

***Calder v. Bull*, interpreting the Constitution as a social compact; or a sequel to Jean Jacques Burlamaqui and the theory of social contract (II)**

Raúl Pérez Johnston

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Abstract: *Calder v. Bull* turns to be the vehicle to link the social contract theory of Jean Jacques Burlamaqui with the American Constitution. After analyzing the thought of Samuel Chase and the framers of the Declaration of Independence, we conclude that the pursuit of happiness ought to be seen as a principle of interpretation of a constitution that is not an isolated document, but part of a larger compact that integrates not only negative liberties but also social rights.

Resumen: *Calder v. Bull* se convierte en el medio vinculatorio de la teoría de Jean Jacques Burlamaqui con la Constitución Americana. Tras analizar el pensamiento de Samuel Chase y de los creadores de la Declaración de Independencia, concluimos que la prosecución de la felicidad debe ser vista como el principio interpretativo de una constitución que no es un documento aislado, sino parte de un contrato más amplio que integra no sólo libertades negativas sino también derechos sociales.

Key concepts: Samuel Chase; Declaration of Independence; American Constitution; Social Contract; Jean Jacques Burlamaqui.

Palabras clave: Samuel Chase; Declaración de Independencia; Constitución Americana; Contrato Social; Jean Jacques Burlamaqui.

IV. WHAT DOES IT MEAN THEN TO INTERPRET THE CONSTITUTION AS A SOCIAL COMPACT?

1. Once we have established that the interpretation of the constitution in accordance to the first great principles of the social compact is to make every government action to comply with the principles of equality, the preservation of life, liberty and the pursuit of happiness, it would be interesting first to put *Calder* into dimension with regard to certain previous classifications of this dictum, since *Calder v. Bull* has been classified like being the basis for substantive due process in the Fourteenth Amendment, as well as like being the basis for claims of an unwritten constitution and unenumerated rights. Once this is done, we can then proceed to determine certain consequences of this method of interpretation, namely with regard to the principle of the pursuit of happiness.

4.1. A proper interpretation of Chase's opinion rules it out as a foundation for substantive due process.

2. *Calder v. Bull's* dictum concerning the great principles of the social compact has been seen too often as an analogous precedent to the substantive due process theory embodied in the Fourteenth Amendment and developed by the Supreme Court, especially in the first third of the twentieth century, with different implications and variations ever since.
3. On this regard, Chase has been accused to have taken his idea too far, to the extent of permitting *Dred Scott* and *Lochner*. This view has been held among others by prof. Foley, with whom we disagree on the assertion that: "The problem with Chase is that he took his idea too far. Chase believed that a constitution could not count as legitimate unless it guaranteed certain substantive rights, including rights to private property. This was Chase's error."¹
4. The error committed by Chase, despite the result of the opinion, is in our view a matter of formulation; had he defined clearly what he meant by social compact in terms of the ends of the American government circumscribed by the Declaration of Independence, then even Iredell's argument would not have neutralized the dictum. Neither do we believe that Chase's idealism was unadulterated,² since the parameters set by Chase, unlike *Lochner*, are not unconstrained. Therefore, Foley's assertion that "the idealism of Chase

¹ See EDWARD B. FOLEY, THE BICENTENNIAL OF *CALDER v. BULL*: IN DEFENSE OF A DEMOCRATIC MIDDLE GROUND, 59 Ohio St. L.J. 1621, 1605 (1998).

² *Id.* at 1628.

gave us *Dred Scott* as well as *Lochner*³ has to be rejected. On this point, despite Chase's incomplete exposition of the principle, if we run the test of the first great principles of the social compact on *Dred Scott* and *Lochner*, those opinions would never have been found as compatible to the ends of government under which we should interpret the Constitution, for violating the principle of equality as understood in the state of nature, and the pursuit of happiness as a limitation of the right of contract by protecting the health of the workers in a bakery through the police powers of the states.⁴

5. Let us thus say that we reject the possibility of looking at *Calder* as a foundation of the substantive due process theory as used in *Lochner*, as well as the implication that Chase's view that "a law that destroys or impairs the lawful private contracts of citizens [or] that takes property from A and gives it to B" is prohibited by natural law in the same terms as argued in *Lochner* with regard to the freedom of contract.⁵ This is so, since even this cited statement by Chase would not have been absolute with respect to contracts, as we have just mentioned, since it has to be interpreted within the context of the rest of the opinion, namely, with the dictum that subjects even this assertion to the great principles of the social contract, which, as we have already seen, are contained in an alternative source of positive law: the Declaration of Independence.⁶
6. On top of this, the right to the pursuit of happiness, has been nevertheless misunderstood in our perspective by some opinions of the Supreme Court in the late nineteenth century, where it has been seen as an absolute individual right protected under the due process clause of the Fourteenth Amendment, rather than as a collective right everyone has. This narrow view of such right transforms completely the nature of the disposition, and instead of being a principle of teleological interpretation as we argue it is, it becomes a mere individual liberty. Should we be prepared to accept this position, we would have to be prepared to accept that the Declaration would then create substantive rights, not only a principle of interpretation.⁷

³ *Id.* at 1629. For *Calder v. Bull* as seen as an alternative theory to substantive due process in the Fourteenth Amendment, by stating that state authority can be limited by the great first principles of the social compact, whether or not they were embodied in the Constitution, see also DAVID P. CURRIE, *THE CONSTITUTION OF THE UNITED STATES A PRIMER FOR THE PEOPLE*, 55 (The University of Chicago Press, 2000) (1988).

⁴ See *infra*, V.

⁵ For such assumptions on how to view Chase's opinion in *Calder* as precedent to *Lochner*, see GEOFFREY R. STONE, *et al.*, *CONSTITUTIONAL LAW*, 710, 720 (Aspen, 2001).

⁶ Let us say that for the founding generation, learned in the English Common Law tradition, to reach to other sources of positive law, complementing the Constitution would not have been something odd or strange, but rather similar to what we have deduced from the interpretation of Sir Edward Coke's system of judicial review. See *supra* n. 24.

⁷ On this regard, see Bradley's concurring opinion in *Butchers' Union Slaughter-House and Live-Stock Landing Company v. Crescent City Live-Stock Landing and Slaughter-House Company*, 111 U.S. 762 (1884), or Field's dissent in *Powell v. Pennsylvania*, 127 U.S. 692 (1888).

7. Therefore, we can only agree to reject the view of seeing *Calder* as a foundation for substantive due process, since if we were to use due process and the principles of the social compact to conceive an “unwritten constitution”, we would be creating a situation where the content and interpretation of the constitution would be left to the discretion of the courts, breaking thus the equilibrium set by the separation of powers conceived in the Constitution. On the other hand, by using the great principles of the social contract set in the Declaration, we would have a standard and a point of reference that makes it easier to identify the substance of the principles that would be shaping the interpretation of the written constitution. Consequently, since Chase’s opinion seeks to give in our view a secure standard of interpretation, rather than to create an omnimodous power for the courts, we cannot understand *Calder v. Bull* as an intended foundation for substantive due process in the fourteenth amendment doctrine.

4.2. Calder’s dictum is compatible with unenumerated rights and natural law doctrine, but only incidentally, it is not its primary objective.

8. Another question that has to be dealt with is that Chase’s dictum is sometimes used as a source for claims of natural law theory and unenumerated rights into the Constitution. Although we say that this dictum may be compatible with those positions, it does not generate them.

9. Despite Raoul Berger’s attacks on *Calder*, in which he considers Chase’s opinion as characteristic of the Court’s “appetite for extra constitutional power”,⁸ we don’t think *Calder* is an exclusive reference to natural law,⁹ nor

⁸ Part of this appetite for extra constitutional power would be due, in Berger’s perspective, to the invocation in Chase’s opinion of the concept of natural law. Such call of natural law elements into the opinion, in Raoul Berger’s perspective, would differ little from “the mandate from heaven” of a Chinese Emperor, which was in itself so vague that the Emperor could identify its own will with the will of heaven. See RAOUL BERGER, *GOVERNMENT BY JUDICIARY, THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT*, 250-252 (Harvard University Press, 1977). In a similar line of argument, Roscoe Pound would say:

“Perhaps nothing has contributed so much to create and foster hostility to courts and law and constitutions as this conception of the courts as guardians of individual natural rights against the state and against society, of the law as a final and absolute body of doctrine declaring these individual natural rights, and of constitutions as declaratory of common-law principles, which are also natural-law principles, anterior to the state and of superior validity to enactments by the authority of the state, having for their purpose to guarantee and maintain the natural rights of individuals against the government and all its agencies.”

ROSCOE POUND, *THE END OF LAW AS DEVELOPED IN JURISTIC THOUGHT*, 27 Harv. L. Rev. 626-627 (1913-1914).

⁹ On a similar line of argument, the opinion that Justice Chase would have been willing to admit judicial review only on the basis of natural rights and social compact can be identified in EDWARD S. CORWIN, *MARBURY v. MADISON AND THE DOCTRINE OF JUDICIAL REVIEW*, in *THE DOCTRINE OF JUDICIAL REVIEW, ITS LEGAL AND HISTORICAL BASIS AND OTHER ESSAYS*, 53 *n.* (Princeton University Press, 1914).

Also, in the opinion of David Currie, “the most noteworthy aspect of the *Calder* opinions, however, had nothing to do with the *ex post facto* clause; it was the famous controversy between Chase and Iredell over the role of natural law in constitutional litigation.” DAVID P. CURRIE, *THE*

a license for the Court to do whatever it wants. The opinion that Chase's view is contrary to the intent of the framers in setting written limits to all grant of power¹⁰ is incorrect, since the power granted to the Court with respect to interpreting the Constitution is, by all means, according to the opinion of Justice Chase, bound by the first great principles of the social compact found in the nation's founding document, *i.e.* the Declaration of Independence. Consequently, the power of interpretation by the Court is far from being limitless, since in the text of the Declaration there would be a formidable check.

10. On this regard, we have to say that this does not authorize by itself an unwritten constitution. The only exception we could see to this principle would be that this so called "unwritten constitution" could be drawn and interpreted from another provision of the Constitution which would authorize it expressly; it is not the case in our opinion since we can trace no such provision in the American Constitution.

11. This same assertion is valid as far as speaking of unenumerated rights under the Constitution.¹¹ If such unenumerated rights can be traced through the Ninth Amendment, or through implicit rights on other explicit ones, call them inherent, penumbra¹² or whatever denomination one wishes to grant them, they would surely have to be compatible with the first principles of the social contract (as understood within our view of *Calder*). But even in this case, we believe that in Chase's opinion there was no intention that the substantive matter of the great principles of the social contract, established

CONSTITUTION IN THE SUPREME COURT, THE FIRST HUNDRED YEARS 1789-1888, 46 (The University of Chicago Press, 1985). Further to this, according to prof. Currie, the outcome of the opinion of Chase is consistent with the fact he thought that *Calder* had no vested right and the decree of the Connecticut Legislature was therefore consistent with natural justice. *Id.* at 46.

¹⁰ "Chase's notion (...) departed from the Founders' commitment to written limits on all power. That commitment sprang from an omnipresent dread of the greedy expansiveness of power, graphically expressed by Jefferson: 'It is jealousy and not confidence which prescribes limited constitutions to bind down those whom we are obliged to trust with power ... In questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution'." RAOUL BERGER, *GOVERNMENT BY JUDICIARY, THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT*, 252 (Harvard University Press, 1977). Additionally, *Calder v. Bull* is also seen as an endorsement of natural law and as a principle by which judges may annul legislation rejecting the trend towards legislative supremacy by CALVIN R. MASSEY, *THE NATURAL LAW COMPONENT OF THE NINTH AMENDMENT*, 61 U. Cin. L. Rev. 78 (1992-1993).

¹¹ "In many of the cases cited by Haines, however, the judges appear to have assumed that they were applying principles or rights that were impliedly part of the constitutional contract – whether implied by the character of the contract or by the reasons the people entered it. In other words, on the basis of the natural rights or compact analysis, these judges argued that the people could not, in the absence of express provisions to the contrary, be presumed to have sacrificed certain natural rights." PHILIP A. HAMBURGER, *NATURAL RIGHTS, NATURAL LAW, AND AMERICAN CONSTITUTIONS*, 102 Yale L.J. 933 (1992-1993).

¹² See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

in the Declaration of Independence, creates any or even additional unenumerated rights.¹³

12. Having said the above, we do not see *Calder v. Bull* as a source and reference to natural law stands, nor to refer to unenumerated rights in the Constitution, but rather, to identify in a certain document (the Declaration of Independence) a standard to understand the extent and content of the rights established in the written constitution.

4.3. Deciding according to the principles of the Declaration as Calder's dictum would seem to suggest.

13. With a lack of criteria as to what method of interpretation should be used, the courts can produce injustice in the name of the constitution; something that would be precisely contrary to its intent of overriding the unfairness of strength as a parameter to take decisions in the state of nature.¹⁴

14. On the contrary, with the recognition of certain rules of interpretation in accordance to the fundamental principles of the social compact, the decisions of the judiciary would not be the target of its traditional criticism in the sense that it is revolutionary, usurping, and that throughout its decisions it is constitutionalizing a possible encroachment of powers as well as the consolidation of its own political will or ideology in the Constitution, most probably, against the original intent of the framers.¹⁵

15. In this sense, is the judiciary becoming a social reformer? If it breaks the status quo, yes, but then it could be claimed that it is usurping powers that do not correspond originally to the courts; but if the status quo has been broken by the courts because the factual situation had turned out to be incompatible with the main principles of the constitution, namely, with the nature of the social compact, then its role is of restoration, not usurpation. In

¹³ In this sense, contrary to what prof. Edward Foley thinks, we do not consider *Calder's* dictum as mainly, or even exclusively dealing with the question of unenumerated rights. See EDWARD B. FOLEY, *THE BICENTENNIAL OF CALDER v. BULL: IN DEFENSE OF A DEMOCRATIC MIDDLE GROUND*, 59 Ohio St. L.J. 1600, 1605 (1998).

¹⁴ This thought is applicable to the United States since from the moment they obtained independence from Britain, falling into a hypothetical state of nature, they celebrated a new covenant and a constitution, to override strength and anarchy through reason and the rule of law in American society. The fact that the Constitution replaced the Articles of Confederation as the complementary document to the first great covenant, i.e. the Declaration of Independence, is by all means irrelevant for purposes of analyzing one document in the light of the other, because due to the fact that the first covenant was not broken, the dispositions of the Constitution must be considered to retroact themselves, for purposes of interpretation and security of the great principles of the social compact, to the moment of the creation of the American nation.

¹⁵ See CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION*, 2-3 (Harvard University Press, 1993) with regard to the fact that all matters regarding the constitution have been seen with a certain eye of partisanship.

this last case, the judiciary would be exercising the powers for which it was conceived.

16. This being said, how to interpret a social compact is the first question we ought to ask ourselves before entering into the contents of the principles to apply to this proposed method of interpretation that seeks a “restoring” judiciary, not an usurping one.

4.3.1. *How to interpret a social compact constitution.*

17. To be coherent with our theory, let us see what Burlamaqui establishes with regard to the interpretation of a compact of political nature: In the Third part of his *Éléments de Droit Naturel*, Burlamaqui consecrates Ch. XV to the manner in which to interpret covenants and laws, and from there we may draw some interesting principles on how to interpret a social compact.

18. Within the rules of interpretation, Burlamaqui identifies, among others, the nature of the matter, and the reason behind the law or covenant, this is, the views and motivations of the legislator or the parties involved.¹⁶ While explaining this last one, Burlamaqui states:

“It is a constant maxim (...) that it is necessary to explain a law or a covenant in accordance to their objective, and that any interpretation contrary to those ends must be rejected.

The reason behind this principle is evident: what determines the true meaning of a covenant or a law, is the intention of the legislator or the contracting parties, & that intention consists in the views and the ends they have set to themselves.”¹⁷

19. As we can see from the referred citation, an interpretation compatible to Burlamaqui’s social contract theory tends to look at the nature or principles upon which the law relies much more than to the letter of the law itself, since that could give rise to several and diverse interpretations especially if the text is not really clear.

20. Another reference we will use to set the rules of interpretation of a social compact is that of Story. On this regard, Story’s ideas on interpretation

¹⁶ See JEAN JACQUES BURLAMAQUI, *ÉLÉMENTS DU DROIT NATUREL*, 328-329 (Librairie Philosophique J. Vrin, 1981) (facsimile edition of the Lausanne 1783 edition).

¹⁷ *Idem* at 337. With respect to this last principle, Burlamaqui prefers to look at the end and nature of a law than the somewhat narrow and treacherous intent of the legislator, especially when there is no certainty of what his real intention was: “When we want to explain a law, a covenant or any other act, we try to seek what was the intention of the author; and since we cannot know his intention but through the signs he used to manifest it, or the circumstances in which he was surrounded, it follows that any interpretation is based on conjectures, since we cannot judge on the intent of the author but through the most tangible signs that accompanied the statement of his will.” *Id.* at 327-328.

should allow us to link them to the ideas expressed by Burlamaqui on the subject since it is interesting to note that in his analysis of the social compact doctrine that prevailed in the Eighteenth Century, Joseph Story had no remorse to cite directly from the texts of Jean Jacques Burlamaqui.¹⁸

21. Furthermore, it is also useful to see that Story establishes that “society is instituted for the general safety and happiness”¹⁹, a reference that can make us presume a certain degree of affinity with Burlamaqui’s conceptions. This having been said, and having similar conceptions as a starting point, it is reassuring to know that Story suggests that the constitution has to be interpreted in such a way as to avoid any obvious mischief, while on the other hand promoting the public good.²⁰ Moreover, he suggests that “a constitution of government, founded by the people for themselves and their posterity, and for objects of the most momentous nature, for perpetual union, for the establishment of justice, for the general welfare, and for the perpetuation of the blessings of liberty, necessarily requires, that every interpretation of its powers should have a constant reference to these objects. No interpretation of the words, in which those powers are granted, can be a sound one, which narrows down their ordinary import, so as to defeat those objects. That would be to destroy the spirit, and to cramp the letter.”²¹

22. In a few words, the social compact ought to be interpreted in accordance to its object, ends and its nature. A rule of interpretation that seems to be compatible with a republican view of government, as defined by prof. Morton Horwitz, in the sense that law would be interpreted as the vehicle to fulfill the aspirations of the American people.²²

¹⁸ See 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES; WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES, BEFORE THE ADOPTION OF THE CONSTITUTION, 293 (Hilliard, Gray and Company, 1833).

¹⁹ *Idem* at 299.

²⁰ *Ibidem* at 404.

²¹ *Ibidem* at 406.

²² “The central focus of law and republicanism in American history ought to be on the normative and constitutive character of law. Liberalism regarded law as a necessary evil and viewed it as the price individuals had to pay for a reasonable degree of security. The republican vision, on the other hand, defined law as constitutive of culture and as potentially positive and emancipatory. Under the republican view, law could create structures that enabled individuals and communities to fulfill their deepest aspirations.” MORTON J. HORWITZ, REPUBLICANISM AND LIBERALISM IN AMERICAN CONSTITUTIONAL THOUGHT, 29 Wm. & Mary L. Rev. 73 (1987-1988). Also, on the aspirational character of the Constitution, the opinion Chief Justice Stone in *United States v. Classic* (313 U.S. 299, 1941) is revealing: “We read its words (...) as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government.”

4.3.2. *What does it mean to interpret the constitution according to its ends and nature.*

23. Now that we have established that constitutional interpretation ought to be in accordance to the nature, ends and aspirations of the social contract, we have to make ourselves the following set of questions: What is the end of the social compact? What is the position of individual rights in front of social rights? Does the social compact set aside groups to favor the individual? Or does the individual waive his preponderant position *vis à vis* the group at the moment he leaves the state of nature for his overall good?
24. With regard to the first question, the answer would seem to be that the overriding goal of a social compact, like it is the case of the Declaration of Independence and the Constitution, as a bloc, is to guarantee equality, life and liberty through the pursuit of happiness.
25. On this regard, there is a distinction between procedural and the classical substantive equality that can be seen in the Declaration. In the Declaration of Independence procedural equality means equal opportunities for the members of the social contract, a concept that is related more with the way and circumstances in which people live, rather than the classical concept of equality before the law. Furthermore, this procedural equality is intimately linked with the pursuit of happiness, and therefore is to be understood as a collective goal rather than as an individual one.
26. Taking that into account, it would also be useful to distinguish between happiness, and the pursuit of happiness: while the first one consists in an individual right, the second implies a duty that has to be performed by the State in order to guarantee sufficient conditions that allow for the fulfillment of the mentioned individual right.
27. Consequently, if the end of the social contract is the pursuit of happiness and the common welfare of the members of the body politic, and these are the conditions by which they sacrifice a certain amount of rights available in the state of nature, then, social rights, in a compact constitution, have to be understood as an essential part of the same constitutional scheme as long as they are a complement to make the individual liberties more effective. Otherwise, if we go back to the analogy of the state of nature, no rational human being would enter into a compact in which he would obtain more disadvantages than benefits.²³

²³ An interesting citation to go along what we just have stated is what John Hamilton said during the New York ratification debates: "There are two objectives in forming systems of government – *safety* for the people, and *energy* in the administration. When these objects are united, the certain tendency of the system will be to the public welfare. If the latter object be neglected, the people's security will be as certainly sacrificed as by disregarding the former. Good constitutions are formed upon a comparison of the liberty of the individual with the strength of government: if the tone of either be too high, the other will be weakened too much. It is the

28. The clauses of a contract must not constitute an unbearable burden to one of the parties, especially when part of the bargain are unalienable rights; therefore, if social rights can assert in a better way individual liberties of the whole, they can only be compatible with the ends of government because they are at the core of the pursuit of happiness guaranteed collectively by the State.
29. In this sense, social rights are at the heart of the social contract theory, more so, if we take into consideration that since the late sixteenth century, contractualists have seen as a natural limitation of the State all that which may prove harmful to the people, either by positive action or by omission; Burlamaqui is the champion of this school of thought by impairing to the pursuit of happiness positive obligations upon the State.
30. Unfortunately, the libertarian economic approach embraced after the adoption of the Constitution, especially during the late nineteenth century, by which the positive obligations of the State were limited, has prejudiced in a certain way this vision. As a result of this, we would have to disagree also with prof. Sunstein in the sense that in America social rights are a creation of the New Deal,²⁴ since they would appear to be included in the scheme of government provided for in the original compact that created the body politic, namely, the Declaration of Independence.
31. Interestingly though, according to Richard Epstein, the language surrounding Roosevelt's Economic Bill of Rights is a conscious imitation of the classical liberal position, imitating the language and structure of the Declaration of Independence. Also, he considers that the intent of such Bill is to reassure that these positive rights will not displace the older negative rights, but complement them.²⁵ The implication of that might be that in the

happiest possible mode of conciliating these objects, to institute one branch peculiarly endowed with sensibility, another with knowledge and firmness." See 2 ELLIOT, DEBATES, 316. What makes this passage of any worth is the statement that individual liberties are not to be taken as absolute, since for a government to be successful, there has to be an equilibrium between such liberties and the action of government.

²⁴ CASS R. SUNSTEIN, WHY DOES THE AMERICAN CONSTITUTION LACK SOCIAL AND ECONOMIC GUARANTEES?, 4, Chicago Public Law and Legal Theory Working Paper No. 36, January 2003, at <http://www.law.uchicago.edu/academics/publiclaw/resources/36.crs.constitution.pdf>. This would also mark a disagreement with the assumption made by Akhil Amar, in his book THE BILL OF RIGHTS, 300 (Yale University Press, 1998) and by David Strauss in DO CONSTITUTIONAL AMENDMENTS MATTER? 9, Chicago Public Law and Legal Theory Working Paper No. 05, November 1999, at <http://www.law.uchicago.edu/academics/publiclaw/resources/05.%20Strauss.Amendments1.pdf>, in the sense that the Sixteenth, Seventeenth and Nineteenth Amendments are the ones authorizing the federal welfare and regulatory state, since this would be done merely in accordance and to reaffirm the principles already stated in the social compact since 1776, and therefore implicit in it.

²⁵ *Cfr.* RICHARD A. EPSTEIN, SKEPTICISM AND FREEDOM, A MODERN CASE FOR CLASSICAL LIBERALISM, 117-118 (The University of Chicago Press, 2003). Although it would be

scheme presented by the founding fathers, social and individual rights were compatible, and therefore the language of the ones suits perfectly the others.²⁶

32. This would then lead us to determine from the “constitutionality bloc” an interpretation of individual liberties limited by positive obligations of the State to procure procedural equality and the pursuit of happiness to all of its citizens, in the same manner the Germans would develop their concept of *Daseinvorsorge*.

33. On this regard, according to German theories developed especially by Ernst Forsthoff, the State has to procure a minimum standard of living to its inhabitants: “*Daseinvorsorge*”. This view starts from the fact that man develops and lives in an environment surrounded of material and immaterial goods and services that determine the existence of man, in what is called a “living space” or *Lebensraum*.²⁷ This vital space can be divided into two kinds; dominated and effective. The “dominated vital space” is the one where man is master of himself, like it is with regard to material goods, property, cultivating one’s own backyard, etc. The “effective vital space” on the other hand, refers to the scope of implementing human life on things an ordinary individual has no control of, like public services, land use controls, etc. The more mankind develops, through human and technological progress, the more the “dominated vital space” is reduced, since men lose control over things; then, it is the duty of the State to compensate such situation by procuring men that “effective vital space” they need to procure for their own existence.²⁸

a little bit bold to pretend that a renown libertarian as prof. Epstein may be suggesting that social rights as presented by Roosevelt are compatible with the principles of the Declaration of Independence, it doesn’t seem to us like a farfetched conclusion, especially if these “truths become accepted as self-evident” and can be integrated within some of the self-evident truths of the Declaration, like the positive obligations of the State surrounding the assertion of the right to pursue happiness. Although in different terms, the same idea is also presented by JOHN DENVIR, *DEMOCRACY’S CONSTITUTION*, 45 (University of Illinois Press, 2001).

²⁶ Evidence of Thomas Jefferson and James Madison as being favorable to a certain form of social rights is provided by CASS R. SUNSTEIN, *WHY DOES THE AMERICAN CONSTITUTION LACK SOCIAL AND ECONOMIC GUARANTEES?*, 6-7, Chicago Public Law and Legal Theory Working Paper No. 36, January 2003, at <http://www.law.uchicago.edu/academics/publiclaw/resources/36.crs.constitution.pdf>.

²⁷ Care should be taken with the use of such term, since clearly we do not intend to use this *lebensraum* concept to justify any kind of territorial expansionism, on the contrary we will concentrate on the “effective vital space” and not on the “dominated vital space”, which could be very helpful in determining the degree of State intervention required to assure every citizen the opportunity to pursue his own happiness. For further reference on this topic, see generally, MANUEL GARCÍA-PELAYO, *LAS TRANSFORMACIONES DEL ESTADO CONTEMPORANEO* “[The Transformations of the Contemporary State] 26-30 (Alianza Universidad, 1985).

²⁸ Now, summarizing this theory, lets imagine the shock of a man in the state of nature put into our twenty first century: the “*bon sauvage*” of which Rousseau spoke, transported to our present times. Unlike in his era, where he hunted his own food, made his own clothes, provided for his own security with a spear and his personal strength, in our age he would have to get educated in a prestigious and expensive school, have a decent job and earn a meaningful salary, in order to be

34. Taking that into consideration, the State must provide means to secure that minimum standard of living.
35. One of the things that can be done on this regard is to include this whole concept into the Human Rights catalog, either in the constitution or through ordinary legislation, like FDR's attempted Second Bill of Rights. The immediate result of such a conduct would seek as a result that people know their social rights and be able to render the State accountable for not procuring them with the necessary means to develop a free, healthy and happy life.
36. Also, this can be achieved by assuring this concept through direct intervention of the State in everyday life, by either managing resources and intervening directly, or by regulating these activities so that the individuals responsible of providing such minimum standards do not abuse of their "power".²⁹
37. In any case, we consider that it is irrelevant whether social rights have been expressly legislated or enumerated, since, if they are a vital part of the social contract through the pursuit of happiness, then, the principle and compatibility of social rights into the scheme of the compact has to be interpreted as a natural limitation to the enumerated negative rights in the

able to buy in a supermarket and eat that same raw piece of meat he once hunted, to buy a pair of jeans and a shirt, to pay taxes in order for police to protect him, etc.; add to that shock the fact that if he wanted to buy a spear, he would probably have to order it through the internet to an antiquarian store!

While in the state of nature he was completely the master of his own destiny, nowadays he would depend importantly on external factors to accomplish his wishes. This dramatic change, according to this theory, has to be guaranteed by the State to maintain social order and a good standard of living for everyone. Notwithstanding the alleged German authorship of this conception, this theory can also be seen, more or less, by what the French Administrative School of Law of the early twentieth century sustained. On this regard, it is useful to consult Léon Duguit's assertion that: "The foundation of public law, is not any more the subjective right of commanding, it is the organization and management rule of public services. Public law is the law of public services". LÉON DUGUIT, *LES TRANSFORMATIONS DE DROIT PUBLIC* [The Transformations of Public Law], 52 (Librairie Armand Colin, 1913).

²⁹ This conception is also compatible with the theory of social compact in which the vast majority of our constitutions is based, since assuring a minimum standard of living would only seem a fair bargain by someone willing to sacrifice its original liberties in the state of nature. The end of social and political association cannot be to the harm of at least one of the contracting parties. Therefore, the creation of the body-politic involves the obligation of the State to take care of its members, not only by securing them with police power, but also seeing that they live according to the expectations of having entered into a social contract. This doesn't necessarily mean converting the government into a gigantic "welfare state" bureaucracy, but at least obliging the State, through regulation or administrative agencies, to see that all services are justly provided, so that everybody has a fair access to them in the proportion of their needs and capacities. In this sense, this is fully compatible with the establishment of the pursuit of happiness as one of the primary ends of the political association in the Declaration of Independence.

Constitution, so that no construction of such rights can be made whereby it supersedes the collective right to the pursuit of happiness.

38. Furthermore, the fact that a constitution may contain social rights in “principle”, does not mean they have to be dogmatic³⁰ and therefore judicially unenforceable, since they can be defined, even indirectly, through legislation passed by Congress as long as it does not contravene the basic framework of the constitution and the other documents comprising the compacts. In this sense, when testing a law according to the text of the Constitution, the scope and extent of the liberties therein conceived will have to be compatible with social rights; consequently a law should not be struck down if its justification is compatible with the goal of assuring collectively the pursuit of happiness, regardless of the fact that an individual liberty may seem to contravene such purpose, because, as we have said, individual rights are limited by the rights of the collectivity when entering the compact.

39. Despite what we have just stated, it is necessary to keep in mind too, that the justiciability of social rights cannot be absolute and without restraints: You cannot order the State to act beyond its possibilities. Budgetary and other limitations arise. Nevertheless, it is not sufficient to say that because the State does not have the possibility of raising taxes to the extent of providing everyone with food, housing or healthcare, we should ban social rights from the framework of the constitution, because in this case we would deprive the constitution of its aspirational character under the covenant entered by the sovereign people when creating the nation, and then, when setting the structure of government to achieve the goals of their association. This implies also the protection of groups and minorities that bring diversity and enriches social life within the state. Social rights as well as individual rights are then at the basis and foundation of the social contract.

40. Taking the aforesaid concepts into account, we can say that the overall goal of the American Constitution has been shortsighted from the moment we lose the perspective of interpreting it as a social compact.³¹ For more than two hundred years and questionable resolutions like *Dred Scott*, *Plessy* or

³⁰ In this point we disagree with Cass Sunstein in WHY DOES THE AMERICAN CONSTITUTION LACK SOCIAL AND ECONOMIC GUARANTEES?, 16, Chicago Public Law and Legal Theory Working Paper No. 36, January 2003, at <http://www.law.uchicago.edu/academics/publiclaw/resources/36.crs.constitution.pdf>.

³¹ Taking on prof. Sunstein’s concept of the “partial constitution” -see CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION, v (Harvard University Press, 1993)-, the constitution would seem to be partial since it is not seen as a whole, it is not only for the courts to interpret it at will, but it is meant as an instrument for the whole nation, as a set of rules that help define an aspirational way of life to achieve a greater goal: be it social peace, general welfare, common good, the pursuit of happiness, etc. This aspirational aspect has been forgotten by the courts due to the fact that the Constitution does not have it expressly and one must find it as part of a compact together with the Declaration of Independence, which provides these first great principles of which Chase spoke about in *Calder*.

Lochner, to name a few, shortsighted interpretations have prevented the Constitution to be seen, for large periods of time, as a document that is part of a larger framework intended to provide everyone the possibility of self realization within a favorable social environment that will help them to pursue their individual goals in life by overriding artificial inequities; in a couple of words, with a constitutional setting that provides not only for individual rights, but also, for social rights that tend to limit negative rights in as far as such limitation provides for a more effective pursuit of happiness of the collective body of the nation.

V. A PRACTICAL EXAMPLE OF INTERPRETING THE CONSTITUTION AS A SOCIAL COMPACT: *LOCHNER V. NEW YORK*.

41. For the sake of shortening the analysis in this work, we have picked *Lochner* as the “representative” landmark case to test through the principles of the Declaration of Independence, namely, through the pursuit of happiness; but the reasoning would apply to most of the landmark cases, as previously mentioned, and in many of them, as it would be the case of *Dred Scott* or *Plessy v. Ferguson*, the result using this test would have been the opposite of what the Courts resolved.

42. As far as *Lochner* is concerned, we will first analyze summarily³² the facts surrounding the case as well as the majority and dissenting opinions, to concentrate on deciphering the meaning of *Lochner*, what the result of the case would have been had the Supreme Court used a test based on the principle of the pursuit of happiness as a collective right, to finally see to what extent this test could avoid mistakes like *Lochner*.

5.1. *Lochner v. New York*, the facts of the case.

43. Joseph Lochner, the owner of a bakery in the City of Utica, Oneida County, in the State of New York was convicted of a misdemeanor on an indictment for the violation of section 110 of article 8, chapter 415 of the Laws of 1897, known as the New York “Labor Law”,³³ which established a maximum number of hours of work in bakeries per day or per week. Further sections of the statute³⁴ established restrictions to employers regarding ventilation,

³² Due to the extensive literature existing on *Lochner v. New York*, we will merely make a short recap of the background and contents of the opinions as a frame of reference to our reasoning.

³³ Section 110 of the New Statute established:

110, Hours of labor in bakeries and confectionery establishments.-- No employee shall be required or permitted to work in a biscuit, bread, or cake bakery or confectionery establishment more than sixty hours in any one week, or more than ten hours in any one day, unless for the purpose of making a shorter work day on the last day of the week; nor more hours in any one week than will make an average of ten hours per day for the number of days during such week in which such employee shall work.

³⁴ See sections 111 to 115.

sanitary, health and security measures in biscuit, bread, or cake bakery or confectionery establishments.

44. The conviction was ruled by the county court upon an indictment consisting in a misdemeanor, second class; after the trial, Joseph Lochner was sentenced to a fine of fifty dollars and to stand committed until paid, not to exceed fifty days in the Oneida County Jail. Upon the appeal filed by Mr. Lochner, the conviction was affirmed by the New York Supreme Court, appellate division, fourth department. A further appeal was also affirmed by the Court of Appeals of the State of New York, before being argued upon a writ of error filed by Mr. Lochner before the Supreme Court of the United States in February 1905 and decided in April 17 of that same year.

5.2. The Majority Opinion in *Lochner*.³⁵

45. The majority of the Court, through Justice Peckham's opinion, held that the New York statute was unconstitutional since it consisted in a restriction and interference "with the right of contract between employer and employees concerning the number of hours in which the latter may labor in the bakery of the employer"³⁶ and that the "general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution."³⁷

46. On this regard, no State can deprive a person of his life, liberty, or property without a due process of law unless there are circumstances that exclude the right from the protection of the Amendment. One of such "circumstances" fall under what has been termed as the "police powers."³⁸ Notwithstanding that the State has a police power under the Constitution, the Court held that such police power and the state's interest had to be balanced against the liberty of contract,³⁹ and that in any case it was necessary to test whether the exercise of the police power by the State was reasonable and within the limits of legislating for the safety, health, morals and general welfare of the public, or an arbitrary interference with the right of personal liberty to contract under the 14th Amendment.⁴⁰

³⁵ *Lochner v. New York*, 198 U.S. 45 (1905).

³⁶ See 198 U.S. at 53.

³⁷ See *idem*.

³⁸ "The state, therefore, has power to prevent the individual from making certain kinds of contracts, and in regard to them the Federal Constitution offers no protection." *Ibid.* at 53.

³⁹ "It must, of course, be conceded that there is a limit to the valid exercise of the police power by the state. (...) Otherwise, the 14th Amendment would have no efficacy and the legislatures of the states would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be." See 198 U.S. at 56.

⁴⁰ "Therefore, when the state, by its legislature, in the assumed exercise of its police powers, has means of livelihood between persons who are sui juris (both employer and employee), it becomes of great importance to determine which shall prevail, - the right of the individual to labor for such time as he may choose, or the right of the state to prevent the individual from laboring, or

47. Following this standard of reasoning, the Court concluded that the determination of the maximum number of hours in the New York statute was an unreasonable interference with the liberty to contract, since on one hand it is a matter that does not involve directly the health and safety of a baker, which made previous precedents inapplicable,⁴¹ and on the other, it constituted an unfair and unreasonable use of the police power since the statute prevented the employee's desire to "earn extra money which would arise from his working more than the prescribed time (...) [in the] statute"⁴² through the exercise of his freedom of contract while only relating to public health in a remote degree.⁴³ On these aspects, the Court held that "[t]here must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty."⁴⁴ Therefore, if the law "is not, within a fair meaning of the term, a health law, [it is] (...) an illegal interference with the rights of individuals (...) to make contracts regarding labor upon such terms as they may think best."⁴⁵ In conclusion, the Court found to reverse the judgment:

"[T]hat the limitation of the hours of labor as provided for in this section of the statute under which the indictment was found, and the plaintiff in error convicted, has no such direct relation to, and no such substantial effect upon, the health of the employee, as to justify us in regarding the section as really a health law. It seems to us that the real object and purpose were simply to regulate the

from entering into any contract to labor, beyond a certain time prescribed by the state." See *idem* at 54.

⁴¹ One of the precedents the Court considers inapplicable to the case is *Holden v. Hardy* (see 169 U.S. 366) which involved a law of the State of Utah limiting the maximum number of hours miners could work in an underground mine; the case was distinguished upon the ground that the ruling of the court relied on a due exercise of the police power of the state, since the safety and health of the miners was clearly at stake; nevertheless, such criterion did not apply to bakers, since it was not considered that bakers' health was at stake, nor that they constituted a disadvantaged class, like coal workers or miners, and that therefore, the conditions of contract were in equal terms; the Court uses the term *sui iuris*. See *ibid.* at 54-55, 57 and *supra n.* 171.

⁴² See *ibid.* at 52-53. Also, on this regard, the Court would determine that if the statute was to be held as valid, "[n]o trade, no occupation, no mode of earning one's living, could escape this all-prevailing power, and the acts of the legislature in limiting the hours of labor in all employments would be valid, although such limitation might seriously cripple the ability of the laborer to support himself and his family." *Id.* at 59.

⁴³ See *ibid.* at 57. Also, the court established that "[t]he act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor." *Id.* at 57-58. On this question, although the Court established in a dictum that other sections of the statute (111-115) were a due exercise of the police power of the state, this did not apply to section 110 since the number of hours a baker decides to work would not be a health related issue and would be "wholly beside the matter of a proper, reasonable, and fair provision as to run counter to that liberty of a person and of free contract provided in the Federal Constitution." *Id.* at 62.

⁴⁴ *Id.* at 59.

⁴⁵ *Id.* at 61.

hours of labor between the master and his employees (all being men, Sui juris), in a private business, not dangerous in any degree to morals, or in any real and substantial degree to the health of the employees. Under such circumstances the freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution.⁴⁶

5.3. The Dissents.

48. The decision in *Lochner* was adopted in a five to four majority, being that Justices Fuller, Brown, Brewer and McKenna voted in favor of Peckham's opinion, while there were two dissents: one by Justice Harlan with whom Justices White and Day concurred and another by Justice Oliver Wendell Holmes.

5.3.1. Justice Harlan's dissent.⁴⁷

49. The minority dissent written by Justice Harlan considered broadly that the judgment of the Court of Appeals of the State of New York should have been affirmed since section 110 of the New York Statute would not have been in violation of the 14th Amendment and was, on the contrary, a due exercise of the police power of the state.

50. On this regard, the dissenting opinion starts by citing previous case law⁴⁸ in saying that the 14th Amendment was not designed to interfere with the power of the state to prescribe regulations to promote the health, peace, morals, education and good order of the people.

51. In what appears to be an open argument against substantive due process, Justice Harlan seems to be considering the right of the 14th Amendment as merely procedural, since it establishes that even if the Constitution protects the freedom of contract against undue interference by the state, "the right to contract in relation to persons and property may be 'regulated, and sometimes prohibited, when the contracts or business conflict with the policy of the state as contained in its statutes.'"⁴⁹

52. In the same line of reasoning, he cites *Holden v. Harding* by establishing clearly that the Court had already recognized that the "right of contract, however, is itself subject to certain limitations which the state may lawfully impose in the exercise of its police power."⁵⁰

⁴⁶ *Id.* at 64.

⁴⁷ *Lochner v. New York*, 198 U.S. 65 (1905).

⁴⁸ See *Barbier v. Conolly*, 113 U.S. 27, 28.

⁴⁹ *Lochner v. New York*, 198 U.S. 66. The citation within the quote is from *Allgeyer v. Louisiana*, 165 U.S. 578.

⁵⁰ See *Holden v. Harding*, 169 U.S. 366.

53. Therefore, the police power can lawfully be resorted to limit the freedom of contract for the purpose of preserving the public health, safety or morals, or the abatement of public nuisances, as long as there are reasonable grounds that this is so; this because the police power cannot be put forward as an excuse for oppressive and unjust legislation.⁵¹
54. Consequently, as resolved by the Court in *Jacobson v. Massachusetts*,⁵² Justice Harlan considers, just like the majority of the Court, that the courts have the power to review legislative action “in respect of a matter affecting the general welfare (...) only ‘when that which the legislature has done comes within the rule that, if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law’ (...).”⁵³
55. With regard to this point, and notwithstanding the resemblance with the majority opinion on the idea that the court may exercise their power of review in some cases, there are two main differences: first, the scope and extent given to the 14th amendment, and second, the fact that Justice Harlan considers that there is a relation between the New York statute and the object sought (to protect the safety and health of the bakers of New York).
56. Prior to determining the constitutionality of the New York “labor law”, Justice Harlan considers also that the burden of proof of the unconstitutionality of a statute is upon the Court who considers it unconstitutional, and that if there is no plain and full proof of the unconstitutionality, in case of doubt, the courts must hold the statute as valid.⁵⁴
57. Once this is established, with regard to the statute in question, he considers that it is “plain that this statute was enacted in order to protect the physical well-being of those who work in bakery and confectionery establishments”⁵⁵, since “labor in excess of sixty hours during a week in such establishments may endanger the health of those who thus labor.”⁵⁶ Also, when asking himself on whether the Court may test this legislation as to the means to an end, he concludes that it is “impossible, in view of common experience, to say that there is here no real or substantial relation between the means

⁵¹ See *Lochner v. New York*, 198 U.S. 67. On this aspect, Justice Harlan is also following *Gundling v. Chicago*, 177 U.S. 183.

⁵² See 197 U.S. 11.

⁵³ See 198 U.S. at 68

⁵⁴ *Idem*.

⁵⁵ See *ibid.* at 69.

⁵⁶ *Id.*

employed by the state and the end sought to be accomplished by its legislation.”⁵⁷

58. As a consequence of the above, he sees no reason to consider: (i) that the statute has no connection with the protection of the health of bakers, (ii) that it consists in an utterly unreasonable and wholly arbitrary legislation, or (iii) an extravagant invasion of rights secured by the fundamental law.⁵⁸

59. If working more than ten hours a day, or sixty hours a week in a bakery can reasonably endanger the health and shorten the lives of the workmen, then the judiciary should not interfere in the exercise of the police power of the state, and since the unconstitutionality or inconsistency is not palpable or plain, Harlan considers the duty of the Court to “sustain the statute as not being in conflict with the Federal Constitution.”⁵⁹

60. Finally, Justice Harlan condemns the majority opinion of seeking a high degree of judicial activism beyond its purported mission by saying that “this court will transcend its functions if it assumes to annul the statute of New York,”⁶⁰ since “[a] decision that the New York statute is void under the 14th Amendment will (...) involve consequences of a far-reaching and mischievous character; for such a decision would seriously cripple the inherent power of the states to care for the lives, health, and wellbeing of the citizens”⁶¹ and “[n]o evils arising from such legislation could be more far reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and upon grounds merely of justice or reason or wisdom annul statutes that had received the sanction of the people’s representatives.”⁶²

5.3.2. Justice Holmes’ dissent.⁶³

61. Holme’s dissent, which has become famous, rests on several premises:

62. First of all, he considers that it is regrettable that the majority decides upon an economic theory, since the:

⁵⁷ *Ibid.* On this regard, further down in the opinion, Justice Harlan will cite several studies regarding the safety and health conditions in bakeries and why, to protect the health of the bakers, it is something reasonable to limit the number of hours the bakers are exposed to the ovens, the inhalation of powder, etc. On this aspect, see *ibid.* 70-72.

⁵⁸ See *ibid.* at 69-70.

⁵⁹ *Ibid.* at 73.

⁶⁰ *Ibid.* at 70.

⁶¹ *Ibid.* at 73.

⁶² *Ibid.* at 74.

⁶³ *Lochner v. New York*, 198 U.S. 74 (1905).

63. "Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire. It is made for people of fundamentally different views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."⁶⁴

64. Consequently, Justice Holmes considers that the decision of cases should be free of ideology and that it is not the mission of the Court to agree or disagree with the opinions that the majority have stated in their laws.⁶⁵ He also states that such has been the behavior of the Court in the past, when deciding on the validity of other limitations of the freedom of contract passed by numerous legislatures.⁶⁶ In this case, if the decision of the majority of the Court is accepted, Holmes considers that it would pervert the meaning of the word "liberty" in the 14th Amendment, unless it can be demonstrated that every "rational and fair man" would agree that the statute in question goes against the fundamental principles "as they have been understood by the traditions of our people and our law";⁶⁷ unfortunately, no such "sweeping condemnation can be passed upon the statute before us" since a reasonable man can very well think that the statute is a "proper measure on the score of health."⁶⁸

65. In a few words, Holmes considers that the Court does not have the elements or the right to reverse the judgment according to the text of the 14th Amendment, since there would be sufficient rationality in the statute as to consider it constitutional.

5.4. The meaning and consequence of *Lochner*.

66. In *Lochner*, the Court decided by a majority vote that the State could not intervene in matters germane to the freedom of contract, unless there was a direct relation between the means and the end in order to justify an intervention in such right defined as a fundamental one protected by the 14th Amendment. In this sense, by setting a high degree of scrutiny, the Court sought neutrality from the state in market ordering, in a manner that it

⁶⁴ *Id.* at 75-76. On this same aspect: "The 14th Amendment does not enact Mr. Herbert Spencer's Social Statistics." *Id.* at 75.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.* Among the limitations of the freedom of contract that Holmes cites and considers applicable to the case, is *Holden v. Hardy*, which was disregarded by the majority. See *supra n.* 172.

⁶⁷ *Id.* at 76.

⁶⁸ *Idem.*

respected the behavior of private actors without altering the state of things, like the distribution of wealth and entitlements.⁶⁹

67. It seems, like Justice Holmes criticized, that one of the aspects *Lochner* is protecting is the prevention from any kind of state intervention in economic matters, in a way that the market is solely regulated by the “invisible hand” Adam Smith talked of. Through the harmonization of the police power with the Fourteenth Amendment, the *Lochner* Court determined that there was no constitutional authorization for the state to change the *status quo* in all matters related to property, contracts or economic activity.⁷⁰

68. It has been an endless debate on whether *Lochner* is the creator of the “substantive due process doctrine” or if it was a mere application and interpretation of the police powers,⁷¹ but the reality is that a general criticism to the decision of the majority of the Court is in the sense that it relied upon a very broad understanding of the 14th Amendment and of the concept of “liberty”. Even if *Lochner* is not the first case where the traditional understanding of liberty, as a physical restraint, was abandoned to include, alongside the concept of property, “freedom of contract”,⁷² it is the one that stretched its consequences to a point where the Court was in a position to decide on the constitutionality of the substantive content of every law, be it state or federal. Freedom of contract then became a constitutional value so

⁶⁹ “For the *Lochner* Court, neutrality, understood in a particular way, was a constitutional requirement. The key concepts here are threefold: government inaction, the existing distribution of wealth and entitlements, and the baseline set by the common law. Governmental intervention was constitutionally troublesome, whereas inaction was not; and both neutrality and inaction were defined as respect for the behavior of private actors pursuant to the common law, in light of the existing distribution of wealth and entitlements. Whether there was a departure from the requirement of neutrality, in short, depended on whether the government had altered the common law distribution of entitlements. Market ordering under the common law was understood to be a part of nature rather than a legal construct, and it formed the baseline from which to measure the constitutionally critical lines that distinguished action from inaction and neutrality from impermissible partisanship.” CASS R. SUNSTEIN, *LOCHNER’S LEGACY*, 87 Colum. L. Rev. 874 (1987)

⁷⁰ *Lochner* seems to be deciding that supporting the disadvantaged through governmental action is not neutral, it is partisan, and therefore constitutes an intrusion by the government into areas where it should not intervene; in other words, the intervention of the state would be in violation of individual rights. But if, as we have seen, individual rights were recognized and framed upon the assumption that every citizen entered the social contract to pursue its own happiness, if the disadvantage is not natural, but the product of the action of men, then, the State, as supreme regulator of social relations, may have the duty to compensate the disadvantaged parties in order to generate conditions that create a sense of equal opportunities. On this aspect, see *infra* 5.5.

⁷¹ On this matter, prof. White has stated: “When courts used the Due Process Clauses to strike down ‘social legislation’ in the late nineteenth and early twentieth centuries, they were not thought of as doing so because they were giving ‘substantive’ reading of those clauses. They were thought of as doing so because the legislation in question had failed to demonstrate that it was an appropriately ‘general’ use of the police powers, as distinguished from an inappropriately ‘partial’ one.” G. EDWARD WHITE, *REVISITING SUBSTANTIVE DUE PROCESS AND HOLME’S LOCHNER DISSENT*, 63 Brook. L. Rev. 89 (1997)

⁷² See *Allgeyer v. Louisiana*, 165 U.S. 578.

fundamental, that it would preempt all notions limiting the right of individuals to make economic decisions.⁷³

69. Nevertheless, the “freedom of contract” is not an express part of the Fourteenth Amendment, nor of any other provision of the Constitution; the *Lochner* Court, just as Justice Harlan seems to be criticizing in its dissent,⁷⁴ would have gone so far in interpreting the Fourteenth Amendment that it gave substantive content to a procedural right, to the extent of incorporating as a fundamental right a right that did not have such characteristic.⁷⁵

70. On this regard, *Lochner* marks an era of the Court where it chose to protect selectively some values over others; be it that they were or not protected in the Constitution, or incorporated through a broad interpretation of the due process clause of the 14th Amendment. It is an era that, beyond the notion of “substantive due process”, marks a certain degree of judicial interventionism or encroachment in the legislative power, due to broad interpretations of the clauses of the Constitution that permitted the inclusion as fundamental values some that are not, alongside the lack of a standard of restraint to the interpretations of the Court. This is what has made of *Lochner* a decision so widely criticized.⁷⁶

71. In this regard, *Lochner* is a decision that gave the court the power to strike down all social legislation for more than 30 years by choosing to uphold the “freedom of contract” above all notions of social or collective rights. Also, it proved that the Court could easily define the extent of its power by giving substantive meaning to several constitutional provisions that may not have been intended for the purpose they were used; it proves to be one of the high points of judicial activism, one of usurpation, not restoration.

⁷³ “The *Lochner*-era Court (...) treated freedom of contract as a cornerstone of the constitutional order and systematically undervalued reasons for limiting or overriding the right. It is one thing to enforce freedom of contract in a limited and qualified way; it is quite another to make freedom of contract a preeminent constitutional value that repeatedly prevails over legislation that, in the eyes of elected representatives, serves important social purposes. (...) [T]he *Lochner* Court’s error (...) was that it did the latter rather than the former.” DAVID A. STRAUSS, WHY WAS LOCHNER WRONG? 70 U. Chi. L. Rev. 375 (2003).

⁷⁴ See *supra* 5.3.1.

⁷⁵ With regard to this aspect, prof. David Strauss says: “Freedom of contract, unlike freedom of speech, for example, is not mentioned in the text of the Constitution. Its basis was the oxymoronic notion of ‘substantive due process.’ There is no problem, on this account, when the courts enforce rights that are in the Constitution; the problem arises when they enforce rights that they have just made up themselves.” DAVID A. STRAUSS, WHY WAS LOCHNER WRONG? 70 U. Chi. L. Rev. 378-379 (2003).

⁷⁶ Speaking about the “Lochner Era”, John Hart Ely says: “That era is presently in bad odor, but by large it is the particular values the Court chose to protect – notably ‘liberty of contract’ – and not the general methodology of identifying fundamental values and enforcing them on the political branches, that has come in for criticism.” JOHN HART ELY, THE SUPREME COURT 1977 TERM, FOREWORD: ON DISCOVERING FUNDAMENTAL VALUES, 92 Harv. L. Rev. 15 (1978-1979).

5.5. *Lochner* tested through the pursuit of happiness, and the justification of the “Labor Law” of New York.

72. As we have seen along this whole work, if the Declaration set the foundation of the nation, and both the Constitution and the state constitutions derive from this founding, then the same principle ought to rule the Federal Constitution and the states, either by the incorporation clause of the fourteenth amendment, or directly as a founding principle of a state constitution. If this is so, and the Federal Constitution and federal laws ought to be interpreted through the glass of the pursuit of happiness, as one of the main objectives of the social compact contained in the Declaration, so is the case of state constitutions and state legislation. Consequently, the pursuit of happiness as a principle of interpretation would also apply to the 1897 “Labor Law” of New York.

73. Therefore, if the pursuit of happiness includes not only the setting of negative obligations to the State, but also of positive obligations, then it is reasonable to consider that the use of the police powers of a state in order to regulate health, safety and the general welfare of several groups within the social compact, even if it means a limitation to individual rights as long as the rights of the whole are asserted in a more effective way, it will always be a reasonable and fair use of legislative power.⁷⁷

74. On this regard, contrary to what the majority of the court decided in *Lochner*, through the lens of the pursuit of happiness it would have been very easy to determine the existence of a direct relation between establishing a maximum amount of allowed hours for bakers to work at the bakery and the safety and public health arguments, in a similar manner to what the New York Court of Appeals argued when affirming the conviction of Joseph *Lochner*.⁷⁸

⁷⁷ “The mistake that the majority made in *Lochner* was not recognizing that legislation to prevent employers from coercing bakers into working long hours for low wages was a reasonable regulation of the liberty of contract. That the right to earn a living as a fundamental right does not mean that a worker can never be fired; it just means the firing must be justified. Neither does it mean that legislatures cannot intervene to protect workers’ rights by means of reasonable regulation.” JOHN DENVIR, *DEMOCRACY’S CONSTITUTION*, 38 (University of Illinois Press, 2001).

⁷⁸ On this point, it is interesting to see that:

“The majority of the New York Court of Appeals had little trouble seeing the connection between the hours and public health. In his opinion for the court, Chief Justice Parker noted that many medical authorities classified baking as an occupation that predisposes one to consumption. Justice Vann, in his concurring opinion, went further, cataloging medical and public health authorities which cited baking as an occupation whose workers were prone to tuberculosis.

The majority of the Supreme Court, however, disagreed.”

WENDY E. PARMET, *FROM SLAUGHTER-HOUSE TO LOCHNER: THE RISE AND FALL OF THE CONSTITUTIONALIZATION OF PUBLIC HEALTH*, 40 *Am. J. Legal Hist.* 499 (1996).

75. Besides the health issues, such as exposure to dust-inhaling,⁷⁹ more humane and hygienic working conditions of the bakers,⁸⁰ which relate more directly to the police power argument in the case, the most fundamental aspect of the New York statute was to seek an improvement in the quality of life of the bakers.⁸¹ If the principal aim of the statute was to seek a general improvement of living conditions of the bakers, even if this meant a restriction to several individual liberties,⁸² then, it is clear that the overarching end of the law is to seek better conditions of the collective body of bakers so that they can, as a group, have a better opportunities of pursuing their own happiness; by the assertion of the whole, every individual ends up benefiting from such collective liberties.

⁷⁹ “[R]eferences to the dangers posed by poor ventilation and dusty occupations are common in the public health literature of the turn of the century. (...) [I]t was well known that tuberculosis occurs more commonly in dust-inhaling professions.” WENDY E. PARMET, FROM SLAUGHTER-HOUSE TO LOCHNER: THE RISE AND FALL OF THE CONSTITUTIONALIZATION OF PUBLIC HEALTH, 40 Am. J. Legal Hist. 498 (1996). On this same aspect: “There also can be little doubt that the exposure problem was significant in the baking industry at the turn of the century.” *Idem* at 498.

⁸⁰ “Part of the journeymen bakers’ struggle for freedom was a struggle for more humane and hygienic working conditions. In 1883, George Block had described the sanitary conditions of the bakeries as ‘miserable’. He later amplified this theme in a pamphlet entitled ‘Slavery in the Baker Shops,’ in which he provided a vivid description of the bakers’ workplace (...)” MATTHEW S. BEWIG, LOCHNER V. THE JOURNEYMEN BAKERS OF NEW YORK: THE JOURNEYMEN BAKERS, THEIR HOURS OF LABOR, AND THE CONSTITUTION, 38 Am. J. Legal Hist. 435 (1994).

⁸¹ “For the bakers, the hours issue was a health issue with ramifications for what, in the late 20th century, would be termed ‘quality of life.’” See *idem* at 435.

⁸² “The (...) argument went even deeper by reasoning that the community has the right, even the duty, to take action to ensure that its members’ rights to the necessities of life are not frustrated.” MATTHEW S. BEWIG, LOCHNER V. THE JOURNEYMEN BAKERS OF NEW YORK: THE JOURNEYMEN BAKERS, THEIR HOURS OF LABOR, AND THE CONSTITUTION, 38 Am. J. Legal Hist. 449 (1994) On this same aspect:

“Here was a trenchant argument for the community’s right and duty to protect itself and its members from the destruction or deprivation wrought by the irresponsible or selfish use of individual economic rights. It was that theme – the right of the community, for the benefit of its less fortunate members, to supersede the private property or economic rights of individuals – that ran through the journeymen bakers’ agitation for shorter hours. These arguments go to the heart of Peckham’s reasoning by denying the major premise of his logic that individual economic rights trump the community’s economic rights.

Though the *Lochner* dissents reached a similar conclusion, they did not contemplate the radical inversion of Liberal individualism that the journeymen bakers’ arguments for shorter hours legislation embraced. The bakers looked first to the well-being of the community, and second to assertions of individual economic rights by its members. This view placed the economic rights of the community as a whole – and of its least economically powerful members – ahead of the economic rights that might be thought to inhere in individuals. Perhaps most importantly, this view involved a re-definition of liberty and freedom that recognized the centrality of access to the necessities of life to the enjoyment of other liberties, and a recognition that the freedom of all is a necessary pre-condition to the freedom of one.”

Id. at 450.

76. This aspect is clearly overlooked in both the majority and the dissenting opinions, to the degree that the reduction of working hours did not have as a purpose an economic aim (either to reduce the income of the bakers or to reduce unemployment), but to secure other freedoms that the bakers were seeking to enjoy, like: free and spare time, access to culture and education, better health and resting conditions, the involvement in other activities as citizens of the state, etc. Aspects that relate all to a more complete development of a person as a human being, and to the possibility of achieving happiness as the most important objective of the association out of the state of nature into the social contract.⁸³
77. Let us then say that in *Lochner*, the constitutionality of the statute was attacked from the limitation of individual rights set by a biased and erroneous conception of the social contract, much more than from constitutional provisions that would be more compatible with the great ends and principles of the social contract and the Declaration of Independence, such as the police power. On this regard, part of the Court's misconception in *Lochner* parts from the idea of a merely individualistic conception of society, and not of a communitarian vision of the social compact.
78. But if the limitation to individual rights is made by the state in protecting the public wellbeing or common well,⁸⁴ then it should be entitled to do so, as it is its duty under the social contract. Therefore, as part of its positive obligations, the state must provide constantly for better living conditions to all of its members; if such improvement is achieved by limiting the number of hours people may work in certain trades, or by limiting the freedom of contract, it is still a reasonable exercise of its duties according to the ends of the social contract, since individual rights can not set the limit to the guarantee by the state of the collective right to the pursuit of happiness.
79. On this regard, let us say also that even if the pursuit of happiness is thought of as a collective right, this does not mean that the state has a weapon to override individual liberty. The duty of the state is to guarantee, to the extent possible, the same conditions to all the members of the social contract. Equality of opportunities is here the engine that moves the state machinery. This justifies not only positive actions, but also, redistributive methods to secure that everyone, within its personal capabilities, have a fair chance of achieving their call in life. But, outside this specific sphere of

⁸³ "Such unbounded definitions of the interests protected by the happiness/safety clauses are not likely to be of use in modern constitutional adjudication. Courts inclined to follow the *Lochner* tradition do not need happiness and safety to bolster their views; liberty and property will do quite well. And outside the economic arena, if the pursuit of happiness is taken to mean whatever an individual may seek for herself, 'happiness' and 'liberty' become equivalent terms." JOSEPH R. GRODIN, *REDISCOVERING THE STATE CONSTITUTIONAL RIGHT TO HAPPINESS AND SAFETY*, 25 *Hastings Const. L.Q.* 27 (1997-1998).

⁸⁴ See see *supra* n. 56.

limitation of individual liberty, the state cannot interfere with other aspects of human life.⁸⁵

80. Consequently, if the reduction of hours allowed to work in bakeries was aimed to an end such as the improvement of living conditions and asserting the collective right to the pursuit of happiness by the bakers of New York, then, it is plain that the statute was constitutional and that the Court was shortsighted in deciding the matter as it did.

81. In this sense, in the case of *Lochner*, there wasn't even the necessity of having a second Bill of Rights or any additional positive legislation to provide any support to the statute, because the principles of the social compact in themselves provide already a limitation to the freedom of contract that was being protected by the due process clause of the Fourteenth Amendment. It is not the right to contract which was being discussed, but the freedom of contract, and in defining what freedom means, we have to look at the goals of the association, i.e. the first principles of the social contract. This being so, individual freedom is defined through its natural limitation: the collective right to the pursuit of happiness.

82. Consequently, the New York statute was compatible with the pursuit of happiness, which gives meaning and content to the 14th Amendment and the police powers of the states. Therefore it was a constitutional piece of legislation. Had the Court used a standard like the one we are proposing, most likely, no Court Packing Plan would have been necessary to force "the swing in time that saved the nine," materialized in *West Coast Hotel v. Parish*.⁸⁶

⁸⁵ One question that arises here is also the level of intervention of the state into human life, and the level of scrutiny that ought to be used to justify such a notion: "If the happiness and safety clauses are to have any independent significance as restraints upon governmental action, we will need to view them as denoting a more limited area of human activity, interference with which will trigger a level of scrutiny more stringent than mere rationality review. Here, the classical view of human happiness, derived from Aristotle and reflected in the writings of philosophers like Burlamaqui, might prove a useful point of departure. The right to pursue happiness, or the right to pursue and obtain happiness and safety, might be viewed as protecting individuals, absent adequate justification, from interference with those decisions and activities that may be deemed basic, or essential, to their identity and well being." JOSEPH R. GRODIN, REDISCOVERING THE STATE CONSTITUTIONAL RIGHT TO HAPPINESS AND SAFETY, 25 *Hastings Const. L.Q.* 27 (1997-1998).

⁸⁶ See 300 U.S. 379 (1937). On this aspect, let us say that "*West Coast Hotel* rests on an understanding that in any case, government –through minimum wage laws or the common law system- is making a choice. The common law could not be regarded as a natural or unchosen baseline. The traditional treatment of the police power was unable to survive this understanding. For the Court in *West Coast Hotel*, the baseline for analysis was instead a system in which all workers had a living wage." CASS R. SUNSTEIN, LOCHNER'S LEGACY, 87 *Colum. L. Rev.* 881 (1987). Now, as to "Why this change should have occurred is a complex matter. In part, the Depression was responsible; in a period of widespread poverty and unemployment, it became harder to see nineteenth century market ordering as in the interest of all. In part, the partial but increasing use of government power to alleviate suffering made the common law system seem less

5.6. The pursuit of happiness as a principle of interpretation that could avoid mistakes like *Lochner*.

83. *Lochner* has become to be renown as such a terrible decision, that prof. Ely even minted a neologism out of it, and “to lochner” would mean that the Court issued a decision as awful as *Lochner v. New York*.⁸⁷

84. It has been until now, the lack of a true standard of interpretation that embraces the aspirational vision of the founding generation that has permitted during the life of the Constitution great interpretational swings; going from *Holden v. Hardy* to *Lochner v. New York* and back to *West Coast Hotel v. Parish* in just forty years or so, while interpreting the same constitutional provisions is a proof of that. Many cases that are being resolved daily by the courts, involving fundamental questions as affirmative action, racial discrimination, state action, campaign regulation, freedom of speech, freedom of religion, etc., depend on notions of neutrality and inaction or on the other side, intervention, just like they were involved in *Lochner*.⁸⁸ While there is no standard of interpretation to follow, and while the discussion on cases like *Lochner* may be diverted to other topics such as judicial activism versus judicial restraint,⁸⁹ without focusing on the real ends of judicial intervention which is to preserve the great goals of the social compact, decisions like *Lochner* will be likely to occur in the future.

85. Therefore, a possible solution that we have depicted to prevent such a thing is to use the pursuit of happiness as a standard of interpretation of the constitution and the validity of the laws enacted by the legislatures. In this sense, being that the Declaration gives meaning to the Constitution, a more stable basis for interpretation by the courts could be provided, and many of

and less natural and inviolate.” *Id.* at 881 n. 42. Even if we partially agree with Prof. Sunstein, we should not overlook as a motor for the change in criterion by the Court the fact that an interpretation that goes against the great principles of the social association, eventually, will fall under the pressure of a test that it will not be able to resist.

⁸⁷ On this regard, see THOMAS C. GREY, DO WE HAVE AND UNWRITTEN CONSTITUTION?, 27 Stan. L. Rev. 711 n. 35 (1974-1975).

⁸⁸ On this aspect, Cass Sunstein establishes that: “Numerous decisions, in widely disparate areas of constitutional law, depend on *Lochner*-like baselines and similar principles of neutrality and inaction (...) The areas to be covered span a wide range, including affirmative action, campaign finance regulation, gender discrimination, the state action doctrine, the distinction between de facto and de jure discrimination, and judicial review of inaction by federal administrative agencies.” CASS R. SUNSTEIN, LOCHNER’S LEGACY, 87 Colum. L. Rev. 883 (1987).

⁸⁹ An interesting opinion on the misleading and out of focus perspective in the discussion of *Lochner* is provided by prof. Morton Horwitz, who has considered that: “Some of our most prominent legal thinkers have been able to return virtually unchallenged to *Lochner* Court assumptions in part because for almost fifty years constitutional historians have taught that the dispute concerned disembodied institutional ideas of legislative power and judicial restraint, not law as the embodiment of substantive visions of the good society.” MORTON J. HORWITZ, REPUBLICANISM AND LIBERALISM IN AMERICAN CONSTITUTIONAL THOUGHT, 29 Wm. & Mary L. Rev. 63 (1987-1988).

the legal discussions of decades could finally find a point of reference. On this regard, debating on whether the Constitution permits or not social rights, or if it is to privilege exclusively individual rights,⁹⁰ becomes completely irrelevant if we start to see the Constitution as a vehicle to fulfill the ends for which men in America formed a nation and an organized society. The Constitution is ahistorical and cannot be seen in the context of isolated historical events or political ideas. The Constitution was made to guarantee that all Americans obtain a fair chance to pursue their own happiness, and consequently, every interpretation contrary to that overriding end has to be considered as usurping and contrary to the will of the whole constituent body.

86. In this sense, it will only be when the courts start seeing legislation through the “eye” of the pursuit of happiness, that mistakes like *Lochner* and other “dark” cases in the judicial system’s history will be avoided.

VI. CONCLUSION.

87. *Calder v. Bull* and the interpretation of the Constitution as a social compact may still seem to most a fiction, even an obscure statement. In this line of argument, Chase’s statement may be considered as one of the most fundamental yet inconsequential dicta in the history of the Supreme Court. Had Chase not repented, had he followed the consequences of his thought to the end, the outcome of constitutional interpretation may have been completely different, and at least, in our view, more true to the aspirations of the framers. After analyzing Chase’s dictum of how to interpret the Constitution in accordance with the great principles of the social compact and seeing its possible implications (that go all the way to stating a balanced concept of liberty that allows a social or collective right as a complement to every individual right), we can only say that this interpretation could have allowed the American Constitution to be at the vanguard of constitution-making without having to change a single letter to its text.

88. Had Chase’s dictum prevailed, a different constitutional path could have been taken, more in accordance to the great principles embraced by the framers to avoid painful episodes that needed to be mended, like we saw with the case of *Lochner*; this process would take more than a hundred years to occur, passing through a civil war, the issue of equality, racial segregation, the absence of social rights as well as the need for artificial

⁹⁰ An interesting idea is here set by prof. Sunstein when stating that: “Here and elsewhere, it is misleading to understand the Constitution solely as a guarantor of ‘negative’ rights. (...) Whether rights are treated as ‘negative’ or ‘positive’ turns out to depend on antecedent assumption about baselines – the natural or desirable functions of government. State protection of private property and contract appears to be a ‘negative’ guarantee because it is so usual, indeed built into the very concepts of property and contract. Provision of welfare is treated differently because it is in some respects new and in any event hedged with limitations and reservations.” CASS R. SUNSTEIN, *LOCHNER’S LEGACY*, 87 Colum. L. Rev. 889 (1987).

legal constructions to reach some limited results; nevertheless, a satisfactory level of progress in some of the fields we have just mentioned, has not yet been possible in some of them, in part due to a lack of standard in judicial interpretation.

89. Interpreting the Constitution as a social compact provides us, despite this principle coming from a misunderstood and dark 1798 decision, with a contemporary interpretation well suited for the twenty first century American society that could perhaps end with so many shifts in interpretation by the Court and endless struggles to find accommodation at the margins of the great principles of the Constitution. Unfortunately, at this moment, there are no hints on achieving such a jurisprudential transformation and we will have to wait a long time, it would seem, before we could see the Constitution interpreted to provide for a collective right like the pursuit of happiness.