TENTH ANNUAL ROSENKRANZ DEBATE: RESOLVED: *LOCHNER V. NEW YORK*: STILL CRAZY AFTER ALL THESE YEARS

Against *Lochner*

AKHIL REED AMAR*

Lochner is a case; it is the name of an era; and it is a metaphor. I think the case on its facts was wrongly decided and the larger philosophy that it embodied was mistaken. That is the position I will try to defend today.

The law at issue in *Lochner* prohibited contracts to work more than sixty hours a week as a baker. You may have been taught that when the *Lochner* Court struck down this law, the Court did so under a libertarian liberty-of-contract theory. I do not think that is actually the theory that animates *Lochner*, because the *Lochner* Court was perfectly okay with all sorts of intrusions on individual liberty of contract—for example, laws prohibiting gambling, laws prohibiting prostitution, and laws prohibiting unsafe working conditions in underground mines even when agreed to by fully competent adults.

So, a full-blown libertarian theory was not what really motivated the *Lochner* Court, though such a theory would be much more attractive than the theory that actually drove *Lochner*. The *Lochner* Court basically set its face against the New York law because the Court thought the law was redistributive. In the Court's view, the law was trying to help Labor (with a capital L) at the expense of Capital (with a capital C). The Court said that it was impermissible for government to try to level "inequalities of fortune." That phrase actually appeared in another *Lochner*-era case, a case called *Coppage*, and that was why the *Lochner* Court was very suspicious of the New York law—because the Court thought the state was trying to help equalize bargaining power and redistribute from employers to employees some of the economic surplus that was generated by voluntary employment transactions. The *Lochner* Court thought this attempted redistribution was unconstitutional; I do not.

The position I defend is close to John Marshall Harlan's. He is "The Great Dissenter"—a great dissenter in *Lochner*, as he was in *Plessy v. Ferguson* in 1896 and in the *Civil Rights Cases* of 1883 and in the 1895 income tax case (*Pollock*) and in several other cases where his dissent has proved prophetic. I thus affiliate

* Sterling Professor of Law and Political Science at Yale University. This Article was adapted from the Tenth Annual Rosenkranz Debate at the 2017 Federalist Society National Lawyers Convention. See Federalist Soc'y, *Tenth Annual Rosenkranz Debate:* Lochner v. New York, YOUTUBE (Nov. 19, 2017), https://www.youtube.com/watch?v=vca6JymWRhM.

myself with John Marshall Harlan, and not with the more famous dissent of Oliver Wendell Holmes, who is vastly overrated. On that point, although not on others, I do affiliate myself with David Bernstein's interesting book, *Rehabilitating Lochner*. Holmes should not be your hero; he does not believe in rights, liberty, freedom, equality, or judicial protection of those things. I know they do not tell you that at the Harvard Law School.

Here are some key facts that appear in Harlan's dissent: "The average age of a baker is below that of other workmen; they seldom live over their fiftieth year, most of them dying between the ages of forty and fifty." This was actually a genuine health and safety law, because bakers were working in the dark. They got up in the pre-dawn hours. They were inhaling flour dust all the time. They were not out in the sunlight, and in this sense, their situation was like being in an underground mine. There are reasons to insist on health and safety rules even if workers might be willing to voluntarily waive these health and safety rules. In unhealthful or unsafe work places, workers are putting not just themselves at risk but their families. Government entities and/or charities and/or members of civil society generally are going to have to care for the bakers' widows and orphans if the bakers themselves are unable to do so.

This was what a New York commission found, as quoted in Harlan's dissent: "The constant inhaling of flour dust causes inflammation of the lungs and of the bronchial tubes." So, it was just a very straightforward health and safety law that was invalidated only because the Court was really suspicious of the state's true motives. The Court thought something else was going on—a certain kind of governmental favoring of underdogs in the economy, and the Court said that was unconstitutional. Harlan actually addressed this issue. He said: "It may be that the statute had its origin, in part, in the belief that employers and employees in such establishments were not upon an equal footing"—meaning an equal *bargaining* footing. And I think that this sort of modestly redistributive bargain-power-equalization is also a permissible government purpose.

Now, why do I think that? After all, you could read the Takings Clause very broadly and say, "Gee, that is improper." Even though the clause is about real property, or property generally, it signals a general anti-redistribution principle. You could also try to read the Contracts Clause that way. One clause (the Contracts Clause) originally applied only against the states while the other clause (the Takings Clause) originally applied only against the federal government. But you could read them both very broadly.

However, if you do try to read both very broadly, you should read the Reconstruction Amendments broadly as well. You see, the Thirteenth Amendment is redistributive. It took property, lawful property, from slave masters and redistributed it to the slaves themselves. It did so in the name of a fuller sort of dignity, liberty, and equality. And it was not just traitors that it took property from. The Thirteenth Amendment took lawful property from lawful masters who fought for the Union Army in places that never seceded, like Kentucky, that were slave states. That would be John Marshall Harlan's family, just in case you missed it; he

was from a slaveholding Kentucky family, and the Thirteenth Amendment redistributes property permissibly. And the Fourteenth Amendment in section four actually says emphatically that there would not be any compensation for slaveholders who lost a slave. Their property was slaves, and we were not going to actually do any compensation for the governmental redistribution of that property. So, I think modest redistribution of a certain sort is not an impermissible purpose. Moreover, health and safety laws are not impermissible.

And even if you think otherwise in 1905 when *Lochner* is decided, remember that post-*Lochner*, We the People of America drafted and ratified the Sixteenth Amendment, the Income Tax Amendment, which was designed to provide for not just an income tax, but a *redistributive* income tax. *Everyone* at the time understood that—understood that previous income taxes in America had always been redistributive and that the income tax authorized by the Sixteenth Amendment would likewise probably be strongly redistributive. The first important federal income tax bill was signed into law by none other than Abraham Lincoln, and it was an openly redistributive tax. According to Treasury Department estimates, less than one percent of the population—the top one percent, to borrow a phrase—had been subject to this tax.

Both political parties in the 1910s actually supported an income tax amendment, and they both understood it was redistributive. We had a great national conversation about this. Consider for example the explicit words of the Democratic Party platform of 1908, which urged "the submission of a constitutional amendment specifically authorizing Congress to levy and collect a tax on individual and corporate incomes to the extent that wealth may bear its proportionate share of the burdens of the Federal Government."

Thus, modest redistribution of a certain sort is as American as apple pie, as constitutional as the Constitution itself—the Sixteenth Amendment, the Thirteenth Amendment, and section four of the Fourteenth Amendment.

At this point, I will let you in on a secret—just among us friends. Personally, I actually have strong libertarian sensibilities on some issues. Now, as I have just explained, *Lochner* is not quite a libertarian case—I think it is a propertarian case. I recommend my friend Randy's books to you because they are powerful and interesting, and I have learned a lot from them.

But I think there are some mistakes in them, which we can talk about. If you have followed me thus far, you should now know what those mistakes might be: Randy tries to defend *Lochner* on Fourteenth Amendment originalist grounds, and I have some doubts about that. Maybe in the second round of our debate he and I can talk about that a bit.

But here are some things that Randy has stood for that I agree with. He has noted that there are people who are desperately ill and are undergoing painful cancer treatments and sometimes medical marijuana can alleviate their pain. Should government be allowed to prohibit that medicinal alleviation? That is the *Raich* case. Randy framed this issue as a federalism case: Can Congress prohibit medicinal marijuana in any state that permits this medicine under state law? I

respectfully disagree with his federalism argument as he chose to frame it. If he had framed his argument as a straight-out liberty claim—that no government, state or federal, should be allowed to prohibit this much-needed pain medicine—then I would have found his argument quite powerful as a matter of public policy. On this policy issue, I am a libertarian, like Randy.

I will give one other example of an issue where I disagree with Randy: I do not find Obamacare an egregious law. True, it had an individual mandate. But if that is the problem as a matter of liberty, then Romneycare was unconstitutional as a violation of liberty, and ditto for all sorts of other state laws that require insurance for all sorts of purposes, like to drive a car. (I suppose you could say, in response, "well, you do not need to drive a car"—but good luck in California or Texas without a car.)

In a nutshell: If the government can tax me—and it can!—and if it can buy stuff with the money it gets from me (and it can!) and if it can choose to give that stuff to me (and it can!), then surely it can instead say: "Amar, we order you to get it yourself." I do not see that as a distinctive threat to liberty.

There are modern cases that I think are libertarian in more attractive ways. *Griswold* is one. *Griswold* is actually about liberty *and equality* because the privacy rights in *Griswold*, unlike the strong property rights underlying *Lochner*, are more equally distributed. It is not quite one person, one vote; it is more like one person, one bed. You can only be in one bed at a time. That is true if you are Bill Gates. That is true if you are a pauper. The sexual privacy right is more evenly distributed. I think privacy brings together the best of liberty and equality.

Let me take one other example where I think Randy and I have some common ground: the right to have a gun in the home, a right at issue in the 2008 *Heller* case, and in the 2010 *McDonald v. City of Chicago* case. Even before Randy entered this debate, I was on record, way back in my 1998 *Bill of Rights* book, that there is a right to have a gun in the home for self-protection. That is a matter of liberty and equality. Everyone can have a gun—it is not that expensive an item. My liberal friends sometimes are a little bit intolerant on this issue. They understand the right to have sex in the home but not a gun in the home. And I say, "this is America"—let them both have what they want.

So, Randy and I have a lot in common: *Griswold*, *Heller*, and *McDonald v. City of Chicago*—but *Lochner*, not so much. As Paul Simon famously noted, there are at least *50 Ways to Leave Your Lover*. Likewise, there are many ways to leave *Lochner*. There are many pathways, and you should pick one.