

Why Was *Lochner* Wrong?

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*Lochner v New York*¹ would probably win the prize, if there were one, for the most widely reviled decision of the last hundred years. *Lochner* does have capable defenders who make arguments that must be taken seriously.² And *Lochner* would have some competition for the prize; *Korematsu v United States*,³ in particular, would be a strong contender. But judged by some rough-and-ready indicators—Would you ever cite this case in a Supreme Court brief, except to identify it with your opponents' position? If a judicial nominee avowed support for this case in a Senate confirmation hearing, would that immediately put an end to her chances?—*Lochner* is one of the great anti-precedents of the twentieth century. You have to reject *Lochner* if you want to be in the mainstream of American constitutional law today.

Lochner, which declared unconstitutional a New York maximum-hours statute for bakers, is, of course, more than just a case. It symbolizes the era in which the Supreme Court invalidated nearly two hundred social welfare and regulatory measures, including minimum wage laws,⁴ laws designed to enable employees to unionize,⁵ and a federal statute establishing a pension system for railway workers.⁶ The

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¹ 198 US 45 (1905).

² See, for example, Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 128–29 (Harvard 1985); Bernard H. Siegan, *Economic Liberties and the Constitution* 113–25, 320–21 (Chicago 1980).

³ 323 US 214 (1944).

⁴ *Morehead v Tipaldo*, 298 US 587 (1936) (declaring unconstitutional a state minimum wage law); *Adkins v Children's Hospital*, 261 US 525 (1923) (declaring unconstitutional a federal statute providing for minimum wages for women and children in the District of Columbia).

⁵ *Coppage v Kansas*, 236 US 1 (1915) (declaring unconstitutional a state law that forbade employers to require employees to agree not to join labor organizations); *Adair v United States*, 208 US 161 (1908) (declaring unconstitutional a federal statute that forbade employers to discharge employees because they were members of labor organizations).

⁶ *Railroad Retirement Board v Alton Railroad Co.*, 295 US 330 (1935). To be sure, the Court also upheld many such measures. In fact, twelve years after *Lochner*, it upheld a maximum hours law that applied to factory workers and thereby overruled, sub silentio, the specific holding of *Lochner*. See *Bunting v Oregon*, 243 US 426 (1917). For a summary of the Court's decisions in this era, see Benjamin Wright, *The Growth of American Constitutional Law* 153–70 (Reynal & Hitchcock 1942).

Lochner-era decisions were ferociously attacked, and the Court's 1937 decision in *West Coast Hotel Co v Parrish*⁷ marked the end of the *Lochner* era. By the early 1940s, *Lochner's* status as a pariah was secure.⁸

The striking thing about the disapproval of *Lochner*, though, is that there is no consensus on why it is wrong. If you ask people why the Supreme Court was right to strike down racial segregation or uphold the right of speakers to criticize the government, their answers are likely to agree in broad outline. But the parallel question about *Lochner* will produce widely differing responses. Was *Lochner* wrong because it enforced a right—"the right of contract between the employer and employé"⁹—that is not expressed in or fairly inferred from the text of the Constitution? Or was it wrong because freedom of contract, although having plausible constitutional status, does not have sufficient weight to override legislation that addresses urgent social needs? Is the problem that freedom of contract, while a perfectly good right in the abstract, should not be enforced by the courts but is instead something legislatures alone should take into account? Or is the problem a more general one, that the Supreme Court treated the rights defined by the common law of contracts as constituting a natural, "pre-political" state of affairs, and refused to recognize that those rights are as much the product of state action as the regulatory statutes the Court was invalidating? All of these accounts, and others, have been offered, and it seems fair to say that none of them has gained a consensus.¹⁰

Why is there no consensus? Much of the reason is that widely-accepted developments in constitutional law since the demise of *Lochner* are subject to the same criticisms that have been directed at *Lochner*. The puzzle, for anyone who generally accepts the way constitutional law has evolved over the last half century or so, is to find an argument against *Lochner* that would not undermine those developments as well. That is the question I will discuss in this Essay: How can *Lochner*, which today is the epitome of an out-of-the-mainstream de-

⁷ 300 US 379 (1937).

⁸ There are many accounts of the demise of *Lochner*. See, for example, Barry Cushman, *Rethinking the New Deal Court* (Oxford 1998).

⁹ *Lochner*, 198 US at 53.

¹⁰ For accounts of the various objections to *Lochner*, see, for example, Geoffrey R. Stone, et al, *Constitutional Law* 718–23 (Aspen 4th ed 2001); Kathleen M. Sullivan and Gerald Gunther, *Constitutional Law* 463–66 (Foundation 14th ed 2001). For the specific objections mentioned in the text, see, for example, Robert H. Bork, *The Tempting of America* 44–46, 49 (Free Press 1990); Laurence H. Tribe, *American Constitutional Law* 574–78 (Foundation 2d ed 1988); Cass R. Sunstein, *Lochner's Legacy*, 87 Colum L Rev 873 (1987); John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 18 (Harvard 1980); Charles Warren, *The New "Liberty" under the Fourteenth Amendment*, 39 Harv L Rev 431 (1926).

cision, be criticized in a way that is consistent with today's mainstream constitutional law?

Three widely-accepted developments in recent decades, in particular, are inconsistent with the traditional criticisms of *Lochner*. First, for a half-century the Supreme Court has enforced fundamental rights, sometimes in the face of significant popular opposition, in a way that few people could have foreseen when *Lochner* was interred by the New Deal Court. Second, it has become generally accepted (or so I will argue) that the courts can properly recognize constitutional rights that are not explicitly mentioned in the text of the Constitution. The third development, not confined to constitutional law, is an enhanced understanding of both the virtues and the limitations of freedom of contract and economic markets—an understanding that validates the *Lochner*-era Court's concern with freedom of contract but impugns many of the specific decisions that Court made as it enforced the right.

My conclusion, in a word, is that the *Lochner*-era Court acted defensibly in recognizing freedom of contract but indefensibly in exalting it. Freedom of contract, judged by the standards that developed in the last half of the twentieth century, is a plausible constitutional right. It might merit careful, case-by-case enforcement, undertaken with sensitivity to the limitations of the right as well as its value. The *Lochner*-era Court went far beyond that. It treated freedom of contract as a cornerstone of the constitutional order and systematically undervalued reasons for limiting or overriding the right. It is one thing to enforce freedom of contract in a limited and qualified way; it is quite another to make freedom of contract a preeminent constitutional value that repeatedly prevails over legislation that, in the eyes of elected representatives, serves important social purposes. Seen from the end of the twentieth century, the *Lochner* Court's error—one that may have enduring lessons for the Supreme Court as an institution—was that it did the latter rather than the former.

I. THE SUCCESS OF JUDICIAL ACTIVISM

In the late 1930s and early 1940s, when *Lochner* was dispatched, many people thought that the courts were simply going to get out of the business of systematically enforcing constitutional rights against legislative majorities. The courts might act against legislation that was especially poorly conceived, or they might invalidate particularly severe abuses. But “the influential and ultimately decisive criticism of the Court in this period” was that the Court should confine itself to

striking down laws that were in some sense irrational.¹¹ This view, associated with James Bradley Thayer, influenced Justices Holmes and Brandeis, the most famous dissenters from the *Lochner*-era rulings; it is reflected in Holmes's *Lochner* dissent.¹² Justice Frankfurter, perhaps the New Deal's leading intellectual opponent of the *Lochner* Court, based his judicial career on this creed, most notably in his opinion dissenting from the Court's invalidation of a mandatory flag salute law in *West Virginia State Board of Education v Barnette*.¹³ As late as 1958, Judge Learned Hand vigorously reasserted the same position.¹⁴

It is easy to see why people drew this lesson from the demise of *Lochner*. During the *Lochner* era, the only constitutional principles that the Supreme Court enforced regularly and systematically were those that the New Deal discredited: freedom of contract, as in *Lochner*, and federalism-based limits on Congress's power. During that time, the Supreme Court invalidated a few laws on the ground that they violated the First Amendment's guarantee of free speech, but only a few;¹⁵ First Amendment principles that are familiar today were barely nascent, and in the late 1930s the Court was only a decade removed from decisions that essentially allowed the government to punish political dissent.¹⁶ The Court struck down a few egregious violations of the Due Process Clause, and even some racially discriminatory government acts, but these decisions too were episodic, not systematic.¹⁷ It would have been quite plausible to think that one lesson of the *Lochner* era was that judicial review is unacceptable unless it is confined to exceptional cases of governmental irrationality or malfeasance. The project of identifying and elaborating constitutional rights, and systematically protecting them against legislative interference, was, one might have thought, precisely what courts should not do.

One of the signal developments in the last half-century of American constitutional law has been the Supreme Court's persistent will-

¹¹ Alexander M. Bickel, *The Least Dangerous Branch* 46 (Bobbs-Merrill 1962).

¹² See James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv L Rev 129, 144 (1893) (asserting that the Court may declare a law unconstitutional only "when those who have the right to make laws have not merely made a mistake, but have made a very clear one, — so clear that it is not open to rational question"). See *Lochner*, 198 US at 75–76 (Holmes dissenting).

¹³ 319 US 624, 647 (1943) (Frankfurter dissenting). See also *id* at 666 ("I know of no other test which this Court is authorized to apply in nullifying legislation" than "the absence of a rational justification for the legislation.").

¹⁴ See Learned Hand, *The Bill of Rights* 66–67, 71–77 (Harvard 3d ed 1960).

¹⁵ See, for example, *Near v Minnesota*, 283 US 697 (1931); *Stromberg v California*, 283 US 359 (1931); *Fiske v Kansas*, 274 US 380, 387 (1927).

¹⁶ See, for example, *Whitney v California*, 274 US 357, 371 (1927); *Gitlow v New York*, 268 US 652, 667 (1925).

¹⁷ See, for example, *Norris v Alabama*, 294 US 587 (1935); *Powell v Alabama*, 287 US 45, 71 (1932); *Moore v Dempsey*, 261 US 86, 91–92 (1923).

ingness to undertake that very project. Since around the mid-1950s, the Court has regularly enforced constitutional rights, and regularly declared laws unconstitutional, including laws that had substantial popular support. During that time, many justices have sat on the Court, of course, with different methodological and political commitments. Some have been politically liberal, some conservative; some said they based their decisions on the text of the Constitution and the original understanding alone, while others have drawn on a wider range of sources in interpreting the Constitution. Different majorities have vindicated different constitutional rights and principles: The Warren Court was particularly solicitous of racial minorities; the current Court has revived limits on Congress's power. But throughout this period, one constant has been the rejection of the Thayer view, arguably by every Justice except Frankfurter (and even Frankfurter was not steadfast by any means). The Court has not limited itself to measures that no rational person could defend; it has consistently asserted a much more prominent role for itself.

The First Amendment is a particularly clear example. The Supreme Court, and the lower courts, regularly invalidate legislation and other official action, including quite important and popular legislation, on First Amendment grounds.¹⁸ The Court does not claim that these laws are irrational; it explicitly applies a higher standard of review.¹⁹ To oversimplify, the Court has, for several decades now, done with freedom of speech something comparable to what it tried to do with freedom of contract in the *Lochner* era. While there are dissents in particular First Amendment cases, no Justice—and seemingly hardly anyone outside of academia—suggests that it is improper for the courts to see themselves as the special guardians of freedom of expression. There are other instances in which the courts have enforced constitutional limits, consistently over an extended period, in a way that cannot be squared with the Thayer approach: criminal procedure, religious establishment and free exercise, gender discrimination, affirmative action, and, in the last few years, limits on Congress's powers.

Moreover, the Court has, with some consistency, been willing to do things that were quite unpopular with at least some segments of society. The Warren Court was famous for doing this, of course, in its decisions on race, school prayer, and criminal procedure. The Burger Court decided *Roe v Wade*;²⁰ the Rehnquist Court held that the First

¹⁸ See, for example, *Ashcroft v Free Speech Coalition*, 122 S Ct 1389, 1405–06 (2002); *Reno v ACLU*, 521 US 844, 849 (1997).

¹⁹ See, for example, *Free Speech Coalition*, 122 S Ct at 1396; *Turner Broadcasting System, Inc v FCC*, 520 US 180, 185 (1997) (applying “intermediate First Amendment scrutiny”).

²⁰ 410 US 113, 154 (1973).

Amendment protected flag-burning,²¹ and several of its decisions limiting Congress's power invalidated laws adopted by substantial legislative majorities.²² This is not to say that it is commendable for courts to thwart the legislature in this way; some of these decisions seem to me severely misguided. Also, one must be careful not to overstate the unpopularity of the courts' actions. Even when the Supreme Court did things that aroused substantial opposition, it was generally supported by important segments of either popular or elite opinion. But the willingness and ability of courts to take an aggressive role in enforcing constitutional rights has become an entrenched aspect of the legal culture in a way that few could have anticipated when *Lochner* was interred.

The upshot of this development is that, for anyone who generally accepts the role that the Supreme Court plays today, the argument that *Lochner* is wrong cannot draw—as it did during the New Deal—on a general skepticism about the legitimacy and efficacy of judicial review. *Lochner*'s critics cannot rely on a background understanding that judicial review is an aberrant and insecure institution in a democracy, and that courts must confine their actions narrowly if they do not want to risk losing their legitimacy. Some justices still profess that attitude toward judicial review, but it is effectively belied by several decades of consensus in favor of much greater activism. The Thayer view has received powerful academic defenses recently,²³ but today anyone holding that view would have to reject a great deal of constitutional law. Today, the attack on *Lochner* has to acknowledge that a judicial practice that has important similarities to *Lochner*—the systematic judicial elaboration of constitutional rights, in the face of a significant degree of popular opposition—has been accepted by, in fact celebrated by, mainstream legal thought. If *Lochner* is outside the mainstream, which it is, it must be for some other reason.

II. UNENUMERATED RIGHTS

A second criticism of *Lochner*—quite different from the view identified with Thayer—was that the Court erred in *Lochner* not by enforcing constitutional rights, but by enforcing a right not found in the Constitution. Freedom of contract, unlike freedom of speech, for example, is not mentioned in the text of the Constitution. Its textual

²¹ See *United States v Eichman*, 496 US 310, 318 (1990); *Texas v Johnson*, 491 US 397, 406, 412 (1989).

²² See, for example, *Kimel v Florida Board of Regents*, 528 US 62, 91 (2000); *City of Boerne v Flores*, 521 US 507, 511 (1997).

²³ See Mark V. Tushnet, *Taking the Constitution Away From the Courts* 154–76 (Princeton 1999); Jeremy Waldron, *Law and Disagreement* 211–31 (Oxford 1999); Adrian Vermeule, *Judicial Review and Institutional Choice*, 43 *Wm & Mary L Rev* 1557 (2002).

basis was the oxymoronic notion of “substantive due process.” There is no problem, on this account, when courts enforce rights that are in the Constitution; the problem arises when they enforce rights that they have just made up themselves.

This attack on *Lochner* appears in Chief Justice Hughes’s majority opinion in *West Coast Hotel Co.*:²⁴ “What is this freedom? The Constitution does not speak of freedom of contract.”²⁵ But the most important proponent of this view was Justice Hugo Black. Black and Frankfurter were the two most influential appointees of President Franklin Roosevelt, and both were sworn opponents of *Lochner*, but they derived sharply differing lessons from *Lochner*’s failure. Their disagreement dominated constitutional law for many years. Between the two, it seems fair to say that Black has prevailed in a rout. Black’s principal campaign, to apply the provisions of the Bill of Rights to the states, has essentially succeeded; Frankfurter’s judicial abstinence is nowhere to be found on the Court today.

Perhaps as a result, the criticism of *Lochner* that is associated with Black has been enormously and persistently influential. It was the basis of what is still perhaps the most prominent criticism of *Roe*: that the right to reproductive choice is simply not found in the Constitution.²⁶ This same account of the vice of *Lochner* was echoed as late as 1986, almost 50 years after the end of the *Lochner* era, in Justice Byron White’s opinion for the Court in *Bowers v Hardwick*:²⁷

The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930’s, which resulted in the repudiation of much of the substantive gloss that the Court had placed on the Due Process Clauses of the Fifth and Fourteenth Amendments.²⁸

But this view—that the courts should confine themselves to rights that are in some sense explicit in the text of the Constitution—has also not prevailed. *Roe*, of course, has withstood many attacks and has been reaffirmed.²⁹ But even the controversy over *Roe* gives a mislead-

²⁴ 300 US at 379, 398–99.

²⁵ *Id.* at 391.

²⁶ See, for example, Bork, *Tempting of America* at 112–16 (cited in note 10); Ely, *Democracy and Distrust* at 15 (cited in note 10); John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L J 920, 943 (1973).

²⁷ 478 US 186 (1986).

²⁸ *Id.* at 194–95.

²⁹ See, for example, *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 US 833, 869 (1992).

ingly favorable impression of the status of Black's literalism. There were other things about *Roe* that many people found objectionable, in particular, *Roe's* account of why the state's interest in protecting fetal life was not sufficient to sustain laws restricting abortion. The argument that the right to abortion is not in the Constitution was surely, for many people, just a means of attacking a decision that was objectionable mostly because of its treatment of fetal life. The rhetoric was available because of the supposed lesson of the *Lochner* era, but the deeper objection lay elsewhere.

The view that the Court should refuse to recognize "unenumerated" constitutional rights has, in fact, never been accepted by a majority of the Court. *Griswold v Connecticut*³⁰ struck down a law forbidding the use of contraceptives by married couples on the basis of an unenumerated right to privacy, over a vigorous dissent by Black that explicitly accused the majority of doing what the *Lochner* Court had done.³¹ That decision now appears to have become thoroughly accepted. *Griswold* and subsequent cases relied on two *Lochner*-era precedents, *Meyer v Nebraska*³² and *Pierce v Society of Sisters*;³³ the Court reconceptualized these decisions as cases about a family's (unenumerated) right to autonomy, instead of freedom of contract.

In its cases dealing with the "right to die," a majority of the Court has carefully refrained from endorsing the view that unenumerated rights should not be recognized.³⁴ In fact, a majority of the Court showed a willingness to engage in a careful inquiry into what unenumerated rights should be enforced.³⁵ In a number of lesser-known cases, the Court has seemed quite untroubled by the prospect of recognizing unenumerated rights.³⁶ It has gone about determining the contours of substantive rights that had no clear textual basis, without even entertaining the possibility that such rights should not be recognized at all.

Today, therefore, it seems fair to say that the attack on *Lochner* as "outside the mainstream" cannot rely on the argument that freedom of contract is not enumerated in the Constitution, any more than it can rely on a general skepticism about judicial review. This is not to say that the view associated with Justice Black has been decisively refuted, any more than one can say that about the Thayer view. But it is

³⁰ 381 US 479 (1965).

³¹ See *id.* at 514–15, 523–24.

³² 262 US 390 (1923).

³³ 268 US 510 (1925).

³⁴ See *Washington v Glucksberg*, 521 US 702, 727 (1997); *Cruzan v Missouri Department of Health*, 497 US 261, 278–79 (1990).

³⁵ See *Glucksberg*, 521 US at 720–21; *Cruzan*, 497 US at 278–79.

³⁶ See, for example, *Washington v Harper*, 494 US 210, 221–22 (1990).

to say that *Lochner*'s status as a case that defines what it is to be outside the mainstream cannot rely on Black's kind of literalism.

III. FREEDOM OF CONTRACT

If the rejection of *Lochner* cannot rest on the proposition that courts should not systematically enforce constitutional rights, including unenumerated rights, then there must be something problematic about the particular right that *Lochner* enforced. This, too, was a prominent line of criticism of *Lochner*. It can take several forms. One argument was that while some unenumerated rights can legitimately be enforced by the courts, freedom of contract lacks any constitutional roots. Another argument was that freedom of contract is simply not a valuable enough right: It is, on some accounts, merely a property right, not a personal right like freedom of speech.

These arguments, too, are much less compelling now than they might have been in the New Deal era. Freedom of contract—at least the freedom to contract to work at a particular job—turns out to be a plausible candidate for protection as a constitutional right. The origins of *Lochner*-era constitutional law have been traced to the ideology of the antislavery movement—which, for obvious reasons, emphasized the importance of allowing all individuals to sell their own labor on the terms that they saw fit—and, even earlier, to Jacksonian opposition to “class legislation.”³⁷ In these ways, freedom of contract was not merely a fabrication of a business-oriented Supreme Court in the early twentieth century; there are plausible historical reasons for viewing freedom of contract as part of the liberty protected from substantive limitation by the Due Process Clause, or as one of the privileges or immunities of citizens of the United States. Normatively, too, it is hard to dispute the importance of freedom of contract in some settings. A law that precludes a person from working at a particular occupation can be terribly burdensome—a serious material burden, an affront to the individual's autonomy, and something that significantly affects the quality of a person's life.

There is also, today, a more prevalent understanding of the value of freedom of contract to society as a whole than there was at the time

³⁷ See Howard Gillman, *The Constitution Besieged* 6, 212 n 25 (Duke 1993); William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 Wis L Rev 767, 800; Charles W. McCurdy, *The Roots of Liberty of Contract Reconsidered: Major Premises in the Law of Employment, 1867–1937*, 1984 S Ct Hist Socy Yearbook 20, 27; David M. Gold, *Redfield, Railroads, and the Roots of “Laissez-Faire Constitutionalism”*, 27 Am J Legal Hist 254, 265 (1983); Eric Foner, *Abolitionism and the Labor Movement in Antebellum America*, in *Politics and Ideology in the Age of the Civil War* 57, 64–65 (Oxford 1980); William E. Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth-Century America*, 87 Harv L Rev 513, 557 (1974).

Lochner was overturned. Today there is a widespread consensus on the basic importance of market mechanisms, suitably regulated. During the New Deal, the consensus was not as clear. Some prominent figures at the time thought that significant elements of the economy should be centrally planned, and the *Lochner* emphasis on the importance of free markets in labor may have seemed obsolete then.³⁸ Today the centrality and importance of free markets is more widely recognized.

What, then, was wrong with the courts' enforcing freedom of contract in the way the *Lochner*-era courts did? The right is valuable to individuals and to society; it has plausible constitutional roots; and neither the lack of an explicit reference in the text of the Constitution, nor the fact that the right would be enforced by courts against democratic majorities, are insuperable obstacles. Part of the problem—as has been powerfully argued—may lie in the *Lochner* Court's unwillingness to recognize that a market ordering governed by freedom of contract is not a natural, pre-political state of affairs, but is as much a choice of government policy as any regulatory scheme.³⁹ But that argument, which captures something important about the *Lochner* Court's intellectual outlook, only gets us part of the way to an account of why *Lochner* was wrong. A defender of the *Lochner* Court might acknowledge that enforcing freedom of contract was not “natural” at all but was a deliberate, conscious policy choice—and then plausibly insist that it was a good choice, a better choice than restrictions on freedom of contract, from the point of view of both constitutional legitimacy and moral desirability.

We can get a better sense of the real problem with *Lochner* by comparing it to some of the Supreme Court's twentieth-century success stories, that is, to lines of doctrine that have been accepted by the legal culture and society at large even though they invalidated significant amounts of legislation and other government action. Why have the Court's decisions enforcing First Amendment rights, for example, become so thoroughly mainstream? Part of the answer seems to be that the courts have developed legal principles that reflect both the value of free expression and the legitimate limits that can be placed on free expression.

This did not happen easily, or overnight. Some early First Amendment decisions, for example, suggested that no restrictions on speech could be upheld unless they were needed to prevent a “clear

³⁸ See Laurence H. Tribe, 1 *American Constitutional Law* 1358–59 (Foundation 3d ed 2000); William E. Leuchtenburg, *Franklin D. Roosevelt and the New Deal* 22, 30, 33–35 (Harper & Row 1963).

³⁹ See Sunstein, 87 *Colum L Rev* at 882 (cited in note 10).

and present danger” of a serious harm.⁴⁰ If that approach had been rigorously applied, it would have produced a state of affairs at least as intolerable as that produced during the *Lochner* era. It might have drawn into question many sensible and necessary laws regulating the time and place of demonstrations, restricting the speech of government employees, compensating people for defamation, and so on. Instead, the courts have developed an elaborate doctrinal structure designed to protect the core values of free speech while allowing the government greater latitude where those values are not threatened or when they can be legitimately overridden.

This is the kind of thing the *Lochner*-era Supreme Court failed to do. The problem was not that that Court protected freedom of contract in a wholly indiscriminate way; its doctrine was complex, and it rejected challenges to economic regulation as often as it sustained them.⁴¹ But the Court lacked an understanding of freedom of contract that might have enabled it to develop a plausible legal regime.

Freedom of contract is valuable for essentially two reasons. First, when parties freely agree to do something, there is a presumption that the agreement reflects a choice that benefits both of them. To the extent that is true, then interfering with freedom of contract gratuitously reduces well being, unless a third party is somehow affected. Second, a restriction on freedom of contract may be inconsistent with autonomy; it denies people the right to control an important aspect of their lives.⁴²

Sometimes one or both of these conditions will not hold. The obvious cases—recognized of course by the *Lochner* Court—are cases of incapacity (as with children) or coercion. Incapacity undermines the premise, necessary to sustaining the argument for freedom of contract, that an individual’s choices reflect his or her own best interests. Coercion does the same. Equally obviously, when an agreement has harmful externalities—effects on a third party—those effects can justify a restriction on freedom of contract. The *Lochner*-era Court of course recognized this, too, in principle.⁴³

A properly formulated conception of freedom of contract, however, must go beyond these basics. Incapacity can take a variety of forms beyond the obvious cases of infancy and mental disability. An individual might lack the information needed to make a choice, or—

⁴⁰ See *Terminiello v Chicago*, 337 US 1, 4 (1949); *Bridges v California*, 314 US 252, 263 (1941); *Cantwell v Connecticut*, 310 US 296, 308 (1940); *Thornhill v Alabama*, 310 US 88, 104–05 (1940); *Schneider v State*, 308 US 147, 160–61 (1939).

⁴¹ See Wright, *The Growth of American Constitutional Law* ch 8 (cited in note 6).

⁴² See, for example, Michael J. Trebilcock, *The Limits of Freedom of Contract* ch 1 (Harvard 1993).

⁴³ See, for example, *McLean v Arkansas*, 211 US 539, 547–48 (1909); *Muller v Oregon*, 208 US 412, 421 (1908).

more significantly, because raw information could, in theory, just be provided—individuals' rationality in making certain choices might be bounded. In such circumstances, a restriction on freedom of contract might benefit a party. Monopoly power in a market, such as a labor market, undermines the autonomy justification for freedom of contract and, importantly, can have distributive consequences that might be rectified by a restriction on freedom of contract. Information asymmetries may lead to agreements that are not mutually beneficial and that restrictions on freedom of contract might improve. The category of harmful externalities is potentially quite large; psychic effects and effects on people's status can be real harms, and significant restrictions on freedom of contract may be needed to prevent them. Individuals' preferences might be questioned in some ways, such as when they have adapted their desires to unjust circumstances and stopped seeking something that was wrongfully denied to them. In some circumstances, even the very idea of an exchange might seem inappropriate, as with the sale of sex, or of children.⁴⁴

This is only a superficial sketch of the kinds of concerns that might justify restricting freedom of contract. Each, of course, presents complexities. The result is that, in many instances, it will be unclear whether a particular prohibition on certain kinds of contracts is inconsistent with the core values of freedom of contract. Occupational health and safety laws, the category to which *Lochner* arguably belongs, might be upheld (or might not) on the ground that information failures and bounded rationality prevent employees from accurately assessing the risks they run. Minimum wage laws, as well as other limits on the employment relationship, might be a way of dealing with markets in which employers have monopoly power; the laws have the same effect as a labor union, reducing competition among employees so that a bilateral monopoly is created, with distributive effects that benefit the employees. Anti-discrimination laws did not exist during the *Lochner* era but would certainly be challenged as abridgments of freedom of contract today if *Lochner* survived.⁴⁵ They might be justified on the ground that discrimination inflicts a kind of externality on all members of the victim group whose status is adversely affected; they might also be justified, sometimes, as dealing with a problem of asymmetric information. (In a freedom of contract regime, an employee might refuse to seek protection against certain kinds of discriminatory conduct—sexual harassment, for example—because she fears the employer will label her a troublemaker. As a result, the par-

⁴⁴ See generally Trebilcock, *Limits of Freedom of Contract* (cited in note 42); Cass R. Sunstein, *Legal Interference With Private Preferences*, 53 U Chi L Rev 1129 (1986).

⁴⁵ See Richard A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* 99 (Harvard 1992).

ties might not reach mutually beneficial agreements.) In some circumstances, notably when the civil rights laws were first passed, there were serious problems of coercion, often in the form of social and extra-legal sanctions that kept employers and employees from contracting freely. In these circumstances the civil rights laws actually enhanced freedom of contract.⁴⁶

In addition, freedom of contract need not be treated as inviolable. Minimum wage legislation—consistently disapproved by the *Lochner*-era Court—provides an example. On standard economic assumptions, minimum wage laws increase unemployment; an employer who would have hired, at a low wage, an employee whose productivity was very low, will find it unprofitable to hire that employee at the mandated minimum wage. In that way, minimum wage laws may harm people at the very bottom of the ladder in order to benefit those a few rungs above them.

It is not clear, however, that the legislature should be precluded from making this choice. Even in this situation—which will not always exist—the legislature might be warranted in concluding that, despite the regressive effect of the minimum wage, the gains to those who benefit from it outweigh the harm to those who lose out. The legislature might decide, for example, that a minimum wage law is needed to provide economic security to large numbers of working class families, and that the burden on the less well-off people who will lose jobs is worth the gain. Such a decision could certainly be questioned as a matter of social policy, but it is not obvious that the value of freedom of contract (even freedom to obtain a job) is great enough to justify the courts in overturning this decision. Also, the legislature may be able to provide benefits—such as cash or in-kind payments, or education and training—to those who lose their jobs because of the minimum wage. The *Lochner*-era Court was systematically unwilling to entertain this kind of defense of regulatory legislation.

Some restrictions on parties' ability to enter into contracts, then, may serve the underlying values of freedom of contract; restrictions that do impair freedom of contract may nonetheless be justified either because they serve more important values or because the legislature can provide substitutes. Obviously these are difficult and complex questions. It is entirely possible that they are too difficult for courts to sort out, and that in the end the only protection for freedom of contract will be provided by legislatures. But it is not wholly out of the question that this right might be judicially enforceable.⁴⁷ The problem

⁴⁶ See James J. Heckman and Houtt Verkerke, *Racial Disparity and Economic Discrimination Law: An Economic Perspective*, 8 Yale L & Pol Rev 276, 290 (1990).

⁴⁷ For similar suggestions, see Jerry L. Mashaw, *Greed, Chaos, and Governance* 50–80 (Yale 1997); Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation*

of enforcing freedom of speech might have seemed equally daunting at one point: How can the courts possibly deal with all the varied questions raised by laws that in some way limit speech? While of course the courts' decisions in First Amendment cases can be criticized, few would say that they are, taken as a whole, the kind of disaster that the *Lochner*-era is generally thought to have been.

The question is not whether a court could, in one stroke, design a comprehensive matrix that would determine the outcome of every possible case involving restrictions on freedom of contract. Rather, it is whether, proceeding case by case, but with a more complete understanding of the nature of freedom of contract and its limitations, courts might design a workable doctrine. Some of the post-*Lochner* cases that rejected freedom of contract claims might have been good places to start because their outcomes seem nearly indefensible. The laws involved in *Williamson v Lee Optical Co*⁴⁸ and *Ferguson v Skrupa*,⁴⁹ for example, seem very hard to justify. Other decisions have been persuasively attacked by commentators.⁵⁰ If some relatively easy cases can be identified, then perhaps a workable legal regime could be elaborated. But it would have to be built step by step, with careful attention to the competing demands and an understanding of when freedom of contract could properly be limited or overridden.

The failings of the *Lochner* era may, in the end, have been more quotidian than is generally supposed. The problem was not that the Court misconceived the judicial role or did not understand how to interpret the Constitution. The justices' failure was in a sense a lack of humility: an inability, or refusal, to understand that although they were vindicating an important value, matters were more complicated than they thought. There is a time for judicial crusades on behalf of principles of the highest importance; the Warren Court's campaign against racial discrimination is an example. More often, though, judicial review requires courts to recognize the complexity of the issues they confront and to develop doctrines that, while vindicating constitutional rights, also accommodate values that are in tension with those rights. *Lochner* presented the latter, but the Court treated it as the former, and that is why *Lochner* deserves the reputation it has today.

and *Reburial*, 1962 S Ct Rev 34, 60.

⁴⁸ 348 US 483, 487-91 (1955).

⁴⁹ 372 US 726, 726-27, 731-32 (1963).

⁵⁰ See, for example, Mashaw, *Greed, Chaos, and Governance* at 56 (cited in note 47); Geoffrey P. Miller, *The True Story of Carolene Products*, 1987 S Ct Rev 397, 399.