

Law Enforcement's Lochner

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Miriam H. Baer

Abstract

Several understudied doctrines of constitutional procedure empower the government to demand information from business entities, whether they are third-party witnesses or first-party targets of criminal and regulatory investigations. These procedural rules vest the government with a remarkable degree of discretion and power.

*This Article examines two jurisprudential developments, whose convergence casts into doubt these government-friendly doctrines. A profound change in how the Supreme Court views Fourth Amendment searches on the one hand, and its how it conceptualizes corporate personhood on the other, threatens an erosion of government enforcement power reminiscent of the Supreme Court's 1905 decision in *Lochner v. New York*. Whereas *Lochner* interfered with the government's ability to make new laws, the developments forecasted here would weaken the government's ability to enforce extant laws.*

*How might the federal government respond to such an equilibrium shift? Faced with the loss of investigative power, enforcement agencies would reach for a mixture of imperfect strategies. The upshot of this analysis is accordingly a warning: If corporations can weaponize speech and religion, they can weaponize other constitutional rights, and a law enforcement's *Lochner* may prove to be just as potent—and problematic—as its more conventional antecedents.*