ABSTRACT

Balancing Liberty of Contract with Police Power: A Hobbesian Approach

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Modern liberal society exists by negotiating a fine balance between the liberty of the citizen and the authority of the state. Yet, as the years put distance between our founding principles and their execution, we have become forgetful of the symbiosis that unites individual and common goods. Particularly in American jurisprudence, we see a growing antagonism between personal liberties and the state's ability to act in the interest of the whole (known as its "police power"). The first and paradigmatic contest between these principles can be traced to the *Lochner v. New York* and its later repudiation in *West Coast Hotel v. Parrish*. *Lochner* and its ilk tend to overemphasize the interest of liberty at the expense of the public good. *West Coast Hotel*, on the other hand, so vehemently rejects the most radical components of *Lochner* that government regulation on behalf of the public good effectually supersedes even moderate liberty interests. Both approaches recur throughout the Court's history, and yet fail to achieve the necessary balance of liberty and the public good because they consider the matter as a dichotomy. My dissertation will explore our constitution's roots in social contract theory, looking

particularly to the thought of Thomas Hobbes for a third option that is consistent with the language and tradition of the Constitution, and is also more effectually viable than existing alternatives. Within a framework of social contract, individual liberty finds its fullest expression within the political community, which in turn exists to promote individual flourishing. When one is favored at the expense of the other, both must suffer. I begin with a review of the existing jurisprudence on the matter, highlighting the role and influence of *Lochner*. I then proceed to identify elements of Hobbesian social contract in the Constitution, discussing how to interpret these provisions in light of their philosophic roots. This section includes a brief explanation of why Hobbes is preferred here to the more traditional Lockean reading. Finally, I conclude with an examination of more recent cases before the Court, applying the method I have set forth.

Balancing Liberty of Contract with Police Power: A Hobbesian Approach

by

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For my wife and family,

Whose patience and prayers have brought me to

the end of this great race

CHAPTER ONE

An Introduction

There often arises a great disparity between the state's dual obligation to the public good and individual liberty. Modern liberal society anticipates and insists upon a certain degree of selfishness in citizens, channeling their interest to serve the public good.[1] For the most part, this mechanism of substituting private vice for public virtue has served us well. Yet, as is exemplified poignantly in recent economic matters, that self-regard can be taken too far. While a great deal of latitude is generally given to private contractual relationships, in the absence of real institutional checks, individuals will occasionally work to subvert the greater aspirations of society. The cause of our current recession, for example, "at least partly, has been dishonesty, greed, and weak business ethics."[2] If selfish individuals cannot be trusted to work toward the best interest of society, then it is the duty of government to restrain their freedom and direct their activity to the common good.

When the principles of *laissez-faire* run amok, there is a temptation to substitute for the invisible hand, the guiding arm of a paternal regime.[3] Observing the recent exploits of subprime mortgage lenders and Wall Street figureheads such as Bernard

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[1] Cf. *Federalist* 51.

[2] David R. Francis, "Economic Slump: Ethics Loom Large," *The Christian Science Monitor*, September 15, 2008.

[3] For a brief discussion of our recent overcompensation, see: Stephen Moore, "'Atlas Shrugged': From Fiction to Fact in 52 Years," *The Wall Street Journal*, January 9, 2009.

Madoff, contemporary economists find themselves increasingly sympathetic to the claim that *laissez-faire* is a failed enterprise. They decry our government's gross overconfidence in the ability of free markets to self-regulate.[4] Resident economist of *The New York Times*, Paul Krugman, has long been a vocal critic of "the *laissez-faire* ideologues ruling Washington" (aka Republicans) who hope to re-institute *Lochner*-era libertarianism.[5] Simply put, the bias towards big business seems to have moved off Wall Street and into Washington, infiltrating even the Supreme Court — an institution often thought insulated from political pressure. We have witnessed the jurisprudence of the Roberts Court steadily advance in the direction of reducing the accountability of businesses to the general public, spurring Supreme Court historians to lament, "There are no economic populists on the court, even on the liberal wing."[6]

All of this constructs a scenario much like that experienced during the early twentieth century, a fact not overlooked by recent political commentators. As the economy continues its steady descent into recession, politicians and pundits have been quick to draw analogies between our present-day plight and the Great Depression of the 1930s.[7] Once again we are confronted with a long period of advancing business interests

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[4] Their attitude toward human nature mirrors that of Glaucon's telling of Gyges' ring. Cf. Plato's *Republic* 2.359a - 2.360d.

[5] Paul Krugman, "A Catastrophe Foretold," *The New York Times*, October 26, 2007.

[6] Jeffery Rosen, "Supreme Court Inc.," *The New York Times Magazine*, March 16, 2008.

[7] See, for example, Barack Obama, "Press Conference by the President," February 9, 2009; Bruce E. Caswell, "The Presidency, The Vote, and The Formation of New Coalitions," *Polity*, Vol. 41, No. 3 (July, 2009): 391; Eric Lotke, "A New New Deal?" *The Nation*, December 23, 2008; "Fare Well, Free Trade," *The Economist*, December 18, 2008; Anthony Faiola, "What Went Wrong" *The Washington Post*, October 15, 2008.

and deregulation, followed by a sharp economic downturn in which job losses mount and major corporations exist on federal life-support.[8] President Obama hopes to emulate the success of Roosevelt, taking office as a progressive vowing to repudiate the conservative economic agenda of his predecessor.[9] It is fascinating to observe just how closely history repeats itself. Unfortunately, we continue to make the same mistakes. In 2008, Congress undertook "its most dramatic interventions in financial markets since the 1930s," forcing us to reevaluate the balance between the contractual liberty of *laissez-faire* and government regulation to secure society against its adverse effects.[10] The consensus thus far has been akin to the Court's repudiation of *laissez-faire* during the New Deal: a rhetorical affirmation of free-market capitalism, with an effectual swing of the pendulum to radical government regulation. In light of pressure to stabilize volatile markets, President Obama has positioned his administration to even further escalate federal oversight, remarking that "the American experiment has worked in large part because we guided the market's invisible hand with a higher principle. A free market was never meant to be a free license to take whatever you can get, however you can get it. That's why we've put in place rules of the road: to make competition fair and open, and honest. We've done this not to stifle but rather to advance prosperity and liberty."[11] His direct

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[8] Ambrose Evans-Pritchard, "Bad News: We're Back to 1931. Good News: It's Not 1933 Yet," *Telegraph*, January 26, 2009.

[9] Jo Becker, "The Reckoning: Bush's Philosophy Stoked the Mortgage Bonfire," *The New York Times*, December 21, 2008; Robert L. Borosage, "A New New Deal?" *The Nation*, December 23, 2008.

[10] Zanny Minton Beddoes, "When Fortune Frowned," *The Economist*, October 9, 2008.

[11] Barack Obama, "Renewing the American Economy," Cooper Union, March 27, 2008.

confrontation with these issues suggests an awareness of their greater philosophical challenges and reflects an attempt to reconcile the competing demands of order and liberty. Nevertheless, the policies of his administration, thus far weighing heavily on the side of government regulation, run the risk of undermining this rhetorical moderation. As a prime example, the most notable product of his administration to date — the healthcare reform legislation of 2010 — was designed largely with a view to protect America's underprivileged. And yet, even today, its Constitutionality is being challenged in federal courts on the grounds of overreaching the government's enumerated powers.

We see a rehashing of the same themes of liberty and authority expressed in two seminal Court cases: *Lochner v. New York* and *West Coast Hotel v. Parrish*.[12] This dissertation will use these cases as a lens by which to evaluate the philosophical implications of the liberty of contract and the police power within the context of American jurisprudence. On the one hand, the danger of the *Lochner* ruling is its tendency to overemphasize the interest of liberty at the expense of the public good, leading to complacency and a lack of oversight amidst material prosperity. *West Coast Hotel*, on the other hand, so vehemently rejects the most radical components of *Lochner* that government regulation on behalf of the public good effectually supersedes even moderate liberty interests. Both approaches have proven to be paradigmatic, and both fail to achieve the necessary balance of liberty and the public good because they consider the matter as a dichotomy, rather than perceiving each as fundamental to the other.

To mediate the conflicting demands of police power and the liberty of contract, we must trace them to their source. Conveniently, both find their genesis in the English

[12] *Lochner v. New York*, 198 U.S. 45 (1905); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

philosopher, Thomas Hobbes. For all his reputation of pushing both the authority of contract and the power of the state to excess, Hobbes is, in fact, quite subtle in his treatment, properly appreciating authority's source in individual liberty and liberty's impotence without proper authority. Under the law of nature, all contracts made in good faith must be honored, with prior agreements taking precedence over those that come later. Foremost of these is the social contract that binds man to civil society, establishing legitimate government and subsuming all subsequent agreements. Consequently, any contract made within civil society involves the state as an implicit third party. There is no altogether "private" bargaining, and the state has the authority to set the terms of such agreements as it sees fit. That is not to say that the state will impose itself into all contracts and eliminate the liberty of its citizens. Hobbes makes it quite clear that the prudent state will only intervene when it serves the public good. But, when such private agreements infringe upon the general welfare, the sovereign power has an obligation to exercise its influence. Heretofore, *Lochner* and the Court's response to it have oversimplified this debate, polarizing the discussion into camps that come precariously close to endorsing either unlimited liberty or unlimited regulation. Hobbes offers us a third option that is consistent with the language and tradition of the Constitution, and is also more effectually viable than its alternatives.

This dissertation aims to contribute to the academic discussion of Hobbesian thought, the constitutional analysis of the *Lochner* era, and the greater contemporary legal debate surrounding the invasion of the state into the realm of individual liberty. Heretofore, scholars have been reluctant to speak out in support of Thomas Hobbes for

fear of the stigma that follows the "Monster of Malmesbury."[13] Within academia, he is often a bogeyman of totalitarianism, who remains in textbooks only as the unfortunate precursor to that enlightened champion of democracy, John Locke.[14] It is only in the last few decades that Hobbesian-sympathizers have been able to come into the light and engage in mainstream discussion.[15] One of the primary contributions of this dissertation is to present Hobbes as a much-overlooked and valuable resource when considering solutions to contemporary discussions of national policy.

This dissertation's contribution to the study of Hobbes is in part a matter of its insistence on neither imposing the sinister caricature of the philosopher as a truism, nor emasculating his teaching by saying that he was, in fact, a modern liberal democrat.[16] It takes the Englishman as he is, rather than as we want him to be. Hobbes has much to teach us about ourselves and we may be uneasy with his conclusions, yet unable to refute

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[13] Samuel I. Mintz, *The Hunting of Leviathan* (Cambridge: Cambridge University Press, 1962), vii.

[14] For examples of those with a more authoritarian view of Hobbes, see: Joshua Foa Dienstag, "Serving God and Mammon: The Lockean Sympathy in Early American Political Thought," *The American Political Science Review*, Vol. 90, No. 3 (September, 1996): 497-511; Michael Locke McLendon, "Tocqueville, Jansenism, and the Psychology of Freedom," *American Journal of Political Science*, Vol. 50, No. 3 (July, 2006): 664-675; Terry M. Moe, "Power and Political Institutions," *Perspectives on Politics*, Vol. 3, No. 2 (June, 2005): 215-233.

[15] See, for example, Peter Berkowitz, *Virtue and the Making of Modern Liberalism* (Princeton: Princeton University Press, 1999); David F. Epstein, *The Political Theory of the Federalist* (Chicago: University of Chicago Press, 1984); Michael J. Rosano, "Liberty, Nobility, Philanthropy, and Power in Alexander Hamilton's Conception of Human Nature," *American Journal of Political Science*, Vol. 47, No. 1 (January, 2003): 61-74.

[16] Compare, for example: Waldemar Gurian, "The Totalitarian State," *The Review of Politics*, Vol. 40, No. 4 (October, 1978): 514-527; Frank Coleman, "The Hobbesian Basis of American Constitutionalism," *Polity*, Vol. 7, No. 1 (Autumn, 1974): 57-89.

the argument that produces them. Such is the nature of a comprehensive philosophic approach. The existing literature does little to represent Hobbes as a balancer of complex ideas, and often fails to recognize the intricacies that tie together the whole. Hobbes on contract is inescapably tied to his teaching of police power and individual liberty. One cannot reject one without destroying the whole.

My argument that Hobbes can help us address contemporary political problems must confront the historicist claim made by members of the Cambridge School, such as Quentin Skinner and Richard Tuck, who loom large in the field of Hobbesian research. Skinner regards the interpretation of Hobbes (and all writers) to be directed by historical and cultural context, limiting the meaning that we are able to draw from any one text to the "illocutionary force" of the author.[17] He uses Hobbes as a case study to illustrate his broader method, and the fruits of this labor have proven invaluable to recent scholarship.[18] Nonetheless, Skinner's approach remains controversial, not for its findings, but for its considerable implications on philosophical inquiry: his project commits itself to confirming "the essential variability of the human experience" against the conventional model of perennial questions.[19] Hobbes is key to Skinner's argument,

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[17] See: Quentin Skinner, "A Reply to My Critics," in *Meaning and Context: Quentin Skinner and His Critics*, ed. James Tully and Quentin Skinner (Princeton: Princeton University Press, 1988), 267, 278.

[18] In particular, Skinner's contributions to our understanding of Hobbes' use of rhetoric remains at the fore of contemporary scholarship: Quentin Skinner, *Reason and Rhetoric in the Philosophy of Hobbes* (Cambridge: Cambridge University Press, 1996).

[19] Ted Miller and Tracy B. Strong, "Meanings and Contexts: Mr Skinner's Hobbes and the English Mode of Political Theory," *Inquiry*, Vol. 40, No. 3 (February, 1997): 323-355.

serving as a model where "grand theory" is often sacrificed for historical expedient.[20] Michael Goodhart challenges Skinner's thesis from the perspective Skinner himself imposes: that is, a critique of method based on an analysis of its implementation.[21] Where Skinner attempts to demonstrate a fundamental shift in Hobbes' teaching and method, Goodhart provides evidence that suggests consistency and reconciles seeming outliers in Hobbes' writing. He then points out the dangers of a history of philosophy that avoids persistent questions. When attempting to understand a philosopher purely in context, we can never fully escape our own historical bias that imposes the contexts we would like to see.

Similarly, Richard Tuck suggests that Hobbes, when viewed in light of his contemporaries, is too unoriginal and inconsistent to justify "the curious fascination that Hobbes has exercised" over modern readers.[22] In particular, he understands Hobbes' later philosophy as little more than an unsuccessful attempt to incorporate the political theory of his contemporaries into his earlier work on natural right.[23] Tuck relies heavily on *Leviathan*'s apparent paradox between self-preservation as a right and the law-like

[20] In particular, he sees *Leviathan*'s rhetorical flourish as a concession to pragmatism and a renunciation of Hobbes' early commitment to the self-sufficiency of pure reason. This also indicates the primacy of England's "Engagement Controversy" in Hobbes' thought, further isolating the thinker from modern readers.

[21] Michael Goodhart, "Theory in Practice: Quentin Skinner's Hobbes, Reconsidered," *The Review of Politics*, Vol. 62, No. 3 (Summer, 2000): 531-561.

[22] Richard Tuck, *Natural Rights Theories* (Cambridge: Cambridge University Press, 1979), 177.

[23] Tuck, *Natural Rights Theories*, 132.

obligation attached to it to dismiss the philosopher.[24] By failing to see how these sides of Hobbes' argument could be anything but contradictory, Tuck depreciates his own insight into Hobbes' complexity.[25]

In contrast to the Cambridge School, others emphasize the liberal dimensions in Hobbes' thought. Leo Strauss introduced Hobbes as a seminal figure to modern liberalism in 1936 with his classic work, *The Political Philosophy of Thomas Hobbes*.[26] In it, he makes the unprecedented argument that Hobbes provides a philosophical defense of bourgeois life.[27] This principle is later developed in *Natural Right and History*, wherein Strauss concludes that Hobbes deserves recognition as "the founder of modern liberalism."[28] My dissertation acknowledges Hobbes' influence on our liberal heritage, with specific reference to the American founding.

With regard to the study of the *Lochner* era, this dissertation will aid in Sunstein and Bernstein's noteworthy efforts to overturn the established reading of *Lochner* as an

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[24] For more on this so-called "Warrender problem," see: Tuck, *Natural Rights Theories*, 120, 127-132; Howard Warrender, *The Political Theory of Hobbes: His Theory of Obligation* (Oxford: Clarendon Press, 1957).

[25] Martin P. Golding argues that Tuck takes the laws of nature too literally, rather than seeing them express general consequences to the right of nature: "Hobbes is quite clear about the hypothetical character of the state of nature and that the laws of nature are principles that men acknowledge insofar as they are self-interestedly rational. It is the tenor of the Leviathan, I think, that we know the laws of nature as divine laws only because they are rational for us to adopt." Martin P. Golding, review of *Natural Rights Theories: Their Origin and Development*, by Richard Tuck, *Political Theory*, Vol. 10, No. 1 (February, 1982): 152-157.

[26] Leo Strauss, *The Political Philosophy of Thomas Hobbes* (Chicago: University of Chicago Press, 1996).

[27] Strauss, *The Political Philosophy of Thomas Hobbes*, 118.

[28] Leo Strauss, *Natural Right and History* (Chicago: University of Chicago Press, 1953), 182.

imposition of economic principle over legitimate constitutional jurisprudence.[29] Similarly, it hopes to allay some of the momentum being picked up by Sunstein's critique by throwing its lot with Bernstein's more rigorous analysis. While Sunstein sees *Lochner* as an attempt to establish a legal doctrine of common law neutrality among classes, Bernstein emphasizes the role that fundamental rights play in the Court's decision. However, although Bernstein correctly establishes the philosophy and motivation behind Peckham's notorious decision, he goes too far in sympathizing with the Justice's conclusions. Bernstein's ability to discern the true issues of *Lochner* (that is, its firm grounding in a tradition of fundamental rights) is undermined by his inability to appropriately balance them in a manner consistent with American Constitutional principles, a problem this dissertation aims to correct. Unfortunately, the existing literature continues to stratify the debate into mutually exclusive categories, thereby overlooking more moderate and desirable alternatives. Without seriously allowing for a balance, appraising extraconstitutional principles such as the liberty of contract and the police power is often left simply to judicial whim.[30] Thomas Hobbes provides us with a measure consistent with our constitutional tradition that may be applied to ensure that our law is employed with both reason and justice.

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[29] We see examples of such an interpretation in such major cases as *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966), *Roe v. Wade*, 410 U.S. 113 (1973), *Bowers v. Hardwick*, 478 U.S. 186 (1986), *United States v. Lopez*, 514 U.S. 549 (1995), *Seminole Tribe of Florida v. Florida et al.*, 517 U.S. 44 (1996), *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666 (1999), *Alden v. Maine*, 527 U.S. 706 (1999), and *Lawrence v. Texas*, 539 U.S. 558 (2003).

[30] I refer to these principles as "extraconstitutional" as they necessarily look beyond the Constitution itself for meaning.

Synopsis

There is nothing quite like a crisis to get people talking about fundamental principles. Infrequently do we see terms such as "*laissez-faire*" and "Keynesian" descend from the lexicon of the ivory tower and grace the pages of *The New York Times*.[31] Recently however, the common citizen has been asked to reflect upon billion-dollar stimulus packages and the relative merits of nationalizing insolvent financial institutions.[32] Each discussion turns on the premise that the root of our trouble is an overabundance of liberty entrusted to the wrong hands.[33] Over the years, our economic prosperity has resulted in complacency, and we have forgotten that unmitigated freedom opens the door to abuse. Even as late into the crisis as the spring of 2008, pundits were predicting a new era of market freedom and pro-business sensibilities.[34] But with the fire sale buyout of Bear Stearns by JPMorgan Chase came the general unease that something was terribly awry with our economy.

Several months after the subprime mortgage crisis first fell under public scrutiny, the federal government took drastic action, bringing mortgage giants Fannie Mae and Freddie Mac under federal control in what has been called "one of the most sweeping

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[31] Peter S. Goodman, "Too Big to Fail?," *The New York Times*, July 20, 2008; Paul Krugman, "Franklin Delano Obama?," *The New York Times*, November 10, 2008.

[32] Peter Baker, "At Town Hall Rally, Obama Pushes Stimulus Plan," *The New York Times*, February 10, 2009.

[33] *New York Times* columnist David Brooks provides thoughtful evidence as to why we can trace the root cause of our problem to greed and ignorance in David Brooks, "Greed and Stupidity," *The New York Times*, April 3, 2009. See also Jerry Z. Muller, "Our Epistemological Depression," *The American*, January 29, 2009; Simon Johnson, "The Quiet Coup," *The Atlantic*, May 2009; and Felix Salmon, "Recipe for Disaster: The Formula That Killed Wall Street," *Wired*, February 23, 2009.

[34] See, for example, Rosen, "Supreme Court Inc."

government interventions in private financial markets in decades."[35] The initial reaction to any calamity is often one of overcompensation. In this instance, however, it proved to be a sign of things to come.[36] Too little oversight had brought the economy to its knees, and Congress, reflecting popular resentment, vowed to put an end to the days where businesses were not held accountable to the public good. President Obama's inaugural address continued the realignment, declaring that "What is required of us now is a new era of responsibility."[37] The rhetoric of freedom, so recently espoused by his predecessor as the source of American exceptionalism, has been replaced with the rhetoric of sacrifice.[38] The question of regulation versus freedom has been simplified and dichotomized into an all-or-nothing debate.

This chasm between the two concepts is not a contemporary innovation, but traces its source back to the turn of the twentieth century. The tension between the freedom of contract and government regulation first came to a head in the infamous case of *Lochner v. New York*, wherein the Court cast its lot with the side of freedom, greatly restricting the state's power to further the general welfare. Justice Peckham's substantive reading of the Due Process Clause in *Lochner* interprets the liberty of contract as an essential element to the pursuit of happiness guaranteed by the Declaration. His argument has been adopted by modern libertarian organizations such as the Cato Institute, who reinforce this

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[35] Zachary A. Goldfarb, David Cho, and Binyamin Appelbaum, "Treasury to Rescue Fannie and Freddie," *The Washington Post*, September 7, 2008.

[36] See, for example, the September 17th bailout of AIG and the notorious "Emergency Economic Stabilization Act" passed on October 3rd, 2008.

[37] Barack Obama, "Inaugural Address," January 20, 2009.

[38] George W. Bush, "Address to Nation," September 11, 2001; George W. Bush, "Second Inaugural Address," January 20, 2005.

connection between contractual freedom and our inalienable rights.[39] Nonetheless, the argument neglects to pay full tribute to the legitimate needs of society. As Justice Hughes rightly points out in *West Coast Hotel*'s repudiation of *Lochner*, "Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people."[40] The Court's new framework brings up a sound point that should be recognized in a just society. Yet Hughes, like his contemporary counterparts, goes too far in distancing himself from the problem. The result is an unprecedented period of government intervention into the market through the New Deal and a vast restriction of fundamental contractual freedoms. We face a similar circumstance today: the ideological pendulum has brought us, at least temporarily, back to the necessity of regulation, and those in power have made little effort to veil their philosophical debts.[41] This same misguided balancing act between liberty of contract and the police power continues, with little more direction than a history we seem doomed to repeat.

The most reasonable place to begin resolving this debate is with an analysis of *Lochner* itself, put into context with the decisions that led to and progressed from it. Chapter Two will introduce this discussion. The whole ordeal began when Joseph

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[39] Roger Pilon, *The Purpose and Limits of Government: Cato's Letters #13* (Washington D.C.: Cato Institute, 1999).

[40] *West Coast Hotel*, 300 U.S. 391.

[41] "Now, you have some people, very sincere, who philosophically just think the government has no business interfering in the marketplace. And in fact there are several who've suggested that FDR was wrong to intervene back in the New Deal. They're fighting battles that I thought were resolved a pretty long time ago." Obama, "Press Conference by the President," February 9, 2009.

Lochner refused to operate his bakery in compliance with a New York maximum hours law. The state defended its legislation as within the legitimate exercise of its police powers, limiting the exposure of bakers (and confectioners) within an atmosphere filled with impurities. Mr. Lochner, on the other hand, asserted his Fourteenth Amendment guarantee of contractual liberty under due process. Beyond the simple matter of a maximum hours law and its effect on Mr. Lochner's business, Justice Peckham's majority opinion understands the true problem at hand to be the tension between the sovereignty of the state and the liberty of the individual. Unfortunately, Justice Holmes' dissent quickly establishes the majority's decision as an exercise of pure Judicial will, clouding the greater issues at stake by reducing the opinion to one of simple economic preference.[42]

Holmes' dissent has carried the day and *Lochner v. New York* remains the most vilified Supreme Court case of the last hundred years. Yet, a charitable reading of *Lochner* will reveal at least a good-faith attempt to make a Constitutional argument that reconciles the seminal demands placed upon any regime. To what extent can liberty find expression within the political community? From whence does the political community derive the authority to restrict that liberty? Justice Peckham looks to the Due Process Clause and its pre-Constitutional foundation as a starting point for the discussion. Although, in my opinion, he ultimately comes to the wrong conclusion, he is right to point us in the direction of our constitution's philosophic tradition as a lens for judicial interpretation, giving meaning to an otherwise opaque legal concept.

[42] "This case is decided upon an economic theory which a large part of the country does not entertain." *Lochner*, 198 U.S. 75.

Although it is clear that social contract theory informs the quarrel between liberty of contract and police power, it remains to be seen why we should apply its insights to a decidedly American expression of the debate. As the progenitor of our modern understanding of both contract and the police power, any discussion with regard to either subject owes an overwhelming debt to Thomas Hobbes' preparatory work.[43] Avoiding him, as so many do, is avoiding the obvious source of the debate. To reiterate, to date, the jurisprudence of the Supreme Court remains stuck in an irresolvable dichotomy when considering the subject of government regulation. However, it is precisely to these issues that Hobbes attempts to speak. "For in a way beset with those that contend," he writes, "on one side for too great liberty, and on the other side for too much authority, 'tis hard to pass between the points of both unwounded."[44] Yet, he does pass unscathed, providing a model of balance that we would do well to follow.

While it may be expedient to apply Hobbes to our constitutional quandaries, we must first demonstrate that such a move is legitimate.[45] Chapter Three will demonstrate his relevance in this context. Historically, the United States has put particular stock in the principles of consent and natural right expressed in Hobbes and later developed by John Locke.[46] Much has been said of the Declaration's debt to these philosophers,

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[43] David Boucher and Paul Kelly, eds., *The Social Contract from Hobbes to Rawls* (New York: Routledge, 1994); Peter J. Steinberger, "Hobbes, Rousseau and the Modern Conception of the State," *The Journal of Politics*, Vol. 70, No. 3 (July 2008): 595–611.

[44] Thomas Hobbes, "To My Most Honor'd Friend Mr. Francis Godolphin, of Godolphin," *Leviathan*, ¶2.

[45] This question of legitimacy necessarily begins by confronting the historicist school, which I discuss at some length in my Contributions section.

[46] See: Michael P. Zuckert, *The Natural Rights Republic* (Notre Dame: University of Notre Dame Press, 1997).

ushering in the first rebellion to justify itself explicitly against the backdrop of social contract.[47] Contrasting the King's abdication of his natural duties, Jefferson asserts certain enduring prepolitical rights of life, liberty, and the pursuit of happiness — those selfsame rights enumerated by Hobbes as those "which no man can be understood by any words or other signs to have been abandoned or transferred."[48] Considerable deference is given to the sovereign's authority to govern, "But when a long Train of Abuses and Usurpations, pursuing invariably the same Object, evinces a Design to reduce them under absolute Despotism, it is their Right, it is their Duty, to throw off such Government, and to provide new Guards for their future Security."[49]

These three seminal rights are later formally institutionalized in the Fifth and Fourteenth Amendments, with a slight alteration to the third prong regarding the "pursuit of happiness." Such an aim is abstract at best, described by Hobbes as "a continual progress of the desire, from one object to another, the attaining of the former being still but the way to the latter."[50] The Declaration substitutes "happiness" for what appears to be the more Lockean "property," refined to reflect the regime's incapacity to rule the

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[47] See, for example, George Mace, *Locke, Hobbes, and the Federalist Papers: An Essay on the Genesis of the American Political Heritage* (Carbondale: Southern Illinois University Press, 1979); H. Mark Roelofs, "Hobbes, Liberalism, and America," in *Liberalism and the Modern Polity: Essays in Contemporary Political Theory*, ed. Michael McGrath (New York: Dekker, 1978), 119-142; Eldon Eisenach, *Two Worlds of Liberalism* (Chicago: University of Chicago Press, 1981); Robert P. Kraynak, "Hobbes's Behemoth and the Argument for Absolutism," *American Political Science Review*, Vol. 76, No. 4 (December, 1982): 837-847; Alkis Kontos, "Of Leviathan Republics," *Canadian Journal of Social and Political Theory* (Fall 1979): 124-129.

[48] Hobbes, *Leviathan*, Part I, Chap. xiv, §8.

[49] Thomas Jefferson, *Declaration of Independence*.

[50] Hobbes, *Leviathan*, Part I, Chap. xi, §1.

immaterial.[51] The guarantee of due process serves to remind the sovereign that an individual's core rights should only be infringed with great reluctance, for each infraction works to undermine the regime's legitimacy. When Peckham finally applies the Fourteenth Amendment to New York's maximum hours law, it is with this consideration in mind.

We find traces of Hobbes throughout our founding documents and a better understanding of his philosophy will in turn help us to make sense of our own liberal institutions. As I will develop in later chapters, his commitment to both sovereign authority and individual liberty points us toward a coherent reconciliation of the state's police power and the citizen's unenumerated rights. Once the Constitution is read in this context, the next step is to explore the nuances of individual liberty within civil society and the extent to which it is affected by contractual agreements.

It is no secret that Hobbes puts a great emphasis on contracts when founding civil society. Yet, he also understands them as our only chance of securing individual fulfillment, raising contracts to a whole new level of import. Using as a first principle that all men pursue such happiness, Hobbes constructs a secular natural law that is binding upon rational men. In Chapter Four, I will explore the tenets of this law of nature and discuss the obligation it imposes upon individuals, compelling them out of the state of nature and into a political order.

In lieu of transcendent principles of moral behavior, it is only within contractual relationships that one can truly speak of justice. Man himself must construct the terms by

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[51] John Locke, *The Second Treatise of Government*, Chap. ii, §6. Hobbes similarly suggests that when instituting a regime, law is properly directed at the body, not the soul. Hobbes, *Leviathan*, Part IV, Chap. xlvi, §37.

which he is fettered, relying upon rational self-interest as his guide. Thus, for Hobbes, "the definition of INJUSTICE is no other than *the not performance of covenant*. And whatsoever is not unjust, is *just*."[52] Although "justice" and "injustice" lack their usual moral connotations, they do become a convenient shorthand for determining the expedient course of human action.[53] Men are free to make contracts with one another, but their agreements should avoid arbitrariness by taking into consideration rational self-interest.

In the state of nature, man is endowed with the liberty to do as he will, as he is able. As a corollary, he may also establish limits for himself, under the stipulation that another do likewise. Contract, in its essential form, is nothing more than this "mutual transferring of right."[54] One agrees to forego the exercise of his full natural right in a matter affecting his neighbor, so as to benefit from the guarantee that his neighbor will similarly abstain from exercising *his* right in a matter affecting him. Because contract for Hobbes is an extension of man's natural right, it can never be completely stripped from the individual.[55]

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[52] Hobbes, *Leviathan*, Part I, Chap. xv, §2.

[53] Cf. William Mathie, "Justice and the Question of Regimes in Ancient and Modern Political Philosophy: Aristotle and Hobbes," *Canadian Journal of Political Science*, Vol. 9, No. 3 (September, 1976): 454-455.

[54] Hobbes, *Leviathan*, Part I, Chap. xiv, §9.

[55] Cf. George E. Panichas, "Hobbes, Prudence, and Basic Rights," *Noûs*, Vol. 22, No. 4 (December, 1988): 555-571.

That is not to say that the liberty of contract is unlimited. One cannot contract away one's inalienable rights — life, liberty, and the pursuit of happiness.[56] Additionally, prior agreements take precedent over those that come later, if there is any tension between the two. Due to this frame, the social contract necessarily supersedes and limits the terms of any subsequent contract that is made in civil society. In effect, citizens relinquish the right of self-government to their sovereign, who may then legitimately impose himself upon them in any manner short of violating their inalienable rights. Thus, while the citizen retains his right to contract, he allows — in the name of his own self-interest — for the sovereign to modify its terms when necessary. Similarly, the sovereign, maintaining the obedience of his subjects only insofar as he regards their good, is careful not to undermine the very thing that binds them to him.[57]

While Hobbes is famous for his contributions to contract theory, he is infamous for his teaching on the state's police power, which I will consider in Chapter Five.[58] The term "police power" is not to be found within the Hobbesian corpus, yet his notion of sovereignty coincides with the doctrine as it was established within the English common law. Blackstone speaks of it as "the due regulation and domestic order of the kingdom," encompassing nearly all domestic management of the state.[59] Although aware of the

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[56] This is a paraphrase of *Leviathan*, Part I, Chap. xiv, §8, which will be explained at length in Chapter Three of this dissertation.

[57] Yishaiya Abosch, "The Conscientious Sovereign: Public and Private Rule in Thomas Hobbes's Early Discourses," *American Journal of Political Science*, Vol. 50, No. 3 (July, 2006): 621-633.

[58] Cf. Joshua Mitchell, "Hobbes and the Equality of All under the One," *Political Theory*, Vol. 21, No. 1 (February, 1993): 78-100.

[59] Sir William Blackstone, *Commentaries on the Laws of England*, Book IV, Chapter 13.

dangers of power, Hobbes did not believe that tyranny was the likely result of his teaching.[60] Instead, the existence of civil society presupposes certain duties on the part of the state, foremost of which are the safety and well-being of its citizens. The nature of the social contract demands that the regime attend to the public welfare in order to retain the loyalty of its citizens. The sovereign, like the individual, is motivated by self-interest. Therefore, the state's interest in cultivating the public good will always trump any other concern that may be offered.[61]

As with contract, the power of the sovereign is limited only insofar as it does not infringe upon the fundamental rights of citizens. Thus, as an implicit party to private contracts, he may supervise their terms and execution as a valid exercise of police power. This is done to enforce legitimate contracts, to preclude illegitimate contracts, and to invoke prudence in modifying those contracts that work against the common good. The appropriate application of police power will always be weighed against the interest of the people to remain free from state intrusion.[62] An oppressive regime that grossly stifles the liberty of its subjects cannot hold their allegiance. Thus, it follows that the sovereign will apply a standard of minimalism when regulating the contracts of citizens.

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[60] "For the good of the sovereign and people cannot be separated." Hobbes, *Leviathan*, Part II, Chap. xxx, §21. See also: David van Mill, "Hobbes's Theories of Freedom," *The Journal of Politics*, Vol. 57, No. 2 (May, 1995): 443-459.

[61] John W. Seaman, "Hobbes on Public Charity & the Prevention of Idleness: A Liberal Case for Welfare," *Polity*, Vol. 23, No. 1 (Autumn, 1990): 105-126.

[62] "For the end of laws is not to restrain people from a harmless liberty, but to prevent them from rushing headlong into dangers or harm to themselves or to the commonwealth, from impetuous passions, rashness or foolishness, as roads are hedged not as an obstacle to travelers, but to prevent them from wandering off, with injury to their fellow citizens." Hobbes, *Leviathan*, Part II, Chap. xxx, §21.

Hobbes intends his work to balance the competing interests of liberty and authority — precisely those concerns expressed in *Lochner* that remain preeminent today. However, his synthesis gives full recognition to both liberty and sovereignty in a manner hereunto unappreciated by American constitutional jurisprudence. Chapter Six will apply the lessons we can learn from Hobbes to our historical and contemporary policy debates.

Although Justice Peckham falls prey to the temptation of overemphasizing the liberty interest in *Lochner*, his formulation of the problem does correctly establish what is at stake if we allow the government to restrict private contract between individuals. A nation founded on consent must recognize the freedom to contract to be, as Justice Cardozo will later express, "implicit in the concept of ordered liberty."[63] Hobbes makes it clear that government requires the consent of its citizens, manifested in a social contract. Thus, one must assume an original position of contractual freedom, and any subsequent restrictions by the state must be considered under the strictest scrutiny. Contract being the formal cause of government, each time the regime stifles the liberty of contract, it moves closer to undermining the very principle that confirms its legitimacy.

Peckham does acknowledge instances in which the state may "prevent the individual from making certain kinds of contracts," but his model of appropriateness is *Jacobson v. Massachusetts* — a case that balances the improbable death of an individual against the lives of an entire city.[64] Such an archetype is too extreme to guide the more moderate situation before him in *Lochner*. While it is plain that *Jacobson* portrays a

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[63] *Palko v. Connecticut*, 302 U.S. 325 (1937).

[64] *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); *Lochner*, 198 U.S. 53. In *Jacobson*, a Massachusetts citizen resists mandatory vaccination during a smallpox epidemic on the grounds that such a procedure may ultimately infect him.

necessary and proper use of the police power, one should not assume that anything short of such clarity is an illegitimate government intrusion. The case itself urges such moderation: "Extreme cases can be readily suggested. Ordinarily such cases are not safe guides in the administration of the law."[65] Unfortunately, this prudent advice is paid no mind.

Justice Hughes' traditional critique of *Lochner*, on the other hand, overstates the extent to which a regime may unconcernedly impose itself upon the individual in the name of the public good. Let there be no mistake: when comparing outcomes, *Lochner* was incorrectly decided, and *West Coast Hotel* was correctly decided. However, the reasoning employed in both cases ultimately results in bad law. Under the *West Coast* precedent that "regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process," the freedom left to private citizens is subject wholly to the mercy of the state.[66] At its most extreme, the life, liberty, and property of a citizen are no longer secure, so long as their taking serves the interest of a majority. Even *Jacobson* is more moderate. Applying the rule established by Hobbes, the Court must embrace the liberty of contract as fundamental, yet hold the public welfare as a competing and equally fundamental interest. Put succinctly, where Hughes demands rational basis and Peckham demands strict scrutiny, the appropriate balance would be something like an intermediate scrutiny, giving recognition to both public and private interests.

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[65] *Jacobson*, 197 U.S. 38.

[66] *West Coast Hotel*, 300 U.S. 391.

As a result of Justice Hughes' strong denunciation of substantive due process rights, the police power of the state was able to go unchallenged for a number of years.[67] However, despite the dramatic decline in the value of individual contractual agreements, civil rights and liberties began to rise to the fore. Just as the Court found itself proclaiming, "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions because they may be unwise, improvident, or out of harmony with a particular school of thought," it was fighting for the rights of black citizens against unjust state laws in *Brown v. Board of Education*.[68] Eventually, the lacuna left by *West Coast Hotel*'s eradication of *Lochner* would need to be filled. Individuals would need some protections against generally applicable legislation and the Equal Protection Clause would not be a sufficient safeguard. The issue came to a head in 1965 with *Griswold v. Connecticut*.[69] A Connecticut state law outlawing the sale of contraceptives was determined by the Court to be "repulsive to the notions of privacy surrounding the marriage relationship."[70] The contractual relationships in question (doctor/patient, husband/wife) hearken back to *Lochner*, but the Court had already burned that bridge.[71] Instead, it was forced to vest

[67] Cf. *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

[68] Quote from *Williamson v. Lee Optical Co.*, 348 U.S. 488.

[69] *Griswold v. Connecticut*, 381 U.S. 479 (1965).

[70] 381 U.S. 486.

[71] "Overtones of some arguments suggest that *Lochner v. New York* should be our guide. But we decline that invitation, as we did in *West Coast Hotel Co. v. Parrish*…" 381 U.S. 481-482.

this right, not on particular Constitutional provisions, but on the penumbras of emanations of Constitutional guarantees.[72]

These substantive rights that fall under the umbrella of the "right to privacy" are an attempt by the Court to regain what was lost with *Lochner*. But while these new individual rights are strong enough to overcome democratically passed legislation, they are grounded upon a Constitutionally suspect foundation. The Court's inability to agree upon any particular source for the doctrine only serves to reaffirm its fragility. Further, this new concept of individual liberty is disassociated from the societal context of substantive liberty bound by Due Process. The result has been a radicalization of liberty that ignores the moral responsibility of citizenship.[73] As Hobbes' model shows us, only when we are able to appreciate the inherent value of the private and the public good can we ensure the security of both.

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[72] 381 U.S. 484.

[73] "[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." *Lawrence v. Texas*, 539 U.S. 578 (2003).

CHAPTER TWO

Learning from *Lochner*

Introduction

With the possible exception of *Dred Scott*, no case has exerted more influence over American policy than *Lochner v. New York*.[1] What began as a relatively minor dispute over the number of hours one could work in a New York bakery quickly escalated into a debate over our nation's fundamental commitment to the principles of freedom and responsibility. In 1905, freedom won the day, drastically altering the landscape of the American economy for the next thirty years. During this "*Lochner* era," the Court became (perhaps undeservedly) infamous for its strong favoritism of business interests, often at the expense of individual citizens. Under the veil of *laissez-faire*, companies were said to operate without oversight or regulation to impede their designs. Yet, the magnitude of their freedom only heightened the intensity of rebuke when markets proved incapable of forestalling our nation's Great Depression.[2] In response to the excesses of *laissez-faire*, the Roosevelt administration, and eventually the New Deal Court, roundly denounced *Lochner* and its progeny as aberrations from proper

[1] *Scott v. Sandford*, 60 U.S. 19 (1856); *Lochner v. New York*, 198 U.S. 45 (1905).

[2] Cass R. Sunstein, "Constitutionalism after the New Deal," *Harvard Law Review*, Vol. 101, No. 2 (December, 1987): 437; David E. Bernstein, "*Lochner v. New York*: A Centennial Retrospective," *Washington University Law Quarterly*, Vol. 85, No. 5 (2005): 1510.

constitutional procedure.[3] Since that time, the critique has expanded to encompass Justice Holmes' harrowing accusation of judicial legislation.[4] According to this line of thought, the five-member majority was not administering justice under law, but imposing a fanciful and oppressive economic theory upon the general populace. It is little wonder that "Avoiding *Lochner*'s mistake is the 'central obsession' of modern constitutional law."[5] The lengths to which the Court has bent over backward to disassociate itself with the decision will be expanded upon in Chapter Six. The repudiation of *Lochner* has gone on to define not only the policies and rhetoric of the New Deal (a lofty feat in its own regard)[6], but each subsequent iteration of constitutional orthodoxy, both in the Court[7] and out.[8]

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[3] "We have always known that heedless self-interest was bad morals; we know now that it is bad economics." Franklin Delano Roosevelt, "Second Inaugural Address," January 20, 1937.

[4] "This case is decided upon an economic theory which a large part of the country does not entertain." *Lochner v. New York*, 198 U.S. 75.

[5] David E. Bernstein, "*Lochner's Legacy*'s Legacy," *Texas Law Review*, Vol. 82, No. 1 (November, 2003): 2. See also: Gary D. Rowe, "*Lochner* Revisionism Revisited," 24 *Law & Soc. Inquiry* 221, 223 (1999).

[6] Even taken alone, this is no little achievement, given the New Deal's status as one of our nation's defining "Constitutional Moments." See: Bruce Ackerman, "Constitutional Politics/Constitutional Law," *The Yale Law Journal*, Vol. 99, No. 3 (December, 1989): 453-547.

[7] *Griswold v. Connecticut*, 381 U.S. 481-482, 515 (1965) (discussing the extent to which the ruling relies upon *Lochner*ian principles); *Harper v. Virginia Bd. of Elections*, 383 U.S. 669 (1966) ("We agree, of course, with Mr. Justice Holmes that the Due Process Clause of the Fourteenth Amendment 'does not enact Mr. Herbert Spencer's Social Statics'"); *Roe v. Wade*, 410 U.S. 117 (1973) ("We bear in mind, too, Mr. Justice Holmes' admonition in his now-vindicated dissent in *Lochner v. New York*"); *Bowers v. Hardwick*, 478 U.S. 194 (1986) ("The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the

The matter started out simply enough, when Joseph Lochner refused to operate his bakery in compliance with a New York maximum hours law. The state defended its legislation as within the legitimate exercise of its police powers, limiting the time that bakers and confectioners are exposed to an atmosphere filled with impurities.[9] Against

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1930's"); *United States v. Lopez*, 514 U.S. 601 n.9 (1995) ("Unlike *Lochner* and our more recent 'substantive due process' cases, today's decision enforces only the Constitution and not 'judicial policy judgments.'"); *Seminole Tribe of Florida v. Florida et al.*, 517 U.S. 166 (1996) ("The majority today, indeed, seems to be going *Lochner* one better"); *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 690 (1999) ("…we must comment upon Justice Breyer's comparison of our decision today with the discredited substantive-due-process case of *Lochner v. New York*"); *Alden v. Maine*, 527 U.S. 814 (1999) ("[T]he Court's late essay into immunity doctrine will prove the equal of its earlier experiment in *laissez-faire*, the one being as unrealistic as the other, as indefensible, and probably as fleeting"); *Lawrence v. Texas*, 539 U.S. 592 (2003) ("[This legislation] undoubtedly imposes constraints on liberty. So do laws prohibiting prostitution, recreational use of heroin, and, for that matter, working more than 60 hours per week in a bakery").

[8] Jeffrey Rosen, "The Unregulated Offensive," *The New York Times*, April 17, 2005 ("Today, the conventional wisdom among liberal and conservative legal thinkers alike is that *Lochner* was decided incorrectly and that the court's embrace of judicial restraint on economic matters in 1937 was a triumph for democracy."); Barack Obama, "Nomination of Janice R. Brown to be U.S. Circuit Judge," June 8, 2005 ("For those who pay attention to legal argument, one of the things that is most troubling is Justice Brown's approval of the *Lochner* era of the Supreme Court"); Adam Cohen, "Is John Roberts Too Much of a Judicial Activist?" *The New York Times*, August 27, 2005 ("If Judge Roberts votes with the most conservative justices, the court could start to revive the spirit of the *Lochner* era, gutting a wide array of laws that protect Americans from harm"); Adam Cohen, "Last Term's Winner at the Supreme Court: Judicial Activism," *The New York Times*, July 9, 2007 ("We are not in a new *Lochner* era, but traces of one are emerging"); Jeffrey Rosen, "Supreme Court Inc.," *The New York Times*, March 16, 2008 ("Ever since 1937, when President Franklin D. Roosevelt threatened to pack a conservative Supreme Court with more progressive justices, the court had largely deferred to federal and state economic regulations"); Barack Obama, "Obama's Remarks on the Economy at Georgetown University," April 14, 2009 ("It is simply not sustainable to have a 21st century financial system that is governed by 20th century rules and regulations that allowed the recklessness of a few to threaten the entire economy").

[9] The traditional functions of police power are to ensure the health, morals, and general welfare of citizens. Cf. *Crowley v. Christensen*, 137 U.S. 86 (1890). A much more detailed discussion of this will take place in Chapter 5.

the state, Mr. Lochner asserted a Fourteenth Amendment guarantee of contractual liberty under due process — a rather novel argument, as we shall see.

Lochner*'s Legacy*

There have been many interpretations over the years as to what Justice Peckham hoped to accomplish with his majority opinion in *Lochner*. It is often thought that his famous opinion had originally been written as a dissent, only procuring a deciding vote in the eleventh hour.[10] This would explain the decision's firm refusal to ignore recent shifts in the Court's Fourteenth Amendment jurisprudence and its rather hasty compromises with relevant precedents. For decades, the conventional interpretation of *Lochner* was the adopted dissent of Justice Holmes: that the majority was simply legislating *laissez faire* economic policy from the bench. Given the strong public perception linking the economic misery of the Depression to *Lochner*'s license, it is little wonder that the established reading would so vehemently deny its rationale any acknowledgement of truth.[11] The attitude toward the decision is captured in the headlines of American newspapers as the Great Depression wore on: "The philosophy of *Laissez Faire* applied

[10] Bernstein, "*Lochner v. New York*: A Centennial Retrospective," 1496.

[11] "The Depression and the failures of unregulated businesses made it harder to argue that governmental intervention beyond common law rules was antithetical to economic productivity." Sunstein, "Constitutionalism after the New Deal," 437. Cf. *West Coast Hotel v. Parrish* (1937) 300 U.S. 402 (Justice Sutherland, rejecting the majority's repudiation of *Lochner*, writes "the meaning of the Constitution does not change with the ebb and flow of economic events"); *Planned Parenthood v. Casey*, 505 U.S. 861 (1992) ("In the meantime, the Depression had come and, with it, the lesson that seemed unmistakable to most people by 1937, that the interpretation of contractual freedom protected in *Adkins* rested on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare").

during last ten years has brought disaster."[12] To this day, the dominant strain of both scholarly and popular discourse on *Lochner* emphasizes the Holmesian contention: Peckham's ruling is nothing more than an elaborate subterfuge.[13] As a result, the subtle argument he begins in *Allgeyer* and concludes in *Lochner* has been largely overlooked by both academic scholarship and subsequent generations of the Court. *Lochner* has become a caricature of *laissez-faire* and a convenient scapegoat to avoid straightforward discussion.

Despite the adoption of Holmes' critique as the classic reading, Cass Sunstein has done much to reinterpret *Lochner* and its progeny in a more charitable light, seeing the decision as a return to principles of neutrality as established by common law.[14] According to Sunstein, the *Lochner* era court understood due process to demand, above

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[12] "Seven-Point Program of Progs Told," *The Helena (Montana) Independent*, April 24, 1931. See also: "Clash of Attitudes," *Centralia (Washington) Daily Chronicle*, October 3, 1931 ("The 'laissez faire' school of economics had almost a unanimous majority until hard times came. Now, however, we are hearing demands for five-year plans, for comprehensive schemes…"); "Minister Continues 'Depression Talks'," *The Circleville (Ohio) Herald*, July 23, 1932 (Arguing that the Depression is God's punishment for greedily favoring business interests at the expense of the common man); "Norman Thomas Urges Socialism," *Lowell (Massachusetts) Sun*, November 3, 1932 ("None of the fundamental causes of the depression has been or can be removed by our laissez faire capitalism").

[13] As I will discuss, recent revisionist movements have done much to weaken *Lochner*'s traditional interpretive orthodoxy, but have not yet overthrown it. The current Chief Justice of the Supreme Court, for example, regards *Lochner* as policy legislation rather than constitutional judgment: "You go to a case like the *Lochner* case, you can read that opinion today and it's quite clear that they're not interpreting the law, they're making the law." September 13, 2005, Transcript, http://www.veiled-chameleon.com/weblog/archives/000205.html. For an excellent discussion of the current ideological positions, see Bernstein, "*Lochner v. New York*: A Centennial Retrospective," 1521-1525.

[14] Cass R. Sunstein, "Lochner's Legacy," *Columbia Law Review*, Vol. 87, No. 5 (June, 1987): 873-919.

all else, that the law be applied without favoritism. "Governmental intervention," he writes, "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."[15] For this reason, it is inappropriate to decry the *Lochner* decision as a paradigm of judicial activism. To meet the requirement of due process, the maximum hours law would have to serve general or public purposes. Lacking sufficient evidence to prove such neutrality, Justice Peckham found himself forced to dismiss New York's claim as "special-interest" legislation.[16] In this and later cases, the *Lochner* court strove simply to ensure that neither employers nor employees were bestowed any legal advantage over the other. To Sunstein, Peckham's failure is not arbitrary or political decision-making, but misinterpreting the appropriate baseline of neutrality. *Holden* provided an essential insight into economic justice that Peckham overlooks — the default relationship between employers and employees favors the former over the latter. Here, and in all economic cases, the status-quo is not something derived from a natural condition, but is something imposed by a contrived legal ordering. Thus, given the requirements of Equal Protection, true neutrality demands a recognition of these agitated power distributions.[17]

Sunstein's thesis regarding "*Lochner*'s Legacy" has garnered much support since its publication in 1987, remaining largely unchallenged for nearly 20 years. During this time, Sunstein has become "the most cited law professor in the United States" and his

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[15] Sunstein, "Lochner's Legacy," 874.

[16] Sunstein, "Lochner's Legacy," 879.

[17] Sunstein, "Lochner's Legacy," 917.

reading remains the dominant alternative to Holmes' classic critique.[18] In 2003, David Bernstein presented a significant challenge to both Holmes and Sunstein in his amusingly titled article, "*Lochner*'s *Legacy*'s Legacy."[19] Bernstein praises Sunstein's tenacity in overthrowing the oft-cited, yet erroneous tradition of his predecessors. The *Lochner* court is not ruled simply by a blind preference for business interests, a la Holmes — but neither is it doing anything so subtle as reestablishing common law tenets of legal neutrality. Sunstein's initial claim was a modest conjecture about the overarching tenor of *Lochner*ian jurisprudence, qualified and even questioned within the article's footnotes.[20] However, over the years he has reiterated his thesis with increasing confidence, despite lurking questions and no additional evidence.[21] Bernstein criticizes the testimony supporting his common law revisionism as circumstantial at best, accusing Sunstein of citing only a handful of relevant cases, while misinterpreting their greater

[18] David E. Bernstein, "*Lochner's Legacy*'s Legacy," Texas Law Review, Vol. 82, No. 1 (November, 2003): 14. Berstein draws his information from: Brian Leiter, *Most Cited Law Faculty*, at http://www.utexas.edu/law/faculty/bleiter/rankings02/most.cited.html (last visited Oct. 1, 2003).

[19] He writes of the title, "Any errors that survive editing will be corrected in a future article to be called *Lochner's Legacy's Legacy's Legacy."* Bernstein, "*Lochner's Legacy*'s Legacy," 1.

[20] For several examples, see Bernstein, "*Lochner's Legacy*'s Legacy," 19-22.

[21] E.g. Cass R. Sunstein, *After the Rights Revolution* (Cambridge: Harvard University Press, 1990), 19-20, 147-48, 211; Cass R. Sunstein, *Democracy and the Problem of Free Speech* (New York: The Free Press, 1993), 97; Cass R. Sunstein, *Free Markets and Social Justice* (Oxford Oxfordshire: Oxford University Press, 1997), 229-230; Cass R. Sunstein, *The Partial Constitution* (Cambridge: Harvard University Press, 1998), 40-92; Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein & Mark V. Tushnet, *Constitutional Law: 6th Edition* (Gaithersburg: Aspen Publishers, 2009).

ideological issues.[22] Sunstein's proposal presumes a homogeneity of the *Lochner* era that simply did not exist. "If Sunstein is correct," Bernstein suggests, "the Court should have consistently invalidated regulatory laws that had real or potential redistributive consequences."[23] Yet, we see that there are many instances between *Lochner* and the New Deal in which the Court seemed quite comfortable upholding such regulation.[24]

More importantly, within *Lochner* itself — the case we would expect to establish the tradition of common law neutrality — we find no language stating, directly or indirectly, the sort of principles he wishes to posit.[25] Sunstein's interpretation of *Lochner* is contingent upon the majority's dismissal of the New York law on the grounds that it constitutes special-interest legislation. In fact, the majority makes no such contention, instead claiming that, "It seems to us that the real object and purpose were simply to

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[22] Sunstein himself admits that his selection of cases was hastily chosen and not necessarily representative of the whole. Cass R. Sunstein, "*Lochnering*," Texas Law Review, Vol. 82, No. 1 (November, 2003): 68.

[23] Bernstein, "*Lochner's Legacy*'s Legacy," 35.

[24] E.g. *Muller v. Oregon*, 208 U.S. 412 (1908); *Sturges & Bum Mfg. Co. v. Beauchamp*, 231 U.S. 320 (1913); *Erie R.R. v. Williams*, 233 U.S. 685 (1914); *Riley v. Massachusetts*, 232 U.S. 671 (1914); *Booth v. Indiana*, 237 U.S. 391 (1915); *Bosley v. McLaughlin*, 236 U.S. 385 (1915); *Miller v. Wilson*, 236 U.S. 373 (1915); *Bunting v. Oregon*, 243 U.S. 426 (1917); *Radice v. New York*, 264 U.S. 292 (1924).

[25] Bernstein, "*Lochner's Legacy*'s Legacy," 48. See also Howard Gillman, *The Constitution Besieged* (Durham: Duke University Press, 1993), 128 (*Lochner* "does not explicitly rely on the language of unequal, partial, or class legislation"). Owen Fiss provides a similar critique: "…the common law had only a tangential relationship to the employment regulation being examined. No common law rule existed that placed a ceiling on the number of hours worked, prohibited the employment of children, or outlawed yellow dog contracts… The *lack* of common law antecedents forced the Court to speak more openly and brazenly about the limits on the legislative power, and thus may have been responsible for the preeminence of *Lochner* as the source of the Fuller Court's identity." Owen M. Fiss, *Troubled Beginnings of the Modern State, 1888-1910* (Cambridge: Cambridge University Press, 2006), 157 (emphasis added).

regulate the hours of labor between the master and his employees… in a private business."[26] This rationale is not "impermissibly partisan," as Sunstein maintains, but corresponds to a more general concern that the legislation oversteps its legitimate jurisdiction as a health law.[27] Considering these and other criticisms, Sunstein has been humble enough to admit, "Most of Bernstein's own claims seem to me convincing."[28]

"A more persuasive understanding of *Lochner* can be found in the Court's own explanation for its decisions," Bernstein suggests. "It was seeking to protect what it saw as fundamental individual rights against excessive government intrusion."[29] Contrary to Sunstein, *Lochner*'s primary import is a movement *away* from class legislation and into the modern paradigm of extraconstitutional fundamental rights. As a consequence of the *Lochner* decision, the Court largely abandons its framework of class legislation arguments under the Equal Protection Clause in favor of liberty of contract arguments

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[26] *Lochner*, 198 U.S. 64. Bernstein provides four reasons why this fact should not be taken lightly: 1) Up until *Lochner*, the Court had no qualms explicitly invoking arguments of class legislation; 2) The prime focus of Lochner's brief was a class legislation argument; 3) The Court of Appeals introduced a class legislation argument regarding Lochner's case; and 4) Justice Peckham, while serving as a New York Court of Appeals justice, explicitly censured class legislation as particularly heinous. "That he failed to articulate a similar critique in *Lochner*, especially in light of indications that the law was passed in part to aid union members at the expense of their rivals, strongly suggests that opposition to class legislation was not the basis of his decision." David E. Bernstein, "*Lochner* Era Revisionism, Revised: *Lochner* and the Origins of Fundamental Rights Constitutionalism," *Georgetown Law Journal*, Vol. 92 (2003-2004): 24-26.

[27] Sunstein, "Lochner's Legacy," 879.

[28] Sunstein "*Lochnering*," 68. This is not to suggest Sunstein has been wholly won over, although it remains unclear what continues to tie him to the common law interpretation. He explicitly mentions two shortcomings with Bernstein's alternative: 1) His account of police power is inadequate and 2) He seems to think *Lochner* was correctly decided. Neither of these add any weight to Sunstein's argument.

[29] Bernstein, "*Lochner* Era Revisionism, Revised," 31.

under the Due Process Clause.[30] In this way, Justice Peckham successfully introduces a doctrine of fundamental rights into the Court's jurisprudence. Berstein is careful to point out that these rights are not arbitrary, but are firmly grounded in an "implicit legal historicism" — their privileged status is derived from their seminal role in America's historical development, flowing from its natural rights tradition.[31]

The Court experienced a similar move earlier in its history with Justice Bradley's dissenting opinion during the *Slaughter-House Cases*. Once more, we witness a conflict between the rights of the state and the rights of the individual. He puts the problem thus: "The right of a State to regulate the conduct of its citizens is undoubtedly a very broad and extensive one, and not to be lightly restricted. But there are certain fundamental rights which this right of regulation cannot infringe. It may prescribe the manner of their exercise, but it cannot subvert the rights themselves. I speak now of the rights of citizens of any free government."[32] Of these, some are expressed within the Constitution. However, even barring explicit protection, they remain in full effect.[33] The ratification of

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[30] "Even cases that seemed to involve the most blatant forms of class legislation were decided solely on a due process fundamental rights theory, with the Court ignoring equal protection class legislation elements." Bernstein, "*Lochner* Era Revisionism, Revised," 30. Cf. *New State Ice Co. v. Liebmann* 285 U.S. 262 (1932).

[31] "Although Anglo-American tradition contained no clear right to liberty of contract, historicist-minded postbellum legal theorists believed that the right, along with general limitations on the scope of the police power, was implicit in the evolutionary history of the liberty of the Anglo-American people." Bernstein, "*Lochner* Era Revisionism, Revised," 39. Cf. Justice Washington's famous words in *Corfield v. Coryell*, "What these fundamental privileges are it would perhaps be more tedious than difficult to enumerate." *Corfield v. Coryell,* 6 Fed. Cas. 546, no. 3230 C.C.E.D.Pa. 1823.

[32] *Slaughterhouse Cases*, 83 U.S. 114 (1872).

[33] "But even if the Constitution were silent, the fundamental privileges and immunities of citizens, as such, would be no less real and no less inviolable than they now are." *Slaughter-House Cases*, 83 U.S. 119.

the Fourteenth Amendment only reinforced their preeminence, allowing the federal government to intervene against abuses by the states. What Justice Bradley wants to do with Privileges & Immunities in his *Slaughter-House* dissent, Justice Peckham accomplishes with Due Process in *Lochner*.

Commenting on the *Lochner* decision, Owen Fiss fleshes out the philosophical source of fundamental rights used by both Peckham and Bradley. He divides authority into two sorts: organic and constitutive.[34] Organic authorities (such as the family) exist naturally, while constitutive authorities (such as government and other contractual relationships) are creations of artifice. Each is bound by external limits, such as moral prohibition. However, constitutive authority is subject to an additional limit internal to itself, arising from its intended purpose. "Violating such a constraint," Fiss insists, "raises not just a question of wrongfulness, as does violating an external restraint, but also one of legitimacy, for such conduct contradicts the very reason for the existence of the authority."[35] When Justice Bradley speaks of the rights of citizens inherent to any free government, this is what he has in mind. Such rights are fundamental because they are intrinsic to the constitutive purpose of the regime. Similarly, Justice Peckham is able to declare the liberty of contract as fundamental due to its centrality to our founding doctrines. While Bernstein's argument for an American natural rights tradition goes no earlier than the *Slaughter-House Cases*, Fiss' insight provides a way to extend it to the Founding and beyond. However, such an addition requires a much more in-depth analysis of the social contract tradition than Fiss is prepared to offer. Subsequent

[34] Fiss, *Troubled Beginnings*, 158-160.

[35] Fiss, *Troubled Beginnings*, 159.

chapters in this dissertation will complete this project and verify the efficacy of Peckham's claims.

Allgeyer v. Louisiana

While the state's rationale in *Lochner*, drawing upon public health concerns, could be traced back at least eighty-one years to *Gibbons v. Ogden* (1824)[36], "liberty of contract" made its first appearance in American constitutional law a mere eight years prior with *Allgeyer v. Louisiana* (1897).[37] Here, the Court, for the first time in its history, interpreted "liberty" under the Fourteenth Amendment to include economic liberty:

> 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.[38]

To further defend its position against the state, Justice Peckham, writing for a unanimous Court, goes on to affirm that "the right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence…"[39] Through these statements, we see that the liberty

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[36] *Gibbons v. Ogden*, 22 U.S. 9 (1824).

[37] This too-oft overlooked case involves a citizen of Louisiana who purchases insurance in New York, despite legislation in his own state designed to criminalize such arrangements. *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).

[38] *Allgeyer*, 165 U.S. 589.

[39] Quoting Justice Bradley in *Butchers' Union Company v. Crescent City Company*, 111 U.S. 762 (1884); *Allgeyer*, 165 U.S. 589. With regard to the facts of this case, the Court continues: "Has not a citizen of a state, under the provisions of the federal

to contract is protected both by the Constitution and by the law of nature, the former drawing strength from the latter. While the Court had earlier in its history (perhaps most notably in *Corfield v. Coryell*) made advances toward a more substantive reading of the Constitution, Peckham's move here is unique in several respects.[40] First, never before had it so closely and explicitly tied the concept to the promises of the Declaration. Second, its vesting in the Due Process Clause suggests both a breadth and limit to a citizen's fundamental rights. They are held as inalienable, but respected by the state only insofar as they do not run afoul of its political obligations, which fulfill the requirements of "due process."

Yet, although the Fifth and Fourteenth Amendments mirror Jefferson's inalienable rights, "pursuit of happiness" is conspicuously substituted for "property" in both constitutional iterations.[41] Justice Peckham makes clear that the "pursuit of happiness" informs the Declaration's guarantees of life and liberty, thereby requiring that their textual expression be interpreted in its light. The Constitution protects economic liberties under the Fourteenth Amendment because such protection is necessary to ensure the everyday activity that accounts for the pursuit of happiness among individual citizens. Peckham's constitutional framework is almost Lincolnian, wherein the Constitution is a "picture of silver" existing to adorn and preserve the principles of the Declaration, which

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Constitution above mentioned, a right to contract outside of the state for insurance on his property — a right of which state legislation cannot deprive him?"

[40] *Corfield v. Coryell*, 6 Fed. Cas. 546, no. 3230 C.C.E.D.Pa. 1823.

[41] This curious revision will be discussed in greater detail in Chapter 3.

is the nation's true "apple of gold."[42] The Declaration is not simply one among many interpretive tools, but is the primary lens through which we should read all constitutional provisions.

That said, liberty under due process is not absolute and is ultimately subject to the regulation of legitimate police power. "[W]e do not intend to hold that in no such case can the state exercise its police power," Justice Peckham admits. However, "When and how far such power may be legitimately exercised with regard to these subjects must be left for determination to each case as it arises."[43] The pursuit of happiness is both individual and societal, police power tending to look to the aggregate good. While the Court recognizes this within its opinion, by requiring case-by-case legitimacy tests for police power, *Allgeyer* establishes a strong predisposition in favor of individual liberty and the burden of proof lies with those who would stifle the de facto position of contractual liberty.

Holden v. Hardy

Although *Lochner* will ultimately rely upon the principles set forth in *Allgeyer*, a more obvious precedent is *Holden v. Hardy*.[44] Like *Lochner* (and unlike *Allgeyer*), *Holden* involves the state imposition of a maximum hours law, disrupting the normal contractual relationship between employer and employee. This correspondence alone should make *Holden* a cornerstone for the Court's later ruling in *Lochner*. Yet, Justice

[42] "Fragment on the Constitution and the Union," *Collected Works of Abraham Lincoln*, ed. Roy P. Basler (New Brunswick, NJ: Rutgers University Press, 1953), 4:168-169.

[43] *Allgeyer*, 165 U.S. 590.

[44] *Holden v. Hardy*, 169 U.S. 366 (1898).

Peckham deemphasizes the role of *Holden* when deciding *Lochner*. Likely, this is because, although the Court attempts to establish a consistency between the cases, *Holden* represents a dramatic departure from the lessons of *Allgeyer*. Justice Brown, writing for the new majority on the Court, is unwilling to adopt Peckham's strong disposition toward the moral autonomy of the individual.

In 1896, the state of Utah determined that, pursuant to the specific provisions of its state constitution,[45] the number of hours any miner or refinery worker could labor would be limited to eight per day. By reducing the workday to a tolerable duration, the state hoped to decrease work-related injuries occurring in these uncommonly dangerous occupations. As will become relevant in *Lochner*, the law held a provision that allowed exceptions to the restriction for reasons of "imminent danger" to life or property.[46]

Mr. Holden ran afoul of the statute by requiring employees to work ten-hour shifts in his mine. In defense of his actions, he argued that the law was in violation of Fourteenth Amendment due process, with regard to both liberty and property. The Court, recognizing *Allgeyer*'s apparent bearing upon this case, took care to shy away from any precise definition of "due process" which might legitimately restrict life, liberty, or property, instead relying upon a more general concept of "natural and inherent principles of justice."[47] It then distanced itself from *Allgeyer*'s holding by emphasizing the limitations inherent to the right of contract. Just as *Allgeyer* declared that the liberty of contract must be protected as an inalienable right, so the new majority in *Holden* stressed

[45] Article 16, §6 of the Utah constitution states, "the legislature shall pass laws to provide for the health and safety of employees in factories, smelters and mines."

[46] *Holden*, 169 U.S. 380.

[47] *Holden*, 169 U.S. 389; 169 U.S. 390.

that legitimate police power could claim the same privilege: both derive their authority insofar as they are necessary to protect the pursuit of happiness. As such, "[t]his power, legitimately exercised, can neither be limited by contract nor bartered away by legislation."[48] This assertion marks a fundamental shift from *Allgeyer*. In the former case, the contractual interests of the individual are weighed against the interests of the public, as protected by police power. Generally, the individual interests will successfully resist constraint by the state in the name of an amorphous societal good. In *Holden*, however, contract can never deter the imposition of regulation for the public good. Thus, the legal emphasis shifts from the individual to society.

As a rule, the Court relegates questions of prudence to the political branches of government. If the desired end is legitimate, then the corresponding means are best left to be hashed out through democratic process. Having established that legislation in the interest of public health may restrict individual contract (in this case, between employer and employee), the purpose of Utah's maximum hours law was unquestionably permissible. The state's implementation to this end became a matter merely of prudence and preference, requiring only rational basis scrutiny.[49] Yet, what the majority solicits is an even lower standard: "Though reasonable doubts may exist as to the power of the legislature to pass a law, or as to whether the law is calculated or adapted to promote the health, safety or comfort of the people, or to secure good order or promote the general

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[48] *Holden*, 169 U.S. 392.

[49] "These employments, when too long pursued, the legislature has judged to be detrimental to the health of the employees, and, so long as there are reasonable grounds for believing that this is so, its decision upon this subject cannot be reviewed by the Federal courts." *Holden*, 169 U.S. 395.

welfare, we must resolve them in favor of the right of that department of government."[50] When done in the interest of society, such an overwhelming predisposition exists in favor of the legislation that even *reasonable doubt* is dismissed. The legislature's claim that the law is in the interest of public health is the only proof that is necessary, again suggesting a shift from the Court's earlier concern for individual liberty to a more general good. Unsurprisingly, the majority rules against Holden, finding his actions in violation of legitimate legislation.

Although this decision seems inconsistent with *Allgeyer*, the Court goes out of its way to reconcile their obvious differences. Rather than overturn recent precedent, the majority hopes to accentuate the facts that distinguish *Holden* from its antecedent by arguing that, "the proprietors of these establishments and their operatives do not stand upon an equality, and… their interests are, to a certain extent, conflicting."[51] When negotiating the terms of employment, employees are often likely to accept unfavorable provisions out of desperation. If they are unable to secure a job — even one of substandard conditions — they risk their very livelihood. In contrast, employers only infrequently finds themselves in a position where they cannot afford to lose a single employee. Consequently, employers will use their leverage to squeeze as much labor out of employees as possible, while offering less compensation than would otherwise be accepted in a state of true contractual parity. Self-interest may prove an insufficient guide under such circumstances. Of course, there is a question as to whether absolute equality among parties is necessary to validate otherwise legitimate contracts, which

[50] *Holden*, 169 U.S. 397.

[51] *Holden*, 169 U.S. 397.

Holden takes as given. The majority understands *Holden*'s employer/employee relationship and *Allgeyer*'s customer/company relationship as fundamentally different, necessitating a course of action in one that would not necessarily follow from the other. This disjunct allows the Court to de-emphasize the claims one might make to individual dignity and the liberty of contract in this case, maintaining instead that the State has a right to interpose itself into any contract which is not made between equals. Traditional standards of equality, such as age and competence, are judged irrelevant — a conclusion that will receive strong rebuke in *Lochner*.[52]

Despite the majority's attempts at reconciliation, it is unable to receive the unanimous support that *Allgeyer* enjoyed. Voting in dissent are Justices Brewer and Peckham, both of whom are strong supporters of the liberty of contract in *Allgeyer* and *Lochner*. Justice Peckham's rejection of the majority's claim in *Holden* is particularly telling, suggesting that it is contrary to the jurisprudence he hoped to establish the year prior. While *Allgeyer* assumes that individuals are competent to make contractual agreements that should be respected by the state, *Holden* instead defaults to a position of state paternalism. Eventually, the Court must either choose between or reconcile these two paths.

[52] *Holden*, 169 U.S. 397. The Court's refusal to consider whether a man is "competent to contract" seems a particularly egregious dismissal. If a man is competent, he is necessarily capable of being responsible for his own success or failure.

Lochner v. New York

For the next few years, the Court consistently upheld labor regulation following *Holden*'s precedent, over the dissents of Justices Peckham and Brewer.[53] Yet, while the Court had diminished the influence of the liberty of contract as a substantive right under due process, it continued to maintain that such a right could find appropriate expression within American constitutional law.[54] *Lochner v. New York* would provide such an occasion. When Lochner brought his case before the Supreme Court in 1905, the outcome seemed relatively straightforward. As in *Holden*, the case involved a maximum hours law ostensibly passed to protect public health under the police power. New York bakeries at the time were often small, family-owned establishments housed in the poorly ventilated basements of tenement buildings.[55] The conditions were sweltering and the air filled with flour. Roaches and rats flourished in such an environment, occasionally finding their way into goods that would later be sold.[56] Due to the strong influence of baker's unions and unfavorable publicity by the local press, it became common opinion that the working conditions of bakers was negatively impacting the health of both themselves and the public at large.[57] It would seem, given this evidence, that *Holden*'s

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[53] See, for example: *Knoxville Iron Co. v. Harbison*, 183 U.S. 13 (1901); *St. Louis Consol. Coal Co. v. Illinois*, 185 U.S. 203 (1902); *Atkin v. Kansas*, 191 U.S. 207 (1903).

[54] See *United States v. Joint Traffic Ass'n*, 171 U.S. 572-73 (1898); *Patterson v. Bark Eudora*, 190 U.S. 173-75 (1903); *N. Sec. Co. v. United States*, 193 U.S. 351 (1904).

[55] Bernstein, "*Lochner v. New York*: A Centennial Retrospective," 1477.

[56] *Tenth Annual Report of the Factory Inspectors of the State of New York, 1896* (Albany Wynkoop Hallenbeck Crawford Co.: State Printers, 1896), 46.

[57] Bernstein, "*Lochner v. New York*: A Centennial Retrospective," 1475, 1478-1479.

standard would demand Lochner's appeal be overturned and that New York's legislation be praised as an exemplary exercise of police power. Of course, this is not how events transpired.

Writing for a bare majority of five, Justice Peckham uses Lochner's predicament as an opportunity to revisit the themes he introduced in *Allgeyer*, which had been muddled by subsequent cases. He opens by clarifying the terms of debate: "The statute necessarily interferes with the right of contract between the employer and employees concerning the number of hours in which the latter may labor in the bakery of the employer."[58] The right of contract hearkens back to *Allgeyer*, but is considered in the context of employment via *Holden*. It was in *Allgeyer* that the Court first considered the effect of the Due Process Clause on the right of individual contract. However, it is not until *Holden* that this doctrine is extended to the relationship between employer and employee. *Holden* appears to be the more relevant model. Due to this precedent, Peckham is unable to fully embrace *Allgeyer* and must therefore temper his philosophy in light of the Court's recent holdings. *Allgeyer* establishes the liberty of contract as inalienable, being essential to the pursuit of happiness. Yet, its emphasis on individual happiness is undermined by *Holden*'s societal perspective, wherein the interest of the whole always trumps that of the part. Despite his dissent in *Holden*, Justice Peckham incorporates its core teaching into *Lochner*: legitimate exercises of police power may trump the rights of the individual. He writes, "If the contract be one which the State, in the legitimate exercise of its police power, has the right to prohibit, it is not prevented

[58] *Lochner*, 198 U.S. 53.

from prohibiting it by the Fourteenth Amendment."[59] Nonetheless, such power must have limits,

> "Otherwise the Fourteenth 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. The claim of the police power would be a mere pretext — become another and delusive name for the supreme sovereignty of the State…"[60]

The question to be addressed in the case then amounts to, "is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family?"[61] In *Allgeyer*, Peckham subjected the claim of legitimate police power to strict scrutiny. *Holden*'s ruling lowered the bar to something even more lenient than rational basis. What Peckham offers in *Lochner* is a compromise between the two — for such legislation to be legitimate, the means need only be reasonable in relation to legitimate ends, without predisposition either for or against the state. Unfortunately, the Justice is too quick to reject the legitimacy of New York's statute, compromising his otherwise moderate and thoughtful position. "The question whether this act is valid as a labor law, pure and simple," he writes, "may be dismissed in a few words."[62] And indeed, the crux of his

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[59] *Lochner*, 198 U.S. 53.

[60] *Lochner*, 198 U.S. 56.

[61] *Lochner*, 198 U.S. 56.

[62] *Lochner*, 198 U.S. 57.

argument is the straightforward claim that only wards of the state can be under the protection of labor laws. Bakers are not wards of the state and therefore, the statute cannot stand as labor law. As a result, "There is no reasonable ground for interfering with the liberty of person or the right of free contract by determining the hours of labor in the occupation of a baker."[63] Justice Peckham's conclusion would be unquestionable if his premises were sound. However, as the Court determined in *Holden*, because of the unequal and adversarial relationship between employer and employee, the state may at times interpose itself between them when self-interest proves an unsafe guide.[64] Peckham, a dissenter in *Holden*, quickly disregards its controlling precedent and moves forward with his earlier doctrine in *Allgeyer*. His black and white rhetoric leads later Justices to believe that he has not given the matter his full consideration, leaving him open to allegations of exercising will rather than judgment.

That said, his argument is not groundless.[65] The primary contention offered by New York was that bakers were working under deleterious conditions, despite their own best interests. Peckham attacks this position on two fronts. First, he denies that working

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[63] *Lochner*, 198 U.S. 57.

[64] "[T]he proprietors of these establishments and their operatives do not stand upon an equality, and… their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employees, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases, self-interest is often an unsafe guide, and the legislature may properly interpose its authority." *Holden*, 169 U.S. 397.

[65] In fact, there is significant evidence suggesting that the legislation was simply a way to keep smaller, independent bakeries from competing with larger, unionized opponents. Cf. Bernstein, "*Lochner v. New York*: A Centennial Retrospective," 1474-1486.

conditions in such bakeries are unusually harmful. "In looking through statistics regarding all trades and occupations," he asserts, "it may be true that the trade of a baker does not appear to be as healthy as some other trades, and is also vastly more healthy than still others. To the common understanding, the trade of a baker has never been regarded as an unhealthy one."[66] Within the opinion itself, there is very little evidence in support of this claim, giving even more credence to Peckham's opponents. However, although he does not cite it, the judge seems to be relying upon an appendix to Lochner's brief, providing various clinical and social studies debunking the alleged risks of bakeshops.[67] While he acknowledges that such an occupation is not the healthiest, the same could be said of almost all professions. Should the state's claim stand here, he wonders, what could ever check it? Further, were there legitimate health concerns to be addressed, a maximum hours law is not the appropriate remedy.[68] Such steps had already been taken through prior legislation, requiring improved facilities and periodic inspections.[69]

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[66] *Lochner*, 198 U.S. 59.

[67] "Brief for Plaintiff in Error," *Lochner v. New York*, 198 U.S. 45 (1905) (No. 292), reprinted in Philip Kurland & Gerhard Casper eds., *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law* (Frederick: University Publications of America, 1975), 653. As has been pointed out by Bernstein, this omission was to the eternal detriment of his reputation. Bernstein, "*Lochner v. New York*: A Centennial Retrospective," 1498.

[68] "If the man works ten hours a day, it is all right, but if ten and a half or eleven, his health is in danger and his bread may be unhealthful, and, therefore, he shall not be permitted to do it." *Lochner*, 198 U.S. 62. In addition, the law holds a provision (§110) that allows employees to work more than ten hours a day, "for the purpose of making a shorter work day on the last day of the week" that seems to undermine any potential health concerns that may arise from overworking employees on any given day. *Lochner*, 198 U.S. 65.

[69] "All that it could properly do has been done by it with regard to the conduct of bakeries, as provided for in the other sections of the act above set forth. These several sections provide for the inspection of the premises where the bakery is carried on, with

The second prong of Peckham's attack addresses the basic principles of human dignity. Even assuming that the conditions of employment were uncommonly hazardous, those involved choose to work of their own free will. Bakers "are in no sense wards of the State," and deserve to be treated and respected as fully rational adults.[70] This argument directly confronts *Holden*'s claim that employees cannot bargain with employers on equal terms. Early on, Peckham acknowledges *Holden*'s apparent bearing, but quickly dismisses any connection between the cases on grounds that the New York maximum hours law contains no emergency exception clause.[71] This red herring distracts from *Holden*'s fundamental argument and allows Peckham to reestablish the liberty of contract in its purest, idealized form. The only homage he pays to *Holden*'s claim is an insinuation that "the character of the employees in such kinds of labor" (i.e. miners) might be substandard and thus deserving of special attention by the state.[72] The common man, he suggests, is made of better mettle. Peckham's unwillingness to bow on this issue demonstrates that it, above the other contentions introduced in *Holden*, runs contrary to the judicial philosophy he wishes to espouse.

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regard to furnishing proper wash-rooms and water-closets, apart from the bake-room, also with regard to providing proper drainage, plumbing and painting; the sections, in addition, provide for the height of the ceiling, the cementing or tiling of floors, where necessary in the opinion of the factory inspector, and for other things of that nature; alterations are also provided for and are to be made where necessary in the opinion of the inspector, in order to comply with the provisions of the statute." *Lochner*, 198 U.S. 61-62.

[70] *Lochner*, 198 U.S. 57.

[71] "There is nothing in *Holden v. Hardy* which covers the case now before us." *Lochner*, 198 U.S. 55.

[72] *Lochner*, 198 U.S. 54.

With *Holden* dismissed as an appropriate model of police power jurisprudence, Justice Peckham looks to the court's most recent decision on the subject, *Jacobson v. Massachusetts*.[73] Citing *Jacobson* is curious for several reasons. Like *Holden*, it was another 7-2 decision with Peckham in the minority. Were he not attempting to lobby for votes, it is unlikely that Peckham would have shown the case in a positive light. That said, the Justice gives up very little ground, considering the case's radical nature. Its facts involve the most extreme scenario possible, balancing the improbable death of an individual against the lives of an entire city.[74] Such an archetype is too extraordinary to guide the more moderate situation before the Court in *Lochner*. While it is plain that *Jacobson* portrays a necessary and proper use of the police power, one should not assume that anything short of such clarity is an illegitimate government intrusion. The decision itself urges such moderation: "Extreme cases can be readily suggested. Ordinarily such cases are not safe guides in the administration of the law."[75] Unfortunately, this seems to be precisely the standard Peckham has in mind.

Ultimately, Justice Peckham denies that there is *any* rational correlation between the legitimate end of New York's maximum hours statute (protecting public health) and its expression in law.[76] Instead, "It seems to [him] that the real object and purpose were simply to regulate the hours of labor between the master and his employees (all being

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[73] *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

[74] In *Jacobson*, a Massachusetts citizen resists mandatory vaccination during a smallpox epidemic on the grounds that such a procedure may ultimately infect him.

[75] *Jacobson*, 197 U.S. 38.

[76] "There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health or the health of the individuals who are following the trade of a baker." *Lochner*, 198 U.S. 58.

men *sui juris*) in a private business…"[77] The legislation was nothing more than an insidious attempt to increase the sphere of governmental authority over the individual, thereby paving the way for even more heinous interventions.

Justice Harlan's dissenting opinion remains firmly grounded to the tradition established in *Holden*. He acknowledges and accepts much of Peckham's philosophical framework, but refuses to relinquish the deference usually paid to legislatures.[78] While conceding that the liberty of contract has attained the status of "right," Harlan does not see why it deserves special protection by the Court. He insists, "It is enough for the determination of this case, and it is enough for this court to know, that the question is one about which there is room for debate and for an honest difference of opinion."[79] Justice Peckham, foreshadowing the Court decades later, demands a narrower scope for operation of the presumption of constitutionality.[80] Harlan, in his own bit of foreshadowing, warns that "A decision that the New York statute is void under the Fourteenth 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 their citizens."[81]

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[77] *Lochner*, 198 U.S. 64.

[78] "…a legislative enactment, Federal or state, is never to be disregarded or held invalid unless it be, beyond question, plainly and palpably in excess of legislative power." *Lochner*, 198 U.S. 68.

[79] *Lochner*, 198 U.S. 72.

[80] Footnote 4 in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

[81] *Lochner*, 198 U.S. 73.

Justice Holmes' dissent is much less politic than his peer's. He accuses the majority of judicial legislation and reading economic theory into the Constitution where none exists. The Constitution, he famously contends, "is made for people of fundamentally differing views."[82] And yet, for all of his poetic outrage, Holmes misses the point of Peckham's argument. He believes the majority's philosophic exposition to be mere posturing, thus overlooking the true value it adds to American jurisprudence.

The End of an Era

Lochner era jurisprudence came to a definitive end in 1937 with the decision of *West Coast Hotel Co. v. Parrish*.[83] While its influence had been on a steady decline since the early 1920's, Justice Hughes was the first to repudiate the liberty of contract on its own terms. The bare facts of the case involve a hotel operating in violation of a state minimum wage law for women and children. These facts are particularly poignant, considering that the law is in direct violation of the Court's *Lochner*ian ruling in *Adkins v. Children's Hospital*.[84] Given the clear precedent provided by *Adkins*, the facts that 1) Washington passed a law in flagrant violation of the decision and 2) the Court decided to hear the case, foreshadows a radical shift in the nation's constitutional understanding. Hoping to challenge the *Adkins* ruling (and thereby the entire *Lochner* tradition), Washington justified its legislation as a necessary protection for a vulnerable

[82] *Lochner*, 198 U.S. 76.

[83] *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

[84] In this fascinating case, the Court strikes down a minimum wage law for women and children based, arguing that such labor contracts are protected by the liberty of contract found in the Due Process Clause of the Fifth Amendment. Justice Taft's dissent heavily influences Hughes' later opinion in *West Coast Hotel*. *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

demographic. As expected, the hotel operator argued that the law violated his liberty of contract.

Chief Justice Hughes wastes no time in qualifying thirty years of jurisprudence. "What is this freedom [of contract]?" he asks. "The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law."[85] Against Justice Bradley's *Slaughter-House* assertion that Constitutional silence does not lessen the inviolability of fundamental rights, Hughes demands a return to textualism. The Constitution protects liberty, of which the liberty of contract is but one type. Furthermore, this liberty is conditional and subject to due process.

Of course, even Justice Peckham would admit as much. The question is how one interprets "due process." While Peckham suggests that due process is a standard met only on the rarest of occasions, Justice Hughes believes that most legislation satisfies the requirement. "Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people."[86] Hughes wishes to remind the Court that law is social and exists to better not just the individual, but the whole. In this respect, the police power cannot be relegated to a status inferior to individual rights. Unfortunately, he goes a step further. Taking a cue from Federalist 51, his repudiation is "made commensurate to the danger of attack."[87] Usually

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[85] *West Coast Hotel*, 300 U.S. 391.

[86] *West Coast Hotel*, 300 U.S. 391.

[87] *Federalist 51*, ¶4.

quite subtle in his decisions, Hughes counters the extremity of the *Lochner* era with an extreme of his own: "Liberty under the Constitution is thus necessarily subject to the restraints of due process, and *regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process*."[88] In what appears to be a complete rejection of substantive due process, this reinterpretation wholly subjugates the once-rampant freedom of contract to even the slightest public good. Calling back to *Holden*, Justice Hughes seems confident that democratically elected legislatures will be the best judges of a sufficiently public purpose and that their decision need only appear reasonable to withstand judicial scrutiny.

A charitable reading of Hughes' opinion would be that he radicalized due process for rhetorical effect, thinking that the new jurisprudence would fall somewhere between *Lochner*'s precedent and his. If so, he was gravely mistaken. FDR, never a man to shy away from power, had been trying for years to increase the scope of federal authority through the New Deal. With a Democratically controlled legislature on his side, the only thing standing in his way was an aging and largely conservative Court. Over the years, the president became increasingly frustrated with the obstinacy of the federal judiciary, complaining publicly that "We have… reached the point as a Nation, where we must take action to save the Constitution from the Court."[89] The enmity between the two branches of government finally reached a peak when Roosevelt designed to pack the Court with up to six additional justices sympathetic to his progressive policies.[90] *West Coast Hotel*'s

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[88] *West Coast Hotel*, 300 U.S. 391 (emphasis added).

[89] Bernard Schwartz, *A History of the Supreme Court* (Oxford Oxfordshire: Oxford University Press, 1995), 233.

[90] Judiciary Reorganization Bill of 1937.

favorable ruling toward the aims of the New Deal marked a "switch in time" that diffused a potential constitutional crisis.[91] By overturning *Adkins*, the Hughes Court opened the door for an increased federal presence in the everyday economic affairs of the nation by way of a broad reading of the Commerce Clause. This found expression within the year when Congress passed the Fair Labor Standards Act of 1938 establishing, among other things, a national minimum wage.[92] Through the FLSA, we see an expansion of the police powers doctrine to the federal government via the Commerce Clause, made explicit in *United States v. Darby*.[93] All of this was made possible by lowering the due process standard in *West Coast Hotel*. Since that decision, the Court has never struck down a federal statute on grounds of violating freedom of contract.[94]

All of this raises important questions about the nature and extent of liberty within the context of political order. The existing jurisprudence of the Court gives too much credence to state authority at the expense of individual liberty. The alternative offered by Justice Peckham, however, errs on the side of a liberty that is destructive to the good of the whole. To reconcile the tension between them, a different perspective is required that can be found in the social contract theory of Thomas Hobbes.

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[91] The traditional account that Roosevelt's court-packing plan pressured Hughes and Roberts to change their votes ("the switch in time that saved nine") has been thoroughly discredited by recent scholarship. Nonetheless, we see that as a result of *West Coast Hotel*, all hope of proceeding with such a plan was lost. Cf. Michael Nelson, "The President and the Court: Reinterpreting the Court-packing Episode of 1937," *Political Science Quarterly*, Vol. 103, No. 2. (Summer, 1988).

[92] Fair Labor Standards Act, 29 USC 201-219, 1938.

[93] *United States v. Darby*, 312 U.S. 100 (1941).

[94] Cass R. Sunstein, *The Second Bill of Rights* (New York: Basic Books, 2004), 54.

CHAPTER THREE

Why Hobbes?

Introduction

As the Court has risen in national prominence, there has been an increasing interest in the philosophic roots of the American founding. This is particularly true given the Originalist bent of the bench's conservative wing. The Court's jurisprudence is necessarily informed, not only by the text of the Constitution, but by the ideas and principles behind it. Yet, while it may be expedient to incorporate the insights of these principles into our jurisprudence, we must first demonstrate that such a move is legitimate. The lens of external sources must work to make sense of the text, clarifying otherwise opaque concepts. Once the general principle of extraconstitutional exposition has been accepted, a specific connection must be made between the text of the Constitution and the principles of interpretation proposed. As John Hart Ely remarks, "if your job is to enforce the Constitution then the Constitution is what you should be enforcing, not whatever may happen to strike you as a good idea at the time."[1] Finally, when such a link is made, the interpretive principles must be properly incorporated into jurisprudence; that is, with due consideration of the text and therewith the text as a whole. This last step seems the most frequent stumbling block for would-be interpreters. Too often, a legitimate Constitutional consideration is proposed, only to be overemphasized by the zeal of its patron. "We must never forget that it is a Constitution we are

[1] John Hart Ely, *Democracy and Distrust* (Cambridge: Harvard University Press, 1980), 12

expounding."[2] Legitimate Constitutional hypotheses will never lose sight of the text itself.

This chapter will explore the second of the three steps, contending that the Constitution is best read in light of Hobbesian social contract theory. It will begin with an analysis of the *The Federalist Papers*, which provide an early exposition of our experiment in self-government. The rationale offered there in support of the proposed Constitution presupposes a Hobbesian ontology and standards of political legitimacy. While Locke is conventionally credited with providing a philosophic foundation for the American republic, I will argue that in important ways, Hobbes provides a clearer picture of the Constitution's ends and motivations. The chapter will then turn to the Constitution itself, paying particular attention to areas often thought to be at odds with Hobbesian notions of sovereignty. Finally, it will conclude with an examination of the Constitution's more liberal elements that find their source in Hobbes and a brief account of why such an invaluable authority has fallen into disfavor.

The Federalist Papers

The Federalists, hoping to convince the nation of the proposed constitution's efficacy, went to great lengths to explain the philosophical principles framing the new government. This apologia is best represented by the famous exchange of Madison, Hamilton, and Jay in the *Federalist Papers*. No other source provides such a

[2] *McCulloch v. Maryland*, 17 U.S. 407 (1819).

comprehensive and high-minded defense of American institutions in light of their theoretical underpinnings.[3]

Fitting to the occasion, Hamilton commences the discussion with an appeal to the seriousness of the endeavor: "You are called upon to deliberate on a new Constitution… in many respects the most interesting in the world," he reminds his readers.[4] The import of the American project extends far beyond the limited purview of thirteen recently liberated states — it is an experiment in deliberate self-government heretofore unattempted by humanity. For the first time, a people has been given the opportunity and relative leisure to reflect upon the political ideal and its effectuation, fully cognizant of their role in fashioning the social contract.[5] In such a situation, it is difficult enough for "wise and good men" to ascertain truth, let alone those led by innumerable biases and interests.[6] Yet, with regard to the question of governing, no man is impartial. Thus,

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[3] In 1825, Thomas Jefferson referred to it as, "The book known by the title of 'The Federalist,' being an authority to which appeal is habitually made by all, and rarely declined or denied by any as evidence of the general opinion of those who framed, and of those who accepted the Constitution of the United States, on questions as to its genuine meaning." Thomas Jefferson, "Report to the President and Directors of the Literary Fund," March 4, 1825.

[4] *Federalist* 1.

[5] Such founding moments are particularly important within a Hobbesian framework: "Therefore, when [regimes] come to be dissolved, not by external violence but intestine disorder, the fault is not in men as they are the *matter*, but as they are the *makers* and orderers of them… they cannot, without the help of a very able architect, be compiled into any other than a crazy building, such as, hardly lasting out their own time, must assuredly fall upon the heads of their posterity." *Leviathan*, II, xxix, §1.

[6] "So numerous indeed and so powerful are the causes which serve to give a false bias to the judgement, that we, upon many occasions, see wise and good men on the wrong as well as on the right side of questions of the first magnitude to society." *Federalist* 1. Cf. *Leviathan* I, v, §3: "And as in arithmetic, unpractised men must, and professors themselves may, often err and cast up false, so also in any other subject of

Hamilton promises to supply the justifications underlying his own support "in a spirit which will not disgrace the cause of truth." While his motives can never be fully dispassionate, his arguments remain available for all to judge.[7] We should be careful to read the *Federalist Papers* in view of this caveat — it is a theoretical work intended to achieve the practical end of ratification. Those expecting an exhaustive philosophical treatise on the foundation and ends of government will be disappointed. Nonetheless, the careful reader will be rewarded with an insight into the principles that underlie our commonwealth.

As Martin Diamond points out, perhaps the most explicit reference to fundamental principles can be found in *Federalist* 43.[8] Here, Madison is addressing the quite legitimate concern that, while all states were party to the Articles of Confederation, less than unanimity is able to dissolve the existing regime and establish rule under the Constitution. This seems particularly troublesome under the Lockean dictate that "he, that has once, by actual Agreement, and any express Declaration, given his Consent to be of any Commonweal, is perpetually and indispensably obliged to be and remain unalterably a Subject to it, and can never be again in the liberty of the state of Nature…"[9]

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reasoning, the ablest, most attentive, and most practised men may deceive themselves and infer false conclusions…"

[7] "My motives must remain in the depository of my own breast. My arguments will be open to all and may be judged of by all." *Federalist* 1. Hobbes makes the same case in *Leviathan*, maintaining that reason is ultimately a tool of the passions. Thus, it is a nonstarter to argue about motives, but one can only scrutinize the soundness of one's reckoning (Cf. *Leviathan* I, v).

[8] Martin Diamond, "Democracy and the Federalist: A Reconsideration of the Framer's Intent," *The American Political Science Review*, Vol. 53, No. 1 (March, 1959): 61.

[9] Locke, *Second Treatise of Government*, VIII, §121.

Of course, while the confederate government could certainly dissolve itself, it is extremely unclear whether individual states have the right to abrogate their contractual duties. In defense of this dissolution, Madison replies that, "The… question is answered at once by recurring to the absolute necessity of the case; to the great principle of self-preservation; to the transcendent law of nature and of nature's God, which declares that the safety and happiness of society are the objects at which all political institutions aim, and to which all such institutions must be sacrificed."[10] Recalling the Declaration's appeal to "nature and nature's God," Madison reiterates that the fundamental principle of government is security, both of one's person and aspirations.[11] His standard of legitimacy is a modern innovation, for the "transcendent law" of which he speaks is one in which man is the measure of all things. These Hobbesian tenets are so core to American political theory that Madison takes for granted that self-preservation will justify the breach of an otherwise legitimate political order.[12] While government under the Articles provided the requisite stability to unite the colonies against Britain, its institutional designs were incapable of supporting the exigencies of long-term governance.[13]

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[10] *Federalist* 43.

[11] "Desire of ease and sensual delight disposeth men to obey a common power… Fear of death and wounds disposeth to the same." *Leviathan*, I, xi, §4.

[12] *Leviathan*, II, xvii, §1; *Leviathan*, II, xxx, §1.

[13] "The cause of fear which maketh such a covenant invalid must be always something arising after the covenant made (as some new fact or other sign of the will not to perform), else it cannot make the government void. For that which could not hinder a man from promising, ought not to be admitted as a hindrance of performing." *Leviathan*, I, xiv, §20.

Regarding *The Federalist*'s brief discussion of political axioms, Diamond suggests that while the Founders ultimately reject a Hobbesian solution to the problem of self-preservation, they do accept his presentation of the problem: "As it were," he writes, "the primary fears of *The Federalist* are Hobbesean, that is, fears of 'foreign war and domestic convulsion.'"[14] This analysis is true, although not in the way that Diamond understands it. To him, Hobbes' project was something of an Orwellian attempt to impose the "chains of despotism" upon societies in the name of peace and safety. It seems clear to him, therefore, that the Founders' explicit rejection of such tyranny amounts to a complete rejection of further Hobbesian insight.[15] However, as I will explain later, while Hobbes expresses a clear preference for strong monarchical authority, he does so in the belief that it will minimize the potential for men to slip back into a state of war. He recognizes that any government will have both strengths and weaknesses — monarchy included. As such, his philosophic framework accounts for other forms of government, and encourages improvements that build upon his ideas. Hobbes calls himself the first political scientist — not the last.[16] He intends to establish new modes and orders upon which the next generation of science, philosophy, and politics will be

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[14] Martin Diamond, "Democracy and the Federalist: A Reconsideration of the Framer's Intent," *The American Political Science Review*, Vol. 53, No. 1 (March, 1959): 62.

[15] "Were the pictures which have been drawn by the political jealousy of some among us faithful likenesses of the human character, the inference would be, that there is not sufficient virtue among men for self-government; and that nothing less than the chains of despotism can restrain them from destroying and devouring one another." *Federalist* 55.

[16] Hobbes, *Leviathan*, II, xxxi, §41.

built — precisely what the American founders carry out some one hundred and fifty years later.[17]

Federalist *10*

Frank Coleman offers the most enthusiastic articulation of Hobbes' role in American constitutionalism, identifying him as father of "the philosophy of liberal-democratic constitutionalism employed in America."[18] While many authors take notice of the Hobbesian influence on our Founding, Coleman goes further, asserting Hobbes' preeminence over both Locke and Madison.[19] Though the critical response to Coleman's thesis has been that it ultimately went too far in tracing American Constitutionalism to Hobbes, it is almost universally agreed that his work brought many heretofore overlooked

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[17] "Therefore I think it may be profitably printed, and more profitably taught in the Universities…" *Leviathan*, "Review and Conclusion," §16.

[18] Frank Coleman, "The Hobbesian Basis of American Constitutionalism," *Polity*, Vol. 7, No. 1 (Autumn, 1974): 74. This thesis is further developed in Frank Coleman, *Hobbes and America: Exploring the Constitutional Foundations* (Toronto: University of Toronto Press, 1977). For other perspectives on Hobbes' role in modern liberal constitutionalism, see David Boucher and Paul Kelly, eds., *The Social Contract from Hobbes to Rawls* (New York: Routledge, 1994) and Peter J. Steinberger, "Hobbes, Rousseau and the Modern Conception of the State," *The Journal of Politics*, Vol. 70, No. 3 (July 2008): 595–611.

[19] "Generally, the contributions which Locke and Madison make to the liberal constitutional philosophy are of marginal importance in comparison with those of Hobbes." Coleman, "The Hobbesian Basis of American Constitutionalism," 66. For more on Hobbes' role in the Founding, see: Timothy Fuller, "On Hobbes and the Character of the American Political Order," in *The Revival of Constitutionalism*, ed. James Muller (Lincoln: University of Nebraska Press, 1988): 70; George Mace, *Locke, Hobbes, and The Federalist Papers* (Carbondale: Southern Illinois University Press, 1979); Mark H. Roelofs, "Hobbes, Liberalism, and America" in *Liberalism and the Modern Polity: Essays in Contemporary Political Theory*, ed. Michael J. Gargas McGrath (New York: Marcel Dekker, 1978); and Eldon Eisenach, *Two Worlds of Liberalism* (Chicago: University of Chicago Press, 1981).

Hobbesian elements into the greater academic conversation.[20] Importantly, Coleman expresses a myriad of ways in which the framers of the Constitution "clearly followed Hobbes's view about the pattern and purpose of politics but came to different conclusions about the appropriate design of political institutions."[21] In particular, Coleman highlights the Framers' distinctly Hobbesian outlook on conflict management and transactional relations in American politics.[22] As Madison persistently reminds us, "power is of an encroaching nature" and America's institutions expect and depend upon self-interested actors.[23]

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[20] See Richard Allen Chapman, review of *Hobbes and America: Exploring the Constitutional Foundations* by Frank M. Coleman, *The American Political Science Review*, Vol. 73, No. 1 (March, 1979): 200-201; Shirley A. Bill, review of *Hobbes and America: Exploring the Constitutional Foundations* by Frank M. Coleman, *Eighteenth-Century Studies*, Vol. 12, No. 2 (Winter, 1978-1979): 241-245; J. David Greenstone, review of *Hobbes and America: Exploring the Constitutional Foundations* by Frank M. Coleman, *Political Theory*, Vol. 6, No. 3 (August, 1978): 390-394; Terry Heinrichs, "Hobbes and the Coleman Thesis," *Polity*, Vol. 16, No. 4 (Summer, 1984): 647-666; D. J. C. Carmichael, "Hobbes on Natural Right in Society: The 'Leviathan' Account," *Canadian Journal of Political Science*, Vol. 23, No. 1 (March, 1990): 3-21. Coleman's work is referenced approvingly in: Gilbert M. Cuthbertson, review of *Hobbes and America: Exploring the Constitutional Foundations* by Frank M. Coleman, *The Journal of Politics*, Vol. 40, No. 2 (May, 1978): 545-546; Douglas Sturm, "Process Thought and Political Theory: Implications of a Principle of Internal Relations," *The Review of Politics*, Vol. 41, No. 3 (July, 1979): 375-401; Gary L. McDowell, "Private Conscience & Public Order: Hobbes & 'The Federalist'," *Polity*, Vol. 25, No. 3 (Spring, 1993): 421-443. Even Terry Heinrichs, Coleman's staunchest critic, praises Coleman for "pos[ing] the issue of Hobbes' liberalism squarely and consistently, even if, as I shall argue, unconvincingly." Heinrichs, "Hobbes and the Coleman Thesis," 648.

[21] Coleman, "The Hobbesian Basis of American Constitutionalism," 86.

[22] Coleman, "The Hobbesian Basis of American Constitutionalism," 66.

[23] *Federalist* 48.

Gary McDowell recasts and improves upon Coleman's project, working to the more limited end of relating Hobbesian influences in *The Federalist Papers*.[24] Like others before him, McDowell praises Hobbes as both the founder of liberalism and modern constitutionalism.[25] From this, it is but a short jump to infer that a comprehensive analysis of American government must eventually pay mind to Hobbes' contributions. McDowell finds Madison's discussion of *Federalist* 10 especially telling of Hobbesian influence. "In short," he writes, "faction is the republican equivalent of Hobbes's dilemma in the state of nature."[26] Lacking the authority of an absolute monarch to keep men in awe, the greatest danger of popular government is an inability to maintain public order through a focused consideration of a common good.[27] Hobbes characterizes the state of nature as a "war of all against all," wherein man's natural selfishness inevitably results in enmity with his fellows.[28] Escape from the peril of this

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[24] Unlike Coleman, McDowell appreciates the contributions Locke makes in reinterpreting the Social Contract. However, he finds the view that wholly rejects Hobbes for Locke unsatisfying. Because he does not deny the influence of Locke, there is no need to delve into the question of whether Locke is merely a more subtle Hobbes. McDowell, "Private Conscience & Public Order," 421-443.

[25] "[Hobbes] was also the founder of modern constitutionalism in the sense of recognizing the necessity of written fundamental law." McDowell, "Private Conscience & Public Order," 423. See also, Walter Berns, "Judicial Review and the Rights and Laws of Nature," *The Supreme Court Review*: 198 (Chicago: University of Chicago Press, 1983), 49. Leo Strauss is the first to identify Hobbes as the founder of liberalism in *Natural Right and History* (Chicago: University of Chicago Press, 1953), 182.

[26] McDowell, "Private Conscience & Public Order," 426.

[27] "The instability, injustice, and confusion introduced into the public councils, have, in truth, been the mortal diseases under which popular governments have everywhere perished." *Federalist* 10. "Hereby it is manifest, that during the time men live without a common power to keep them all in awe, they are in that condition which is called war; and such a war, as is of every man, against every man." *Leviathan* I, xiii, §8.

[28] *De Cive*, I, §13.

conflict is the primary design behind civil society. Yet, a faction is a group "united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."[29] Such an ill is precisely the problem that Hobbes sought to avoid. In *Federalist* 10, Madison confirms Hobbes' fear that democracy is unable to unite sundry interests. "A pure democracy," he writes, "can admit of no cure for the mischiefs of faction."[30] Yet, having seen the abuses of English monarchy, the founders were intent on establishing a system of government that would be both accountable to citizens and able to resist those who would employ its institutions for personal gain.

If the latent causes of faction are indeed "sown in the nature of man," the affliction will not be lightly overcome.[31] Hobbes traces its source to both a diversity of passions and a difference of knowledge among men. Contrary to the teachings of antiquity, there is no *Finis ultimus* or *Summum Bonum* which all men seek. Instead, men are drawn from desire to desire, "the attaining of the former being still but the way to the latter."[32] Moreover, even when men chance upon on a common good, a disparity of knowledge results in conflict over the means to that end. Madison echoes these concerns, attributing faction to the influence of passion, fallible reason, and man's natural

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[29] *Federalist* 10.

[30] *Federalist* 10.

[31] "If the impulse and the opportunity be suffered to coincide, we well know that neither moral nor religious motives can be relied on as an adequate control. They are not found to be such on the injustice and violence of individuals, and lose their efficacy in proportion to the number combined together, that is, in proportion as their efficacy becomes needful." *Federalist* 10.

[32] *Leviathan*, I, xi, §1.

selfishness.[33] "Government," McDowell remarks, "must be wedged, somehow, between the reason and the passion of mankind."[34] It is in this regard that the American founders saw their Constitution as a decisive improvement upon classical models. Taking to heart the warnings of modern philosophers concerning the danger of faction and the responsibility of government, the Founders chose to approach the problem from a new direction, adopting a "republican remedy for the diseases most incident to republican government."[35] Standing upon the shoulders of thinkers like Hobbes, they thought themselves able to see further, embarking on a great political experiment in self-rule.[36] Contrary to the forms of the past, the American response to faction is to embrace and channel man's unquenchable passions into institutional forms.[37] As Coleman observes, the social contract does not restrict us from attempting to influence the actions of the sovereign in ways that would be to our advantage.[38] The passions are thus laid bare in politics and give direction to both citizens and their representatives. That "the provision for defense… be made commensurate to the danger of attack," transactional relations

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[33] *Federalist* 10.

[34] McDowell, "Private Conscience & Public Order," 430.

[35] *Federalist* 10.

[36] Cf. *Federalist* 1.

[37] "The inference to which we are brought is, that the CAUSES of faction cannot be removed, and that relief is only to be sought in the means of controlling its EFFECTS." *Federalist* 10. This too, is an extension of Hobbes' project. Unlike the ancient philosophers, Hobbes does not try to fight the passions, but rather embraces them. Civil society is the natural progression of man's desire.

[38] Coleman 73.

come to the forefront of our political order and an adequate system of checks and balances becomes essential to ensuring administrative stability.[39]

Federalist *51*

Hamilton remarks in *Federalist* 72 that, "the desire of reward is one of the strongest incentives of human conduct" and that, "the best security for the fidelity of mankind is to make their interests coincide with their duty."[40] His sentiment is both telling of human nature and representative of how the Constitution aims to regulate self-interest.[41] Just as men brought themselves out of the state of war by founding coalitions of power greater than themselves, so they must now sacrifice to a common good that their voices may be heard. The result is a moderating effect on the ambitions of citizens and statesmen.[42] Practically, this is accomplished through a system of representation, a separation of powers, and checks between them. Representative government holds individual officeholders accountable to a constituency and encourages majority factions to reflect broad interests.[43] The separation of powers further undermines the potential of

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[39] *Federalist* 51. As I will argue, while a system of checks and balances is generally associated with a Lockean regime, Hobbes, as a pragmatist, encourages innovation in ruling to meet political exigencies.

[40] *Federalist* 72.

[41] "It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary." *Federalist* 51.

[42] "Ambition must be made to counteract ambition." *Federalist* 51.

[43] "…a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good." *Federalist* 51.

majority faction by creating multiples spheres of influence that must be overcome.[44] "Enlightened statesmen will not always be at the helm," Madison cautions.[45] Yet, other passages of *The Federalist* hint that perhaps they never were. All statesmen lack "better motives" and must therefore be watched by "opposite and rival interests."[46] It is naturally assumed that each branch of government will work to prevail over the others, so each must be given ample authority of its own. Each has the capacity to stalemate the political process and destroy the commonwealth — however, this would eliminate its own base of power in the process. Accordingly, the accumulation of power is gradual and snatches at authority are modest, rather than sweeping. This inefficiency that is built into our society helps to ensure that the general progression of conflict involves compromise and larger interests, rather than the violence that characterizes the state of nature.

Against His Critics

There are of course, several questions that must first be resolved before we can embrace a Hobbesian reading of the Constitution without reservation. His forceful defense of sovereign power comes across as abrasive to our liberal sensibilities. Many, for example, suggest that Hobbes' predilection to monarchical government precludes us from applying his thought to a republican constitution. There is no doubt that Hobbes

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[44] "In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature." *Federalist* 51. Note Publius' reference to social contract theory and his rather violent (non-Lockean) characterization of the state of nature.

[45] *Federalist* 10.

[46] *Federalist* 51.

fancied monarchies to be best equipped to meet the ends of civil society, providing the most direct energy to the sovereign.[47] As Alexander Hamilton reminds us some two hundred years later, "A feeble Executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be, in practice, a bad government."[48] That said, Hobbes consistently reminds his readers that his philosophy is applicable to any shape sovereignty may take, at times going so far as to remark that competing forms of government may even improve upon the monarchical system.[49] With this caveat, it is impossible to say that America's great political experiment denies Hobbesian politics simply because it does not crown a king.[50]

Some of Hobbes' most practical advice for structuring regimes occurs when discussing "Those Things That Weaken, Or Tend To The Dissolution Of A Commonwealth." Here, he considers many of the common deficiencies in regimes and

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[47] Hobbes, *Leviathan*, II, §xix.

[48] *Federalist* 70. Madison concurs with this sentiment in *Federalist* 37, writing, "Energy in government is essential to that security against external and internal danger, and to that prompt and salutary execution of the laws which enter into the very definition of good government."

[49] See, for example, his discussion on the right of succession in *Leviathan*, II, xix, §14-18.

[50] It is interesting to note, however, that the Constitution does set aside an unusual amount of power for a unitary executive. While the legislative power is limited to that "herein granted" and the judicial power is divided between one supreme and many inferior courts, the entirety of executive power is vested in a single individual — the President — and all lesser executive authority flows from him. Other institutional similarities between the structure of American government and Hobbes' model include the prohibition of *ex post facto* laws (*Leviathan*, II, xxvii, §9), the prohibition against Corruption of Blood (*Leviathan*, II, xxviii, §22), and the Necessary and Proper Clause (*Leviathan*, II, xxx, §1-3).

how they may be overcome, subdividing his list into "infirmities" and "diseases."[51] These deficiencies are often thought to be some of the most incriminating bits of evidence of Hobbes' incompatibility with American liberalism. Yet, a careful analysis of the provisions proves otherwise. While Hobbes' distinction between the two classes of ailments may seem nominal, it is in fact representative of deeper philosophical discrepancies that exist between obstacles to peace. "Infirmities" are those evils which are embedded into the very constitution of a commonwealth. As birth defects, these ills may remain latent for many years, but their existence will eventually work to obstruct the exercise of legitimate government. Bound as they are to the nature of the regime, they are the more consequential charges.

Foremost of infirmities is the self-limitation of sovereign power, when such power proves necessary for effective government.[52] Our Constitutional limits on federal power are such an exercise of self-restraint, but not necessarily the sort that offends Hobbesian sensibilities. So long as there remains sufficient authority to maintain peace and the common defense, the exercise of sovereign power may be limited without hazard.[53] While the Articles of Confederation were abandoned for too zealous a check on sovereign power, the Founders did not intend government under the new Constitution to

[51] *Leviathan*, II, xxix, §2, §6.

[52] "Of which, this is one [infirmity], that a man to obtain a kingdom, is sometimes content with less power, than to the peace, and defence of the commonwealth is necessarily required." *Leviathan*, II, xxix, §2.

[53] For example, a great wrestler might not need to use his full power when facing lesser opponents, but he would be foolish to restrain himself with shackles that would hinder his ability to overcome a worthy opponent.

suffer from the same ill.[54] Alexander Hamilton makes this explicit in *Federalist* 23, poignantly echoing Hobbes' insight:

> These powers [of securing peace] ought to exist without limitation, BECAUSE IT IS IMPOSSIBLE TO FORESEE OR DEFINE THE EXTENT AND VARIETY OF NATIONAL EXIGENCIES, OR THE CORRESPONDENT EXTENT AND VARIETY OF THE MEANS WHICH MAY BE NECESSARY TO SATISFY THEM. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed.[55]

We see that where Constitutional restrictions (or ambiguities) have stood in the way of these aims, various exercises of prerogative have been necessary to stabilize the Constitutional crisis.[56] Of the more notorious examples are Lincoln's suspension of *habeas corpus* and FDR's internment of Japanese-Americans during World War II.[57] Hobbes approves of such extraordinary measures (as the limitation is self-imposed, it may always be revoked when necessary), but chides the regimes that must resort to them

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[54] Similarly, with regard to the Articles, Hamilton writes, "Defective as the present Confederation has been proved to be, this principle [that there must be sufficient power to maintain peace and safety] appears to have been fully recognized by the framers of it; though they have not made proper or adequate provision for its exercise." *Federalist* 23.

[55] *Federalist* 23.

[56] Notably, the exercise of prerogative is undertaken by the Executive — the branch of government most akin to the Hobbesian sovereign. Such exercises are deemed legitimate when the normal Constitutional powers of government are insufficient to meet the occasion — that is, only in the direst of political emergencies. Prerogative (a term usually associated with Locke, but which predates him) highlights a legal contradiction and risks undermining the rule of law.

[57] "[W]e have had recent occasion to quote approvingly the statement of former Chief Justice Hughes that the war power of the Government is 'the power to wage war successfully.' Therefore, the validity of action under the war power must be judged wholly in the context of war. That action is not to be stigmatized as lawless because like action in times of peace would be lawless." *Korematsu v. United States*, 323 U.S. 224.

for their short-sightedness. To limit the power of a government to protect itself is to threaten the very purpose for which it exists.[58]

Hobbesian "diseases," on the other hand, are simply false conceptions of sovereignty spread throughout the citizenry. They are pernicious opinions that, while untrue in any commonwealth, serve to undermine sovereign power. Of these fictions, Hobbes mentions three that at first glance seem rather damning of the American constitution:

"That he that hath the sovereign power is subject to the civil laws"[59]

Certainly, Congressmen, Judges, and even the President are subject to prosecution under the law. The Constitution makes this explicit in Article I, Section 3.[60] However, no single individual holds sovereign power in our regime. Instead, it is the regime itself — as a whole — that is the soul of our "Leviathan." The regime, qua regime, is beyond reproach. Legitimate complaints must operate within the legal system and never outside of it.

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[58] "It rests upon axioms as simple as they are universal; the MEANS ought to be proportioned to the END; the persons, from whose agency the attainment of any END is expected, ought to possess the MEANS by which it is to be attained… government ought to be clothed with all the powers requisite to complete execution of its trust." *Federalist* 23.

[59] "Civil law" here refers to law in general as Hobbes makes no distinction here between civil and criminal law.

[60] "Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law."

"That every private man has an absolute propriety in his goods"

A man's home may be his castle, but the Constitution's Takings Clause reminds us that individual property may be seized by the government, should the need arise.[61] Hobbes would approve, stating that "Every man has indeed a propriety that excludes the right of every other subject… But if the right of the sovereign also be excluded, he cannot perform the office they have put him into."[62]

"That the sovereign power may be divided"

Our tripartite system often gives the illusion that we have successfully divided sovereignty into three discrete parts: Executive, Legislative, and Judicial. However, the Founders recognized that these divisions are imprecise at best and a "partial agency" of power is frequently shared between the branches.[63] The *exercise* of sovereign power is delegated to various branches of government, while the ultimate source of this power rests with the institutional system as a whole.

Federalism does complicate the matter to some degree, as "In the compound republic of America, the power surrendered by the people is first divided between two

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[61] "…nor shall private property be taken for public use, without just compensation." Amendment V.

[62] Hobbes, *Leviathan*, II, xxix, §10.

[63] "[The legislative department's] constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with the greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments." *Federalist* 48. "Some deviations, therefore, from the principle [of full separation between the branches] must be admitted." *Federalist* 51. "If we look into the constitutions of the several States, we find that, notwithstanding the emphatical and, in some instances, the unqualified terms in which this axiom has been laid down, there is not a single instance in which the several departments of power have been kept absolutely separate and distinct." *Federalist* 47.

distinct governments, and then the portion allotted to each subdivided among distinct and separate departments."[64] Nonetheless, the Supremacy Clause makes it clear that the United States is not "a kingdom divided in itself."[65] Both the states and federal government operate under the authority of the Constitution.

The Constitution

Having discussed some of the major objections to understanding the American Constitution in light of Hobbesian principles, we will touch on some of the major parallels between our founding document and Hobbesian philosophy.

The Constitution is itself a social contract, whereby the people of the several states divest themselves of certain powers and privileges for the sake of commodious living. Speaking as the voice of "We the People," it explicitly aims to "form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity." Considering these ends, the first four involve the establishment and maintenance of public order, while the latter aspire to the enjoyment of the consequent benefits. Taken together, the Preamble's tenets, forming the philosophic core of the new regime, coincide precisely with the contractual motivations espoused by Thomas Hobbes.

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[64] *Federalist* 51.

[65] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." United States Constitution, Article VI. "it followeth, that where one is sovereign, another supreme; where one can make laws, and another make canons; there must needs be two commonwealths, of one and the same subjects; which is a kingdom divided in itself, and cannot stand." *Leviathan*, II, xxix, §15.

"The final cause, end, or design of men (who naturally love liberty and dominion over others) in the introduction of that restraint upon themselves in which we see them live in commonwealths is the foresight of their own preservation, and of a more contented life thereby…"[66] Indeed Hobbes writes, "The office of the sovereign… consisteth in the end for which he was trusted with sovereign power, namely, the procuration of the *safety of the people*… But by safety here is not meant a bare preservation, but also all other contentments of life, which every man by lawful industry… shall acquire to himself."[67]

Looking closer, we see that "We the People of the United States" (rather than simply "We the People," period) acknowledges a preexisting distribution of sovereignty among the states.[68] Such an articulation is consistent with Hobbesian reasoning, but

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[66] Hobbes, *Leviathan*, II, xvii, §1.

[67] Hobbes, *Leviathan*, II, xxx, §1.

[68] This is vigorously discussed during the Constitutional Convention of 1787: "Mr. L. MARTIN contended at great length and with great eagerness that the General Govt. was meant merely to preserve the State Governts.: not to govern individuals… that individuals as such have little to do but with their own States… that to resort to the Citizens at large for their sanction to a new Governt. will be throwing them back into a State of Nature: that the dissolution of the State Govts. is involved in the nature of the process: that the people have no right to do this without the consent of those to whom they have delegated their power for State purposes: through their tongue only they can speak, through their ears, only, can hear… that tho' the States may give up this right of sovereignty, yet they had not, and ought not: that the States like individuals were in a State of nature equally sovereign & free. In order to prove that individuals in a State of nature are equally free & independent he read passages from Locke, Vattel, Lord Summers — Priestly. To prove that the case is the same with States till they surrender their equal sovereignty, he read other passages in Locke & Vattel, and also Rutherford… This was the substance of a speech which was continued more than three hours. He was too much exhausted he said to finish his remarks, and reminded the House that he should tomorrow, resume them." James Madison, "Wednesday, June 27," *The Debates in the Federal Convention of 1787*. Martin, as an opponent of the proposed Constitution, highlights its tension with pure Lockeanism.

unlikely in the purely Lockean framework that is traditionally upheld.[69] For Locke, sovereignty *always* remains vested in the people, irrespective of institutional constructs.[70] Only their unmitigated command holds the authority to alter a regime's legislative structure. Further, when the legislative power is reassigned, the people temporarily reenter the state of nature and all formal political institutions are dissolved.[71] That is, when the legislative core of civil society is altered, it is first abolished and then reconstituted under a new contract. Even if the American states held sovereign authority to transfer the stewardship of legislative power, they do not technically exist at the moment of refounding. From a Lockean perspective, the Preamble's "of the United States" is both superfluous and absurd. Hobbes, on the other hand, maintains that full sovereignty passes from the people to government, allowing regimes to reconstitute

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[69] See, for example, Gary Wills, *Inventing America* (Boston: Houghton Mifflin Co, 2002); Gary Wills, *Explaining America* (New York: Penguin Books, 2001); Morton White, *Philosophy, The Federalist, and the Constitution* (Oxford Oxfordshire: Oxford University Press, 1989); Vincent Ostrom, *The Political Theory of a Compound Republic* (Lincoln: University of Nebraska Press, 1987). Other less Lockean perspectives include, George Mace, *Locke, Hobbes, and the Federalist Papers: An Essay on the Genesis of the American Political Heritage* (Carbondale: Southern Illinois University Press, 1979); H. Mark Roelofs, "Hobbes, Liberalism, and America," in *Liberalism and the Modern Polity: Essays in Contemporary Political Theory*, ed. Michael McGrath (New York: Dekker, 1978), 119-142; Eldon Eisenach, *Two Worlds of Liberalism* (Chicago: University of Chicago Press, 1981); Robert P. Kraynak, "Hobbes's Behemoth and the Argument for Absolutism," *American Political Science Review*, Vol. 76, No. 4 (December, 1982): 837-847; Alkis Kontos, "Of Leviathan Republics," *Canadian Journal of Social and Political Theory* (Fall 1979): 124-129.

[70] "…there remains still in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them…" Locke, *Second Treatise of Government*, XIII, §149.

[71] Locke, *Second Treatise of Government*, XIX, §212. Sir William Blackstone highlights this problem in his *Commentaries on the Laws of England*, suggesting that "Mr. Locke… perhaps carries his theory too far." Blackstone, *Commentaries*, vol. 1, Introduction §2. This is the very thing that Luther Martin is concerned about in the above footnote.

themselves without relinquishing authority or reverting to a state of nature.[72] It is not only appropriate but necessary to include the states in the new republic.

Likewise, the Preamble's commitment to "establish Justice" is ill-worded for a Lockean system. Locke is insistent that justice and injustice transcend political order and exist even in lieu of civil society. It would therefore be appropriate to "execute" or "dispense" justice, but justice as such can never be "established."[73] Hobbes, on the other hand, maintains that "Justice and Propriety begin with the Constitution of Commonwealth."[74] They are, properly speaking, "established" when the state comes into being. Prior to this time, "The notions of Right and Wrong, Justice and Injustice have there no place. Where there is no common Power, there is no Law: where no Law, no Injustice."[75] It is only within a Hobbesian reading that this clause can be read naturally.

Finally, it is worth noting that the Preamble (and most other Founding documents), in cataloging the ends of the fledgling republic, makes no pretense of instilling public virtue or a higher moral ordering.[76] Instead, the promised goods are of

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[72] Hobbes, *Leviathan*, II, xvii, §13.

[73] It is telling that most mentions of Lockean justice are coupled with verbs of this sort, while Hobbes likewise speaks almost exclusively of justice being constituted. See for example, 7 of the 15 references to "justice" in *Second Treatise of Government*: §6 ("do justice"); §20 ("administer justice"); §107 ("execution of justice"); §123 ("[observe] justice"); §136 ("dispense justice"); §172 ("execution of justice"); §219 ("administration of justice"). Of the 8 remaining, each is either an idiom or referencing a preexisting justice in the law of nature.

[74] Hobbes, *Leviathan*, I, xv, §3.

[75] Hobbes, *Leviathan*, I, xiii, §13.

[76] "Other political theories had ranked highly, as objects of government, the nurturing of a particular religion, education, military courage, civic-spiritedness, moderation, individual excellence in the virtues, etc. On all of these *The Federalist* is either silent, or has in mind only pallid versions of the originals, or even seems to speak

the earthly sort, to be enjoyed in this life, and no moral obligations are imposed upon the citizenry. This is curious in light of Locke's understanding of the Law of Nature. Both Hobbes and Locke understand government as an institutionalized expression of the Law of Nature. However, Locke adds to this Law certain moral duties and an ethical framework based upon Divine will.[77] Were our Constitution truly Lockean, the absence of this moral element in the Preamble (and the Constitution as a whole) would be a peculiar omission.[78]

The Bill of Rights

Beyond the evidence of the Constitution's Preamble and institutional structure, the Bill of Rights weighs heavily in favor of social contract theory. As Hamilton so eloquently entreats in *Federalist* 84, "The truth is, after all the declamations we have heard, that the Constitution is itself, in every rational sense, and to every useful purpose, a bill of rights."[79] In the state of nature, man has a right to all things, but finds himself so preoccupied with the necessities of mere survival that he unable to avail himself of this

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with contempt. The Founders apparently did not consider it necessary to make special provision for excellence." Martin Diamond, "Democracy and the Federalist: A Reconsideration of the Framer's Intent," *The American Political Science Review*, Vol. 53, No. 1 (March, 1959): 64.

[77] While Locke's moral virtue is certainly not the same sort as discussed by the ancients, it is nonetheless an objective ethical code that is in some way binding on the hearts of men. Unlike Hobbes, Lockean justice exists apart from the creation of civil society. Whereas a breach in the law of nature for Hobbes would simply be foolish, for Locke, it would be wicked.

[78] The Founders seem extremely pessimistic about the "goodness" of man and the institutional checks of our government do not attempt to reform him, but to channel his private vice to public virtue (Cf. *Federalist* 51).

[79] *Federalist* 84.

liberty in any meaningful sense. For this reason, he transfers his natural right to a sovereign, thereby relinquishing the full exercise of inherent freedom in the hope that the rights he retains may be more effectively employed.[80] Whereas before, he had the right to all things, but could do nothing, he now has the right to relatively few things, but is satisfied. These rights are valued, not for their own sake, but insofar as they facilitate the "pursuit of happiness."[81] Thus, the Constitution (and any commonwealth) serves to enable the exercise of rights which previously found no expression in the state of nature.[82]

Ironically, the Bill of Rights also presents some of the Constitution's strongest affirmations of sovereignty. The mere inclusion of the first ten amendments evidences the breadth of sovereign power. Publius argues in *The Federalist* that the inclusion of a Bill of Rights would be a redundant and dangerous addition to the Constitution, as "in strictness, the people surrender nothing; and as they retain everything they have no need of particular reservations."[83] Hamilton's phrasing here is interesting, as he refers to the rights of the people, rather than individuals. That is, insofar as sovereignty rests with the

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[80] "[I]t is equally undeniable that whenever and however [government] is instituted, the people must cede to it some of their natural rights, in order to vest it with requisite powers." *Federalist* 2. There is a difference, however, between alienable and inalienable rights.

[81] "And therefore the voluntary actions and inclinations of all men tend, not only to the procuring, but also to the assuring of a contented life…" *Leviathan* I, xi, §1.

[82] "In such a condition there is no place for industry… no arts, no letters, no society…" *Leviathan*, I, xiii, §9.

[83] *Federalist* 84.

people, it retains the full right of nature.[84] However, as individuals, rights are ceded in the interest of the whole.[85] Hamilton fears that, in addition to delaying ratification, the inclusion of a Bill of Rights "would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted."[86] While sovereign authority in its purest form suffers no limit, a regime founded under a constitution reciprocates the social contract by agreeing to restrict its exercise of right to certain institutional expressions. In this sense, the American model hopes to improve upon ancient and modern patterns.[87] Hamilton is correct in arguing that it is worse than useless to prohibit that which the regime lacks the power to do. However, he underestimates (or at least understates) the extent of authority still held by the national government under the proposed constitution. Despite his arguments to the contrary, a Bill of Rights was determined to be a necessary addendum to the proposed Constitution. That is, those tasked with ratification recognized that the powers granted to the national government were broad enough to threaten freedoms such as speech, religion, and assembly. History has proven Hamilton's entreaty, "Why… should it be said that the liberty of the press shall not be restrained, when no power is given by which

[84] "It" here refers to "the people" as a singular unit. "[they] may reduce all their wills, by plurality of voices, unto one will… to appoint one man or assembly of men to bear their person." *Leviathan* II, xvii, §13. The sovereign, as a third party to the Social Contract, does not relinquish any of his naturally held rights (*Leviathan*, II, xvii, §13).

[85] "By transferring [rights]; when he intendeth the benefit thereof to some certain person, or persons." *Leviathan*, I, xiv, §7.

[86] *Federalist* 84.

[87] "The science of politics, however, like most other science, has received great improvement." *Federalist* 9. Also, "The valuable improvements made by the American constitutions on the popular models, both ancient and modern, cannot certainly be too much admired…" *Federalist* 10.

restrictions may be imposed?" to be more than a little naïve. A Bill of Rights, above all else, is an acknowledgement of sovereign power's breadth. Unless it is explicitly hedged, be it through institutional forms or enumerated rights, sovereign authority knows no limit.

Eminent Domain

Nowhere is this more clearly demonstrated than the Fifth Amendment's consideration of eminent domain. Its final clause reads, "nor shall private property be taken for public use, without just compensation." Here, through the Takings Clause, the Constitution introduces and curbs the regime's power of eminent domain. As a philosophical principle, eminent domain predates the Constitution, stretching at least as far back as the English feudal system. It is described by authors such as Vattel and Puffendorf as "Transcendental Propriety," "Right Paramount," and "Sovereign Domain."[88] Preceding even these two, Thomas Hobbes speaks of eminent domain as a necessary component of sovereign power, the absence of which heralds a commonwealth's dissolution.[89] Within the feudal system, ownership of all land could ultimately be traced back to the King. Noblemen and peasants were granted permission to use the land at his pleasure. Thus, whenever the King requested the return of his property, its occupants were forced to comply with no means of redress. This procedure continued for centuries until 1215, with the signing of the Magna Carta. As a protection against sovereign imposition, the King agreed to provide monetary compensation for all

[88] "The Right of Eminent Domain," *The American Law Register (1852-1891)*, Vol. 4, No. 11 (September, 1856): 643.

[89] *Leviathan*, II, xxix, §10.

takings in the name of the Crown.[90] This policy continued within the American colonies and became an issue of debate when considering a Bill of Rights. Some statesmen, particularly Thomas Jefferson, were loath to implement any carryover from feudal England.[91] Despite these outspoken critics, the principle of eminent domain was already seen as an integral facet of sovereign power. In a move to compromise between those who guarded individual rights and those who recognized the inherent necessity of eminent domain in providing for the exigencies of governing, Madison added the stipulation that all federal takings be for "public use."[92] Although the qualifier is ambiguous (perhaps intentionally so), it at least guarantees that property is not simply being taken from person A and given to person B.[93] From the perspective of Hobbesian social contract, individuals will feel much less threatened by sovereign takings if proceeds go to the profit of the whole. Individuals may suffer, but the majority will benefit. Coupled with the existing English limitation of "just compensation," the exercise of eminent domain is greatly limited in the American system, but still available when required for legitimate purposes.

It is extremely important to note that the Takings Clause is not a grant of power, but a limitation of existing authority. The Constitution assumes that the natural state of sovereign power allows government to take any property for any reason without

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[90] *Magna Carta*, 1215, §28.

[91] Thomas Jefferson, *A Summary View of the Rights of British America*, 1774.

[92] Duane L. Ostler, "Bills of Attainder and the Formation of the American Takings Clause at the Founding of the Republic," *Campbell Law Review*, Vol. 32, No. 2 (Winter, 2010): 228.

[93] At least, not until *Kelo v. City of New Londo*n, 545 U.S. 469 (2005).

compensation. While such an understanding is consistent with a Hobbesian model, it is more problematic from a Lockean perspective.[94] The "great and chief end" of government, for Locke, is the preservation of Property.[95] As such, to deprive a citizen of his estate is absolutely contrary to the first principles of government.[96] Property is a natural right of man, existing even in absence of civil society. It stems from a pre-rational ownership in one's own person.[97] When man "mixes his labor" with the common goods of the earth, they take on value as an extension of his being. For a regime to strip a man of anything with which he has mixed his labor (be it so small as "one penny of his money") is an offense tantamount to an assault on his person and a reestablishment of the state of war.[98] Even with the promise of just compensation and a guarantee of public use, there can never be a legitimate Taking under Lockean rule.

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[94] "The Supream Power cannot take from any Man any part of his Property without his own consent." Locke, *Second Treatise of Government*, XI, §138. "For I have truly no Property in that, which another can by right take from me, when he pleases, against my consent." Locke, *Second Treatise of Government*, XI, §138. "[B]ut yet we see, that neither the Serjeant, that could command a Souldier to march up to the mouth of a Cannon, or stand in a Breach, where he is almost sure to perish, can command that Soldier to give him one penny of his Money; nor the General, that can condemn him to Death for deserting his Post, or for not obeying the most desperate Orders, can yet with all his absolute Power of Life and Death, dispose of one Farthing of that Soldiers Estate, or seize one jot of his Goods; whom yet he can command any thing, and hang for the least Disobedience." Locke, *Second Treatise of Government*, XI, §139.

[95] Locke, *Second Treatise of Government*, IX, §124.

[96] "The chief matter of Property being now not the Fruits of the Earth, and the Beasts that subsist on it, but the Earth it self." Locke, *Second Treatise of Government*, V, §32.

[97] "Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a Property in his own Person. This no Body has any Right to but himself." Locke, *Second Treatise of Government*, V, §27.

[98] Cf. Locke, *Second Treatise of Government*, XI, §139.

Due Process

However, the purpose of this exposition is not simply to show the Constitution's authoritarian underbelly. We can also trace some of its prominently liberal elements to Hobbes, as demonstrated by the Due Process Clause of the Fifth (and later Fourteenth) Amendment. The Clause reads, "[No person shall] be deprived of life, liberty, or property, without due process of law." Like eminent domain, the principle of due process hearkens back to the English monarchy. In 1215, King John assented to the following provision: "No freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land."[99] This section was later revised under Edward III to state, "That no man, of what estate or condition he be, should be put out of his land or tenements, nor taken, nor imprisoned, nor disherited, nor put to death, without being brought to answer by due process of law."[100] Here, we witness the first explicit reference to "due process." As expressed in the Magna Carta, due process protects life, liberty, and property — those selfsame rights we see in the Fifth Amendment — but in the most literal sense possible. Further, the clause is almost certainly to be interpreted in light of criminal adjudication. That is, if one is to be killed, imprisoned, or dispossessed of his land, he must first be found in violation of some law. Certainly, this is not how due process has been interpreted in an American context.

With the advent of Revolution in 1776, the former colonies began drafting Declarations of Rights in order to restore the lost protections of the Magna Carta. Yet,

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[99] *Magna Carta*, 1215, §39.

[100] *Magna Carta*, 1354, §29.

their implementation went further, building upon the English model and broadening the scope of rights. Virginia's Declaration pronounces, "That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."[101] Likewise, Delaware's asserts, "That every Member of Society hath a Right to be protected in the Enjoyment of Life, Liberty and Property."[102] These reproductions take the rights established by the Magna Carta and reinterpret them in light of a social contract, wherein men are by nature free, equal, and independent.[103] Even upon entrance into civil society, life, liberty, and the pursuit of happiness are inalienable.[104]

Thus, we see that the interpretation of these rights has been expanded far beyond the Magna Carta's literalism. "Life" and "liberty" in the American context do not simply mean protection from death and imprisonment. Instead, they are to be understood in the fullest sense — to encompass the *enjoyment* of life and liberty.[105] Accordingly, the value of property for its own sake is depreciated in favor of facilitating acquisition and

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[101] *Virginia Declaration of Rights*, 1776, §1.

[102] *Delaware Declaration of Rights and Fundamental Rules*, 1776, §10.

[103] Cf. *Leviathan*, I, xiii, §1; *Leviathan*, I, xiv, §4; *Second Treatise of Government*, II, §6.

[104] Hobbes, *Leviathan*, I, xiv, §8.

[105] Cf. *Leviathan*, II, xxx, §1: "But by safety here is not meant a bare preservation, but also all other contentments of life…"

possession.[106] The American iterations of these rights all point to a single underlying foundation: the pursuit of happiness. We see then, that Justice Peckham is touching upon something genuine when he asserts, "The 'liberty' mentioned in that amendment [Fifth and Fourteenth]… 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."[107] He is right to connect Fifth Amendment guarantee of due process to the philosophic principles of the Declaration of Independence.[108]

Of course, there is an obvious discrepancy between the Declaration and the Constitution, in that the Declaration's "pursuit of happiness" is substituted for the Constitution's "property." From a Hobbesian perspective, this is a curious move. After all, the Declaration's enumeration of "Life, Liberty, and the pursuit of Happiness" as unalienable rights precisely mirrors those "rights which no man can be understood by any words or other signs to have abandoned or transferred" which are found in Hobbes:[109]

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[106] Cf. *Leviathan*, I, xiii, §9: "In such condition [the State of War] there is no place for industry…"; "Felicity is a continual progress of the desire, from one object to another, the attaining of the former being still but the way to the latter." *Leviathan*, I, xi, §1.

[107] *Allgeyer v. Louisiana*, 165 U.S. 589 (1897).

[108] "The right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence, which commenced with the fundamental proposition that 'all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness.'" *Allgeyer v. Louisiana*, 165 U.S. 589.

[109] *Leviathan*, I, xiv, §8 (emphasis added).

Life

> As, first, a man cannot lay down the right of resisting them that assault him by force, to take away his life, because he cannot be understood to aim thereby at any good to himself.

Liberty

> [Second], the same may be said of wounds, and chains, and imprisonment, both because there is no benefit consequent to such patience… as also because a man cannot tell, when he seeth men proceed against him by violence, whether they intend his death or not.

The Pursuit of Happiness

> [Third] and lastly, the motive and end for which this renouncing and transferring of right is introduced, is nothing else but the security of a man's person, in his life and in the means of so preserving life *as not to be weary of it*.[110]

One might interpret the move from "pursuit of happiness" to "property" as a nod to John Locke, who makes much of the concept in his *Second Treatise of Government*. However, the meaning of "property" shifts when we interpret it in its constitutional context. Unlike what we see in the Constitution (or the Declaration), Locke's catalogue of inalienable rights is comprised of "life, liberty, and *estate*."[111] "Property," as he understands it, is the sum of these three things, which strongly suggests that the Constitution's Due Process Clause is something other than Lockean.[112]

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[110] Recall also Hobbes' particular concern with man's felicity in chapter xi of *Leviathan*, as well as his repeated reminders that safety goes beyond "a bare preservation, but also all other contentments of life…" *Leviathan*, II, xxx, §1.

[111] Locke, *Second Treatise of Government*, VII, §87; Locke, *Second Treatise of Government*, IX, §123.

[112] It would be nonsense to write, "life, liberty, and property" if "property" encompasses "life, liberty, and estate."

In addition to simply being redundant, there is the greater issue that Locke's understanding of "rights" and "inalienability" precludes the regime from *ever* transgressing such entitlements, regardless any claim to "due process."[113] Civil society exists to compel observance of the law of nature, whose core tenet is the preservation of property.[114] Should the regime disregard the inviolable terms of individual property, it would replace legitimate government with a state of war. "For a Man's Property," Locke writes, "is not at all secure, though there be good and equitable Laws to set the bounds of it, between him and his Fellow Subjects, if he who commands those Subjects, have Power to take form any private Man, what part he pleases of his Property, and use and dispose of it as he thinks good."[115] The law, ceasing to function as a protector of life, liberty, and estate, places the individual in a position "of no reparation, [permitting him of his] own Defence, and the Right of War."[116] Instead, the Due Process Clause echoes an earlier understanding of social contract theory, explained in the pages of *Leviathan*. The pursuit of happiness, insofar as it can be touched by the regime, necessarily

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[113] "Thirdly, The Supream Power cannot take form any Man any part of his Property without his own consent." Locke, *Second Treatise of Government*, XI, §138.

[114] "Men therefore in Society having Property, they have such a right to the goods, which by the Law of the Community are theirs, that no Body hath a right to take their substance, or any part of it from them, without their own consent; without this, they have no Property at all. For I have truly no Property in that, which another can by right take from me, when he pleases, against my consent. *Hence it is a mistake to think, that the Supream or Legislative Power of any Commonwealth, can do what it will, and dispose of the Estates of the Subject arbitrarily, or take any part of them at pleasure*." Locke, *Second Treatise of Government*, XI, §138, emphasis added. See also, Locke, *Second Treatise of Government*, IX, §123-124.

[115] Locke, *Second Treatise of Government*, XI, §138.

[116] Locke, *Second Treatise of Government*, III, §19.

corresponds to the material concerns of man.[117] Consequently, the more philosophically complete expression of right found in the Declaration ultimately gave way to an articulation more appropriate to the practical exigencies of a formal constitution. "Property" represents "the fruit of [a man's] labour" which men exiting the state of nature expect government to protect.[118]

Hobbism

Given the importance of Hobbesian social contract theory to our Constitutional order, why is it that we are so quick to dismiss his contribution as little more than a footnote to John Locke? To this day, Hobbes is widely known, not as a founder of modern liberalism and constitutional government, but as a holdover of the feudal authority from less enlightened times.[119] One of the primary virtues of McDowell's reexamination of the Founding is its emphasis on the distinction between Hobbes and

[117] *Leviathan*, IV, xlvi, §37. "Happiness, 'a knowledge of the means' to which *The Federalist* openly claims to possess, seems to consist primarily in physical preservation from external and internal danger and in the comforts afforded by a commercial society." Martin Diamond, "Democracy and the Federalist: A Reconsideration of the Framer's Intent," *The American Political Science Review*, Vol. 53, No. 1 (March, 1959): 63.

[118] Hobbes lists "the fruit of labour" with life and liberty as the primary goods threatened in the State of Nature that may be protected within Civil Society (*Leviathan*, I, xiii, §3).

[119] For examples of those with a more authoritarian view of Hobbes, see Joshua Foa Dienstag, "Serving God and Mammon: The Lockean Sympathy in Early American Political Thought," *The American Political Science Review*, Vol. 90, No. 3 (September, 1996): 497-511; Michael Locke McLendon, "Tocqueville, Jansenism, and the Psychology of Freedom," *American Journal of Political Science*, Vol. 50, No. 3 (July, 2006): 664-675; Terry M. Moe, "Power and Political Institutions," *Perspectives on Politics*, Vol. 3, No. 2 (June, 2005): 215-233.

"Hobbism" in early American thought.[120] Reviewing the debates and correspondence of the turn of the eighteenth century, one quickly discovers that almost every explicit reference to Hobbes among the Founders is decidedly negative, characterizing the philosopher as an oppressor of rights and friend of tyrants.[121] Nonetheless, this popular caricature of Hobbes must be weighed against the degree to which the Founders adopt his assessment of and solution to basic political problems. In resolving this tension between word and deed, McDowell adopts the framework of Sterling P. Lamprecht, who strives to separate the man from his reputation.[122] Even in his own time, Lamprecht notes, Hobbes was a figure of infamy. During his life and the decade following, his work received fifty-one hostile and only two favorable reviews.[123] Hobbes was so unpopular that he was forced to burn many of his private papers for fear that a parliamentary investigation would lead to his execution under charges of heresy.[124] As anyone who has read *Leviathan* can attest, Hobbes himself did little to make himself popular. As his most accessible work, *Leviathan* became the torchbearer of Hobbesian thought. Yet it is a

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[120] "The latter holds that, since for Hobbes sovereignty was to be absolute, this could only mean something like the absolute sovereignty of a monarch. But Hobbes's well-known inclination toward kingly power is allowed to blur the line between his personal preference and his philosophy of politics." McDowell, "Private Conscience & Public Order," 425.

[121] James Wilson, for example, says of Hobbes: "Such an abhorrence [Hobbes] contracted for popular government, and the principles of freedom, that he was anxious to see both extirpated from the face of the earth." James Wilson, "Of the Judicial Department," in *The Works of James Wilson*, ed. Robert G. McCloskey, 2 vols. (Cambridge: Harvard University Press, 1967), II: 464.

[122] Sterling P. Lamprecht, "Hobbes and Hobbism," *The American Political Science Review*, Vol. 34, No. 1 (February, 1940): 31-53.

[123] Lamprecht 32.

[124] Lamprecht 31.

political polemic, aimed at inflaming men to action. *De Cive* expresses the same model, but in much less abrasive terms. Were *Leviathan* never published, there is good reason to speculate that Hobbes would be less known, but much better appreciated. With a biting wit, *Leviathan*'s thinly veiled attacks were aimed at the most powerful forces of his time.[125] It is little wonder that he quickly earned the nickname, "The Monster of Malmesbury." We can easily see how the influence of Hobbes' principles of government, and in the American founding, in particular, has been generally overlooked. When John Locke came to the fore in 1689, he expressed many of the same ideas, although in much more hospitable terms. Therefore, Lamprecht suggests, "That Hobbes continued to be deemed a Hobbist by many historians in subsequent centuries has been due both to the force of tradition and to the wide acceptance of a rival political philosophy which was sponsored with great power by Locke."[126]

Conclusion

A careful look at our founding documents reveals two insights, to summarize, that are routinely overlooked. On the one hand, our Constitution has a much stronger commitment to sovereignty than we usually give credit. Certainly, our state (and all states) was established to promote individual flourishing.[127] However, a weak

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[125] "Hobbes had a remarkable gift for trenchant utterance and a glee in exploiting this gift to the irritation of his opponents." Lamprecht 34.

[126] Lamprecht 33.

[127] "Flourishing" here should be read broadly, taking into account not only the necessary condition of physical safety, but also the greater concern for individual happiness: "[T]he motive and end for which this renouncing and transferring of right is introduced, is nothing else but the security of a man's person, in his life and in the means of so preserving life as not to be weary of it." *Leviathan*, I, xiv, §8.

administration is impotent to protect the interests of its citizens. The Founders therefore carved out in the Constitution the requisite power for adequate governance. Here, the effectual advantage of Hobbes over Locke shines through. Yet, that power nonetheless exists to secure the exercise of individual rights. This more liberal side of Hobbes is grossly underappreciated. Thus, as we shall see, the police power of the state and the freedom of the individual are inextricably linked. Our Constitution embodies this fusion of liberty and authority, and its context within a tradition of Hobbesian social contract helps to clarify its tenets.

CHAPTER FOUR

Hobbes on Contract

Introduction

Thomas Hobbes is the progenitor of contract theory as we understand it today, laying the foundation for later advances by such thinkers as Adam Smith and William Blackstone.[1] Our modern appreciation of individualism, empiricism, and rationally-binding obligation all find philosophic roots within his theoretical framework. Perhaps most importantly, Hobbes' name remains famous as the source of modern political legitimacy based on popular consent, conceived in terms of a social contract. Because of this, any discussion of modern contract, particularly in a political context, owes at least a cursory glance to Hobbes' preliminary work so as to make sense of contemporary contractual implications.[2] As it pertains to our discussion, the liberty of contract within Constitutional jurisprudence claims something essential and inalienable about contractual relationships, justified by the latent social contract theory of our founding documents. If the argument of Justice Peckham is accepted — that is, that the liberty of contract can trace its roots to a preconstitutional right protected by constitutional provision — then it

[1] Smith was versed in Hobbes' corpus, citing his influence at least once in *The Wealth of Nations* ("Wealth, as Mr. Hobbes says, is power") (Smith, *The Wealth of Nations*, I, v, ¶3). Likewise Blackstone, although suspicious of the historicity of a literal state of nature, nonetheless subscribes to the Hobbesian basis of original contract and legitimacy (Blackstone, *Commentaries on the Laws of England*, I, §2).

[2] "The use and end of reason is not the finding of the sum and truth of one or a few consequences, remote from the first definitions and settled significations of names, but to begin at these, and produce from one consequence to another. For there can be no certainty of the last conclusions without a certainty of all those affirmations and negations on which it was grounded and inferred." *Leviathan*, I, v, §4.

becomes the duty of those who would interpret the law to discover as much as they can about the nature of this right. What does it mean to have a "liberty of contract" and why do we hold such a right? In answering these questions, Hobbes provides Peckham's model with the additional girding necessary to permit coexistence between the liberty of contract and what might otherwise be seen as irreconcilable constitutional demands.

I will begin by discussing the basis of Hobbesian contract, which finds its source in a materialist ontology and builds to a description of man's natural selfishness. While initially resulting in a war of all against all, this same selfishness, when coupled with reason, can be channeled to a viable social order. In man's natural state, I will show, man lacks the security, leisure, and resources to enjoy his connate rights. Born from necessity, a tentative agreement is reached. I will continue by discussing the foundations and limits of this fragile political commitment, which Hobbes calls the "social contract." The social contract has many critics, and I will address some of the more serious recriminations. If social contracts undergird and legitimize government, then we can extrapolate the authority and boundary of lesser private agreements within civil society. My analysis will end with a discussion of this topic, pointing us in the direction of contract's relationship to the state's police power.

The Development of Contract in Hobbes

Leviathan is, foremost, a political treatise, written to effect specific political resolutions to problems plaguing seventeenth-century England. Its opening dedicatory letter to Mr. Francis Godolphin reminds us of the very real political consequences facing its publication. Yet the turmoil of the English Civil War was merely the catalyst for Hobbes' masterpiece and the work cannot be reduced to simple party rhetoric. *Leviathan*

recasts and builds upon his earlier compositions, developing a political doctrine with reference to first principles — a project whose like had not been attempted on such a scale since Aristotle. The comprehensive nature of Hobbes' enterprise, beginning with a theory of being and progressing to advice for good governance, makes philosophical cherry-picking an extremely difficult task. One cannot undermine the foundation of a building and then resolve to live in it. Given the debt our society owes Hobbes' preparatory work, we would do well to strengthen, rather than weaken, its bedrock. The following discussion hopes to clarify these first principles and show their logical progression to a consistent theory of right and obligation within civil society.

Hobbes begins his discourse with a discussion of sense perception. As he aims to provide a complete ontological account of man, this is an appropriate place for him to start. Like Descartes before him, Hobbes stresses a strict dichotomy between the internal and external world.[3] Yet, man's experience of the universe is wholly contingent upon the mind's interpretation of bodily sense — perceived truth may as well be reality. From this, Hobbes extrapolates a metaphysics of mechanistic determinism. Ideas are the product of sense, which is in turn simply the outside world physically impressing itself upon thought.[4] External motion produces internal motion, resulting in more external motion, and so on.[5] During the process, internal motions beget either a movement toward

[3] A distinction that will later be picked up by philosophers like Emmanuel Kant in his distinction between the phenomenal and noumenal.

[4] *Leviathan* I, i, §4.

[5] "[F]or motion produceth nothing but motion." *Leviathan* I, i, §4. "As in sense that which is really within us is (as I have said before) only motion caused by the action of external objects." *Leviathan* I, vi, §9.

or away from similar stimuli. The former is "appetite," while the latter is "aversion."[6] Taken together, they are what Hobbes calls "passions."[7] "Love" and "hate," "good" and "evil" are merely terms that we ascribe to our appetites and aversions.[8] Objectively, they have the moral import of a leaf in the breeze. Regardless, passion is what drives man. The ancient philosophers taught that reason exists to tame and direct the passions. Hobbes, on the other hand, gives them free reign. Passion directs reason, which is but a tool for passion's fulfillment.

At this point in the discussion, Hobbes has established man as an intensely selfish creature with arbitrary desires.[9] Without an overwhelming power to keep them in awe, the diversity of passions among men quickly devolves into adversity, which Hobbes refers to as a war of all against all. During this time, man is at liberty to use his own power to preserve himself against perceived threats and his regard is wholly self-centered.[10] His only direction is the "law of nature," which is merely reason in service of the passions.[11] The authority of the law of nature stems from its binding influence over

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[6] *Leviathan* I, vi, §2.

[7] More precisely, "passions" is the common name given to the interior beginnings of voluntary motions. However, all voluntary motion is either an endeavor toward or away from its source, and therefore all passion is either appetite or aversion. Cf. Hobbes on "indifference" at *Leviathan* I, viii, §16.

[8] *Leviathan* I, vi, §3; §7.

[9] "And because the constitution of a man's body is in continual mutation," Hobbes reminds us, "it is impossible that all the same things should always cause in him the same appetites and aversions; much less can all men consent in the desire of almost any one and the same object." *Leviathan* I, vi, §6.

[10] This is what Hobbes refers to as the "right of nature." *Leviathan* I, xiv, §1.

[11] *Leviathan* I, xiv, §3. Given that life is requisite to the enjoyment of passions, Hobbes raises its preservation to the fore.

rational men — a man will not knowingly disobey it, for in doing so, he would work to undermine his own ambitions.[12] Yet, although men compete with each other for resources and power, they will occasionally discover situations of mutual benefit. In light of such a circumstance, Hobbes proclaims it a fundamental precept of reason for the actors to pursue peace, insofar as there is hope of enjoying it.[13] During this pursuit, man may need to relinquish some of his natural freedom, but the restriction of his liberty is justified by a greater good.[14] Hobbesian contract is the medium by which self-interested individuals set aside the natural order of conflict so as to attain the otherwise unattainable.[15]

In the state of nature, man has a right to all things, meaning that his liberty to work to his own preservation is unlimited. Therefore, any contract on his part necessarily involves a divesting of natural right. That is, he agrees not to hinder the exercise of another man's original right, by standing out the way.[16] The agreement results in

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[12] Note that the "Law of Nature" is at most a "general rule," rather than something without exception. (*Leviathan* I, xiv, §3). Men may, at times, value something more than the preservation of life (*De Cive* III, §12). Further, note the severe limitations Hobbes places upon reason (*Leviathan* I, v, §3-4). "But for Hobbes the Laws of Nature are not categorical imperatives. They are only means to self-preservation and felicity." J.B. Stewart, "Hobbes among the Critics," *Political Science Quarterly*, Vol. 73, No. 4 (December, 1958) 562.

[13] *Leviathan* I, xiv, §4.

[14] That is, a "greater good" for him — not some objective and altruistic concept. "But mere freedom as absence of restraint, without positive power to achieve what we deem good, is empty and of no real value." Morris R. Cohen, "The Basis of Contract," *Harvard Law Review*, Vol. 46, No. 4 (February, 1933) 560.

[15] Specifically, "contract" is "the mutual transferring of right," which will be discussed later (*Leviathan* I, xiv, §9).

[16] *Leviathan* I, xiv, §6.

obligation, although not of the moral sort. A man is obliged to carry out agreements made in good faith because he has already recognized that they are to his benefit (otherwise, he would not have made them).[17] The divestiture of right was for the enjoyment of some passion that would otherwise go unmet and to renege on the agreement is to work to his own destruction, denying him a good and encouraging retribution from the offended party.[18] In this way, contractual obligation finds its source in both reason and passion. Yet, this same source of obligation also points to its limit. "[O]f the voluntary acts of every man the object is some good to himself," Hobbes reminds us. "And therefore there be some rights which no man can be understood by any words or other signs to have abandoned or transferred."[19] Specifically, a renouncement of one's life, liberty, or ability to pursue happiness can never be of advantage to him. Therefore, a man suffers no obligation to an agreement which would take away these inalienable rights. In a sense, it is the aim of all legitimate contracts to preserve them.

The Social Contract

Of course, this initial presentation of contract seems a bit naïve, given the harsh realities of man's treachery. The law of nature, which teaches men to pursue peace, is too often overlooked for shortsighted gain. The "natural punishments" that follow its breach are insufficient to restrain man from finding a greater advantage in its

[17] This assumes that the terms of the contract have not changed. A man is released from his obligation if "some new fact" arises, or if the other party signifies noncompliance (*Leviathan* I, xiv, §20).

[18] "For as there is called an absurdity to contradict what one maintained in the beginning, so in the world it is called injustice and injury to undo that which form the beginning he had voluntarily done." *Leviathan* I, xiv, §7.

[19] *Leviathan* I, xiv, §8.

transgression.[20] Covenants, a subdivision of contract wherein a party defers his transfer of right, are particularly susceptible to default.[21] Hobbes recognizes the shortcoming of these promissory agreements in the state of nature, lamenting, "he that performeth first has no assurance the other will perform after, because the bonds of words are too weak to bridle men's ambition, avarice, anger, and other passions, without the fear of some coercive power."[22] For all practical purposes, the anarchy of nature makes the mutual trust necessary for effective covenanting impossible.[23] An enforcement mechanism is required to guarantee that all parties will remain faithful to their word.

Despite the fact that the laws of nature are simply reasonable expressions of passion, they are often disregarded for seeming so contrary to their source. Men fail to realize the long-term advantage that short-term compromise will bring. Also, as mentioned before, until a critical mass of contractors are guaranteed to keep their word, it is often to the advantage of the individual to neglect his commitment. To meet the need of stability and reap the benefits of collective action, Hobbes theorizes that men eventually used their contractual abilities to form a social contract with one another, establishing a sovereign power and civil society. In its essential form, the contract states,

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[20] *Leviathan*, II, xxxi, §40

[21] M.T. Dalgarno takes issue with this definition, suggesting that covenant is a contract waiting to be actualized by a mutual transferring of right ("a contract consists of a mutual transferring of right while a covenant is a unilateral transfer of right"; M.T. Dalgarno, "Analyzing Hobbes's Contract," *Proceedings of the Aristotelian Society*, Vol. 76 (1975 - 1976), 211). However, he goes too far in distancing the two, and his definition of "covenant" seems indistinguishable from what Hobbes dubs "free-gift" ("When the transferring of right is not mutual, but one of the parties transferreth in hope to gain… this is not contract, but GIFT." *Leviathan* I, xiv, §12).

[22] *Leviathan* I, xiv, §18.

[23] *Leviathan* I, xv, §3.

"I authorise and give up my right of governing myself to this man, or to this assembly of men, on this condition, that thou give up thy right to him, and authorize all his actions in like manner."[24] It is a covenant between men of reason, whereby one party relinquishes his right, wagering that his neighbor will see the virtue in doing likewise. Each agrees to throw his lot with a third party, adding their power to his. Their creation (civil society) becomes "an artificial man, though of greater stature and strength than the natural, for whose protection and defence it was intended."[25] By combining their power and uniting its direction under one head (the sovereign), they are able to overcome the natural equality of the state of nature. Whereas before, "the weakest [of men] has strength enough to kill the strongest," under the social contract, the collective wisdom and capacity of the commonwealth is unmatched.[26]

Worth emphasizing is that the newly-created sovereign authority is not a party to the social contract. Consequently, in lieu of reciprocal promises to citizens (such as a constitution), the sovereign has no obligation to his people.[27] The best that the original contractors can hope is that their "free-gift" of authority will influence the sovereign to use his power for their benefit.[28] Yet, insofar as the sovereign fulfills even the barest minimum of protection from external violence and internal volatility, citizens are better

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[24] *Leviathan* II, xvii, §13.

[25] *Leviathan*, Introduction, §1.

[26] *Leviathan*, I, xiii, §1.

[27] One should not interpret this too harshly. "Obligation" is a technical term used to describe the law of nature's role in contracts. As we will see, it is to the sovereign's benefit to keep his people content. Thus, that same law of nature (reason) nonetheless binds the sovereign outside of explicit contract.

[28] Cf. *Leviathan* I, xiv, §12.

off than they were in their natural condition. The sovereign law of the state finally provides an objective good to trump the many subjective passions of men. No matter the desire of a single subject, the benefit of peace and stability provided by the state is (almost) certainly of more value to him. Thus, while a citizen is free to do as he will when the law is silent, reason dictates that he sacrifice his fleeting desires should they contravene his obligation to the law. It is on this ground that Hobbes establishes justice and injustice.

One of the most ancient definitions of "justice" is giving to one what is owed.[29] This seems to be what Hobbes has in mind when he describes the virtue in its philosophic context. Like other moral abstractions, justice is an artificial, rather than a natural, concept. He begins with a definition of "injustice," establishing it as "no other than the not performance of covenant."[30] Justice, then, characterizes all other human action in a contractual framework. These principles only hold true within civil society, where sovereign threat of punishment fulfills the necessary conditions for contract.[31] Thus, justice and injustice are rightly said to coincide with the civil law.[32] Interestingly, while most modern conceptions of injustice emphasize the wrong done to another, Hobbes warns against injustice for the harm done to oneself. By not fulfilling one's obligation, one undermines both the possibility of peace and the possibility of future benefit,

[29] See Cephalus' claim in Plato's *Republic*.

[30] *Leviathan* I, xv, §2; *Leviathan* I, xiv, §7.

[31] Without this threat, there is no obligation, because it is no longer in one's interest (and therefore coinciding with the law of nature) to keep one's word.

[32] The sovereign only uses his authority to enforce the legal and thus contracts that take place outside of the legal realm at best do not have the weight of the state to prosecute default.

rendering oneself untrustworthy and feeding the violence that constitutes the state of war. "Justice" then, while not holding the same moral (at least, in the sense that we use the word "moral") import for Hobbes that we associate with the term today, serves as a convenient shorthand for prudent action.

Potential Criticism

Hobbes' model of social contract theory has been met with criticism since its inception. Perhaps the earliest rebuttal offered by his opponents involves the viability of an actual state of nature and subsequent covenant to bring about civil society.[33] This criticism was common among his contemporaries, two outspoken examples being Sir Robert Filmer and Bishop William Lucy.[34] If one can question the historical fact of a literal state of nature, the argument goes, Hobbes' remaining insights on sovereign authority and political legitimacy lack a foundation. Without a social contract, there is no reason to suppose that government finds its genesis in consent. The criticism runs into some difficulty, however, in that Hobbes himself is not absolutely committed to the historicity man's natural state.[35] Instead, he is concerned with the principles of human motivation that hold true for all time. Whether or not Hobbesian principles actually brought the state into being, he contends, they are what keep it together. Thus, his project is less to provide an accurate historical report and more to discuss solutions to persistent

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[33] J.A. Thomas, "Some Contemporary Critics of Thomas Hobbes," *Economica*, No. 26 (June, 1929), pp. 185-191.

[34] Sir Robert Filmer, "Observation on Mr. Hobbes's Leviathan," in *Patriarcha and Other Political Works*, ed. Peter Laslett (Oxford: Blackwell, 1949) 239; William Lucy, *His Observations, censures and confutations of Notorious errours in Mr. Hobbes His Leviathan*, 1663.

[35] See, for example, *Leviathan* I, xiii, §11.

and contemporary problems. Should the sovereign power dissolve today, we would witness the same ruthlessness and paranoia that characterize his pre-political state of nature.[36]

More penetrating criticisms of Hobbes' contract have been offered since the renewed interest of his work in the early twentieth century. Howard Warrender introduced one of the more enduring evaluations of the social contract in *The Political Philosophy of Hobbes*.[37] Warrender's thesis highlights the difficulty of obligation inherent to the social contract. Rejecting the traditional theories of obligation that have been attributed to Hobbes, he instead offers a theory of moral obligation that transcends empirical or prudential claims.[38] Warrender questions the grounds for purely contractual obligation between a subject and his sovereign, given that the latter is merely a third-party beneficiary of the original covenant. As such, he argues, the sovereign can suffer no injury should a subject violate its terms.[39] And yet, as he points out, Hobbes

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[36] "It may seem strange to some man, that has not well weighed these things; that nature should thus dissociate, and render men apt to invade, and destroy one another… Let him therefore consider with himself, when taking a journey, he arms himself, and seeks to go well accompanied; when going to sleep, he locks his doors; when even in his house he locks his chests; and this when he knows there be laws, and public officers, armed, to revenge all injuries shall be done him; what opinion he has of his fellow-subjects, when he rides armed; of his fellow citizens, when he locks his doors; and of his children, and servants, when he locks his chests. Does he not there as much accuse mankind by his actions, as I do by my words?" *Leviathan*, I, xiii, §10.

[37] Howard Warrender, *The Political Philosophy of Hobbes* (Clarendon Press: Oxford, 1957).

[38] Thus, Warrender would criticize the prudential theory of obligation taken by this paper.

[39] He might suffer "damage," (harm) but not "injury" (a violation of right - *Leviathan* I, xiv, §7). Cf. *Leviathan* I, xvii, §11: "Fifthly, irrational creatures cannot distinguish between injury, and damage; and therefore as long as they be at ease, they are not offended with their fellows."

maintains that "government is upheld by a double obligation from the citizens; first, that which is due to their fellow-citizens; next, that which they owe their prince."[40] If citizens are obliged to their sovereign, Warrender reasons, then that duty must come from something other than contract. That source is the moral command of God, which can be known through reason as the law of nature. In short, because the laws of nature establish obligation, they are binding and cannot be merely prudential maxims.

The Warrender thesis, or an iteration of it, has been adopted by several Hobbes scholars over the years. Richard Tuck, who continues to loom large in scholarly work on Hobbes, relies heavily on *Leviathan*'s apparent paradox between self-preservation as a right and the law-like obligation attached to it to criticize the philosopher.[41] Although he ultimately rejects Warrender's solution (that Hobbes was reengaging the natural law tradition), he embraces Warrender's critique of Hobbesian obligation (as pertains to the law of nature). As a result, Tuck finds Hobbes an interesting, but fundamentally flawed case-study, in the end too unoriginal and inconsistent to justify "the curious fascination that Hobbes has exercised" over modern readers.[42] However, these criticisms largely overlook Hobbes' own definition of "obligation," fabricating a problem when there need not be one.[43] As I have mentioned earlier, Hobbesian obligation arises out of a logical necessity: "And when a man hath… abandoned or granted away his right, then he is said

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[40] *De Cive* VI, §20.

[41] Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge University Press: New York, 1979).

[42] Richard Tuck, *Natural Rights Theories* (Cambridge: Cambridge University Press, 1979), 177.

[43] Brian Barry, "Warrender and his Critics," *Philosophy*, Vol. 43, No. 164 (April, 1968) 117.

to be OBLIGED or BOUND not to hinder those to whom such a right is granted or abandoned from the benefit of it."[44] To do so is "to make void that voluntary act of his own" — an absurdity.[45] When Warrender and Tuck speak of "obligation," they are often using the term in its colloquial, rather than technical, sense. Given the prominence that Hobbes grants the law of nature, it is easy to see how one could misattribute a duty to follow it. Yet, true obligation only follows from contract. It is the term used to express the reasonable pursuance of passion when in a contractual relationship. In the case of the social contract, parties transfer rights to the sovereign, who is indeed outside of the covenant. Despite the fact that he is a third-party, citizens are still obliged to him (and not to the law of nature itself), as they have granted him their rights. Thus, the dual obligation of citizens to each other and their sovereign still finds its source in contract.

Both Tuck and Warrender look to Hobbes' explanation of sovereignty-by-acquisition as an example of a recasting and deviation from his initial social-contract story. In the case that an existing sovereign is conquered by another, the obligation subjects held to the defeated sovereign passes to the victor. Because the conquered subjects have made no contract with their new prince, it seems as though Hobbes has presented us with a new, non-contractual, source of obligation. However, this argument does not give adequate consideration to the nuances of the transaction. Hobbes writes of the distinction: "And this kind of dominion [sovereignty by acquisition], or sovereignty, differeth from sovereignty by institution, only in this, that men who choose their sovereign, do it for fear of one another, and not of him whom they institute: but in this

[44] *Leviathan* I, xiv, §7.

[45] *Leviathan* I, xiv, §7.

case, they subject themselves, to him they are afraid of."[46] If we take Hobbes at his word, only the motivation for sovereignty, rather than its source, has changed. It is not the victory itself which binds men to their new master, but the consent of the vanquished who realize that their sovereign has failed to protect the terms under which they have submitted themselves to him.[47] The new sovereign serves their purposes just as well as (and perhaps better than) the old. In their submission, "they contract with the victor, promising obedience, for life and liberty."[48] Obligation, bound as it is to reason, is not offended insofar as the conditions of the contract remain constant (that the multiplicity of the state of war is reduced to one sovereign law within civil society). Covenant and contract continue to exist, passing obligation with it.

Contract within Civil Society

Hobbes' discussion of contract emphasizes its role in the foundation of civil society, his primary end being the legitimization of sovereign authority. Thus, much of his writing explores the basis of compromise and obligation, finally culminating in the logical consequence of social contract. Yet after men transfer their rights to a sovereign and civil society has been established, there is comparatively little consideration of private contract within the now-secure social order. Other than broad assurances that contracts do indeed take place within civil society, we are left to infer the mechanics of implementation from Hobbes' earlier statements. Nonetheless, contracts between private individuals remain an essential feature of legitimate regimes.

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[46] *Leviathan* II, xx, §2.

[47] *Leviathan* II, xx, §11.

[48] *Leviathan*, "A Review and Conclusion," §7.

To begin, it good to recall that the source of contract (and all voluntary human action) is passion, manifesting itself in either appetite or aversion. Contract is simply another means to this end, whereby men relinquish some of their natural liberty that they may better realize that which their liberty is for. In this regard, it is a particularly potent tool, for when it is employed, it both promotes peace and leverages a power beyond that available to the individual contractor. However, because a contract is a mean, rather than an end, there must be limits to its legitimacy. In particular, a man cannot be alienated from his life, liberty, or provisions for happiness through contractual agreement. These prerequisites for pursuing the passions serve as guiding principles for contractual propriety in a Hobbesian framework, and any contract which works to further these ends is said to be valid.

Given the scope of man's ambition, contract is not only expedient, but necessary for human happiness.[49] In an environment where contract is insecure, man is only able to pursue the good insofar as his own efforts will allow and he must confront his fellows as rivals, rather than partners.[50] "In such a condition," Hobbes writes, "there is no place for industry… no culture of the earth… no arts, no letters, no society, and which is worst of all, continual fear and danger of violent death, and the life of man, solitary, poor, nasty,

[49] "Further, seeing it is not enough to the sustentation of a commonwealth, that every man have a propriety in a portion of land, or in some few commodities, or a natural property in some useful art, and there is no art in the world, but is necessary either for the being, or well being almost of every particular man; it is necessary, that men distribute that which they can spare, and transfer their propriety therein, mutually one to another, by exchange, and mutual contract." *Leviathan* II, xxiv, §10.

[50] "every man is enemy to every man… men live without other security than what their own strength and their own invention shall furnish them withal." *Leviathan* I, xiii, §9.

brutish, and short."[51] While civil society satisfies the base requirement of peace and eases men beyond the brutality of nature, further political bonds are required for true human flourishing. Sovereign power, bringing with it the threat of punishment for injustice (the failure to perform one's obligation), supplies the requisite conditions for private covenants — only within the shelter of civil society can individuals be trusted to uphold the terms of their agreements.[52] Therefore, despite Hobbes' reputation for promoting a totalitarian system, it is the private social interactions within a loose framework of peace that account for commodious living.[53]

Of course, all of this presupposes that the sovereign will use the power of the state to punish those that hinder contractual obligations. What motivates him to enforce these private agreements under the sanction of law? "[N]o man giveth but with intention of good to himself," so he must receive some benefit for the service he renders.[54] Situated outside of the social contract, the sovereign retains all of the rights that he would otherwise possess in the state of nature. Yet coupled with this limitless freedom is man's limitless passion, expressing itself as "a perpetual and restless desire of power after power, that ceaseth only in death."[55] This is precisely what the transfer of rights by citizens under the social contract offers him — the aggregate power of the

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[51] *Leviathan* I, xiii, §9.

[52] "For he that performeth first, has no assurance the other will perform after; because the bonds of words are too weak to bridle men's ambition, avarice, anger, and other passions, without the fear of some coercive power." *Leviathan* I, xiv, §18.

[53] Cf. *Leviathan*, I, xiii, §14.

[54] *Leviathan*, I, xv, §16.

[55] *Leviathan* I, xi, §2.

commonwealth is at his disposal. As sovereign, he has the resources to chase and maintain the objects of his passions beyond all others. Furthermore, the authority that he wields comes with no obligation to reciprocate the free-gift that he enjoys.

A lack of obligation, however, does not mean a lack of compulsion. Prudence dictates that the sovereign will do all that he can to maintain his privileged position. Indeed, the fourth law of nature (which is binding upon sovereign and subject alike) demands an exercise of gratitude.[56] Although the sovereign is not contractually obligated to his subjects in any way, he should "endeavor that he which giveth [benefit] have no reasonable cause to repent him of his good will."[57] Citizens may have agreed to subject themselves to a sovereign will, but their authorization is not without limit. Should the sovereign fail to protect the inalienable rights of his people, the ties that bind them to him will cease to exist.[58] Sovereignty is "not only subject to violent death by foreign war," Hobbes reminds, "but also through the ignorance and passions of men it hath in it, from the very institution, many seeds of a natural mortality by intestine discord."[59] This latter death may be slower, but it is no less potent. Apart from the fear of losing sovereign authority altogether, the ruler of a commonwealth also has an interest in allowing his people to flourish. Simply put, if the source of his power is the collective strength of his subjects, it follows that the more prosperous his people, the more powerful he becomes.

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[56] *Leviathan* I, xv, §16.

[57] *Leviathan* I, xv, §16.

[58] "The obligation of subjects to the sovereign is understood to last as long, and no longer, than the power lasteth by which he is able to protect them." *Leviathan* II, xxi, §21.

[59] *Leviathan* II, xxi, §21.

He can then use this power to follow interests and passions of his own. "The name of tyranny" may "signifieth nothing more nor less than the name of sovereignty," but at the same time, not all sovereigns need be tyrants.[60] Remarkably, while "[d]esire of ease and sensual delight disposeth men to obey a common power," these same things dispose the sovereign to bend himself to a good beyond his own.[61] A private selfishness results in a public good.

In a society where men are held responsible for upholding their contractual obligations, the question of how to deal with conflicting promises will inevitably arise. Luckily, the problem is quickly and succinctly resolved: "A former covenant makes void a later."[62] Recalling that contract is a transfer of right, any covenant that would contradict an earlier agreement is an attempt to transfer a right that one does not have.[63] For this reason, it becomes extremely important to recall which rights one retains and which have been contracted away. This is particularly significant when considering the rights one surrenders upon entrance into civil society. The social contract is open-ended, preauthorizing any actions or governance by the sovereign power, insofar as the inalienable rights of the citizenry are not offended. At times, the sovereign may impose limitations on himself, reserving additional rights for his citizens, but such restraint is not

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[60] *Leviathan*, "A Review and Conclusion," §9.

[61] *Leviathan* I, xi, §4.

[62] *Leviathan* I, xiv, §28.

[63] "For a man that hath passed away his right to one man today, hath it not to pass tomorrow to another; and therefore the later promise passeth no right, but is null." *Leviathan* I, xiv, §28. Note that this argument holds true for any contract. One cannot ever give something that he does not have. Covenants are just unusually susceptible to this problem.

required. As a consequence, no private covenant contrary to the laws of the state can be legitimate. Because civil society provides the necessary conditions for covenant, it is also precedes all others. Any contract made within civil society involves the state as an implicit third party. There is no altogether "private" bargaining — the sovereign is at perfect liberty to preclude or modify the terms of any contract under his domain. While the prudent sovereign will remain largely aloof of such matters, intervention remains within his prerogative. On the other hand, the citizen is completely free to do as he pleases in the silence of the law.

Conclusion

Hobbesian contract teaches us of man's attempt to overcome the curse of natural selfishness through political association. Unlike the ants and bees, he seeks a good apart from, and often in tension with, the good of his species.[64] Through contract, man is able to resist the violence of his own nature and establish a lasting, if artificial peace with his neighbor. Contract is a recognition of a common humanity shared by men — a man cannot contract with beasts or brutes, but only with those whom he understands and who understand him in return.[65] Without contract, man would be left to his own devices in a hostile world where force and fraud become cardinal virtues.[66] What little he could gather for himself would not endure. In this respect, nature has been found lacking and artifice has mended its defect. We see then how essential contract is to man's pursuit of happiness, for "the voluntary actions and inclinations of all men tend, not only to the

[64] *Leviathan* II, xvii, §6-12.

[65] *Leviathan* I, xiv, §22.

[66] *Leviathan* I, xiii, §13.

procuring, but also to the assuring of a contented life."[67] However, man is only able to channel, but not change, his nature. No matter what common good is attained through compromise and accord, the driving force behind the agreement is still the self-interest of individual actors.

On the other hand, this demonstrates that public and private goods need not be at odds. Contract, and especially the social contract, can never forsake the general welfare. It must take into account the sundry desires of men and arbitrate between them. This sort of political compromise is the basis of the state, which is itself "the greatest of all reflections on human nature."[68] Contract both generates and legitimizes civil society, for the power of the state is drawn from the consent of its citizenry. Should its law undermine the authority of contract or limit the enforcement of contractual obligation, it would weaken the very bedrock upon which it stands. Instead, when the state fortifies the sanctity of contractual agreements, it works to reinforce the loyalty of citizens. Not only does it affirm the regime's founding, but it provides space for private flourishing among the people.

The purely calculating relationship between the sovereign and his subjects may seem off-putting, but by stripping away the moral foundation of contract, Hobbes allows it to more easily fall within the purview of law and justicibility. This is an important contribution to the modern regime, as it adds an objectivity and consistency to the law.[69]

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[67] *Leviathan*, I, x, §1.

[68] *Federalist* 51.

[69] Cf. Hobbes on the necessity of objectivity: "And seeing every man is presumed to do all things in order to his own benefit, no man is a fit arbitrator in his own cause." *Leviathan*, I,xv, §31.

Judges do not have to ponder questions of goodness and truth, but simply questions of law and fact. "The peace of this civil society would be jeopardized," Professor Walter Berns remarks, "if men were permitted to dispute questions of good and bad, or, to say the same thing, if men in their capacity as citizens were permitted to raise questions concerning the end or ends of civil society. Such questions must be suppressed in the modern liberal state. (Whether they can be suppressed is another matter.)"[70]

While Hobbes greatly influenced the rhetoric of contract among his philosophic contemporaries in Europe, his true influence came to bear with the founding of the United States. The advent of America as a political experiment based upon the consent of the governed helped to establish Hobbesian principles of contract as conventional precepts of modern society. For this reason, America still serves as a fascinating case study as the regime and its people continue to explore the nuances of modern social contract theory put into practice.

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[70] Walter Berns, "Judicial Review and the Rights and Laws of Nature," *The Supreme Court Review*, Vol. 1982 (1982), 60.

CHAPTER FIVE

Hobbes on Police Power

Introduction

For Hobbes, the sovereignty of the state rests upon the prior foundation of obligation and contract. Whereas the ancients traced its source to something higher, such as justice or a divine calling, Hobbes builds upon the low but firm ground of popular consent. Because of this, sovereign power finds itself limited only by the extent to which individual citizens agree to lend the state their collective strength. The grant of power is expansive, but not so boundless as modern commentators would suggest. The greatest check on sovereign will turns out to be simple prudence. There is an internal tension between the demands of liberty, necessitating both freedom and an ordering of competing interests. Liberty both resists and requires authority. Hobbes recognizes this antagonism while outlining his doctrine of sovereignty, but looks to the consensual nature of the social contract to arbitrate the dispute. Trusting in the efficacy of reason coupled with self-interest, Hobbes embraces a comprehensive sovereign power, able to anticipate the necessities of the regime. This doctrine of the state's latent power has been adopted by jurists as the inherent "police power" held by all regimes. It is the implicit authorization of any means necessary to fulfill the ends of the social contract. As such, it is only to be used in the interest of the whole, promoting some common good.

This chapter will discuss the nature and limits of Hobbesian sovereignty, as well as its expression in modern jurisprudence in the form of "police power." Properly used, its incremental restrictions on individual liberty ultimately provide for liberty's truer

expression. I will begin with a brief overview of the police power, exploring its history and Hobbesian roots. Sir William Blackstone, the primary architect of our modern legal studies, draws upon Hobbes' doctrine of social contract to first coin the idea as a distinct power of the state. Given these ties, I will examine how Hobbes himself approaches the question of sovereign authority and its responsibility to the commonwealth. The traditional interpretation of Hobbesian contract has minimized the practical constraints on this authority, painting Hobbes' sovereign as a Machiavellian tyrant — Individual citizens have no hope of recourse against such an overbearing state. Yet, the caricature goes too far, ignoring the role that reason plays in restraining the violence of passion. I argue that in practice, Hobbes' teaching is more liberal than authoritarian.[1] Finally, I will appraise the particularly American expression of police power, both in the founding and later jurisprudence. While our federal system has modified the articulation of sovereignty, Hobbes' lessons still remain central to answering our fundamental political questions.

The Historical Roots of Police Power

Constitutional scholars have struggled for decades over how best to understand the notoriously vague concept of police power. "An attempt to define its reach or trace its outer limits is fruitless," comments Justice Douglas, reflecting the sentiment of the Court since the late nineteenth century.[2] Despite its ambiguity, the police power endures as a mainstay of American law. Whatever confusion may exist with regard to its precise

[1] It is telling that Blackstone himself, generally portrayed as a defender of liberalism, is strikingly Hobbesian in his characterization of English law.

[2] *Berman v. Parker*, 348 U.S. 31 (1954).

nature and extent, at the very least it is understood to include legislation made in the interest of public morals, health, and safety.[3] More often than not, this definition also includes a broad mandate to attend to the "general welfare."[4] Perhaps surprisingly, the content of the state's power to police its domain has remained relatively stable since its inception into English common law. Blackstone was the earliest to describe powers held by the government in terms of what we understand by the "police power." He writes:

> By the public police and economy I mean the due regulation and domestic order of the kingdom, whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners, and to be decent, industrious, and inoffensive in their respective stations. This head of offences must therefore be very miscellaneous, as it comprises all such crimes as especially affect public society and are not comprehended under any of the four preceding species [those against public justice, public peace, public trade, and public health].[5]

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[3] *Mugler v. Kansas*, 123 U.S. 661 (1887); *Crowley v. Christensen*, 137 U.S. 89 (1890); *Jacobson v. Massachusetts*, 197 U.S. 26 (1905); *West Coast Hotel Co. v. Parrish*, 300 U.S. 391 (1937); *United States v. Darby*, 312 U.S. 114 (1941).

[4] *New York v. Miln*, 36 U.S. 104 (1837); License *Cases*, 46 U.S. 588 (1847); *Holden v. Hardy*, 169 U.S. 397 (1898); *Lochner v. New York*, 198 U.S. 64 (1905); *West Coast Hotel Co. v. Parrish*, 300 U.S. 391 (1937); *United States v. Darby*, 312 U.S. 114 (1941).

[5] Sir William Blacktone, *Commentaries on the Laws of England*, volume 2, chapter XIII. Crimes against "public justice, public peace, public trade, and public health" are not so comprehensive as one might assume. Blackstone meant them in a much more literal sense than we tend to read things today. Crimes against "public justice" are those which obstruct legal procedure (perjury, bribery) , crimes against "public peace" involve literal incitements of civil disorder (libel, riots), crimes against "public trade" hinder economic exchange (smuggling, fraud), and crimes against public health regard deliberate negligence leading to the spread of disease (ignoring quarantines, selling rotten food). This last provision has been merged into our modern understanding of police power, but it is important to recognize that Blackstone's divisions are merely of convenience. He writes earlier, "The species of crimes which we have now before us is subdivided into such a number of inferior and subordinate classes that it would much exceed the bounds of an elementary treatise, and be insupportably tedious to the reader, were I to examine them all minutely or with any degree of critical accuracy. I shall therefore confine myself principally to general definitions or descriptions of this great variety of offences…" (ch. X). The crimes against public police, being those against the

Blackstone roots this police power in the implied right of sovereignty. The state is a sort of guardianship or protectorship, wherein the king serves as the head of a macro household, albeit one based upon the consent of its constituents.[6] As *pater-familias*, the sovereign ensures that individual citizens conform themselves to the political order of the whole. It is his responsibility to arbitrate the competing demands of individual liberty.

The realm of police power is necessarily vague, encompassing the general mandate of the sovereign to order his kingdom. Blackstone derives the mandate from the original social contract which undergirds all regimes. He takes as given that the ultimate source of sovereign power is the consent of the governed. As such, it falls to the sovereign to "[execute] those laws which the people themselves, in conjunction with him, have enacted, or at least have consented to by an agreement either expressly made in the persons of their representatives, or by a tacit and implied consent, presumed and proved by immemorial usage."[7] The sovereign performs his duty because from it, he derives his power.[8] In turn, the subject performs his duty because he wishes to enjoy the riches of civil society.[9] Blackstone's framework is Hobbesian, wherein the private selfishness of

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sovereign as *pater-familias*, comprehend the former subdivisions, as well as any overlooked.

[6] Markus Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (New York: Harper Perennial, 2005), 49.

[7] Blackstone, *Commentaries*, vol. 2, ch. X.

[8] "I proceed next to the duties, incumbent on the king by our constitution; in consideration of which duties his dignity and prerogative are established by the laws of the land: it being a maxim in the law, that protection and subjection are reciprocal." Blackstone, *Commentaries*, vol. 1, ch. VI.

[9] "The only true and natural foundations of society are the wants and the fears of individuals." Blackstone, *Commentaries*, vol. 1, Introduction §2.

each actor works to the benefit of the whole.[10] Recalling the image of *Leviathan* as a literal body politic, Blackstone writes, "Allegiance is the tie, or ligamen, which binds the subject to the king, in return for that protection which the king affords the subject."[11] That allegiance is forged by man's desire for felicity and serves as the cornerstone of all political order:

> This law of nature ["that man should pursue his own true and substantial happiness"], being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force and all their authority, mediately or immediately, from this original.[12]

Insofar as the king rules in such a way as to promote the flourishing of his people, the laws of the state are binding upon them and his authority is strengthened. The police power serves to account for the innumerable potentialities that might be necessary to fulfill the broad charge of the social contract.

If the aim of civil society is "to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature, but which could not be preserved in peace without that mutual assistance and intercourse," and those absolute rights "are usually summed up in one general appellation, and denominated the natural liberty of mankind," then it is of the utmost importance that

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[10] "Self-defence, therefore, as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society." Blackstone, *Commentaries*, vol. 2, ch. I. For further similarities to Hobbes, one need look no further than §2 of Blackstone's introduction to volume 1, wherein he mirror's Hobbes' outline of causality leading to political order. See for example, his discussion of "matter in motion," as well as his distillation of the laws of nature to the axiom: "that man should pursue his own true and substantial happiness."

[11] Blackstone, *Commentaries*, vol. 2, ch. VI.

[12] Blackstone, *Commentaries*, vol. 1, Introduction §2.

government works to promote, rather than stifle, liberty.[13] Yet, unordered liberty for all results in liberty for none. Such is the state of nature. Given the realities of scarcity (in all its forms), men can truly enjoy their liberty only when it is restrained so as to minimize its imposition on the liberty of others.[14] This is the crux of the police power, restricting individual liberty in the name of the common good. In this light, the police power is fundamental to all regimes, implied even if it is not granted explicitly.[15]

Thomas Hobbes and the Police Power

That Blackstone understands the police power to be absolutely essential for legitimate government hints at the immense debt he owes to his predecessor, Thomas Hobbes. Blackstone's axiomatic presupposition that all government is, at its core, based upon a social contract dramatically influences his appreciation of its powers and responsibilities. It is important, therefore, to examine what Hobbes himself contributes to the doctrine of police power. Recalling that man's plight is ultimately one of "a perpetual and restless desire of power after power, that ceaseth only in death," proper government

[13] Blackstone, *Commentaries*, vol. 1, ch. I. Compare this to Hobbes, who similarly defines the right of nature as natural liberty and claims that the purpose of civil society is to protect this right (Hobbes, *Leviathan*, ch. XIV).

[14] Cf. Warner R. Winborne, "Modernization and Modernity: Thomas Hobbes, Adam Smith, and Political Development," *Perspectives on Political Science*, Vol. 37, No. 1 (Winter, 2008): 43.

[15] The King's power of prerogative springs from the same source: "The limitation of these public resorts to such time and such place as may be most convenient for the neighbourhood, forms a part of economics, or domestic polity, which, considering the kingdom as a large family, and the king as the master of it, he clearly has a right to dispose and order as he pleases." Blackstone, *Commentaries*, vol. 1, ch. VII. However, the police power works within the usual legislative framework.

must channel the selfish ambition of its citizens so as to benefit the whole.[16] At the same time, in doing so, it must not frustrate the liberty of individuals to the extent that they begin to consider whether they might not fare better in a state of nature. These dual concerns temper man's propensity to tyrannize and make Hobbesian government much more liberal than it is often given credit.

The initial social contract comes into being to structure man's existence. Man is restless because he lacks both "the power and means to live well."[17] His passions are without measure, far extending the limits of his own industry. Moreover, until he has mastery over them, all other men are potential competitors for the objects of his desires. This insecurity inclines him to war, which only further obstructs his fulfillment.[18] Left to his own devices, the chaos of nature dashes all hope of human progress.[19] Yet, at some point, man gives up on his quest for omnipotence and realizes that a compromised felicity is better than none at all. He desires to conquer, but must instead be conquered. By sacrificing some of his loftier ambitions, man is able to realize many, if not most, of the more mundane. The social contract involves each man putting aside his natural right (ability) to pursue whatever he pleases and agreeing to bend to a common rule.[20] That is,

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[16] Hobbes, *Leviathan*, I, xi, §2.

[17] Hobbes, *Leviathan*, I, xi, §2.

[18] "Competition of riches, honour, command, or other power, inclineth to contention, enmity, and war; because the way of one competitor to the attaining of his desire is to kill, subdue, supplant, or repel the other." Hobbes, *Leviathan*, I, xi, §3.

[19] "In such a condition, there is no place for industry… no account of time… and which is worst of all, continual fear and danger of violent death, and the life of man, solitary, poor, nasty, brutish, and short." Hobbes, *Leviathan*, I, xiii, §9.

[20] "And this species of legal obedience and conformity is infinitely more desirable than that wild and savage liberty which is sacrificed to obtain it. For no man that

as Blackstone will later put it, to "conform their general behaviour to the rules of propriety, good neighbourhood, and good manners."[21]

However, just because man has grudgingly entered into civil society does not mean that he has abandoned his natural egoism. Hobbes is unique insofar as he founds politics not upon a transcendent common good, but merely upon an aggregation of individual goods.[22] Those who enter into the social contract do so, not out of a sense of altruism, but selfishness. Even with a common power to keep him in awe, man will still seek his own interest.[23] Typically, this will be at the expense of the whole. It is for this reason that Hobbes has scant trust in the individual's ability to be an impartial judge in his own case.[24] So little does man know his neighbor that he can only appreciate his political duty when it is put in relation to himself: "Do not that to another, which thou wouldst not have done to thyself."[25] Even then, the command looks not to positive benefit, but merely minimizing the harm that one would cause another. Both citizen and

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considers a moment would wish to retain the absolute and uncontrolled power of doing whatever he pleases: the consequence of which is, that every other man would also have the same power, and then there would be no security to individuals in any of the enjoyments of life." Blackstone, *Commentaries*, vol. 1, ch. I.

[21] Blackstone, *Commentaries*, vol. 2, ch. XIII.

[22] Strictly speaking, society stands upon even less than that — an aggregation of individual *desires* which are assumed to be good.

[23] Hobbes, *Leviathan*, I, xiii, §8.

[24] "And seeing every man is presumed to do all things in order to his own benefit, no man is a fit arbitrator in his own cause." Hobbes, *Leviathan*, I, xv, §31.

[25] Hobbes, *Leviathan*, I, xv, §35.

sovereign alike are plagued by this consuming love of self. Because "no man giveth but with intention of good to himself," incentive must replace a faith in virtue.[26]

Ultimately, it is reason which inclines citizens to obedience and the sovereign to moderation. The law of nature (that is, reason) dictates "that every man strive to accommodate himself to the rest" in the interest of peace.[27] Yet man, unable to abstract himself from his own particulars, is a poor assessor of how to fairly situate himself in relation to his peers. It is therefore necessary that these common rules of order are formalized through law, thus removing any guesswork from the equation. So long as citizens continue to abide by the laws of the state, they reinforce the social contract and secure the benefits of civil society. While Hobbes makes it relatively clear why the citizen grants his obedience to the state, he is less upfront about what the sovereign has to gain by eschewing tyranny. This is perhaps why he has received the unflattering reputation of an authoritarian, despite his deep contributions to liberalism.

Even a cursory reading of Hobbes reveals his commitment to establishing the authority of government upon principles of reason, individualism, equality, and inalienable rights. As Leo Strauss suggests, "If we may call liberalism that political doctrine which regards as the fundamental political fact the rights, as distinguished from the duties, of man and which identifies the function of the state with the protection or the safeguarding of those rights, we must say that the founder of liberalism was Hobbes."[28] Indeed, it is Hobbes who champions a system of government resting upon the consent of

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[26] Hobbes, *Leviathan*, xv, §16.

[27] Hobbes, *Leviathan*, xv, §17.

[28] Leo Strauss, *Natural Right and History* (Chicago: University of Chicago Press, 1953), 181-182.

the governed. This foundation thereby confers the regime with both its powers and limitations. Because it cannot operate without the authorization of its citizens, there are certain boundaries which a government can never cross. These are the inalienable rights of men — those things which no man would ever choose to abandon. Consequently, those who would maintain their power cannot rule by caprice, but are held accountable by the general citizenry. Legislation must be reasoned, rather than arbitrary, and always with a view to the benefit of the whole.

Although the sovereign is not a party to the social contract, but is instead simply the beneficiary of the free-gift of rights from the contracting citizens, he is still bound by his own prudence to not mistreat them. "Benefits oblige," Hobbes reminds us.[29] While the social contract does not fetter him, the sovereign is still constrained by the laws of nature which dictate that when others lay aside their right to all things for the sake of peace, he should do likewise.[30] In this sense, the sovereign suppresses his right to do mischief to those who have laid themselves at his feet. To do otherwise would threaten the tenuous peace which all men seek.[31] It is therefore appropriate to speak of certain duties held by the sovereign. Hobbes obviously spends the greater part of his political works such as *Leviathan* outlining the duties that subjects owe their sovereign. However, it is fascinating to note that there are very real and explicit duties owed by the sovereign, according to the law of nature: "The office of the sovereign… consisteth in the end, for which he was trusted with the sovereign power, namely the procuration of the safety of

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[29] Hobbes, *Leviathan*, I, xi, §7.

[30] Hobbes, *Leviathan*, I, xiv, §5.

[31] Not to mention, it is a status quo with him on top.

the people; to which he is obliged by the law of nature, and to render an account thereof to God…"[32] Lest the reader disregarded this duty as trivial, Hobbes elaborates: "But by safety here, is not meant a bare preservation, but also all other contentments of life, which every man by lawful industry, without danger, or hurt to the commonwealth, shall acquire to himself."[33] Man's greatest fear may be a violent death, but it is by no means his sole motivation. He enters into civil society in the hope of securing life, liberty, and the ability to pursue happiness. If the sovereign neglects these basic concerns, the obligation of citizen to sovereign ceases.[34] The self interest of the sovereign forces him to consider the interest of his people.[35]

To guard against man's natural fear of arbitrary power, the sovereign should limit his exercise of prerogative in favor of "a general providence" expressed through "the making and executing of good laws."[36] He must attend to the needs of his people, but in a way that leaves them the greatest degree of individual freedom. Hobbes does not deny his sovereign the authority to occasionally exercise what would traditionally be seen as

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[32] Hobbes, *Leviathan*, II, xxx, §1.

[33] Hobbes, *Leviathan*, II, xxx, §1.

[34] "The obligation of subjects to the sovereign is understood to last as long, and no longer, than the power lasteth by which he is able to protect them." Hobbes, *Leviathan*, II, xxi, §21. See also: Hobbes, *Leviathan*, I, xiv, §8. Here, it again rings true that "benefits oblige."

[35] H.L.A. Hart writes of such "limits" on sovereign authority: "…the theory does not insist that there are no limits on the sovereign's power but only that there are no *legal* limits on it. So the sovereign may in fact defer, in exercising legislative power, to popular opinion either from fear of the consequences of flouting it, or because he thinks himself morally bound to respect it." H.L.A. Hart, *The Concept of Law* (New York: Oxford University Press, 1994), 66.

[36] Hobbes, *Leviathan*, II, xxx, §2.

extralegal measures when the need arises.[37] However, his normal mode of governing should be generally applicable law. With good law, the sovereign is able to preempt circumstances which would otherwise require his prerogative. This, of course, begs the question as to what constitutes "good law." "A good law," Hobbes writes, "is that, which is needful, for the good of the people, and withal perspicuous."[38] The stipulation that laws be needful highlights the desirability of limited government. Simply because the sovereign has the capacity to legislate the conduct of his people does not mean that he should. The sovereign has no interest in "restrain[ing] people from a harmless liberty," but only in ensuring that they do not injure themselves or others.[39] He allows for freedom through legislative minimalism — where the law is silent, the citizen is free to do as he pleases.[40] Good law is like a hedge, Hobbes contends, which shepherds rather than oppresses. Despite those who suggest that the Hobbesian sovereign will ruthlessly tyrannize over those under him, Hobbes himself argues explicitly to the contrary: "A law may be conceived to be good when it is for the benefit of the sovereign, though it is not necessary for the people; but it is not so. For the good of the sovereign and the people cannot be separated. It is a weak sovereign that has weak subjects…"[41] His motivation may lack altruism, but it does reveal the more liberal side of Hobbes. This same mandate

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[37] Nor does Blackstone (Blackstone, *Commentaries*, vol. 1, ch. VII).

[38] Hobbes, *Leviathan*, II, xxx, §20.

[39] Hobbes, *Leviathan*, II, xxx, §21 (*latin variant*).

[40] "In cases where the sovereign has prescribed no rule, there the subject hath the liberty to do or forbear, according to his own discretion." Hobbes, Leviathan, II, xxi, §18.

[41] Hobbes, *Leviathan*, II, xxx, §21.

to protect and nourish citizens even leads Hobbes to recommend a system of public charity, or welfare. Because private individuals cannot be trusted to overcome their self-interest and care for the unfortunate, the laws of the commonwealth must look after the truly needy to guard against the public evils of letting them fend for themselves.[42]

In addition to being necessary, good law is also perspicuous. If the purpose of law is to create order out of chaos, then the legislator gains nothing when he is misunderstood. Citizens cannot obey what they do not know. For this reason, Hobbes encourages succinct and simple precepts of governance. Going further, not only should individual laws be straightforward, but the whole body of law should itself aim for concision. Only then can the finite individual hope to fulfill his civic duty. Men fear that which is unknown, for there is always the danger that it may work to their destruction.[43] Therefore, it is to the advantage of the sovereign to declare, not only the letter of the law, but the reason behind it.[44] This serves several purposes. Foremost, assuming that the sovereign is doing his part, legislative transparency grants weight to statutes by demonstrating a clear connection between the civil law and the natural law. Citizens must never forget the harshness of nature and the great benefits of civil society. In addition, providing a rationale of legislation minimizes the risk of accidental criminal offense. Men may at times be excused for being unaware of the civil law, but they can never claim ignorance of the law of nature.[45] Insofar as the civil law mirrors the natural,

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[42] Hobbes, *Leviathan*, II, xxx, §18.

[43] Cf. Hobbes, *Leviathan*, I, xii §6.

[44] Hobbes, *Leviathan*, II, xxx, §22.

[45] Hobbes, *Leviathan*, II, xxvii, §4-5.

men should be able to use their reason to determine proper conduct, even when they are unaware of particular decrees.

Hobbes grants his sovereign an extremely broad mandate to provide for the general welfare of his subjects. Retaining all of the rights that he held in the state of nature, the sovereign is technically limited only by his own prudence. However, the law of nature, which is reason, reveals that his desires are best met by maintaining his position of power. It therefore allows and demands that the sovereign do whatever is necessary to preserve civil society. Hobbes justifies this unqualified power with a defense that Alexander Hamilton will echo just over 200 years later in *Federalist* 23: "whosoever has right to the end has right to the means."[46] If the law of nature proclaims it the sovereign's duty to protect the inalienable rights of the commonwealth, then it also grants him the authority to discharge such an obligation. Both prerogative and the police power flow from this same source of authority — that is, the general charge to pacify those who have entered into civil society. While Blackstone will later subcategorize police power legislation as one among several types of law, Hobbes makes no such divisions.[47] Thus for Hobbes, all civil law is an exercise of "due regulation and domestic order."[48] Accordingly, the sovereign's authority to police his kingdom forms the backbone of all civil law. It is worth noting that Hobbes makes no special distinction between the exercise of prerogative (understood as extralegal action for the good of

[46] Hobbes, *Leviathan*, II, xviii, §8. Cf. *Federalist 23.*

[47] Bear in mind that Blackstone too recognizes the police power as the general swath of power from which the other categories are drawn. It is not equal to the subdivisions, but encompasses them.

[48] Blackstone, *Commentaries*, vol. 2, ch. XIII.

society) and normal law. Instead, civil law is defined as "to every subject, those rules, which the commonwealth hath commanded him, by word, writing, or other sufficient sign of the will, to make use of, for the distinction of right, and wrong; that is to say, of what is contrary, and what is not contrary to the rule."[49] Hobbes is a vocal proponent of written law — it minimizes ambiguity and therefore encourages prompt and proper execution. However, should the sovereign choose to otherwise convey his will, the decree is no less binding. Because "any sufficient sign of the will" is enough to characterize civil law, there is no room for extralegal action on the part of the sovereign. He already holds complete authority to protect and nurture his people.

Hobbes on Liberty and Authority

Because the police power, as it finds its way into American law, is derived from the more sweeping Hobbesian power of the sovereign to regulate his people, we must examine the more general limits and implications of civil law. Hobbes describes several of these limits in his account of "good law," but it still remains to be seen how he reconciles the tension between the demands of civil society (which modern jurists have broken off and now associate with "police power") and the rights of individuals. The clearest explication of this dilemma takes place in Chapter XXI of *Leviathan*, "Of the Liberty of Subjects." Liberty is best described as an absence of opposition. Therefore, Hobbes argues, a man may be considered "free" when he is able to do (that is, when he is not hindered in doing) that which he wills.[50] Note that Hobbes makes no claims on the

[49] Hobbes, *Leviathan*, II, xxvi, §3.

[50] "…a free-man is he that in those things which by his strength and wit he is able to do is not hindered to do what he has a will to do." Hobbes, *Leviathan*, II, xxi, §2.

freedom of the will, which is subject to all manner of influences beyond man's control.[51] This caveat allows him to make liberty consistent with both fear and necessity, insofar as an individual freely chooses the best of several undesirable options. Of course, every choice that one makes has a finite number of options — this does not negate, however, the ability to choose, nonetheless. Only God himself, Hobbes suggest, possesses the pure freedom of will that would satisfy the requirements of liberty that his critics demand.[52]

The general liberty ascribed to man is further qualified when related to him qua subject. Recalling that Hobbesian liberty is of a corporeal nature, the liberty of the subject is found in the silence of the law.[53] For this reason, no one society can claim to be any more free than another — "whether a commonwealth be monarchical or popular, the freedom is still the same."[54] Citizens in all regimes are subject to the law. Yet, Hobbes is insistent that the law increases, rather than diminishes, the *exercise* of individual liberty. Those who allege otherwise seem to disregard the benefits of civil society, forgetting that the greater gifts of liberty are bought with the sacrifice of lesser pleasures.[55] By relinquishing a portion of his natural liberty, one is better able to use that liberty which remains. The citizen is both bound and freed by the law. Of course, there

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[51] "Lastly, from the use of the word *free-will* no liberty can be inferred of the will, desire, or inclination, but the liberty of the man…" Hobbes, *Leviathan*, II, xxi, §2.

[52] Hobbes, *Leviathan*, II, xxi, §4.

[53] "The liberty of the subject lieth, therefore, only in those things which, in regulating their actions, the sovereign hath praetermitted." Hobbes, *Leviathan*, II, xxi, §6.

[54] Hobbes, *Leviathan*, II, xxi, §8.

[55] "And yet, as absurd as it is, this is it they demand, not knowing that the laws are of no power to protect them without a sword in the hands of a man, or men, to cause those laws to be put into execution." Hobbes, *Leviathan*, II, xxi §6.

are limits to the obligation of the citizen, predetermined by the terms of the social contract.[56] These are the inalienable rights which the contract itself exists to preserve. The sovereign may, of course, make specific grants of liberty to subjects — such as allowing the use of public roads, the freedom of speech, or maximum hours laws. However, such liberties are not absolute. Just as the freedom of speech may be restricted to prevent someone from shouting "fire" in a crowded theatre, so the sovereign may rescind his grants in the name of the public welfare which undergirds the social contract: "If a monarch or sovereign assembly grant a liberty to all or any of his subjects, which grant standing, he is disabled to provide for their safety, the grant is void, unless he directly renounce or transfer the sovereignty to another."[57] This is a rather serious claim — the sovereign must cease to be sovereign if he chooses to favor the liberty of the few (or even of all) over the security of the whole. Its gravity highlights the importance of a more general welfare that often works against the desires or good of the individual. In such cases, the sovereign cannot allow the part to govern the whole.[58]

Such stark occurrences, however, are few and far between. On an everyday basis, the sovereign must exercise the virtue of statesmanship, balancing competing interests in an attempt to avoid all-or-nothing conflicts like the above scenario. The general welfare must trump individual liberty when the two cannot be reconciled, but the prospect of reconciliation is too often overlooked without consideration. Whenever possible, the

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[56] "For in the act of our *submission* consisteth both our *obligation* and our *liberty*." Hobbes, *Leviathan*, II, xxi, §10.

[57] Hobbes, *Leviathan*, II, xxi, §20.

[58] Hobbes seems to foreshadow this difficult choice in his introduction, writing, "He that is to govern a whole nation, must read in himself, not this or that particular man; but mankind." Hobbes, *Leviathan*, Introduction, ¶4.

sovereign should work to ensure that the needs of individual citizens are not being ignored, even when society on the whole is prospering.[59] Hobbes warns that "though sovereignty, in the intention of them that make it, be immortal, yet is it in its own nature, not only subject to violent death by foreign war, but also through the ignorance and passions of men it hath in it, from the very institution, many seed of a natural mortality by intestine discord."[60] That is, the sovereign may find himself so caught up in the more flagrant threats to the commonwealth (such as war) that he ignores the internal diseases that plague it. This decay from within is due to a lack of attention to the true motivations driving men. When the rights of the citizen are threatened, he will rebel from the laws of the commonwealth without hesitation. Usually, these instances are so isolated that they do not threaten the stability of the whole. However, if citizens are unable to trust that the sovereign will protect their interests as individuals, the legitimacy of the social contract begins to dissolve.[61]

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[59] James Bernard Murphy articulates this sentiment nicely while reflecting on the works of William Galston: "The penultimate paragraph of [Galston's] *Liberal Pluralism* articulates an ideal of politics that could not be more Hobbesian: 'A politics that does everything within reason to ward off or abolish the great evils of the human condition while allowing as much space as possible for the enactment of diverse but genuine human goods is probably the best we can hope for, or even imagine.'" James Bernard Murphy, "From Aristotle to Hobbes: William Galston on Civic Virtue," *Social Theory and Practice*, Vol. 33, No. 4 (October, 2007): 644.

[60] Hobbes, *Leviathan*, II, xxi, §21.

[61] Peter Steinberger reiterates this point in greater detail in "Hobbes, Rousseau and the Modern Conception of the State," *The Journal of Politics*, Vol. 70, No. 3 (July, 2008): 605-607.

Therefore, Hobbes goes out of his way to ensure that the sovereign does not neglect his role in contributing to individual, as well as societal, flourishing.[62] Devoting a chapter to "Of the Nutrition and Procreation of a Commonwealth," Hobbes goes beyond the theoretical skeleton of the social contract and offers practical advice for governing within his new political framework. In keeping with his material ontology, "the nutrition of a commonwealth," he writes, "consisteth in the plenty and distribution of materials conducing to life."[63] A healthy commonwealth is a prosperous commonwealth. If citizens do not lack the implements to provide for commodious living, he reasons, there will be no cause (or opportunity) for complaint. The question is how best to procure such material blessings. Preempting the *laissez-faire* theorists of the 18th century, Hobbes determines that everyday economic decisions are generally best left in private hands.[64] The sovereign, while impressive, is still fallible. He is much safer furnishing the machinery of prosperity and leaving the responsibility of private life to individuals. This protects the sovereign from blame for individual failures — at least they were given opportunities they would not have otherwise had in a state of nature. By the same token, he can celebrate in the triumphs of individual successes.

Unlike Locke, Hobbes has no concept of natural propriety outside of civil society. In the state of nature, where all men have a right to all things, it is impossible to stake any sort of claim on material possessions. Property is created by law, the sovereign

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[62] For a good discussion of this point, see: Warner R. Winborne, "Modernization and Modernity: Thomas Hobbes, Adam Smith, and Political Development," *Perspectives on Political Science*, Vol. 37, No. 1 (Winter, 2008): 41-49.

[63] Hobbes, *Leviathan*, II, xxiv, §1.

[64] Hobbes, *Leviathan*, II, xxiv, §7.

determining initial allotments and terms of ownership.[65] Because property is contrived rather than natural, the sovereign who gives can also take away. Yet once given, the taking does not come without a cost. "Commonwealths can endure no diet," Hobbes cautions. "[S]eeing their expense is not limited by their own appetite, but by external accidents and the appetites of their neighbors, the public riches cannot be limited by other limits than those which the emergent occasions shall require."[66] Unless there is a clear and present danger to justify the restriction of goods, the people will begin to grumble against the arbitrary intervention into their liberty. Hobbes' earlier definition of "good law" holds true especially in this instance.

The prudent sovereign, therefore, leaves the property of his citizens untouched once it has been established. He hedges out a realm of private affairs left largely to individual discretion. With the sovereign acting as watchful benefactor, a sort of pseudo-sovereignty develops among individuals. Given the liberty to work for his own prosperity under the law, the citizen enjoys the opportunity to fulfill the third inalienable right — the pursuit of happiness.[67]

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[65] "The distribution of the materials of this nourishment is the constitution of *mine*, and *thine*, and *his* (that is to say, in one word *propriety*), and belongeth in all kinds of commonwealth to the sovereign power." Hobbes, *Leviathan*, II, xxiv, §5.

[66] Hobbes, *Leviathan*, II, xxiv, §8.

[67] "Thus, Hobbes is far from unleashing the sovereign to do as he pleases through his doctrine of unlimited sovereign power… Hobbesian natural law does not involve a moral obligation in the sense of a duty to do something regardless of whether it profits oneself… When Hobbes instructs the sovereign in natural law, he is advising him on how best to preserve his rule. The sovereign will best preserve his rule by preserving the greatest sphere of individual liberty that is compatible with civil peace." J. Judd Owen, "The Tolerant Leviathan: Hobbes and the Paradox of Liberalism," *Polity*, Vol. 37, No. 1 (January, 2005): 139.

The Sovereign's Interest in Contract

Foremost of the liberties afforded to subjects is that of contract. Just as contract brings men out of the state of nature and into civil society, so can it bring those in civil society out of a condition of mere living and into one of living well. The primary vice of the state of nature was the lack of grounds for mutual trust: "For he that performeth first has no assurance the other will perform after, because the bonds of words are too weak to bridle men's ambition, avarice, anger, and other passions, without the fear of some coercive power."[68] Without the hope of cooperation, man was left to provide for himself, forfeiting the riches of collective action. This problem is resolved upon entrance into civil society. Not only does the sovereign protect the individual from violent death, but he introduces those conditions necessary for citizens to form the contractual relationships that were impossible in man's natural state. Within civil society, a man no longer need fear that others will purloin his handiwork, but unfortunately, his own efforts can only take him so far. It is not enough that citizens are able to enjoy the fruits of their own labor — they will not be content until they are able to exchange their goods for the goods of others.[69] The butcher is able to employ the services of the carpenter to fix his roof, while the carpenter is able to treat himself to a fresh leg of lamb. Through the division of labor, men are exposed to possibilities they could never attain as individuals.

It is left to the sovereign, therefore, to facilitate these transactions by establishing the ground rules for private contract. Here though, he faces something of a dilemma. On the one hand, the sovereign has no interest in policing the daily commercial transactions

[68] Hobbes, *Leviathan*, I, xiv, §18.

[69] Hobbes, *Leviathan*, II, xxiv, §10.

of citizens. The state is too cumbersome an entity to quickly adapt to the changing needs of the market, while modern history has demonstrated that free market economies consistently outperform those that are centrally planned. Moreover, individual citizens relish the liberty to live as they see fit, without government intrusion. Yet, on the other hand, the natural selfishness of men will lead them to abuse their freedom when given the opportunity. The sovereign must balance these concerns with an ordered liberty, intervening only enough to reinforce the existing obligations of the law of nature. This soft paternalism is all that is necessary for the sovereign to sufficiently account for the nourishment and growth of the commonwealth.[70]

Following the standard Hobbes sets with the implementation of "good law," valid restrictions of individual contract must be in the interest of the general welfare — a caveat that holds true in police power jurisprudence to this day. Further, such interventions must be minimalist in nature, leaving subjects the greatest degree of freedom that is possible. The laws of the commonwealth exist to supplement the laws of nature with civil punishment. They are hedges that serve to remind citizens of their own self-interest, rightly understood.[71] Unfortunately, the precept that citizens tend to forget most frequently is that of complaisance — "that each man strive to accommodate himself to the rest."[72] In such instances, the sovereign must reinforce the dictates of reason by way of the state's coercive power. Hobbes offers the analogy of the state as a sort of stonemason, smoothing out the rough edges of stones so that they can properly fit

[70] Hobbes, *Leviathan*, II, xxiv, §10.

[71] Hobbes, *Leviathan*, II, xxx, §21.

[72] Hobbes, *Leviathan*, I, xv, §17.

together and form a proper foundation for the building of an edifice.[73] If a stone is unable to be made to fit, it must ultimately be cast aside as unworkable. Similarly, the sovereign will use regulations such as minimum wage laws, maximum hours laws, regulatory agencies, and the like to remind individuals that they must take note of a greater common good. Such legislation necessarily impedes upon individual liberty, but so long as it is done to right a legitimate public wrong, it is merely an extension of the otherwise binding natural law of complaisance. In these circumstances, the individual has no cause for complaint and the sovereign need not fear rebellion.

That said, the sovereign must be extremely careful not to misuse this authority to further the interests of one sectarian group at the expense of the whole. Even seemingly legitimate claims of public good too often hide factional priorities.[74] This is precisely why the *Lochner*-era Court was so reluctant to permit police power legislation that interfered with the individual's liberty of contract. Much legislation crafted to promote "the general welfare" was, in fact, nothing more than a veiled attempt to use the machinery of the state for private gain. Even when pursuing a genuine public good, the sovereign must exercise caution. Should he undermine the sanctity of private contract, he threatens to undermine the very foundation of the commonwealth. Therefore, any intrusion into contractual relationships among citizens must be done with the utmost reverence for the seriousness of the undertaking. Blackstone succinctly gives a summary of what could describe Hobbes' arbitration between individual liberty and sovereign authority in the following passage:

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[73] Hobbes, *Leviathan*, I, xv, §17.

[74] For a particularly famous example, see *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993).

> Political, therefore, or civil liberty, which is that of a member of society, is no other than natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the public. Hence we may collect that the law, which restrains a man from doing mischief to his fellow-citizens, though it diminishes the natural, increases the civil liberty of mankind; but that every wanton and causeless restraint of the will of the subject, whether practised by a monarch, a nobility, or a popular assembly, is a degree of tyranny: nay, that even laws themselves, whether made with or without our consent, if they regulate and constrain our conduct in matters of mere indifference, without any good end in view, are regulations destructive of liberty: whereas, if any public advantage can arise from observing such precepts, the control of our private inclinations, in one or two particular points, will conduce to preserve our general freedom in others of more importance; by supporting that state of society, which alone can secure our independence.[75]

Police Power in America

The police power made its first notable appearance in American constitutional law in 1824 during the case of *Gibbons v. Ogden*.[76] Here, the state of New York had awarded exclusive rights of steamboat operation within the state's waters to Aaron Ogden, who brought suit against Thomas Gibbons when Gibbons began traversing the contested waters under a license granted by the United States Congress. While evaluating the state of New York's claim of concurrent power to regulate interstate commerce alongside the Federal Government, Chief Justice John Marshall finds occasion to explore the concept of sovereignty in a regime that divides power between central and local governments. The police power, understood by Hobbes as an embodiment of *all* sovereign power and by Blackstone as a catchall term for *unenumerated* authority, is even further qualified within a federal system. The United States of America, qua regime (that is, comprehending both its national and state levels), wields absolute and undiluted

[75] Blackstone, *Commentaries*, vol. 1, ch. I.

[76] *Gibbons v. Ogden*, 22 U.S. 1 (1824).

sovereignty. However, the exercise of this sovereignty is channeled into various institutional molds — the two primary divisions being the states and the Federal Government. When Marshall considers the responsibilities of each, he locates the police power among the states, defining it as "that immense mass of legislation which embraces everything within the territory of a State not surrendered to the General Government" — that is, its sovereign power predating the federal constitution of 1787.[77] The states "possessed [the power of police] as an inseparable attribute of sovereignty, before the formation of the Constitution."[78] Note the fullness of his definition, hearkening back to what we see in Hobbes. However, the ratification of the Constitution delegated some exercise of this power to the Federal Government alone (in this case, especially those instances which concern interstate commerce), which brings Marshall to side with the United States.[79] Despite his acknowledgement that the states have a significant sphere of authority, it is consistent with the broad tenor of the Marshall Court to accentuate the grant of power vested in the Federal Government, often at the expense of the states. Given the practical needs of the fledgling nation and the harsh lessons learned under the Articles of Confederation, such an emphasis is to be expected. That said, the Tenth Amendment clearly proclaims that the states are to retain the great mass of unenumerated

[77] *Gibbons v. Ogden*, 22 U.S. 198 (1824).

[78] *Gibbons v. Ogden*, 22 U.S. 198 (1824).

[79] "It has been said that they were sovereign, were completely independent, and were connected with each other only by a league. This is true. But, when these allied sovereigns converted their league into a government, when they converted their Congress of Ambassadors, deputed to deliberate on their common concerns and to recommend measures of general utility, into a Legislature, empowered to enact laws on the most interesting subjects, the whole character in which the States appear underwent a change." 22 U.S. 187.

power. Marshall suggests that some expressions of this implicit authority include "Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c."[80] The general theme of these examples corresponds to what Hobbes would consider "good law" — necessary provisions made in the interest of society writ large.

Justice Marshall may have introduced the police power to American Constitutional Law, but his successor (and sometimes nemesis) Chief Justice Roger Taney developed the concept into its present-day form. Whereas Marshall only grudgingly acknowledged the police power as an outlet for the more mundane tasks of local governance, the Taney Court attempted to recapture some of its lost glory as the states' ability to do whatever is necessary to satisfy the general welfare. Taney's first opportunity for a substantive departure from earlier police power jurisprudence occurred in 1837's *New York v. Miln*.[81] The case involves a state law requiring all ships docking in New York City's harbor to provide a full list of passengers, as well as guarantees that the travelers will not be abandoned to the public charge. The legislation's ostensible purpose is to protect the physical and moral welfare of the city's population from the questionable cleanliness and character of vagrants and foreigners. Similar to the Constitutional dispute in *Gibbons*, the law is challenged on ground that it interferes with interstate commerce, which remains the exclusive domain of Congress. Despite the strong precedent set by *Gibbons* against such legislation, the Taney Court rules in favor of New York, emphasizing the breadth of state sovereignty in matters that only

[80] *Gibbons v. Ogden*, 22 U.S. 203 (1824).

[81] *New York v. Miln*, 36 U.S. 102 (1837).

tangentially affect interstate commerce. The earlier case stressed that the limits of "commercial activity" are best determined by Congress — the body best attuned to the wisdom of the people at large.[82] When a Federal action appears questionable, the burden of proof rests with the states to assert themselves against the Federal Government. However, in *Miln*, federal law is silent and the Court is able to use that lacuna to reassert state authority. Because sovereignty cannot be limited, as the scope of federal power diminishes, the power of states necessarily increases to compensate.[83] By rejecting the notion of a dormant Commerce Clause attempted in *Gibbons*, the Taney Court makes room for additional state action.[84]

The Court continued its expansion of state police power for the remainder of Taney's tenure as Chief Justice. The *License Cases* of 1847 upheld the ability of states to

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[82] "The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments." 22 U.S. 197.

[83] "The legislature cannot by any contract divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim *salus populi suprema lex*;, and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself." *Beer Company v. Massachusetts*, 97 U.S. 33 (1877).

[84] This doctrine states that the Commerce Clause precludes states from any legislation that would interfere with interstate commerce, even in lieu of a conflicting federal statute. The case's dissenters, Justice Story and Justice Thompson, declaim the majority's apparent disregard for *Gibbons*' precedent here: "[The Commerce Clause] is an investment of power for the general advantage, in the hands of agents selected for that purpose, which power can never be exercised by the people themselves, but must be placed in the hands of agents or lie dormant." 22 U.S. 189. They also cite the more explicit precedent of another Marshall-era case, *Willson v. Black-Bird Creek Marsh Co.*, 27 U.S. 245 (1829). Taney favors a doctrine of concurrent power which he outlines more fully in the *License Cases*, 46 U.S. 579 (1847).

disallow importation of intoxicating liquor on the grounds that "Every state… may regulate its own internal traffic, according to its own judgment and upon its own views of the interest and wellbeing of its citizens."[85] In doing so, it further curtailed the reach of the Federal Government, reversing Marshall's deference to Congress and declaring that the Court itself was the final arbiter of commercial activity.[86] The authority of states expanded not only as against the Federal Government, but also at the expense of individual liberty. Again in a radical departure from his predecessor, Taney downplays the sanctity of private contractual agreements in favor of state interests. Writing in *Charles River Bridge v. Warren Bridge*, he professes that "We cannot deal thus with the rights reserved to the states, and, by legal intendments and mere technical reasoning, take away from them any portion of that power over their own internal police and improvement, which is so necessary to their wellbeing and prosperity."[87] That is, the technicalities of contracts cannot be allowed to stand in the way of public interest. Contracts are made within civil society, itself the product of a greater contract. Therefore, private contracts must be construed in a manner consistent with the aims of

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[85] *License Cases*, 46 U.S. 574 (1847). Elsewhere in the opinion, Taney writes, "In all matters of government, and especially of police, a wide discretion is necessary. It is not susceptible of an exact limitation, but must be exercised under the changing exigencies of society." 46 U.S. 592.

[86] "It is unquestionably no easy task to mark by a certain and definite line the division between foreign and domestic commerce and to fix the precise point in relation to every important article where the paramount power of Congress terminates and that of the state begins. The Constitution itself does not attempt to define these limits. They cannot be determined by the laws of Congress or the states, as neither can by its own legislation enlarge its own powers or restrict those of the other. And as the Constitution itself does not draw the line, the question is necessarily one for judicial decision and depending altogether upon the words of the Constitution." 46 U.S. 574.

[87] *Charles River Bridge v. Warren Bridge*, 36 U.S. 552 (1837).

that original contract. Ambiguities, Taney argues, should be interpreted in a way that favors civil society.[88] This model will prove important for later cases decided in the early twentieth century.

The increased opportunity for police power comes with a tradeoff, however. The Taney Court's seemingly blank-check approach made the police power a permanent feature of American jurisprudence, but left it without practicable form or content. Later justices would lament, "it is much easier to perceive and realize the existence and sources of it than to mark its boundaries, or prescribe limits to its exercise. This power is, and must be from its very nature, incapable of any very exact definition or limitation."[89] With this ambiguity comes the risk of tipping the balance too far in favor of the state and denying legitimate constitutional provisions of authority to Congress (the general welfare of New York may be met by sabotaging that of New Jersey). Necessity required that certain bright-line conventions be adopted to serve as a touchstone for constitutionality. Thus, American jurists began to qualify the title to refer primarily to the ability of states to regulate internal matters concerning health, morals, or some indisputable general welfare.[90] Although each expression of the police power can be traced back to a common

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[88] "The rule of construction in such cases is well settled… 'the canal having been made under an act of Parliament, the rights of the plaintiffs are derived entirely from that act. This, like many other cases, is a bargain between a company of adventurers and the public the terms of which are expressed in the statute, and the rule of construction in all such cases is now fully established to be this — that any ambiguity in the terms of the contract must operate against the adventurers and in favor of the public, and the plaintiffs can claim nothing that is not clearly given them by the act.'" 36 U.S. 544.

[89] *Slaughterhouse Cases*, 83 U.S. 62 (1872).

[90] See, for example, *Beer Company v. Massachusetts*, 97 U.S. 25 (1877). As we have mentioned, the Tenth Amendment appears to preclude any general federal police power. Further, the Court does recognize that the police power, theoretically speaking, is much more broad than these three spheres ("The Federalist, No 45, speaking of this

Hobbesian core, by emphasizing certain aspects over others, there is a tendency to fall into certain modes of common practice. The last prong, while always mentioned, is frequently overlooked in favor of its more concrete counterparts — more of a nod to its roots and insurance against unanticipated crises. Instead, special emphasis lies with the clear power of the state to protect its population from physical and moral hazard.[91] The danger, of course, is in assuming that because health and moral regulations are clearly legitimate, that they are the *only* legitimate regulations. We too quickly dismiss the breadth of the state's true authority as anachronistic in our era of liberalism.

The Civil War brought to light harsh lessons regarding the dangers of state sovereignty, and the amendments following its wake sought to curb the most egregious excesses of their unchecked power. These new constitutional provisions left some question as to whether the police power remained intact under the restrictions of Fourteenth Amendment Due Process. *Barbier v. Connolly* (1885) answered with a resounding "yes."[92] Although the Fourteenth Amendment was "undoubtedly intended" to reaffirm the nation's commitment "that all persons should be equally entitled to pursue their happiness" (cf. *Lochner*), "neither the amendment — broad and comprehensive as it

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subject, says the powers reserved to the several states all extend to all the objects which in the ordinary course of affairs concern the lives, liberties, and properties of the people and the internal order, improvement and prosperity of the state"), but it chooses to highlight the more bright line approach of those cases that no one would argue fall under the purview of the general government (*New York v. Miln*, 36 U.S. 133).

[91] The tradition begins in *Miln*: "We think it as competent and as necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts as it is to guard against the physical pestilence which may arise from unsound and infections articles imported or from a ship the crew of which may be laboring under an infectious disease." 36 U.S. 142.

[92] *Barbier v. Connolly*, 113 U.S. 27 (1885).

is — nor any other amendment, was designed to interfere with the [police] power of the state… Special burdens are often necessary for general benefits."[93] Further, it is ultimately the case that "All rights are held subject to the police power of the state… The legislature cannot by any contract divest itself of the power to provide for these objects."[94] However, as is later elaborated in *Mugler v. Kansas* (1887), "our system of government, based upon the individuality and intelligence of the citizen, does not claim to control him except as to his conduct to others, leaving him the sole judge as to all that only affects himself."[95] Therefore, while police legislation may be enacted for some general good, Due Process guarantees that it is not haphazardly exploited simply to oppress private conduct.

Conclusion

From this caveat begins a new tradition of jurisprudence, for the first time asserting individual liberty as a competing interest against the police power of the regime. The debate between the Marshall Court and Taney Court was not over the scope of sovereignty, but its proper expression. *Mugler* however, reminds us of America's commitment to the individual and Constitutional promises that limit arbitrary power. This tension between Fourteenth Amendment guarantees of liberty and the sovereignty of the regime continues to be explored in *Allgeyer v. Louisiana* (1897) and *Holden v. Hardy* (1898), ultimately culminating in the great police power decisions of the early twentieth

[93] 113 U.S. 31.

[94] *Beer Company v. Massachusetts*, 97 U.S. 32 (1877).

[95] *Mugler v. Kansas*, 123 U.S. 660 (1887).

century.[96] By the time that things come to a head in *Lochner v. New York* (1905), the groundwork has been laid for Justice Peckham to make an argument based upon the doctrine of inalienable rights that resists (although perhaps does not trump) the power of the state. The following chapter will synthesize both of the arguments made by the Court on behalf of the individual's liberty of contract and the state's police power, looking to find a middle-line approach grounded in the principles of social contract undergirding our regime.

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[96] A comprehensive discussion of this period of cases is found in Chapter 2.

CHAPTER SIX

Applying Hobbesian Lessons

Introduction

Observing America in the early nineteenth century (just before the Taney Court's reassertion of Police Power jurisprudence), Alexis de Tocqueville notes that its citizens are unusually disposed to favor those issues which affect the whole, at the expense of those which only pertain to the individual. "They easily agree," he remarks, "that the interest of the one is everything and that the interest of the other is nothing."[1] The source of this preference, Tocqueville suggests, is a radical egalitarianism at the heart of American democracy which diminishes the protection of individual rights on the ground that their protection is an expression of legal favoritism.[2] In light of the foregoing discussion, his description would seem to imply a broad application of police power legislation insofar as it met the requirements of general applicability.[3] Yet, perhaps due to his uniquely antebellum perspective, Tocqueville understates the similarly egalitarian

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[1] Alexis de Tocqueville, *Democracy in America*, trans. James T. Schleifer (Indianapolis: Liberty Fund Inc, 2009), 1196.

[2] "This naturally gives men of democratic times a very high opinion of the privileges of the society and a very humble idea of the rights of the individual." Tocqueville, *Democracy in America*, 1196.

[3] "They grant readily enough that the power that represents the society possesses much more enlightenment and wisdom than any one of the men who compose it, and that its duty, as well as its right, is to take each citizen by the hand and to lead him." Tocqueville, *Democracy in America*, 1196. This passage hints at both legislative deference and appreciation for a paternalist regime.

tradition that some rights are both inalienable and universal.[4] Rights that cannot be relinquished (such as freedom from absolute slavery), which are grounded in nature itself, belong to all men and their assertion cannot be construed as special privilege. This tradition, which dates back to the Founding, will see a resurgence at the turn of the century through *Lochner* and its progeny.

When Justice Peckham confronts the claim that New York's maximum hours law violates Joseph Lochner's liberty of contract, he finds occasion to approach the issue from the perspective of fundamental principles. The police power, itself an extraconstitutional authority, had already met some resistance following the adoption of the Fourteenth Amendment in 1868.[5] Given that the Tenth Amendment (as it is traditionally understood) relegates police power to the states, the Fourteenth Amendment's Due Process requirements appear to severely limit the exercise of state power. Much of the late nineteenth century was spent reevaluating state authority in light of these new demands. By 1897, the Court had deduced that the "liberty" prong of the Due Process Clause is a specific nod to the inalienable rights of the Declaration.[6] Interestingly, under this interpretation, the clause does not create new law, but simply reiterates the natural restrictions that bind all regimes. Even without the Fourteenth Amendment, the sovereignty of civil society is still constrained by the law of nature.

[4] This is not to suggest that Tocqueville accepts the justice of slavery. Instead, as the United States hurtled headlong into civil war, it better articulated its commitment to the universality of rights (see, for example, Lincoln's "1861 Fragment on the Constitution and Union").

[5] By "extraconstitutional," I mean that it derives its source and authority from something besides the plain text of the Constitution itself. While the Tenth Amendment may delegate the police power to the states, it does not create it.

[6] *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).

Thus, with regard to both the power in question and its limits, the conversation hinges upon the extraconstitutional first principles of civil society. On the one hand, it is inherent in the very nature of government that regimes can legislate in the interest of the public good. Yet, on the other, those same governments exist to protect the inalienable rights of their citizens. The greater question is how to arbitrate between these two legitimate and corollary concerns when they come into conflict. While the Court has been unable to successfully resolve the tension, vacillating between extremes from the outset, Thomas Hobbes, considering the claims of liberty and authority, reconciled the two long ago. Instead of formulating the problem as an either/or, Hobbes stresses that each side supports the other — neither can exist alone. True reconciliation must correctly identify this bond and pay heed to its synthesis.

Because all government is ultimately derived from the consent of the governed, the foremost priority of a regime is to maintain that consent. Men themselves are driven by an infinite number of passions but, generally speaking, whatever their motives, peace is requisite to attaining them. Therefore, governments must likewise seek to establish peace — understood both as protection from foreign invasion, as well as ensuring orderly and predictable conduct among citizens. To accomplish this end, the sovereign may employ the full force of civil society. It is here that most scholars take their leave of Thomas Hobbes, fearing that in his ardor to bolster the legitimate authority of the state, he descends into the worst forms of tyranny. Without a standard of justice independent of the regime by which the actions of the sovereign may be judged, they see Hobbes' proposition as an endorsement of a totalitarian state, prone to the worst abuses of arbitrary power. Such a characterization overlooks the preeminent role played by the law

of nature, which obliges both citizen and sovereign alike. The proper legal framework is therefore one of minimalism, enacting legislation only when it is required for the common good. This leaves room for the greatest degree of individual autonomy within the constraints of political life. Civil society exists so that this liberty may be enjoyed. While sacrifices must inevitably be made, any deprivation of individual liberty weakens the bond of the social contract and should be undertaken only in the gravest of circumstances. Should the legislature violate the law of nature's dictum to respect the liberty of subjects, it falls to the Court to rescue the commonwealth from error.[7] It is the duty of the judicial power to ensure that the civil law is interpreted such that it does not contravene the natural law.[8] However, since the repudiation of *Lochner v. New York* in 1937, the Court has abdicated this charge in the name of deference to the political process. Certainly, change within a democratic society should originate from elected representatives and it is obviously not the role of the Court to debate the prudence of

[7] "The obligation of subjects to the sovereign is understood to last as long, and no longer, than the power lasteth by which he is able to protect them. For the right men have by nature to protect themselves, when none else can protect them, can by no covenant be relinquished." Hobbes, *Leviathan*, II, xxi, §21; "For the use of laws… is not to bind the people from all voluntary actions, but to direct and keep them in such a motion as not to hurt themselves by their own impetuous desires, rashness, or indiscretion, as hedges are set, not to stop travellers, but to keep them in the way. And therefore, a law that is not needful, having not the true end of a law, is not good. A law may be conceived to be good when it is for the benefit of the sovereign, though it be not necessary for the people; but it is not so. For the good of the sovereign and the people cannot be separated." Hobbes, *Leviathan*, II, xxx, §21.

[8] "The interpretation of the law of nature is the sentence of the judge constituted by the sovereign authority to hear and determine such controversies as depend thereon, and consisteth in the application of the law to the present case… Princes succeed one another; and one judge passeth, another cometh; nay, heaven and earth shall pass; but not one tittle of the law of nature shall pass, for it is the eternal law of God. Therefore, all the sentences of precedent judges that have ever been cannot all together make a law contrary to natural equity." Hobbes, *Leviathan*, II, xxvi §23-24.

legislation. Nonetheless, arbitrary restrictions of fundamental liberties must be met with a heightened level of judicial scrutiny.

This chapter will reexamine the Court's major decisions involving police power legislation in light of the lessons learned from Hobbesian social contract theory. It will begin with a brief review of the principles to be applied, as well as discuss major criticisms. In particular, an account must be made against those who refuse to acknowledge the more liberal aspects of Hobbes' philosophy. Making use of conclusions drawn from Hobbes, I will next review the theoretical shortcomings of the Court's early attempts at Substantive Due Process. Unfortunately, the intellectual merit of these decisions has been lost over the years due to the rabid outcry against their (admittedly improper) implementation. The practical effect of *Lochner* becoming a legal pariah has led the Court down a bizarre path of rulings to compensate for its loss. I will explore some of the more curious oddities and offer recommendations for a more appropriate jurisprudence. Of course, the Court cannot simply turn back the clock on a century of precedent. Luckily however, a reassertion of *Lochner*ian principles does not immediately overturn a large swath of law. Most decisions (for example, those pertaining to a right to privacy) will merely benefit from a firmer foundation than "penumbras" and "emanations."

Hobbes and His Critics

Unfortunately, it is difficult to argue that Hobbesian lessons may be applied to modern jurisprudence due to the inordinate academic bias that has been built up around him over the years. Hobbes' reputation as the "Monster of Malmesbury" continues to haunt him, even in recent scholarship. His ignominy is nothing new, having been

publicly rebuked by figures no less than David Hume, Jean Jacques Rousseau, and John Locke.[9] It should come as little surprise then, that the widespread sentiment among academics remains so dismissive.[10] The nefarious reputation of Hobbes has been furthered by his popularity in the field of international relations, wherein he has become the figurehead of the Realist school of IR Theory.[11] This tribute is bittersweet, keeping his name prominent in pioneering research, but at the same time, closely associating him with a paradigm to which he might not fully subscribe. Without question, he belongs within the ranks of Realism and his characterization of the state of nature frames the Realist conception of international politics. Nonetheless, he has gradually slipped from exemplar to caricature. Too often, the philosopher is confused with a burlesque and often exaggerated theory of unrestrained and unthinking anarchy.[12] As the esteemed IR

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[9] "[Some argue that citizens] are to be looked on as an herd of inferior creatures under the dominion of a master, who keeps them and works them for his own pleasure or profit. If men were so void of reason, and brutish, as to enter into society upon such terms, prerogative might indeed be, what some men would have it, an arbitrary power to do things hurtful to the people," writes Locke in *Second Treatise of Civil Government*, Chapter XIV, §163; "Hobbes's politics are fitted only to promote tyranny," writes Hume in *The History of England, 6 vols.* (Indianapolis: Liberty Fund, [1778] 1983): VI:153; "Above all, let us not conclude, with Hobbes, that because man has no idea of goodness, he must be naturally wicked," writes Rousseau in *A Discourse on the Origin of Inequality*, Part I, ¶34 (Note that Rousseau elsewhere writes of Hobbes, "It is not so much what is false and terrible in his political theory, as what is just and true, that has drawn down hatred on it" in *The Social Contract*, Book IV, Chapter VIII, ¶13).

[10] During his lifetime alone, Hobbes received fifty-one reviews attacking him and only two in support of his theory (Sterling P. Lamprecht, "Hobbes and Hobbism," *The American Political Science Review*, Vol. 34, No. 1 (February, 1940): 32).

[11] See, for example, Bertrand Badie, "Realism under Praise, or a Requiem? The Paradigmatic Debate in International Relations," *International Political Science Review*, Vol. 22, No. 3 (July, 2001): 253-260.

[12] For some recent examples, see: Séverine Autesserre, "Hobbes and the Congo: Frames, Local Violence, and International Intervention," *International Organization*, Vol. 63 (Spring, 2009): 249-80; Shannon Brincat, "Reclaiming the Utopian Imaginary in

theorist Martin Wight reminds us, while pigeonholing great thinkers can be a useful shorthand for organizing ideas, it should not be taken as a true representation of their thought. Even Machiavelli was not a pure "Machiavellian."[13]

The greatest obstacle we face in learning from Hobbes is distinguishing between the man himself and the mythos that has been built up around him — as Sterling Lamprecht would say, to separate Hobbes from "Hobbism."[14] Without a doubt, the most fervent demonization of Hobbes occurs outside of philosophic circles. There, Hobbes remains a caricature of unbridled sovereign oppression.[15] This would be of little more than passing interest, except for the fact that it suggests that broader public opinion is still

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IR Theory," *Review of International Studies*, Vol. 35 (2009): 581-609; William Vlcek, "A Leviathan Rejuvenated: Surveillance, Money Laundering, and the War on Terror," *International Journal of Political Culture and Society*, Vol. 20 (February, 2008): 21-40; B. Sharon Byrd and Joachim Hruschka, "From the State of Nature to the Juridical State of States," *Law and Philosophy*, Vol. 27 (2008): 599-641.

[13] Martin Wight, *International theory: The Three Traditions* (New York: Holmes & Meier, 1992), xiii.

[14] Sterling P. Lamprecht, "Hobbes and Hobbism," *The American Political Science Review*, Vol. 34, No. 1 (February, 1940): 31-53. The four central tenets of "Hobbism," Lamprecht proposes, are: 1) "God made man such a beast and rascal that he inclines universally to malice and fraud," 2) "There is no real distinction between moral right and moral wrong," 3) "A defacto ruler is always justified in all his ways," and 4) "Appeal to law as a protection of popular rights is essentially invalid." Lamprecht, "Hobbes and Hobbism," 32-33.

[15] For particularly striking examples, see Philip Carl Salzman, "The Iron Law of Politics," *Politics and the Life Sciences*, Vol. 23, No. 2 (September, 2004): 25; Alex John London, "Justice and the Human Development Approach to International Research," *The Hastings Center Report*, Vol. 35, No. 1 (January - February, 2005): 31; Sukumar Muralidharan, "Religion, Nationalism and the State: Gandhi and India's Engagement with Political Modernity," *Social Scientist*, Vol. 34, No. ¾ (March - April, 2006): 29; Thomas Halper and Douglas Muzzio, "Hobbes in the City: Urban Dystopias in American Movies," *The Journal of American Culture*, Vol. 30 No. 4 (2007): 379-390; Leo Lucassen, "Between Hobbes and Locke. Gypsies and the limits of the modernization paradigm," *Social History*, Vol. 33 No. 4 (November, 2008): 423-441.

hostile to most anything associated with the philosopher from Malmesbury. A refinement of jurisprudence is unlikely to occur in a climate so virulent. While Justices are not subject to the normal politicking of reelection, neither are they wholly cushioned from the pressures of popular sentiment.

Even in publications devoted to political theory, the philosopher continues to be frequently misread.[16] To characterize a regime as "leviathan" has become a gross insult, suggesting a system of politics so self-serving that even the most humble public interests are disregarded.[17] And, although the Englishman has enjoyed a resurgence of popularity in the last half-century by revisionist scholars, his concept of citizenship still remains closely associated with a certain sort of chattel slavery.[18] His widespread contributions to liberalism are largely overlooked,[19] and when acknowledged, they are often qualified.[20]

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[16] See, for example, Rahul Sagar, "Presaging the Moderns: Demosthenes' Critique of Popular Government," *The Journal of Politics*, Vol. 71, No. 4 (October, 2009): 1394-1405; Arye L. Hillman, "Hobbes and the prophet Samuel on leviathan government," *Public Choice*, Vol. 141 (May, 2009): 1-4; Mary Nyquist, "Hobbes, Slavery, and Despotical Rule," *Representations*, Vol. 106 (Spring, 2009): 1-33; Kinch Hoekstra, "Tyrannus Rex vs. Leviathan," *Pacific Philosophical Quarterly*, Vol. 82 (2001): 420-446.

[17] Frode Brevik and Manfred Gärtner, "Can tax evasion tame Leviathan governments?" *Public Choice*, Vol. 136 (February, 2008): 103-122.

[18] See Michael Locke McLendon, "Tocqueville, Jansenism, and the Psychology of Freedom," *American Journal of Political Science*, Vol. 50, No. 3 (July, 2006): 664-675; Terry M. Moe, "Power and Political Institutions," *Perspectives on Politics*, Vol. 3, No. 2 (June, 2005): 215-233; Joshua Foa Dienstag, "Serving God and Mammon: The Lockean Sympathy in Early American Political Thought," *The American Political Science Review*, Vol. 90, No. 3 (September, 1996): 497-511; Sheldon S. Wolin, ''Hobbes and the Culture of Despotism,'' in *Thomas Hobbes and Political Theory*, ed. Mary G. Dietz (Lawrence: University Press of Kansas, 1990): 9-36.

[19] "It would be absurd to call Hobbes a liberal," writes Alan Ryan in ''Liberalism,'' in *A Companion to Contemporary Political Philosophy*, ed. Robert E. Goodin and Philip Pettit (Oxford: Blackwell, 1995): 298. "[T]hus, it is not just Hobbes's authoritarianism, but his very insistence on the absolute sovereignty of the artificial

One of the most common mischaracterizations is echoed by Randy Barnett (a name not unfamiliar to those currently serving on the bench):

> In my experience, the world is divided between Lockeans and Hobbesians: between those for whom individual liberty is their first principle of social ordering, and those who give priority to the need for government power to provide social order and pursue social ends. Yet most Americans, like Locke himself, harbor a belief in both individual liberty and the need for government power to accomplish some ends they believe are important.[21]

The mistake is subtle, but subversive. It presumes that Hobbes, while clever in his own right, is no friend of individual liberty and therefore, an imperfect fit for America. Such a perspective disregards Hobbes' own commitment to liberal principles and frames the debate between the individual and society a dichotomy, rather than a unified whole. Given these options, one side will always be neglected at the expense of the other.

At this point, it is appropriate to remark on the vast body of recent historical research on Hobbes, spearheaded by Quentin Skinner. Over the last several decades, Skinner has devoted a significant amount of effort to reassess the orthodox scholarly

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person constituting the state that separates him from liberalism in the usual sense of the word," writes Andrzej Rapaczynski in *Nature and Politics* (Ithaca, NY: Cornell University Press, 1987): 27.

[20] ''Though Hobbes was no liberal in his conclusions, advocating an absolute rather than restrained state, many of his most important ideas — including original individual equality and freedom — became central tenets of liberal theory,'' writes Susan Moller Okin in ''Humanist Liberalism,'' in *Liberalism and the Moral Life*, ed. Nancy Rosenblum (Cambridge, MA: Harvard University Press, 1989): 257; "Liberals rightly pall at the idea of Hobbes as a liberal predecessor because his fear of anarchy leads him to embrace an authoritarian conception of the state incompatible with limited government. Yet inasmuch as the state serves a liberty the natural condition imperils, Hobbes does share a crucial liberal premise: that the legitimating political principle is the service of individual self- preservation, which is the sine qua non of liberty,'' writes Benjamin Barber in ''Liberal Democracy and the Cost of Consent,'' in *Liberalism and the Moral Life*, 261.

[21] Randy Barnett, "Is the Constitution Libertarian?" *Cato Supreme Court Review* (2009): 10-11.

assumptions about Thomas Hobbes.[22] The impetus for this project is less an interest in Hobbes himself and more a critique of historical method writ large.[23] Too frequently, Skinner suggests, historians sacrifice scientific rigor for dubious storytelling. Academics have made careers of proposing outlandish causal relationships ("Plato read and was influenced by the writings of Moses")[24] where hard evidence is tenuous at best.

The quandary of the historian, Skinner laments, is the difficulty of establishing causality without succumbing to either the Scylla of radical skepticism or the Charybdis of blind assertion. When the historian suspects an intellectual relationship of historical personage P_1 influencing later personage P_2, it becomes literally impossible to prove with certainty that such an influence does indeed exist. No matter the similarities between works, at any point, the radical skeptic is always able to contend that the resemblance is due to either chance or some overlooked third cause. Even if P_2 explicitly professes to have been influenced by P_1, "It provides at most a clue to the intellectual biography of one of them" — that is, that he *thinks* that he has been influenced; not necessarily that he

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[22] Quentin Skinner, *Hobbes and Republican Liberty* (Cambridge: Cambridge University Press, 2008); Quentin Skinner, *Visions of Politics: Volume III: Hobbes and Civil Science* (Cambridge: Cambridge University Press, 2002); Quentin Skinner, "Thomas Hobbes on the Proper Signification of Liberty: The Prothero Lecture," *Transactions of the Royal Historical Society*, Vol. 40 (1990): 121-151; Quentin Skinner, "Thomas Hobbes and the Nature of the Early Royal Society," *The Historical Journal*, Vol. 12, No. 2 (1969): 217-239.

[23] "The other alternative is to say something more about my general approach to the study of political theory, of which my work on Hobbes… has mainly been intended to serve as an example." Quentin Skinner, "Some Problems in the Analysis of Political Thought and Action," *Political Theory*, Vol. 2, No. 3 (August, 1974): 277. A greater discussion of Skinner's model for historical studies can be found in: Quentin Skinner, "The Limits of Historical Explanations," *Philosophy*, Vol. 41, No. 157 (July, 1966): 199-215.

[24] This of course, is nothing new. See Justin Martyr, "Hortatory Address to the Greeks," Chapter XXV (circa 2nd century, AD).

has in fact.[25] Obviously, this is quite a blow to the traditional method of historical exegesis. As the protestations of the skeptics have grown louder, Skinner laments the reactionary trend in political theory, allegedly led by Leo Strauss and his followers, of searching for an overarching conversation among our greatest minds, where contradictions simply serve as evidence for a fuller esoteric theory.[26] At the core of their model, Skinner remarks, is nothing more than speculation and assertion, ultimately driven by the thrill of uncovering some hidden secret. Between the choice of erring on the side of skepticism or the side of assertion, he finds the former to be a lesser evil. Given these constraints, the most that we can ever say about any intellectual figure is a report of apparent commonalities with predecessors and extremely circumspect hypotheses of probable causes. Description, rather than explanation, comes to the fore and the context in which an author is writing becomes as (if not more) important as the text itself.[27]

When applied to the intellectual history of Thomas Hobbes, Skinner's method seeks to stress that "even if Hobbes may have had the ambition to speak 'transhistorically' (which I have never sought to deny), his work *was* addressed to a

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[25] Quentin Skinner, "The Limits of Historical Explanations," *Philosophy*, Vol. 41, No. 157 (July, 1966): 205.

[26] "[M]y reason for attacking these methodologies was my sense that they had given rise to a number of exegetically plausible but historically incredible interpretations of the classic texts." Quentin Skinner, "Some Problems in the Analysis of Political Thought and Action," *Political Theory*, Vol. 2, No. 3 (August, 1974): 279.

[27] See Quentin Skinner, "A Reply to My Critics," in *Meaning and Context: Quentin Skinner and His Critics*, ed. James Tully and Quentin Skinner (Princeton: Princeton University Press, 1988), 267, 278.

strictly limited and precisely identifiable audience."[28] That is, while we may never be certain of Hobbes' desire or capacity to influence a grand philosophic narrative, we know for sure that the very act of publication suggests a quantifiable and contemporary audience. With speculation of a grand narrative on the one hand or certainty of a contemporary message on the other, Skinner advocates that we prefer the latter. Thus, as readers of Hobbes, we would do well to pay attention not only to the text itself, but to its historical context. At his best, Skinner reminds us that no amount of time locked in a room with a text will lead us to become aware of a deliberate lacuna without some infusion of outside knowledge.[29] The danger, of course, is in relegating thinkers to a historical context so specific that their work ceases to be relevant to a broader audience.

It goes without saying that *Leviathan* must be read within the context of the English Civil War. Hobbes himself admits as much in his dedicatory letter, discussing the immoderate positions taken by all sides of the conflict.[30] The question is whether Hobbes presents us with a "grand theory" that can stand independent of the particulars of his time. Skinner makes much of the rhetorical shift from Hobbes' earlier works, such as *De Cive* and *The Elements of Law*, to the illustrious prose of *Leviathan*.[31] The move, he suggests, stems from Hobbes' desire to broaden his audience and affect political change

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[28] Quentin Skinner, "Some Problems in the Analysis of Political Thought and Action," *Political Theory*, Vol. 2, No. 3 (August, 1974): 286. Note that there is a difference between "not denying" and affirming.

[29] Quentin Skinner, "Motives, Intentions and the Interpretation of Texts," *New Literary History*, Vol. 3, No. 2, On Interpretation: I (Winter, 1972): 395.

[30] Hobbes, *Leviathan*, "To My Most Honor'd Friend Mr. Francis Godolphin, of Godolphin," ¶2.

[31] Quentin Skinner, *Reason and Rhetoric in the Philosophy of Hobbes* (Cambridge: Cambridge University Press, 1996).

among his contemporaries.[32] Eloquence, Hobbes writes, is a sort of power. It allows for words to seem wise even when they are not.[33] This subtle class of sophistry is one of the primary corruptions of the so-called school-men and philosophers, who substitute flowery rhetoric for reason. Their empty words are so pleasing that the speakers fool even themselves.[34] Hobbes likens their self-deception to a kind of madness.[35] Given his apparent bias against gilded oration, *Leviathan*'s marked rhetorical charm seems at odds with his earlier objections.[36] Skinner attributes the discrepancy to a concession by Hobbes that reason alone is insufficient to persuade men. This is then taken as evidence that Hobbes too is willing to compromise on theoretical rigor, sacrificing any grand theory of politics for practical exigencies.

However, Skinner understates Hobbes' grander ambition to transcend his own time. His primary opposition instead seems to be the old modes and orders carried over from the ancient world that continue to cloud the reason of men.[37] He rages against Aristotle and the hubristic philosophy of the scholastics which teaches that there is an intelligible world beyond that of empirical sense, which ultimately results in an objective

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[32] Ibid 426.

[33] Hobbes, *Leviathan*, I, x, §12.

[34] Hobbes, *Leviathan*, I, xi, §13.

[35] Hobbes, *Leviathan*, I, viii, §27.

[36] Writing of himself, Hobbes notes that "There is nothing I distrust more than my elocution." Hobbes, *Leviathan*, "A Review and Conclusion," §15.

[37] Compare, for example, *Leviathan*'s references to Aristotle versus any of Hobbes' contemporaries.

justice apart from the regime.[38] Whereas Aristotle discriminates between just and unjust political orderings, Hobbes rejects the basic concept of altruism upon which this distinction is built.[39] Even self-seeking rulers will work to the good of the whole when properly guided by reason. Aristotle's second sin is to depict man as naturally sociable, which underplays the latent conflict of human nature.[40] In short, Hobbes emphasizes, Aristotle disillusions men into taking for granted the gifts of the sovereign, thereby destabilizing the regime and compromising peace.[41] Against this perhaps well-intentioned folly, Hobbes audaciously proclaims himself the first man to truly engage in the science of politics.[42] His intent is to "do like those that build a new house where an old one stood before, that is to say, carry away the rubbish."[43] From new foundations of human, rather than divine, constitution, Hobbes hopes to become a model for legitimate

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[38] Hobbes, *Leviathan*, I, i, §5; Hobbes, *Leviathan*, II, xlvi, §32.

[39] For Aristotle, just regimes seek the advantage of the people, while unjust regimes seek the good of the ruler. For Hobbes, all regimes necessarily seek the advantage of the ruler, but in doing so coincidentally advantage the people.

[40] Hobbes, *Leviathan*, II, xvii, §6.

[41] "And I believe that scarce anything can be more absurdly said in natural philosophy, than that which now is called Aristotle's *Metaphysics*; nor more repugnant to government, than much of that he hath said in his *Politics*; nor more ignorantly, than a great part of his *Ethics*." Hobbes, *Leviathan*, II, xlvi, §11.

[42] Hobbes, Leviathan, II, xxxi, §41. "…I shall deserve the reputation of having been the first to lay the grounds of two sciences: this of optics… and the other of *Natural Justice*, which I have done in my book *De Cive*, the most profitable of all other." Thomas Hobbes, *The English Works of Thomas Hobbes of Malmesbury*, edited by Sir William Molesworth, volume VII, 471.

[43] Thomas Hobbes, *The English Works of Thomas Hobbes of Malmesbury*, edited by Sir William Molesworth, volume VII, 469.

politics moving forward.[44] By building upon the admittedly low but firm ground of human passions, Hobbes imagines a realm in which reason and compromise define political life.

While Skinner's greater point is well-taken, the fact remains that Hobbes does present us with a theory of politics that is remarkably consistent and that, whether it was intended or not, his framework has been incorporated into our constitutional system. Over the years, we have grappled with questions pertaining to the appropriate relationship between liberty and authority and have been unable to reconcile the two in a way that does not diminish either one or the other. While Hobbes' intent is inseparable from his historical context and will always remain unresolved, the logic of his position and reasonableness of his arguments are both accessible and independent of time and place. Given his immense contributions to the subject, we would be foolish to disregard what wisdom we might glean from his philosophy.

Hobbesian Lessons

Yet, while we have accepted the framework of Hobbes' philosophy in our constitutional order, we have rejected the man. What's more, in our ardor to distance ourselves from the spectre of Hobbism, we have lost sight of the connection between the state's police power and the more liberal protections that undergird the social contract. The authority of the state hinges upon the liberty of the individual, existing to ensure that he is free to enjoy life without growing weary of it. As we have moved away from Hobbes, and subsequently away from social contract theory, we no longer possess an

[44] Hobbes, *Leviathan*, "A Review and Conclusion," §16.

intelligible way to discern fundamental rights. Therefore, despite having a government of increasing authority, we lack a justiciable limit to the state's Police Power.[45]

The broad lessons we can learn are twofold, and responsibility falls to both sovereign and citizen. First, Hobbes teaches us that the sovereign must not take advantage of his power to the extent that citizens have nothing to gain from their consent. We must expect the sovereign to be selfish, but not unreasonable. To maximize his own profits from the social contract, the sovereign will encourage prosperity and, in doing so, a sense of obligation among his people. Second, the individual citizen must not take the comforts afforded by civil society for granted, always recalling the horrors that await just beyond its borders. For this reason, the prudent sovereign will occasionally remind citizens how they came into civil society and ensure that the contract is reaffirmed by subsequent generations. Hobbes goes so far as to suggest that legislators should trace specific statutes back to fundamental principles, demonstrating the close relationship between the social contract and civil law. This, in turn, should increase the patience and forbearance of citizens towards the law. These lessons combined, the mutual respect of both parties will benefit all.

If we form a judicial rule from these precepts, we will find that a stricter scrutiny is required when examining legislation which appears to offend fundamental liberties. The Court has already adopted a similar position derived from the ruling in *Carolene Products*, but under a different rationale. The current doctrine concerns itself with the exercise of political liberties — that is, it ensures that wronged parties have an

[45] A Lockean alternative, on the other hand, errs on the side of granting the state too little Police Power.

opportunity to make amends through the political process.[46] This is a necessary first step. Should the oppressed have no outlet for voicing grievances, their only alternative is a return to a state of war. However, the Court's protection of fundamental rights must expand to include those things which significantly obstruct the pursuit of happiness — that right from which all others flow. Admittedly, the judicial mandate here is a broad one. The change would manifest itself in at least two concrete ways.

First, the Court must apply a heightened level of judicial scrutiny when reviewing legislation which restricts the liberty of contract. Since the close of the *Lochner* era, the Court has shied away from striking down legislation on the grounds of contractual liberty. This is an unfortunate development, given the seminal role of contract in maintaining social order and sustaining the sovereign authority. Contract upholds the legitimacy of the sovereign and is the chief facilitator of the pursuit of happiness within civil society.[47] Nonetheless, the liberty of contract should not exist as an immediate veto against a legitimate exercise of police power. The happiness of one cannot be allowed to thwart that of the whole. Therefore, strict scrutiny is too high a standard for such legislation to satisfy.[48] Instead, the appropriate judicial inquiry involves an intermediate level of scrutiny, existing between strict scrutiny and a simple rational-basis test. That is,

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[46] "It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation." *United States v. Carolene Products Co.*, 304 U.S. 144 [Footnote 4] (1938).

[47] Which the Court holds in *Allgeyer v. Louisiana*.

[48] Particularly bearing in mind the near-insurmountable burden it imposes in practice.

the legislation should demonstrate substantial bearing on a significant government interest, but it needn't utilize the least-restrictive means possible.

A second implication of treating the pursuit of happiness as a fundamental right involves a reexamination of how the Court perceives the legitimate exercise of police power. As Hobbes teaches us, government exists to facilitate the pursuit of happiness among its citizens. The Court's traditional interpretation of police power acknowledges its undefined authority to promote the general welfare, but since *West Coast Hotel*, the Court has fallen short of conceding its limits. The source of police power is the happiness of the whole, but it is similarly restrained by the happiness of the individual — restrained, but not overcome. Only when the general welfare is threatened may the police power be invoked and only then may it trump the rights of the individual. Again, an intermediate level of scrutiny must be invoked to determine whether a significant government interest is truly at stake. Such a shift will likewise affect the Court's interpretation of "public use" found in the Takings Clause of the Fifth Amendment.[49]

Reviewing Jurisprudence - Lochner v. New York

In light of these principles, we should take another look at Justice Peckham's decision in *Lochner v. New York*. Drawing upon his majority opinion in *Allgeyer v. Louisiana*, Peckham concludes that New York's maximum hours law restricts Joseph Lochner's liberty of contract, as protected by the Fourteenth Amendment. However, as is made clear in *Holden v. Hardy*, such a restriction alone does not immediately invalidate the legislation. "The State therefore," he writes, "has power to prevent the individual

[49] The historical ties between the Takings Clause and the police power are discussed in chapter three.

from making certain kinds of contracts, and, in regard to them, the Federal Constitution offers no protection."[50] The legitimate exercise of police power meets the demands of due process to which all liberty is subject. This much is consistent with what we have learned from Hobbes. In further applying Hobbesian lessons, an intermediate scrutiny should be imposed to determine the validity of the statute. That is, given that the maximum hours legislation necessarily infringes the otherwise unimpeded contract between employer and employee, we cannot simply defer to the word of the legislature. Instead, the Court must examine the legislature's rationale for why this particular transgression of personal liberty is justified.[51] A broad, but not unlimited, discretion is granted to the state when concerning matters of internal police.[52] The argument offered by New York is that a maximum hours law is necessary to protect both the health of bakers (and confectioners) and that of the public at large. Such an end, as Peckham admits, is more than sufficient to meet the requirements of due process. The question remains, however, whether the statute bears a substantial relationship to this stated end.[53]

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[50] 198 U.S. 53.

[51] "This is not a question of substituting the judgment of the court for that of the legislature." 198 U.S. 56-57.

[52] "This court has recognized the existence and upheld the exercise of the police powers of the States in many cases which might fairly be considered as border ones, and it has, in the course of its determination of questions regarding the asserted invalidity of such statutes on the ground of their violation of the rights secured by the Federal Constitution, been guided by rules of a very liberal nature, the application of which has resulted, in numerous instances, in upholding the validity of state statutes thus assailed." 198 U.S. 54.

[53] "The purpose of a statute must be determined from the natural and legal effect of the language employed, and whether it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose." 198 U.S. 64.

In this regard, Peckham contends that there is no reasonable relationship between the content of the law and its purported object. Instead, New York's maximum hours law is "an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty [and] to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family."[54] The legislation fails even a rational basis test of validity. Thus far, the test established by the majority in *Lochner* appears to be consistent with the sort that we have suggested. However, its application we find lacking.

Peckham quickly dismisses the claim that the occupation of bakers or confectioners is substantially more dangerous than that of any other normal laborer. "To the common understanding," he writes, "the trade of a baker has never been regarded as an unhealthy one."[55] It is less healthy than some, but more healthy than others, he contends. This is, of course, beside the point. As Justice Harlan notes in his dissent, the legislature does not need to justify its position beyond demonstrating a substantial state interest and a rational relationship between the means with this object. Peckham is correct to suggest that the burden of proof lies with those who would impede the liberty interest, but as Harlan goes at lengths to point out, there is more than enough evidence to satisfy the test. One study he cites claims that, "The labor of the bakers is among the hardest and most laborious imaginable, because it has to be performed under conditions injurious to the health of those engaged in it."[56] Another purports, "The average age of a

[54] 198 U.S. 56.

[55] 198 U.S. 59.

[56] 198 U.S. 70.

baker is below that of other workmen… During periods of epidemic diseases, the bakers are generally the first to succumb to the disease, and the number swept away during such periods far exceeds the number of other crafts in comparison to the men employed in the respective industries."[57] In light of this evidence, it is surprising that Peckham could maintain a position that the legislation is arbitrary and utterly unreasonable. The problem is compounded given the circumstances of the contractual relationship. So concerned is Peckham with wanting to emphasize the autonomy and liberty of the citizen that he refuses to acknowledge *Holden*'s key argument that there is a necessary inequality between employers and employees. This further weakens the liberty interest that stands in tension with the police power. All of these factors taken into account, the majority in *Lochner* approaches the case from the right perspective, but misapplies the otherwise appropriate judicial test.

West Coast Hotel Co. v. Parrish

The next major shift in the Court's jurisprudence regarding the police power's relationship to individual liberty comes in 1937 with *West Coast Hotel Co. v. Parrish*.[58] Washington's minimum wage law for women and minors is attacked as a violation of their liberty of contract, as protected by the Fourteenth Amendment. Justice Hughes, writing the majority opinion of the case, immediately challenges the precedent set by *Allgeyer v. Louisiana* that the liberty of contract is a discernible constitutional right.[59]

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[57] 198 U.S. 71.

[58] *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

[59] "What is this freedom? The Constitution does not speak of freedom of contract." 300 U.S. 391.

The *Lochner* era Court, he suggests, has overemphasized this particular freedom at the expense of the greater right which supports it — that is, a general liberty that is subject to the restraints of due process. Hughes reminds us that the liberty protected by the Fourteenth Amendment cannot be abstracted from the social contract which preserves it. We hold our liberty in a political context.[60] In this instance, it is clear that pure contractual liberty has been breached by the state, which immediately heightens the appropriate level of judicial scrutiny. Hughes rejects the deferential tone of *Holden v. Hardy* that grants legislatures ultimate discretion when matching means to ends, Hughes preferring instead the same intermediate level of scrutiny we see in *Lochner* and recommended by Thomas Hobbes.

Accordingly, he first considers the purpose of Washington's statute: "What can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers?"[61] Not only is the legislation justified on these grounds, but Hughes finds it appropriate to further legitimize the state's police power by recalling the extenuating circumstances posed by the nation's Great Depression.[62] Under the existing rules, women and children were forced to work protracted hours without sufficient compensation to provide a living wage. Such duress often led them to become wards of the state or pursue less reputable means of

[60] "But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people… This essential limitation of liberty in general governs freedom of contract in particular." 300 U.S. 391-392.

[61] 300 U.S. 998.

[62] "We may take judicial notice of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved." 300 U.S. 399.

employment. Against this cycle of inescapable poverty, Hughes objects, "The community is not bound to provide what is, in effect, a subsidy for unconscionable employers."[63] Clearly then, the purpose of Washington's minimum wage legislation is a valid exercise of the police power, protecting both the oppressed and society writ large. The only question remaining is whether the legislation is appropriately tailored to meet that end. Hughes determines that providing a minimum wage is relevant in at least four ways. First, women who are forced to work are necessarily of humble means. Second, women receive less compensation for their labor. Third, their ability to negotiate better wages is weak relative to their male counterparts. Fourth and finally, the spectre of prostitution is always looming for desperate women.[64]

As in *Lochner*, the judicial framework applied by the Court is precisely the sort of test that we would expect from the perspective of social contract theory. The majority applies an intermediate level of scrutiny, ensuring that both ends and means are legitimate, but gives some discretionary leeway to the legislature as to the nature of the problem and the application of a reasonable solution.[65] However, while the proper test is applied and the case is decided rightly, several aspects of the decision fall short of the Hobbesian ideal. To begin, *West Coast Hotel v. Parrish* initiates a movement away from a more broadly defined reading of the Due Process clause to a more stringent textualism. Justice Hughes is quick to downplay the liberty of contract, reminding us that no such liberty is explicitly protected by the Constitution. Hughes' greater point is well-taken —

[63] 300 U.S. 399.

[64] 300 U.S. 399.

[65] "Their [women] relative need in the presence of the evil, no less than the existence of the evil itself, is a matter for the legislative judgment." 300 U.S. 400.

we should not so value this particular expression of liberty that we lose sight of its other expressions. Yet, the rhetorical shift did such damage to the liberty of contract that it has not been used to invalidate state law since. Similarly, Hughes makes the mistake of exaggerating the scope of due process. Liberty, as he describes, exists within political bounds and may therefore be curbed by what the Constitution calls "due process." Hughes famously exclaims, "regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process."[66] That is, any restriction of individual liberty done in the name of the state cannot be contested. It is this prong of Hughes' decision that has done the most damage to a principled application of the police power.

Williamson v. Lee Optical, Inc.

Hughes' decision in *West Coast Hotel* was a crippling blow to *Lochner*ian jurisprudence. So radical was the shift that many Supreme Court historians have (inaccurately) attributed the reversal to political pressure from FDR's ill-fated "Court Packing" plan. When Hughes retired from the Court in 1941, it had transformed from one characterized largely by opposition to state and federal intervention to one that would be cited as a model of judicial deference. Although Hughes himself did not go so far, later justices would interpret the lesson of his tenure to be that the Court is not responsible for considering the relative merits of democratically passed legislation. "We are not concerned… with the wisdom, need, or appropriateness of the legislation," writes Justice Douglas just four years after *West Coast Hotel*.[67] "The criterion of

[66] 300 U.S. 391.

[67] *Olsen v. Nebraska*, 313 U.S. 236 (1941).

constitutionality is not whether we believe the law to be for the public good," the Court echoes in 1963.[68] Substantive due process appeared to be wholly overtaken by procedural. Coinciding with the Court's repudiation of *Lochner* was an adoption of the Holmesian narrative.[69] Justice Peckham's decision was not recognized as principled (albeit with obvious shortcomings in application). Instead, his attempt to reinvigorate a tradition of unenumerated and inalienable rights was quickly dismissed as a straightforward imposition of judicial will.[70]

The result of the Court's recoil from what was seen as *Lochner*'s overreaching was an equally exaggerated refusal to question the proper exercise of police power legislation. State legislatures "are entitled to their own standard of the public welfare" which cannot be abridged "so long as specific constitutional prohibitions are not violated and so long as conflicts with valid and controlling federal laws are avoided. That is the essence of *West Coast Hotel Co. v. Parrish.*"[71] "Public welfare," which was once an essential measure of legitimate police power, became left wholly to the discretion of the legislature. Such a position pays no heed to the roots of the Fourteenth Amendment in

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[68] *Ferguson v. Skrupa*, 372 U.S. 730 (1963) (Quoting Holmes' dissent in *Adkins v. Children's Hospital*).

[69] See *Ferguson v. Skrupa* (1963) where Justice Black adopts Holmes' interpretation of Peckham's decision in *Lochner*: "Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation. There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy." 372 U.S. 729.

[70] See, for example *Day-Brite Lighting, Inc. v. Missouri* (1952): "But if our recent cases mean anything, they leave debatable issues as respects business, economic, and social affairs to legislative decision. We could strike down this law only if we returned to the philosophy of the *Lochner*, *Coppage*, and *Adkins* cases." 342 U.S. 425.

[71] *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 423 (1952).

either the Declaration or social contract theory, but instead rubber-stamps state legislation that appears questionable even under a rational basis test. If all law is good law, what then is the role of the Court?

One of the more egregious violations of an appropriate jurisprudence occurs in 1955 with *Williamson v. Lee Optical, Inc*.[72] Oklahoma had recently passed legislation prohibiting anyone but a licensed optometrist or ophthalmologist from fitting, duplicating, or replacing optical lenses. The practical effect of such a law was to prevent opticians from replacing lost or broken lenses, or even merely putting old lenses into new frames without a prescription. As the District Court's decision notes, eye examinations fall under the jurisdiction of police power legislation, but this particular mandate bears no reasonable relation to the public health or welfare. New examinations are not required for an optometrist to present a new prescription and if an old prescription is on file with the optician, the customer need not even visit the specialist. On this point, the Court admits that "the law need not be in every respect logically consistent with its aims to be constitutional."[73] And so, following the assumed trend of the post-*Lochner*ian court, the legislation is upheld, despite its unwarranted and unwelcome intrusion into the relationship between the craftsman and his customer. "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions because they may be unwise, improvident, or out of harmony with a particular school of thought," writes the

[72] *Williamson v. Lee Optical Inc.*, 348 U.S. 483 (1955).

[73] 348 U.S. 487-488.

majority.[74] But by subjecting economic regulation to only the most flimsy of rational basis review, the Court rejects the Hobbesian assumption that the sovereign will provide a certain degree of liberty "to buy, and sell, and otherwise contract with one another."[75]

Griswold v. Connecticut

Williamson v. Lee Optical, Inc. and those cases surrounding it provide us with a convenient segue from economic cases to those that concern the right to privacy. In 1965, the Court was asked to rule on a case involving an Executive Director of Planned Parenthood charged with providing information about contraceptives to a married couple against Connecticut law. This case, *Griswold v. Connecticut*, has received a certain renown for being the first in a series of decisions developing the right to privacy in American jurisprudence.[76] The invasive nature of Connecticut's law into personal liberty under the guise of the police power immediately recalls to mind the Fourteenth Amendment framework established by Justice Peckham. If anything offends the citizen's inalienable liberty to pursue happiness, it is the state legislating with regard to his children. Nonetheless, using the precedent of *Williamson v. Lee Optical, Inc.*, the Court sidesteps the obvious *Lochner*ian overtones of the case.[77] "We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions," Justice Douglas sanctimoniously

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[74] 348 U.S. 488.

[75] *Leviathan* II, xxi, §6.

[76] *Griswold v. Connecticut*, 381 U.S. 479 (1965).

[77] "Overtones of some arguments suggest that *Lochner v. New York* should be our guide. But we decline that invitation." 381 U.S. 481-482.

writes.[78] And yet, the Court does interpose itself against Connecticut's law, although in a much more roundabout manner. Rejecting *Lochner*'s appeal to inalienable liberties, Douglas introduces a new doctrine of Constitutional "penumbras," formidable enough to trump democratic process. These penumbras derive their authority from the "emanations" of specific Constitutional provisions found in the Bill of Rights.[79] Unlike Justice Peckham's Substantive Due Process, these penumbral rights are (supposedly) clause-bound and do not make mention of what the Court has traditionally defined as fundamental principles.[80] For the purposes of *Griswold*, "zones of privacy" are suggested by various amendments, which Douglas interprets to successfully countermand Connecticut's prohibition of contraception. One can only assume that the majority's circuitous reasoning is due to the historical stigma associated with *Lochner*. It appears to be fumbling for a way to recast *Lochner*'s articulation of underlying Constitutional principles, but in highlighting the rights of the individual, it fails to respect the corresponding duties of the state. No attention whatsoever is given to the state's alleged motive in passing the law. Thus, *Lochner*'s requirement of stricter scrutiny when fundamental liberties are at stake gives way to an unqualified rejection of state access to an ambiguously-defined zone of privacy, based upon the insinuation of a potential right. Even the explicit Constitutional guarantee of liberty must give way to due process.

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[78] 381 U.S. 482.

[79] "The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." 381 U.S. 484.

[80] The dissent makes it clear that Douglas' attempt at textualism is halfhearted, at best: "In the course of its opinion, the Court refers to no less than six Amendments to the Constitution… But the Court does not say which of these Amendments, if any, it thinks is infringed by this Connecticut law." 381 U.S. 527-528.

Justice Harlan's concurring opinion comes much closer to an appropriate judicial test, suggesting that the Fourteenth Amendment incorporates those rights which are "implicit in the concept of ordered liberty."[81] This rationale, borrowing from *Palko v. Connecticut*, challenges any state law which looks to contravene the first principles of free government.[82] Harlan acknowledges that extraconstitutional principles are susceptible to abuse.[83] Therefore, a consistent and fair application of his proposal will require a "continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms."[84] His approach is remarkably similar to the one established at the turn of the century by Justice Peckham. However, any reference to *Lochner* is conspicuously absent. This is not the first opportunity for Justice Harlan to put forward a new framework of Substantive Due Process. In *Poe v. Ullman*, an earlier case regarding Connecticut's contraception law (dismissed due to a lack of standing), Harlan produced a rather lengthy dissent in which he outlined in greater detail the

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[81] 381 U.S. 500.

[82] *Palko v. Connecticut*, 302 U.S. 325 (1937).

[83] "[The dissent relies] on the thesis that, by limiting the content of the Due Process Clause of the Fourteenth Amendment to the protection of rights which can be found elsewhere in the Constitution, in this instance, in the Bill of Rights, judges will thus be confined to 'interpretation' of specific constitutional provisions, and will thereby be restrained from introducing their own notions of constitutional right and wrong into the 'vague contours of the Due Process Clause.' While I could not more heartily agree that judicial 'self-restraint' is an indispensable ingredient of sound constitutional adjudication, I do submit that the formula suggested for achieving it is more hollow than real." 381 U.S. 500-501.

[84] 381 U.S. 501.

principles that he applies in *Griswold*.[85] In it, Harlan ties the protection of liberty in the Fifth and Fourteenth amendments to the pre-constitutional inalienable rights of the social contract.[86] "Due Process" then, is irreducible to a specific formula, but must represent "the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society."[87] Although the reasoning mirrors the argument advanced by Peckham, his contributions are largely ignored. *Allgeyer v. Louisiana* is mentioned only in passing and *Lochner* not at all. It appears as though Harlan is doing all that he can to disassociate himself from the Court's first abortive attempt to introduce a substantive reading of due process. This new venture differs from the first in at least one important respect: strict scrutiny, he asserts, is the proper level of judicial inquiry to apply when considering such cases.[88] While Harlan correctly recognizes the importance of our nation's commitment to fundamental rights, he, like so many others, fails to recognize the irreducible link between the rights of the individual and the responsibility of the state. Strict scrutiny places too heavy a burden on

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[85] *Poe v. Ullman*, 367 U.S. 497 (1961).

[86] "[T]he basis of judgment as to the constitutionality of state action must be a rational one, approaching the text which is the only commission for our power not in a literalistic way, as if we had a tax statute before us, but as the basic charter of our society, setting out in spare but meaningful terms the principles of government… But as inescapable as is the rational process in constitutional adjudication in general, nowhere is it more so than in giving meaning to the prohibitions of the Fourteenth Amendment…" 367 U.S. 540. "However, it is not the particular enumeration of rights in the first eight Amendments which spells out the reach of Fourteenth Amendment due process, but rather, as was suggested in another context long before the adoption of that Amendment, those concepts which are considered to embrace those rights 'which are… fundamental; which belong… to the citizens of all free governments,' for 'the purposes (of securing) which men enter into society…'" 367 U.S. 541.

[87] 367 U.S. 542.

[88] 367 U.S. 548.

the state to justify legislation required for the maintenance of public order, effectively reducing the police power to a level of inferiority when compared to the rights of the individual.

Lawrence v. Texas

The Court's decision in *Griswold* has had far-reaching consequences. Perhaps most notoriously, both Douglas' majority opinion and Harlan's concurrence are heavily cited in *Roe v. Wade*, which ultimately adopts Harlan's demand for strict scrutiny.[89] As substantive due process continued to gain traction in jurisprudence, the Court moved to narrow precisely what could be understood as fundamental liberty interests. It was determined that to invoke the standard of strict scrutiny, fundamental liberty interests must be "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[90] This introduction of tradition and conscience is again something novel to the liberty understood by the social contract.

In 1986, the Court was asked to rule upon a state law outlawing sodomy in *Bowers v. Hardwick*.[91] Adopting Justice Harlan's fundamental liberties approach once more, the Court determined that the Constitution does not confer a fundamental right to homosexual sodomy and therefore upheld the legislation.[92] The issue did not rest long

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[89] *Roe v. Wade*, 410 U.S. 113 (1973). This is later reaffirmed in *Planned Parenthood v. Casey* 505 U.S. 833 (1992).

[90] *United States v. Salerno*, 481 U.S. 751 (1987).

[91] *Bowers v. Hardwick*, 478 U.S. 186 (1986).

[92] 478 U.S. 191.

and it was revisited in 2003 in *Lawrence v. Texas*.[93] However, rather than assuming Justice Harlan's fundamental liberties test and applying strict scrutiny to the legislation, the Court instead develops a new application of substantive due process. "The protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person," writes Justice Kennedy.[94] Note the subtle shift from the earlier requirement of fundamental rights "implicit in the concept of ordered liberty."[95] The Court is no longer concerned with the liberties necessary for sustaining free society, but those which define the rights of the person. A further disconnect has been made between the interests of the individual and civil society. Accordingly, Kennedy continues, noting that the Court has seen "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[96] As Justice Scalia retorts in his dissent, "'emerging awareness' is by definition not 'deeply rooted in this Nation's history and tradition[s],' as we have said 'fundamental right' status requires."[97] It is unclear what principled case Kennedy is making in *Lawrence*, given its sharp break from prior

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[93] *Lawrence v. Texas*, 539 U.S. 558 (2003).

[94] 539 U.S. 565.

[95] "Though there is discussion of 'fundamental proposition[s]' and 'fundamental decisions,' nowhere does the Court's opinion declare that homosexual sodomy is a 'fundamental right' under the Due Process Clause; nor does it subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy were a "fundamental right.'" Scalia's dissent, 539 U.S. 586.

[96] 539 U.S. 572. *Griswold v. Connecticut* serves as the vanguard of this new outlook, although despite Kennedy's commendation of the ruling, he does not embrace the penumbral rhetoric of the majority (539 U.S. 564; 539 U.S. 566).

[97] 539 U.S. 597.

traditions and jurisprudence. Using a curious sort of rational basis test (rather than the expected strict scrutiny), the majority determines that the state lacks any rational interest in regulating private sexual conduct. The Due Process Clause guarantees individuals "the full right to engage in their conduct without intervention of the government… The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual"[98] Besides lacking judicial precedent, it is remarkable that the legislation was unable to meet the low bar of rational basis. Echoing Justice Stevens' *Bowers* dissent, the majority further asserts that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."[99] As Justice Scalia laments, such a resolution appears to spell the end of moral legislation across the board.[100] No longer can the majority seek to codify its deepest values in law, but the state must now submit to each individual's self-definition.[101] Instead of a static and principled concept of liberty which supports and stabilizes the interests of the political community, "persons in every generation can invoke [the Constitution's] principles in their own search for greater freedom."[102]

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[98] 539 U.S. 578.

[99] 539 U.S. 577.

[100] "This effectively decrees the end of all morals legislation." 539 U.S. 599.

[101] "The State cannot demean their existence or control their destiny by making their private sexual conduct a crime." 539 U.S. 578.

[102] 539 U.S. 579.

Review and Conclusion

Particularly in the wake of *West Coast Hotel*, the Court's approach to the police power and individual liberty has been consistent only insofar as it has been adversarial. The rift between the interests of the individual and the interests of the state continues to grow wider. What began as a political interest — a certain right to engage in contract — has evolved into a right to define one's own destiny without the interference of civil society. *Lochner*'s more principled take on the complicated relationship between the citizen and the state has been completely disregarded due to its fateful misapplication. Yet by refusing to acknowledge the virtues of Peckham's argument, grounded as it is in the tradition of the social contract, the Court has denied itself the only reasonable ground it has to deal with such questions in the future. On the one hand, with regard to economic matters, the presence of the regime on private decision-making has become almost inescapable. On the other hand, the individual's "right to privacy" in the social sphere has ballooned to exclude even the most moderate legislation aimed at an immaterial good. With issues such as California's Proposition Eight and a new concern for healthcare legislation on the horizon, the Court will continue to fumble until it is finally able to apply a test that recognizes the necessary connection between the individual's pursuit of happiness and the common good. The Court must rediscover the Constitution's commitment to life, liberty and the pursuit of happiness that undergirds our society and animates our law.

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