

# *Lochner* Under Lockdown

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## I. INTRODUCTION

In 1905, the Supreme Court rendered two landmark decisions on the scope of individual liberty—*Jacobson v. Massachusetts*<sup>1</sup> and *Lochner v. New York*.<sup>2</sup> The first denied a substantive due process claim and has become the legal bedrock of all judicial examinations of public health measures ever since (and is the go-to citation of contemporary COVID-19 cases). The other upheld a substantive due process claim—and was thrown in the dustbin of constitutional history, known now only as part of the “anticanon.”<sup>3</sup> Yet to address the broad restrictions on liberty caused by current and foreseeable pandemic responses, it is worth noting that the *Lochner* Court is the *Jacobson* Court and that the cases were decided within months of each other.<sup>4</sup> The latter’s broad deference to public health authority lived side-by-side with a broader conception of individual liberty. At a time when state police power has imposed unprecedented limitations on individuals’ ability to provide for themselves in dignity, *Lochner* should be brought out of lockdown.

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The overarching story of substantive due process in the twentieth century was the rejection of economic rights as fundamental, followed by a recognition of unenumerated rights largely in the area of reproduction and sexuality. One explanation for this trajectory could simply be a deeper social understanding of what is important in life. But another view would suggest that the Court believed basic economic rights to be largely safe from legislative encroachment. From the late 1940s on, it seemed increasingly unlikely that the United States would go the way of Eastern Europe, embracing economic doctrines that fundamentally

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<sup>1</sup> 197 U.S. 11 (1905).

<sup>2</sup> 198 U.S. 45 (1905).

<sup>3</sup> See Jamal Green, *The Anticanon*, 125 HARV. L. REV. 379, 380 (2011).

<sup>4</sup> See *Lochner*, 198 U.S. at 75 (“The other day we sustained the Massachusetts vaccination law.” (citing *Jacobson*)).

reified the power of the state over the individual. It was not generally thought that the freedom of contract would be suppressed or interfered with as thoroughly, as say, abortions. The shift parallels, perhaps not accidentally, the shift in progressive intellectuals' emphasis from economic rights to ones of autonomy and identity. As Marcuse put it, rapidly increasing standards of living ("freedom from want, the concrete substance of all freedom") reduced the public salience of "freedom of enterprise," while inhibiting true autonomy and spirit of humans, which required, *inter alia*, sexual liberation.<sup>5</sup>

The government response to the COVID-19 pandemic has changed all that. In a matter of weeks, across the country, entire industries were shut down indefinitely, and often fatally. State and local shut-down and social distancing orders have prohibited contractual relations on a scale previously unimagined. By means of illustration, the unemployment rate during 2020 rose to its highest levels since official measurement began—due to a combination of private avoidance behaviors and government fiat.<sup>6</sup> The broad closures and lockdowns that are characteristic of governments' COVID-19 responses, and will likely characterize responses to future pandemics, are unprecedented. As will be discussed below, even in the vastly more virulent Spanish Flu pandemic,<sup>7</sup> state governments did not implement blanket closures of businesses. Similarly radical was the federal mandate, formulated nearly two years after the start of the pandemic, making the COVID-19 vaccine an actual or de facto condition of employment for much of the nation's workers.<sup>8</sup>

In the first several months of the pandemic, courts uniformly turned away all constitutional challenges to lockdown measures. In these early cases, courts expressed broad and uncritical deference to emergency measures responding to the novel pandemic. Yet as closures

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<sup>5</sup> HEBERT MARCUSE, ONE DIMENSIONAL MAN: STUDIES IN THE IDEOLOGY OF ADVANCED INDUSTRIAL SOCIETY 1–2 (1964).

<sup>6</sup> GENE FALK ET AL., CONG. RSCH. SERV., R46554, UNEMPLOYMENT RATES DURING THE COVID-19 PANDEMIC 2 (2021), <https://fas.org/sgp/crs/misc/R46554.pdf> [<https://perma.cc/JLY8-L3UC>].

<sup>7</sup> By some estimates, the Spanish Flu was four times deadlier than COVID-19—that is, an infected person had a four times greater chance of dying. Moreover, the Spanish Flu resulted in a far greater loss of life-years because it overwhelmingly struck the young. Daihai He et al., *Comparing COVID-19 and the 1918–19 Influenza Pandemics in the United Kingdom*, 98 INT'L J. INFECTIOUS DISEASES 67, 68 (2020), <https://doi.org/10.1016/j.ijid.2020.06.075> [<https://perma.cc/48GY-T9Q2>].

<sup>8</sup> This Essay was written before President Biden announced on Sept. 9, 2021 a series of vaccine mandates that extend the great majority of American workers. While the focus of this Essay is on business closures and similar restrictions, they are also relevant to such sweeping vaccine mandates, though unlike closure orders, the effects of the former are conditional on non-vaccination.

wore on,<sup>9</sup> courts began striking down closure and distancing rules when they impacted particular individual rights—political protests,<sup>10</sup> communal prayer,<sup>11</sup> travel restrictions,<sup>12</sup> gun purchases,<sup>13</sup> and abortion services.<sup>14</sup> For such rights, courts have resumed their strict scrutiny of restrictions, examining their evidentiary basis, the availability of less burdensome alternatives, and so forth.

Yet, while courts have been willing to “second guess” public health determinations when faced with certain kinds of individual rights claims,<sup>15</sup> such litigation has only nibbled around the edges of the regulations’ liberty-restricting effects. While a growing number of plaintiffs have won relief from restrictions on communal prayer,<sup>16</sup> by far the

<sup>9</sup> Compare *Ramsek v. Beshear*, 468 F. Supp. 3d 904, 918 (E.D. Ky. 2020), *appeal dismissed as moot and remanded*, 989 F.3d 494 (6th Cir. 2020) (holding that Kentucky’s ban on any outdoor protests with more than ten people violates the First Amendment because it is not narrowly tailored to try to preserve free assembly interests, as evidenced by the fact that “the Commonwealth has required implementation of [social distancing, masking and related measures] in places like restaurants, office buildings, and auctions, but continues to wholly prohibit gatherings for political protest above a set number no matter the circumstance”), with *Givens v. Newsom*, 459 F. Supp. 3d 1302, 1314 (E.D. Cal. 2020) (upholding a challenge to a blanket moratorium on protests at the state Capitol).

<sup>10</sup> See generally, e.g., *Ramsek*, 468 F. Supp. 3d 904.

<sup>11</sup> The increasing scrutiny that regulations have faced as closures have stretched on for months can be seen in the Supreme Court’s growing willingness to strike down limits on communal prayer. Compare *S. Bay Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020), with *S. Bay Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021). See also *Ramsek*, 468 F. Supp. 3d at 918; *Capitol Hill Baptist Church v. Bowser*, 496 F. Supp. 3d 284, 299 (D.D.C. 2020) (“Now months into this public health crisis, the District has had the opportunity to determine with greater particularity the risks presented by COVID-19 and the restrictions necessary; sweeping justifications perhaps more suitable to the early stages of a public health crisis will not suffice.”).

<sup>12</sup> See *Roberts v. Neace*, 457 F. Supp. 3d 595, 603 (E.D. Ky. 2020) (“Not only is there a lack of procedural due process with respect to the Travel Ban, but the above examples show that these travel regulations are not narrowly tailored to achieve the government’s purpose.”).

<sup>13</sup> *Conn. Citizens Def. League, Inc. v. Lamont*, 465 F. Supp. 3d 56, 73 (D. Conn. 2020) (holding that, despite the “principles of deference and even granting the wisdom of the decisions of the Governor and the Commissioner to great deference to the protective measures ordered by government officials in response to the COVID-19 crisis,” the imposing of stricter social distancing rules on gun licensing requirements than on “hair salons and barber shops” impermissibly burdens Second Amendment rights), *appeal docketed*, No. 20-2078 (2d Cir. July 1, 2020); *Lynchburg Range & Training v. Northam*, 105 Va. Cir. 159 (Va. Cir. Ct. 2020) (striking down Virginia’s ban on indoor gun ranges under a mixture of federal constitutional and state statutory grounds).

<sup>14</sup> See, e.g., *Robinson v. Att’y Gen.*, 957 F.3d 1171, 1183 (11th Cir. 2020) (“[T]he burdens on abortion created by the state’s initial interpretations of the March 27 and April 3 orders far exceeded the orders’ benefits in combatting the COVID-19 epidemic.”); *Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913, 926 (6th Cir. 2020) (granting a preliminary injunction against a three-week moratorium on certain abortions, on the grounds that the dangers posed to medical personnel were based on the “State’s say-so”), *vacated sub nom.* *Slatery v. Adams & Boyle, P.C.*, 141 S. Ct. 1262 (2021).

<sup>15</sup> See, e.g., *Roman Cath. Diocese v. Cuomo*, 141 S. Ct. 63, 79 (2020) (Sotomayor, J., dissenting).

<sup>16</sup> This is not to say that communal prayer is inherently less important than the ability to work at one’s job. Rather, the desire for communal prayer in forms not allowed by state closure orders is likely relevant to fewer people than the desire for remunerative work. Moreover, for most people one’s work, and pay that comes from it, is a central part of their lives, and generally more

broadest and greatest impact of the COVID-19 regulations on peoples' lives—on their ability to work—has largely remained outside the realm of constitutional scrutiny. The shuttering of broad swaths of commerce has led to many constitutional challenges by affected businesses, but these have been extraordinarily unsuccessful.<sup>17</sup> Only two federal court decisions have thus far enjoined closure measures in challenges brought by affected business owners—and were promptly stayed by appellate courts.<sup>18</sup> State courts have,<sup>19</sup> with one obscure exception,<sup>20</sup> been similarly unreceptive.<sup>21</sup>

The very mention of substantive economic rights in these cases has been shocking to some scholars.<sup>22</sup> Challenges to business closures have a hard time getting off the ground because, in the post-*Lochner* world, economic liberty claims are thought to not enjoy heightened constitutional protection.<sup>23</sup>

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This Essay will argue that whatever *Lochner's* failings, the rationales for abandoning “freedom of contract” as against economic regulation are largely inapplicable to the current COVID-19 restrictions. This

important than religion. See *Where Americans Find Meaning in Life*, PEW RSCH. CTR. (Nov. 20, 2018), <https://www.pewforum.org/2018/11/20/where-americans-find-meaning-in-life/> [<https://perma.cc/X3W3-YFWT>].

<sup>17</sup> See Jeffrey Thaler, *The Next Surges Are Here: What Can American Governments Lawfully Do In Response to the Ongoing COVID-19 Pandemic?*, 42 MITCHELL HAMLINE L. J. PUB. POL'Y & PRAC. 165, 208–09 nn.154–57 (2020) (collecting cases).

<sup>18</sup> See *Cnty. of Butler v. Wolf*, 486 F. Supp. 3d 883 (W.D. Pa. 2020), *stay granted*, No. 20-2936, 2020 WL 5868393 (3d Cir. Oct. 1, 2020); *League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer*, 468 F. Supp. 3d 940, 952 (W.D. Mich. 2020), *stay granted*, 814 F. App'x. 125 (6th Cir. 2020).

<sup>19</sup> See, e.g., *Desrosiers v. Governor*, 158 N.E.3d 827, 844 (Mass. 2020) (finding closure orders that permitted the reopening of casinos but not arcades were not so arbitrary as to violate substantive due process, in part because “the right to work is not a fundamental right that receives strict scrutiny”); *Cnty. of Los Angeles Dep't of Pub. Health v. Superior Ct. of Los Angeles Cnty.*, 61 Cal. App. 5th 478, 495 (Cal. Ct. App. 2021) (rejecting substantive due process claim against order prohibiting restaurants from having outdoor dining), *reh'g denied* (Mar. 12, 2021), *review denied* (June 9, 2021).

<sup>20</sup> See *Lasertron, Inc. v. Empire State Dev. Corp.*, 138 N.Y.S.3d 844, 851 (N.Y. Sup. Ct. 2021) (finding plaintiff laser-tag operator's due process rights were violated when it was closed although state officials “could not (or would not) answer why certain indoor activities were permitted and others, like Lasertron, were not”).

<sup>21</sup> See, e.g., *Midway Venture LLC v. County of San Diego*, 274 Cal. Rptr. 3d 383, 412 (Cal. Ct. App. 2021) (vacating lower court injunction against order closing nude dancing establishment that also served food), *as modified on denial of reh'g* (Feb. 8, 2021).

<sup>22</sup> See, e.g., Paul Gowder, *The Dangers to the American Rule of Law Will Outlast the Next Election*, 2020 CARDOZO L. REV. DE-NOVO 126, 157 (2020) (“To a member of the left-leaning side of the legal profession, [Wolf] is truly astonishing.”).

<sup>23</sup> See, e.g., *Desrosiers*, 158 N.E.3d at 844 (“To the extent the plaintiffs argue that operating a business [is] . . . burdened by the emergency orders, these arguments do not subject the emergency orders to strict scrutiny. The right to work is not a fundamental right that receives strict scrutiny.”), *petition for cert. filed sub. nom.* *Desrosiers v. Baker*, No. 20-1569 (U.S. May 12, 2021).

Essay does not argue that the COVID-19 response has been constitutionally unwarranted. A revival of *Lochner* would not call into question all or even many closure orders, as a wide variety of economic legislation of far more dubious necessity than the pandemic response was upheld in the *Lochner* era,<sup>24</sup> and courts today have stressed that the pandemic is a compelling, rather than merely plausible, government interest.<sup>25</sup> Indeed, *Jacobson*, which sustained a mandatory vaccination program, was decided by the *Lochner* Court and was framed against a backdrop of broad and unenumerated Fourteenth Amendment liberty. Rather, this Essay urges that, in a post-*Lochner* world, we lack the constitutional language to deal with the potential danger to liberty implicated by such impositions on peoples' freedoms.<sup>26</sup> At the same time, the *Jacobson/Lochner* juxtaposition demonstrates that taking work-related liberties seriously does not mean jettisoning deep deference to public health measures, especially during infectious emergencies.

*Lochner* is heavily criticized as an attempt by the Court to second-guess legislative judgements about economic policy and redistribution. But this Essay will argue that at least a more modest and more focused version of the *Lochner* doctrine is much better suited to traditional police power measures (such as health and safety) that nonetheless have significant effects on people's ability to pursue their callings and support themselves. (*Lochner* itself was the opposite—an economic regulation dressed up as public health measure.) The need for a mechanism of constitutional scrutiny is particularly acute when, as with COVID-19, a set of early emergency public health orders are repeatedly renewed, leading to devastating economic effects.<sup>27</sup> Since the start of the epidemic, well over 100,000 businesses have closed. For most of these, a variety of economic factors will likely prevent reopening.<sup>28</sup> For these businesses, the temporary has become the permanent.<sup>29</sup> Nor does the

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<sup>24</sup> See David Bernstein, *Lochner v. New York: A Centennial Retrospective*, 83 WASH. U. L. Q. 1469, 1505–07 (2005).

<sup>25</sup> Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 67 (2020) (“Stemming the spread of COVID-19 is unquestionably a compelling interest.”).

<sup>26</sup> Even in one outlier case where an appellate court has called into question to overall effect COVID-19 emergency measures on unenumerated liberties, it was through the vehicle of state separation of powers doctrine. See *Wis. Legislature v. Palm*, 942 N.W.2d 900, 912 (Wis. 2020) (holding that the state non-delegation doctrine prevents a cabinet member from unilaterally issuing emergency orders “even at the expense of fundamental liberties”).

<sup>27</sup> See *Capitol Hill Baptist Church v. Bowser*, 496 F. Supp. 3d 284, 297 (D.D.C. 2020) (suggesting that judicial review should distinguish between the initial “onset” period of a public health emergency and its regularization, when the “crisis stops being temporary, and as days and weeks turn to months and years, the [constitutional] slack in the leash eventually runs out”).

<sup>28</sup> Lisa Fickenscher, *Nearly 60 Percent of COVID-19 Business Closures are Permanent: Report*, N.Y. POST (Sept. 17, 2020), <https://nypost.com/2020/09/17/majority-of-covid-19-business-closures-are-permanent-report/> [<https://perma.cc/R8QY-2CW9>].

<sup>29</sup> See generally *S. Bay Pentecostal Church v. Newsom*, 141 S. Ct. 716, 720 (2021) (statement

“temporary” nature of burdens on constitutional interests, even economic ones, make them less real.<sup>30</sup>

Previous emergencies—World War I and, even more so, World War II—saw governments around the world extend broad and sometimes near-dictatorial powers over the economy. Some countries, like the United States, chose to move away from most of these policies after the war.<sup>31</sup> Others, like Argentina, did not. The point here is that emergency measures with significant effects on individuals’ ability to contract freely can easily persist beyond the emergency, especially when there is no constitutional counterweight. Indeed, at least one state has already taken steps to institutionalize parts of its emergency regulations.<sup>32</sup>

To police against such dangers—and not necessarily to strike down business closures today—some rehabilitation of *Lochner* is needed. For marketing purposes, however, it likely needs another name. For present purposes, “little *Lochner*” will do. Part II of this Essay will demonstrate most rationales for repudiating *Lochner* do not necessarily preclude any liberty-based challenge to closure laws. Part III shows that the present closure measures are different enough in scope and purpose from the regulations dealt with under the *Lochner* Doctrine to potentially warrant a different result. It also shows how COVID-19 restrictions are fundamentally different from any prior peacetime government

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of Gorsuch, J.) (“As this crisis enters its second year—and hovers over a second Lent, a second Passover, and a second Ramadan—it is too late for the State to defend extreme measures with claims of temporary exigency, if it ever could.”).

<sup>30</sup> See, e.g., *First Eng. Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 482 U.S. 304, 318 (1987) (“[T]emporary’ takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation.”).

<sup>31</sup> Even in the United States, vestiges of the wartime regulatory system survive until this day. New York’s rent control regime began with federal regulation of prices justified by a broad interpretation of the War Power. See, e.g., *Bowles v. Willingham*, 321 U.S. 503, 519 (1944) (“A nation which can demand the lives of its men and women in the waging of that war is under no constitutional necessity of providing a system of price control on the domestic front which will assure each landlord a ‘fair return’ on his property.”); *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 143–44 (1948) (holding that rent controls can be implemented years after the conclusion of hostilities because the “effects” of the war were still felt). Interestingly, the COVID-19 pandemic has also seen federal housing regulation, this time as a public health measure, rather than a wartime one. Today the measures take the form of repeatedly extended eviction moratoria. See *Tiger Lilly v. Dep’t Housing & Urb. Dev.*, 992 F.3d 518, 522–23 (6th Cir. 2021) (holding that the CDC’s moratorium or evictions for non-payment of rent exceeded the agency’s statutory authority); *Terkel v. Ctrs. For Disease Control & Prevention*, No. 6:20-CV-00564, 2021 WL 742877, at \*10 (E.D. Tex. Feb. 25, 2021) (holding that the CDC eviction moratorium violated the Commerce Clause), *appeal docketed*, No. 21-40137 (5th Cir. Mar. 3, 2021).

<sup>32</sup> See Taylor DesOrmeau, *Michigan’s Push for Permanent Covid-19 Rules Sparks Battle with Business Leaders*, M LIVE (May 17, 2021), <https://www.mlive.com/public-interest/2021/05/michigans-push-for-permanent-covid-19-rules-sparks-battle-with-business-leaders.html> [<https://perma.cc/SE3W-WERX>].

measures—including in pandemics. The unprecedentedly broad powers exercised by governments calls for judicial scrutiny and illustrates why a constitutional liberty interest in work is normatively attractive. Part III discusses the limited scope of such an interest. It concludes by showing that recognizing a limited liberty interest in such circumstances would not only limit judicial authority to second-guess public health determinations but would also likely leave most COVID-19 restrictions in place.

## II. THE LIMITED REPUDIATION OF *LOCHNER*

This Part will examine whether existing doctrine, and in particular the famous repudiation of the *Lochner* line of cases, entirely precludes the kind of “little *Lochner*” doctrine that might enable liberty-based challenges to broad business closure orders to at least withstand a motion to dismiss. Despite the consignment of *Lochner* itself to the “anti-canon,” its doctrinal underpinning, substantive due process, has not been repudiated and indeed has been revived.<sup>33</sup> This has led to an extensive discussion of what *Lochner*’s mistake was. Under many understandings of *Lochner*, its error and, thus, the reasons for its repudiation would not preclude “liberty” based challenges to public health lockdown rules, even when the harm asserted is economic.

Substantive due process is the idea that there are certain government actions that weigh so heavily on individual liberty that almost no amount of “process” can justify them. In part because enumerated rights are historically contingent, they cannot exhaust the list of enormities the government might inflict on citizens. The *Lochner* Court saw a broad doctrine of freedom of contract as one such essential liberty: the ability to provide for oneself is what makes all other enumerated rights possible, from buying a newspaper, to tithing for a church, to purchasing firearms. As has been widely noted, the sexual autonomy cases beginning with *Griswold v. Connecticut*<sup>34</sup> have shown that substantive due process has not been abandoned by the Court. Rather, one “substance” has been replaced with another. Thus, what was wrong with *Lochner*, in the conventional account, was its understanding of economic liberties as fundamental ones that must be protected beyond enumeration.<sup>35</sup>

It could be that the broadest criticism is correct—that any kind of substantive due process lacks constitutional basis. In this view, *Lochner*

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<sup>33</sup> Substantive due process rights have been successfully invoked against COVID-19 closure orders even in the early days of the pandemic. See cases cited *supra* note 11.

<sup>34</sup> 381 U.S. 479 (1965).

<sup>35</sup> See *Planned Parenthood v. Casey*, 505 U.S. 833, 861–62 (1992).

is as misguided as cases that are far from anticanonical, such as *Roe v. Wade*<sup>36</sup> and *Planned Parenthood v. Casey*.<sup>37</sup> In this view, substantive due process is an empty set, and abstract concepts of “liberty” should not be a reason to set aside legislative enactments. Under this understanding, there would be no basis in the Fourteenth Amendment’s Due Process Clause to challenge business closures.<sup>38</sup>

However, most academic accounts of *Lochner*’s error do not throw out the entire substantive due process baby with the baking-regulation bathwater—and thereby leave room for at least some liberty interest adequate enough to contest, if not set aside, broad business closure orders. Most accounts of *Lochner*’s sin point to narrower errors than believing in unenumerated “liberties.”

Some simply contend that “freedom of contract” is not a fundamental or essential liberty. Instead, the correct ones are a cluster of rights that intersect with concepts of autonomy and sexuality, such as abortion and contraception. The right not to quarter soldiers is little consolation if policemen can nonetheless pop in to monitor one’s sexual acts; indeed, the latter may be the greater intrusion.<sup>39</sup> The common justification for this is that the sexual autonomy rights, unlike economic ones, are “fundamental or integral to personhood, autonomy, or equal concern and respect.”<sup>40</sup> In this view, *Lochner*’s error was not in protecting unenumerated rights as being essential to liberty but in protecting the wrong rights. Yet work and compensation are, at least today, central to people’s lives, ranked second after family in surveys.<sup>41</sup> Work can be a form of self-actualization and a means of obtaining funds to pursue other means of self-actualization. Thus, this understanding of *Lochner*’s mistake does not do full justice to the interests implicated by prolonged business closures.

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<sup>36</sup> 410 U.S. 113 (1973).

<sup>37</sup> 505 U.S. 833 (1992).

<sup>38</sup> Many of the proponents of this position, however, believe that not only that *Lochner* and *Roe* were wrongly decided, but the Slaughter-House Cases as well, and see a role for the Fourteenth Amendment’s Privileges and Immunities Clause to do some of the work of unenumerated rights. The understanding of Privileges and Immunities as limiting legislative power to give special treatment to favored businesses would be particularly powerful as applied to lockdown regulations with multiple classes of favored and disfavored businesses, but is not pursued in this essay.

<sup>39</sup> See, e.g., *Griswold*, 381 U.S. at 484 (finding that the Constitution protects a constellation of privacy-preserving rights, such as the ban on quartering, and that the “penumbras” of these rights extend to marital privacy).

<sup>40</sup> James E. Fleming, *Fidelity, Basic Liberties, and the Specter of Lochner*, 41 WM. & MARY L. REV. 147, 164 (1999).

<sup>41</sup> Cf. *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (observing that sexual conduct is important in part because it is instrumental to achieving other meaningful things in life such as an “enduring” romantic relationship).



Relatedly, Professor Fleming suggests another understanding of the repudiation of *Lochner*—that, while economic liberties are genuine and important, they should not be aggressively enforced by courts because economic regulation does not typically undermine preconditions for democratic deliberation or trigger “distrust” of legislative motives in sense meant by John Hart Ely.<sup>42</sup> This rationale does not obviously apply to sweeping business closure orders that eliminate entire livelihoods. One might think that the government’s ability to prevent millions from working and make them dependent on government aid could also affect their ability to participate in democracy. Democratic participation can be undermined by both increasing direct costs (i.e., poll taxes), which is unconstitutional, and perhaps through indirect costs (i.e., inconvenient polling places and times). It would stand to reason that reducing people’s ability to bear any costs could undermine their energy and interest in politics.

The *Casey* plurality emphasized that *Lochner* was based on mistaken “factual assumptions” that “relatively unregulated” markets can “satisfy even minimum levels of human welfare.”<sup>43</sup> But as scholars have shown, this caricatures the *Lochner* Court, which accepted a fair degree of economic regulation.<sup>44</sup> Furthermore, the characterization of *Lochner* offered by the *Casey* Court does little to explain why such a doctrine should not be used to evaluate long-term COVID-19 business closures. Unlike the measures sometimes struck down by the *Lochner* Court, the current rules cannot be described as mere market regulation. They often involve the closure of business altogether and are not undertaken in the name of economic policy.

Other objections to *Lochner* stem not from a rejection of the notion of economic liberty, but rather the view that courts’ supervision of economic regulation would essentially come down to checking legislatures’ economic theories against their own. Economic policy, as Cass Sunstein<sup>45</sup> and the *Casey* majority put it,<sup>46</sup> cannot presuppose a baseline of a perfectly functioning free market. The “freedom of contract” that *Lochner* presumed, in this account, is of an equal bargaining position between the bakery owner and his employees. In this critique, an unrealistic view of the market was imposed by the Court to limit fairly minor

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<sup>42</sup> See Fleming, *supra* note 40, at 172.

<sup>43</sup> See *Planned Parenthood v. Casey*, 505 U.S. 833, 861 (1992).

<sup>44</sup> See, e.g., David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 9 n.24 (2003) (collecting cases).

<sup>45</sup> Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 882 (1987) (“We may thus understand *Lochner* as a case that failed because it selected, as the baseline for constitutional analysis, a system that was state-created, hardly neutral, and without prepolitical status.”).

<sup>46</sup> See *Casey*, 505 U.S. at 862 (holding that *Lochner* was overruled because “the facts of economic life were different from those previously assumed”).

adjustments in the employer-employee relationship designed to redress colorable market imperfections.<sup>47</sup> The bakers in New York were allowed to work long hours—just not more than sixty a week.

One need not embrace the sweeping “absolute” doctrine of *Lochner* to admit a liberty interest in a right to pursue one’s calling. Indeed, some state constitutions already continue to recognize a liberty interest in such matters.<sup>48</sup> Unlike the laws at issue in *Lochner*-era cases, a closure order does not relate to the conditions on which labor may be sold, but rather on whether it can be sold at all. Closure orders have entirely barred or made unsustainable otherwise lawful callings. For those not deemed “essential,” the inability to work in a job they had trained for, practiced, and invested in has a potentially vast impact on their identity and life that may persist long after the measures have been repealed. A person’s job is the single largest component of their day, a central part of their life. The liberty interest implicated by COVID-19 measures is not *Lochner*’s radical freedom of contract but rather something that may better be described as a right to pursue one’s occupation, which has a significant pre-*Lochner* pedigree.<sup>49</sup> Being prohibited from one’s work can carry with it a loss of purpose, depression, and a fundamental reordering of one’s life.<sup>50</sup> Contemporary substantive due process doctrine recognizes that “choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.”<sup>51</sup>

As a doctrinal matter, *Lochner*’s demise need not categorically preclude such challenges. *Lochner* dealt with commonplace economic regulation, based on debatable views of economic policy, which merely adjusted around the edges of the great web of contractual relationships

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<sup>47</sup> As numerous scholars have noted, this characterization, based on the facts of *Lochner* itself, fails to account for much of the “*Lochner* era,” in which the Court upheld most economic regulation and intervened primarily when there was a suggestion of special interest maneuvering behind restrictions on business. The law at issue in *Lochner*, for example, was pushed through by largely unionized German immigrant bakers to limit the competitive advantage of mostly non-German, non-unionized immigrant bakers. See Bernstein, *supra* note 24, at 1476–81.

<sup>48</sup> *Patel v. Tex. Dep’t of Licensing & Regul.*, 469 S.W.3d 69, 87 (Tex. 2015) (“[T]he standard of review for as-applied substantive due course challenges to economic regulation statutes includes an accompanying consideration . . . : whether the statute’s effect as a whole is so unreasonably burdensome that it becomes oppressive in relation to the underlying governmental interest.”).

<sup>49</sup> See John Hart Ely, “*To Pursue Any Lawful Trade or Avocation*”: *The Evolution of Unenumerated Economic Rights in the Nineteenth Century*, 8 U. PA. J. CONST. L. 917, 952–4 (2006); see also David E. Bernstein, *The Due Process Right to Pursue a Lawful Occupation: A Brighter Future Ahead?*, 126 YALE L.J.F. 287, 299–301 (2016) (arguing that a right to pursue an occupation is not just an economic interest, but involves aspects of personal self-realization and autonomy, and may have more appeal to the contemporary Supreme Court).

<sup>50</sup> See *Patel*, 469 S.W.3d at 87 (Tex. 2015) (Willet, J., concurring) (“[T]he right to put your mind and body to productive enterprise, is not a mere luxury to be enjoyed at the sufferance of governmental grace, but is indispensable to human dignity and prosperity.”).

<sup>51</sup> *Casey*, 505 U.S. at 851.

that are made possible by organized government, and might thus be regulated by government. Even during the pandemic, some unenumerated “liberty” interests not recognized by the *Lochner* Court have afforded protection against COVID-19 closure orders.<sup>52</sup> It is not doctrinally unthinkable—though certainly not clearly provided for in existing constitutional doctrine—to suggest that novel government prohibitions on doing business in general could implicate a right to pursue an occupation. To borrow a phrase from *Casey*, workers’ and business owners’ “ability to participate equally in the economic and social life of the Nation has been facilitated by their ability”<sup>53</sup> to work in otherwise lawful professions even if not deemed “essential” by the state.

### III. VIABLE SUBSTANTIVE DUE PROCESS THEORIES POST-*LOCHNER*

#### A. The Difference Between Economic Regulation and Wholesale Closure Orders

The abandonment of *Lochner* does not necessarily preclude substantive due process challenges in the context of broad business closure orders that are distinguishable in important ways from the issues at play in cases of hours and wages regulation. Assuming, as current law does, that due process provides protection against extreme deprivations of liberty, then depending on what *Lochner*’s mistake was, Fourteenth Amendment challenges to business closures should not be entirely precluded. The vast level of control state governments have taken over daily economic life during the pandemic is unprecedented and reveals a need for a recognition of some liberty interest in the ability to pursue a calling.

One reason to think that the abandonment of *Lochner* should not entirely preclude Fourteenth Amendment challenges to business closure orders is that the nature of the liberty interest the business owners assert against COVID-19 closures is quite different from the interest in *Lochner*. When the Court overruled the *Lochner* doctrine in *West Coast Hotel v. Parrish*,<sup>54</sup> it claimed that those cases embodied a doctrine of “absolute freedom of contract.”<sup>55</sup> Yet, as Justice Holmes explained in his famous dissent from the *Lochner* Court’s jurisprudence, involving a case where the majority struck down a federal minimum wage law for women, contractual relations are already limited by a wide variety of

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<sup>52</sup> See cases cited *supra* note 14.

<sup>53</sup> *Casey*, 505 U.S. at 856.

<sup>54</sup> 300 U.S. 379 (1937).

<sup>55</sup> *Id.* at 406.

regulatory provisions whose constitutionality seems well-settled.<sup>56</sup> Hours and wages regulation added just another layer.

*Lochner's* maximum hours regulation limited some bakers' business at the margins (and did not affect many other bakers at all). In overruling it, the Court emphasized the businesses must necessarily submit to many regulations on the manner and conditions in which they conduct themselves. So perhaps the problem with the *Lochner* doctrine policing laws that tweaked around the edges of contracts was that, given the ubiquity of regulation, there is no clear, non-ideological principle for accepting some but not all.

Alternatively, if *Lochner's* mistake was judicial second-guessing of economic policy, it tells us little about shutdown orders, which in no way seek to make economic policy. Stay-at-home orders and lockdowns are not based on any theory of labor relations, market structure, or other economic theory. Yet shutdown orders, more than most economic regulations, impinge on people's ability to make a living. To put it another way, scale matters. *West Coast Hotel's* rejection of a liberty of contract does not necessarily govern in the current circumstances because the breadth of governmental assertions of power over people's livelihoods is unprecedented.

#### B. The Difference Between the Public Health Response to COVID-19 and Prior Pandemics

COVID-19 is not the first public health menace since the adoption of the Constitution. Nor is it the first pandemic—the 1918 Spanish Flu, the study of which heavily informed government contingency planning for such emergencies—was considerably worse in its lethality, with case fatality rates in excess of 2.5 percent.<sup>57</sup> The virus was also respiratory and transmissible through close contact. Public health authorities responded in many ways we would find familiar today: school closures, mask mandates, and calls for social distancing.<sup>58</sup> While many cities shuttered mass gathering places (churches, saloons, theaters, and dance halls), a general closure of business was not implemented in almost any jurisdiction.<sup>59</sup> The most aggressive measures were regulating

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<sup>56</sup> *Adkins v. Children's Hosp.*, 261 U.S. 525, 568–69 (1923) (Holmes, J., dissenting) (citing Sunday closure laws, insurance rate regulation, mining regulation, bread-loaf size regulation and other measures that restrict freedom of contract).

<sup>57</sup> See generally JOHN BARRY, *THE GREAT INFLUENZA: THE STORY OF THE DEADLIEST PANDEMIC IN HISTORY* (2005).

<sup>58</sup> See ALFRED W. CROSBY, *AMERICA'S FORGOTTEN PANDEMIC: THE INFLUENZA OF 1918* (2d ed. 2003).

<sup>59</sup> See Robert Barro, *Non-Pharmaceutical Interventions and Mortality in US Cities During the Great Influenza Pandemic, 1918–19* 4 (Nat'l Bureau of Econ. Rsch., Working Paper No. 27,409,

business hours with curfews or staggered shifts in factories<sup>60</sup>—closer to the measures in question in *Lochner* than to the current pandemic response.

Several comprehensive studies of health measures adopted across the United States during the Spanish Flu reveal that, even in the most proactive jurisdictions, closures of ordinary retail businesses were off-limits.<sup>61</sup> The benefits of reducing human interaction to reduce transmission were well understood, and it is unclear whether such measures were not considered solely because of the economic effects, or because of some constitutional scruple.

The lack of general closures is ironic given that twenty-first-century studies of the “non-pharmaceutical interventions” adopted during the 1918 Spanish Flu were quite influential in formulating the response to the COVID-19 pandemic. In particular, the relative success of a combination of measures, such as masking and closures of mass gathering places, led public health scientists in 2020 to emphasize “[e]arly, layered, and long” interventions.<sup>62</sup> But the nature or “thickness” of the closure “layer” of intervention does not seem to have been informed by the 1918 experience.

The history of public health response is particularly relevant because the public health experts take the 1918 Spanish Flu response as a general model for thinking about contemporary pandemic response, including COVID-19. Governmental planning for a new pandemic had in recent decades taken the Spanish Flu as an explicit model or principal case. Notably, such plans did not contemplate mandatory business closures at all, and instead dealt only briefly and warily with optional “snow days.”<sup>63</sup> In other words, in the years prior to COVID-19, pandemic planners saw the response to the 1918 Spanish Flu as a model.

Yet the COVID-19 response unexpectedly departed from the script by using blanket business closure orders. These measures, adopted early by the West Coast states, were apparently mimicking China’s and

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2020), [https://www.nber.org/system/files/working\\_papers/w27049/w27049.pdf](https://www.nber.org/system/files/working_papers/w27049/w27049.pdf) [https://perma.cc/UW43-GN5B].

<sup>60</sup> *Id.*

<sup>61</sup> Howard Markel et al., *Nonpharmaceutical Interventions Implemented by US Cities During the 1918-1919 Influenza Pandemic*, 298 JAMA 644, 646–48 (2007); Richard J. Hatchett et al., *Public Health Interventions and Epidemic Intensity During the 1918 Influenza Pandemic*, 104 PROC. NAT’L ACAD. SCI. 7582, 7583 (2007).

<sup>62</sup> Lawrence Wright, *The Plague Year*, NEW YORKER (Dec. 28, 2020), <https://www.newyorker.com/magazine/2021/01/04/the-plague-year> [https://perma.cc/822X-GFPH].

<sup>63</sup> See THE NATIONAL STRATEGY FOR PANDEMIC INFLUENZA, HOMELAND SEC. COUNCIL 108 (2006), <https://www.cdc.gov/flu/pandemic-resources/pdf/pandemic-influenza-implementation.pdf> [http://perma.cc/VZ4K-LL8U] (“How long and how effectively snow day restrictions can be maintained has not been determined and thus the value of such restrictions has not been quantified.”).

Italy's handling of their COVID-19 outbreaks,<sup>64</sup> though, of course, those countries were not limited by the U.S. Constitution's individual rights doctrines. The point here is not to criticize the handling of the COVID-19 pandemic but rather to highlight its radical departure from prior practice, and perhaps prior imagination,<sup>65</sup> of the scope, intensity, and duration of government power over private business. This suggests that the reversal of *Lochner* and its progeny by *West Coast Hotel*, based on a view of the Court's role in relation to economic regulation, should not necessarily extend to broad circumscribing of people's livelihoods in the context of a public health response.

C. The Ability to Close Businesses Because they are Deemed "Unessential" Represents an Unprecedented Exercise of Government Power, with Significant Potential for Arbitrariness

Broadly-worded public health laws have given governments extraordinary power to force people from their chosen occupations, destroy vast investment and reliance interests, and make millions dependent on government assistance. This is one of broadest exercises of state power over individuals in the country's history.<sup>66</sup> Moreover, the power to both shutter the economy and then exempt certain lines of work as "essential," or to issue individual exemptions, only exacerbates the potential intrusion on liberty. In the COVID-19 dispensation, who works and who does not is a discretionary determination by government officials. To be sure, not all of the pandemic's economic dislocation can be attributed to government orders. Even in the absence of government action, increased absenteeism, voluntary social distancing, consumer uncertainty, and other factors would have resulted in the closure of some businesses. But, presumably, voluntary avoidance would not have the same effect because otherwise the closure orders would not have been necessary.<sup>67</sup>

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<sup>64</sup> Vivian Ho, *California: Millions Told to 'Shelter in Place' to Stop Spread of Coronavirus*, GUARDIAN (Mar. 16, 2020), <https://www.theguardian.com/world/2020/mar/16/california-coronavirus-shelter-in-place-bay-area> [<https://perma.cc/3L5U-3F6A>].

<sup>65</sup> See generally David Bell et al., *Nonpharmaceutical Interventions for Pandemic Influenza, National and Community Measures*, 12 WORLD HEALTH ORG., Jan. 2006, [https://wwwnc.cdc.gov/eid/article/12/1/05-1371\\_article](https://wwwnc.cdc.gov/eid/article/12/1/05-1371_article) [<https://perma.cc/3BQZ-Z5GX>] (describing current knowledge of efficacy of masks, school closures and other measures to combat a severe global pandemic, but not discussing broad business closures).

<sup>66</sup> The only comparable regulations of similar reach, such as conscription and wartime rationing, were federal.

<sup>67</sup> The question of whether a particular business's losses are due to government closure orders or the indirect effects of the pandemic arises frequently in the litigation of business interruption insurance claims since the start of the pandemic. Insurers often claim, with considerable success, that the policyholders' losses are attributable to government orders, and thus do not constitute a

The point about “essential” businesses bears emphasis. Even in the first frantic wave of stay-at-home orders, some occupations were deemed “essential”; this list would later expand. Many of these determinations have typically not been based on particular scientific knowledge about what kind of work is more likely to spread contagion. Often, they depend on competing intuitions or hunches, or perhaps competing interest group lobbying,<sup>68</sup> rather than epidemiological data. Perhaps the most glaring example of this is the California restaurant that could not even provide outdoor dining, while a huge catering tent serving hundreds was set up next door,<sup>69</sup> due to the determination that the entertainment industry was essential.<sup>70</sup> Moreover, the determination of a business being essential has typically not required it be “essential” in the strict sense that perhaps would apply only to grocery stores and pharmacies. For example, liquor and marijuana purveyors have been allowed to stay open from the beginning almost everywhere.<sup>71</sup> Allowing marijuana sellers to continue their business while shuttering others shows the vast state power implicit in “essential” designations, as marijuana remains a scheduled drug prohibited under federal law<sup>72</sup> and, until very recently, state law.

Politically influential professionals such as lawyers and members of the media have enjoyed special dispensation, far broader than would be required by the constitutional right to counsel or heightened protection for political speech. For example, the legal and media exceptions

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“direct physical loss” as required by many policies. See Rachel E. Keen & Jonathan Reid Reich, *COVID-19 Shutdowns, Related Litigation Put Pressure on Business Interruption Insurers*, NAT'L L.J. (Oct. 26, 2020), <https://www.natlawreview.com/article/covid-19-shutdowns-related-litigation-put-pressure-business-interruption-insurers> [<https://perma.cc/473E-69S2>].

<sup>68</sup> Many states included exceptions for “labor union essential activities.” See, e.g., *Essential Business Operations*, STATE OF IND. (Apr. 20, 2020), <https://www.coronavirus.in.gov/2496.htm> [<https://perma.cc/KG4J-RFV2>].

<sup>69</sup> Mary Meisenzahl, ‘A Slap in My Face’: LA Restaurant Owner’s Video Showing a Film Shoot’s Catering Tent Set Up Next to Her Closed Eatery Goes Viral, BUS. INSIDER (Dec. 7, 2020), <https://www.msn.com/en-us/foodanddrink/other/a-slap-in-my-face-la-restaurant-owners-video-showing-a-film-shoots-catering-tent-set-up-next-to-her-closed-eatery-goes-viral/ar-BB1b154v> [<https://perma.cc/6D8Q-WJ3W>].

<sup>70</sup> STATE OF CAL., ESSENTIAL WORKFORCE 23 (Apr. 28, 2020), <https://files.covid19.ca.gov/pdf/EssentialCriticalInfrastructureWorkers.pdf> [<https://perma.cc/V9UU-67W3>]; see also Lee Fang, *Hollywood Deployed Lobbyists to Win Exemptions to Strict California Lockdown*, INTERCEPT (Dec. 11, 2020), <https://theintercept.com/2020/12/11/hollywood-covid-filming-california-lockdown/> [<https://perma.cc/GZ4J-QZZW>].

<sup>71</sup> See Connie Lin, *What is An ‘Essential’ Business Anyway? A Cheat Sheet for Getting Through the COVID-19 Pandemic*, FAST CO. (Mar. 31, 2020), <https://www.fastcompany.com/90484557/what-is-an-essential-business-anyway-a-cheat-sheet-for-getting-through-the-covid-19-pandemic> [<https://perma.cc/J6JE-V4T3>].

<sup>72</sup> 21 U.S.C. § 812, Sched. I(c)(10) (2019).

apply in full to entertainment lawyers<sup>73</sup> and gossip reporters.<sup>74</sup> Real estate services enjoyed special exemptions in some jurisdictions,<sup>75</sup> even as the Centers for Disease Control and Prevention banned residential evictions on the theory the people moving around could spread the virus.<sup>76</sup>

All such professions may be essential in some sense, but not in the sense of essential to keeping body and soul together, maintaining wartime production, or some other clear goal.<sup>77</sup> Given the ubiquitous inclusion of liquor stores, “essential” is clearly not defined in relation to the public health. Rather, they simply represent judgements about what callings the government deems worthwhile or important based on considerations going far beyond the expertise of public health officials. The greatest prior assertion of government authority over private individual livelihoods was the Office of Price Administration, War Production Board, and related agencies which had vast powers including ordering the cessation of businesses using a long list of defense-related products.<sup>78</sup> Yet, even their power was statutorily confined to matters that “promote[d] the national defense.”<sup>79</sup>

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<sup>73</sup> Joshua Lenon, *Are Lawyers Essential Workers in Your State?*, CLIO (Apr. 6, 2020), <https://www.clio.com/blog/lawyers-essential-services/> [<https://perma.cc/P3CR-N4HX>] (listing state exemptions for legal services). Notably, some jurisdictions indeed limited the legal services exception with the language “only when necessary to assist in compliance with legally mandated activities,” but most did not. *Id.*

<sup>74</sup> See, e.g., Memorandum from Brandon Wales, Acting Director, Cybersecurity and Infrastructure Security Agency, at 19 (Dec. 16, 2020) [https://www.cisa.gov/sites/default/files/publications/ECIW\\_4.0\\_Guidance\\_on\\_Essential\\_Critical\\_Infrastructure\\_Workers\\_Final3\\_508\\_0.pdf](https://www.cisa.gov/sites/default/files/publications/ECIW_4.0_Guidance_on_Essential_Critical_Infrastructure_Workers_Final3_508_0.pdf) [<https://perma.cc/UK95-RZD2>] (recommending states treat as essential “media” and “lawyers” regardless of their specialty or function); Mich. Exec. Order No. 2020-21 (Mar. 23, 2020), <https://www.legislature.mi.gov/documents/2019-2020/executiveorder/pdf/2020-EO-21.pdf> [<https://perma.cc/ZR68-WTUD>] (issuing a blanket “news media” exception); *Guidance for Determining Whether a Business Enterprise is Subject to a Workforce Reduction Under Recent Executive Orders*, STATE OF N.Y. (Oct. 23, 2020), <https://esd.ny.gov/guidance-executive-order-2026> [<https://perma.cc/2TFB-4U4A>] (same).

<sup>75</sup> Memorandum from Brandon Wales, *supra* note 74; *Guidance for Determining Whether a Business Enterprise is Subject to a Workforce Reduction Under Recent Executive Orders*, *supra* note 74.

<sup>76</sup> Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292, 55,292 (Sept. 4, 2020).

<sup>77</sup> Some states, like Pennsylvania, attempted to define “essential” more strictly, such as Pennsylvania Gov. Tom Wolfe’s broad closure order, which applied to all but “life-sustaining businesses.” See *Order Regarding the Closure of All Businesses That are Not Life Sustaining*, COMMONWEALTH OF PA. § 1 (Mar. 19, 2020), <https://www.governor.pa.gov/wp-content/uploads/2020/03/20200319-TWW-COVID-19-business-closure-order.pdf> [<https://perma.cc/XA4Z-YAZP>]. In practice, however, “life-sustaining” functioned synonymously with “essential.” See Josh Blackman, *The “Essential” Free Exercise Clause*, 44 HARV. J. L. & PUB. POL’Y 637, 651, 658, 690 (2021).

<sup>78</sup> See, e.g., *Perkins v. Brown*, 53 F. Supp. 176, 179 (S.D. Ga. 1943) (upholding an order by the Office of Price Administration barring plaintiff gas dealers from operating their business due to rationing).

<sup>79</sup> Act of May 31, 1941, 55 Stat. 236, 236.



In short, COVID-19 business closure orders are not merely exercises of ordinary public health power, nor are they economic regulation of a traditional kind. They apply, unlike the traditional measures of quarantines and isolation, not to people and enterprises suspected of being infected or potentially exposed, but to everyone. COVID-19 closures involve a far broader power to determine what work is worthwhile to permit. Such an exercise of power will almost always be “reasonable” given the lack of any standard for what is “essential,” and thus any constitutional check must involve a higher level of scrutiny.

#### IV. UNLOCKING *LOCHNER*—AND LIMITING IT

Recognizing what one might call a “little *Lochner*” interest in a right to be free of bans on engaging in otherwise lawful vocations need not reopen the door, closed in *West Coast Hotel*, to challenging state economic regulation. The Fourteenth Amendment can limit state power to engage in wholesale deprivations of people’s livelihoods without resurrecting *Lochner* itself. Thus, the liberty interest contemplated here would be narrower than *Lochner*’s free-wheeling examinations of state economic policy.

For example, a highly restrictive test for invoking such a liberty interest would be to allow its invocation only against prohibitions on work that are (1) categorical; (2) lack a basis in the historical and traditional uses of the police power in pandemic emergencies of comparable severity; and (3) do not necessarily deserve the great deference afforded to public health measures because they do not have a particularized scientific rationale. The Court’s substantive due process jurisprudence frequently looks to what practices have won acceptance with time as a limiting factor.<sup>80</sup>

The first factor would limit the use of “little *Lochner*” to orders shuttering otherwise lawful businesses as a class, as opposed to imposing limits on their operations. This would bypass almost all economic legislation without calling into doubt public health responses such as social distancing requirements or occupancy and hours regulations. The

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<sup>80</sup> See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (“Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation’s history and tradition.”) (citations omitted). To be sure, over time new practices may displace older ones as touchstones of tradition, but it would be hard to say the past eighteen months of COVID-19 response makes irrelevant the extent the government exercised authority in the past century of pandemic control measures, from the Spanish Flu to H1N1. Cf. *Lawrence v. Texas*, 539 U.S. 558, 571–72 (2003) (“We think that our laws and traditions in the past half century are of most relevance here.”). The more current the practice, the harder it is to distinguish a genuine tradition from simply things that have happened. And the 1918–19 experience is particularly relevant because the public health threat was at least as great as with COVID-19.

second factor would prevent such substantive due process claims to be used to raise the level of scrutiny of standard public health measures, such as compulsory vaccination, quarantine and isolation, and the closure of mass gatherings and schools, all of which have been long-standing staples in the management of infectious diseases. It would, however, allow courts to meaningfully scrutinize measures that have a broad and dramatic impact, while going far beyond previously accepted or expected measures.

The third factor is crucial to both policing arbitrary exercises of government authority and respecting the scientific judgements of public health authorities. Many determinations about what businesses can remain open were not supported by an explicit scientific basis.<sup>81</sup> For example, in one case, when asked what evidence supported closing certain business but not others, one state official “could not point to any facts in the record.”<sup>82</sup> But it is clear that many of the determinations about who is permitted to work also lack any individualized evidentiary or scientific basis. Thus, the third factor should allay concerns about second-guessing expert determinations. In practice, it would mean that a broad shutdown would be easier to constitutionally justify than one riddled with exceptions. The former could be justified by a high-level public health determination that regular business must halt. That a broader shut-down might be easier to sustain than one riddled with special interest exemptions makes sense, as refusing to grant such dispensations is a political check on the use of shut-downs and confirms the exigency of the public health situation.

Recognizing a limited liberty interest in pursuing one’s business would provide some check against government overreach in time of crisis, and, in particular, against the extraordinary power of determining what work is important. But it need not call into doubt public health business closure orders and stay-at-home rules generally. The ability to articulate such a right does not mean it would necessarily, or even commonly, lead to the invalidation of such measures. The existence of constitutional protection for religion did not stop courts from turning away the majority of Free Exercise challenges to closure orders and social distancing rules imposed on places of worship, especially during the first months.<sup>83</sup>

A revival of a mini-*Lochner* doctrine would still be subject to the deference to public health measures called for by *Jacobson*, which itself

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<sup>81</sup> See *supra* notes 68–76 and accompanying text.

<sup>82</sup> *League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer*, 468 F. Supp. 3d 940, 950 (W.D. Mich. 2020), *appeal dismissed*, 843 F. App’x 707 (6th Cir. 2021).

<sup>83</sup> See *supra* notes 9–11.

involved a substantive due process claim. Government public health measures have a strong presumption of validity under *Jacobson*, but that is not the same as saying there is no individual rights basis on which to challenge them. *Jacobson* sustained a municipal vaccination requirement during a smallpox epidemic and was, until the COVID-19 pandemic, the Court's principal pronouncement on balancing constitutional rights and public health measures. From the start of the pandemic, many have read *Jacobson* as standing for vast judicial deference to public health measures taken to prevent the spread of a serious infectious disease.<sup>84</sup> Some courts have read it even more broadly as condoning a suspension of constitutional liberties during a pandemic so long as the health measures are not "pretext[ual]."<sup>85</sup> Whatever the soundness of these ideas, they certainly read too much into *Jacobson*. Though *Jacobson* did have broad language about a society's right to brush away individual rights to protect itself, such language presaged the Supreme Court's notorious upholding of compulsory sterilization to stop the "spread" of mental retardation.<sup>86</sup> *Buck v. Bell*<sup>87</sup> alone shows the dangers of confusing *Jacobson*'s holding in light of its limited facts with its broader musings about social self-defense.

On its facts, *Jacobson* was not dramatic. The public health threat involved was in many ways greater than COVID-19: smallpox, a disease far deadlier, and which particularly targeted children. But the governmental response was far more modest than in the current pandemic: it required people to either be vaccinated or pay a one-time five-dollar penalty (roughly \$140 today).<sup>88</sup> The plaintiff in *Jacobson* faced what amounts to a parking ticket, and the case thus serves as, at most, a limited precedent for today's COVID-19 measures.<sup>89</sup> Yet rights protected by the even the strictest scrutiny have received *Jacobson* treatment during the pandemic.

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<sup>84</sup> See, e.g., *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring).

<sup>85</sup> See *Cassell v. Snyders*, 458 F. Supp. 3d 981, 993 (N.D. Ill. 2020), *aff'd*, 990 F.3d 539 (7th Cir. 2021).

<sup>86</sup> *Buck v. Bell*, 274 U.S. 200, 207 (1927) ("[S]ociety can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes." (citing *Jacobson*)).

<sup>87</sup> 274 U.S. 200 (1927).

<sup>88</sup> See *Jacobson v. Massachusetts*, 197 U.S. 11, 21 (1905). See also *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 70, (2020) (Gorsuch, J., concurring) (questioning *Jacobson*'s relevance to COVID shutdown orders by asking "what does that [a small fine] have to do with our circumstances?").

<sup>89</sup> See *Lasertron, Inc. v. Empire State Dev. Corp.*, 138 N.Y.S.3d 844, 851–52 (N.Y. Sup. Ct. 2021) ("*Jacobson* is hardly the super-precedent that it is purported to be. The 1905 case addresses a challenge to a state law that required residents to be vaccinated against smallpox or pay a \$5 fine. The burden in *Jacobson* was fairly modest—either get vaccinated or pay a fine. Here, the burden is unlimited, as the result is closure and the forfeiture of your business and livelihood.").

One important limitation in applying *Jacobson* to current COVID-19 measures is that the former involved a single, discrete public health measure with a well-elaborated scientific justification—vaccination. The Court held that the efficacy of vaccination was “knowledge which, it is safe to affirm, is common to all civilized peoples touching smallpox and the methods most usually employed to eradicate that disease.”<sup>90</sup> This leaves open the possibility that more particular measures, such as not allowing outdoor dining in restaurants but only in film catering tents, that may not be as universally obvious or widely practiced, could be open to challenge.

Valid concerns about courts’ relative lack of expertise are reflected in an extremely forgiving standard of review, not in entirely insulating such measures from challenge. Moreover, allowing such challenges to measures would not substitute courts’ judgements for those of medical experts but rather check whether there is any particularized scientific determination behind the restriction.<sup>91</sup> Courts have repeatedly noted that government closure orders are not necessarily based on “science,” as evidenced by governmental defendants’ occasional inability to articulate reasons for some closure orders<sup>92</sup>—and these are exactly the kind of measures a “little *Lochner*” would target.

Courts already scrutinize the necessity and arbitrariness of COVID-19 measures as applied to abortion clinic restrictions, gun shops, travel restrictions, and protests. In some of these cases,<sup>93</sup> they have even found that the challenged policies impermissibly infringe on constitutional rights. Such a finding typically includes at least an implicit determination that the measure was not absolutely vital for public safety. If public health restrictions can be arbitrary when they affect churches and abortion clinics, there is no reason to think they may not be arbitrary when they affect people’s ability to work while sweeping far more broadly than typical paternalistic economic regulations.

It has become clear in the past year that courts do not abdicate their responsibility of judicial review simply because challenged measures have a public health justification.<sup>94</sup> Courts have even struck

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<sup>90</sup> *Jacobson*, 197 U.S. at 28.

<sup>91</sup> See, e.g., *Capitol Hill Baptist Church v. Bowser*, 496 F. Supp. 3d 284, 299 (D.D.C. 2020) (noting that the city “marshaled no scientific evidence” to sustain certain closure rules and distinctions, and that what it had put forth would fail to satisfy *Daubert* evidentiary test for admissibility of scientific expertise).

<sup>92</sup> See *Lasertron*, 138 N.Y.S.3d at 851 (“Respondents could not (or would not) answer why certain indoor activities were permitted and others, like *Lasertron*, were not.”).

<sup>93</sup> See cases cited *supra* notes 9–15.

<sup>94</sup> See, e.g., *Lasertron*, 138 N.Y.S.3d at 851 (“While it is understood that recommendations of those in the public health field should be given considerable weight, this does not mean that *carte blanche* is generously given to governmental authorities without redress or review.”)

down measures with purported public health justifications not only on individual rights grounds, but even on more inchoate structural constitutional grounds.<sup>95</sup> Thus a “little *Lochner*” would not represent some new supremacy of judges over health determinations. It would simply recognize that perhaps the most important human impact of such measures on people’s autonomy falls in the broad powers exercised over their ability to work.

## V. CONCLUSION

The extraordinarily broad restrictions on business imposed during the COVID-19 pandemic have highlighted the extraordinary power governments can exercise over individuals’ lives by preventing them from making a livelihood and deciding who does get to work. Despite the revival of substantive due process as a constitutional doctrine in the 1960s, liberty interests involving work are commonly thought to be outside the scope of the Fourteenth Amendment as a result of the repudiation of the *Lochner* doctrine. This Essay has shown that a closer examination of the reasons behind the abandonment of *Lochner* demonstrate that, even under current precedents, substantive due process challenges to unprecedentedly broad business closures should remain viable under certain circumstances, especially when such measures regulate people’s ability to work but are not based on any particular view of economic policy. As a positive matter, the sheer scope of government control of livelihoods in the name of public health suggests some such liberty interest should be recognized, even if it currently is not. It would be paradoxical for courts to police various commonplace incursions into people’s autonomy yet leave perhaps the largest interference outside the scope of constitutional protection.

This is not to say that business closures in a pandemic should not enjoy the same high presumption of validity as other public health measures. Certainly, they should, especially at the height of an emergency. But this Essay argues that such a presumption should not be absolute and should yield to liberty interests in some circumstances. Judicial scrutiny will be most valuable when dealing with broad and novel assertions of power.

The ability to assert a mini-*Lochner* right in such circumstances would provide is some layer of judicial safeguard against closure

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<sup>95</sup> See, e.g., *Skyworks, Ltd. v. Ctrs. for Disease Control & Prevention*, No. 5:20-CV-2407, 2021 WL 911720, at \*10 (N.D. Ohio Mar. 10, 2021) (holding that CDC eviction moratorium exceeded the agency’s statutorily delegated powers, and noting that a contrary conclusion would “implicate serious constitutional concerns”), *order clarified*, No. 5:20-CV-2407, 2021 WL 2228676 (N.D. Ohio June 3, 2021); *Terkel v. CDC*, No. 6:20-CV-00564, 2021 WL 742877, at \*10 (E.D. Tex. Feb. 25, 2021) (holding that CDC moratorium on residential evictions to avoid spreading COVID exceeded federal government’s enumerated powers).

measures whose impact on the lives of Americans—and on their ability to exercise autonomy—may far exceed, in practical effect, the burdens to religious or reproductive rights.<sup>96</sup> Even with a limited right of the kind described here, the relevant public health measures would enjoy the strongest presumption of validity. Yet courts have also recognized that, during the pandemic, states have issued regulations that are arbitrary,<sup>97</sup> excessive, and lack even a purported scientific basis.

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<sup>96</sup> Given the U.S. system of purely negative rights, neither the right to congregate in prayer, to read a newspaper, have an abortion, nor carry a firearm in self-defense have practical value without the money to build and maintain houses of worship, subscribe to new sources, and pay for a gun or an abortion.

<sup>97</sup> For example, Michigan deemed hardware stores essential, unless they sell paint or mulch. See Blackman, *supra* note 77, at 643 (describing the classification as “unreasonable”). Other states included landscaping and nurseries in list of essential businesses. See, e.g., Memorandum from the Maryland Office of Legal Counsel 12(b)(ii) (Mar. 23, 2020) <https://governor.maryland.gov/wp-content/uploads/2020/03/OLC-Interpretive-Guidance-COVID19-04.pdf> [<https://perma.cc/728L-5677>].