



**FOREWORD: WHAT'S SO WICKED ABOUT
LOCHNER?**

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I am honored to have been invited to provide some opening remarks to this fascinating symposium on *Lochner v. New York*,¹ the case that, like the Wicked Witch of the West, so many law professors love to hate. The articles in this issue are far too diverse to provide the basis of a coherent comment, so I shall not attempt to do so. Instead, I will offer my own brief analysis of *Lochner* and what I think was really wrong with this much reviled opinion from the perspective of the original meaning of the Fourteenth Amendment.

The Alleged Wickedness of *Lochner*

When I was a student in constitutional law, I became disillusioned with the Constitution.² It seemed that each time we came to one of the good parts that limited government powers—such as the Commerce Clause, Necessary and Proper Clause, and Tenth Amendment—or protected liberty—such as the Ninth Amendment and the Privileges or Immunities Clause of the Fourteenth—we would read how the Supreme Court had interpreted them to eliminate any barriers they might have posed.³ Supreme Court opinions that limited federal or state powers were few and far between.

Then we came to *Lochner v. New York*. Compared with previous cases, this one seemed to be in a completely different spirit. Absent was the usual effort to twist the meaning of the text to justify some claim of governmental power. Instead, *Lochner* exemplified a refreshing judicial skepticism about legislative rationales of-

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¹ 198 U.S. 45 (1905).

² Elsewhere I have told the story of how, after this initial disillusionment, I regained my interest in the Constitution again. See RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY ix-xiv (2004).

³ See, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

ferred by the state. That *Lochner* was different was also evidenced by the whining dissent of Mr. Justice Holmes—with its cheap shot reference to “Mr. Herbert Spencer’s *Social Statics*.”⁴ “The Fourteenth Amendment does not enact Dr. John Locke’s *Two Treatises of Government*” or “Justice Thomas Cooley’s treatise on the police power of states” would not have packed quite the same rhetorical impact.⁵

The casebook we used was the ninth edition of Gerald Gunther’s *Constitutional Law*.⁶ Immediately following the case was a section entitled, “The Discredited Period of Judicial Intervention: What Was Wrong with *Lochner*?”⁷ This section made clear that, unlike *McCulloch*, *Gibbons*, and *Slaughter-House*, the *Lochner* decision was not held in high esteem. Professor Gunther made clear that “the modern Court has repeatedly insisted that it has turned its back on the *evils* of the *Lochner* philosophy.”⁸ But he then went on to ask a series of questions that signaled an uncertainty about why *Lochner* was really so wicked:

What were those evils? The giving of substantive content to due process? The expansive view of “liberty” and “property” to include values not specifically stated in the Constitution? The selection of the “wrong” fundamental values for special judicial protection? The failure to state general standards? The inadequacy of the articulated standards? The failure to apply the standards with adequate receptiveness to factual date? The failure to apply the general standards with adequate receptiveness to the society’s hierarchy of values? The failure to apply the general standards with adequate consistency and neutrality? Excessive preoccupation with the permissibility of legislative ends? Excessive preoccupation with the “reasonableness” of legislative means—the extent to which the means contributed to the achievement of permissible ends?⁹

Before offering some possible answers to these questions, Professor Gunther noted that “the modern Court has *not* drawn from *Lochner* the lesson that *all* judicial intervention via substantive due process is improper. Rather, it has withdrawn from careful scrutiny in most economic areas but has maintained and increased intervention with respect to a variety of non-economic personal interests.”¹⁰

Later in the chapter came a section entitled “The Revival of Substantive Due Process, for Noneconomic Rights: Privacy and Autonomy,” which started with a discussion of the still-respected *Lochner*-era cases of *Meyer v. Nebraska*¹¹ and *Pierce*

⁴ 198 U.S. at 75 (Holmes, J., dissenting).

⁵ See also Barnett, *supra* note 2, at 214-16 (discussing invocation of Herbert Spencer’s *Social Statics* in Thirty-Ninth Congress).

⁶ GERALD GUNTHER, CONSTITUTIONAL LAW: CASES AND MATERIALS (9th ed. 1975).

⁷ *Id.* at 564.

⁸ *Id.* at 565 (emphasis added).

⁹ *Id.*

¹⁰ *Id.*

¹¹ 262 U.S. 390 (1923).

v. Society of Sisters.¹² This was immediately followed by *Griswold v. Connecticut*¹³ and *Roe v. Wade*.¹⁴ When I reviewed the casebook to write this Foreword, I was surprised to see that as many as fifty pages separated *Lochner* and *Griswold*,¹⁵ since as a student the message of the casebook was clear: If *Griswold* and *Roe* were today thought to be good cases, then *Lochner* could no longer be dismissed as “evil.”

Twelve years later, in one of my earliest articles on the Constitution, I wrote that:

Beginning in the 1970s, when the doctrine of substantive due process was rehabilitated by such writers as Gerald Gunther and Lawrence Tribe, the positions of those on the left and those on the right had reversed. Modern liberals now use substantive due process and the language of “entitlement” to protect certain basic personal (as opposed to economic) liberties and to defend the welfare and regulatory state from the powerful intellectual (and popular) assault that classical liberals and conservatives have developed in recent years.¹⁶

As evidence for Professor’s Gunther’s contribution to this “rehabilitation,” I cited his casebook.¹⁷

Soon after the article appeared, I received a short note from Professor Gunther expressing his dismay at my suggestion that he had anything to do with the rise of “substantive due process.” To the contrary, he said he paired *Lochner* with *Griswold* and *Roe* not to boost the legitimacy of *Lochner*, but to undermine *Griswold* and *Roe*! He was appalled by the thought that his casebook might have had the opposite effect.¹⁸ Yet, given that his was the predominant constitutional law casebook in those days, I do believe it had this opposite, unintended effect on many.

Since the Seventies, however, it has been harder for today’s political progressives to inveigh against the evils of *Lochner* while defending the use of substantive due process to protect “personal” liberties. *Lochner* may have been wrongly decided on the facts, and perhaps also in protecting the liberty of contract as fundamental, but they can hardly claim, as their progressive forbears had done, that

¹² 268 U.S. 510 (1925).

¹³ 381 U.S. 479 (1965).

¹⁴ 410 U.S. 113 (1973).

¹⁵ There is an intervening section entitled, “The Modern Era: The Decline—and Disappearance?—of Judicial Scrutiny of Economic Regulation.” GUNTHER, *supra* note 6, at 576-616.

¹⁶ Randy E. Barnett, *Are Enumerated Constitutional Rights the Only Rights We Have? The Case of Associational Freedom*, 10 HARV. J.L. & PUB. POL’Y 101, 106 (1987) (citations omitted). Writing this article for the Fifth Annual National Student Symposium of the Federalist Society, the punch line of which was the Ninth Amendment (*see id.* at 110), is what initially rekindled my interest in the Constitution. *See id.* at 112 n.46 (“The proper meaning and use of the Ninth Amendment is a topic that merits further discussion.”).

¹⁷ *See id.* at 106 n.21.

¹⁸ I wish I could find the note so I could report his exact words and nuance, but alas I have had no luck. I am forced to rely on my eighteen-year-old recollection.

the *Lochner* court was engaging in “judicial activism” by using the Due Process Clause to protect a fundamental liberty from state infringement.¹⁹

The honor of completely rejecting *Lochner* has fallen to today’s judicial conservatives. Although not all *political* conservatives are judicial conservatives, it is ironic that those who are can be described as unreconstructed Roosevelt New Dealers in their judicial philosophy. For them only a “specific prohibition” in the Constitution can rebut the presumption of constitutionality. In short, they adhere strictly to the original meaning of Footnote Four of the 1938 case, *U.S. v. Carolene Products*, which begins:

There may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be *within a specific prohibition* of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.²⁰

But notice that even today’s Rooseveltian judicial conservatives who hew to Footnote Four allow for the protection of the specific prohibitions provided by the *enumerated* rights. While some may grumble about the historical bona fides of “the incorporation doctrine,” by which selected portions of the Bill of Rights are applied to the states, few advocate rejecting “incorporation” and entirely abandoning all judicial review of state legislation under the Due Process Clause of the Fourteenth Amendment. Certainly no current Justice takes such a stance, and so some use of “substantive due process” survives even among judicial conservatives.²¹

In contrast, while some political progressives may be returning to their judicial conservative heritage,²² those who stick with *Roe* and *Griswold* could be called “reconstructed” Roosevelt New Deal jurists. They adopt the current approach of the Supreme Court: allow courts to enforce the express prohibitions of the Constitution *plus* judicially-selected “fundamental” unenumerated rights that are “deeply rooted in this Nation’s history and tradition,” or “implicit in the concept of ordered liberty.”²³ I call this “Footnote Four-Plus.”

So if “substantive due process” is not inherently wrong, what, if anything, was wrong with *Lochner*? Its recognition of liberty of contract as a fundamental

¹⁹ *But see* PAUL BREST, SANFORD LEVINSON, JACK BALKIN & AKHIL AMAR, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 337 (4th ed. 2000) (describing era in which *Lochner* was decided, 1890-1934, as “the heyday of judicial activism”).

²⁰ *United States v. Carolene Prod.*, 304 U.S. 144, 152 n.4 (1938) (emphasis added).

²¹ Below I explain how and why this stance is mistaken.

²² *See, e.g.*, CASS SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

²³ *See* *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (“[T]he Due Process Clause specially protects those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition,’ . . . and ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed . . .’”) (internal citations omitted).

right? It is doubtful that the Court was using the current conception of “fundamental rights,” which can only be overcome by demonstrating a “compelling state interest.” As evidenced by other cases before and after *Lochner*—indeed by the fact that the constitutionality of the rest of the Bakeshop Act was not even challenged—the burden placed on the government was simply not that severe. As was noted even by Justice Holmes in his dissent, the Court had previously upheld many regulations of and restrictions on freedom of contract.²⁴

Still, the Court did find that freedom of contract was the rule or baseline against which deviations needed to be justified. Holmes’ use of previous exceptions to argue against the existence of a general rule fails to acknowledge the exceptional status of “exceptions.” His move highlights the danger of making exceptions in a legal system that tends to view exceptions on Monday as precedents to be extended on Wednesday. Most importantly, as I have explained elsewhere, privileging some of the natural liberty rights retained by the people—either just the enumerated ones under Footnote Four or those plus some additional privileged unenumerated rights under Footnote Four-Plus—violates the equal protection of rights mandated by the Ninth Amendment that reads: “The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the People.”²⁵ And, as I shall briefly explain, it would also violate the original meaning of the Fourteenth Amendment.

From Slaughterhouses to Bakeshops: The Real Problem with *Lochner*

Lochner is indeed problematic because it violates the original meaning of the Due Process Clause of the Fourteenth Amendment. But ironically it does so in such a way that helps restore the original meaning of the Fourteenth Amendment as a whole. To understand this, consider the structure of section one of the Fourteenth Amendment (with a few key terms highlighted):

[1] *All persons* born or naturalized in the United States and subject to the jurisdiction thereof, are *citizens* of the United States and of the State wherein they reside.

[2] No State shall make or enforce any *law* which shall abridge the privileges or immunities of *citizens* of the United States;

[3] nor shall any State deprive *any person* of life, liberty, or property, without due *process* of law;

[4] nor deny to *any person* within its jurisdiction the equal *protection* of the laws.

²⁴ *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

²⁵ U.S. CONST. amend. IX; see Barnett, *supra* note 2, at 224-52.

These four provisions can be viewed as operating as a coherent unit. Doing so resolves a number of interpretive conundrums. Why did the Privileges or Immunities Clause apply to “citizens,” while the Due Process and Equal Protection Clauses applied to “persons”? How is it that privileges or immunities shall not be abridged, but “any person” *can* be deprived of the most fundamental rights of life, liberty, and property provided “due process” is observed? Does the fact that the “equal protection of the laws” applies to any “person” mean that statutes can make no distinction in treatment between citizens and non-citizens?

[1] The first sentence grants citizenship to all persons born or naturalized in the United States. That the scope of this sentence, and the rest of section one, was not limited to the newly freed slaves is evidenced textually both by its reference to “all persons” and also by its reference to those persons who are naturalized citizens.

[2] The Privileges or Immunities Clause, therefore, protects all “*citizens*,” whether white or black, born or naturalized in the United States. Over the past fifteen years, legal scholars have come to acknowledge that “privileges or immunities” was a reference both to natural rights and also to positive rights of citizenship established by the government, such as the right to trial by jury in the Fifth Amendment.²⁶ The Privileges or Immunities Clause was written as it was to protect citizens as defined in the first sentence, which included former slaves born in the United States and also white southern Republicans. And citizens have privileges in addition to the natural rights they have as persons.

As important for grasping the coherence of section one, the Privileges or Immunities Clause applies to “*law[s]*.” A law can violate the Privileges or Immunities Clause in two ways: first, because it deprives some citizens of the privileges or immunities enjoyed by others; second, because it abridges the privileges or immunities of all citizens equally. In other words, the Privileges or Immunities Clause protects against both discriminatory laws and laws that deprive all citizens of their rights. Laws that do either are not proper exercises of the police power of states.²⁷

[3] The Due Process Clause applies to the “*process*” of applying laws to particular “*persons*.” It governs any state action that, pursuant to a law that satisfies the Privileges or Immunities Clause, deprives any *person* of life, liberty or property. There are three possible ways that a state can use its police power to sanction behavior that violates a proper law: it can punish a person by death (“*life*”), by imprisonment (“*liberty*”), or by fine or confiscation (“*property*”). The Due Process Clause, then, governs how proper laws are to be applied to any particular person,

²⁶ The path-breaking work on this issue was done by Michael Kent Curtis in his greatly influential book, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986). I add additional historical evidence in support of his thesis in BARNETT, *supra* note 2, at 60-68.

²⁷ For a discussion of how the extratextual “police power” of states should be construed in light of the original meaning of the Fourteenth Amendment, see BARNETT, *supra* note 2, at 319-34.

citizen or not. A proper law can discriminate between a citizen and a non-citizen under the Privileges or Immunities Clause, but no person may be executed, imprisoned, or fined without due process.

[4] The Equal Protection Clause concerns the equal *protection* of otherwise proper laws.²⁸ A law can be perfectly fine under the Privileges or Immunities Clause, but still receive unequal protection by law enforcement. For example, while there may be a nondiscriminatory law against murder on the books, law enforcement could look the other way when some are lynched by others. The problem here would not be with the law itself, or with the process of applying laws to particular persons, but with the fact that some persons are not receiving the equal protection of a law against murder.

At the risk of oversimplification, another way to characterize the distinct functions of each of the three clauses is this: The Privileges or Immunities Clause is aimed mainly at the *legislative branch* of state governments and enjoins them from making certain *laws* (but it also enjoins the enforcement of improper laws too). The Due Process Clause is aimed mainly at the *judicial branch* of state governments and enjoins them from sanctioning the violation of otherwise proper laws without following *procedures* that ensure accurate outcomes (but it would apply to “administrative” procedures as well). And the Equal Protection Clause is aimed mainly at the *executive branch* of state governments and mandates that *protection* of proper laws be provided equally to all persons.

Ever since *The Slaughter-House Cases* were decided in 1873, the Privileges or Immunities Clause has been effectively redacted from the Fourteenth Amendment.²⁹ Not too long afterwards, the Due Process Clause was expanded beyond the procedures by which laws are applied to persons and became applicable to the laws themselves. Enter the so-called “substantive due process” of statutes. This expansion of “due process” is not as textually unwarranted as it is sometimes made to appear. If the “due process of law” includes judicial review to ensure that a law being applied to a particular person was within the proper constitutional power of the legislature to enact, then scrutinizing the substance of statutes is a part of the procedures that must be followed before a law may be enforced by death, imprisonment, or fine.

Nevertheless, the redaction of the Privileges or Immunities Clause wreaks havoc on the coherence and original meaning of Section 1. Using the Due Process Clause to textually justify the substantive scrutiny of laws distorts the original meaning of the Fourteenth Amendment in at least five closely-related ways. (1) It shifts the substantive scrutiny of laws from the Privileges or Immunities Clause to

²⁸ See generally Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507 (1991).

²⁹ The sole exception to this generalization is *Saenz v. Roe*, 526 U.S. 489 (1999).

the Due Process Clause; (2) because the Due Process Clause protects all persons, using it to scrutinize laws obscures the fact that a proper law may make distinctions between citizens and non-citizens; (3) it distorts the original meaning of “liberty” in the Due Process Clause by stretching its meaning beyond the matter of deprivation of liberty by imprisonment; (4) when “liberty” is expanded in this way, it is not clear how it fits with “property”; and (5) it limits the scope of the Fourteenth Amendment to life, liberty, and property and not other positive rights or privileges of citizenship that may properly be denied to non-citizens but not to citizens. The most serious consequence of stretching the Due Process Clause beyond its original meaning to substantively scrutinize laws is how it undermines the legitimacy of this type of scrutiny.

The same story can be told about the Equal Protection Clause. After *Slaughter-House*, the scrutiny of discriminatory laws was shifted to the Equal Protection Clause, which was originally concerned mainly with protection of otherwise proper nondiscriminatory laws. In contrast with substantive due process, few have protested this shift. Still, it distorts the original meaning of the Equal Protection Clause in much the same way as the Due Process Clause and obscures the distinction between citizen and non-citizen acknowledged in the Privileges or Immunities Clause.

As a result of *The Slaughter-House Cases*, then, the entire Fourteenth Amendment was distorted, as the Due Process and Equal Protection Clauses were stretched beyond their original meaning to restore a portion of the original meaning of the Privileges or Immunities Clause. Consequently, the use of the Due Process Clause in this manner has been vulnerable to historical claims of illegitimacy from its inception during the Progressive Era until today. Not only has this shift in meaning undermined the legitimacy of protecting the rights of individuals from violation by state governments, it has also become a potent weapon against the practice of originalist constitutional interpretation. To the extent that distorting the Due Process and Equal Protection Clauses in this way is thought to be morally desirable, indeed essential, the moral imperative of this distortion provides a powerful argument against adhering to what is made to look like a morally inferior original meaning.

Moreover, the doctrine of substantive due process has only partially restored the original meaning of the Fourteenth Amendment as a whole. The Privileges or Immunities of citizens included, but was not limited to, the rights specified in the Civil Rights Act of 1866:

Such citizens of every race and color, without regard to any previous condition of slavery . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal prop-

erty, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens.³⁰

Of course, the Civil Rights Act of 1866 protected these privileges or immunities only from discriminatory laws. But the wording of the Fourteenth Amendment was not limited to discrimination. The content of the Civil Rights Act is significant because it identifies some of the privileges or immunities protected from abridgement by the Fourteenth Amendment. And these included the “right . . . to make and enforce contracts”—the very right protected by the Court in *Lochner v. New York*.

Conclusion

The real problem with *Lochner* was not the protection it afforded to the liberty of contract. Nor was it putting the burden on the states to justify the maximum hours law as a proper exercise of the police power. Nor did *Lochner* alter the constitutional structure as amended by the Fourteenth Amendment. No, *Lochner* and the other Due Process Clause cases of the Progressive Era—and substantive due process cases today—are all problematic because they continue to respect the precedent of the *Slaughter-House Cases* and refuse to restore the original meaning of the Privileges or Immunities Clause.

Were the original meaning of the Privileges or Immunities Clause revived, the text of section one of the Fourteenth Amendment would regain its original coherence. The federal protection of both enumerated and unenumerated rights against state governments would regain its legitimacy. And the advantages of adhering to the original meaning of the Constitution—even where the Court and commentators think they have something better to put in its place—would be reinforced.

We are not today preoccupied with the threats posed by slaughterhouses or bakeshops to the health of persons employed there or of the general public. Yet the cases involving slaughterhouses and bakeshops still pose a threat to the health of constitutional interpretation and the Constitution itself. But there is a cure: Reverse *Slaughter-House* and the “evils” of *Lochner* would simply melt away like the Wicked Witch of the West.³¹

³⁰ Act of April 19, 1866, 14 Stat. 27 (emphasis added).

³¹ *But see* GREGORY MAGUIRE, *THE LIFE AND TIMES OF THE WICKED WITCH OF THE WEST* (2004) (providing backstory that explains why so-called Wicked Witch of the West was completely mischaracterized in *Wizard of Oz* and was really good).