Chapter Seven: The Lochner Era & *Lochner v. New York* (1905)

You Have The Right To Remain Exploited

Three Big Things:

1. In *Lochner v. New York* (1905), the Supreme Court overturned a New York law limiting how many hours employees could be required to work each week. The Court determined that "freedom of contract" was an important right, even if it wasn't explicitly mentioned in the Constitution.

2. The "Lochner Era" was a forty-year period (1897–1937) during which the Court rejected a variety of efforts by both Congress and state legislatures to regulate the relationships between companies and their employees. This irritated both Progressives and eventual President Franklin D. Roosevelt, whose "New Deal" was at times stifled as a result.

3. The Court relied heavily on the idea of "substantive due process" and "unenumerated rights." Just because a right isn't specifically addressed in the Constitution or its Amendments doesn't mean it's not still a right – or so adherents to substantive due process would claim.

The Lochner Era & *Lochner v. New York* (1905)

There are several periods in the history of the Supreme Court which tend to be remembered for an overall approach and lasting impact rather than for a specific case or two. Often, the periods are simply referred to by the name of the Chief Justice at the time. The Marshall Court of the early 19th century promoted federal power in the early days of the United States. The Warren Court discovered a slew of new rights and protections for the accused in the 1950s and 1960s. The Roberts Court – well, it's a bit early to make that call.

The Lochner Era (1897 – 1937), however, is named for a case representing a judicial philosophy which dominated the nation's highest court for nearly forty years. For over a generation, the Court pushed back against the reform efforts of the Progressive Era and gave FDR fits by overturning many of his best efforts to regulate industry during the Great Depression. They laid the foundation for the modern "school choice" movement by uncovering new rights related to parenting and families. In the process, they brought to life an understanding of the Fourteenth Amendment that would end up securing the rights of American citizens to contraception, gay sex, and abortions.

Who saw THAT coming?

The 20th Century Begins

The Spanish-American War was over, the U.S. was quickly becoming a leader in imperialist expansion, and World War I wasn't yet a twinkle in the Kaiser's eye. The Second Industrial Revolution was in full swing; massive manufacturing and swelling cities increasingly absorbed available real estate. The American Federation of Labor (AFL) had recently formed under the leadership of Samuel Gompers and was already making some headway with higher wages and better working conditions. These gains were local and inconsistent, however, and advocates hoped for a little help from higher-ups.

Crowded, dirty, dangerous cities, and the evolving power of media to reveal "how the other half lives" brought about what would be remembered as the "Progressive Era." Reformers began staking out victories, primarily at the municipal level – although by 1920 they could celebrate four new constitutional amendments as well. Both churches and charities were inspired by the idea that individuals, with a little help and "encouragement,"

could *improve*. Individuals make up families, families make up societies… the world could become a better place, starting with the education of one child, the health of one mother, the reform of one man.

At the same time, human fallibility was both substantial and entrenched. While individuals offering soup and a place to sleep were certainly part of the solution, many believed fundamental changes to the *system* would be necessary for long-lasting, widespread prosperity. It was time to get local, state, and even national governments to "promote the general welfare" a bit more aggressively. The most logical place to begin was the epicenter of discord between the handful of men who seemed to own *everything* and those perpetually consumed in their name – the workplace.

Lochner v. New York (1905)

It was in the spirit of societal progress that the State of New York passed the "Bakeshop Act" which prohibited bakers from working more than 10 hours a day or more than 60 hours a week. Like other labor reform, the intent was to protect workers from being exploited by greedy owners – those some intellectuals referred to as the *bourgeoisie*. Joseph Lochner was a New York baker who violated this law several times and was fined as a result. Lochner protested that the law was unconstitutional. The Fourteenth Amendment, he argued, protected "freedom of contract," in principle if not in name. Why should the government interfere with an otherwise legal, private business arrangement between two rational adults?

The case eventually reached the Supreme Court, which sided with Lochner. Justice Rufus W. Peckham, writing for the majority, explained the Court's reasoning:

> *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, interfering with their independence of judgment and of action. They are in no sense wards of the State.*

In short, bakers are grown-ups just like anyone else, and they can make their own decisions about whether or not to agree to specific hours, wages, or anything else. Expand that to include most of the adult workforce, and you have the basic philosophy of the entire Lochner Era.

Allgeyer v. Louisiana (1897)

Lochner wasn't the first indication the Court was moving this direction. Nearly a decade before, the case of *Allgeyer v. Louisiana* had reached the Supremes. Louisiana passed a law intended to protect state businesses by prohibiting out-of-state insurance companies from selling policies in Louisiana. Allgeyer & Co. was a Louisiana company that bought out-of-state insurance anyway and was assessed heavy fines by the State as a result. The company argued that the law itself was unconstitutional based on the Fourteenth Amendment's "due process" guarantee.

The Court acknowledged the State's obligation to protect its inhabitants but found in favor of Allgeyer & Co. based on a rather Gordian brew of precedent and equivocation. Along the way, however, a concept emerged which would shape the next forty years – "economic liberty." While the term itself is absent from the Constitution or its amendments, the idea is inherent in the text as a whole – or so the Court determined. Little could they have guessed where this philosophy would take them in subsequent generations.

"Procedural" Due Process v. "Substantive" Due Process

This discovery of "economic liberty" in the Fourteenth Amendment meant that states like Louisiana, and later New York, couldn't limit an individual's right to make their own economic decisions without what the Fifth and Fourteenth Amendments called "due process." (The Fifth limits federal power; the Fourteenth extends those limits to state and local governments.)

The Framers wished to prevent the sort of tyrannical justice handed out by kings or dictators and to ensure the U.S. remained a nation of laws rather than of men and their unreliable judgments. While the government can, in some situations, take your life, liberty, or property, doing so requires they first clear numerous hurdles and meet certain standards. Those hurdles and standards are "due process."

The most common understanding of this principle involves "procedural due process." Anyone accused of a serious crime is guaranteed a fair trial before a jury of their peers. They have a right to an attorney and there are limits as to how the State may go about making the case against them. "Procedural due process" refers to the steps which must be taken and the rules which must be followed before any level of government can take or limit your life, liberty, or stuff – whether the issue is property taxes, prison, or capital punishment. The concept isn't limited to criminal law; "due process" also covers the steps your public school has to go through before suspending or expelling little Marco for his shenanigans, and why his guardians or other advocates have the right to challenge the system along the way.

What the Court was calling forth in *Lochner*, however, wasn't procedural. The steps had been followed – the legislature passed a law, the bureaucrats distributed the rules, Lochner violated them, enforcers caught him, and the local court heard his case and declared him guilty, all before assessing those fines. What Justice Peckham and the majority were relying on was something else – what would eventually be referred to as "substantive due process."

Defining Between the Constitutional Lines

"Substantive due process" is a bit harder to define, and it's been controversial since it first emerged. Some see it as jurisprudential accommodation of the natural rights and common law traditions which sparked the nation's birth to begin with, while others find it more akin to the Voldemort tumor under Professor Quirrell's turban, manipulating dark justices into sacrificing both good sense and original intent on the way to defeating the Constitution-That-Lived once and for all.

One of the better explanations comes from Professor Erwin Chemerinsky, Dean of UC Berkeley's Law School:

> *Substantive due process asks the question of whether the government's deprivation of a person's life, liberty or property is justified by a sufficient purpose. Procedural due process, by contrast, asks whether the government has followed proper procedures when it takes away life, liberty, or property. Substantive due process looks to whether there is a sufficient substantive justification, a good enough reason for such a deprivation.*
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> *Consider this simple illustration. The Supreme Court has said that under the word liberty in the due process clause, parents have a fundamental right to the custody of their children. Procedural due process means that the government must give notice and a hearing before it can permanently terminate custody. Substantive means the government must show a compelling reason that would demonstrate an adequate justification for terminating custody.*

What "substantive due process" protects, then, are what we sometimes refer to as "unenumerated rights" – protections implied by the written words of the Constitution and its Amendments, perhaps even inherent in

them, but not spelled out as such. In the Lochner Era, this primarily referred to "economic substantive due process" – ideas like "freedom of contract" between companies and workers. It was during this same era, however, that two cases were decided largely on the basis of "substantive due process" which had nothing to do with workers' rights or minimum wages. *Meyer v. Nebraska* (1923) involved the right of parents to determine the specifics of their child's education and of educators to offer wildly controversial courses like foreign languages. *Pierce v. Society of Sisters* (1925) allowed parents to choose private schooling, religious or otherwise.

Both *Meyer* and *Pierce* were cited repeatedly throughout the 20th century as evidence of the validity of unenumerated rights. They are, in fact, the foundation of most "school choice" arguments – particularly by those most determined to funnel public tax dollars into religious training via "vouchers" and related schemes. Ironically, however, the same controversial judicial philosophy which allowed the Lochner Courts to strike down efforts to regulate big business, and which encourages "school choice" advocates to keep fighting the good fight, served as the foundation for another collection of unenumerated rights which emerged rather dramatically in the late 20th century.

This little club would call itself the "right to privacy." You'd recognize them anywhere because they wear giant "pro-choice" buttons, use contraception, and marry members of different races but the same sex.

"Economic Substantive Due Process" in the Lochner Era

"School choice" wouldn't emerge onto the national scene until after *Brown v. Board of Education* (1954). Other forays into moral corruption and social decay wouldn't become staples of the nation's highest court until a decade after that. The rest of the Lochner Era was largely about how freedom meant letting corporations do whatever they wanted to workers because those being exploited had just as much theoretical control over the outcome as their gilded overlords did. (They didn't put it in those *exact* terms.) Between 1897–1937, the Supreme Court struck down nearly 200 different statues, most for violating "freedom of contract" or other varieties of "economic substantive due process."

The Court acknowledged in principle that state governments, and even sometimes the federal government, had *some* limited authority to regulate workplaces in order to promote safety and the general welfare, but only in cases involving explicit physical danger. Efforts to regulate mining, for example, might have a chance; restricting the hours during which one could safely bake bread, on the other hand… not so much.

Any such regulations should avoid restricting "market choices"; they couldn't interfere with the ability of men to sign up for whatever working conditions they choose at whatever wages are available. The Lochner Era Court had little use for Congress's claims to expanding authority under the Commerce Clause, making it one of those rare periods in U.S. history during which federal power didn't simply expand at will. The Court was particularly unsympathetic towards labor unions during this period, regularly striking down laws facilitating union activities or offering workers more leverage in negotiations.

Other Major Cases of the Lochner Era

Here are a few of the more frequently cited cases of the period, although there were dozens of others which could just as readily demonstrate the ideology of the era:

***Adair v. United States* (1908)** – Congress passed legislation in 1898 prohibiting "yellow dog contracts" in which workers agreed to forego union membership in order to obtain employment. An interstate railroad company nevertheless fired an employee for joining a labor union. The company argued that the law was

unconstitutional because it violated the Fifth Amendment, which protects liberty and property from government interference without due process. The Supreme Court agreed. While Congress had the right to regulate interstate commerce, that didn't give it the right to override the "liberty of contract" between employers and employees.

***Hammer v. Dagenhart* (1918)** – In 1916, Congress passed the Keating-Owen Bill, which attempted to standardize protections for children under the age of 16 (or 14 in some industries) working in factories or other labor-intensive settings. The Court declared Keating-Owen unconstitutional, insisting that Congress's power to regulate interstate commerce was intended to facilitate trade among the States, not to regulate labor and production itself. Besides, the Court pointed out, the States had already addressed the issue in their own ways as the Tenth Amendment allowed.

***Adkins v. Children's Hospital* (1923)** – The District of Columbia passed a minimum wage law for women and minors, complete with provisions for investigation and enforcement. The Children's Hospital of D.C. protested that this was a violation of its "freedom of contract" as clearly established in *Lochner v. New York* (1905). The Supreme Court agreed and overturned the minimum wage legislation based on the same principles articulated in *Lochner*, adding that the law was "arbitrary" in that it imposed a uniform minimum wage regardless of women's individual skills, occupations, wants, or needs. Besides, the Court added, with the passage of the 19th Amendment only a few years before, the idea that women required special protection was quickly becoming antiquated.

***Carter v. Carter Coal Company* (1936) –** The Bituminous Coal Conservation Act of 1935 was intended to establish national standards for the coal industry. It was not technically mandatory, but companies which agreed to pay the designated wages, limit working hours for designated groups, and follow the suggested pricing guidelines, received a substantial tax refund. The Court determined that Congress had (once again) overstepped its authority under the Commerce Clause. Employee wages and hours were part of production, not distribution or sales, and any relationship between the two was indirect at best. If individual states wished to regulate their industries in this way, that was fine – but nothing in the Constitution gave the federal government the right to step in on this level.

***West Coast Hotel Co. v. Parrish* (1937)**

On its surface, *West Coast Hotel* was a fairly straightforward case. The State of Washington set a minimum wage for women and minors working in most industries. Elsie Parrish, who worked at a local hotel, sued for the difference between what she actually made and the legal minimum. Lower courts, following the precedent set in *Adkins v. Children's Hospital* (1923), found in favor of the hotel – "freedom of contract" and "substantive due process" and all the usual staples of what was by this time forty years of "Lochner Era" jurisprudence.

When the case reached the Supreme Court, however, they found for Parrish and the State of Washington. The minimum wage was fine. *Adkins* was officially overturned. Just like that, the Lochner Era was over.

West Coast Hotel marked a dramatic shift in the Court's approach towards legislation regulating industry and protecting workers. This was not the result of a massive change of heart or mind by nine robed individuals, but a philosophical reversal on the part of a single Supreme Court Justice, Owen J. Roberts. Many of the infamous Lochner Era cases were decided by split votes, with 5–4 being the most common. *West Coast Hotel* was decided 5–4 as well, but 4 of the new 5 were the same core group who'd been overruled in similar cases for decades prior.

Why the change? Popular wisdom suggests it was a reaction to President Franklin D. Roosevelt's infamous "court packing plan" via the Judicial Procedures Reform Bill of 1937. Tired of having so many of his New Deal efforts stymied or outright overturned by the Court, FDR proposed adding six additional justices over a period of several years – claiming he simply wanted to help the Court manage its extensive workload. What a guy.

There was nothing unconstitutional about adding Justices to the Court, but even his supporters saw it as a rather obvious ploy to gain some leverage over a troublesome bench. Although the bill failed, perhaps Owen Roberts sensed a change in the popular winds and decided it was time for the Court to pick its battles more carefully. Someone coined the phrase "the switch in time that saved nine" in reference to Roberts' change of heart and the term stuck.

The Inglorious Demise of Economic Due Process

The Majority Opinion in *West Coast Hotel*, penned by Chief Justice Charles Evans Hughes, accepted the state's argument that women and minors were particularly vulnerable to exploitation by employers and that what was bad for women (many of them mothers) usually ended up being bad for society as well. This was the opposite of the "women don't need no stinkin' protection" approach of *Adkins*, but if you're going to overturn a previous ruling, you might as well go all the way.

In an instant, "economic substantive due process" went from being head cheerleader to the weird girl nobody would invite to parties. It fell out of favor – hard – and has been generally vilified ever since. *Lochner v. New York* (1905) is now regularly lumped together on "worst ever" lists with cases like *Scott v. Sandford* (1857), *Plessy v. Ferguson* (1896), and *Citizens United v. FEC* (2010).

The idea that there are unenumerated rights just as essential to personal liberty as those spelled out explicitly, however, did not go away. Some would argue it had been there all along – hence the Ninth Amendment:

> *The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.*

Eventually, substantive due process would re-emerge. It periodically popped up in the slew of "rights of the accused" cases for which the Warren Court is best-remembered, and later became a staple of both sexual freedom jurisprudence and the ongoing reframing of "religious liberty" to mean elevating select sectarian beliefs above laws of otherwise general application.

Because unenumerated rights by their very nature rely on inference and historical interpretations, they can prove both malleable and unpredictable. Arguably the biggest error of the Lochner Era Courts wasn't their consideration for "unenumerated rights" while making their decisions, but the elevation of those inferred rights to a status trumping all other considerations – economic, social, or legal.