The Constitutional Liberty We Lost

Legal scholar David Mayer explains why liberty of contract is about more than economics

Brian Doherty | February 9, 2011

"For a period of exactly 40 years, from 1897 to 1937, the Supreme Court protected liberty of contract as a fundamental right, one aspect of the basic right to liberty safeguarded under the Constitution's due process clauses, which prohibit government—the federal government, under theFifth Amendment, and states, under the Fourteenth Amendment—from depriving persons of 'life, liberty, or property without due process of law'...[but] following its 'New Deal Revolution' of 1937, it ceased protecting liberty of contract."

So writes David N. Mayer, professor of law and history at Capital University, in his new book*Liberty of Contract: Rediscovering a Lost Constitutional Right.* Although progressive legal scholars have derided liberty of contract as merely a tool of plutocrats—the most famous liberty of contract case, *Lochner v. New York* (1905), overturned maximum working hour laws for bakers in New York—Mayer argues that a wide range of individual liberties were properly protected under the doctrine.

Senior Editor Brian Doherty interviewed Mayer by phone in January about how and why liberty of contract was briefly a key part of the Supreme Court's arsenal of defenses against government action, and why it's a shame we've lost it.

Reason: Why is a book about the lost constitutional doctrine of liberty of contract worth writing and reading now?

David N. Mayer: We are facing a vast expansion of the 20th century regulatory and welfare state, and in debates over the welfare state it's important that people understand that the regulatory state has been built on a number of important myths: myths about economics, myths about history, and myths about

constitutional law. I hope my book shatters one of the most important myths about early 20th century constitutional law.

The traditional story goes back to Justice Oliver Wendell Holmes' dissent in *Lochner*. The decision struck down a maximum hour law for bakers, and according to Holmes the majority was reading a laissez-faire economic theory into the Constitution. He accuses the majority of "enacting Mr. Herbert Spencer's *Social Statics,*" referring to the most famous classical liberal English philosopher of the time.

That's entirely wrong. The majority didn't decide the case based on any kind of economic theory. The majority decided based on well-established principles of constitutional law. But Holmes' accusation stuck and was repeated by several generations of Progressive movement activists, including the people who in the early 20th century were pushing these new kinds of laws—minimum wage and maximum hour laws that the Court was striking down in liberty of contract cases. What has been accepted as the orthodox view of the *Lochner* era is that the Court in protecting liberty of contract was engaged in libertarian judicial activism. But the Court was following traditional views about constitutional law, applying traditional definitions of the police power as limited to certain categories of activities.

Reason: If the Court had been doing what Holmes accused them of doing in *Lochner*, how would constitutional law have been different?

Mayer: It would have meant hundreds of laws would be struck down at the state and federal level as interfering with liberty. If trying to enact *Social Statics*, the Court would have limited the police power to enforcement of what Spencer called the "law of equal freedom," so that any legislative act that limited the freedom of the individual to do what they please, and didn't directly harm someone else, would be struck down. That wasn't the case.

In the vast majority of challenges to state police power, the court upheld the traditional categories of police power used in the

19th century: protecting public health, safety, and morality. Categories which were so broad and slippery that the Court upheld, for example, virtually every case involving challenges to paternalistic laws, for example liquor prohibition [laws] were upheld, as in *Mugler v. Kansas*.

In the *Lochner* decision, Justice Rufus Peckham pointed out that the number of hours a baker worked had nothing to do with his health, let alone the health of the public. It had everything to do with bakeries in competition with unionized bakeries—and taking the side of unionized bakeries. It was, as Peckham said, not a legitimate traditional use of police power.

Before 1937, judges took seriously the due process clauses of both the Fifth and 14th Amendment as real limitations on the power of government, protecting both liberty and property rights. I quote in the book a wonderful passage describing the broad scope of liberty the Court protected from Justice Peckham's decision in *Allgeyer v. Louisiana*, the 1897 case where the Court first explicitly protected liberty of contract. [The decision overturned a Louisiana law barring its citizens from buying marine insurance from an out-of-state firm, an issue of great relevance in the health care debate]:

The "liberty" mentioned in that amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.

The real key to *Lochner*-era jurisprudence was not laissez-faire, but liberty of contract. The late 19th and early 20th century was a golden age of contracts. People understood that contract law dealt with the whole realm in which individuals privately ordered their lives and reached agreements for their mutual benefit—without interference from government.

Reason: Unlike conservative legal thinkers of the Robert Bork variety, you do believe in substantive due process. Why?