Legal History

Still *Another* Awful Decision by the U.S. Supreme Court

By C. Evan Stewart

When this series of essays on the worst Supreme Court decisions began, the focus was on Dred Scott and the invention of substantive due process – finding in the Fifth Amendment the unwritten right to protect (and travel with) one's property; in that case, the property at issue was another human being. (*Federal Bar Council Quarterly* (May 2016)) Now let us turn to the expansion of that judicial invention, to where it was utilized to find another unwritten right, this time in the Due Process Clause of the Fourteenth Amendment – the right of economic free will ("freedom of contract"). The case: *Lochner v. New York*, 198 U.S. 45 (1905).

A Man Named Henry Weismann

Without one man – Henry Weismann – there would have been no *Lochner* decision. But he is a figure lost to history. Who was Henry Weismann, and why is he so central to this case?

Henry Weismann was an émigré from Germany, who (after he reached San Francisco) became a force in the Anti-Coolie League of California. His public behavior against Chinese immigration (carrying explosives) resulted in a jail term in 1886.

After six months in the hoosegow, Weismann switched interests; he became a union-organizer for bakers. He must have been pretty effective because he was soon recruited to become the editor of *Bakers' Journal*, which was headquartered in New York City. In that role he developed into a powerful advocate for bakers and against their poor working conditions: "the bakers [have] been robbed daylight, robbed of everything that makes life sweet and desirable, and left to work almost incessantly, day and night." Together with a muckraking journalist, Edward Marshall, Weismann brought a lot of heat and light to the bakers' woeful lot. And that pressure led to petitions to the New York State legislature for action.

In fairly short order, both the Senate and the Assembly unanimously passed a bill stating that "No employee shall be required or permitted to work in a biscuit, bread or cake bakery or confectionery establishment more than sixty hours in one week, or more than ten hours in one day." (Violating the law was a misdemeanor crime.) On May 2, 1895, New York's Governor signed The New York Bakeshop Act into law. On the heels of this legislative success, Weismann one month later was elected International Secretary of the Journeyman Bakers' Union; he was now the union's highest officer, and (like Leonardo DiCaprio) he was "on top of the world."

Two years later, Weismann's world fell in. Found to have his hand in the *Bakers' Journal* cookie-jar (skimming off advertisers' money), he was forced to resign his union posts. Thereafter, Weismann opened his own bakery (and then another). Becoming an owner caused his sympathies to morph. He experienced "an intellectual revolution, [seeing] where the law I had succeeded in having passed was unjust to the employers"; soon he was working with other bakery owners to eviscerate the Bakeshop Act.

Besides switching from labor's side, Weismann started to study the law, with an eye to becoming a practicing lawyer. And practice he did, but without actually becoming a lawyer. Handling a number of small matters in Brooklyn courts in 1901, he was accused of the unauthorized practice of law. There is no record of how this was resolved, but Weismann was in fact never admitted to the New York State Bar; regardless, this would not be the end of Weismann's legal career.

A Man Named Joseph Lochner

Joseph Lochner, an immigrant from Bavaria, owned a small bakery ("Lochner's Home Bak-

ery") in Utica, New York. One of his bakers was Arron Schmitter, and Schmitter worked more than 60 hours in one week in April of 1901. Shortly thereafter, Lochner was arrested and criminally charged with violating the Bakeshop Act – for the second time (in 1899, he had been fined $25 for violating the statute). The matter was referred to an Oneida County grand jury, which returned an indictment on October 22, 1901.

On February 12, 1902, the case went to trial; Lochner was represented by William S. Mackie. For some reason, Mackie presented no defense, and Lochner was found guilty; he was subsequently sentenced to pay fifty dollars or spend 50 days in jail.

Mackie appealed to the Appellate Division, Fourth Department in Rochester. His argument was that "laws which impair or trammel the right of one to use his facilities in lawful ways, to earn his livelihood in any lawful calling, to pursue any lawful trade or vocation, are infringements upon fundamental rights of liberty which are under constitutional protection." The Fourth Department (by a 3 to 2 vote) was not persuaded – the court ruled that the law was not a prohibition, but merely a regulation and, as such, a valid exercise of the state's police power. *See* 79 N.Y.S. 396 (4th Dep't 1902).

Mackie made the same argument to the New York Court of Appeals in 1904. And while he again found some sympathetic judges, he did not find enough, losing in that court by a 4 to 3 vote. *See* 69 N.E. 373 (N.Y. 1904) (The majority opinion was written by Chief Judge Alton B. Parker, who later that year ran unsuccessfully for president against Theodore Roosevelt.).

On to the U.S. Supreme Court

That ended Mackie's formal involvement in representing Lochner. But obviously the case did not end at this point. So who stepped in as Lochner's legal representation? None other than Henry Weismann! After fumbling around procedurally on how to get to the U.S. Supreme Court, non-lawyer Weismann brought on board a fellow Brooklynite – Frank Harvey Field – who actually was an admitted attorney. Field, with Weismann listed as "of counsel," put together sufficient certiorari papers ("writ of error") to pass muster, and Justice Rufus W. Peckham granted the petition. Briefing proceeded (Weismann was now listed as co-counsel); Lochner's lawyers took dead aim at the due process right at stake: "the treasured freedom of the individual… should [not] be swept away under the guise of the police power of the state." Mindful of *Holden v. Hardy*, 169 U.S. 366 (1898), however, where the Court had upheld a Utah law establishing an eight-hour work day for miners in order to protect their health, they argued that the Bakeshop Act could hardly be deemed a health related statute since the "average bakery… is well ventilated, comfortable both summer and winter, and always sweet smelling."

The case was argued on February 23, 1905 (with Weismann *pro hac vice* participating in oral argument). Two months later, on April 17, 1905, the Supreme Court handed down its decision.

Freedom of Contract

Technically speaking, the 5-to-4 decision overturning New York's Bakeshop Act was not the first Supreme Court decision to find that freedom of contract was a substantive constitutional right found in the Fourteenth Amendment. Seven years earlier, Justice Peckham, writing for a unanimous Court, discovered such a right when a Louisiana statute concerning the sale of marine insurance was struck down: *Allgeyer v. Louisiana*, 165 U.S. 578 (1897). (And its original antecedent came from Justice Stephen J. Field's dissent in the *Slaughter-House Cases*, 83 U.S. 36 (1873), where he wrote of the Fourteenth Amendment empowering "the liberty of citizens to acquire property and pursue happiness.")

In *Allgeyer*, Justice Peckham did not define the parameters of this new right (or the limits of a state's police power to infringe on this new right), leaving the law's development to "each case as it arises." And as noted above, in the year after *Allgeyer*, the Court expressly declined to rule in *Holden* that the right to contract "freely" could be invoked successfully to allow Utah miners to "freely" decide to work underground more than eight hours

a day.

Justice Peckham, who had been in the minority in *Holden*, was now writing for the majority in *Lochner*, and he undertook to put some meat on the constitutional bone he had discovered seven years earlier. First off, Justice Peckham addressed head-on the *Holden* precedent, which – on its face – seemed a pretty big obstacle. But according to him, no problemo, and for two reasons: (i) the Utah law only dealt with "peculiar conditions" – i.e., the very dangerous situation of working in underground mines (and the Utah legislature had specifically limited the law to those "peculiar conditions"); and (ii) the Utah law provided for cases of emergency, where the law would not apply. Neither situation "covers the case now before [the Court]": "there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one"; furthermore, the Bakeshop Act had no emergency clause. New York's law was thus not "within any fair meaning of the term, a health law, but [was] an illegal interference with the rights of individuals ... to make contracts." And, as such, it was a clear violation of the Federal Constitution.

While aware of what Justice John Marshall Harlan had written for the Court just two years earlier in *Atkin v. Kansas*, 191 U.S. 207 (1903) (acts of a legislature should be upheld "unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution."), Justice Peckham simply proclaimed that "[t]his is not a question of substituting the judgement of the [C]ourt for that of the legislature." It was instead a question of whether the legislature could interfere "with the liberty of person or the right of the free contract." And according to the majority's view, New York's legislators had "no reasonable ground" for doing so.

Justice Peckham then moved on to the slippery slope. If laws restricting the freedoms of bakers were to be upheld, whose freedoms would be next? Why, lawyers' freedoms, of course. Repeatedly invoking lawyers, the Justice worried that someone might want to try to restrict the working hours of lawyers (especially young lawyers), those "condemned to labor day after day in buildings where the sun never shines"; we would *never* want to forbid such professionals from "fatiguing their brains and bodies by prolonged hours of [work]"!

There were two dissenting opinions, both famous. The first was by Justice Harlan, in which Justices Edward Douglas White and William R. Day joined. Some have speculated that Harlan's opinion at one point had been the majority opinion; if so, somewhere along the line he lost Justices Henry Billings Brown and Joseph McKenna, both of whom had been in the *Atkin* majority. Undeterred, he reiterated the basic tenet of a restrained judiciary in our democracy:

> If there be doubt as to the validity of the statute, that doubt must therefore be resolved in favor of its validity, and the courts must keep their hands off, leaving the legislature to meet the responsibility for unwise legislation. If the end which the legislature seeks to accomplish be one to which its power extends, and if the means employed to that end, although not the wisest or best, are yet not plainly and palpably unauthorized by law, then the court cannot interfere.

Justice Harlan then took up the notion of whether a baker's lot was a "happy one," free from a dangerous work environment. First, he cited to a leading treatise in which it was written "[t]he labor of the bakers is among the hardest and most laborious imaginable." Next, in a review that would have caused Justice Antonin Scalia apoplexy, Justice Harlan compared workingmen's hours in the United States to those of various European nations. Finally, he circled back to the fact that the majority's ruling could not be squared with *Atkin* and the "plainly and palpably" standard enunciated by a six Justice majority just two years before.

The Yankee from Olympus, Justice Oliver Wendell Holmes, also dissented, issuing a brief opinion under just his name. Not mincing words, he quickly (and famously) got to the point: "This case is decided upon an economic theory which a large part of the country does not entertain....

The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." (Spencer was an English "Social Darwinist" – in fact, he has been credited with inventing the phrase "survival of the fittest.") Then, with a tip of his hat to James Madison's Federalist #10, Justice Holmes wrote that the Constitution "is not intended to embody a particular economic theory.... [Rather,] [i]t is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."

The Aftermath of *Lochner*

Historian William E. Leuchtenburg has written that *Lochner* is "the high-water mark of usurpation by the courts of legislative authority." The majority decision has been widely criticized by legal and constitutional scholars and political scientists as being, at bottom, anti-democratic: un-elected Justices, by judicial fiat, using substantive due process to overturn laws enacted by elected officials. *Lochner* also ushered in an era of judicial activism – on the politically "conservative" side.

For the next three decades, the Supreme Court generally hewed to the *Lochner* brand of "laissez-faire constitutionalism." Thus, for example, in *Adkins v. Children's Hospital*, 261 U.S. 525 (1923),

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the Court struck down a statute which created a minimum wage for women and children working in the District of Columbia. (Following *Lochner*, Justice George Sutherland also justified the majority's ruling under a feminist flag: "we cannot accept the doctrine that women of mature age, *sui juris*, require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances.") And when President Franklin Roosevelt pushed through Congress his "New Deal" legislation, the Court simply nullified one after another. *See, e.g., A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (striking down the NRA). Only in the face of President Roosevelt's "Court-Packing Scheme" – when a "switch in time save[d] nine" – did the Court do an immediate about-face in *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) (upholding Washington State's minimum wage law; reversing *Morehead v. New York ex. rel. Tipaldo*, 298 U.S. 587 (1936), which a year earlier had struck down New York's minimum wage law (following *Lochner* and *Adkins*)). *See Federal Bar Council Quarterly* (February 2008).

This judicial about-face saved the Court, averted a separation of powers crisis, and ended the invocation of substantive due process by judicial "conservatives" to achieve certain policy ends (and block "progressive" legislation). But would those on the other end of the spectrum feel so constrained once they came into the majority and wanted to achieve their policy goals? Stay tuned for the answer in the next issue of *Federal Bar Council Quarterly*!

Further Readings

For those who wish to do a deeper dive on *Lochner*, highly recommended is Paul Ken's *Lochner v. New York: Economic Regulation on Trial* (Kansas 1998). *See also* Charles W. McCurdy's "The Roots of 'Liberty of Contract' Reconsidered: Major Premises in the Law of Employment, 1867-1937," *Yearbook of the Supreme Court Historical Society* (1984); Bernard H. Siegan's "Rehabilitating *Lochner*," 22 *San Diego Law Review* 453 (1985); David E. Bernstein's "Lochner v. New York: A Centennial Retrospective," 83 *Washington Univ. Law Review* 1469 (2005).