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# SYMPOSIUM: LOCHNER CENTENNIAL CONFERENCE

## INTRODUCTION

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Have we come to bury *Lochner*, or to praise it? *Lochner v. New York*,<sup>1</sup> decided 100 years ago, gave its name to an era in which judges struck down popular statutes that regulated hours, wages, and conditions of work, on grounds that such labor regulations violated a constitutional liberty of contract. After 1937, *Lochnerism* and *Lochnerizing* were more or less uniformly condemned by judges and law professors alike. Recently, some scholars have tried to resurrect the *Lochner* approach, presumably as a way to render much of the twentieth-century regulatory state unconstitutional.

The *Lochner* case invalidated New York State's Bakeshop Act of 1895, a measure passed unanimously by both houses of the state's legislature and signed promptly by its governor.<sup>2</sup> The statute set minimum standards for sanitation and a maximum ten-hour work day and sixty-hour week for bakeshop employees. Joseph Lochner, owner of a small bakery in Utica, was convicted in 1902 and fined 50 dollars for employing Aman Schmitter to work more than sixty hours in one week in his shop. New York state courts upheld the conviction and the validity of the statute. On April 17, 1905, the U.S. Supreme Court overturned Joseph Lochner's conviction on a 5-to-4 vote. Justice Rufus W. Peckham's majority opinion held that New York's statute interfered with liberty of contract between employers and employees in violation of the due process clause of the Fourteenth Amendment to the U.S. Constitution. Justice Oliver Wendell Holmes wrote a forceful and memorable dissent in which he accused the majority of writing their own economic views into the Constitution. Justice John Marshall Harlan wrote in his dissent that the majority had brought under judicial scrutiny matters that belonged exclusively to the legislature.

Boston University is a good place to consider *Lochner* in historical and

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<sup>1</sup> 198 U.S. 45 (1905).

<sup>2</sup> The *Lochner* story is admirably told in PAUL KENS, *LOCHNER V. NEW YORK: ECONOMIC REGULATION ON TRIAL* (1998), and in PAUL KENS, *JUDICIAL POWER AND REFORM POLITICS: THE ANATOMY OF LOCHNER V. NEW YORK* (1990).

constitutional perspective. Two connections come to mind. A principal architect of *Lochner*'s substantive due process argument, the young firebrand conservative law professor Christopher G. Tiedeman, was a visiting faculty member at Boston University when his groundbreaking treatise *Limitations of Police Power* was published in 1886.<sup>3</sup> In its preface Tiedeman warned that "Socialism, Communism, and Anarchism are rampant throughout the civilized world" because "[t]he State is called on to protect the weak against the shrewdness of the stronger" (an abomination to a Social Darwinist like him) and that "the conservative classes stand in constant fear of the advent of an absolutism more tyrannical and more unreasoning than any before experienced by man, the absolutism of a democratic majority."<sup>4</sup> No student evaluations of his classes have been found. And in the fall of 1906, a year after the *Lochner* decision came down, Boston University's dean Melville Madison Bigelow addressed the law school in these terms: "Freedom of contract proved the worst kind of delusion; it ran to gigantic monopoly and threatens today, whether for good or ill I am not concerned as a teacher of law to say, the whole fabric of equality. . . . The economists made a great mistake in their dogma of freedom of contract, a mistake which has precipitated another conflict, at the crisis of which we now stand, trembling at the possibilities. . . ."<sup>5</sup> While the rhetoric of fear and trembling has abated somewhat, Boston University's School of Law faculty continues to present diverse ideological, political, and methodological views of the law (who is right and who is wrong I am not concerned as a teacher of law to say).

This conference, hosted by Pnina Lahav, Randy Barnett, Tracey Maclin, and Andrew Kull at Boston University School of Law, did not devolve into a shouting match between *Lochner* resurrectionists and anti-exhumationists. Revisionism, not revivalism, was in the air. The five principal papers appraised *Lochner* from five illuminating perspectives: constitutional scholarship, federalism, civil rights enforcement, political context, and historical revisionism. All five papers suggested, in different ways and to different extents, that at one hundred years' perspective the firestorm over *Lochner* may well have died out for now.

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<sup>3</sup> CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES CONSIDERED FROM BOTH A CIVIL AND CRIMINAL STANDPOINT (1886).

<sup>4</sup> *Id.* at vii.

<sup>5</sup> Melville Madison Bigelow, Address at Boston University School of Law (1906), quoted in 2 RICHARD T. ELY, PROPERTY AND CONTRACT IN THEIR RELATIONS TO THE DISTRIBUTION OF WEALTH 622 (1914). Christopher Tiedeman, before his early death in 1903, also came to repent that his early opposition to government regulation played so well into the hands of monopoly capitalism. His story is well told in Louise A. Halper, *Christopher G. Tiedeman, 'Laissez-Faire Constitutionalism' and the Dilemmas of Small-Scale Property in the Gilded Age*, 51 OHIO ST. L.J. 1349 (1990).

## CONSTITUTIONAL HISTORICISM

Jack Balkin<sup>6</sup> opened the conference with a series of provocative questions. Was *Lochner* rightly decided on the day it was decided? Had it become wrongly decided at some later stage in history? Will it become rightly decided again? Balkin did not answer his own questions, but used them to reflect on his larger view of constitutional historicism. Balkin asserted that the classification of constitutional arguments as “good” or “bad” changes over time, and more fundamentally, that the meaning of the Constitution changes over time depending on a larger social and political climate of opinion and constitutional ethos. Balkin’s principal comparison is between *Lochner* and another prominent member of the constitutional anti-canon, *Plessy v. Ferguson*.<sup>7</sup> The New Deal story in which *Lochner* was wrongly decided from the start has not persisted down to this day, Balkin said. On the other hand, the Civil Rights Revolution story, in which *Plessy* was wrongly decided, is still going strong. Jack Balkin sidestepped the objection that his historicist position would disable him from ever saying that any Supreme Court decision was incorrectly decided – or was not the inevitable product of prevailing ideas and arguments – on the day it was decided.

## FEDERALISM

Lynn Baker’s concern, in the second paper presented at this conference, was with federalism.<sup>8</sup> Baker recounted the recent, little-known *Pierce County v. Guillen* decision,<sup>9</sup> in which Baker had participated as amicus curiae. A unanimous Supreme Court upheld in *Guillen*, over Baker’s objection, a federal statute that afforded an evidentiary privilege for highway safety information collected by states and localities. Baker had argued that this federal statute interfered with state sovereignty. Distant as this might seem from the concerns of *Lochner v. New York*, Baker explained that what she called three “*Lochner*-based concerns” motivated five Justices who usually support states’ rights to vote against that position. These concerns are: (1) a worry about the Court’s institutional incompetence to make policy judgments about such things as what constitutes interstate commerce; (2) a view that “political safeguards of federalism”<sup>10</sup> in the constitutional structure make it unnecessary for the Supreme Court to protect states; and (3) a normative constitutional value system that prefers individual personal and cultural liberties over economic

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<sup>6</sup> Jack M. Balkin, “*Wrong the Day it Was Decided*”: *Lochner and Constitutional Historicism*, 85 B.U. L. REV. 677 (2005).

<sup>7</sup> 163 U.S. 537 (1896).

<sup>8</sup> Lynn A. Baker, *Lochner’s Legacy for Modern Federalism: Pierce County v. Guillen as a Case Study*, 85 B.U. L. REV. 727 (2005).

<sup>9</sup> 537 U.S. 129 (2003).

<sup>10</sup> On whether these safeguards actually work, see Carol F. Lee, *The Political Safeguards of Federalism?: Congressional Responses to Supreme Court Decisions on State and Local Liability*, 20 URB. LAW. 301 (1988).

liberties and states' rights. *Lochner's* three lessons, as Baker sets them forth, are by no means the lessons taught by Justice Peckham's majority opinion in *Lochner*. Rather, they are the lessons drawn from the solid phalanx of critics of the *Lochner* decision from 1905 onward. In arguing against these concerns, Baker focused on the centrality, in both *Guillen* and *Lochner*, of the question of what a statute was about. In *Lochner*, the New York legislature said that its statute was about health, and the Supreme Court disagreed. In *Guillen*, the Supreme Court characterized the federal statute at issue as a highway safety regulation, while Baker saw it as an interference with the traditional states' role in setting their own rules of evidence.

#### CIVIL RIGHTS

Pamela Karlan put *Lochner* in the context of civil rights enforcement.<sup>11</sup> Karlan reminded us that the constitutional text applied in *Lochner*, the Fourteenth Amendment, was intended, like its companion Thirteenth and Fifteenth Amendments, to safeguard newly freed former slaves and not Utica bakeshop owners. Karlan paired *Lochner* with a case decided just one year later, *Hodges v. United States*,<sup>12</sup> in which liberty of contract was incorporated into the Thirteenth Amendment's protection against the badges and incidents of slavery. The case arose when white sawmill employers secured a federal indictment against white employees for intimidating black employees and attempting to drive the black employees away from their jobs at the sawmill. Did the Thirteenth Amendment give the federal government power to secure to former slaves the same liberty of contract employers enjoyed in *Lochner*, this time against private parties' interference? The government argued that it did, but the Supreme Court shrank the Thirteenth Amendment to an abstract prohibition against the formal institution of slavery. *Lochner*, in Karlan's telling, was of a piece with *Plessy v. Ferguson* and *Hodges v. United States* in retreating from the promise of racial justice intended by the post-Civil War amendments. Formal freedom won, and practical freedom lost.

#### POLITICAL CONTEXT

Keith Whittington, the political scientist among the paper presenters, answered the question: How typical was *Lochner v. New York* compared to the rest of the Supreme Court docket in the fifteen years before and after the *Lochner* decision?<sup>13</sup> *Lochner* invalidated a state statute, but Whittington chose to count and to explain Supreme Court review of federal statutes in this thirty year period. He set forth a theoretical model, building on the work of Robert

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<sup>11</sup> Pamela S. Karlan, *Contracting the Thirteenth Amendment: Hodges v. United States*, 85 B.U. L. REV. 783 (2005).

<sup>12</sup> 203 U.S. 1 (1906).

<sup>13</sup> Keith E. Whittington, *Congress Before the Lochner Court*, 85 B.U. L. REV. 821 (2005).

Dahl and Mark Graber, in which the Supreme Court would never be expected to invalidate a statute enacted by a strong, broadly-shared political majority. In this model, Supreme Court justices belong to a political elite presumed to share the same views as the dominant political coalition at the time of their appointment. Since the *Lochner* Court was a Republican court in a period of Republican ascendancy, Whittington showed that the Court left more legislation standing than it invalidated, and that when federal statutes were struck down (e.g., the income tax and child labor regulation), or drastically limited (e.g. the antitrust statute), particular political compromises had formed weak or fleeting majorities to get them enacted. Populist and Progressive Era legislation was not really what the Republican elite wanted, and when such compromises were enacted the Supreme Court was happy to invalidate them. It was not until 1934 to 1936 that the Supreme Court engaged in a broad campaign against federal government regulation informed by a constitutional vision at odds with the President and strong majorities in Congress. Whittington did not make *Lochner's* countermajoritarian difficulty disappear entirely, but he did much to reduce the Supreme Court's role during most of that era to politics as usual.

#### REVISIONISM RE-REVISED

Barry Cushman, in the final paper of the conference, endeavored to complicate the simple stories of both opponents and proponents of *Lochner*.<sup>14</sup> Once upon a time, *Lochner* represented, to its enemies, a Supreme Court majority's embrace of a highly-contested ideology of Social Darwinism and laissez-faire economics. Holmes himself, in his famous dissent, identified these as the twin sources of the majority's error.<sup>15</sup> Then came the inexorable revisionism. According to Cushman, Howard Gillman<sup>16</sup> replaced this longstanding critique with a new orthodoxy that the Supreme Court in *Lochner* and cases like it was merely giving effect to a principle of neutrality by which the Court struck down class legislation that had been secured improperly by bakery employees, laundry women, and other such powerful special interests. This revisionism had itself been challenged by younger scholars who took at face value the *Lochner* Court's invocation of individual liberty and autonomy constitutionally protected against government regulation. Cushman argued that Gillman's neutrality principle held considerable force in a number of cases not considered by Gillman's critics. He showed that a surprising large number

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<sup>14</sup> Barry Cushman, *Some Varieties and Vicissitudes of Lochnerism*, 85 B.U. L. REV. 881 (2005).

<sup>15</sup> "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. . . . [A] constitution is not intended to embody a particular economic theory, whether of paternalism . . . or of laissez-faire." *Lochner*, 198 U.S. at 74 (Holmes, J., dissenting).

<sup>16</sup> Howard Gillman attended the conference, and his comment addresses Keith Whittington's paper with sidelights as well on the Cushman paper. Howard Gillman, *De-Lochnerizing Lochner*, 85 B.U. L. REV. 859 (2005).

of rate regulation and price regulation statutes had come under Supreme Court scrutiny on the precise charge of class legislation. Cushman complicated all our stories of *Lochner*'s lessons by reminding us that the U.S. Supreme Court had then, as it has now, nine distinctly different intellectual biographies.

#### CONCLUSION

These five conference papers may have a common thread, expressed in different ways and to different extents, that courts, scholars and students are not as outraged at *Lochner v. New York* now as they had been decades ago. Whether *Lochner*-like challenges to the modern regulatory state are dead and gone, as Jack Balkin's paper suggested, or are just gaining momentum again, remains to be seen. Perhaps only legal historians of a certain age can feel outrage nowadays at a hundred-year-old case. Each of the papers in this conference attracted learned commentators and lively questions. A gathering of so many constitutional law professors in one place inevitably led to some playing of the "I can name a Supreme Court case that the rest of you don't know" game. But nobody called for constitutional revolution or coup d'état. *Lochner*, it seems, is only turning over in its grave. What *Lochner* sparks, at its centenary, is not a reanimated corpse at all but these fresh, notable, and interesting contributions to the scholarship of law, politics, and the Constitution. We hope that you enjoy them.