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Social Contract Theory in American Jurisprudence

Too Much Liberty and Too Much Authority

Thomas R. Pope

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Social Contract Theory in American Jurisprudence

"Pope breathes new life into the old debate in constitutional law between defenders of liberty and defenders of the interest of the community. He shows the futility of the unqualified acceptance of either alternative as a consistent guide to constitutional adjudication, and returns to the roots of modernity to explain how Thomas Hobbes brought these two principles together to provide a solid foundation for modern liberal politics. Both political theorists and constitutional scholars have much to learn from this subtle and thoughtful analysis."

—David K. Nichols, *Baylor University*

"A fascinating rumination on the relationship between individual liberty and the government's 'police power' to serve the common good that will challenge readers of all political persuasions to reconsider cherished nostrums."

—David E. Bernstein, *George Mason University School of Law*

Despite decades of attempts and the best intentions of its members, the U.S. Supreme Court has failed to develop a coherent jurisprudence regarding the state's proper relationship to the individual. Without some objective standard on which to ground jurisprudence, decisions have moved along a spectrum between freedom and authority and back again, affecting issues as diverse as individual contractual liberties and the right to privacy.

Social Contract Theory in American Jurisprudence seeks to reintroduce the lessons of modern political philosophy to offer a solution for this variable application of legal principle and to lay the groundwork for a jurisprudence consistent in both theory and practice. Thomas R. Pope's argument examines two exemplary court cases, *Lochner v. New York* and *West Coast Hotel Co. v. Parrish*, and demonstrates how the results of these cases failed to achieve the necessary balance of liberty and the public good because they considered the matter in terms of a dichotomy. Pope explores the Constitution's roots in social contract theory, looking particularly to the ideas of Thomas Hobbes for a jurisprudence that is consistent with the language and tradition of the Constitution, and that is also more effectually viable than existing alternatives. Pope concludes with an examination of recent cases before the Court, grounding his observations firmly within the developments of ongoing negotiation of jurisprudence.

Addressing the current debate between individual liberty and government responsibility within the context of contemporary jurisprudence, Pope considers the implications of a Hobbesian founding for modern policy. This book will be particularly relevant to scholars of constitutional law, the American founding, and modern political theory.

Thomas R. Pope is an Assistant Professor of Political Science at Lee University.

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For my wife and her unending patience

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1 An Introduction

There often arises a great disparity between the state's dual obligation to the public good and individual liberty. Modern liberal society (also known as the West) anticipates and insists on a certain degree of selfishness in citizens, channeling their interest to serve the public good.[1] For the most part, this mechanism of substituting private vice for public virtue has served us well. Yet, as is exemplified poignantly in the economic debacles of the past few years, that self-regard can be taken too far. While a great deal of latitude is generally given to private contractual relationships, in the absence of real institutional checks, individuals will occasionally work to subvert the greater aspirations of society. The cause of our most recent recession, for example, "at least partly, has been dishonesty, greed, and weak business ethics."[2] If selfish individuals cannot be trusted to work toward the best interest of society, then it is the duty of government to restrain their freedom and direct their activity to the common good.

When the principles of laissez-faire run amok, there is a temptation to substitute for the invisible hand the guiding arm of a paternal regime.[3] Observing the exploits of subprime mortgage lenders and Wall Street figureheads such as Bernard Madoff, contemporary economists find themselves increasingly sympathetic to the claim that laissez-faire is a failed enterprise. They decry our government's gross overconfidence in the ability of free markets to self-regulate.[4] Resident economist of the *New York Times* Paul Krugman has long been a vocal critic of "the laissez-faire ideologues ruling Washington" (aka Republicans) who hope to reinstitute *Lochner*-era libertarianism.[5] Simply put, the bias toward big business seems to have moved off Wall Street and into Washington, infiltrating even the Supreme Court—an institution often thought insulated from political pressure. We have witnessed the jurisprudence of the Roberts Court steadily advance in the direction of reducing the accountability of businesses to the general public, spurring Supreme Court historians to lament that "[t]here are no economic populists on the court, even on the liberal wing."[6]

All of this constructs a scenario much like that experienced during the early twentieth century, a fact not overlooked by recent political commentators. As the economy continues its steady descent into recession, politicians and

pundits have been quick to draw analogies between our present-day plight and the Great Depression of the 1930s.[7] Once again, we are confronted with a long period of advancing business interests and deregulation, followed by a sharp economic downturn in which job losses mount and major corporations exist on federal life support.[8] President Obama hopes to emulate the success of Roosevelt, taking office as a progressive vowing to repudiate the conservative economic agenda of his predecessor.[9] It is fascinating to observe just how closely history repeats itself. Unfortunately, however, we continue to make the same mistakes. In 2008, Congress undertook "its most dramatic interventions in financial markets since the 1930s," forcing us to reevaluate the balance between the contractual liberty of laissez-faire and government regulation to secure society against its adverse effects.[10] The consensus thus far has been akin to the Court's repudiation of laissez-faire during the New Deal: a rhetorical affirmation of free-market capitalism, with an effectual swing of the pendulum to radical government regulation. In light of pressure to stabilize volatile markets, President Obama has positioned his administration to even further escalate federal oversight, remarking that "the American experiment has worked in large part because we guided the market's invisible hand with a higher principle. A free market was never meant to be a free license to take whatever you can get, however you can get it. That's why we've put in place rules of the road: to make competition fair and open, and honest. We've done this not to stifle but rather to advance prosperity and liberty."[11] His direct confrontation with these issues suggests an awareness of their greater philosophical challenges and reflects an attempt to reconcile the competing demands of order and liberty. Nevertheless, the policies of his administration, thus far weighing heavily on the side of government regulation, run the risk of undermining this rhetorical moderation. As a prime example, the most notable product of his administration to date—the health care reform legislation of 2010—was designed largely with a view to protect America's underprivileged. And yet, even today, its constitutionality is being challenged in the Supreme Court on the grounds of overreaching the federal government's enumerated powers.

We see a rehashing of the same themes of liberty and authority expressed in two seminal Court cases: *Lochner v. New York* and *West Coast Hotel Co. v. Parrish*.[12] Each of these early twentieth-century cases introduces a unique argument regarding the limits of individual freedom in the context of the public good. While the decisions are from an age long past, the lessons they offer are of abiding value as we continue to struggle with the scope of government intervention into private life. These cases will serve as a lens by which to evaluate the philosophical implications of the liberty of contract and the police power within the context of American jurisprudence. On the one hand, the danger of the *Lochner* ruling is its tendency to overemphasize the interest of liberty at the expense of the public good, leading to complacency and a lack of oversight amidst material prosperity. *West Coast Hotel*, on the other hand, so vehemently rejects the most radical components of *Lochner* that government regulation on behalf of the public good effectually

supersedes even moderate liberty interests. Both approaches have proved to be paradigmatic, and both fail to achieve the necessary balance of liberty and the public good because they consider the matter as a dichotomy, rather than perceiving each as fundamental to the other.

To mediate the conflicting demands of police power and the liberty of contract, we must trace them to their source. Conveniently (and perhaps surprisingly), both find their genesis in the English philosopher Thomas Hobbes. For all his reputation of pushing both the authority of contract and the power of the state to excess, Hobbes is, in fact, quite subtle in his treatment, properly appreciating authority's source in individual liberty and liberty's impotence without proper authority. Under what Hobbes dubs "the law of nature," all contracts made in good faith must be honored, with prior agreements taking precedence over those that come later. Foremost of these is the familiar social contract that binds man to civil society, establishing legitimate government and subsuming all subsequent agreements. Consequently, any contract made within civil society involves the state as an implicit third party. There is no altogether "private" bargaining, and the state has the authority to set the terms of such agreements as it sees fit. That is not to say, of course, that the state will impose itself into all contracts and eliminate the liberty of its citizens. Hobbes makes it quite clear that the prudent state will only intervene when it serves the public good. However, when such private agreements infringe on the general welfare, the sovereign power has an obligation to exercise its influence. Heretofore, *Lochner* and the Court's response to it have oversimplified this debate, polarizing the discussion into camps that come precariously close to endorsing either unlimited liberty or unlimited regulation. As I will argue, Hobbes offers us a third option that is consistent with the language and tradition of the Constitution and is also more effectually viable than its alternatives.

SYNOPSIS

There is nothing quite like a crisis to get people talking about fundamental principles. Infrequently do we see terms such as "laissez-faire" and "Keynesian" descend from the lexicon of the ivory tower and grace the pages of the *New York Times*.[13] Recently, however, the common citizen has been asked to reflect on billion-dollar stimulus packages and the relative merits of nationalizing insolvent financial institutions.[14] Each discussion turns on the premise that the root of our trouble is an overabundance of liberty entrusted to the wrong hands.[15] Over the years, our economic prosperity has resulted in complacency, and we have forgotten that unmitigated freedom opens the door to abuse. Even as late into the crisis as the spring of 2008, pundits were predicting a new era of market freedom and probusiness sensibilities.[16] But with the fire-sale buyout of Bear Stearns by JPMorgan Chase came the general unease that something was terribly awry with our economy.

Several months after the subprime mortgage crisis first fell under public scrutiny, the federal government took drastic action, bringing mortgage giants Fannie Mae and Freddie Mac under federal control in what has been called "one of the most sweeping government interventions in private financial markets in decades."[17] The initial reaction to any calamity is often one of overcompensation. In this instance, however, it proved to be a sign of things to come.[18] Too little oversight had brought the economy to its knees, and Congress, reflecting popular resentment, vowed to put an end to the days where businesses were not held accountable to the public good. President Obama's inaugural address continued the realignment, declaring that "[w]hat is required of us now is a new era of responsibility."[19] The rhetoric of freedom, so recently espoused by his predecessor as the source of American exceptionalism, has been replaced with the rhetoric of sacrifice.[20] The question of regulation versus freedom has been simplified and dichotomized into an all-or-nothing debate.

This chasm between the two concepts is not a contemporary innovation but traces its source back to the turn of the twentieth century. The tension between the freedom of contract and government regulation first came to a head in the infamous case of *Lochner*, wherein the Court cast its lot with the side of freedom, greatly restricting the state's power to further the general welfare. Justice Peckham's substantive reading of the due process clause in *Lochner* interprets the liberty of contract as an essential element to the pursuit of happiness guaranteed by the Declaration. His argument has been adopted by modern libertarian organizations such as the Cato Institute, which reinforce this connection between contractual freedom and our inalienable rights.[21] Nonetheless, the argument neglects to pay full tribute to the legitimate needs of society. As Justice Hughes rightly points out in *West Coast Hotel*'s repudiation of *Lochner*, "Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people."[22] The Court's new framework brings up a sound point that should be recognized in a just society. Yet Hughes, like his contemporary counterparts, goes too far in distancing himself from the problem. The result is an unprecedented period of government intervention into the market through the New Deal and a vast restriction of fundamental contractual freedoms. We face a similar circumstance today: the ideological pendulum has brought us, at least temporarily, back to the necessity of regulation, and those in power have made little effort to veil their philosophical debts.[23] This same misguided balancing act between liberty of contract and the police power continues, with little more direction than a history we seem doomed to repeat.

The most reasonable place to begin resolving this debate is with an analysis of *Lochner* itself, put into context with the decisions that led to and progressed from it. Chapter 2 will introduce this discussion. The whole ordeal began when Joseph Lochner refused to operate his bakery in compliance

with a New York maximum hours law. The state defended its legislation as within the legitimate exercise of its police powers, limiting the exposure of bakers (and confectioners) within an atmosphere filled with impurities. Mr. Lochner, on the other hand, asserted his Fourteenth Amendment guarantee of contractual liberty under due process. Beyond the simple matter of a maximum hours law and its effect on Mr. Lochner's business, Justice Peckham's majority opinion understands the true problem at hand to be the tension between the sovereignty of the state and the liberty of the individual. Unfortunately, Justice Holmes's dissent quickly establishes the majority's decision as an exercise of pure judicial will, clouding the greater issues at stake by reducing the opinion to one of simple economic preference.[24]

Holmes's dissent has carried the day, and *Lochner* remains the most vilified Supreme Court case of the past hundred years. Yet, a charitable reading of *Lochner* will reveal at least a good-faith attempt to make a constitutional argument that reconciles the seminal demands placed on any regime. To what extent can liberty find expression within the political community? From whence does the political community derive the authority to restrict that liberty? Justice Peckham looks to the due process clause and its preconstitutional foundation as a starting point for the discussion. Although, in my opinion, he ultimately comes to the wrong conclusion, he is right to point us in the direction of the Constitution's philosophical tradition as a lens for judicial interpretation, giving meaning to an otherwise opaque legal concept.

Although it is clear that social contract theory informs the quarrel between liberty of contract and police power, it remains to be seen why we should apply its insights to a decidedly American expression of the debate. As the progenitor of our modern understanding of both contract and the police power, any discussion with regard to either subject owes an overwhelming debt to Thomas Hobbes's preparatory work.[25] Avoiding him, as so many do, is avoiding the obvious source of the debate. To reiterate, to date, the jurisprudence of the Supreme Court remains stuck in an irresolvable dichotomy when considering the subject of government regulation. However, it is precisely to these issues that Hobbes attempts to speak. "For in a way beset with those that contend," he writes, "on one side for too great liberty, and on the other side for too much authority, 'tis hard to pass between the points of both unwounded."[26] Yet, he does pass unscathed, providing a model of balance that we would do well to follow.

While it may be expedient to apply Hobbes to our constitutional quandaries, we must first demonstrate that such a move is legitimate.[27] Chapter 3 will demonstrate his relevance in this context. Historically, the United States has put particular stock in the principles of consent and natural right expressed in Hobbes and later developed by John Locke.[28] Much has been said of the Declaration's debt to these philosophers, ushering in the first rebellion to justify itself explicitly against the backdrop of social contract.[29] Contrasting the king's abdication of his natural duties, Jefferson asserts

certain enduring prepolitical rights of life, liberty, and the pursuit of happiness—those selfsame rights enumerated by Hobbes as those "which no man can be understood by any words or other signs to have been abandoned or transferred."[30] Considerable deference is given to the sovereign's authority to govern, "[b]ut when a long Train of Abuses and Usurpations, pursuing invariably the same Object, evinces a Design to reduce them under absolute Despotism, it is their Right, it is their Duty, to throw off such Government, and to provide new Guards for their future Security."[31]

These three seminal rights are later formally institutionalized in the Fifth and Fourteenth Amendments, with a slight alteration to the third prong regarding the "pursuit of happiness." Such an aim is abstract at best, described by Hobbes as "a continual progress of the desire, from one object to another, the attaining of the former being still but the way to the latter."[32] The Declaration's "happiness" is substituted for what appears to be the more Lockean "property," refined to reflect the regime's incapacity to rule the immaterial.[33] The guarantee of due process serves to remind the sovereign that an individual's core rights should only be infringed with great reluctance, for each infraction works to undermine the regime's legitimacy. When Peckham finally applies the Fourteenth Amendment to New York's maximum hours law, it is with this consideration in mind.

We find traces of Hobbes throughout our founding documents, and a better understanding of his philosophy will in turn help us to make sense of our own liberal institutions. As I will develop in later chapters, his commitment to both sovereign authority and individual liberty points us toward a coherent reconciliation of the state's police power and the citizen's unenumerated rights. Once the Constitution is read in this context, the next step is to explore the nuances of individual liberty within civil society and the extent to which it is affected by contractual agreements.

It is no secret that Hobbes puts a great emphasis on contracts when founding civil society. Yet, he also understands them as our only chance of securing individual fulfillment, raising contracts to a whole new level of import. Using as a first principle that all men pursue such happiness, Hobbes constructs a secular natural law that is binding on rational men. In chapter 4, I will explore the tenets of this law of nature and discuss the obligation it imposes on individuals, compelling them out of the state of nature and into a political order.

In lieu of transcendent principles of moral behavior, it is only within contractual relationships that one can truly speak of justice. Man himself must construct the terms by which he is fettered, relying on rational self-interest as his guide. Thus, for Hobbes, "the definition of Injustice is no other than *the not performance of covenant.* And whatsoever is not unjust, is *just.*"[34] Although "justice" and "injustice" lack their usual moral connotations, they do become a convenient shorthand for determining the expedient course of human action.[35] Men are free to make contracts with one another, but their agreements should avoid arbitrariness by taking into consideration rational self-interest.

In the state of nature, man is endowed with the liberty to do as he will, as he is able. As a corollary, he may also establish limits for himself, under the stipulation that another does likewise. Contract, in its essential form, is nothing more than this "mutual transferring of right."[36] One agrees to forego the exercise of his full natural right in a matter affecting his neighbor, so as to benefit from the guarantee that his neighbor will similarly abstain from exercising *his* right in a matter affecting him. Because contract for Hobbes is an extension of man's natural right, it can never be completely stripped from the individual.[37]

That is not to say that the liberty of contract is unlimited. One cannot contract away one's inalienable rights—life, liberty, and the pursuit of happiness.[38] Additionally, prior agreements take precedent over those that come later, if there is any tension between the two. Due to this frame, the social contract necessarily supersedes and limits the terms of any subsequent contract that is made in civil society. In effect, citizens relinquish the right of self-government to their sovereign, who may then legitimately impose himself on them in any manner short of violating their inalienable rights. Thus, while the citizen retains his right to contract, he allows—in the name of his own self-interest—for the sovereign to modify its terms when necessary. Similarly, the sovereign, maintaining the obedience of his subjects only insofar as he regards their good, is careful not to undermine the very thing that binds them to him.[39]

While Hobbes is famous for his contributions to contract theory, he is infamous for his teaching on the state's police power, which I will consider in chapter 5.[40] The term *police power* is not to be found within the Hobbesian corpus, yet his notion of sovereignty coincides with the doctrine as it was established within the English common law. Blackstone speaks of it as "the due regulation and domestic order of the kingdom," encompassing nearly all domestic management of the state.[41] Although aware of the dangers of power, Hobbes did not believe that tyranny was the likely result of his teaching.[42] Instead, the existence of civil society presupposes certain duties on the part of the state, foremost of which are the safety and well-being of its citizens. The nature of the social contract demands that the regime attend to the public welfare in order to retain the loyalty of its citizens. The sovereign, like the individual, is motivated by self-interest. Therefore, the state's interest in cultivating the public good will always trump any other concern that may be offered.[43]

As with contract, the power of the sovereign is limited only insofar as it does not infringe on the fundamental rights of citizens. Thus, as an implicit party to private contracts, he may supervise their terms and execution as a valid exercise of police power. This is done to enforce legitimate contracts, to preclude illegitimate contracts, and to invoke prudence in modifying those contracts that work against the common good. The appropriate application of police power will always be weighed against the interest of the people to remain free from state intrusion.[44] An oppressive regime that grossly stifles

the liberty of its subjects cannot hold their allegiance. Thus, it follows that the sovereign will apply a standard of minimalism when regulating the contracts of citizens.

Hobbes intends his work to balance the competing interests of liberty and authority—precisely those concerns expressed in *Lochner* that remain preeminent today. However, his synthesis gives full recognition to both liberty and sovereignty in a manner hereunto unappreciated by American constitutional jurisprudence. Chapter 6 will apply the lessons we can learn from Hobbes to our historical and contemporary policy debates.

Although Justice Peckham falls prey to the temptation of overemphasizing the liberty interest in *Lochner*, his formulation of the problem does correctly establish what is at stake if we allow the government to restrict private contract between individuals. A nation founded on consent must recognize the freedom to contract to be, as Justice Cardozo will later express, "implicit in the concept of ordered liberty."[45] Hobbes makes it clear that government requires the consent of its citizens, manifested in a social contract. Thus, one must assume an original position of contractual freedom, and any subsequent restrictions by the state must be considered under the strictest scrutiny. Contract being the formal cause of government, each time the regime stifles the liberty of contract, it moves closer to undermining the very principle that confirms its legitimacy.

Peckham does acknowledge instances in which the state may "prevent the individual from making certain kinds of contracts," but his model of appropriateness is *Jacobson v. Massachusetts*—a case that balances the improbable death of an individual against the lives of an entire city.[46] Such an archetype is too extreme to guide the more moderate situation before him in *Lochner*. While it is plain that *Jacobson* portrays a necessary and proper use of the police power, one should not assume that anything short of such clarity is an illegitimate government intrusion. The case itself urges such moderation: "Extreme cases can be readily suggested. Ordinarily such cases are not safe guides in the administration of the law."[47] Unfortunately, this prudent advice is paid no mind.

Justice Hughes's traditional critique of *Lochner*, on the other hand, overstates the extent to which a regime may unconcernedly impose itself on the individual in the name of the public good. Let there be no mistake: when comparing outcomes, *Lochner* was incorrectly decided, and *West Coast Hotel* was correctly decided. However, the reasoning employed in both cases ultimately results in bad law. Under the *West Coast Hotel* precedent that "regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process," the freedom left to private citizens is subject wholly to the mercy of the state.[48] At its most extreme, the life, liberty, and property of a citizen are no longer secure, so long as their taking serves the interest of a majority. Even *Jacobson* is more moderate. Applying the rule established by Hobbes, the Court must embrace the liberty of contract as fundamental, yet hold the public welfare as a competing

and equally fundamental interest. Put succinctly, where Hughes demands rational basis and Peckham demands strict scrutiny, the appropriate balance would be something like an intermediate scrutiny, giving recognition to both public and private interests.

As a result of Justice Hughes's strong denunciation of substantive due process rights, the police power of the state was able to go unchallenged for a number of years.[49] However, despite the dramatic decline in the value of individual contractual agreements, civil rights and liberties began to rise to the fore. Just as the Court found itself proclaiming, "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions because they may be unwise, improvident, or out of harmony with a particular school of thought," it was fighting for the rights of black citizens against unjust state laws in *Brown v. Board of Education*.[50] Eventually, the lacuna left by *West Coast Hotel*'s eradication of *Lochner* would need to be filled. Individuals would need some protections against generally applicable legislation, and the equal protection clause would not be a sufficient safeguard. The issue came to a head in 1965 with *Griswold v. Connecticut*.[51] A Connecticut state law outlawing the sale of contraceptives was determined by the Court to be "repulsive to the notions of privacy surrounding the marriage relationship."[52] The contractual relationships in question (doctor/patient, husband/wife) hearken back to *Lochner*, but the Court had already burned that bridge.[53] Instead, it was forced to vest this right not on particular constitutional provisions, but on the penumbras of emanations of constitutional guarantees.[54]

These substantive rights that fall under the umbrella of the "right to privacy" are an attempt by the Court to regain what was lost with *Lochner*. But while these new individual rights are strong enough to overcome democratically passed legislation, they are grounded on a constitutionally suspect foundation. The Court's inability to agree on any particular source for the doctrine only serves to reaffirm its fragility. Further, this new concept of individual liberty is disassociated from the societal context of substantive liberty bound by due process. The result has been a radicalization of liberty that ignores the moral responsibility of citizenship.[55] As Hobbes's model shows us, only when we are able to appreciate the inherent value of the private and the public good can we ensure the security of both.

2 Learning from *Lochner*

With the possible exception of *Dred Scott*, no case has exerted more influence over American policy than *Lochner v. New York*.[1] What began as a relatively minor dispute over the number of hours one could work in a New York bakery quickly escalated into a debate over our nation's fundamental commitment to the principles of freedom and responsibility. In 1905, freedom won the day, drastically altering the landscape of the American economy for the next thirty years. During this "*Lochner* era," the Court became (perhaps undeservedly) infamous for its strong favoritism of business interests, often at the expense of individual citizens. Under the veil of laissez-faire, companies were said to operate without oversight or regulation to impede their designs. Yet, the magnitude of their freedom only heightened the intensity of rebuke when markets proved incapable of forestalling our nation's Great Depression.[2] In response to the perceived excesses of the free market, the Roosevelt administration, and eventually the New Deal Court, roundly denounced *Lochner* and its progeny as aberrations from proper constitutional procedure.[3] Since that time, the critique has expanded to encompass Justice Holmes's harrowing accusation of judicial legislation.[4] According to this line of thought, the five-member majority was not administering justice under law, but imposing a fanciful and oppressive economic theory on the general populace. It is little wonder that "[a]voiding *Lochner*'s mistake is the 'central obsession' of modern constitutional law."[5] The lengths to which the Court has bent over backward to disassociate itself with the decision will be expanded on in chapter 6. The repudiation of *Lochner* has gone on to define not only the policies and rhetoric of the New Deal (a lofty feat in its own regard),[6] but also each subsequent iteration of constitutional orthodoxy, both in the Court[7] and out.[8]

The matter started out simply enough, when Joseph Lochner refused to operate his bakery in compliance with a New York maximum hours law. The state defended its legislation as within the legitimate exercise of its police powers, limiting the time that bakers and confectioners are exposed to an atmosphere filled with impurities and protecting the health of those who would eat their bread.[9] Against the state, Mr. Lochner asserted a Fourteenth Amendment guarantee of contractual liberty under due process—a rather novel argument, as we shall see.