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How Written Advocacy Shapes Doctrine (Part I): Did Bad Briefing Decide *Lochner v. New York*?

By Douglas E. Abrams

It was Thursday morning, February 23, 1905, and Chief Justice Melville W. Fuller opened oral argument in a case destined to shape the course of American constitutional history. The Supreme Court's calendar that day included a largely unnoticed appeal by Joseph Lochner, the owner of a small bakery in Utica, a city of about 63,000 persons in rural upstate New York. Three years earlier, the state had fined him \$50 for employing a worker for more than 60 hours a week in violation of the state's Bakeshop Act, a maximum-hours law passed unanimously by both houses of the legislature and signed by the governor in 1895.

By a narrow 5-4 vote, the Court reversed the bakery owner's misdemeanor conviction. Writing for the majority in *Lochner v. New York*, Justice Rufus W. Peckham held that the Bakeshop Act violated "liberty of contract," an interest that a few Court decisions had found in the Fourteenth Amendment's Due Process Clause.¹ The constitutional liberty enjoyed by Joseph Lochner and his employees alike, wrote Justice Peckham, turned on whether the 1895 legislation was "a fair, reasonable and appropriate exercise of the police power of the State," or whether the legislation was "an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty or

to enter into those contracts in relation to labor which may seem to him appropriate and necessary for the support of himself and his family."²

Lochner's slender majority chose the latter, and Justices John Marshall Harlan and Oliver Wendell Holmes filed stinging dissents. Justice Harlan accused the Court of "seriously cripp[ing] the inherent power of the States to care for the lives, health and wellbeing of their citizens."³

In one of the most memorable dissents in Supreme Court history, Justice Holmes charged that the majority had embraced "an economic theory which a large part of the country does not entertain." The theory was, *laissez faire* economics associated with Herbert Spencer's Social Darwinism, which taught that a nation's economy develops best when the fittest survive in the marketplace free from government regulation.⁴ Holmes argued that by empowering courts to impose their own economic views on the nation, *Lochner* thwarted "the right of a majority to embody their opinions in law."⁵

The final word on *Lochner's* dual touchstones – reasonableness or arbitrariness – lay not with the political branches, but with courts that grew increasingly hostile to federal or state economic regulation. By the time the nation confronted the depths of the Depression in the early 1930s, the decision had morphed into a "constitutional monstrosity" that

"disembowel[ed] federal and state efforts to protect workers from predatory employers."⁶

The Supreme Court interred *Lochner's* economic substantive due process doctrine in 1937, but not before the Court had struck down nearly 200 social welfare and regulatory measures.⁷ The doctrine's demise led to Justice Harlan Fiske Stone's Footnote Four in *United States v. Carolene Products Co.* (1938), which foreshadowed today's tiered analysis by distinguishing the Court's new deference to economic regulation from heightened scrutiny of claims implicating civil rights and personal liberties.⁸

The verdict of history has generally not been kind to *Lochner*. Chief Justice William H. Rehnquist called it "one of the most ill-starred decisions that [the Supreme Court] ever rendered."⁹ A leading constitutional scholar calls *Lochner* "the most disparaged decision in the entire history of the Supreme Court . . . , a decision that threatened the very legitimacy of judicial review by setting the Court against the democratic branches without doctrinal justification or institutional competence."¹⁰

More than a century later, *Lochner* remains "one of the most intriguing constitutional cases ever decided,"¹¹ and "[f]ew cases in American history continue to attract more attention."¹² The decision, says one legal historian, "continues to hover over constitutional law like a ghost. It haunts every

judge's chambers and every constitutional law classroom. It gives force to the never-ending debate between judicial activism and judicial restraint. It generates the famed tension between judicial review and democracy."¹³

Lochner's immortality highlights the choices of two undecided "swing" Justices to join the 5-4 majority. Might *Lochner* have come out the other way if the brief filed by the losing New York Attorney General had not appeared so paltry next to Joseph Lochner's sterling brief (which, as I recount below, the bakery owner's counsel wrote with a significant assist from a Mizzou law professor)? The question is one of the great "what if's" of American constitutional history because the contrary decision would likely have charted an alternate constitutional path to destinations unknown.

The State of New York was "out-briefed" by a resourceful defendant and his counsel. Even for today's lawyers who may never argue an appeal so profound, *Lochner's* evident turnabout from a razor-thin victory for the state to a victory for the convicted defendant underscores judicial reliance on written advocacy in the adversary system of civil and criminal justice.

This reliance assumed the Supreme Court spotlight most recently in 2008, when *Kennedy v. Louisiana* held, 5-4, that the Eighth Amendment prohibits imposition of the death penalty for rape of a child where the crime did not result, and was not intended to result, in the victim's death.¹⁴ The Justices decided *Kennedy* without citing or discussing a relevant two-year-old congressional enactment that the parties had overlooked, and that neither the Justice Department nor *amici curiae* had brought to the Court's attention.

This Part I discusses the Court's internal deliberations in *Lochner*. In

Precedent's Spring issue, Part II will discuss *Kennedy's* embarrassing oversight and recount the institutional challenges that it caused the Court. *Lochner* and *Kennedy* together demonstrate the contemporary vitality of Justice Felix Frankfurter's message that in the adversary system of civil and criminal justice, "the judicial process [is] at its best" when courts receive "comprehensive briefs and powerful arguments on both sides."¹⁵

Nineteen Pages That Changed History

To establish that New York's maximum hours law was an unreasonable exercise of the state's police power, Joseph Lochner's counsel submitted a lengthy, carefully researched brief whose appendix supplemented legal doctrine with research from medical journals indicating that bakery work was not inherently hazardous to employees' health.¹⁶ One scholar has called the submission "an incipient 'Brandeis Brief.'"¹⁷ The term "Brandeis Brief" today describes a filing that combines legal analysis with relevant evidence from the social sciences, but lawyer Louis D. Brandeis did not prevail with his fabled Supreme Court submission until *Muller v. Oregon*, which distinguished *Lochner* three years after the New York bakery owner's brief provided the future Justice a useful template.¹⁸

The Mizzou Connection

Though largely overlooked today, the University of Missouri directly influenced Joseph Lochner's brief. According to Professor David J. Seipp, "[a] principal architect of *Lochner's* substantive due process argument [was] the young firebrand conservative law professor Christopher G. Tiedeman," who taught at the University of

Missouri from 1881 to 1891.¹⁹ While a member of the Mizzou faculty, Tiedeman wrote his influential treatise, *Limitations of Police Power* (1886), whose preface embraced Social Darwinism and warned that "Socialism, Communism, and Anarchism are rampant throughout the civilized world" because "the State is called on to protect the weak against the shrewdness of the stronger."²⁰

Lessons from Tiedeman's treatise were not lost on Joseph Lochner's counsel. "For people such as . . . Christopher Tiedeman," writes Professor Paul Kens, "substantive due process and liberty of contract represented not only reasonable but necessary interpretations of the Constitution. In their eyes the theory of law that was finalized in *Lochner* was supported by the spirit and purpose of that document."²¹

Overconfidence, Carelessness or Lack of Personal Commitment

The New York Attorney General's office evidently did not take Joseph Lochner's Supreme Court appeal seriously, a costly lapse that seems particularly surprising because the state's two appellate courts had each affirmed the conviction by only scant one-vote margins over strong dissents.²² Attorney General Julius M. Mayer's "incredibly sketchy"²³ 19-page brief provided the justices little factual analysis or legal argument, few citations to precedent, and barely any mention of medical authorities which plausibly indicated that toiling 12 hours per day for six to seven days each week in damp, dusty, rat-infested bakeries in urban slum tenement cellars debilitated most workers before they turned 45 and caused many to die young.²⁴ The Attorney

General did not even try to expand on medical discussion advanced by a concurring judge when the New York Court of Appeals upheld *Lochner's* conviction.²⁵

Labor leader Samuel Gompers said later that the Court might have decided *Lochner* differently if the Justices could have seen for themselves the squalid working conditions that marked the nation's bakeries, including the one in Utica, New York.²⁶ With the Justices unable to take testimony or receive other live evidence from eyewitnesses or expert witnesses, however, the parties' briefs were the Court's eyes and ears. In a case that ultimately turned on the Justices' perceptions of reasonableness or arbitrariness, the state's meager written submission squandered any opportunity to paint a persuasive picture with information gleaned from the medical literature.

Historians have speculated about why the state Attorney General's office paid only lip service to Joseph *Lochner's* Supreme Court appeal. The likely reasons do not reflect well on the office's approach to advocacy. Perhaps Attorney General Mayer assumed a relatively easy victory because the Court, in *Holden v. Hardy*, had upheld a state's maximum hours statute for coal miners in 1898 by a seemingly comfortable 7-2 margin.²⁷ Professor Kens suggests that, even if not overconfident, the Attorney General may have lacked enthusiasm for the challenged Bakeshop Act because he personally opposed most economic regulatory legislation.²⁸ Perhaps the Attorney General brushed aside *Lochner's* case because his office faced deadlines in another Supreme Court appeal that seemed more important, though the decision in the other appeal would ultimately pass into history largely unremembered.²⁹

The Court's Deliberations

Whatever the impulse for the state's evident inattention in *Lochner*, the imbalance that marked the parties' briefs may have turned a close decision for the state into a close decision for the bakery owner. Evidence indicates that Justice Harlan initially drafted the opinion of the Court, and that Justice Peckham initially drafted a dissent. Justice Harlan's son later said that his father's original draft was for the majority, and another commentator argued that the tone and structure of Justice Harlan's ultimate dissent suggest the same.³⁰

The two swing votes, Justices Henry Billings Brown and Joseph McKenna, ended up joining the 5-4 majority under circumstances that suggest that the parties' briefing influenced the outcome. Justice Brown had written the majority opinion upholding maximum hours legislation for mine workers in *Holden v. Hardy*, and neither he nor Justice McKenna had previously voted to strike down state labor legislation for violating the Fourteenth Amendment.³¹

The two swing justices likely switched from Harlan to Peckham during the Court's internal deliberations. Professor David E. Bernstein concludes that "the unusual votes of Brown and McKenna . . . can most plausibly be attributed to the creativity of *Lochner's* brief in presenting a statistics-filled appendix showing that baking was not an especially unhealthy profession, combined with the singularly ineffective brief filed by New York."³²

On April 17, *Lochner's* five-Justice majority – with Justices Brown and McKenna safely on board – announced that "[t]here is, in our judgment, no reasonable foundation for holding [the 1895 Bakeshop Act] to be necessary or appropriate as a health

law to safeguard the public health, or the health of the individuals who are following the trade of a baker."³³ To the contrary, the majority concluded, the Act had "no . . . direct relation to, and no . . . substantial effect upon, the health of the employee."³⁴

Lochner's Lessons in Advocacy

Perhaps through overconfidence, carelessness or lack of personal commitment, the New York Attorney General suffered a narrow defeat in *Lochner* following his office's inadequate briefing. The Justices' evident turnabout reminds lawyers that no victory is "easy" until after entry of final judgment and exhaustion of the appellate process, that deadlines and other law office constraints are poor excuses for half-hearted advocacy, and that every case deserves the advocate's zeal regardless of his or her personal feelings about the cause.

Endnotes

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- Id.* at 73 (Harlan, J., dissenting).
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- Id.*
- HAROLD M. HYMAN & WILLIAM M. WIECEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835-1875*, at 480 (1982).
- West Coast Hotel v. Parrish*, 300 U.S. 379 (1937); David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373, 373 (2003).
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20. CHRISTOPHER G. TIEDEMAN, *A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES CONSIDERED FROM BOTH A CIVIL AND CRIMINAL STANDPOINT* vii (1886); see also CLYDE E. JACOBS, *LAW WRITERS AND THE COURTS: THE INFLUENCE OF THOMAS M. COOLEY*, CHRISTO-

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21. PAUL KENS, *LOCHNER V. NEW YORK: ECONOMIC REGULATION ON TRIAL* 179 (1998).

22. *People v. Lochner*, 76 N.Y.S. 396 (App. Div. 1902) (3-2 vote), *aff'd*, 69 N.E. 373 (N.Y. 1904) (4-3 vote), *rev'd*, *Lochner v. New York*, 198 U.S. 45 (1905).

23. Paul Kens, *supra* note 21, at 127.

24. *Id.* at 614.

25. *People v. Lochner*, 69 N.E. 373, 382-84 (N.Y. 1904) (Vann, J., concurring), *rev'd*, *Lochner v. New York*, 198 U.S. 45 (1905).

26. Paul Kens, *supra* note 12, at 35.

27. *Holden v. Hardy*, 169 U.S. 366 (1898); David E. Bernstein, *The Story of Lochner v. New York: Impediment to the Growth of the Regulatory State*, in *CONSTITUTIONAL LAW STORIES* 299, 317 (Michael C. Dorf ed., 2d ed. 2009).

28. Paul Kens, *supra* note 23, at 127.

29. *Id.* at 128; David E. Bernstein, *supra* note 16, at 1495-96.

30. David E. Bernstein, *supra* note 27, at 317 & n.109.

31. *Id.* at 317.

32. *Id.* at 317-18.

33. *Lochner*, 198 U.S. at 58.

34. *Id.* at 64.

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