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Economic Liberty and the Constitution, Part 1

by Jacob G. Hornberger

In 1905, the constitutionality of Joseph Lochner’s criminal conviction by the state of New York was decided by the U.S. Supreme Court. New York had enacted a “maximum-hours” law that prohibited bakeries from requiring employees to work more than 60 hours a week. Lochner, a New York baker, had been convicted of violating the law.

Lochner v. New York was part of the enormous battle in the United States that took place over the concept of economic liberty during the late 1800s and early 1900s. The battle was fought on all fronts — intellectual, political, economic, legal, and constitutional, ultimately culminating in 1937 in the U.S. Supreme Court case of *West Coast Hotel v. Parrish*.

Lochner’s attorneys argued that his criminal conviction was invalid because the New York statute violated the Constitution of the United States. Keep in mind that the original Constitution was primarily designed to restrain the powers of the federal government by limiting its powers to those enumerated in the document itself. For example, Article 1, Section 8, listed the powers of Congress, and thus Congress was precluded from exercising any other powers.

It was different with the states, however. The states were free to exercise any power whatsoever, so long as the power was not expressly prohibited by the Constitution. For example, Article 1, Section 10, expressly prohibited the states from issuing paper money or impairing contracts. While the states would be prohibited from exercising those particular powers, therefore, they would be free to exercise others that were not enumerated.

Thus, the Constitution set up a system in which the federal government’s powers were limited and the state governments’ powers were almost unlimited. If a person wanted to know whether a power could be exercised by the federal government, all he had to do was examine the list of enumerated powers. If it was enumerated, the federal government could exercise it. If not, then it couldn’t.

On the other hand, if someone wanted to know whether the states could exercise a certain power, he examined the Constitution to see whether the states were prohibited from exercising the power. If the power wasn’t prohibited, the states could exercise it.

Of course, it's important to note that even though a state power might be not be prohibited by the U.S. Constitution, it was entirely possible that it was proscribed by the state's own constitution.

Those dual concepts of a limited federal government and unlimited state sovereignty were reconfirmed when the Bill of Rights was enacted. The first eight amendments placed express restrictions on the powers of the federal government but not the state governments. The Ninth Amendment clarified that the list of the people's rights was not all-inclusive. And the Tenth Amendment emphasized that the states could exercise those powers not granted to the federal government and not expressly prohibited from being exercised by them.

Let's assume that the Congress had enacted a law in 1800 that required every family to attend church on Sunday. The law would have been unconstitutional on two grounds: First, the power to require people to go to church was not among the powers enumerated in Article 1, Section 8, and second, the exercise of that particular power was expressly prohibited by the First Amendment to the Constitution (which controls the acts of Congress).

But suppose the Commonwealth of Massachusetts had enacted the exact same law. Would it also have violated the U.S. Constitution? No, because there was no express restriction on the power of the states to enact such a measure. While the law might have violated the constitution of Massachusetts, it would not have violated the U.S. Constitution.

The Fourteenth Amendment

Why then had *Lochner* appealed his state criminal conviction to the U.S. Supreme Court? The maximum-hours law under which he had been convicted had been enacted by New York, not by the U.S. Congress. How could he hope to prevail, given that under the U.S. Constitution the states had the sovereign power to enact any laws that were not expressly forbidden by the U.S. Constitution? And there certainly was no constitutional provision expressly prohibiting the states from enacting maximum-hours legislation.

The answer lies with the Fourteenth Amendment, which had been ratified in 1868, three years after the end of the Civil War. It reads in part,

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Thus, the enactment of the Fourteenth Amendment gave the federal courts the power to determine whether a state law "abridged the privileges and immunities of citizens," deprived "any person of life, liberty, or property, without due process of law," or denied "any person within its jurisdiction the equal protection of the laws."

Although *Lochner's* attorneys raised both the Due Process clause and the Equal Protection clause of the Fourteenth Amendment in their arguments, the court battle ultimately revolved around whether the Due Process clause would trump the traditional “police powers” of the state. The police-powers concept referred to the sovereign powers of the state governments — that is, to the historical powers of the state to punish people for criminal acts.

Police powers and mercantilism

The courts, however, had not limited the concept of “police powers” to laws proscribing violent crimes, such as murder, rape, theft, and burglary. Instead, the concept had been vaguely defined as the power to enact laws relating to the “safety, health, morals, and general welfare” of the public, a definition that opened up a Pandora’s box that harkened back to the era of mercantilism, an economic system that characterized European life during the 1600s and 1700s.

Under the old mercantilist system, the government had the power to regulate the most minute aspects of people’s economic affairs. Consider, for example, the cloak industry. The government prescribed how many cloaks should be produced in the nation, as well as sizes and colors. Regulations even outlined exactly how the nation’s weavers were to do their weaving.

Why were these extensive regulations necessary? Because if the government did not regulate the production of cloaks, it was believed, there existed the distinct possibility that people might end up with no cloaks to wear, which would mean that they might very well freeze to death. After all, what if everyone forgot to make cloaks one year? Or what if they didn’t make them in sizes that would fit the people?

Those questions were equally important with respect to the production of all other goods and services in the realm, especially vitally important items such as food and clothing. Only through state direction and control could people be assured of being provided affordable food, clothing, housing, and other important items.

The mercantilist laws were intended to help the poor, which consisted of most of the citizenry. To ensure that goods and services were not too expensive, the government maintained an extensive set of price controls on good and services. Those controls prohibited people from selling their products at a higher price than that set by the government. There were also laws that prohibited “speculation,” the practice by which a seller made a profit by purchasing something at a lower price with the expectation of selling it a higher price. “Middlemen” were illegal because they tended to increase prices, which hurt the poor.

Despite the best efforts of government to help people with the extensive economic regulations that characterized the mercantilist system, however, there was tremendous economic suffering, especially for those at the bottom of the economic ladder. Living standards were abysmally low, and life for the average person was miserable and short. Life expectancy for both men and women was less than 30, which was why people married in their early teens. Couples

would have many children, in the hope that a few would survive into adulthood. Disease and famine made life nasty and short for the average person, despite the best efforts of government to combat poverty through its mercantilist system.

Two revolutionary events

Then, in the year 1776, two monumental events took place, both of which involved revolutionary ideas: the Declaration of Independence was written and Adam Smith's *Wealth of Nations* was published.

Throughout history, people had lived and died under the assumption that their government officials had the right to regulate and control their economic affairs. People belonged to the king, who had the unfettered power to do whatever he wanted with them. If the king's armies were involved in some foreign war and he needed additional soldiers, for example, all he had to do was grab young men in the realm and force them to go fight for him. If he needed additional revenues, he just confiscated people's property. Hardly anyone gave it a thought — it was just commonly understood that people belonged to the government and were therefore unconditionally subject to the commands and dictates of their king.

Over time, the concept of freedom became associated with limits placed on the power of the king over people's lives and fortunes. People began understanding that the greater the limits on the power of government, the greater the freedom of the people. That's the reason that Magna Carta plays such an important role in the history of liberty — it was the first time that a king openly admitted that there were limits on his powers over the citizenry. In Magna Carta, King John admitted that his powers over the people were not *unlimited*, but instead *limited*.

One of Magna Carta's most famous limitations on the king's powers prohibited him from seizing a person or his property in violation of "the law of the land." Here is the formal language:

No Freeman shall be taken, or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or otherwise destroyed; nor will we pass upon him, nor condemn him, but by lawful Judgment of his Peers, or by the Law of the Land.

Over the centuries, that phrase — "law of the land" — gradually became known as "due process of law" in the judicial systems of Great Britain and later the United States. It was the phrase that our ancestors included in the Fifth Amendment as a restriction on the power of the federal government. It was the phrase that was included in the Fourteenth Amendment as a restriction on the power of the states.

It was also the phrase on which the *Lochner* decision ultimately turned. Indeed, one of the most important constitutional battles in American history revolved around the phrase "due

process of law” — a battle that would ultimately have an enormous impact on the economic liberty and well-being of the American people.

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