Locke to *Lochner*: The Constitutional History of Freedom of Contract

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Lawyers hate *Lochner*. Few Supreme Court decisions unite titans from so many disparate legal persuasions as *Lochner v. New York*.[1] Justice Scalia once called the decision "erroneous" and "widely opposed,"[2] and Justice Ginsburg said, "If anything is well established, it is well established that the *Lochner* era is over."[3] The case and its logic are so universally reviled that it has been christened one of the Supreme Court's "anti-canons."[4]

Lochner is anathema in legal and historical circles; it's an assumed conclusion that one should only cite the case to disparage.[5] The case has become a mere pejorative, utterly disclaimed by lawyers and denied legal plausibility. Such presentism makes it easy to forget that the case once carried an air of legitimacy – at least enough to win a majority at the Supreme Court. The absurdity of freedom of contract is a modern conception, only fully crystalized in response to *Lochner*. Historical analysis shows that political philosophers influential to modern understandings of liberty would not be as put off by *Lochner*'s freedom of contract as modern jurists.

Whether or not the Constitution demands states honor one's freedom of contract stands decided – perhaps no reputable legal mind still believes in the concept. As a matter of policy, however, the doctrine would likely find allies in thinkers foundational to American conceptions

[1] Lochner v. New York, 198 U.S. 45 (1905).
[2] Planned Parenthood v. Casey, 505 U.S. 833 (1992).
[3] Ruth Bader Ginsburg, "Ginsburg Confirmation Hearing Day 3 Part 2." C-SPAN video. 1:29:15. July 22, 1993.
[4] Jamal Greene, *The Anticanon*, 125 *Harvard Law Review* 125, no. 2 (2011): 380.
[5] E.g. Lawrence v. Texas, 539 U.S. 558, 592 (2003) (Scalia, J., dissenting); *Casey*, 505 U.S. 988 (Scalia, J., concurring); Seminole Tribe v. Florida, 517 U.S. 44, 165 (1996) (Souter, J., dissenting).

of liberty. Freedom of contract was a consistent and earnest thread in American legal history, evidenced in philosophical writings at least as early as Locke, whose precedential merit endured well into the *Lochner* era.

Lochner **Explained**

Lochner v. New York is a 1905 Supreme Court case. Lochner violated a New York labor law when an employee worked more than 60 hours in one week.[6] Is such a state law valid? In *Lochner*, most of the Supreme Court Justices said no. Writing on behalf of the five-justice majority, Justice Peckham said the law could be dismissed in a few words: "There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker."[7] Such interference in Lochner's ability to control the terms of his contracts with his employees, the majority reasoned, violated his "freedom of contract." The court reasoned that such deprivation of liberty, without due process, violated the 14th Amendment.[8]

The 14th Amendment bars states from "depriv[ing] any person of life, liberty, or property, without due process of law." For more than a century, courts have analyzed which types of liberty the Amendment protects from state deprivation. Surely the amendment doesn't excuse adherence from any state law one disagrees with,[9] but it must limit the exercise of some state laws, lest either state laws or the 14th Amendment become a mere pretext without any effect.

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[6] *Lochner*, 198 U.S. at 52.
[7] Ibid at 57.
[8] Ibid at 53.
[9] E.g. Jacobson v. Massachusetts, 197 U.S. 11 (1905) (holding that the 14th Amendment's liberty guarantee does not excuse someone from compliance with a compulsory vaccination law).

To the agita of progressives, *Lochner* found a freedom of contract protected in the 14th Amendment, but *Lochner* was close. The four justices that did not agree with the majority opinion published two dissenting opinions, where they laid out why they disagreed with the majority. History has vindicated these dissents. After years of 20th-century sparring between President Roosevelt and the Supreme Court on New Deal legislation, one could no longer locate a freedom of contract in the Constitution.[10] Since then, the concept is poison.

Locke's Freedom of Contract

"Freedom of contract" is uniquely 20th-century verbiage. One will not find the concept invoked by name much earlier than 1900. Nonetheless, one can fairly identify philosophical antecedents to the doctrine in early America without engaging in unprincipled presentism. Writings at least as early as the Father of Liberalism, John Locke, begin to encircle the principles later used to defend freedom of contract in the *Lochner* era.

Locke's famous social contract posits that men trade in the absolute liberty and equality abundant in the state of nature – an ungoverned state – for the enhanced security that governments provide. Locke theorized in his *Second Treatise of Government*, his magnum opus laying out his political philosophy and explaining what made governments just, that men do not make this contract altruistically; instead, men make such a contract

> only with an intention in every one the better to preserve himself, his liberty, and property; (for no rational creature can be supposed to change his condition with an intention to be worse) the power of the society, or legislative constituted by them, can never be supposed to extend farther, than the common good.[11]

[10] West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937) ("The Constitution does not speak of freedom of contract").
[11] John Locke, *Two Treatises of Government* (1690), 131.

For a judge giving deference to this theory, the material question becomes whether New York's labor law extended further than the common good. The *Lochner* court considered this. A state could exercise its police powers, one's freedom of contract notwithstanding, to provide for the public's general welfare.[12] The court applied a Locke-adjacent test in *Lochner* – analyzing whether New York's labor law genuinely advanced the common good – and the law failed: "From the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law."[13] Perhaps one rejects the finding that New York's law is unrelated to public health, Justice Harlan dissented to this effect,[14] but such a reservation is a finding of fact. It remains true that should Locke's law control, *Lochner* would stand.

Locke's defense would not end there. One can easily question whether the liberty in the 14th Amendment includes freedom of contract. The word *contract* appears nowhere in the Amendment, and holding that the Amendment wholly unrestrained every person from legal duty whatsoever would court anarchy. When *Lochner* fell, it was precisely on these grounds. In departing from *Lochner*, the court asked of freedom of contract, "What is this freedom? The Constitution does not speak of freedom of contract."[15] Locke's conception of liberty defends against this attack; elsewhere in his *Second Treatise*, Locke concludes that "every man has a property in his own person: this no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his."[16] For Locke, a man owns his labor. In equating labor with property, Locke commanded tremendous respect for freedom of contract.

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[12] *Lochner*, 198 U.S. at 53.
[13] Ibid at 64.
[14] Ibid at 70.
[15] *West Coast Hotel*, 300 U.S. at 391.
[16] Locke, *Two Treatises of Government*, 124.

A sacrosanct respect for property rights is ancient in English legal traditions. Section 29 of the 13th-century charter of the rights of Englishmen, the Magna Carta, provides that "no freeman is to be taken or imprisoned or disseised of his free tenement or of his liberties … save by lawful judgement of his peers or by the law of the land."[17] An ancestor to the U.S.'s due process clause, this section protects liberty in the same breath that it protects property. This legal tradition of blurring property with liberty was core to Locke's ideology:

> According to Locke, private property existed under natural law before the creation of political authority. Indeed, the principal [sic.] purpose of government was to protect these natural property rights, which Locke fused with liberty.[18]

If liberty is a product of private property, and every man has property in his labor, then it is amply reasonable to conclude that Locke would view one's ability to labor how he pleases as intimately connected to his liberty. There can be no doubt that Locke's social contract demands that a just government defend this liberty. "The great and chief end, therefore, of men's uniting into commonwealths, and putting themselves under government," Locke wrote, "is the preservation of their property."[19]

Locke's Influence on Early Americans

The link between labor, property, and liberty would not have been lost on America's founders in constituting the new government. As law professor Laura S. Underkuffler summarized in her essay on the history of property rights, "During the American Founding Era, property included not only external objects and people's relationships to them, but also all of those human rights,

[17] *Magna Carta* § 29 (1297).
[18] James W. Ely, *The Guardian of Every Other Right: A Constitutional History of Property Rights* (New York, NY: Oxford University Press, 2007), 17.
[19] John Locke, *Two Treatises of Government*, 134.

liberties, powers, and immunities that are important for human well-being."[20] Of course, this is not a coincidence; Locke's influence on America's founders was tremendous.

Locke is cited in 2.9 percent of American political pamphlets published between 1760 and 1805, making him the third-most cited European writer in these foundational documents.[21] He is the single most cited authority in pamphlets published in the 1760s and 70s.[22] One should note, however, that after the Revolutionary War began, political pamphlets in early America started referencing Locke substantially less. This makes sense. Locke's *Second Treatise* did much to help thinkers identify unjust governments, where leaders had usurped the natural law and extended their powers beyond that of the common good, but it offered little in the way of constitutional design or statecraft. It is reasonable, then, for Locke to be the most cited authority in pamphlets published when authors wrote principally to justify splitting from England while also having been cited in just 1% of pamphlets published when the founding fathers were designing the new nation.[23]

Some modern minds accordingly caution against overstating Locke's influence on American Constitutional law. Political science professor and author Donald S. Lutz warns that "Locke's influence has been exaggerated … and finding him hidden in passages of the U.S. Constitution is an exercise that requires more evidence than has hitherto even been provided."[24] Other historians have analyzed Locke's availability in founding-era libraries to estimate his impact on the Constitution, where he has come up short.[25]

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[20] Laura S. Underkuffler, "On Property: An Essay," *Yale Law Journal* 100, no. 1 (October, 1990): 128-129.
[21] Donald S. Lutz, "The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought," *The American Political Science Review* 78, no. 1 (March, 1984): 193.
[22] Ibid.
[23] Ibid.
[24] Ibid.
[25] D. Lundberg and H. F. May, "The Enlightened Reader in America," *American Quarterly* 28, no. 2 (Summer, 1976).

In analyzing references to Locke in 10 states' constitutional conventions, historian Laura J. Scalia concluded that 19th-century American statesmen were undeniably Lockean. Locke's writings were sufficiently malleable, however, that conflicting politicians could all cite Locke to contradictory ends. "Saying Americans were influenced by Locke does not say which Locke," Scalia explained.[26] "While [Locke's] ideas may have set the boundaries of discussion, they likely never determined the policy outcomes which emerged over time."[27]

These discoveries should not discount the obvious Lockean threads present in early America, however. One should avoid the implication that American history is *Locke and nothing else*,[28] true, but no one contends that the social contract or respect for "life, liberty, and property" is not distinctively Locke's in origin. Freedom of contract is so fundamental to these ideas that where Americans invoke these concepts, there is a substantial implication that they also invoke the freedom of contract that underpins them.

Madison's Freedom of Contract

Like Locke, James Madison also fused property with liberty. In a 1792 essay on property, for instance, Madison disclaims the notion that one may have property only in external, tangible items. "In [property's] larger and juster [sic.] meaning, it embraces every thing to which a man may attach a value and have a right."[29] Using this more just definition of property, Madison continues to say that a man

[26] Laura J. Scalia, "The Many Faces of Locke in America's Early Nineteenth-Century Democratic Philosophy," *Political Research Quarterly* 49, no. 4 (December, 1996): 831.
[27] *Id*., 831-832.
[28] Lutz, "European Writers and 18th Century American Political Thought," 196. ("Even though the motto *Locke et praeterea nihil* as it applies to eighteenth-century American political thought has been thoroughly discredited by historians, there is probably still a tendency to overestimate his importance.")
[29] James Madison. *Writings of James Madison, Comprising His Public Papers and His Private Correspondence, including Numerous Letters and Documents Now for the First Time Printed*, edited by Gaillard Hunt (New York: G.P: Putnam's Sons, 1900-1910), 101.

> has an equal property in the free use of his faculties and free choice of the objects on which to employ them.
>
> In a word, as a man is said to have a right to his property, he may be equally said to have a *property in his rights*.[30]

This conception was not unique to Madison; rather, it was ubiquitous among the founders. Underkuffler noted that the property theory invoked in Madison's essay was "implicit in the writings of others in the Founding Era,"[31] was "not an aberration in intellectual history,"[32] and reflected "an understanding that was common in the writing of the English Whigs, an intellectual tradition to which the Americans were heirs."[33]

Doubtless, Madison would find freedom of contract in these rights. Later in his property essay, Madison warns that a violation of one's rights may be more ominous than an outright seizure of his private property:

> If there be a government then which prides itself on maintaining the inviolability of property … and yet *directly* violates the property which individuals have in their opinions, their religion, their persons, and their faculties; nay more, which *indirectly* violates their property, in their actual possessions, in the labor that acquires their daily subsistence … such a government is not a pattern for the United States.[34]

Note that Madison constructs the abridgment of the right to labor as an indirect property violation. Such a frame suggests allegiance to Locke's assertion that restrictions on labor amount to a quasi-deprivation of private property. Presciently, Madison concludes that a government engaging in such a violation of freedom to labor is no model for the United States.

Madison also wrote Federalist No. 44, a political pamphlet published in a series of papers aiming to drum up support in New York for the ratification of the U.S. Constitution. Fed. 44 explains why the Constitution had denied states some types of authority. The Contract Clause is

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[30] Ibid, (emphasis added).
[31] Underkuffler, "On Property," 137.
[32] Ibid.
[33] Ibid.
[34] Madison, *Writings of James Madison*, 103.

one such denial; it provides that no state shall pass a "law impairing the obligation of contracts." Madison described laws that would violate this clause as "contrary to the first principles of the social compact."[35] "Very properly," Madison continued, "have the convention added this constitutional bulwark in favor of personal security and private rights."[36] Including this clause demonstrates that Madison's allegiance to Locke's framing of property rights was not cheap talk. No, Madison's respect for private property was a genuine, deeply-held belief that informed his understanding of liberty and measurably impacted the new nation's foundational documents.

Freedom of Contract in the Contract Clause

Deference to property rights is clear among the founding fathers, so it is no surprise that the Constitution includes provisions intended to safeguard contract rights. The Supreme Court waffled on whether the Contract Clause enshrined Locke's freedom of contract precisely, but the historical definition of liberty used by Locke and Madison colored American jurists' understandings of the clause regardless. At least as early as 1798, just eight years after the Supreme Court's first sitting, the Court alluded to Lockean principles in a Contract Clause case. *Calder v. Bull*[37] indirectly references Locke's social contract: "The purposes for which men enter into society will determine the nature and terms of the social compact."[38]

The Lockean parallel is not merely nominal; the Court adheres substantively to the logic of Locke's Second Treatise of Government. The Court concludes that there exist republican principles that "overrule an apparent and flagrant abuse of legislative power, as to authorize

[35] James Madison, "Federalist No 44," *Federalist Papers: Primary Documents in American History*, Library of Congress, accessed March 20, 2023.
[36] Ibid.
[37] Calder v. Bull, 3 U.S. 386 (1798).
[38] Ibid*,* 388.

manifest injustice by positive law or to take away that security for personal liberty or private property for the protection whereof of the government was established."[39] Though the Court does not state it explicitly, I contend that one such republican principle is merely Locke's conclusion that no logical creature would enter a social contract with the intention of being worse. Just as Locke used this principle to conclude that the power of society can never be supposed to extend farther than the common good, the Court concludes that laws violating the unenumerated republican principles are invalid: "It is against all reason and justice for a people to entrust a legislature with such powers, and therefore it cannot be presumed that it has done it."[40]

Later, the court appears to come to the same conclusion as Madison. The ability of legislatures to violate individuals' property rights is incompatible with a republican United States: "The legislature may … command what is right and prohibit what is wrong, but it cannot … violate the right of an antecedent lawful private contract or the right of private property."[41]

Subsequent Supreme Court opinions did not so plainly invoke Locke as *Calder*, but this is in line with a broader trend in American history: citations to Locke giving way to others as the nation developed. Nonetheless, the general spirit of these early decisions is one that matches Locke's vigor in protecting property and contract rights.

When Georgia attempted to renege on a land grant, for instance, the Supreme Court said it "was restrained, either by general principles which are common to our free institutions or by the particular provisions of the Constitution of the United States" from vitiating its executed contract with the purchaser of the land.[42] When New Hampshire tried to contravene a colonial charter to nationalize Dartmouth College, the Court forbade it, reasoning that the Contract

[39] Ibid.
[40] Ibid.
[41] Ibid, 388-389.
[42] Fletcher v. Peck, 10 U.S. 87, 139 (1810).

Clause "must be understood as intended to guard against a power of at least doubtful utility … and to restrain the legislature in future from violating the right to property."[43]

Freedom of contract did not always win the day. In the 1827 case *Ogden v. Saunders*,[44] a hair's majority of the court held that a New York bankruptcy law excusing an insolvent debtor from compliance with a past contract – excusing him from paying back his debt – did not violate the Constitution. For a total of 5 opinions, each member of the 4-person majority wrote separately, and Chief Justice Marshall, perhaps the most influential justice ever, authored his only dissent on a constitutional question. As in historian Scalia's analysis, most sides were Lockean; three of the opinions (representing 5 of 7 Justices since 2 Justices joined Marshall's dissent) referenced Locke's state of nature or the social contract.

Even in moving away from freedom of contract, much of the majority still recognized that freedom of contract was the rule in the state of nature and that departure from this freedom was the exception. Justice Johnson acknowledged that contract rights originated with the people but answered that they had been turned over to the government via the social contract:

> The rights of all must be held and enjoyed in subserviency to the good of the whole … The state decides how far the social exercise of the rights they give us over each other can be justly asserted. I say the social exercise of these rights because in a state of nature, they are asserted over a fellow creature, but in a state of society over a fellow citizen.[45]

Justice Trimble agreed:

> I admit that men have, by the laws of nature, the right of acquiring and possessing property and the right of contracting engagements … But when men form a social compact and organize a civil government, they necessarily surrender the regulation and control of these natural rights into the hands of the government.[46]

[43] *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 628 (1819).
[44] Ogden v. Saunders, 25 U.S. 213 (1827).
[45] Ibid at 282. (Johnson, J., seriatim opinion).
[46] Ibid at 319. (Trimble, J., seriatim opinion).

Chief Justice Marshall's dissent is perhaps the strongest defense of freedom of contract ever published by the Court. He also found that freedom of contract was a natural right but paralleled the *Second Treatise*'s logic in asserting that the people had never surrendered this right to government.

> In a state of nature, these individuals may contract, their contracts are obligatory, and force may rightfully be employed to coerce the party who has broken his engagement.
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> What is the effect of society upon these rights? When men unite together and form a government, do they surrender their right to contract as well as their right to enforce the observance of contracts? For what purpose should they make this surrender? Government cannot exercise this power for individuals. It is better that they should exercise it for themselves.[47]

Again, this logic invokes Locke's conclusion that no creature signs the social contract with the intention of being worse. It is illogical for people to surrender their power to contract to a legislature, Marshall concludes, so one should presume that they have not.

Marshall concedes that a state's power "to prohibit such as may be deemed mischievous, is unquestionable," but beyond this actual restraint, "the original power [to contract] remains unimpaired."[48] Such a test can equally be articulated by saying a state may contravene the freedom of contract only to the effect of the common good – exactly the test proposed by Locke and applied in *Lochner*.

Though Marshall's logic – Locke's logic – lost the day in *Ogden*, the dissent serves as a blueprint for how Locke's ideology influenced reasonable statesmen in foundational America. In identifying which governments are unjust, Locke established a boundary that the United States must not cross. Locke's boundary did not appear explicitly in the U.S. Constitution, and reasonable minds disagreed on the exact qualities of this boundary, but many sensible Americans placed the boundary short of violating what *Lochner* would later call the freedom of contract.

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[47] Ibid. at 346. (Marshall, C. J., dissenting).
[48] Ibid. at 347.

With an eye toward these early conceptions of American liberty, one can better understand the logic of *Lochner* in holding that freedom of contract was part of the liberty protected by the 14th Amendment.

Rebutting Holmes

It is apparent that the definition of liberty invoked by the *Lochner* Court is in line with the historical definition used by Locke, Madison, and Marshall; one that fuses liberty with property and produces the freedom of contract. Few jurists contemporary to *Lochner* would refute this, and Justice Harlan conceded to the notion of a freedom of contract in his *Lochner* dissent.[49] In an earlier majority opinion, the great dissenter even praised the proposition that the "privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, is an essential part of [one's] rights of liberty and property" as "a sound principle of constitutional law."[50]

Justice Holmes's lone *Lochner* dissent is an aberration. Now vindicated, the dissent stood alone in criticizing *Lochner* as being "decided upon an economic theory which a large part of the country does not entertain."[51] In a biting condemnation, Holmes bemoans that "the Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."[52]

Spencer was a 19th-century English philosopher. Holmes's criticism likely alludes specifically to chapter 13 of Spencer's book *Social Statics*, "The Right of Exchange," which

[49] *Lochner*, 198 U.S. at 65. (Harlan, J., dissenting). ("The State in the exercise of its powers may not unduly interfere with the right of the citizen to enter into contracts.")
[50] Powell v. Pennsylvania, 127 U.S. 678, 684 (1888).
[51] *Lochner*, 198 U.S. at 75. (Holmes, J., dissenting).
[52] Ibid.

begins, "Freedom to exchange his property for the property of others, is manifestly included in a man's general freedom."[53] Later in *Social Statics*, Spencer contemplates "poor laws" and "sanitary supervision" by government – two concepts relevant to the New York law challenged in *Lochner*. On the first, Spencer claims "the state has no concern" with how men use their liberty to accumulate property.[54] On sanitation supervision, "Men's rights are infringed by these, as much as by all other trade interferences."[55] Holmes invoking Spencer as a likely supporter of *Lochner* is sufficient to support freedom of contract, but doing so is unnecessary.

An early advocate for social Darwinism, Spencer had made a cottage industry of writing athwart government assistance. In one such writing, Spencer decried banking regulations, reasoning that those who put blind faith in banks deserved their comeuppances. "The ultimate result of shielding men from the effects of folly," Spencer reasoned, "is to fill the world with fools."[56] This is to say Spencer was an easy target.

But liberty of contract is not unique to Spencer, nor is any other idea Holmes invokes in his rebuttal. The Spencer reference in Holmes's argument merely restated Holmes's assertion that

> The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not.[57]

The principle refuted is at least as well epitomized by the harm principle described in English philosopher John Stuart Mill's essay *On Liberty*: "The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent

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[53] Herbert Spencer, *Social Statics or The Conditions Essential to Human Happiness* (New York: Augustus M. Kelley, 1969), 146.
[54] Ibid, 312.
[55] Ibid, 373.
[56] Herbert Spencer, *Moral, Political and Aesthetic* (Boston: D. Appleton & Company, 1878), 348-349.
[57] *Lochner*, 198 U.S. at 75. (Holmes, J., dissenting).

harm to others."[58] Grounding this philosophical thread in Mill, as is fair, casts freedom of contract in a better light.

Mill's Freedom of Contract

A Millian analysis exposes that social Darwinism is a non sequitur to freedom of contract. Though Mill never explicitly wrote on social Darwinism, the philosophy is incompatible with his writings. In one paper, political philosopher William R. Patterson found it likely that Mill would have found social Darwinism not only wrong but abhorrent.[59] So while Mill never wrote on freedom of contract with as much vigor and clarity as Spencer, there is some evidence to suggest he would ally himself with *Lochner*.[60]

For instance, in at least one private letter, Mill criticized maximum-hours mandates much like the law *Lochner* struck down. Mill celebrated that Europe's upper class had begun to realize that it was "morally responsible for the well-being of society, especially of the poor,"[61] but he despised that it understood this obligation in an unworthy manner, only "by reducing it to the giving of alms."[62] Mill concluded that governing the poor in a paternalistic fashion by reducing their working hours and regulating their sanitary conditions completely disregarded the self-respect of the poor.[63]

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[58] John Stuart Mill. *On Liberty*. (South Bend: Infomotions, Inc., 2000), 7.
[59] William R. Patterson, "The Greatest Good for the Most Fit? John Stuart Mill, Thomas Henry Huxley, and Social Darwinism," *Journal of Social Philosophy* 36, no. 1 (February, 2005): 74.
[60] O. Kurer, "John Stuart Mill on Government Intervention," *History of Political Thought* 10, no. 3 (1989): 478. ("More interesting, however, is Mill's studious avoidance of taking a position over the reduction of the working day of adult workers, which is a pretty good indication that he was opposed to it.")
[61] John Stuart Mill, *The Correspondence of John Stuart Mill and Auguste Comte*, trans. Oscar Haac (Somerset: Routledge, 2018), 382.
[62] Ibid.
[63] Ibid.

Mill wrote *On Liberty* well after the Constitution was ratified, but his 19th-century philosophy is steeped in liberalism akin to that of Locke and America's founders. There is no doubt that Mill has had a massive effect on how modern judges understand the Constitution.[64] Ironically, this fact would be lost on Holmes least of all; Holmes has been identified as the progenitor of Millian thinking in the analysis of the First Amendment.[65] Most illustrative of this is Holmes's practical paraphrasing of Mill's harm principle in analyzing whether speech is protected by the First Amendment: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger."[66] Contemporary writings by Holmes indicate that Mill's *On Liberty* was on Holmes's mind when he penned this test.[67]

In this same vein, compare Holmes's dissent in *Abrams v. United States* ("The best test of truth is the power of the thought to get itself accepted in the competition of the market")[68] with Mill's defense of free speech in *On Liberty* (Silencing the expression of an opinion is evil because "if the opinion is right, [people] are deprived of the opportunity of exchanging error for truth: if wrong, [people] lose … the clearer perception and livelier impression of truth, produced by its collision with error").[69]

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[64] E.g. John Lawrence Hill, *The Prophet of Modern Constitutional Liberalism: John Stuart Mill and the Supreme Court* (New York: Cambridge University Press, 2020), 2. (Mill's "new conception of liberty would inevitably influence the way we think about what rights we have, how freedom can be infringed and how our Constitution should protect our basic liberties."); Eric T. Kasper and Troy A. Kozma, "Absolute Freedom of Opinion and Sentiment on All Subjects: John Stuart Mill's Enduring (and Ever-Growing) Influence on the Supreme Court's First Amendment Free Speech Jurisprudence," *University of Massachusetts Law Review* Vol. 15: Iss. 1, Article 1 (2020): 53. ("Regardless of whether the Justices are using Mill's approach because they really believe in following Mill, they are blindly following prior opinions that used Mill, or for some other strategic reasons, the modern Supreme Court is publicly espousing a Millian approach to the freedom of speech.")
[65] Kasper and Kozma, "Absolute Freedom of Opinion."
[66] Schenck v. United States, 249 U.S. 47, 52 (1919).
[67] Kasper and Kozma, "Absolute Freedom of Opinion," 20.
[68] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
[69] Mill, *On Liberty*, 11.

This is not to say Holmes's *Lochner* dissent is debased; Judges need not genuflect to Mill any more than Spencer or Locke. But this does remind of a doctrinal coherence of *Lochner* that modern minds have generally overlooked.

A Note on Blackstone

William Blackstone is another hugely influential person in American legal history. Lockean in many respects, Blackstone organized disparate English common law traditions into a logical ruleset. He can fairly be credited with largely defining the Founders' (and therefore modern jurists') opinions of the judiciary's function.

Of America's earliest Supreme Court cases, 2% referenced Blackstone.[70] Indeed, Blackstone's Commentaries were the most cited work in those opinions.[71] Today, nothing has changed; between 1990 and 2014, Blackstone appeared in 8% of signed opinions.[72] More than what Locke, Spencer, or Mill wrote, the Court listens to what Blackstone wrote.

It is illustrative, then, of the process the Court took to abandon *Lochner* when Blackstone wrote about when it is appropriate to abandon precedents. *Stare Decisis* instructs courts to adhere to prior decisions where the same facts come up again unless doing so would be egregiously wrong. "Even in such cases, the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation,"[73] Blackstone wrote. "If it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but

[70] Jessie Allen, "Reading Blackstone in the Twenty-First Century and the Twenty-First Century through Blackstone," in *Re-Interpreting Blackstone's Commentaries: A Seminal Text in National and International Contexts*, edited Wilfred Prest (Oxford: Hart Publishing, 2014), 2.
[71] Ibid.
[72] Ibid, 3.
[73] William Blackstone, *American Students' Blackstone. Commentaries on the Laws of England, in Four Books* (New York: Banks & Bros, 1938), 70.

that it was *not law*."[74] Blackstone implied that law cannot become bad – it is either good or never was. To comport with this tenet, lawyers assume away the idea that a once-valid *Lochner* could spoil. Thus, lawyers must conclude that the now-derelict freedom of contract was never legitimate. Historians need not concede this point.

A measured historical analysis shows that freedom of contract was a supportable doctrine present in many different parts of pre-*Lochner* American legal history. English Whig ideology framed freedom of contract as a property and liberty right, which Locke also propounded. In penning the Constitution, Madison informed his political philosophy with this legal tradition. Early American courts generally assented to these principles, and well into the *Lochner* Era, liberal scholars like Mill had not neglected the concept. Eight members of the *Lochner* court did not doubt freedom of contract.

But today's lawyers obfuscate this legal tradition. In declaring that freedom of contract was *not law*, contemporary jurists have lost track of the natural coda of Lockean liberalism. It is not for historians to say if *Lochner* was *good law*, but it ought to be admitted, at least, that it *was law*.

[74] Ibid.

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