THE LOCHNER COURT AND THE NEW DEAL

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ABSTRACT: *The New Deal era was one of the most politically charged and transformative times in American history. Most of the attention is rightly focused on the vast array of new social programs forged during that time; however many critics of the New Deal place blame at the feet of the Supreme Court. The narrative goes that the Supreme court, abandoning the good judicial interpretation of previous generations, allowed Franklin Roosevelt to have his way due to political pressure. The strong implication of this critique is that the Court did something fundamentally new when it judged cases based on popular economic policies rather than an originalist understanding of the Constitution. The irony of this position is that the New Deal era Court was mimicking the tactics of the previous Court in the legacy of the Republican era. The previous Court actively promoted laissez-faire economic policies through their rulings, most notably in the infamous* Lochner v. New York *decision. It was actually due to this precedent of Lochner era court that laid the groundwork for the judicial activism prevalent in the New Deal era court.*

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One of the biggest debates throughout constitutional history has been whether judges' political beliefs should be guides in their rulings. In our modern context, left-leaning political figures tend to argue that the Supreme Court should judge based on their personal views on rights while conservatives insist that judges should stick to an originalist interpretation of the Constitution. When judges opt to push personal agendas through their decisions, they mean well. They think that the ends justify the means and that by stretching the literal interpretation of the law, they can promote something they deem good for society. There may be situations where this is the case. However, not all judicial activism ultimately pays off. When judges separate the ideas they are trying to promote from any legitimate grounding in previous law, they run the risk of having such ideas quickly removed as soon as they lose power. One of the best examples of judicial activism gone awry is not from a left-leaning court but from politically

conservative judges during the early twentieth century. In *Lochner v. New York 1905,* the Court majority abandoned the traditional view of contracts to promote a new absolute right of contract born out of laissez-faire economics instead of constitutional analysis. The beginnings of this theory began to take root right after the Civil War and the passage of the Fourteenth Amendment. The ideas promoted in *Lochner* were originally presented in the dissent of the *Slaughter-House Cases* in 1873, but it was not until 1905, after years of development during the Industrial Revolution, that the Supreme Court codified the concept of a right of contract into law. By introducing the notion of absolute economic rights, creating an authority vacuum for police powers, and associating their position with bold faced agenda, the *Lochner* court undermined their own position and helped open the door for the New Deal.

In order to make sense of the *Lochner* decision, it is important to realize that the absolute right of contract was

not upheld by the Court before this case. Even as early as the Marshall court, protecting contracts was held as a "high and solemn duty." At that time, however, contracts were being discussed and defined in completely different terms.[1] In *Trustees of Dartmouth College v. Woodward*, when John Marshall was ruling on an issue of constitutional protections of contract, he did not start with general precepts of justice or fundamental rights of citizenship.[2] Instead, he started by examining the Contracts Clause of the Constitution, which bans states from passing any "law impairing the Obligation of Contracts."[3] In addition, he established that the Court was required to uphold only "those contracts which the Constitution of our country has placed beyond legislative control."[4] This meant he was asserting that the Constitution did not assume all contracts were automatically protected just by nature of being contracts. Rather, the intention

1 Trustees of Dartmouth Coll. v. Woodward, 17 U.S. 518 (1819).
2 Slaughter-House Cases, 83 US 36 (1873).
3 U.S. Const. art. I, §10, cl. 1.
4 *Woodward*, 17 U.S. at 625.

of the law provided for specific protections for specific contracts. The only reason Marshall ruled to uphold the contract in *Trustees of Dartmouth College v. Woodward* was because he examined the details of the case and found the specific contract to qualify for protected status under the Contracts Clause. It was not until after the Civil War that a new vision for contracts started to take shape. In fact, the very first case to be heard under the Fourteenth Amendment, the *Slaughter-House Cases,* was one of the first times that members of the Supreme Court presented a fully formed doctrine of a right of contract. Even though the *Slaughter-House Cases* majority ruled in favor of the traditional priority of police powers over contract rights, the dissents presented all the essential pieces of the right of contract that were later established in *Lochner v. New York.*

The two most important things the *Slaughter-House* dissent presented were that the right of contract is

fundamental—meaning it is one of the most basic rights guaranteed in a free republic—and that it took priority over police powers. The *Slaughter-House Cases'* dissent broke away from the view of contracts presented in the Marshall court mostly by separating it from the text of the Constitution. While Marshall in *Dartmouth* is very careful to trace the exact textual basis for protection of contract in the Constitution and only reached the conclusion that the specific contract was legitimate after doing this analysis, the *Slaughter-House* dissent flipped this process on its head. Justice Field claimed that "even if the Constitution were silent, the fundamental privileges…would be no less real and no less inviolable than they are now," or, in other words, right of contract is something so sacred that it does not even need to be based in the Constitution to demand being supported by the Supreme Court.[5] This idea was codified in *Lochner v. New York.* Aligning with the

5 *Slaughter-House*, 83 US at 119.

majority opinion, Justice Peckham doubled down on the right of contract as fundamental, saying "the general right to make a contract…is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution."[6] In doing so, he moved from Marshall's view that specific types of contracts were protected to claiming that the very act of making a contract is a sacred right of all Americans and must always be protected.

Lochner then broke even farther away from precedent by directly challenging police powers. The Court needed to put a strong barrier between state power and their newly created right of contract, so they limited state police power to situations when state legislation has 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

6 Lochner v. New York, 198 U.S. 45, 53 (1905).

to contract in relation to his own labor.[7]

This extra stipulation was critical because it reversed which right was assumed as the default. Justice Peckham established this shift in the *Lochner* majority when he tried to distinguish between the professions of a baker and that of a miner or any other profession whose work hours were already being regulated for safety reasons. He reasoned that the only grounds that states had to limit working hours in these professions was that overworking miners could directly lead to their death.[8] In effect, he meant that unless there was a strong correlation between a provision and the prevention of death, then the limit was illegitimate. The implication of this was that states could only use their police powers if they could prove that it would directly preserve human life. By the time the *Lochner* court had finished creating their new understanding of contract rights, they had changed them from conditional to absolute while also

7 *Id*. at 57.
8 *Id*. at 62.

reducing states' police powers to only true emergencies.

The problem with the reasoning of the *Lochner* majority is that the absolute right of contract is simply not in the Constitution. Justice Hughes pointed out this fact in 1937 in *West Coast Hotel Co. v. Parrish,* when he overturned the precedent of *Lochner.* He wrote, "the Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrollable liberty."[9] This analysis is exactly right. The reason no court until *Lochner* had upheld anything looking like a right of contract was that the Constitution, by itself, does not lead to an absolute right of the individual to contract himself without any regulation.

The question, then, is why did the *Lochner* court abandon the old interpretation for such an extreme

9 West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937).

position? The answer appears to be exactly what the Court was accused of in the case's own dissent: the judges were pursuing a political agenda. In his majority opinion, Justice Peckham showed his hand by asking fearfully if "[we are] all, on that account, at the mercy of legislative majorities?" and insisting that if we do not enforce the absolute right of contract, then "no trade, no occupation, no mode of earning one's living could escape this all-pervading power." In short, the Court had to take a no-compromise stand on the right of contract because otherwise "the acts of the legislature in limiting the hours of labor in all employments would be valid, even if such limitation might seriously cripple the ability of the laborer to support himself and his family."[10] The true motivation behind the Court's decision was the fear of state power encroaching on the power of individual, not an accurate reading of constitutional protection of the right of contract. *Lochner*

10 *Lochner*, 198 U.S. at 59.

argued backwards—looking to the potential legislative consequences of ruling in favor of police powers rather than starting with the Constitution and court precedent.

With the arrival of the Great Depression, the decision to abandon good legal interpretation in favor of pushing laissez-faire economics created opportunities for progressives to more effectively undermine the conservative agenda. One way this happened was that framing contracts as a fundamental right gave President Franklin Roosevelt (FDR) the opportunity to make a similar argument for his own vision. Like the *Lochner* court, FDR believed that individuals had certain absolute economic rights. The real difference was that the *Lochner* court believed individuals had a negative right to not have their contracts tampered with, while FDR believed that individuals had a positive right to have certain economic goods, such as a job, given to them. In a speech to Congress, FDR was very intentional about using the

language of rights, especially economic rights, to describe the plan that would eventually morph into the New Deal. He claimed that "in our day these economic truths have become accepted as self-evident," drawing on the language of the Declaration of Independence.[11] However, the way he described his new economic bill of rights also drew on more recent rhetoric of the right of contract decisions. Throughout his speeches and writings, FDR insisted that these rights were "essential" and that without them there could be no free democracy.[12] Both of these strongly parallel the language used in cases like *Lochner* and the *Slaughter-House* dissent, which referred to the right of contract as "fundamental" and insisted that without them there could be no free citizens.[13] While there is little reason to think that FDR was making this link intentionally, and

11 Gerhard Peters and John T. Woolley, *Franklin D. Roosevelt, State of the Union Message to Congress,* The American Presidency Project, https://www.presidency.ucsb.edu/node/210825 (last visited Mar. 4, 2021) (1944).
12 Gerhard Peters and John T. Woolley, *Franklin D. Roosevelt, Annual Message to Congress on the State of the Union,* The American Presidency Project, https://www.presidency.ucsb.edu/node/209473 (last visited Mar. 4, 2021) (1941).
13 *Slaughter-House*, 83 US.

he probably would have tried to make this transition even without the existence of the *Lochner* case, the ideas that were drafted in the *Lochner* court helped prepare the intellectual groundwork for FDR. This introduced the idea of absolute economic rights and started weaving it into the mindset of the Court. FDR may have introduced an entirely new economic plan, but the concept that individuals were entitled to some type of absolute economic rights was already in the air thanks to the *Lochner* court.

Another unforeseen consequence of the *Lochner* decision was the way it helped to start a shift in federalism that took off during the New Deal. Specifically, the New Deal era redefined the relationship between state and federal power by giving the federal government such vast powers to implement the New Deal. One of the biggest impacts of New Deal legislation was that several key court cases gave unprecedented power to the federal government at the expense of state governments. Over the course of

a few decades, states went from having their own clear sphere of influence to cases such as *Wickard v. Filburn,* granting the federal government such broad commerce power that it could control every aspect of activity within a state.[14]

This shift, much like the origination of fundamental economic rights, was started during the era of the *Lochner* court. For most of the Court's history, the states were allotted broad powers to regulate activity within their own state. The Court upheld this "traditional" scope of power as late as the *Slaughter-House Cases*.[15] However, in *Lochner*, the power of the state to regulate the wellbeing of citizens was limited in cases considering the right of contract to only instances where the law could trace a direct link between an act and loss of life. This was held to such a degree that in the dissent in *West Coast Hotel Co. v. Parrish,* conservative-leaning judges were still arguing that police

14 Wickard v. Filburn, 317 US 111 (1942).
15 *Slaughter-House*, 83 US.

powers were the "exception and had to be proven that there were exception circumstances."[16] Debasing police powers in this way was dangerous because it endangered limits on commerce power. Part of the reason why *United States v. E.C. Knight Co.* supported strong state police powers was that "it is vital that the independence of the commercial power and of the police power, and the delimitation 'between them, however sometimes perplexing, should always be recognized and observed.'"[17] By damaging this vital delimitation for the sake of the right of contract, the *Lochner* era rulings effectively hamstrung the states' ability to regulate trade and employment for their citizens, consistently having such regulations struck down by the Supreme Court.

However, just because the states were blocked from regulating trade within their own borders did not mean that the problems with trade disappeared. All these legal battles

16 West Coast Hotel Company v. Parrish, 300 US 406 (1973).
17 United States v. E.C. Knight Co., 156 US 1, 13 (1895).

were happening against the backdrop of the Industrial Revolution, and the fact that so many court cases from this era were about regulating monopolies or imposing limits on work hours reflects the upheaval surrounding labor policy in this era. The Court's efforts to hamper states in their traditional prerogative to step in and regulate these situations did not take away from the people's desire for someone or something to intervene. This desire was only heightened by the very real catastrophe of the Great Depression, which left millions of Americans without jobs. Amid the power vacuum created by the Court's attack on police powers, FDR presented his plan for a New Deal. The New Deal became a type of federal police power to replace the missing role of the old, full-fledged state police powers, providing for the health and wellbeing of the citizens of the United States in a way the states had traditionally been tasked with doing, maybe even to a further extent.[18]

18 Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. Chi. L. Rev. 483, 495 (1997).

While there is no way to evaluate the counterfactual of what would have happened if the *Lochner* decision had never happened, it is quite possible that states would have increasingly used their police powers to counter the imbalances of the Industrial Revolution. Then, perhaps, there would not have been such a gaping power vacuum for the New Deal to step into. At the very least, *Lochner* left the door wide open for progressive reformers who had long wanted to increase federal power.

Yet another way that the efforts of *Lochner* actually worked against that court's goals was through their obvious association with political agendas. This critique was brought up even in the *Lochner* dissent and was a rallying point for progressive opposition that saw the Court's ruling as a thinly veiled attempt to use the Constitution to prop up laissez-faire economics. This position was first presented in the dissent of *Lochner*, with Justice Holmes leading his dissent by claiming that "this case is decided

upon an economic theory which a large part of the country does not entertain."[19] The fact that there was vocal critique of *Lochner's* motives from within the Supreme Court itself was capitalized on by progressives of the time, who then used this as the main line of attack for the next several decades.

FDR simply followed in this tradition by also accusing the Court of his time, still mostly controlled by the same sorts of judges as during the *Lochner* era, of pushing laissez-faire agendas.[20] In his "Fireside Chat on Court Packing Plan," he was able to credibly assert that "the Court has not been acting as a judicial body, but as a policymaking body."[21] He supported this assertion by pointing to the opinions of other judges, saying, "That is not only my accusation. It is the accusation of most

19 Lochner v. New York, 198 US 45, 75 (1905).
20 David Strauss, *Why Was Lochner Wrong*, 70 U. Chi. L. Rev. 373 (2003).
21 Franklin D. Roosevelt, *Fireside Chat on Court-Packing Plan, in* American Constitutionalism Vol I 434 (Howard Gillman, Mark Graber, & Keith Whittington, eds., Oxford U. Press 1st ed., 2013) (1937).

distinguished justices of the present Supreme Court."[22] FDR's opinion was further underscored by his appointment of Justice Hugo Black to the Supreme Court, who was one of the strongest critics of the motives behind the *Lochner* decision and was heavily influential in undoing its legacy.[23] By choosing to abandon good lawmaking in favor of pushing a specific favored political agenda, the judges of the *Lochner* era delegitimized their own position. Instead of presenting a more moderate version of the right of contract, rooted in constitutional analysis and linked to precedent, they opted to completely disconnect their argument from precedent and the Constitution, making it that much easier for their successors to immediately discard the entire concept.

In addition, by making the right of contract so strong, the Court alienated the American people. At the time that Franklin Roosevelt was proposing his radical New Deal,

22 *Id.* at 435.
23 Strauss, *supra* note 20.

there were "industrial workers with low wages, dangerous working conditions, and eroded bargaining power. Massive agricultural surpluses meant that farmers could not sell enough crops to make a living. Millions were laid off. The country starved."[24] This situation has traditionally been attributed to the years of laissez-faire policies encouraged by the *Lochner* precedent.[25] Since public polling was a new and notoriously inaccurate tool at that point in US history, it was difficult to accurately gauge the exact response the average American had to the *Lochner* case specifically. But their frustration rang loud and clear through the election of FDR and the general approval of his policy reforms in the first one hundred days of his term.[26] By refusing to compromise even remotely on the right of contract, the *Lochner* court managed to frustrate the people until their

24 Matthew Ding, *The Switch in Time that Saved Nine: The Supreme Court's Conflict and Compromise on New Deal Legislation*, Iowa Department of Cultural Affairs, https://iowaculture.gov/sites/default/files/history-education-nhd-projects-categories-sample-switch-paper.pdf (last visited Mar. 4, 2021).
25 *Id.*
26 *Id.* For a good example of this, see the 1936 Literary Digest Poll that predicted that FDR would lose the election.

elected leader could easily convince them to support him in overturning their efforts.

If this was not damaging enough, the *Lochner* court's own dabbling in judicial activism made it much harder for them to protest when the progressives used the Court to support the New Deal. The right of contract precedent connected the idea of absolute economic rights with the federal government, directly ensuring that such economic rights were provided to Americans. Since the right of contract was a negative right, the only action the government needed in order to ensure it was to prevent anything from encroaching on individuals contracting amongst themselves. However, FDR and the New Deal were proposing positive economic rights, like a guarantee to quality education. In order to provide those absolute economic rights, the federal government would have to be significantly larger and more powerful. So, even though *Lochner* and the New Deal had diametrically

opposed stances on the size and scope of the government, they both reached their conclusions from the premise of absolute economic rights for the individual American. This idea was not originally proposed by the New Deal but by the *Lochner* decision. Since the government had to actively support legislation that guaranteed Americans were getting their economic rights, the progressives used cases like *Wickard v. Filburn* to shamelessly stretch the meaning of the Commerce Clause as far as it took for FDR to provide Americans with such economic rights.[27] Like the old story of the oak that snapped in the thunderstorm because it did not know how to bend, the uncompromising nature of *Lochner's* vision of contract rights made it easier to completely discard them when a genuine economic crisis arose.

After all the work the *Lochner* era court put into creating and defending right of contract, it was their own

27 Wickard v. Filburn, 317 US 111 (1942).

poor decision that ensured it would never last. By trying to make right of contract absolute and utterly inviolable, they ensured that people discarded the entire laissez-faire economic philosophy. The reality of the Court is that a particular legal philosophy can be quickly removed as soon as new judges are in place, and new judges can be put in place as soon as the people lose faith in the Court's legal philosophy and support a president who changes the makeup of the Court. The first of these consequences for the *Lochner* court was that all the precedent they had designed to establish the right of contract was overturned in a single court case decision with very little pushback from the American people.[28] While there were undoubtedly attempts from *Lochner* critics to undermine the case politically, the legal precedent remained solid until being completely overturned in one fell stroke. A more detrimental consequence was that they created

28 West Coast Hotel Company v. Parrish, 300 US 379 (1973).

the very legal philosophies the New Deal appropriated to take root. They introduced the idea that individuals had absolute economic rights and that these rights were absolutely guaranteed by the federal government. By limiting the state's ability to take care of its citizens during the Industrial Revolution, they helped create a case for why the New Deal was needed as millions of Americans felt exploited by unregulated trade. The great irony of the *Lochner* case is that, by being so resolute in supporting laissez-faire economics, they straw-manned their own position and subsequently made it easier to discard it once it became inconvenient. The *Lochner* case is a stark reminder that chasing after immediate political goals can have disastrous, unintended consequences in the long term. It is also a reminder that judicial activism is only as effective as the judge's control on the court is strong.