned “what may be called a ‘bill of rights,’” he was referring to George Mason’s canonical description of fundamental natural rights, and not to his other proposals that formed the basis of the first ten amendments.

In the beginning of his proposed bill of rights to be added to the Preamble, Madison wanted an affirmation “[t]hat government is instituted and ought to be exercised for the benefit of the people, which consists in the enjoyment of” their natural rights. This too echoed Mason’s draft declaration, which affirmed, “[t]hat Government is, or ought to be, instituted for the common Benefit and Security of the People, Nation, or Community.”¹⁴

With Mason and Madison’s “bill of rights” language in mind, let us now move closer to the text of the Fourteenth Amendment. In the original Constitution, there is a Privileges and Immunities Clause in Article IV. To what did “privileges and immunities” refer? The canonical case defining these “privileges and immunities” was Justice Bushrod Washington’s 1823 circuit court opinion in *Corfield v. Coryell*. In the middle of a lengthy passage, Justice Washington summarizes these “privileges and immunities” as: “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.*”¹⁵ By now, you will recognize this as Mason’s description of natural rights and better appreciate why I refer

11. 1 ANNALS OF CONG. 451 (1789) (Joseph Gales ed., 1834).

12. *Id.* at 453.

13. GERARD N. MAGLIOCCA, *THE HEART OF THE CONSTITUTION: HOW THE BILL OF RIGHTS BECAME THE BILL OF RIGHTS* (2018); Pauline Maier, *The Strange History of the Bill of Rights*, Address for the Hart Lecture at Georgetown University Law Center (2013), in 15 GEO. J.L. & PUB. POL’Y 497 (2017); Michael J. Douma, *How the First Ten Amendments Became the Bill of Rights*, 15 GEO. J.L. & PUB. POL’Y 593 (2017).

14. First Draft, *supra* note 4.

15. *Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (emphasis added).

to it as “canonical.” To this formulation, Justice Washington also added, “[t]o take hold *and dispose* of property, either real or personal.”¹⁶

Washington’s language was repeatedly invoked by those who drafted and defended the Fourteenth Amendment to explain the meaning of the Privileges or Immunities Clause. Not only do they cite *Corfield v. Coryell*, they also specifically quoted this passage. For example, when explaining what are the privileges or immunities of citizens of the United States, Jacob Howard, who was the sponsor of the Fourteenth Amendment in the Senate, read verbatim Justice Washington lengthy description of “privileges and immunities” in *Corfield*. Howard then added: “To these privileges and immunities, whatever they may be, for they are not and cannot be fully defined in their entire extent and precise nature, to these should be added the personal rights guaranteed and secured by the first eight amendments of the Constitution.”¹⁷ In other words, for Howard, first came the rights stated in *Corfield*—which Madison considered to be “a bill of rights”—and then came the rights that were enumerated in what *we* now call “the Bill of Rights.”

The last piece of pre-Fourteenth Amendment text I will mention is the wording of the Civil Rights Act of 1866. You will notice that, so far, the sources refer to the rights of private property. Although they do not expressly reference the right of contract, this is necessarily included within the right to “dispose of property,” which would be by gift, bequest, or contract. The centrality of the right of contract as a privilege or immunity of citizens was made explicit in the Civil Rights Act of 1866, which included the rights “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.”¹⁸

The Civil Rights Act was passed pursuant to the enforcement power delegated to Congress by Section Two of the Thirteenth Amendment. Yet President Andrew Johnson vetoed the Act on the ground that it was outside of this delegated power of Congress. Some in Congress, most notably including Representative John Bingham, also questioned whether the Thirteenth Amendment truly gave Congress the power to enact the Act. They were also concerned that the Democrats would repeal the Act, as they pledged to do upon resuming their seats in Congress.

For these reasons, Bingham and others undertook to ground these privileges or immunities in the Constitution itself, so the rights protected by the Act would bind the courts and would be insulated from repeal. Their efforts would eventually culminate in the Fourteenth Amendment. After its ratification, Congress then formally reenacted the Civil Rights Act to ensure its constitutionality. The enforcement power granted Congress in Section Five of the Fourteenth

16. *Id.* at 552 (emphasis added). I will return to “dispose of” shortly.

17. CONG. GLOBE, 39th Cong., 1st Sess., 2765 (1867).

18. 14 Stat. 27–30 (emphasis added).

Amendment then justified the passage of the Civil Rights Act of 1866 to protect “the privileges or immunities of citizens of the United States.”

With all this in mind, there can be little doubt that, historically, the rights of property and contract were among the privileges or immunities of citizens of the United States to which the Fourteenth Amendment referred. The Constitution now affirmed that “no state shall make any law” abridging these rights of their citizens. The Due Process of Law Clause of the Fourteenth then adds a right to a *process* by which citizens may challenge the substance of a legislative act abridging their fundamental liberties—their privileges or immunities—as not a proper *law*.

But then what? Was the *Lochner* Court¹⁹ so extreme that it applied what we would now call “strict scrutiny” to every regulation of the freedom of contract? To the contrary. I can think of a statute that significantly regulated liberty but that the *Lochner* Era Court nevertheless upheld. It happened in a case by the name of . . . *Lochner v. New York*. And the law it upheld was called the Bakeshop Act, which regulated the minutiae of the bake shop industry. This included, for example, the ceiling height, the composition of the floors, the location of washroom facilities, and much more. All these regulations are reproduced in the Court’s opinion in *Lochner*. They all were upheld by the Court in *Lochner* as reasonable health and safety regulations of liberty.

There was only one provision of the extensive Bake Shop Act that the *Lochner* Court questioned: the maximum-hours law, which was added to the Act by the bake shop union. No doubt aware of its origin—though the decision does not mention it—the Court employed what by that time had become the traditional way of evaluating whether a police power regulation was within the power of the legislature to enact: it asked whether the law was irrational or arbitrary.²⁰

The majority concluded that the law was arbitrary in part because the maximum-hours restriction was only applied to bakeshop employees and not to workers in other businesses. The Court looked at the appendix that had been filed by Joseph Lochner, which included much social science research from the time, primarily involving the English bake shop industry. That research purported to demonstrate that baking was no more dangerous or unhealthful than many other occupations. Singling out the bake shop workers, therefore, was an arbitrary exercise of power. Nor did the law protect bake shop owners, who were allowed to work more than sixty hours per week in the very same conditions in which the bake shop workers were being allowed to work. If working that many hours was so unhealthy, why were bake shop owners allowed to do it?

It is important to note that the law was found to be “arbitrary” insofar as it did not fit as a means to a *legitimate* health and safety police power legislative end.

19. “The *Lochner* Court,” in fact, was a term that did not get invented until Gunther started calling it “The *Lochner* Court” in the 1970s.

20. See generally Barnett & Bernick, *supra* 2 (examining the traditional inquiry into the arbitrariness of an exercise of the police power).

So, the Court concluded, it must have been passed for “other motives.”²¹ By this, the Court meant a purpose that was *not* within the legitimate police power of a state to enact. In this case, that improper purpose was siding with one party in a labor contest—here the bakeshop unions—and against the other—here the mom and pop, small, ethnic bakeshops that had, unlike more industrialized bakeries, resisted unionization.

So, the Bake Shop Act was arbitrary and irrational in the sense that there was inadequate evidentiary support for it being a genuine health and safety law. Justice Harlan disputed the facts on which the majority based its decision, so there was a good-faith disagreement about the application of the due process of law in the case at hand. But, although the opinions are not completely clear, Harlan also appeared to adopt a different presumption and burden of proof to establish the reasonableness of restrictions on liberty. I believe, for the majority, the burden of proof is more or less on the legislature to establish that the legislative act was a valid exercise of its proper authority, while Justice Harlan wanted to adopt a rebuttable presumption of constitutionality. But only Holmes urged that the thumb irrebuttably be placed on the scale against a member of the general public and ultimate sovereign, like Joseph Lochner, and in favor of his servants in the legislature.

For all these reasons, I submit that a case like *Lochner v. New York* would not have been “crazy” in 1868 when the Fourteenth Amendment’s Privileges or Immunities Clause and Due Process of Law Clause were adopted. It was not “crazy” in 1905, when it was decided. Indeed, it was generally supported by newspaper editorials at the time.²² It did not become a public issue until Theodore Roosevelt made it a political cause when he ran as a Progressive Party candidate in 1912.²³ As a presidential candidate, he criticized *Lochner* and praised Holmes, whom Roosevelt had put on the Supreme Court.²⁴

Most importantly, for purpose of this debate, it would not be “crazy” after all these years for courts, as the Court did in *Lochner*, to realistically examine regulations to ensure that they are neither irrational nor arbitrary restrictions on the privileges, immunities and liberties of We the People—each and every one.

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

22. BERNSTEIN, *supra* note 14.

23. *Id.* See also BARNETT, *supra* note 4.

24. BARNETT, *supra* note 4, at 130–34.