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Economic Liberty and the Constitution, Part 7

by Jacob G. Hornberger

In 1895 the New York legislature enacted a law making it a criminal violation for New York bakery owners to “require or permit” bakery employees to work more than 60 hours a week. Joseph Lochner, the owner of Lochner’s Home Bakery in Utica, was convicted of violating the statute.

His conviction having been upheld by the New York appellate courts, Lochner appealed to the U.S. Supreme Court, which decided the case in 1905.

Lochner v. New York became a landmark case in the ideological, legal, and intellectual battle between the advocates of economic liberty and the advocates of socialism and interventionism.

It is important to note that the legislation in *Lochner* was state legislation, not federal. Let’s review the original concept of the U.S. Constitution to see why that’s an important point.

The Constitution called into existence the federal government. By its own terms, the Constitution limited the powers of the federal government to those enumerated in the document itself.

That is, the federal government was never intended to be a government of unlimited powers, despite the fact that its public officials would be democratically elected. It was intended to be a government whose powers were extremely limited — limited to those few powers that the Constitution granted it. If the power wasn’t enumerated, everyone understood that the federal government couldn’t exercise it.

That wasn’t sufficient for the American people. They didn’t trust government — any government, not even a democratically elected one headed by the likes of George Washington, Thomas Jefferson, and John Adams. They knew that governments throughout history had used every excuse in the books, especially “crises,” to take away people’s liberties.

Thus our ancestors insisted on the passage of the first 10 amendments to the Constitution as a condition of approving the existence of the federal government. Those amendments restricted the government from interfering with the fundamental rights of the people, such as freedom of religion, freedom of the press, freedom of assembly, the right to keep and bear arms, and due process of law.

However, it was always understood that with the exception of a few express restrictions on the power of the states (e.g., the power to emit bills of credit or make anything but gold and silver coin a medium of exchange) the Constitution was a restraint on federal, not state, power.

Therefore, why would the U.S. Supreme Court assume jurisdiction over the *Lochner* case? After all, the case involved a New York statute, not a federal statute, and the New York appellate courts had already upheld the statute under New York's constitution. What business did the U.S. Supreme Court have accepting *Lochner's* appeal?

The answer lies in the Fourteenth Amendment, the post-Civil War amendment to the U.S. Constitution that effectively applied the Due Process protections of the Fifth Amendment (which applied only to the federal government) to the states.

Liberty of contract

Relying on the dissenting opinions in the *Slaughterhouse Cases*, on the holding in the *Tenement-House Cigar Case*, and on other cases, *Lochner* argued that the New York statute deprived him of liberty without due process of law. His argument was based on what became known as “substantive” due process of law rather than “procedural” due process of law.

That is, even though the state might follow well-recognized procedural methods before taking away a person's rights (e.g., notice or hearing), substantive due process meant there were certain fundamental rights that could not be taken away even if the correct procedures were followed.

One of those fundamental rights, *Lochner* argued, was freedom of contract — the right of two people, in this case employer and employee, to enter into mutually beneficial economic exchanges with one another. In the case at hand, *Lochner* and his employee, Aman Schmitter, had agreed that Schmitter would work for more than 60 hours a week in *Lochner's* home bakery and that *Lochner* would pay him at an agreed-upon rate.

So how could the state of New York justify interfering with an employment agreement reached by two adults? Recall the doctrine of police powers: throughout the ages, the common law had held that the state was vested with certain powers by its very nature. Among these would be the power to arrest, prosecute, and punish people who had inflicted violence on others, such as murderers, rapists, and burglars.

Much more controversial, however, was the notion that the state's police powers extended to laws that protected the health, safety, and welfare of the people. Such a doctrine fitted well within the traditional, unlimited powers of the state in Europe, but what place did it have in a society in which states' powers were enumerated in their own state constitutions? Moreover, the doctrine of state police powers now collided directly with the notion that no state could deprive a person of due process of law, which many legal scholars construed to include the fundamental rights of economic liberty and liberty of contract.

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Writing for the majority in a 5-4 decision, Justice Rufus W. Peckham put the issue directly and succinctly:

“It is a question of which of two powers or rights shall prevail — the power of the State to legislate or the right of the individual to liberty of person and freedom of contract.”

Lochner's triumph

The Supreme Court reversed the lower court decisions and declared the New York statute in violation of the U.S. Constitution. Writing for the majority, Justice Peckham wrote,

“The statute necessarily interferes with the right of contract between the employer and employees, concerning the number of hours in which the latter may labor in the bakery of an employer. The general right to make a contract in relation to his business is part of the liberty of the individual guaranteed by the Fourteenth Amendment of the Federal Constitution.... Under that provision no State can deprive any person of life, liberty or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right. There are, however, certain powers, existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those

powers, broadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State in the exercise of those powers, and with such conditions the Fourteenth Amendment was not designed to interfere.”

The Court reasoned that New York’s maximum-hours law for bakers was an illegitimate exercise of its police powers:

“There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State. Viewed in the light of a purely labor law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act. The law must be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation of a baker. It does not affect any other portion of the public than those who are engaged in that occupation. Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week. The limitation of the hours of labor does not come within the police power on that ground....”

The mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.

The dissent

The *Lochner* decision is famous not only for the majority decision but also for the dissenting opinion of Justice Oliver Wendell Holmes, in which he criticized the idea of economic liberty and laissez faire:

“This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory I should desire to study it further and long before making my mind. But I do not conceive that to be my duty, because I strongly

believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The Fourteenth Amendment does not enact Mr. Herbert Spencer's *Social Statics*."

Spencer, an Englishman, was one of the 19th century's most prominent advocates of laissez-faire economics. Holmes, however, misconstrued the thrust of the majority's decision. The majority was not justifying its decision on the basis of the benefits that flow from laissez-faire economics but instead simply defining the meaning of liberty and due process of law.

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In other words, while the issue of whether to embrace economic liberty or socialism was a political one involving economic arguments, the decision still had to withstand the test of whether the legislation comported with the Constitution.

Thus, no matter how viable or popular a course of action was, it could not be enacted if it violated the supreme law of the land. That determination was the job of the judicial branch of government.

If the majority had been deciding an economic, rather than a constitutional, issue, however, the issue of economic benefits weighs in favor of economic liberty and against socialism and interventionism.

For one thing, the fact that both the employer and employee agree to a contract reflects that they both perceive a benefit (as compared with not entering into contract); otherwise they would not enter into the contract.

Moreover, as Bernard Siegan described in his book *Economic Liberties and the Constitution*, the effect of New York's law was to benefit the large, newly industrialized bakeries and harm the small, home-based bakeries, such as that of Joseph Lochner.

Some workers, especially newly arrived immigrants, needed to work more than 60 hours in order to make enough money to feed their families.

Second, since many of them couldn't speak English, they were more comfortable working in the small neighborhood bakeries.

Third, maximum-hours legislation raised the costs of production; these could more easily be absorbed by the big bakeries but they put marginal home-based firms out of business, which meant unemployment for their employees.

As Siegan put it,

“Over the years, this nation has learned that a considerable amount of social and economic legislation has not served its intended purpose and has been frequently counterproductive. From the foregoing data, one can conclude that New York's restriction on working hours would have had a relatively short-term impact. Moreover, if effective, it might have been a highly destructive influence on the lives of the workers it sought to help.”

In any event, the gauntlet had clearly been thrown down by both sides in the Supreme Court. The battle lines were forming for what would be the decisive Supreme Court battle between the advocates of economic liberty and the advocates of socialism and interventionism, a battle that would ultimately take place during the New Deal regime of Franklin D. Roosevelt.

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