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Lochnering

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Between 1905 and 1937, the legal culture experienced a genuine revolution. In 1905, the Supreme Court invalidated a maximum hour law for bakers,[1] concluding that the State of New York could not transform bakers into "wards of the state."[2] In 1923, the Court struck down a minimum wage law for women and ehildren.[3] The Court explained: "To the extent that the sum fixed exceeds the fair value of the services rendered, it amounts to a compulsory exaction from the employer for the support of a partially indigent person, for whose condition there rests upon him no peculiar responsibility, and therefore, in effect, arbitrarily shifts to his shoulders a burden which, if it belongs to anybody, belongs to society as a whole."[4] In the Court's view, the police power was sharply limited, and whatever it included, it did not include the power to require minimum wages or maximum hours.[5] Ideas of this sort played an important role in cases striking down not only minimum wage and maximum hour laws, but a number of other measures attempting to protect workers.[6]

At the same time, a countermovement was occurring within the legal culture.[7] Between 1915 and 1935, many commentators urged that property rights were a product of law, and that government regulation, in the form of maximum hour or minimum wage laws, could not be seen as interference with a voluntary or law-free private domain. In 1923, the Supreme Court emphasized the importance of respecting "fair value."[8] But in 1918, Justice Holmes had produced a responsive and relevant near-haiku: "Property, a

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

2. *Id.* at 57.

3. Adkins v. Children's Hosp., 261 U.S. 525 (1923).

4. *Id.* at 557–58.

5. A qualification is *Bunting v. Oregon*, 243 U.S. 426 (1917), upholding a maximum hour law for factory workers of both sexes.

6. *See, e.g.*, Adair v. United States, 208 U.S. 161 (1908) (overturning a conviction for firing a worker belonging to a union); Coppage v. Kansas, 236 U.S. 1 (1915) (invalidating a law banning contracts forbidding workers to join unions). I am not arguing that the invalidated measures were desirable or that they actually protected workers in general or on balance. It is well known, for example, that minimum wage legislation can increase unemployment.

7. For a superb and detailed treatment, see BARBARA FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT (1993).

8. *Adkins*, 261 U.S. at 557.

creation of law, does not arise from value, although exchangeable—a matter of fact."[9] In this highly compressed sentence, Holmes insisted that property is not produced by value but instead by law—and that this is simply "a matter of fact." By 1935, the attack on laissez-faire, and the insistence on the omnipresence of government regulation, was well-known, to the point where an unsigned student note, dealing with the law of contract, ridiculed the idea that a refusal "to supervise the ethics of the market place" could be justified by "doctrines of *laissez-faire*."[10] The student author thought the justification implausible for one reason: "[T]he freedom from regulation postulated by *laissez-faire* adherents is demonstrably non-existent and virtually inconceivable. Bargaining power exists only because of government protection of the property rights bargained, and is properly subject to government control."[11]

Columbia law professor Robert Hale set forth the most powerful defense of this view, and his eyes were trained directly on *Lochner* and related decisions.[12] Hale wrote against the background of the political struggle over government efforts to set minimum wages and to regulate prices, a struggle that he believed was being waged on false premises. His special target was the view that governmental restrictions on market prices should be seen as illegitimate regulatory interference in the private sphere. This, said Hale, was an exceedingly confused way to describe the problem. Regulatory interference was already there:

> The right of ownership in a manufacturing plant is . . . a *privilege* to operate the plant, plus a *privilege* not to operate it, plus a *right* to keep others from operating it, plus a *power* to acquire all the rights of ownership in the products. . . . This power is a power to release a pressure which the law of property exerts on the liberty of others. If the pressure is great, the owner may be able to compel the others to pay him a big price for their release; if the pressure is slight, he can collect but a small income from his ownership. In either case, he is paid for releasing a pressure exerted by the government—the law. The law has delegated to him a discretionary power over the rights and duties of others.[13]

Did these ideas play any role in American political life? Consider Franklin Delano Roosevelt's Commonwealth Club Address in 1932, where he emphasized the view, which he attributed to Thomas Jefferson, "that the

9. Int'l News Serv. v. Associated Press, 248 U.S. 215, 246 (1918) (Holmes, J., dissenting).

10. Note, *The Peppercorn Theory of Consideration and the Doctrine of Fair Exchange in Contract Law*, 35 COLUM. L. REV. 1090, 1091 (1935).

11. *Id.* at 1091–92.

12. *See* FRIED, *supra* note 7, at 8 (remarking that Hale's analyses of property rights, coercion, and the role of legal entitlements in structuring economic life are the "best treatments of the subject to date").

13. Robert Hale, *Rate Making and the Revision of the Property Concept*, 22 COLUM. L. REV. 209, 214 (1922).

exercise of the property rights might so interfere with the rights of the individual that the Government, *without whose assistance the property rights could not exist*, must intervene, not to destroy individualism, but to protect it."[14] In first accepting the Democratic nomination, Roosevelt made a similar point. He complained that some leaders refer to "economic laws—sacred, inviolable, unchangeable"; to this he responded that "we must lay hold of the fact that economic laws are not made by nature. They are made by human beings."[15] Consider as well Roosevelt's emphasis on "this man-made world of ours" in advocating social security legislation.[16]

Did these views play any role in the Supreme Court? In dealing its 1937 death-blow to the *Lochner* era, the Court wrote,

> The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage . . . casts a direct burden for their support upon the community. What these workers lose in wages the taxpayers are called upon to pay. The bare cost of living must be met. We may take judicial notice of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved . . . . The community is not bound to provide what is in effect a subsidy for unconscionable employers.[17]

Or consider the Court's decision just one year later in *Erie Railroad Company v. Tompkins*,[18] recognizing that the common law should be seen, not as a set of timeless or natural truths, but as the emanation of the will of some sovereign. In many ways, the attack on the system of laissez-faire, and the claim that the common law was a humanly constructed social order, came to prominence in the late 1930s.

Lochner's Legacy[19] was a mildly revised version of a public lecture.[20] It offered a seven-page discussion of *Lochner* and its demise, about half of which was devoted to the *Lochner* decision itself. The goal of the lecture was to suggest that *Lochnering* could be seen, not merely in "judicial

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14. Franklin D. Roosevelt, Campaign Address on Progressive Government at the Commonwealth Club (Sept. 23, 1932), *in* 1 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 742, 746 (Samuel I. Rosenman ed., 1938) (emphasis added) [hereinafter PUBLIC PAPERS].

15. Franklin D. Roosevelt, The Governor Accepts the Nomination for the Presidency (July 2, 1932), *in* 1 PUBLIC PAPERS, *supra* note 14, at 657.

16 Franklin D. Roosevelt, Message to the Congress Reviewing the Broad Objectives and Accomplishments of the Administration (June 8, 1934), *in* 3 PUBLIC PAPERS, *supra* note 14, at 288. See also Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927), which makes similar points.

17. West Coast Hotel Co. v. Parrish, 300 U.S. 379, 399 (1937).

18. 304 U.S. 64 (1938).

19. Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987).

20. *See id.* at n.*.

activism," but in all decisions taking the status quo, or the common law, as the baseline for deciding whether government had engaged in some constitutionally troublesome intervention into existing affairs. Following the 1935 student commentator, I urged that a "failure to impose a minimum wage is not nonintervention at all but simply another form of action—a decision to rely on traditional market mechanisms, within the common law framework, as the basis for regulation."[21] I claimed that *Lochnering*, understood in this way, could be found in many places, including the constitutional assaults on campaign finance law and affirmative action, as well as certain uses of the state action doctrine, and certain understandings of sex discrimination.[22] I also claimed that we should not "*Lochner* preferences"—that is, we should not see existing preferences as if they spring from the sky and never have anything to do with legal arrangements.[23]

To say the least, *Lochner's Legacy* was not a work of legal history. I attempted to stay true to the period—hence, among other things, the heavily qualified nature of the seven-page discussion[24]—but in a way that could not come close to doing real justice to it. In these circumstances, David Bernstein's article is an extremely valuable addition.[25] Bernstein examines the Court's performance with far more care than I did; he greatly illuminates the era, and he offers reasons to question my basic claims. I am grateful to Bernstein not only because he adds so much to our understanding of the period, but also because of the generosity, care, and scrupulousness with which he states, and rejects, the argument of *Lochner's Legacy*.

Most of Bernstein's own claims seem to me convincing. He is right to say that the Supreme Court allowed state governments to alter the rules of the common law, perhaps above all in *Holden v. Hardy*,[26] upholding a maximum hour law for miners, but also in cases abolishing the contributory negligence defense and the fellow servant rule.[27] He is correct to observe that the *Lochner* Court allowed governments to go well beyond the system of laissez-faire.[28] Again *Holden v. Hardy* is an example, but in other cases the Court allowed states to protect women and children and to reduce workplace injuries, among other things.[29] Bernstein emphasizes, reasonably, that the

21. *Id.* at 880–81.

22. *Id.* at 883–900.

23. *Id.* at 900–02.

24. *See, e.g.*, *id.* at 878 n.27 (emphasizing that redistributive taxation was permitted); *id.* at 879 n.30 (emphasizing that changes in the common law were permitted); *id.* (emphasizing that a commitment to the common law was coextensive with a widely held normative theory about the proper role of government); *id.* at 880 n.40 (emphasizing the complexity of the framework governing the legitimate uses of the police power).

25. David E. Bernstein, *Lochner's Legacy's Legacy*, 82 TEXAS L. REV. 1 (2003).

26. 169 U.S. 366 (1898).

27. Bernstein, *supra* note 25, at 23–24.

28. *Id.*

29. *Id.*

Court protected civil liberties in cases that did not involve economic liberties at all, creating the origins of the modern right to privacy.[30] He also objects to my reading of the *Lochner* opinion, and urges that in *West Coast Hotel*, the Court did not, in fact, emphasize that the common law is a regulatory system—one that also embeds government action. To Bernstein, *West Coast Hotel* was very far from a recognition of Hale's views, or Roosevelt's.

In all of these ways, Bernstein adds to existing learning about the *Lochner* period. But his picture seems to me incomplete, above all because it does not adequately specify the Court's understanding of the police power. I believe that there is a close connection between that understanding and the Court's use of common law baselines to question legislation. Compare two claims:

1. *The* Lochner *Court treated the common law as sacrosanct; it did not allow legislatures to depart from it.*

2. *Insofar as the* Lochner *Court invalidated legislation under the Due Process Clause, it usually did so because it saw the Constitution as forbidding departures from the common law unless those departures could be justified as falling under certain specific "heads" of the police power.*

To the extent that Bernstein rejects claim (1), he is on firm ground. But I believe that claim (2) is correct, and that it helps to explain what *Lochnering* was, and is, all about. Here *Lochner* itself is the strongest evidence. The heart of the opinion is a lengthy discussion of how the maximum hour law cannot be justified as a "labor law" or a "health law."[31] In the Court's view, it cannot be justified as a labor law because bakers have full legal capacity.[32] By itself, this is an extraordinary and even amazing holding, one with large implications, because it forbids government from using the idea of "labor law" to attempt to protect a wide range of workers from adverse outcomes in the labor market.[33] The Court also held that the maximum hour law could not be defended as a "health law," because it could not be shown that bakers' health was peculiarly vulnerable from long hours of work.[34] As the Court itself stressed, this ruling also had significant implications, forbidding maximum-hour legislation in innumerable domains.

30. *Id.* at 44–47.

31. Lochner v. New York, 198 U.S. 45, 57–64 (1905).

32. *Id.* at 57.

33. Bernstein offers useful and important qualifications. *See* Bernstein, *supra* note 25, at 47–53.

34. *Lochner*, 198 U.S. at 57–59.

Bernstein insists that we should not overread the Court's suspicion "that there was some other motive dominating the legislature than the purpose to subserve the public health or welfare."[35] Let us grant him the point. The larger claim remains. In *Lochner*, the Court held that the police power did not permit the state to invoke paternalistic or redistributive goals to engage in legislation of the kind that is now believed to be legitimate in democracies all over the world. And when the *Adkins* Court complained of a "compulsory exaction," I believe that it was specifying the foundation for the Court's view of what made those uses of the police power off-limits. In my view, the key to many of the *invalidations* in the *Lochner* period—and the invalidations are what remain of interest—lies in the relationship between the limited understanding of the police power and the notion of what employers "owned" or "had" as a matter of constitutional right.

West Coast Hotel raises many complexities, and Bernstein is right to say that the Court did not produce the opinion that would have been written by Robert Hale or Franklin Delano Roosevelt (though in the latter case it came fairly close). The Court's opinion has many strands. But the Court did emphasize the situation of workers "who are in an unequal position with respect to bargaining power and are thus relatively defenceless against the denial of a living wage."[36] The Court did contend that it was perfectly legitimate to require "the payment of a minimum wage fairly fixed in order to meet the very necessities of existence."[37] The Court did insist that the "community is not bound to provide what is in effect a subsidy for unconscionable employers."[38] Is it entirely coincidental that just one year later, the Court, quoting Justice Holmes, rejected the idea that there is "a transcendental body of law outside of any particular State"[39]—and thus insisted that federal courts must follow state common law, rather than jettisoning it in favor of their version of "federal general common law"?[40] If we see *West Coast Hotel* as symbolizing the end of an era, we would do well to place it in a particular context, one in which anonymous student writers could contend that "the freedom from regulation postulated by *laissez-faire* adherents is demonstrably non-existent and virtually inconceivable,"[41] and in which the nation's leader could insist "that the exercise of the property rights might so interfere with the rights of the individual that the Government,

35. *Id.* at 63. An interesting puzzle remains, however: What did the Court mean by this statement?

36. West Coast Hotel Co. v. Parish, 300 U.S. 379, 399 (1937).

37. *Id.*

38. *Id.* By drawing attention to these remarks, I am not arguing in favor of minimum-wage legislation or suggesting that such legislation is the best way of helping low-wage workers.

39. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79 (1938) (quoting Black & White Taxicab Co. v. Brown & Yellow Taxicab Co., 276 U.S. 518, 533 (1927)) (Holmes, J., dissenting)).

40. *Id.* at 78.

41. Note, *supra* note 10, at 1091–92.

without whose assistance the property rights could not exist, must intervene, not to destroy individualism, but to protect it."[42]

Bernstein is certainly correct to say that the *Lochner* Court did not wield the idea of the night-watchman state as a kind of all-purpose check on government action. Holmes overstated; the *Lochner* Court did not try to enact Mr. Herbert Spencer's Social Statics. But I am not sure what Bernstein thinks was wrong with the *Lochner* decision, or even what he thinks the era was all about. When all the dust settles, I continue to believe that it will not be possible to understand *Lochner* without close attention to the simultaneous attack on the common law and laissez-faire—an attack that found its way into the White House itself.[43] *Lochnering* is not just one thing. But *Lochner*'s legacy can be found in the many domains in which people continue to neglect the large presence of government, and law, in areas that are in fact pervaded by them.

42. Roosevelt, *supra* note 14, at 746.

43. I discuss some of this in more detail in CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS (forthcoming Basic Books 2004).

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