Introduction

BETWEEN RECONSTRUCTION AND the New Deal, American courts struggled with the issue of how much protection the Fourteenth Amendment of the United States Constitution, adopted in 1868, accorded economic activity. The amendment was primarily intended to secure the rights of the freedmen against hostile state and local governments, but its supporters also sought to extend federal constitutional protection of liberty against state action more broadly. Unfortunately, the scope of the protections provided was left extremely vague. The amendment does not explain what is meant by "privileges or immunities of citizens of the United States," and "equal protection of the laws," which the amendment purports to protect from hostile state action. Nor does the amendment spell out what it means when it prohibits states from depriving persons of "life, liberty, or property, without due process of law."

Because contemporary American ideology placed high value on the right to make and enforce contracts, particularly labor contracts, litigants quickly challenged economic regulations as violations of the vague terms of the Fourteenth Amendment. In the *Slaughter-House Cases,*[1] decided in 1873, a one-vote majority of the Supreme Court embraced a narrow reading of the amendment. The majority stated that the Court may not interfere with state and local economic regulations that did not explicitly discriminate against African Americans. The dissenters, however, vigorously argued that the amendment gave courts latitude to invalidate legislation that interfered with prevalent notions of economic freedom, particularly the right to pursue a lawful occupation without unreasonable government interference.

Several state courts implicitly or explicitly rejected the *Slaughter-House* majority opinion in favor of the dissent and invalidated economic regulations, especially labor regulations, as violations of the Fourteenth Amend-

ment and analogous state constitutional provisions. Lower federal courts, led by courts in the West that overturned facially neutral labor regulations intended to harm Chinese immigrants, meanwhile developed case law holding that the Fourteenth Amendment protected occupational liberty.[2]

In 1905 the United States Supreme Court adopted in *Lochner v. New York* the *Slaughter-House* dissenters' view that the Fourteenth Amendment barred certain types of state economic regulation.[3] In *Lochner* the Court invalidated a provision of a law regulating bakeries that prohibited business owners from employing bakers for more than sixty hours per week. From 1905 to 1937, during the so-called *Lochner* era, the Supreme Court was relatively sympathetic to plaintiffs who challenged government regulations, especially occupational regulations, as violations of the implicit constitutional right to "liberty of contract."

Lochnerism was never consistently practiced.* Even at the height of the *Lochner* era, from 1923 to 1934, federal and state courts upheld the vast majority of challenged regulations. Nevertheless, *Lochner* did inhibit government regulation to some extent and was therefore always extremely unpopular with the statist Progressives and Legal Realists who dominated the legal academy. Once New Deal constitutionalism triumphed and *Lochner* was explicitly overruled, Lochnerian jurisprudence was widely discredited.

Nevertheless, the ghost of *Lochner* continues to haunt American constitutional law. Supreme Court justices consistently use *Lochner* as an

*Throughout this book, the phrases "Lochnerism" or "Lochnerian jurisprudence" are used to refer to the liberty-of-contract jurisprudence associated with the *Lochner* era, instead of the more common "substantive due process" or "laissez-faire jurisprudence." The phrase "substantive due process" was never used by Lochnerian judges or, for that matter, by their opponents. The phrase has no known use before the early 1930s, and caught on only years later as a pejorative oxymoron used by opponents of Lochnerism and, later, opponents of the Warren Court. The phrase "laissez-faire jurisprudence," meanwhile, is a misnomer. Although *Lochner*-era courts sometimes invalidated economic regulations, they never attempted to institute a regime remotely approaching the sort of Nozickian night watchman state normally associated with the phrase "laissez-faire." See James W. Ely Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* 103–4 (2d ed. 1998); James W. Ely Jr., "Reflections on *Buchanan v. Warley,* Property Rights and Race," 51 *Vand. L. Rev.* 953, 956 (1998); Gary D. Rowe, "The Legacy of *Lochner: Lochner* Revisionism Revisited," 24 *Law & Soc. Inquiry* 221, 244 (1999).

epithet to hurl at their colleagues when they disapprove of a decision declaring a law unconstitutional. Conservative justices accuse their colleagues of Lochnerizing when abortion restrictions are curtailed, while liberal justices return fire when property regulations are declared unconstitutional under the Takings Clause, and when the Court uses the Commerce Clause to invalidate congressional edicts.[4]

Lochner was discredited primarily on two grounds. First, since the Progressive era, critics have argued that *Lochner* and related decisions had no basis in the text or history of the Constitution, but were instead based on the personal political predilections of the justices.[5] Worse yet, scholars have frequently contended that these predilections were based on pernicious Social Darwinism.[6] Meanwhile, Cass Sunstein's assertion in his 1987 article "*Lochner*'s Legacy" that Lochnerian judges believed that "market ordering under the common law was part of nature rather than a legal construct," and formed a baseline from which to measure the constitutionality of state action, has been very influential among legal scholars.[7]

The accusation that Lochnerian jurists were Social Darwinists is based on a misreading of Justice Olive Wendell Holmes's dissent in *Lochner,* and little else.[8] The historical basis of Sunstein's argument, meanwhile, is extremely thin. Besides *Lochner* itself, Sunstein cites only five of the hundreds of state and federal cases decided between *Slaughter-House* and the New Deal relevant to his thesis, and even then misreads these cases from both a legal and an economic perspective.[9]

More generally, the view that constitutional protection of liberty of contract was essentially made up by willfully political or formalistic judges has been persuasively rebutted by revisionist scholars. These scholars — including political scientists, historians, and law professors — argue that Lochnerian jurists genuinely tried to enforce what they saw as the mandates of the Fourteenth Amendment. Lochnerian judges relied primarily on two long-standing American intellectual traditions that heavily influenced American conceptions of liberty and the proper role of government in the postbellum era when the Fourteenth Amendment was framed: the abolitionist natural rights and "free labor" tradition, and opposition to "class legislation" — legislation that aided politically powerful interest groups at the expense of the public at large.[10]

As a result of the convergence of the free labor and anti-class-legislation traditions, *Lochner*-era courts were especially skeptical of laws regulating

the employment relationship—at least when such laws appeared to be special-interest legislation, rather than legislation aimed at protecting the health or safety of either the general public or workers themselves.[11] Legitimate health and safety laws were not constitutionally vulnerable because they came within the states' inherent "police powers."

In *Lochner* the defendant bakery owner submitted a brief showing that mortality rates for bakers were only slightly above average, and lower than the mortality rates for many unregulated occupations. Moreover, other unchallenged provisions of the law regulated bakery sanitation, while the hours provision was widely known to be special interest legislation benefiting unionized German bakers at the expense of unorganized recent Jewish and Italian immigrants. The Supreme Court therefore concluded that the hours provision of the law was not a constitutional measure protecting bakers' health, but was class legislation "passed for other motives."[12] Because the law was not within the police power, and interfered with the constitutional right not to be deprived of liberty without due process, it was unconstitutional.

Largely because of the courts' hostility to labor legislation, especially legislation aiding labor unions, the second major criticism of Lochnerian jurisprudence has been that judicial invalidation of economic regulations benefited the wealthy and powerful at the expense of the poor and helpless. Concomitantly, scholars argue that the Supreme Court was out of touch with the need of a modern economy for a strong regulatory state.[13] Implicitly influenced by Marxist interest-group theory that attributes nearly all societal conflict to economic "class" conflict, and by Progressive myths contrasting "The People" with "The Interests," scholars have assumed that political conflicts over labor regulations during the *Lochner* era involved oppressed "workers" with a common interest on one side, and powerful "employers" or "capitalists" on the other.[14]

More modern and sophisticated economic analysis appreciates that not all workers have a common interest in supporting labor regulations, nor do all employers gain from opposing such regulation. Unionized workers, for example, benefit from legislation favoring labor unions, whereas such legislation harms workers excluded from unions. Employers who already have high-wage union shops or who are on the cutting edge of mechanization, meanwhile, also gain from prounion legislation, because such legislation forces a disproportionate rise in their competitors' labor costs.

Skilled high-wage workers gain from legislation that prices less-skilled lower-wage competitors out of the market. High-wage employers also benefit from such legislation. During and after the New Deal era representatives of northern industry consistently supported high-minimum-wage laws to reduce competition from the lower-wage South.[15]

More generally, as noted in the Preface, economic regulations tend to benefit those with political power at the expense of those without such power. There was much merit to Lochnerian jurists' instincts that labor legislation that was purportedly ameliorative and humanitarian could in fact be used as a subterfuge to give certain politically powerful workers special privileges at the expense of those, including other workers, who had less influence.

African Americans, for example, were largely disenfranchised during the *Lochner* era. They were also typically excluded from the most politically powerful labor interest groups of the *Lochner* era, such as craft unions and professional associations. One would therefore expect that much labor legislation challenged in the courts during the *Lochner* era advanced the interests of the dominant native white majority at the expense of African Americans and other politically weak groups.

This book presents several case studies of how facially neutral occupational regulations passed between the 1870s and the 1930s harmed African American workers. Sometimes racism motivated the laws, either directly (as when the sponsors of the legislation were themselves racists) or indirectly (when legislative sponsors responded to racism among their constituents). Some laws had the primary goal of restricting African American access to the labor force, whereas in other instances this was a secondary goal related to the broader goal of limiting competition faced by entrenched workers. In yet other situations, racism did not motivate the laws, but the adverse effects on African Americans were foreseen, and critics pointed out the likely adverse effects when the legislation was under consideration. And, finally, whether intended or not, whether actually foreseen or not, the adverse effects of some legislation were foreseeable in light of the way labor markets operate.

Much of the early post-Reconstruction legislation that harmed African Americans originated at the state and local level. Between the 1870s and the 1920s, states and localities that faced the out-migration of African American workers passed laws restricting labor recruitment (chap. 1).

The goal and effect were to restrict the mobility—and, therefore, the market power—of African American workers.

Labor unions and professional associations used occupational licensing laws (chap. 2) to reduce competition from unorganized, politically weak rival workers by preventing them from obtaining needed licenses. The organizations that controlled licensing processes generally barred African Americans. Not surprisingly, the exclusionary effects of licensing disproportionately affected African Americans.

By the 1920s federal labor legislation was an emerging threat to African American workers. The Railway Labor Act (chap. 3), passed in 1926 and amended in 1934, marked the culmination of railroad unions' attempts to monopolize the railroad labor market. Several whites-only unions used the monopoly power the act gave them to force employers to oust their African American employees and to cease hiring new African American workers.

The Davis-Bacon Act (chap. 4), a 1931 statute requiring that the federal government's construction contractors pay the prevailing wage, similarly marked the realization of construction unions' goal of using their political power to dominate the public construction labor market. Racist legislators sponsored the act, and its supporters had the specific (though not exclusive) goal of preventing African American workers from competing with white labor union members. The act successfully restricted African American participation in the construction industry for decades.

Broad-based New Deal labor legislation (chap. 5), meanwhile, typically did not have discriminatory intent but had harsh, foreseeable, discriminatory effects. Many unions used the power they received under the National Industrial Recovery Act "to organize a union for all the workers, and to either agree with the employers to push Negroes out of the industry or, having effected an agreement with the employer, to proceed to make the union lily-white."[16] The effects of the Wagner Act were more complex, but ultimately African Americans suffered from the power that law granted to unions, too.

The federal minimum-wage laws passed during the 1930s, meanwhile, were applied selectively so that African American workers who generally did not compete with whites, such as domestics, were not covered at all. The minimum-wage laws did cover African American industrial workers, but at rates dictated by wages affordable in the unionized and indus-

trialized north, not in the impoverished South, where the vast majority of African Americans still resided. The result was to create more jobs for white union workers in the North, and to protect northern industry from southern competition, while reducing employment opportunities for southern African American industrial workers.

Some courts relied on *Lochner* and related doctrines to resist emigrant agent laws, licensing laws, laws granting monopoly power to the railroad and construction unions, and the cartelization of the labor market brought about by New Deal labor legislation. African Americans benefited greatly from such decisions preserving free labor markets. In each instance, however, the courts, led by the United States Supreme Court, ultimately acceded to these regulations, much to the detriment of African American workers. The triumph of proregulation constitutional arguments was complete by the late 1930s, when the Supreme Court rejected *Lochner* and declared that it considered liberty of contract a nonfundamental right worthy of no more than a bare minimum of constitutional protection.

Few have noticed that Lochnerian jurisprudence, when applied, protected African Americans from facially neutral legislation that restricted their access to, and mobility in, the labor market. Indeed, legal scholars and historians have traditionally seen Lochnerism as at best irrelevant to the welfare of African Americans, and at worst a menace.[17]

As this book shows, however, in the context of a racist American polity between Reconstruction and the New Deal, the problem with Lochnerism from African American workers' perspective was that it was much too timid and ineffectual; courts gave far too much leeway to the regulatory powers of government, allowing powerful interest groups to profit from labor regulations at the expense of African Americans. To the extent that Lochnerian jurisprudence did restrain government, it lasted far too short a time to provide much protection to African American workers from harmful labor regulations.