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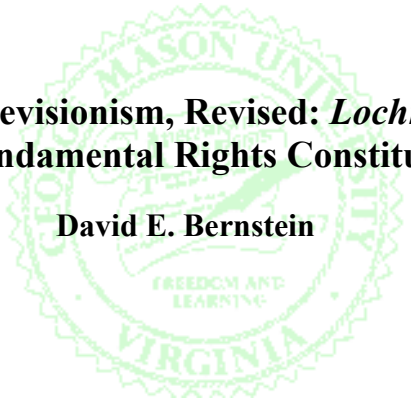

***Lochner* Era Revisionism, Revised: *Lochner* and the Origins of Fundamental Rights Constitutionalism**

David E. Bernstein

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Lochner Era Revisionism, Revised: *Lochner* and the Origins of Fundamental Rights Constitutionalism

David E. Bernstein*

* Visiting Professor, Georgetown University Law Center; Professor, George Mason University School of Law. E-mail: dbernste@gmu.edu. Jim Ely, Cynthia Estlund, Barry Friedman, Richard Friedman, Tom Grey, Renee Lerner, Michael Solimine, Nate Oman, Robert Post, Michael Seidman, and John Witt have provided helpful comments and suggestions, as did participants in faculty workshops at Columbia Law School, Georgetown University Law Center, and the University of Michigan School of Law. The author thanks the Law and Economics Center at the George Mason University School of Law for financial support for this Article. Megan Fotouros of George Mason's library staff diligently tracked down dozens of obscure sources needed for this Article. Jeffrey Jackson (Georgetown L.L.M. 2003) and Mollie Malone (GMU 2004) provided excellent research assistance.

Lochner Era Revisionism, Revised: *Lochner* and the Origins of Fundamental Rights Constitutionalism

Lochner v. New York *and its eponymous jurisprudential era have been central to constitutional discourse and debate in the United States for nearly one hundred years. Until recently, the legal community's understanding of the* Lochner era *was clouded by myths left over from the ideological and political battles of the Progressive and New Deal eras. In particular, the* Lochner *era Justices were portrayed as reactionary Social Darwinists who sought to impose a system of economic laissez-faire on the public. More recently, revisionist historians have disproved this and other myths, and have attempted to construct a more historically-grounded understanding of the* Lochner *era.*

The most popular revisionist work is Howard Gillman's book, The Constitution Besieged. *Gillman contends that the* Lochner *era Court was motivated by opposition to "class legislation," what today we would call special interest legislation. However, Gillman grossly overstates the role of class legislation analysis on the police powers jurisprudence of the United States Supreme Court during the* Lochner *era. Rather, as this Article shows, the basic motivation for Lochnerian jurisprudence was the Justices' belief that Americans had fundamental unenumerated constitutional rights, and that those rights were protected by the Fourteenth Amendment's Due Process Clause. The Justices had a generally historicist outlook, seeking to discover the content of fundamental rights through an understanding of which rights had created and advanced liberty among the Anglo-American people.*

This Article, then, argues that the jurisprudential significance of Lochner *was not, as Gillman and his supporters would have it, that the Court enforced a ban on class legislation. Quite the opposite,* Lochner's *primary importance is that it moved the Supreme Court away from class legislation (equal protection) analysis of police power legislation to an analysis that relied on the Justices'*

understanding of the fundamental liberties of the American people. In this regard, Lochner *was the progenitor of modern substantive due process cases such as* Griswold v. Connecticut *and* Roe v. Wade.

Some will argue that the current Court should reassess its endorsement of Roe, *because it is in the same tradition as* Lochner. *But perhaps the proper reaction to the conclusion that* Lochner *and* Roe *are in the same fundamental rights tradition is to reassess our understanding of* Lochner.

Lochner v. New York[1] and its eponymous jurisprudential era have been central to constitutional discourse and debate in the United States for nearly one hundred years.[2] For many decades, the history of the *Lochner* era's "substantive due process"[3] jurisprudence was portrayed as a simple

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[1] 198 U.S. 45 (1905).

[2] Even today, Supreme Court Justices across the political spectrum use *Lochner* as a negative touchstone with which they verbally bludgeon their colleagues. *See* Alden v. Maine, 527 U.S. 706, 814 (1999) (Souter, J., dissenting) ("the 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"); Seminole Tribe v. Florida, 517 U.S. 44, 166 (1996) (Souter, J., dissenting) ("The majority today, indeed, seems to be going *Lochner* one better."); United States v. Lopez, 514 U.S. 549, 604 (1995) (Souter, J., dissenting) (comparing the Court's decision limiting the scope of the Commerce Clause to *Lochner*); Dolan v. City of Tigard, 512 U.S. 374, 406-09 (1994) (Stevens, J., dissenting) (equating the majority's refusal "to identify a sufficient nexus between an enlarged building with a newly paved parking lot and the state interests in minimizing the risks of flooding and traffic congestion" with the *Lochner* Court's refusal to presume a connection between the maximum hours regulation in that case and the state interest in protecting the public health); C & A Carbone, Inc., v. Town of Clarkstown, 511 U.S. 383, 423-24 (1994) (Souter, J., dissenting) ("No more than the Fourteenth Amendment, the Commerce Clause 'does not enact Mr. Herbert Spencer's *Social Statics* . . . [or] embody a particular economic theory, whether of paternalism . . . or of *laissez faire* . . .'"), quoting Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting); Planned Parenthood v. Casey, 505 U.S. 833, 959-61 (1992) (Rehnquist, C.J., dissenting) (analogizing *Roe v. Wade* to *Lochner*). Justices in the majority feel obligated to distinguish their opinions from *Lochner*. *E.g.*, College Savings Bank v. Florida Prepaid Post Secondary Educ. Expense Bd., 527 U.S. 666, 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* . . . ."); United States v. Lopez, 514 U.S. 549, 601 n.9 (1995) (Thomas, J., concurring) ("Nor can the majority's opinion fairly be compared to *Lochner v. New York* . . ."); TXO Productions Corp. v. Alliance Resources Corp., 509 U.S. 443, 455 (1993) (Stevens, J.) (plurality opinion) (distinguishing reliance on specific sound *Lochner* era precedents with relying on *Lochner*ian jurisprudence more generally).

[3] The phrase "substantive due process" is an anachronism when applied to the *Lochner* era. No one, including the Justices who typically dissented from the libertarian cases of the era, used this phrase. *See* JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 103-04 (2d ed. 1998); James W. Ely, Jr., *Reflections on* Buchanan v. Warley*, Property Rights, and Race*, 51 VAND. L. REV. 953, 956 (1998); Gary D. Rowe, Lochner *Revisionism Revisited*, 24 L. & SOC. INQUIRY 221, 244 (1999); *see also* G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 245 (2000) (explaining that it was not until the 1950s that jurisprudence under the Due Process Clause was separated into "substantive" and "procedural" categories). Morton Horwitz argues that attacks on the substantive aspect of due process were "largely produced by later critical Progressive historians intent on delegitimating the *Lochner* court." *See*

story of enlightened wisdom losing to, struggling with, and ultimately triumphing over reactionary mendacity.

Historians, political scientists, and legal scholars all told a tale with the following outline: *Lochner* era Supreme Court Justices, influenced by pernicious Social Darwinist ideology, sought to impose their laissez-faire views on the American polity.[4] The *Lochner* era Justices, infected with class bias, knew that their substantive due process decisions favored large

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MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 158 (1992). Some contemporaries of the *Lochner* era Court, however, did argue that the Due Process Clause of the Fourteenth Amendment only applied to procedural controversies. *E.g.*, 2 LOUIS B. BOUDIN, GOVERNMENT BY JUDICIARY? 374-96 (1932); EDWARD S. CORWIN, COURT OVER CONSTITUTION 107 (1938) [Hereinafter, CORWIN, COURT] (claiming that the original interpretation of the Due Process Clause was limited to ensuring a fair trial for accused persons); Edward S. Corwin, *The Supreme Court and the Fourteenth Amendment*, 7 MICH. L. REV. 643 (1909), *reprinted in* 2 CORWIN ON THE CONSTITUTION: THE JUDICIARY 123, 146 (Richard Loss, ed. 1987) ("the moment the Court, in its interpretation of the Fourteenth Amendment, left behind the definite, historical concept of 'due process of law' as having to do with the *enforcement* of law and not its *making* . . . that moment it committed itself to a course that would bound to lead . . . into that of legislative power which determines policies on the basis of facts and desires") (emphasis in original); *see also* CHARLES GROVE HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS ch. 5 (1930) (discussing due process); Charles E. Shattuck, *The True Meaning of the Term "Liberty" in the Federal and State Constitutions Which Protect "Life, Liberty, and Property,"* 4 HARV. L. REV. 365 (1891) (presenting an early and influential critique of the view that the Due Process Clause protects anything but procedural rights); Charles Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431 (1926) (arguing that the Due Process Clause protects neither economic rights nor civil liberties). For a contemporary work arguing that the Court was correct in its due process jurisprudence, see RODNEY L. MOTT, DUE PROCESS OF LAW (1926). For a recent review of the current status of the controversy over the meaning of the Due Process Clause, see James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMM. 319 (1997).

[4] *E.g.*, FRANK R. STRONG, SUBSTANTIVE DUE PROCESS OF LAW: A DICHOTOMY OF SENSE AND NONSENSE 95 (1986) (stating that the "Justices of the *Lochner* Court, steeped in the economics of Adam Smith and the sociology of Herbert Spencer, unabashedly read their philosophy into the Constitution"); *see also* DERRICK A. BELL, JR., RACE, RACISM AND AMERICAN LAW 42 (3d ed. 1992); PAUL BREST & SANFORD LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 228 (2d ed. 1983); NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 23-35 (1995); RICHARD HOFSTADER, SOCIAL DARWINISM IN AMERICAN THOUGHT 5-6 (rev. ed. 1955); CLYDE E. JACOBS, LAW WRITERS AND THE COURTS: THE INFLUENCE OF THOMAS E. COOLEY, CHRISTOPHER G. TIEDEMAN, AND JOHN F. DILLON UPON AMERICAN CONSTITUTIONAL LAW 24 (1954); PAUL KENS, JUDICIAL POWER AND REFORM POLITICS: THE ANATOMY OF *LOCHNER V. NEW YORK* 5 (1990); ROBERT G. MCCLOSKEY, AMERICAN CONSERVATISM IN THE AGE OF ENTERPRISE, 1865-1910, at 26-30 (1951); ARNOLD M. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895, at 236 (1960); CARL B. SWISHER, AMERICAN CONSTITUTIONAL DEVELOPMENT 520-22 (1943); Benjamin Twiss, LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT 154 (1942); MORTON WHITE, SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM 104 (1949); TINSLEY E. YARBROUGH, JUDICIAL ENIGMA: THE FIRST JUSTICE HARLAN 179 (1995); Ronald F. Howell, *The Judicial Conservatives Three Decades Ago: Aristocratic Guardians of the Prerogatives of Property and the Judiciary*, 49 VA. L. REV. 1447 (1963); Alpheus Thomas Mason, *The Conservative World of Mr. Justice Sutherland, 1883-1910*, 32 AM. POL. SCI. REV. 443, 470 (1938); Frank R. Strong, *The Economic Philosophy of* Lochner: *Emergence, Embrasure and Emasculation*, 15 ARIZ. L. REV. 419 (1973); Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence, Part II*, 25 HARV. L. REV. 489, 496-99 (1912).

corporations and harmed workers.[5] Because of their "survival of the fittest" mentality that is exactly what they intended.[6] Once liberty of contract was established as a constitutional right, even Justices not inclined to Social Darwinism or laissez faire ideology felt obligated to formalistically follow precedent, ignoring social conditions and the need for ameliorative legislation.[7] Only a few prophetic dissenters, most

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[5] *See generally* James W. Ely, Jr., *Economic Due Process Revisited*, 44 VAND. L. REV. 213, 213 (1991) ("In many constitutional histories the presentation of economic issues between 1880 and 1937 resembles a Victorian melodrama. A dastardly Supreme Court is pictured as frustrating noble reformers who sought to impose beneficent regulations on giant business enterprises.").

[6] *See* BELL, *supra* note 4, at 35 ("Called upon to decide pressing questions concerning the relations of labor and capital, the power of state legislatures, and the rights of big business, the courts foreswore impartiality and came down heavily on the side of economic interests."); LOREN P. BETH, THE DEVELOPMENT OF THE AMERICAN CONSTITUTION, 1877-1910, at 190 (1971) (referring to the Court's "familiar pattern of favoring employers at the expense of employees"); ARCHIBALD COX, THE COURT AND THE CONSTITUTION 135 (1987) (claiming the Supreme Court engaged in a "willful defense of wealth and power"); HAINES, *supra* note 3, at 207 (criticizing "judge-made constitutional doctrines supported by the conservative groups of the country and fostered by the extreme individualism of leaders of industry and finance . . . "); JACOBS, *supra* note 4, at 24 ("The development of the liberty of contract as a limitation upon the powers of both the state and the national governments was a judicial answer to the demands of industrialists in the period of business expansion following the Civil War."); A.H. KELLY & W.H. HARBISON, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 498 (4th ed. 1970) (arguing that *Lochner* era judges were "concerned primarily with protecting the property rights and vested interests of big business," which manifested itself in the doctrine of freedom of contract); MCCLOSKEY, *supra* note 4, at 84 (stating that after *Lochner* the liberty and equality protected by the Fourteenth Amendment amounted to "an unadorned endorsement of the strong and wealthy at the expense of the weak and poor"); ARTHUR SELWYN MILLER, THE SUPREME COURT AND AMERICAN CAPITALISM 50, 57 (1968) (stating that courts protected economic activity from adverse governmental regulation based on principles and opinions that "are singularly devoid of rational reasons for the decisions"); JOHN E. SEMONCHE, CHARTING THE FUTURE: THE SUPREME COURT RESPONDS TO A CHANGING SOCIETY, 1890-1920, at 430-31 (1978) (describing the Supreme Court's "hostility to union activity" and to "laws that encouraged unionism"); MELVIN UROFSKY, A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES 553-55 (1988) (attributing *Lochner* to anti-union bias by the Supreme Court); WILLIAM M. WIECEK, LIBERTY UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE 121 (1988) (finding that the Supreme Court and lower federal and state courts "distrusted labor organization[s]"); Robert L. Hale, *Labor Legislation as an Enlargement of Individual Liberty*, 15 AM. LAB. LEGAL REV. 155, 155 (1925) (arguing that the process of meeting the burden of proof in cases challenging labor legislation weighs in favor of big business); *cf.* JAMES W. ELY, JR., THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER, 1888-1910, at 1 (1995) ("Historians have been all too prone to mimic the image, fixed by the Progressives, of a bench single-mindedly devoted to safeguarding corporate interests."); LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 589 (2d ed. 1988) (criticizing the economic, social, and judicial philosophy espoused by the *Lochner* Court); WIECEK, *supra*, at 126 (claiming that "freedom of contract meant freedom of the rich to impose terms"); *cf.* Michael J. Phillips, *Another Look at Economic Substantive Due Process*, 1987 WIS. L. REV. 265, 275 (depicting *Lochner* era jurisprudence as vulnerable "to the claim that [it] benefitted established economic interests at the expense of the relatively powerless"); Melvin I. Urofsky, *Myth and Reality: The Supreme Court and Protective Legislation in the Progressive Era*, 1983 SUP. CT. HIST. SOC'Y Y.B. 53, 58 [hereinafter, Urofsky, *Myth*] (stating that decisions like *Lochner* "gave credence to charges that the bench had gone over completely to the service of big business in opposing humane reform legislation").

[7] *E.g.*, J. M. Balkin, *Ideology and Counter-Ideology from* Lochner *to* Garcia, 54 UMKC L. REV. 175 (1986) (describing *Lochner* as elevating formalist logic above empirical data); Louis D. Brandeis, *The Living Law*, 10 ILL. L. REV. 463, 467 (1916) (bemoaning the purported abstract reasoning and legal formalism that led judges to invalidate reform legislation); Roscoe Pound, *Mechanical*

prominently Justices Oliver Wendell Holmes and Louis Brandeis, protested against this abuse of judicial power. These dauntless Justices' views emerged triumphant when the heroic Franklin Roosevelt stood up to the Nine Old Men and, over time, remade the Court in his image.[8]

This morality tale bore only a modest relation to reality. However, it suited the political needs of the Progressive[9] and New Deal[10] era controversialists who initially wove it. It also played to and to some extent confirmed the political and ideological prejudices in favor of the modern welfare and regulatory state of post-World War II scholars such as Richard Hofstader and Robert McCloskey, both of whom played significant roles in canonizing the traditional *Lochner* story.[11]

Jurisprudence, 8 COLUM. L. REV. 605, 616 (1908) (attacking the Court for invalidating laws based on logical deduction rather than the effect the law had on a specific factual situation); Robert Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943); Robert Hale, *Coercion and Distribution in a Supposedly Noncoercive State*, 38 POL. SCI. Q. 470 (1923); Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 RES. IN L. & SOC. 3 (1980) (linking *Lochner* to common-law formalism).

[8] *See, e.g.*, Urofsky, *Myth*, *supra* note 6, at 58 (stating that Justice Holmes' dissent in *Lochner* "raised the spirits of the faithful and kept them hoping for a better day and a court more attuned to contemporary realities").

[9] *See generally* WILLIAM G. ROSS, A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS 1890-1937 (1994) (recounting the reactions of Progressives and other to *Lochner* and similar decisions); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of* Lochner, 76 N.Y.U. L. REV. 1383, 1391-96 (2001) (showing that Progressives consistently accused the Court of favor the wealthy and powerful at the expense of workers and other who needed government assistance). For some of the more academic attacks on *Lochner*ian jurisprudence, see, e.g., CHARLES GROVE HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS 207 (1928) (criticizing "judge-made constitutional doctrines supported by the conservative groups of the country and fostered by the extreme individualism of leaders of industry and finance . . ."); Louis M. Greeley, *The Changing Attitude of the Courts Toward Social Legislation*, 5 U. ILL. L. REV. 222, 226-32 (1910) (arguing that the Supreme Court was increasingly reluctant to uphold law benefitting workers); Robert L. Hale, *Labor Legislation as an Enlargement of Individual Liberty*, 15 AM. LAB. LEGAL REV. 155, 155 (1925) (arguing that the process of meeting the burden of proof in cases challenging labor legislation weighs in favor of big business); Albert M. Kales, *"Due Process," The Inarticulate Major Premise and the Adamson Act*, 26 YALE L.J. 519, 523 (1917) (criticizing the Court for adopting a due process jurisprudence with no clear boundaries); Thomas Reed Powell, *Collective Bargaining Before the Supreme Court*, 33 POL. SCI. Q. 396, 397-429 (1918) (discussing the Court's purported hostility to labor unions); Margaret Spahr, *Natural Law, Due Process and Economic Pressure*, 24 AM. POL. SCI. REV. 332, 332-54 (1930) (chastising the Court for relying on abstract notions based on natural law rather than considering the needs of workers).

[10] *E.g.*, CORWIN, COURT, *supra* note 3; EDWARD S. CORWIN, THE TWILIGHT OF THE SUPREME COURT: A HISTORY OF OUR CONSTITUTIONAL THEORY (1934) [hereinafter, CORWIN, TWILIGHT]; ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY (1941); DREW PEARSON & ROBERT S. ALLEN, THE NINE OLD MEN (1936).

[11] *See* HOFSTADER, *supra* note 4 (arguing that Social Darwinism motivated *Lochner* era jurists); MCCLOSKEY, *supra* note 4 (adopting Hofstader's argument and weaving it into a broader history of the "laissez-faire" Court). For other works that contributed to the widespread adoption of the conventional account of *Lochner,* see, e.g., EDWARD S. CORWIN, COURT OVER CONSTITUTION (2d ed. 1950); ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT (1960); FRED RODELL, NINE MEN (1955); BERNARD SCHWARTZ, THE SUPREME COURT: CONSTITUTIONAL REVOLUTION IN RETROSPECT (1957).

Few scholars bothered to question the received wisdom about the *Lochner* era.[12] Until recently, constitutional history was mostly the province of attorneys and law professors "roaming through history looking for one's friends"[13] to support a preconceived legal or normative viewpoint. The academic community, meanwhile, was firmly committed to justifying the New Deal and discrediting its opponents. In the wake of the Depression and the horrors of Naziism, nothing could discredit the "Old Court" as well as associating it with laissez-faire capitalism and Social Darwinism.

Over the last few decades constitutional history has become a more sophisticated and far less normative academic discipline. At the same time, temporal distance from the controversy over the New Deal, combined with an upsurge in libertarian economic thought[14] that made the *Lochner* line of decisions seem less evil and less daft, encouraged scholars to reassess the traditional *Lochner* morality tale. Beginning in the late 1960s, a trickle of *Lochner* revisionist scholarship began to appear.[15] By

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[12] *Lochner* was so reviled that as far as this Author can determine, between the demise of *Lochner* in *West Coast Hotel v. Parrish* in 1937 and publication of Bernard Siegan's *Economic Liberties and the Constitution* in 1980, hundreds of anti-*Lochner* passages appeared, but only a single article that expressed even mild support for *Lochner* was published. *See* Guy Miller Struve, *The Less-Restrictive-Alternative Principle and Economic Due Process*, 80 HARV. L. REV. 1463 (1967) (proposing a moderate application of economic due process and criticizing the Court for completely abandoning constitutional review of regulations). In such an environment, it was easy for indolent scholars to parrot the standard story.

[13] Morton J. Horwitz, *Republican Origins of Constitutionalism*, in TOWARD A USABLE PAST, 148 (Paul Finkelman & Stephen E. Gottliev, eds. 1991); *see generally* Morgan Cloud, *Searching through History; Searching for History*, 63 U. CHI. L. REV. 1707, 1710 (1996) (describing and critiquing "lawyers' history"); Barry Friedman, *The Turn to History*, 72 N.Y.U. L. REV. 928, 958 (1997) ("Lawyers do tend to search for any support we can find to bolster current positions, earning the approbation [sic] attached to 'law office history.'").

[14] The manifestation of this in the legal academic realm was the growing influence of Chicago School law and economics. In addition to allowing historians the opportunity to revisit *Lochner* shorn of the utter revulsion the case used to cause, the growing influence of libertarian economic theory created a boomlet in normative books and articles suggesting that the Supreme Court was wrong to abandon *Lochner* in the wake of the New Deal. *See, e.g.*, HADLEY ARKES, THE RETURN OF GEORGE SUTHERLAND: RESTORING A JURISPRUDENCE OF NATURAL RIGHTS (1995) (defending Justice Sutherland and the *Lochner* Court's natural rights jurisprudence); BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION (1980) (defending *Lochner* and its progeny); Richard A. Epstein, *The Mistakes of 1937*, 11 GEORGE MASON U. L. REV. 5 (1988) (arguing that the Supreme Court was wrong to abandon *Lochner* during the New Deal period); Alan J. Meese, *Will, Judgment, and Economic Liberty: Mr. Justice Souter and the Mistranslation of the Due Process Clause*, 41 WM. & MARY L. REV. 3 (1999) suggesting that the court was wrong to completely abandon *Lochner*; Michael J. Phillips, *Entry Restrictions in the* Lochner *Court*, 4 GEO. MASON L. REV. 405 (1996) (contending that *Lochner*ian decisions prohibiting monopolization of certain occupations were correct); Note, *Resurrecting Economic Rights: The Doctrine of Economic Due Process Reconsidered*, 103 HARV. L. REV. 1363-83 (1990) (calling for a revival of *Lochner*ian jurisprudence); *see generally* James W. Ely, Jr., *Melville W. Fuller*, 1998 J. SUP. CT. HIST. 35 (defending *Lochner* and other controversial Fuller Court decisions as forward-looking and consistent with contemporary public opinion and political economy).

[15] *E.g.,* Alan Jones, *Thomas M. Cooley and "Laissez-Faire Constitutionalism": A Reconsideration*,

the 1980s, this trickle became a stream,[16] and by the late 1990s—as constitutional history became "hot" within the legal academy,[17]—it turned into a flood[18] of sufficient magnitude to inspire a growing counter-

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53 J. AM. HIST. 751 (1967) (arguing that Cooley, often considered the progenitor of *Lochner*ism, was a Jacksonian, not a laissez-fairest); Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism*, 1863-1897, 61 J. AM. HIST. 970 (1975) (noting that Justice Field, often portrayed as an apostle of laissez-faire, believed many regulatory interventions to be both constitutional and normatively attractive); William E. Nelson, *The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513 (1974) (tracing the impact of abolitionist free labor thought on the development of the liberty of contract doctrine).

[16] *E.g.*, Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 L. & HIST. REV. 293 (1985) (finding the origins of nineteenth century "laissez faire" jurisprudence in traditional opposition to "class legislation"); William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767 (examining the influence of free labor ideology on constitutional law in the late nineteenth century); Charles W. McCurdy, *The Roots of "Liberty of Contract" Reconsidered: Major Premises in the Law of Employment, 1867-1937*, 1984 SUP. CT. HIST. SOC'Y Y.B. 20 (finding that *Lochner* followed naturally from earlier lower court rulings); Urofsky, *Myth*, *supra* note 6 (contending that the supposedly laissez faire Court upheld the vast majority of regulations that it rule upon).

[17] *See* LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM (1996) (claiming that constitutional history's new popularity is attributable to a desire by liberal law professors to stave off conservative originalism); Barry Friedman, *The Turn to History*, 72 N.Y.U. L. REV. 928 (1997) (discussing the increasing prominence of constitutional history).

[18] *E.g.*, BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT (1998) (arguing that the seeds of the New Deal era Court's abandonment of *Lochner* were sown by weaknesses and concessions in *Lochner*ian jurisprudence); JAMES W. ELY, JR., THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER: 1888-1910 (1995) (suggesting that the Fuller Court's historical reputation is lower than it should be); JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 103-04 (2d ed. 1998) (evincing some sympathy for *Lochner*); OWEN FISS, THE TROUBLED BEGINNINGS OF THE MODERN STATE (1993) (attributing *Lochner* to the Court's desire to set boundaries for government regulation to protect individual liberty); WHITE, *supra* note 3, at 21-29 (condemning the traditional story as ahistorical, and criticizing some of the modern revisionists whose historical views are dictated by normative concerns); Charles W. McCurdy, *The Liberty of Contract Regime in American Law*, in THE STATE AND FREEDOM OF CONTRACT 161 (Harry N. Scheiber, ed. 1998) (adopting the view that *Lochner* was motivated by hostility to "class legislation"); Felice Batlan, *A Reevaluation of the New York Court of Appeals: The Home, the Market, and Labor, 1885-1905*, 27 L. & SOC. INQUIRY 489, 492 (2002) (claiming that the New York Court of Appeals' reputation as a leading pro-laissez faire court during the *Lochner* era is undeserved); Joseph Gordon Hylton, *Prelude to* Euclid: *The United States Supreme Court and the Constitutionality of Land Use Regulation*, 1900-1920, 3 WASH. U. J. L & POL'Y 1 (2000) (concluding that the *Lochner* era Court consistently upheld land use regulations challenged as violations of the Due Process Clause).

A subset of the revisionist literature is a growing body of work discussing *Lochner* from the perspective of race and gender, with the overall theme that *Lochner* had ambiguous, and at times helpful consequences for disenfranchised groups. *E.g.*, DAVID E. BERNSTEIN, ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL (2001) (examining the effect of labor regulations on African Americans, and concluding that *Lochner* generally aided them by invalidating harmful laws); RICHARD A. EPSTEIN, FORBIDDEN GROUNDS ch. 3 (1992) (noting that *Lochner*ian doctrine, consistently applied, would have led to *Plessy* coming out the other way); JULIE NOVKOV, CONSTITUTING WORKERS, PROTECTING WOMEN: GENDER, LAW, AND LABOR IN THE PROGRESSIVE ERA AND NEW DEAL YEARS (2001) (discussing the debate over the constitutionality of protective legislation for working women); NANCY WOLOCH, *MULLER V. OREGON*: A BRIEF HISTORY WITH DOCUMENTS 28 (1996) (same); David E. Bernstein, Lochner *vs.* Plessy: *The* Berea College *Case*, 25 J. Sup. Ct. Hist. 93 (2000) (noting that

revisionist literature[19] including, in some respects, this Article.

The deluge of *Lochner* revisionism has challenged various aspects of the conventional story,[20] especially the idea that the origins of *Lochner*ian

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restricting the states' police power inevitably meant some limits on their ability to regulate race relations); David E. Bernstein, Lochner *and Women*, 101 MICH. L. REV. __ (2003) (forthcoming) (suggesting that protective laws for women workers were often quite harmful to them); David E. Bernstein, Lochner*, Parity, and the Chinese Laundry Cases*, 41 WM. & MARY L. REV. 211 (1999) (examining how *Lochner*ian jurisprudence aided Chinese laundry owner threatened with hostile regulation); David E. Bernstein, *Philip Sober Controlling Philip Drunk*: Buchanan v. Warley *in Historical Perspective*, 51 VAND. L. REV. 797, 808 (1998) (discussing how the Supreme Court's anti-regulatory decision in *Buchanan* limited the spread of Jim Crow); David E. Bernstein, *Two Asian Laundry Cases*, 24 J. SUP. CT. HIST. 95 (1999) (recounting two *Lochner*ian challenges to anti-Asian legislation); Anne C. Dailey, Lochner *For Women*, 74 TEX. L. REV. 1217 (1996) (discussing *Muller v. Oregon*); James W. Ely, Jr., *Reflections on* Buchanan v. Warley*, Property Rights, and Race*, 51 VAND. L. REV. 953 (1998) (bemoaning the lack of credit given to the Supreme Court for its anti-Jim Crow decision in the 1917 case of *Buchanan v. Warley*); Nancy S. Erickson, Muller v. Oregon *Reconsidered: The Origins of a Sex-Based Doctrine of Liberty of Contract*, 30 LAB. HIST. 228 (1989) (suggesting that many supporters of protective legislation for women workers were either venal or naive); VIVIEN HART, BOUND BY OUR CONSTITUTION: WOMEN, WORKERS, AND THE MINIMUM WAGE (1994) (explaining the problems protective laws posed to many women); Frances E. Olsen, *From False Paternalism To False Equality: Judicial Assaults On Feminist Community, Illinois, 1869-1895*, 84 MICH. L. REV. 1518, 1520 (1986) (arguing that protective laws benefitted women); David E. Bernstein, Note, *The Supreme and "Civil Rights," 1886-1908*, 100 YALE L.J. 725 (1990) (discussing the tension between *Lochner* and *Plessy*); Lori Ann Kran, Gendered Law: A Discourse Analysis of Labor Legislation, 1890-1930 (Ph.D. Diss. U. Mass. 1993) (reviewing the controversy over protective labor laws for women).

For reviews of the general revisionist literature, see Rowe, *supra* note 3; Stephen A. Siegel, *The Revisionism Thickens*, 20 L. & HIST. REV. 631 (2002).

[19] *E.g.*, BARBARA H. FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT (1998) (implicitly accepting the view that the *Lochner*ians were foolish reactionaries, while Hale and other Progressive critics of *Lochner*ism were far-sighted visionaries); WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT (1995) (rejecting the revisionist account of the "switch in time"); Barry Friedman, T*he History of the Countermajoritarian Difficulty, Part Three: The Lesson of* Lochner, 76 N.Y.U. L. REV. 1383 (2001) (explaining that contemporary critics of *Lochner* understood *Lochner* in a way that is far closer to the traditional account than to many of the revisionist accounts); Manuel Cachán, *Justice Stephen Field and "Free Soil, Free Labor Constitutionalism": Reconsidering Revisionism*, 20 L. & HIST. REV. 541, 549-50 (2002) (dismissing revisionist accounts of Justice Field, who is considered by many to be the progenitor of Supreme Court *Lochner*ism); Paul Kens, *Dawn of the Conservative Era*, 1995 J. SUP. CT. HIST. 1 (defending the traditional account of *Lochner*); Paul Kens, Lochner v. New York: *Rehabilitated and Revised, But Still Reviled*, 1997 J. SUP. CT. HIST. 31 (arguing that the traditional obloquy leveled at *Lochner* is amply justified).

[20] *E.g.*, BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 269 (1998) ("The *Lochner* Court was . . . interpreting the Constitution, as handed down to them by the Republicans of Reconstruction. *Lochner* is no longer good law because the American people repudiated Republican constitutional values in the 1930s, not because the Court was wildly out of line with them before the Great Depression."); SIEGAN, *supra* note 14 (suggesting that the regulations invalidated under *Lochner* were frequently harmful to consumers and small businesses (questioning the idea that in 1937 the Supreme Court buckled to external political pressure when it repudiated *Lochner*); BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998) (contending that the *Lochner* era Court was far less doctrinaire than is normally thought, and that the structure of *Lochner*ian jurisprudence made its collapse inevitable); Richard D. Friedman, *Switching in Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. PA. L. REV. 1891(1994) (rebutting the claim that FDR's Court-packing plan induced Justice

jurisprudence lay in Social Darwinism.[21] Intellectual historians have known for some time that Spencer and his laissez-faire-oriented followers had little impact on American public discourse by the time *Lochner* was decided.[22] Legal historians, meanwhile, have been unable to discern any influence of Social Darwinism on *Lochner* era Justices, with the ironic exception of Justice Holmes,[23] the Court's most vociferous opponent of

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Roberts to vote to uphold regulatory legislation).

[21] This claim never had much going for it. Even though the link between *Lochner* and Social Darwinism was asserted countless times, a close reading of the footnotes in various sources suggests that its purported existence was based on a misreading of Justice Holmes's dissent in *Lochner* and little else. Holmes famously wrote that "the Fourteenth Amendment does not enact Mr. Herbert Spencer's *Social Statics*." Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). Spencer is generally considered, perhaps a bit unfairly, to have been a leading Social Darwinist. *See* JOHN GRAY, LIBERALISM 31 (1986) (contending that it is unfair to caricature Spencer as a Social Darwinist). To base a theory about an entire line of Supreme Court cases on one sentence in a dissenting opinion is hardly meticulous historical scholarship. But, worse yet, a close reading of the context of the *Social Statics* remark reveals that Holmes did not actually accuse the Court of believing in Social Darwinism, or of otherwise being influenced by Spencer. Rather, Holmes was arguing that the libertarian *sic utere tuo ut alienum non laedes* principle—"use your own property in such a manner as not to injure that of another"—could not be the basis of American constitutional law, and had indeed been rejected in previous cases by the Court itself. Holmes used Spencer as an example of a prominent intellectual who believed the *sic utero* principle should be the basis of law.

Spencer called this the "law of equal freedom." HERBERT SPENCER, SOCIAL STATICS (1848). A more apt example for Holmes would have been "Mr. Christopher Tiedeman's *A Treatise on the Limitations of Police Power in the United States*." *See* CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES vii (1886) ("The police power of the government is shown to be confined to the detailed enforcement of the [sic utero] maxim."). Tiedeman was a leading constitutional commentator whose views had far more influence on American early twentieth century American judges than did British philosopher Spencer's, whose *Social Statics* was published over fifty years earlier. A focus on Tiedeman would also have been misleading, however, because Tiedeman's views were far more libertarian than anything the *Lochner* Court was willing to enforce.

In any event, Holmes, a master of the flip aphorism, such as the unforgettable "three generations of idiots are enough," Buck v. Bell, 274 U.S. 200, 207 (1927), chose the foreign, vaguely menacing, and more alliterative Spencer's *Social Statics*. *See* PETER IRONS, A PEOPLE'S HISTORY OF THE SUPREME COURT 258 (1999) ("Holmes sprinkled his *Lochner* dissent with the pith aphorisms he delighted in crafting"); *see generally* WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 19 (1995) (noting Holmes's "disdain for facts," "contempt for views divergent from his own," "indifference to citing legal precedent," "reliance on quips," and "allegiance to elite attitudes").

[22] *See, e.g.*, ROBERT C. BANNISTER, SOCIAL DARWINISM: SCIENCE AND MYTH IN ANGLO-AMERICAN THOUGHT 58-60 (1979) (stating that few laissez-faire liberals based their beliefs on Social Darwinism); THOMAS F. GOSSETT, RACE: THE HISTORY OF AN IDEA IN AMERICA 168-75 (1963) (asserting that laissez faire liberals recognized need of man to survive by cooperating with his fellow man rather than through power struggles); DONALD K. PICKENS, EUGENICS AND THE PROGRESSIVES 18-22 (1968) (explaining that the influence of Social Darwinism in the Progressive era was primarily apparent among Progressives).

[23] Holmes accepted Spencer's view of human life as involving the "survival of the fittest," but rejected laissez-faire in favor of a vision that saw political rent-seeking as just another aspect of man's battle for survival, in which courts should not intervene. The influence of Darwinism on Holmes was manifest from the early stages of his career. *See* Oliver Wendell Holmes, *The Gas Stokers' Strike*, 7 AM. L. REV. 558, 583 (1873) ("The more powerful interests must be more or less reflected in

Lochner and its progeny. Moreover, given the many ameliorative laws upheld by the *Lochner* era Court,[24] one can hardly plausibly accuse it of supporting a laissez faire "survival of the fittest" society.[25]

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legislation; which, like every other device of man or beast, must tend in the long run to aid the survival of the fittest."). Holmes's writing during his time on the Supreme Court continued to show the influence of Darwinism. The Darwinian influence on Holmes was apparent when he took issue with the *Lochner* majority's view that liberty included the liberty of the worker to contract freely. He stated that the word liberty in the Fourteenth Amendment "is perverted when it is held to prevent the natural outcome of a dominant opinion." Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting); *see generally* J. W. Burrow, *Holmes in His Intellectual Milieu*, in THE LEGACY OF OLIVER WENDELL HOLMES, JR. 17, 25 (Robert W. Gordon ed., 1992) (explaining the origins of Holmes's Darwinian attitudes); Joseph F. Wall, *Social Darwinism and Constitutional Law with special reference to* Lochner v. New York, 33 ANNALS OF SCIENCE 475 (1976) (arguing that Holmes was the only Social Darwinist on the Court when it decided *Lochner*); Yosel Rogat, *The Judge as Spectator*, 31 U. CHI. L. REV. 213, 251 (1964) (finding that Holmes was a strong adherent to Darwinian doctrines). For a recent discussion and detailed critique of Holmes' Darwinian views, see ALBERT W. ALSCHULER, LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES (2000).

More generally, Progressives such as Roscoe Pound seem to have been more influenced by evolutionary theory than were more laissez-faire minded members of the bar, see Herbert Hovenkamp, *Evolutionary Models in Jurisprudence*, 64 TEX. L. REV. 645, 677-78 (1985), although that did not stop the Progressives from attributing their *opponents'* views to a misguided Darwinism. Pound, though clearly influenced by Darwinism himself, see David E. Bernstein, *Philip Sober Controlling Philip Drunk:* Buchanan v. Warley *in Historical Perspective*, 51 VAND. L. REV. 797, 816 n.89 (1998), wrote that the "[r]evolt of the social conscience against such (Darwinian) theories" was an important factor in the development of the movement for the "socialization of law." Pound, *supra* note 4, at 496.

[24] *E.g.* Bunting v. Oregon, 243 U.S. 426 (1917) (regulating the hours of men in industrial occupations when overtime work was permitted); Booth v. Indiana, 237 U.S. 391 (1915) (regulating the width of entries to coal mines); Rail & River Coal Co. v. Yaple, 236 U.S. 338 (1915) (requiring that coal miners' pay be based on car loads of coal they produced); Keookee Consolidated Coal Co. v. Taylor, 234 U.S. 224 (1914) (requiring mining companies to pay their employees in cash); Erie R.R. Co. v. Williams, 233 U.S. 685 (1914) (requiring railroads to pay their employees in cash); Plymouth Coal. Co. v. Pennsylvania, 232 U.S. 531 (1914) (upholding a mine safety law); Sturges & Burn Mfg. Co. v. Beauchamp, 231 U.S. 320 (1913) (forbidding the employment of children below the age of sixteen in certain hazardous occupations); Barrett v. Indiana, 229 U.S. 26 (1913); Chicago Dock & Canal Co. v. Fraley, 224 U.S. 603 (1913) (upholding a law requiring the enclosure of certain shafts or openings of bin building during construction); McLean v. Arkansas, 211 U.S. 539 (1909) (requiring coal produced by miners be weighed for payment purposes before it passes over a screen); Wilmington Star Mining Co. v. Fulton, 205 U.S. 60 (1907) (requiring coal mines to maintain wash houses for their employees at the request of twenty or more workers, making mining companies liable for their willful failure to furnish a reasonably safe place for workers, requiring railroads). Perhaps most significant was New York Cent. R.R. v. White, 243 U.S. 188 (1917) (unanimously upholding the constitutionality of workers' compensation laws).

[25] Although the conventional narrative ignores this fact, careful scholars have known for decades that until the mid-1920s, well into the *Lochner* era, the Supreme Court rarely invalidated legislation under the Due Process Clause. Even at the height of the *Lochner* era in the late 1920s, the Supreme Court upheld most regulatory laws challenged under the Due Process Clause. *See* LOREN P. BETH, THE DEVELOPMENT OF THE AMERICAN CONSTITUTION, 1877-1910, at 190 (1971) ("the cases are marked by hesitance, ambiguity, indecisiveness, and inconsistency, and in fact many more of the decisions favored the state than the other way around"); Ray A. Brown, *Due Process of Law, Police Power, and the Supreme Cour*t, 40 HARV. L. REV. 943, 944-45 (1927); Joseph Gordon Hylton, *Prelude to* Euclid: *The United States Supreme Court and the Constitutionality of Land Use Regulation*, 1900-1920, 3 WASH. U. J. L & POL'Y 1 (2000); Michael J. Phillips, *The Progressiveness of the* Lochner *Court*, 75 DENV. U. L. REV. 453, 453 (1998); Urofsky, *Myth*, *supra* note 6, at 69-70; Charles Warren, *The Progressiveness of the United States Supreme Court*, 13 COLUM. L. REV. 294, 295 (1913); *cf.* Melvin I. Urofsky, *State Courts and Protective Legislation During the Progressive Era: A Reevaluation*, 72

If laissez faire/Social Darwinist ideology did not motivate the *Lochner* era Court, the question remains as to what did. The answer is inevitably complex. If the *Lochner* era unofficially began in 1897 with *Allgeyer v. Louisiana*[26] and ended in 1937 with *West Coast Hotel v. Parrish*,[27] then twenty-six Justices served on the *Lochner* Era Court over a period of forty years. The vast majority of these Justice were at least moderate *Lochner*ians in that they believed the Court should review regulatory legislation that interfered with liberty of contract to ensure that it could justified constitutionally as an assertion of the states' police powers.[28]

Two additional problems with discerning the origins of *Lochner* era jurisprudence present themselves. The first is that Justices in those days rarely wrote concurrences, and many dissents were not accompanied by opinions.[29] The dearth of *Lochner* era concurrences and dissents limits our knowledge about the views of many individual Justices. This situation is exacerbated by the fact that biographical scholarship has focused almost entirely on Harlan, Holmes, Brandeis, and Cardozo to the exclusion of other Justices.

Second, in practice there was not one *Lochner* era, but three.[30] The first

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J. AM. HIST. 63, 64 (1985) (concluding that state courts' willingness to invalidate legislation during the *Lochner* era has also been greatly exaggerated).

[26] 165 US 578 (1897).

[27] 300 U.S. 379 (1937).

[28] The only Justices to serve on the Court during this period who clearly rejected the mode of jurisprudence associated with *Lochner* were Brandeis, Cardozo, and Holmes. Even Justice Stone joined the majority in New State Ice v. Liebmann, 285 U.S. 262 (1932) (invalidating a government-sponsored ice monopoly, over a famous dissent by Brandeis invoking states as the "laboratories of democracy"). Of course, many of the Justices thought their colleagues went too far in particular instances.

[29] *Cf.* Lee Epstein, et al., *The Norm of Consensus on the U.S. Supreme Court*, 45 AM. J. POL. SCI. 362 (2001) (explaining that during the Waite Court era, which immediately preceded the *Lochner* era, many times Justices who dissented in conference voted with the majority in the end).

[30] *See* Stephen A. Siegel, Lochner *Era Jurisprudence and the American Constitutional Tradition*, 70 N.C.L. REV. 1, 9 (1991). David Brewer and Rufus Peckham were the two most libertarian Justices sit on the Court during the *Lochner* era. *Lochner*ian jurisprudence is often associated with the views of those two men. Yet with the notable exception of *Lochner* itself, they rarely got a majority for their views. Both were off the Court by 1911, as were the moderate *Lochner*ians Brown, Fuller and Harlan, who were among the swing voters on the Court during the first decade of the 20th Century. Justice Brown, in particular, almost never found himself in dissent. *See generally* Siegel, *supra*, at 18 n.76 (nominating Brown as the "most typical of all Lochner era Justices.").

During the 1910s, the Court became more "Progressive" as (relative) *Lochner* skeptics, appointed by Progressive presidents Roosevelt and Wilson joined the Court. However, by the early 1920s, Harding appointees Taft, Sutherland, Sanford and Butler, joined by conservative Taft and Wilson appointees Van Devanter and McReynolds and *Lochner* holdover McKenna, took control of the Court. The "Four Horsemen"—McReynolds, Sutherland, Van Devanter and Butler—dominated the Court through the early 1930s, joined by various other Justices, especially Taft and Sanford. The Four Horseman, though favorably inclined toward *Lochner*ism, almost certainly accepted a broader police power than did Peckham and Brewer. *See* Barry Cushman, *The Secret Lives of the Four Horsemen*, 83 Va. L. Rev. 559, 566-67 (1997). Yet they achieved far more substantial limitations on the police power than did their more libertarian predecessors because they consistently managed to find a majority to support their views.

began in approximately 1897 and ended in about 1911, with moderate *Lochner*ians dominating the Court. The second lasted from approximately 1911 to 1923, with the Court, while not explicitly repudiating *Lochner*, generally refusing to expand the liberty of contract doctrine to new scenarios, and at times seeming to drastically limit the doctrine.[31] From 1923 to the mid-1930's, meanwhile, the Court was dominated by Justices who expanded *Lochner* by voting to limit the power of government in both economic and non-economic contexts.

Not surprisingly given this diversity, historians and legal scholars have suggested an incredible variety of intellectual forces that they claim influenced *Lochner*ian jurisprudence, including free labor ideology,[32] social contractarianism,[33] opposition to paternalism,[34] a desire to establish a sphere of personal autonomy in an era of total war,[35] and classical economics.[36] Among constitutional law professors, the most popular understanding of *Lochner* is Cass Sunstein's view that the Court believed that common law rules were natural and immutable and therefore formed the appropriate baseline with which to judge the constitutionality of regulatory legislation.[37] Sunstein's interpretation of *Lochner* is examined in detail and ultimately rebutted in a soon-to-be-published article.[38]

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[31] *See* ALEXANDER M. BICKEL & BENNO C. SCHMIDT, JR., THE JUDICIARY AND RESPONSIBLE GOVERNMENT, 1910-1921 chs. II, V, & VI (1984) (discussing the fate of social legislation challenged in the Supreme Court between 1910 and 1921); *cf.* CORWIN, TWILIGHT, *supra* note 10, at 86 ("during a part of the interval between the *Lochner* and the *Adkins* cases, and especially between 1910 and 1920, the Court was generally dominated by a majority which was distinctly disinclined to interfere with state legislation on the basis of the Fourteenth Amendment, and whose members frequently asserted doctrine which to all practical intents and purposes was the doctrine of presumed constitutionality").

[32] *See*, *e.g.*, McCurdy, *supra* note 18, at 165-79; Daniel R. Ernst, *Free Labor, the Consumer Interest, and the Law of Industrial Disputes, 1885-1900*, 36 AM. J. LEGAL HIST. 19, 19 (1992); Forbath, *supra* note 16, at 792-96; Nelson, *supra* note 15, at 558-60; G. Edward White, *Revisiting Substantive Due Process and Holmes's Lochner Dissent*, 63 BROOK. L. REV. 87, 105-06 (1997).

[33] *E.g.*, FISS, *supra* note 18.

[34] Aviam Soifer, *The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court 1888-1921*, 5 L. & HIST. REV. 249 (1987).

[35] Robert C. Post, *Defending the Lifeworld: Substantive Due Process in the Taft Court Era*, 78 B.U. L. REV. 1489 (1998).

[36] *E.g.*, HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836-1937, at 99-101 (1991); Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379 (1988). Some scholars have despaired of finding an all-encompassing ideological source for *Lochner*ian jurisprudence. Michael Phillips's recent book on *Lochner* suggests that "one might conclude that the justices' motives aligned with their words: that they were trying to protect liberty and property against government action that would deprive people of either or both." MICHAEL J. PHILLIPS, THE *LOCHNER* COURT, MYTH AND REALITY: SUBSTANTIVE DUE PROCESS FROM THE 1890S TO THE 1930S, at 115 (2000). Similarly, Lawrence Friedman's recent kaleidoscopic survey of American legal history concludes that the *Lochner* era Justices "simply reacted in the way that respectable, moderate conservatives of their day would naturally react." LAWRENCE M. FRIEDMAN, AMERICAN LAW IN THE 20TH CENTURY 24 (2002).

[37] *E.g.*, Cass R. Sunstein, Lochner's *Legacy*, 87 COLUM. L. REV. 873 (1987).

[38] David E. Bernstein, Lochner's *Legacy's Legacy* (submitted for publication 2/2003).

Legal historians, meanwhile, pay little heed to Sunstein's rather impressionistic understanding of *Lochner*, dismissing it as a "sophisticated form of special pleading" and an attempt "to enlist history as a weapon for progressive change."[39] Instead, historians have generally favored Howard Gillman's contention, discussed in detail in his 1993 book, *The Constitution Besieged*,[40] that the Court was motivated by opposition to "class legislation." Gillman claims the Court opposed legislation that could not be deemed as public-regarding because it benefitted certain interest groups[41] or took from A to give to B.[42] Gillman's understanding of *Lochner* is winning an increasing audience among mainstream constitutional scholars, and threatens to eventually supplant Sunstein's interpretation as the conventional understanding of *Lochner* among law professors.

Gillman explains that hostility to special interest legislation and unjustified redistribution, especially when they tended to promote monopoly, was a long-standing theme in American political thought. He also reveals that around the turn of the century many state courts relied on a class legislation analysis to invalidate various types of protective legislation, especially legislation regulating labor.[43] Moreover, in the immediate pre-*Lochner* period, the United States Supreme Court focused on class legislation analysis as the primary tool for separating licit from illicit regulatory legislation.[44]

However, as discussed in Part I of this Article, Gillman grossly overstates the role of class legislation analysis on the police powers jurisprudence of the United States Supreme Court during the *Lochner* era. Rather, as Part II of this Article shows, the basic motivation for *Lochner*ian jurisprudence was the Justices' belief that Americans had fundamental unenumerated constitutional rights, and that those rights were protected by the Fourteenth Amendment's Due Process Clause. The Justices had a generally historicist outlook, seeking to discover the content of fundamental rights through an understanding of which rights had created and advanced liberty among the Anglo-American people. This Article argues that the jurisprudential importance of *Lochner* was primarily that it moved the Supreme Court away from class legislation analysis of police power legislation to an analysis that relied on the

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[39] WHITE, *supra* note 3, at 24, 25.
[40] HOWARD GILLMAN, THE CONSTITUTION BESIEGED (1993).
[41] GILLMAN, *supra* note 40, at 10.
[42] *Id.* at 46, 127.
[43] *See infra* notes 78 to 84 and accompanying text.
[44] *See infra* notes 52 to 76 and accompanying text.

Justices' understanding of the fundamental liberties of the American people.

I. CLASS LEGISLATION

As noted above, the current mainstream revisionist theory among constitutional historians is that the *Lochner* era Supreme Court was motivated by hostility to so-called "class legislation."[45] This was also known as "partial" or "unequal" legislation. Howard Gillman deserves much praise for calling attention to the importance of hostility to class legislation in American history and in the jurisprudence of the late nineteenth century. As discussed below, between the *Slaughter-House Cases* and *Lochner v. New York* the class legislation paradigm was the primary focus of courts attempting to set forth the limits of the states' police power to regulate the economy.

However, there are several problems with the class legislation thesis as applied to the *Lochner* era Supreme Court. The first is that Gillman and other supporters of this paradigm too closely associate the concept of class legislation with the modern concept of special interest legislation.[46] As will be discussed in more detail below, for the Supreme Court during the *Lochner* era to deem something special interest legislation it had to be clearly and facially so because the Court refused to inquire into legislative motivation. Few special interest laws so clearly reveal their motivation, so opposition to special interest legislation was not the primary jurisprudential meaning of class legislation.

In practice, class legislation was primarily legislation that contained arbitrary *classifications*[47] and therefore violated the Fourteenth Amendment's equal protection guarantee by discriminating in favor of

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[45] In addition to Gillman, prominent legal historians who have adopted the class legislation thesis include Barry Cushman, see *supra* note 20; Charles McCurdy, see Charles W. McCurdy, *The Liberty of Contract Regime in American Law*, in THE STATE AND FREEDOM OF CONTRACT 161 (Harry N. Scheiber, ed. 1998); and Ted White, see WHITE, *supra* note 3, at 21-29, 246. The author of the present Article found the class legislation thesis correct with regard to late nineteenth century lower court economic liberty jurisprudence, and, to his regret, assumed it was an accurate interpretation of *Lochner* era Supreme Court jurisprudence as well. *See* DAVID E. BERNSTEIN, ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS, AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL 4 (2001); David E. Bernstein, Lochner*, Parity, and the Chinese Laundry Cases*, 41 WM. & MARY L. REV. 211, 290 (1999).

[46] Gillman focuses on the Court's claimed commitment to legislative "neutrality" against redistributionism. After an extensive Westlaw search of Supreme Court decisions during the *Lochner* era, the author of this Article was unable to locate any decisions using the terms "neutral" or "neutrality" in this sense, which, though not dispositive, at least raises additional doubts about the significance of this concept.

[47] *See* Richard S. Kay, *The Equal Protection Clause in the Supreme Court: 1873-1903*, 29 BUFF. L. REV. 667, 688-89 (1980).

some and against others.[48] If the classification was deemed arbitrary, legislative motive was irrelevant. What was important was that the legislative classification was either arbitrary on its face or reasonable people would deem it arbitrary. Arbitrary legislation, as one contemporary scholar pointed out, meant "oppressive or unjust or not based upon sufficient reason."[49]

Gillman would likely reply that behind the Court's dislike of "arbitrary" classifications was the latent fear that such classifications often resulted from special interest considerations. Perhaps. Regardless, the problem that remains with the class legislation thesis is that, as discussed below, the Supreme Court, unlike many state courts, had a very narrow conception of what constituted illicit partial legislation. The Court therefore rarely invalidated regulations for constituting class legislation. While almost all of the Supreme Court's *Lochner*ian decisions were decided solely or primarily under the Due Process Clause, class legislation was analyzed primarily under the Equal Protection Clause.[50] Moreover, while the class legislation thesis has more explanatory power than its cruder predecessors, it cannot explain the broad range of *Lochner*ian opinions, including the Court's nascent civil liberties jurisprudence of the 1920s.

A. *Class Legislation and the Courts After the Civil War*

Opposition to class legislation had deep roots in post-Civil War constitutional thought. Thomas Cooley's famous treatise on the police power argued that class legislation was unconstitutional and void.[51] Justice Stephen Field's concurring opinion in *Butchers' Union v. Crescent City*[52] stated that the Fourteenth Amendment was "designed to prevent all discriminating legislation for the benefit of some to the disparagement of others."[53] While the police power remained intact, the Amendment "inhibits discriminating and partial enactments, favoring some to the

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[48] *See*, *e.g.*, Barbier v. Connolly, 113 U.S. 27, 31 (1884).

[49] Robert P. Reeder, *Is Unreasonable Legislation Unconstitutional?*, 62 U. PA. L. REV. 191, 192 (1913).

[50] *See* Robert E. Cushman, *The Social and Economic Interpretation of the Fourteenth Amendment*, 20 MICH. L. REV. 737 (1922) (noting that courts' "rigid" construction of the Equal Protection Clause led to the invalidation of "long lists" of class legislation).

[51] THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 459 (3d ed. 1874) ("everyone has a right to demand that he be governed by general rules"); *id*. at 466 ("the same securities which one citizen may demand, all others are entitled to").

[52] 111 U.S. 746, 758 (1883) (Field, J., concurring).

[53] *Id.*at 758.

impairment of the rights of others."[54] Each American, Field continued, had the right to "pursue his happiness unrestrained, except by just, equal, and impartial laws."[55]

Justice Bradley, writing for the Court in the *Civil Rights Cases*, declared in dicta that "many wrongs may be obnoxious to the prohibitions of the Fourteenth Amendment which are not, in any just sense, incidents or elements of slavery."[56] For example, "what is called class legislation. . .would be obnoxious to the prohibitions of the Fourteenth Amendment, [which] extends its protections to races and classes, and prohibits any State legislation which has the effect of denying to any race or class, or to any individual, equal protection of the laws."[57]

The Court, however, quickly disclaimed any intention of strictly applying the Fourteenth Amendment's prohibition against class legislation. In *Barbier v. Connolly*,[58] a laundryman argued that a San Francisco ordinance was illicit class legislation because it singled out laundries for a night work ban. The Court acknowledged that the Fourteenth Amendment prohibits "[c]lass legislation, discriminating against some and favoring others."[59] However, the Court added that this ban did not preclude all special or partial legislation. For example, the Court noted that legislation sometimes must apply to only certain districts, "such as for draining marshes and irrigating arid plains."[60]

Moreover, "[s]pecial burdens are often necessary for general benefits,—for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects." While regulations for these purposes "may press with more or less weight upon one than upon another," they are constitutional because they are not "designed to impose unequal or unnecessary restrictions upon any one, but to promote, with as little inconvenience as possible, the general good."[61] Even though such legislation is "special in character," it is within the police power "if within the sphere of its operation it affects alike all persons similarly situated.'"[62]

With regard to the laundry ordinance in particular, Justice Field wrote for the unanimous Court in language reminiscent of the modern rational basis test that "[i]t may be a necessary measure of precaution in a city

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[54] *Id.*
[55] *Id.*
[56] The Civil Rights Cases, 109 U.S. 4, 23-24 (1883).
[57] 109 U.S. 3, 24 (1883).
[58] Barbier v. Connolly, 113 U.S. 27 (1884).
[59] *Id*. at 31.
[60] *Id*.
[61] *Id*.
[62] *Id*.

composed largely of wooden buildings like San Francisco, that occupations, in which fires are constantly required, should cease after certain hours at night until the following morning; and of the necessity of such regulations the municipal bodies are the exclusive judges; at least, any correction of their action in such matters can come only from state legislation or state tribunals."[63] Field concluded that the law did not "discriminat[e] against any one. All persons engaged in the same business within it are treated alike; are subject to the same restrictions, and are entitled to the same privileges under similar conditions."[64]

The following year a Chinese plaintiff in *Soon Hing v. Crowley*[65] challenged the same laundry law on the grounds that its purpose was to force Chinese-owned laundries out of business. Field, again for a unanimous Court, wrote that because the law was facially-neutral and operated uniformly it was not illicit class legislation. He also noted the difficulty of "penetrating into the hearts of men"and announced that "the rule in general, with reference to the enactments of all legislative bodies, [is] that *the courts cannot inquire into the motives of the legislators* in passing them, except as they may be disclosed on the face of the acts, or inferrible from their operation."[66] The refusal to inquire regarding legislative motivation was a severe constraint on the Court's willingness and ability to overturn facially-neutral legislation that intentionally benefitted or harmed a particular class or group.[67]

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[63] *Id.* at 35.

[64] *Id*.

[65] 113 U.S. 703 (1885).

[66] *Id*. at 709 (emphasis supplied).

[67] The alert leader is likely to wonder how this result squares with *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). In *Yick Wo*, the Court invalidated a laundry ordinance that required owners of wooden laundries, most of whom were Chinese, to be licensed by the Board of Supervisors. Brick or stone laundries, all owned by whites, did not require licenses. If that had been all that was involved, the Supreme Court almost certainly would have upheld the law as a valid police power measure to prevent fires. However, the Supervisors established no objective standards to determine which wood laundries could receive licenses. Instead, they granted license to all whites who owned wooden laundries, and denied them to all Chinese.

Justice Matthews, for a unanimous Court, wrote that "the facts shown establish an administration directed so exclusively against a particular class of persons . . . , with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to the petitioners . . . by the broad and benign provisions of the fourteenth amendment to the constitution of the United States. *Id*. at 373. Justice Matthews then proclaimed a lasting principle in American constitutional law:

> Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.

Id. at 373-74.

The *Yick Wo* ruling is narrower than it might first appear. The Court was able to declare the law

In 1888, the Supreme Court again emphasized the narrow reach of the Fourteenth Amendment's prohibition on class legislation. By this time the ban on class legislation seems to have become firmly associated with the Equal Protection Clause,[68] with due process sometimes playing a supporting role. At issue in *Missouri P. R. Co. v. Mackey*[69] was an 1874 Kansas law providing that every railroad company was liable to its employees for injuries caused by mismanagement of its engineers or other employees. A railroad challenged the law as "special" or "class" legislation because the law applied only to railroads and to no other industries. The Court, in an opinion by Justice Field, unanimously rejected this argument, noting that it seemed "to rest upon the theory that legislation which is special in its character is necessarily within the constitutional inhibition."[70] But, Field explained, "nothing can be further from the fact. The greater part of all legislation is special, either in the object sought to be attained by it, or in the extent of its application."[71] Special legislation is not illicit class legislation "if all persons brought under its influence are treated alike under the same conditions."[72]

The ramifications of this doctrine are well-illustrated by *Powell v. Pennsylvania*.[73] The case involved special interest legislation attempting to protect the dairy industry by prohibiting the sale of margarine.[74] The

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unconstitutionally discriminatory without looking into the Supervisors' motives because the ordinance in question was *always* applied against Chinese laundrymen, and *never* against whites, a fact the Court specifically emphasized. *Id*. at 374. If the law had merely had a disproportionate impact on the Chinese, even a severe one, it likely would have been upheld, as in *Soon Hing*.

Even *Yick Wo* would likely have been more controversial among the Justices but for the Court's perceived need to establish federal protection of the Chinese in the wake of anti-Chinese pogroms that broke out throughout the West after *Soon Hing* but before the Court decided *Yick Wo*. *See* Bernstein, *supra* note 45, at 273-74. Anti-Chinese forces in the West were protesting against the fact that the Chinese Exclusion Act of 1882 grandfathered in existing Chinese residents.

The Supervisors argued that the laundry licensing ordinance was not discriminating against the Chinese. Rather, Chinese-owned laundries used scaffolding on their roofs, which created a fire hazard not present in white-owned wooden laundries. *Id*. at 367. Given the Court's reluctance at this time to inquire into the motives of state actors, and the fact that another discriminatory measure had been upheld 9-0 the year before, this rationale may have been sufficient to persuade some of the Justices to uphold the law, but for the circumstances requiring that national authority over immigration be asserted. *Cf. In re* Quong Woo, 13 F. 229 (C.C.D. Cal. 1882) (Field, J.) (invalidating a laundry licensing ordinance that required all laundry owners to get the written assent of twelve of their neighbors and noting that the law tended to deny the right to pursue an occupation to Chinese immigrants, despite the United States' treaty with China that granted the Chinese full rights).

[68] *See* MOTT, *supra* note 3, at 277-78 ("the Fourteenth Amendment expressly prohibits the states from denying any person the equal protection of the laws, and it was but natural that the courts should seize upon this specific provision rather than the more general Due Process Clause").

[69] 127 U.S. 205 (1888).

[70] *Id.* at 209.

[71] *Id.*

[72] *Id.*

[73] Powell v. Pennsylvania, 127 U.S. 678 (1888).

[74] *See* Geoffrey P. Miller, *Public Choice at the Dawn of the Special Interest State: The Story of Butter and Margarine*, 77 CAL. L. REV. 83 (1989).

Court, in an opinion by Justice Harlan, upheld the law. With regard to the claim that the law was special interest legislation, Harlan argued that the Court must assume that the law was, as the state claimed, an anti-fraud and public health measure.[75] As to the claim that the law otherwise created an arbitrary classification repugnant to the Fourteenth Amendment, Harlan rejoined that "[t]he statute places under the same restrictions, and subjects to like penalties and burdens, all who manufacture, or sell, or offer, or keep in possession to sell, the articles embraced by its prohibitions; thus recognizing and preserving the principle of equality among those engaged in the same business."[76]

State courts, meanwhile, were far more aggressive about invalidating laws on class legislation grounds.[77] In contrast to the Supreme Court's understanding that partial laws were constitutional so long as "all persons" subject to the law "are treated alike under the same conditions," state courts issued a series of highly-publicized decisions invalidating regulatory legislation that applied only to certain industries.[78] For example, the Missouri Supreme Court invalidated a "truck act"[79] that applied only to manufacturing and mining concerns.[80] According to the court the law was void because, *inter alia*, it "single[d]out those persons who are engaged in carrying on the pursuits of mining and manufacturing."[81] If such legislation were permitted to stand the government would become one "of special privileges, instead of a compact, to promote the general welfare of the people."[82] The West Virginia Supreme Court quashed a similar truck act, explaining that "[i]t is not competent for the legislature, under the constitution, to single out owners and operators of mines, and manufacturers of every kind, and provide that they shall bear burdens not imposed upon the owners of other property, or employers of labor, and prohibit them from making contracts

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[75] *Powell*, 127 U.S. at 686.

[76] *Id*. at 687. As an indication of how forgiving the Court's test was in *Powell*, even Progressive Ernst Freund later criticized the Court for upholding the margarine law. ERNST FREUND, THE POLICE POWER § 62, at 57 (1904) ("Even the danger to health or safety should not justify the absolute prohibition of a useful industry or practice" such as the manufacture of oleomargarine").

[77] Until 1914, the Supreme Court lacked jurisdiction to review state court decisions invalidating legislation on federal constitutional grounds, and also, like today, lacked jurisdiction to review state court interpretations of state constitutions.

[78] For example, the Illinois Supreme Court voided a law prohibiting company stores in mining and manufacturing because it did not apply to "other branches of industry" such as construction, transportation, agriculture, and domestic service. Frorer v. People, 31 N.E. 395, 400 (Ill. 1892).

[79] Truck acts required companies to pay their workers in cash, not in scrip redeemable at the company store.

[80] State v. Loomis, 22 S.W. 350, 353 (Mo. 1893).

[81] *Id*.

[82] *Id.*

which it is competent for owners of property or employers of labor to make."[83] Numerous other examples could be cited.[84]

The many state decisions invalidating laws on class legislation grounds led treatise writer Ernst Freund to conclude in 1904 that the ban on unequal laws is "one of the most effectual [sic] limitations upon the exercise of the police power."[85] Freund explained that "[w]here a restraint is confined to a special class of acts or occupations, that class must present the danger dealt with in a more marked and uniform degree than the classes omitted."[86] The impact on labor legislation was particularly stark, with the prohibition on class legislation seen as the greatest extant barrier

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[83] State v. Goodwill, 10 S.E. 285, 288 (W. Va. 1889); *see also* Godcharles v. Eigman, 113 Pa. St. 431 (1886).

[84] The Indiana Supreme Court found unconstitutional discrimination in a truck act that only applied to corporations. Toledo, St. L. & W. R.R. Co. v. Long, 169 Ind. 316 (1907). The Illinois Supreme Court invalidated an act forbidding employers engaged in mining or manufacturing to make deductions for advances to employer unless such advances were made in cash, Kellyville Coal Co. v. Harrier, 69 N.E. 927 (Ill. 1904), and overturned a law requiring mine owners to provide washrooms for their employees. Starne v. People, 78 N.E. 61 (Ill. 1906). Both decisions rested on opposition to class legislation, and found that the acts in question denied the regulated parties equal protection of the law. The Illinois Court also voided a law prohibiting women from being employed in factories for more than eight hours a day. Ritchie v. People, 40 N.E. 454 (Ill. 1895); *see also* Burcher v. People, 93 P. 14 (Colo. 1907); People v. Williams, 81 N.E. 778 (N.Y. 1907) (also invalidating protective laws for women); *but cf.* Wenham v. State, 91 N.W. 421 (Neb. 1902); State v. Buchanan, 70 P. 502 (Wash. 1902) (upholding protective laws for women). The court found that the law was illicit class legislation, both because it only applied to factories and because it applied to women and not men.

The California Supreme Court, meanwhile, invalidated a law regulating the timing of wages that applied only to corporations, Johnson v. Goodyear Mining Co. 59 P. 304 (Cal. 1899); *cf.* Leep v. St. Louis Ry. Co., 25 S.W. 75 (Ark. 1894); State v. Brown & Sharpe Mfg. Co., 25 A. 246 (R.I. 1892) (both allowing similar regulations that applied only to corporations because state control over corporate charters permitted such regulations), and overturned a law under which "the laboring barber, engaged in a most respectable, useful and cleanly pursuit, is singled out from the thousands of his fellows in other employments and told that, willy nilly, he shall not work'" on Sundays and holidays. *Ex Parte* Jentzsch, 44 P. 803 (Cal. 1898). The court added, "How comes it that the legislative eye was so keen to discern the needs of the oppressed barber, and yet was blind to his toiling brethren in other vocations? . . . A law is not always general because it operates upon all within a class. There must be back of that a substantial reason why it is made to operate only upon a class, and not generally upon all." The Missouri, Illinois, and Washington supreme courts also invalidated Sunday closing laws for barbers as class legislation because the laws applied only to one profession. State v. Granneman, 33 S.W. 784 (Mo. 1896); Eden v. People, 43 N.W. 1108 (Ill. 1896); City of Tacoma v. Krech, 46 P. 255 (Wash. 1896); *but cf.* People v. Bellet, 57 N.W. 1094 (Mich. 1894); People v. Havner, 43 N.E. 541 (N.Y. 1896) (upholding such a law and remarking that "[i]t is to the interest of the state to have strong, robust, healthy citizens, capable of self-support, of bearing arms, and of adding to the resources of the country."); *Ex Parte* Northrup, 69 P. 445 (Ore. 1902); Breyer v. State, 50 S.W. 769 (Tenn. 1898). Seager points out that these laws were not typical class legislation because the purported victims of the laws, barbers, generally supported these laws. To protect themselves from competition, barbers were inclined to stay open to satisfy customers who with little extra inconvenience could come some other time. Henry R. Seager, *The Attitude of American Courts Towards Restrictive Labor Laws*, 19 POL. SCI. Q. 589, 600 (1904). The only similar case to come before the United States Supreme Court involved a Minnesota law that banned all Sunday labor. Petit v. State, 177 U.S. 164 (1900). The law exempted works of charity and necessity, and was amended to specify that shaving was not charity or necessity. The Court found that this amendment was not class legislation, but merely was a clarification of the law.

[85] FREUND, *supra* note 76, § 683, at 705.

[86] *Id*.

to protective labor legislation. Freund noted that labor statutes invalidated by the courts "have generally contained elements of discrimination which the courts took into consideration in arriving at their decisions."[87] Henry Seager concluded that same year that "[t]he prohibition of special or class legislation" had led courts to almost universally recognize "the right to contract." Labor regulations were permissible only if they did not exceed "the scope of the police power."[88]

Thus, Gillman, and Michael Les Benedict, whose influential 1985 article on judicial opposition to class legislation in the late nineteenth Century is largely responsible for bringing the issue of class legislation to the attention of contemporary legal historians,[89] are correct when they contend that class legislation was the primary issue in the debate over so-called "laissez-faire jurisprudence" during the Gilded Age and just beyond. Indeed, in *Dent v. West Virginia*,[90] the Supreme Court even declared that the absence of arbitrary classification bars not just successful equal protection claims against regulatory legislation, but due process claims as well. Where Gillman errs is in not recognizing that while many late nineteenth century state courts interpreted the ban on class legislation broadly, the United States Supreme Court interpreted the ban narrowly, including during the *Lochner* era.

B. *Class Legislation and the United States Supreme Court During the* Lochner *Era*

At the beginning of the *Lochner* era, the Supreme Court occasionally overturned on class legislation grounds legislative classifications that seemed patently discriminatory with no valid justification.[91] Such holdings were explicitly based on equal protection/class legislation concerns. These decision were also relatively rare, as the Court upheld even laws that seemed very likely candidates for condemnation as class legislation.[92]

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[87] *Id.*, § 502, at 539. Freund did acknowledge, however, that the "Supreme Court of Illinois has also said that chief stress should be laid upon the violation of the constitutional liberty of contract." *Id*.

[88] Seager, *supra* note 84, at 594.

[89] Other legal historians had noted the class legislation issue before Benedict, but his article explored the issue in far more detail, and to far greater attention compared to previous discussions of the issue. *See* Benedict, *supra* note 16.

[90] Dent v. West Virginia, 129 U.S. 114, 124 (1889) ("legislation is not open to the charge of depriving one of his rights without due process of law, if it be general in its operation upon the subjects to which it relates").

[91] *E.g.*, Connolly v. Union Sewer Pipe Co., 184 U.S. 540 (1902) (invalidating an antitrust law that exempted only farmers and ranchers); Cotting v. Kansas City Stock Yards Co. 183 U. S. 79, 114-15 (1901) (Harlan, J., concurring for six Justices) (invalidating a mine inspection law because it applied only to one of the many mining companies in the state); Gulf C. & S.F. Ry. Co. v. Ellis, 165 U. S. 150 (1896) (invalidating a law that allowed plaintiffs with small claims against railroads to recover fees and costs if the railroad initially refused to pay the claim and then lost at trial, three Justices dissenting).

[92] *E.g.*, American Sugar Refining Co. v. Louisiana, 179 U.S. 89, 92, 95 (1900) (upholding an

For example, in 1898 the Court heard a railroad's challenge to a law that allowed plaintiffs to collect attorneys' fees from railroad defendants in actions arising from fires caused by railroad operations.[93] Despite recent precedent declaring a similar law unconstitutional,[94] and despite a vigorous dissent authored by Justice Harlan for himself and three other Justices, the Court upheld the law. Justice Brewer wrote for the Court that "the very idea of classification is that of inequality, so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality."[95] Brewer gave "full force to its purpose as declared by the supreme court of Kansas, to the presumption which attaches to the action of a legislature that it has full knowledge of the conditions within the state, and intends no arbitrary selection or punishment, but simply seeks to subserve the general interest of the public."[96]

The most substantial blow to the use of the class legislation argument to support liberty of contract came from the early *Lochner* era's most representative Justice, Henry Billings Brown.[97] In his 1898 opinion in *Holden v. Hardy*[98] Brown interpreted the ban on class legislation narrowly, preventing the class legislation prohibition from being a serious restraint on government regulation in the labor context.[99] In *Holden*, the

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exemption for planters and farmers from a tax on the refining of sugar as a reasonable classification; finding that the law was "obviously intended as an encouragement to agriculture" but was not "pure favoritism"). Justice Field had a broader notion of class legislation, apparent in his concurring opinion invalidating the federal income tax. Pollock v. Farmers Loan and Trust, 157 U.S. 429 (1895) (Field, J., concurring) ("The legislation, in the discrimination it makes, is class legislation. Whenever a distinction is made in the burdens a law imposes or in the benefits it confers on any citizens by reason of their birth, or wealth, or religion, it is class legislation, and leads inevitably to oppression and abuses, and to general unrest and disturbance in society.").

[93] Atchison, T. & S. F. R. Co. v. Matthews, 174 U.S. 96 (1899).

[94] *Ellis*, 165 U. S. 150.

[95] *Matthews*, 174 U.S. at 106.

[96] *Id.*

[97] *See* Siegel, *supra* note 30, at 18 n.76 (arguing that Brown was the most typical Justice of the early *Lochner* period because he was almost always in the majority in important cases).

[98] Holden v. Hardy, 169 U.S. 366, 398 (1898).

[99] Brown's views were similarly influential in the context of segregation laws. In *Plessy v. Ferguson*, 163 U.S. 537 (1896), Brown infamously argued that the segregation law at issue was not discriminatory class legislation. He acknowledged "that every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class." *Id.* at 549. But he concluded that the law was reasonable, because it followed the "established usages, customs, and traditions of the people," and was passed "with a view to the promotion of their comfort, and the preservation of the public peace and good order." *Id.* Given "racial instincts," segregating whites and African Americans was a reasonable legislative classification, not class legislation, because a "statute which implies merely a legal distinction . . . has no tendency to destroy the legal equality of the two races." *Id*. at 543. Justice Harlan, of course, dissented vigorously, and argued that the law was unconstitutional as both caste and class legislation. *Id.* at 552-64 (Harlan, J., dissenting).

Opponents of segregation, including the Louisiana segregation law at issue in *Plessy*, consistently argued that such laws constituted illicit class legislation. *See* CHARLES A. LOFGREN, THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION 28 (1987); Bernstein, *supra* note 23, at 822 n.113.

Of course, racism played a significant role in *Plessy*. But the point here is that *Plessy's* narrow

Court (Peckham and Brewer dissenting without opinion[100]) upheld a maximum hours law that applied only to underground miners, despite the claim that the law was class legislation, not equal or uniform in its provisions. Brown acknowledged that the question was whether the statute was an "exercise of a reasonable discretion [by the legislature], or whether its action be a mere excuse for an unjust discrimination, or the oppression, or spoliation of a particular class."[101] Brown found that the law was indeed reasonable, meanwhile ignoring a Colorado case invalidating similar legislation.[102]

A narrow understanding of class legislation carried the day again in 1901.[103] Relying on *Holden*, the Court concluded that a truck act was "not special, but general; tending towards equality between employer and employee in the matter of wages; intended and well calculated to promote peace and good order, and to prevent strife, violence, and bloodshed."[104] Peckham and Brewer again dissented without opinion.

The following year, the Court upheld safety regulations that were imposed only on mines with more than five employees. Justice Brown wrote for a unanimous Court that "this is a species of classification which

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understanding of the prohibition on class legislation was consistent with the Court's more general equal protection/class legislation jurisprudence. *Cf.* LOFGREN, *supra*, at 80 ("the approach that the Court took to state economic and social regulations paralleled and anticipated its treatment of restrictions on blacks"); Kay, *supra* note 47, at 696 (concluding that during this period, "the objection to discrimination on grounds of race may be merely a special case of the objection to classifications not reasonably related to a police power objective."); *see generally* American Sugar Refining Co. v. Louisiana, 179 U.S. 89, 92 (1900) (suggesting that classifications in tax laws based on "color, race, religious opinions [and] political affiliations" would violate equal protection because would be "arbitrary, oppressive or capricious . . . having no possible connection with the duties of citizens as taxpayers"); David E. Bernstein, Lochner *vs.* Plessy: *The* Berea College *Case* 25 J. SUP. CT. HIST. 93 (2000) (contrasting the Court's relatively aggressive judicial review regarding the right to pursue an occupation under the Due Process Clause in *Lochner* with its passive review of segregation laws under the Equal Protection Clause in *Plessy*).

[100] Peckham and Brewer's dissents were likely not based specifically on concerns about class legislation. They were the two most libertarian Justices on the Court, and often dissented in cases upholding economic regulations. In addition to the cases discussed below, see Gardner v. People, 199 U.S. 325, 335 (1905) (Brewer and Peckham dissenting without opinion from a decision upholding a law requiring hotels to pay a particular contractor to haul their garbage); Otis v. Parker, 187 U.S. 606, 609 (1903) (Brewer and Peckham dissenting without opinion from a decision upholding a law banning futures contracts); Booth v. People, 184 U.S. 425, 431 (1902) (same). Brewer once wrote, "The paternal theory of government is to me odious. The utmost possible liberty to the individual, and the fullest possible protection to him and his property is both the limitation and the duty of government." Budd v. New York, 143 U.S. 517, 551 (1892) (Brewer, J., dissenting). As a state court justice, Peckham spoke of "the absolute liberty of the individual to contract regarding his own property." People *ex rel.* Annan v. Walsh, 22 N.E. 682, 687 (N.Y. 1889) (Peckham, J., dissenting).

Brewer apparently did not have a particularly expansive view on the scope of the ban on class legislation, as he wrote the opinion in the 5-4 case of *Ellis*, 165 U. S. 150.

[101] *Holden*, 169 U.S. at 398.

[102] *In re* Morgan, 58 P. 1071 (Colo. 1889).

[103] Knoxville Iron Co. v. Harbison, 183 U.S. 13, 22 (1901).

[104] *Id*. at 21.

the legislature is at liberty to adopt, provided it be not wholly arbitrary or unreasonable."[105] Brown asserted that "[t]here was clearly reasonable foundation" for discrimination in this case because the state reasonably assumed "that mines which are worked upon so small a scale as to require only five operatives would not be likely to need the careful inspection provided for the larger mines, where the workings were carried on upon a larger scale or at a greater depth from the surface, and where a much larger force would be necessary for their successful operation."[106]

Perhaps the most significant evidence of the *Lochner* Court's reluctance to rely on class legislation arguments to invalidate regulatory legislation, especially in the labor context, comes from *Lochner* itself. *Lochner* involved a maximum hours law that could have been construed as class legislation on two grounds. First, it applied only to bakers. Second, the hours law was arguably special interest legislation benefitting established, unionized German-American bakers at the expense of more recent immigrants.[107] Yet, as even Gillman acknowledges, *Lochner* "does not explicitly rely on the language of unequal, partial, or class legislation."[108] Rather, *Lochner* invalidated the bakers' law because it violated liberty of contract without a valid police power rationale.[109]

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[105] St. Louis Consol. Coal Co. v. Illinois, 185 U.S. 203, 207 (1902).

[106] *Id*. at 208.

[107] *See* Sidney Tarrow, Lochner v. New York: *A Political Analysis,* 5 LABOR HIST. 27 (1964) (reviewing the origins of the law); Editorial, *A Check on Union Tyranny*, THE NATION, May 4, 1905, at 346, 347 (praising *Lochner* for reining in union power).

[108] GILLMAN, *supra* note 40, at 128.

[109] Also indicating that the Court did not condemn the bakers' hours law at issue in *Lochner* as class legislation is the Court's reliance on the Due Process Clause and not the Equal Protection Clause in its decision. *See* discussion, *infra*. Peckham does provocatively state that the health rationale that supported the law in question was so weak that it gave rise "to at least a suspicion that there was some other motive dominating the legislature than the purpose to subserve the public health or welfare." *Lochner*, 198 U.S. at 63. The "other motive" is presumed by many to be the desire to enact "class legislation" benefitting organized bakers. In fact, however, Peckham followed the well-established rule "that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferable from their operation." Soon Hing v. Crowley, 113 U.S. 703, 709 (1885); *cf*. Florida C. & P. R. Co. v. Reynolds, 183 U.S. 471, 480 (1902) ("We must assume that the legislature acts according to its judgment for the best interests of the state. A wrong intent cannot be imputed to it."). The bakers hours law betrayed no facial illicit "class" motive, and the Court did not infer one. Suspecting a non-health-related motive is merely the flip side of refusing to accept the state's claimed health rationale. But the reason the law was unconstitutional was not that the Court discerned an illicit rationale, but because once the Court rejected the state's claim that the law was a health measure there was no valid police power rationale for the law's interference with liberty of contract.

Later, Peckham states, "It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives." *Id*. at 64. However, this comment is not directly referring to the bakers hours law at issue. Rather, Peckham states that "interference on the part of the legislatures of the several States with the ordinary trades and occupations of the people seems to be on the increase." *Id.* Peckham first gives several examples of state court decisions invalidating occupational licensing laws, relatively uncontroversial illustrations given that even Progressive treatise author Ernst Freund thought licensing laws were often

The failure of *Lochner* to rely on a class legislation argument is especially noteworthy for four reasons. First, as we have seen, courts, including the Supreme Court, were perfectly willing and able to speak directly of class legislation when that was the basis of their holding.[110] Indeed, the precedent most directly on point in *Lochner* was a California case explicitly holding that a law regulating bakers' hours was unconstitutional class legislation.[111]

Second, Joseph Lochner's brief focused primarily on an anti-class legislation argument.[112] The Court had consistently stated that "special" legislation affecting only on industry is not illicit class legislation only "if all persons brought under its influence are treated alike under the same conditions." Lochner's brief therefore tried to demonstrate that the bakers' hours law did not meet this standard. The brief's first and most detailed argument argues that the maximum hours law at issue was illicit class legislation that violated equal protection guarantees because it "affect[ed]

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unnecessary or excessive. *See* FREUND, *supra* note 76, at 534-35. Peckham, however, then cites two cases in which state courts "upheld the right of free contract and the right to purchase and sell labor upon such terms as the parties may agree to." *Id*. Not only did the Supreme Court never adopt such a broad understanding of the right to contract, but the first of the cases cited by Peckham had voided an antiscrip law, a type of legislation that the Supreme Court had already upheld over his (and Brewer's) dissent. Knoxville Iron Co. v. Harbison, 183 U.S. 13, 22 (1901). There is every reason to believe, then, that this portion of the opinion did not fully reflect the sentiments of the full five-member majority, nor was it the underlying basis for invalidating the bakers hours law.

[110] *See generally* Barry Friedman, T*he History of the Countermajoritarian Difficulty, Part Three: The Lesson of* Lochner, 76 N.Y.U. L. REV. 1383, 1418 (2001) (noting "the demonstrated ability of judges to be quite explicit when they were applying the [anti-class legislation] principle").

[111] *Ex parte* Westerfield, 55 Cal. 550 (1880). In 1880, the California legislature banned bakery owners from employing workers between 6:00 p.m. on Saturday and 6:00 p.m. Sunday. Justice Milton H. Myrick, writing for the court, explained the that this law was unconstitutional "special legislation" because a "certain class" had been selected for special benefits or burdens. "[I]f there be authority to restrain the labor on some one day," Myrick added, it must be, if at all under *a general law* restraining labor on that day." *Id.* at 551 (emphasis supplied). Justice Elisha W. McKinstry concurred, noting that the law was unconstitutional even though it applied equally to all bakers. He argued that if courts were to concede that "every law is 'general' within the meaning of the Constitution, which bears equally upon all to whom it is applicable," the prohibition on class legislation would be rendered a nullity, as a court would never be able to say that discriminatory legislation was a "special law." The end result of adopting such a cramped view of class legislation would be that bakers could "be forced to rest from their labors periodically" because of a law "not applicable to many other classes of artisans and workmen." Yet, even though Lochner cited this case in his brief, the *Lochner* Court declined to discuss the class legislation issue.

Of course, the California court's reasoning was contradicted by later United States Supreme Court cases that had a much narrower view of class legislation, but *Lochner* provided the Court with an opportunity to revisit its prior opinions. A future California Supreme Court opinion would invalidate an Oakland law that set maximum hours for laundry workers, relying both on *Lochner* and also on the fact that the law was class legislation violating the Equal Protection Clause because, by restricting only the hours of launderers, it did not operate uniformly. *In re* Mark, 58 P.2d 913, 915 (Cal. 1936).

[112] Gillman notes this, but uses it as evidence that *Lochner* was based on hostility to class legislation. It seems more logical to concentrate on the disconnect between the brief's focus on class legislation and the opinion's neglect of that issue.

but a portion of the baking trade, namely, employes [sic] in biscuit bread or cake bakeries and employes in confectionary establishments."[113] According to the brief, at least one-third to one-half of people in the baking business were not within the prohibition of the statute, because they worked in pie bakeries, hotels, restaurants, clubs, boarding houses, and private homes.[114] Yet, bakers in such establishments typically faced conditions less sanitary and healthful than those of the modern bakery.[115]

Third, Justice O'Brien, dissenting below in the New York Court of Appeals, relied explicitly on an anti-class legislation rationale.[116] The Supreme Court could have followed his lead. Justice O'Brien noted that while the vast majority of the public was free to hire labor for any mutually agreed upon number of hours, "a very small fraction of the community who happen to conduct bakeries or confectionery establishments are prohibited, under pain of fine and imprisonment, from regulating the conduct of their own business."[117] O'Brien concluded that "[c]lass legislation of this character, which discriminates in favor of one person and against another, is forbidden by the Constitution of the United States."[118]

Fourth, when Peckham served as a New York Court of Appeals justice he explicitly denounced class legislation of the special interest variety. In an oft-cited case, he criticized legislation

> which is meant to protect some class in the community against the fair, free and full competition of some other class, the members of the former class thinking it impossible to hold their own against such competition, and therefore flying to the legislature to secure some enactment which shall operate favorably to them or unfavorably to their competitors in the commercial, agricultural, manufacturing or producing fields.[119]

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[113] Brief for Appellant, Lochner v. New York, 198 U.S. 45 (1905), at 8.

[114] *Id*. at 8-9. "The employer of bakers in biscuit, bread and cake bakeries is subjected to heavy penalties of fine and imprisonment for requiring or permitting his men to work more than the prescribed number of hours, whereas employers of the same class of men doing the same work throughout the state are exempt from the provisions of the statute." *Id*. at 12.

[115] *Id*. at 10-11. Also, bakery owners who worked in their bakeries were not subject to the statute, nor were partners in a bakery organized by a few bakers as a partnership. *Id*. at 8. Half the bakeries in the state had only one or two bakers. These were most likely sole proprietorships or family businesses which did not have employees and therefore did not come within the scope of the law.

This section of the brief relied on *Connolly v. Union Sewer Pipe Company*, 184 U.S. 540 (1901), one of the few cases in which the Court explicitly invalidated a law as class legislation. The brief also stated that the bakers' hours law violated the dictum of *Barbier v. Connolly,* 113 U.S. 27 (1884), that "no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances."

[116] People v. Lochner, 69 N.E. 373, 386 (N.Y. 1904) (O'Brien, J., dissenting), *rev'd sub nom*, Lochner v. New York, 198 U.S. 45 (1905).

[117] *Id*.

[118] *Id*.

[119] People v. Gillson, 109 N.Y. 389, 398 (1888).

That he failed to articulate a similar critique in *Lochner*, despite 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.

After *Lochner*, the Court continued to interpret the class legislation prohibition narrowly. In 1909, the Court upheld—over the dissents of Brewer and Peckham—a law that required mining companies to pay miners based on pre-screened coal despite arguments, *inter alia*, that the law was class legislation.[120] In *Quong Wing v. Kirkendall*,[121] the Court, over a lone dissent by Justice Lamar, found that a law taxing laundries that exempted steam laundries and laundries employing women was not facially unconstitutional class legislation.[122]

In *Bunting v. Oregon*,[123] which upheld a maximum hours and overtime law for factory workers, the Court rejected the plaintiff's contention "that the law discriminates against mills, factories, and manufacturing establishments in that it requires that a manufacturer, without reason other than the fiat of the legislature, shall pay for a commodity, meaning labor, one and one-half times the market value thereof while other people, purchasing labor in like manner in the open market, are not subjected to the same burden." The Court simply noted that "there is a basis" for such a classification with regard to hours of service.[124]

The Supreme Court also defined "class legislation" narrowly outside of the labor context. Perhaps most dramatically, at the height of the *Lochner*

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[120] McLean v. Arkansas, 211 U.S. 539 (1909). Another example of the U.S. Supreme Court rejecting a class legislation argument that had found favor in a state court involved the obscure issue of laws that prohibited the use of the American flag in advertising. The Illinois Supreme Court voided such a law in part because the law was "unduly discriminating and partial in its character. It exempts from penalties imposed by the act person who may choose to make use of the national flag or emblem for either public or private exhibitions of art. . . The manner in which the act thus discriminates in favor of one class of occupations and against all others places it in opposition to the constitutional guarantees hereinbefore referred to." Ruhstrat v. People, 57 N.E. 41, 46 (Ill. 1900). The United States Supreme Court rejected this argument. The Court stated that "it is well settled that, when prescribing a rule of conduct for persons or corporations, a state may, consistently with the Fourteenth Amendment, make a classification among its people based "upon some reasonable ground, –some difference which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection." Halter v. Nebraska, 205 U.S. 34, 43-44 (1907). The Court concluded that "the classification made by the state cannot be regarded as unreasonable or arbitrary, or as bringing the statute under condemnation as denying the equal protection of the laws." *Id*. at 45.

[121] 223 U.S. 59 (1912). The Court did suggest that the law would be unconstitutional if, as in *Yick Wo v. Hopkins*, see *supra* note 67, it only applied to Chinese-owned hand laundries.

[122] *Id*. at 60. The case was eventually reargued in the Montana Supreme Court, and held unconstitutional as discriminatory against the Chinese. For details see David E. Bernstein, *Two Asian Laundry Cases*, 24 J. SUP. CT. HIST. 95 (1999).

In contrast to the result in *Quong Wing*, a federal district court had invalidated a similar law in 1896. *In re* Yot Sang, 75 F. 983, 985 (D. Mont. 1896), *rev'd on other grounds sub nom.,* Jurgens v. Yot Sang, 171 U.S. 686 (1898).

[123] 243 U.S. 426 (1917).

[124] *Id.* at 438.

era in 1924 the Court unanimously upheld the "recapture" provisions of the Transportation Act of 1920, under which the Interstate Commerce Commission appropriated "excess" profits from strong railroads to create a fund to aid weaker railroads.[125] Indeed, as Barry Cushman points out, the Court generally upheld "rate regulation of railroads, grain elevators, gas, water and electric works, stockyards, fire insurance, taxis, attorneys, and rental housing."[126] In each case, the laws in question were intended to promote the interests of consumers at the expense of producers and thus were arguably class legislation.

When the *Lochner* Court did invalidate regulatory legislation, it consistently relied on liberty of contract arguments under the Due Process Clause rather than class legislation arguments under the Equal Protection Clause.[127] As we have seen,[128] as late as 1889 in *Dent v. West Virginia*, the Court seemed to assert that if a law that was not class legislation it could not violate the Due Process Clause. However, in a series of decisions in the 1890s, the Court, usually speaking through Justice Brewer, Harlan, or Peckham, reversed course and declared that "liberty of contract" was protected by the Due Process Clause.[129] It was this doctrine that was relied upon in *Lochner* itself and in all of the famous "economic due process" cases of the *Lochner* era. Moreover, it was *Lochner's* substitution of fundamental rights analysis for class legislation analysis that allowed the 1920s Supreme Court to broaden due process protections to non-economic rights in cases such as *Pierce v. Society of Sisters*[130] and *Gitlow v. New York*.[131]

Dent and other cases decided during the period just before the Court adopted the liberty of contract doctrine suggested that when the police power was asserted, due process protection included, or perhaps was even limited to, a ban on unequal legislation.[132] Post-*Lochner* cases, however,

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[125] Dayton-Goose Ry. Co. v. United States, 263 U.S. 456 (1924).

[126] CUSHMAN, *supra* note 20, at 89. Cushman could have added laundries to this particular "laundry list." *See* Oklahoma Operating Co. v. Love, 252 U.S. 352, 356 (1920) (implying that regulation of rates charged by laundries is proper so long as the rates are not confiscatory).

[127] For a contemporary attempt to resolve the csee HANNIS TAYLOR, DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS (1917) (concluding that due process overlaps with but is not coextensive with equal protection); *see also* C. K. BURDICK, LAW OF THE AMERICAN CONSTITUTION 419 (1922) (concluding that due process limits legislation that inflicts inequality of burden and is clearly arbitrary).

[128] *See supra* note 90, and accompanying text.

[129] *E.g.*, Allgeyer v. Louisiana., 165 U.S. 578, 589 (1897) (Peckham, J.); Frisbie v. United States, 157 U.S. 160, 165-66 (1895) (Brewer, J.); Hooper v. People, 155 U.S. 648, 655 (1895) (Harlan, J., dissenting).

[130] 268 U.S. 510 (1925) (invalidating a law banning private schools).

[131] 268 U.S. 652 (1925) (holding that freedom of speech is a fundamental right protected by the Fourteenth Amendment).

[132] Leeper v. Texas, 139 U.S. 462, 468 (1891) ("Due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice."); Dent v. West

relied on due process as the basis for protection of fundamental rights such as liberty of contract against arbitrary legislation, and suggested the equality component of due process was minimal, if it existed at all. For example, several decisions suggested that because Congress is subject to due process but not equal protection limitations, federal discriminatory legislation might be constitutional.[133]

Meanwhile, there were no United States Supreme Court cases decided just before or during the *Lochner* era clearly invalidating legislation as "class," "unequal," "special," "partial," or "discriminatory" legislation that relied on the Due Process Clause alone.[134] Most Supreme Court discussions of class legislation involved only the Equal Protection Clause, even in cases in which due process claims were raised.[135] For example, the Court found that a law creating special, more lenient rules for torts committed by striking workers violated fundamental rights under the Due Process Clause. The Court then found that it also constituted illicit class

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Virginia, 129 U.S.114, 124 (1889) ("legislation is not open to the charge one of his rights without due process of law, if it be general in its operation upon the subjects to which it relates").

[133] District of Columbia v. Brooke, 214 U.S. 138, 142 (1908) ("The defendant in error asserts this discrimination and argues its consequences at some length, but does not refer to any provision of the Constitution of the United States which prohibits Congress from enacting laws which discriminate in their operation between persons or things."); *see generally* E. Connor Hall, *Due Process of Law and Class Legislation*, 43 AM. L. REV. 926, 927 (1909) (noting that this opinion intimates that "Congress may enact class legislation" and asserting that "this opinion would seem to be correct"). At this time, the Court was careful not to assert that the Fifth Amendment's due process included a vigorous anti-discrimination component. *E.g.*, Second Employers' Liability Cases, 223 U.S. 1, 52 (1912) ("Even if it be assumed that that [due process] clause is equivalent to the 'Equal protection of the laws' clause of the Fourteenth Amendment . . ."); United States v. Heinz, 218 U.S. 532, 546 (1910) ("Assuming, therefore, and assuming only, not deciding that congress may not discriminate in its legislation . . .").

The Due Process Clauses of the Fifth and Fourteenth Amendments were thought to have the same scope. *See* Hurtado v. California, 110 U.S. 516, 534-35 (1883).

[134] Some early cases relied on both an equal protection and due process analysis to invalidate laws that unjustly discriminated, including what one author claims was the first case in which the Court declared that a state police regulation was unconstitutional because it was inconsistent with due process "as a substantive requirement." *See* Reagan v. Farmers Loan and Trust Co., 154 U.S. 362 (1894); MOTT, *supra* note 3, at 341.

[135] *E.g.*, Truax v. Corrigan, 257 U.S. 312, 333-34 (1921). According to Mott, "Since 1916 less than one-third of the opinions, in decisions nullifying legislations [sic] because of the arbitrary classifications involved, mentioned due process at all." MOTT, *supra* note 3, at 278.

The only *Lochner* era case of any note in which the equality component of due process played a noticeably large role was *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), where the unequal aspects of the law in question helped doom it. In *Adkins* the Court found that a minimum wage law was unconstitutional in part because it required employers to subsidize their employees. The law in *Adkins* also applied only to female workers, an arguably unreasonable classification. To the extent that class legislation was an issue in *Adkins*, the law normally would have been subjected to challenge primarily under the Equal Protection Clause. However, because the case arose from a District of Columbia law, the Fourteenth Amendment did not apply. The Court therefore relied on the Fifth Amendment's Due Process Clause in finding that the law involved unconstitutional classifications. The major premise of the holding, however, was the violation of liberty of contract, with the class legislation aspects of the case merely used to show that the violation was unreasonable. In any event, the prominence of *Adkins* should not obscure the fact that, as a *Lochner* era due process case with explicit class legislation elements, it was rather exceptional.

legislation under the Equal Protection Clause.[136]

The Court ultimately did not completely abandon the equality component of due process. Rather, the Court limited due process's potency and scope, so that the Equal Protection Clause remained the primary barrier to class legislation, with due process playing only a subsidiary role. As one commentator noted, "it was but natural that the courts should seize upon this specific provision rather than the more general Due Process Clause."[137] In practice, while the Equal Protection Clause prohibited all discriminatory legislation that did not have a valid police power justification, due process only entered the equality picture when a violation of a fundamental right such as liberty of contract was involved. Even then, the equal protection component of due process overlapped with the protections granted by the Equal Protection Clause and provided only a "mere minimum" of equal protection.[138]

With the exception of cases involving otherwise valid regulations that the Court found were unconstitutional because they arbitrarily applied only to part of the class being regulated,[139] the *Lochner* era Court was far

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[136] Truax v. Corrigan, 257 U.S. 312, 333-34 (1921).

[137] MOTT, *supra* note 3, at 278.

Chief Justice Taft explained in 1921:

> The [equal protection] clause is associated in the amendment with the Due Process Clause and it is customary to consider them together. It may be that they overlap, that a violation of one may involve at times the violation of the other, but the spheres of the protection they offer are not coterminous. The Due Process Clause brought down from Magna Charta was found in the early state constitutions and later in the Fifth Amendment to the federal Constitution as a limitation upon the executive, legislative and judicial powers of the federal government, while the equality clause does not appear in the Fifth Amendment and so does not apply to congressional legislation. The Due Process Clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. It, of course, tends to secure equality of law in the sense that it makes a required minimum of protection for every one's right of life, liberty, and property, which the Congress or the Legislature may not withhold. Our whole system of law is predicated on the general fundamental principle of equality of application of the law. 'All men are equal before the law,' 'This is a government of laws and not of men,' 'No man is above the law,' are all maxims showing the spirit in which Legislatures, executives and courts are expected to make, execute and apply laws. But the framers and adopters of this amendment were not content to depend on a mere minimum secured by the Due Process Clause, or upon the spirit of equality which might not be insisted on by local public opinion. They therefore embodied that spirit in a specific guaranty.

Truax, 257 U.S. at 331-32.

[138] *Truax*, 257 U.S. at 332.

[139] *See*, *e.g.*, Hartford Co. v. Harrison, 301 U.S. 459 (1937) (holding unconstitutional a statute that permitted mutual insurance companies to act through salaried resident employees, but forbidding stock companies from doing the same); Mayflower Farms, Inc. v. Ten Eyck, 297 U.S. 266 (1936) (invalidating a price-fixing scheme for milk that had provisions that benefitted incumbents and not new market entrants); Valentine v. Great Atlantic & Pacific Tea Co., 299 U.S. 32 91936) (declaring unconstitutional a graduated sales tax on the authority of *Levy*, *infra*); Stewart Dry Goods Co. v. Levy, 294 U.S. 550 (1935) (invalidating a graduated sales tax that applied a higher rate to larger merchants); Louis K. Liggett Co. v. Lee, 288 U.S. 517 (1933) (overturning a graduated retail sales tax that rose with the number of stores a chain store company owned); Smith v. Cahoon, 283 U.S. 553 (1931) (invalidating a law that required motor carriers to obtain certificates of public convenience and to give bond or evidence of insurance, but exempting carriers of certain commodities); Quaker City Cab Co.

more inclined to invalidate legislation as a violation of fundamental rights than as class legislation. 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. For example, *New State Ice v. Liebmann,*[140] famous for Justice Brandeis' invocation of states as the "laboratories of democracy," involved an Oklahoma law granting a monopoly to an ice company. Not only could this easily be deemed class legislation, but it is exactly the sort of legislation—government grants of monopoly power to big business—that had motivated the Jacksonians one hundred years earlier when they established opposition to class legislation as an integral component of American political thought.[141] Nevertheless, the *New State Ice* Court ignored the class legislation paradigm, and instead invalidated the law as a "regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business."[142]

Thus, in addition to a semantic difficulty over the typical meaning of the phrase "class legislation,"[143] the idea that *Lochner*ian decisionmaking was primarily motivation by hostility to class legislation rests on faulty assumptions. First, it assumes that because class legislation was a primary factor in the controversy over judicial review of economic regulations in both federal and state courts in the late nineteenth century, *Lochner* and its progeny necessarily followed in that tradition. This neglects the fact that before and during the *Lochner* era, the United States Supreme Court explicitly and consistently adopted an extremely forgiving test for class legislation.

The class legislation hypothesis also mistakenly relies on the speculative belief that even though time after time the Court rejected the opportunity to explicitly rely on a class legislation analysis when invalidating regulatory legislation, and instead claimed to be protecting fundamental individual rights under the Due Process Clause, we can nevertheless deconstruct the Court's opinions and determine that hostility to class legislation was the Court's "real" motive. As discussed below, a more persuasive explanation for *Lochner* can be found in the Court's own

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v. Pennsylvania, 277 U.S. 389 (1928) (holding that a statute that taxed corporations that owned cabs, but not individual owners, violated the Equal Protection Clause); F. S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920) (invalidating a tax on the out of state income of Virginia corporations that derived some of their income from foreign sources because the tax did not also apply to Virginia corporations that received all of their income from foreign sources); Southern Ry. Co. v. Greene, 216 U.S. 400 (1910) (invalidated a franchise tax that applied only to out of state railraods).

[140] 285 U.S. 262 (1932).

[141] *See* GILLMAN, *supra* note 13, at 35-37.

[142] *New State Ice*, 285 U.S. at 278.

[143] *See supra* notes 46 to 49 and accompanying text, (noting that the phrase class legislation has been associated by many scholars with special interest legislation, when in fact most decisions involving a class legislation analysis turned on whether the classifications at issue were arbitrary and unreasonable, not whether the laws in question benefitted specific groups).

explanation for its decisions: it was seeking to protect what it saw as fundamental individual rights against excessive government intrusion.

II. FUNDAMENTAL RIGHTS ANALYSIS: NATURAL RIGHTS AND HISTORICISM

The Supreme Court's desire to protect fundamental liberties under the Due Process Clause primarily motivated its *Lochner*ian jurisprudence. When leading postbellum lawyers considered American constitutionalism, they thought of it not as being solely the powers and prohibitions contained within the four corners of a document. Rather, they took a cue from British constitutional theorists, who posited that England had a "constitution" despite the absence of any such written document. American theorists argued that the United States, too, had an unwritten constitution, one that complemented and supplemented the written document. This idea was sufficiently widely accepted that the Supreme Court declared in 1875 that "[t]here are limitations on [government] power which grow out of the essential nature of all free governments."[144]

In England, the Constitution only restrained the monarchy and was safeguarded by Parliament, leading to a system of legislative supremacy. There had always been a strong strain in American constitutionalism that suggested that the federal government, as one of delegated and enumerated powers, was constrained by both the written Constitution and unwritten natural law.[145] The post-Civil War American innovation was to argue that America's unwritten constitution was judicially enforceable against the states despite the states' police powers, an inherent attribute of their sovereignty.[146] Even at the state level, the judiciary, not the people's elected representatives, was the ultimate guardian of American constitutional liberty.

Thomas Cooley's very influential 1868 treatise, *Constitutional*

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[144] Loan Association v. Topeka, 20 Wall. 655, 662 (1875); *see generally* Hanson v. Vernon, 27 Iowa 28, 73 (1869) ("There is , as it were, back of the written Constitution, an unwritten Constitution . . . which guarantees and well protects all the absolute rights of the people."); THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 93, 95, 175, 410-13 (1868) (discussing various limitations on government power that exist even in the absence of textual prohibitions). For a discussion of transatlantic collaboration during the late nineteenth century in romanticizing the "constitutional" traditions of the Anglo-American people, see RICHARD A. COSGROVE, OUR LADY THE COMMON LAW (1987).

[145] Very early Supreme Court jurisprudence suggested that natural rights were judicially-enforceable, e.g., Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798). Such dicta became less common in later years, but as late as the 1850s, the infamous *Dred Scott* decision was based in part on implicitly protecting the purported natural right to property in slaves from federal interference. Dred Scott v. Sanford, 19 How. 393 (1856).

[146] *See generally* Frederick N. Judson, *Liberty of Contract Under the Police Power*, 14 REP. A.B.A. 1, 1 (1891) (contrasting the "comprehensive and all-pervading police power of the States" with the "limited power of the Federal Government").

Limitations, stated in its Introduction that "there are on all sides definite limitations which circumscribe the legislative authority, aside from the specific restrictions which the people impose by their constitutions."[147] Courts therefore could set aside a state law as invalid even if the written constitution did not contain "some specific inhibition which has been disregarded, or some express command which has been disobeyed."[148] Two years after his treatise appeared, Cooley, serving as Chief Justice of the Michigan Supreme Court, wrote that "there are certain limitations upon this [police] power, not prescribed in express terms by any constitutional provision, but inherent in the subject itself, which attend its exercise under all circumstances, and which are as inflexible and absolute in their restraints as if directly imposed in the most positive form of words."[149]

Future United States Supreme Court Justice David Brewer, dissenting in an 1871 Kansas Supreme Court case,[150] wrote that the provisions of bills of rights are just "glittering generalities" if considered against a background of legislative supremacy. Instead of looking solely at the express restriction the Constitution places on the government, courts should look first to "those essential truths, those axioms of civil and political liberty upon which all free governments are founded, and secondly those statements of principles in the bill of rights upon which this governmental structure is read."[151] Then "we may properly inquire what powers the words of the Constitution, the terms of the grant, convey."[152]

The existence of an unwritten American constitution was accepted even by those who denied that the judiciary had the power to enforce its terms. For example, Richard McMurtie agreed "that there is an unwritten Constitution here quite as much as there is in England."[153] However, he argued that just as the English courts recognized that the unwritten

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[147] COOLEY, *supra* note 51, at iv.

[148] *Id.*

[149] People v. Salem, 20 Mich. 452, 473 (1870). As Alan Jones points out, in his later years, "Cooley openly used the word 'constitutional in the same way that he had covertly use it before—to apply to the established usages, the unwritten purposes, and the habits of thought which had historically created the great arrangements under which the English and American peoples had long rule themselves." ALAN R. JONES, THE CONSTITUTIONAL CONSERVATISM OF THOMAS MCINTYRE COOLEY 359 (Garland Pub. ed. 1987).

[150] State *ex rel*. St. Joseph & D.C.R. Co. v. Comm'rs of Nemaha Co., 7 Kan. 542, 555 (1871).

[151] *Id.*

[152] *Id*.

[153] Richard C. McMurtie, A *New Canon of Constitutional Interpretation*, 32 AM. L. REG. & REV. 1, 7 (1893); *see also* Shattuck, *supra* note 3 (arguing that the Due Process Clause only gives the courts authority to protect procedural rights).

constitution is binding only on the legislature and is not to be enforced by the courts, the same rule applies in the United States.[154]

Other commentators insisted that the genius of the American constitutional system was precisely that it allowed courts to review the constitutionality of legislation. Prominent commentator Christopher Tiedeman asserted that natural rights protected under the English Constitution "have been incorporated into the American Constitutions, both state and federal."[155] He praised the "disposition of the courts to seize hold of these general declarations of rights as an authority for them to lay their interdict upon all legislative acts which interfere with the individual's natural rights, even though these acts do not violate any specific or special provision of the Constitution."[156] A. V. Dicey, the leading English commentator on constitutionalism, wrote that judicial review is "the only adequate safeguard which has hitherto been invented against unconstitutional legislation."[157] "The glory of the founders of the United States," Dicey added, "is to have devised or adopted arrangements under which the Constitution became in reality as well as in name the supreme law of the land."[158]

Regardless of what jurists believed about the unwritten Constitution, before the Civil War they generally agreed that federal courts had very limited authority to review state legislation; only explicit limitations on state authority, such as the Contracts Clause, could be enforced. However, postBellum thinkers, despite a strong contrary statement in the *Slaughter-House Cases*,[159] argued that the Fourteenth Amendment's Due Process Clause gave courts the right and obligation to enforce against the states not just the largely procedural rights protected by the Magna Carta and long-standing Anglo-American tradition, but all fundamental individual rights deemed essential to the development of American liberty, including

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[154] *Id*.

[155] CHRISTOPHER G. TIEDEMAN, THE UNWRITTEN CONSTITUTION OF THE UNITED STATES 77-78 (1890).

[156] *Id.* at 81.

[157] A.V. DICEY, THE LAW OF THE CONSTITUTION 125 (2d ed. 1886); *see also* JOHN W. BURGESS, POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW 209-32 (1890) (championing judicial review to protect constitutional guarantees as the best protection for liberty).

[158] DICEY, *supra* note 157, at 145.

[159] Justice Miller declared for the majority: "Under no construction of that provision [due process of law] that we have ever seen, or any that we deem admissible" could the law in question be declared void. Slaughter-House Cases, 16 Wall. 36, 81 (1872). However, the due process issue was a very minor one in this case, and the quotation above is the extent of the Court's discussion. If the due process holding had been more detailed and extensive, it likely would have inhibited future due process jurisprudence far more successfully. Justice Stephen Field, for one, always contended that the issue of due process and its relationship to the police power had not been properly presented or considered in *Slaughter-House*. *See* 3 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 271 (1922) (explaining Field's view of the matter).

economic rights.[160] Professor John F. Dillon, for example, wrote in 1894 in *The Laws and Jurisprudence of England and America* that the Due Process Clause embodies "the great fundamental principles of right and justice" which it "makes part of the organic law of the nation."[161] He added that the "great fundamental rights guaranteed by [American] constitutions are life, liberty, contracts and property."[162]

As early as 1878, the Supreme Court stated in dicta that the Due Process Clause prohibits the invasion of private rights by the states.[163] A few years later, in *Hurtado v. California*,[164] the Court noted, again in dicta, that while in England the practical barrier "against legislative tyranny was the power of a free public opinion represented by the Commons," in the United States "written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments."[165] While the due process ("law of the land") provisions of the Magna Carta were "applied in England only as guards against executive usurpation and tyranny, here they have become also bulwarks against arbitrary legislation, . . . they must be held to guarantee not particular forms of procedure, *but the very substance of individual rights to life, liberty and property.*"[166]

Critics argued that allowing courts to protect unspecified rights under the Due Process Clause amounted to judicial usurpation.[167] Nevertheless,

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[160] *See* CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW 129 (1986) (noting that for certain advocates of the Fourteenth Amendment, the Amendment "was merely providing for *national enforcement* of rights that had been guaranteed all along (but without effective means of enforcemen)").

[161] JOHN F. DILLON, THE LAWS AND JURISPRUDENCE OF ENGLAND AND AMERICA 208-12 (1894); *see also id*. at 213 ("The Fourteenth Amendment in the most impressive and solemn form places life, liberty, contracts, and property, and also equality before the law, among the fundamental and indestructible rights of all the people of the United States."); *id*. at 226 ("These great and fundamental principles, these distinguishing excellences of the English law, have been adopted in all their scope and vigor in this country. We have gone further, and by constitutional limitations upon legislative power we have placed these primordial rights beyond legislative invasion, thereby giving them a theoretical if not an actual, security greater than they possess in the old country.").

[162] *Id.* at 203; *see also id.* at 382 ("Austin's doctrine that all law proceeds from the sovereign, and therefore is binding alone upon the subject, is defective in that it fails to realize that law has not reached its full development until it attains complete supremacy by binding alike the sovereign and the subject. This . . . sublime conception . . . has only been made a reality by the American device of written constitutions, which are the supreme law of the land.").

[163] Davidson v. New Orleans, 96 U.S. 97, 102 (1878).

[164] 110 U.S. 516, 531 (1884).

[165] *Id*.

[166] *Id*. (emphasis supplied).

[167] For contemporary criticism of fundamental rights jurisprudence, see, e.g., T. W. Brown, *Due Process of Law*, 32 AM. L. REV. 14, 20 (1898) (critiquing judicial invalidation of popularly enacted legislation, and questioning the use of generic terms like "general rules of jurisprudence," "the fundamental principles of liberty and justice," and "the principles of the common law" to justify judicial decisions.).

by the time *Lochner* was decided there was a broad consensus that the Fourteenth Amendment's Due Process Clause protects fundamental rights from government intrusion.[168] As discussed below, the source of the fundamental rights recognized by the United States Supreme Court during the *Lochner* era was the American natural rights tradition, tempered by a historicist perspective. The Justices' historicism, along with concerns for federalism and of the judiciary overstepping its bounds, limited the scope of the judicial enforceability of natural rights to those rights considered fundamental to the Anglo-American heritage of liberty. Moreover, the Court would only step in when such rights were infringed upon in ways that went beyond the states' traditional police powers.[169]

A. *Natural Rights*

Natural rights theory—meaning, in this context, the idea that individuals possess prepolitical rights that antedate positive law and that could be discovered through human reason—influenced *Lochner* era jurisprudence in general, and the development of the liberty of contract doctrine in particular. The *Slaughter-House* dissents of Justices Field and Bradley,[170] so crucial to the development of the liberty of contract idea, were laden with natural rights rhetoric, a testament to the influence of Republican free labor ideology on post-Civil War thought.[171] For example, Field wrote that "it is to me a matter of profound regret that [the statute's] validity is recognized by a majority of this court, for by it the right of free labor, one the most sacred and imprescriptible rights of man, is violated."[172]

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[168] *See infra* notes 179 to 217 and accompanying text; *see generally* Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226 (1897) (finding that due process requires that states that take property for public use must pay the former owner just compensation); HADLEY ARKES, THE RETURN OF GEORGE SUTHERLAND: RESTORING A JURISPRUDENCE OF NATURAL RIGHTS 26 (1994) (discussing the consensus regarding fundamental rights). By 1904, even Ernst Freund, who generally held Progressive views, argued only that "the older principles of justice" should not "*absolutely* control the progress of the law." FREUND, *supra* note 76, § 21, at 17 (emphasis supplied).

[169] Judges who believed in a natural rights-based jurisprudence had always conceded that police power regulations were constitutional. *See, e.g.*, the famous opinion of Justice Bushrod Washington in Corfield v. Coryell, 6 F. 546, 551-52 (C.C.E.D. 1823).

[170] Slaughter-House Cases, 83 U.S. 36, 83-124 (1872).

[171] *See generally* McCurdy, *supra* note 18, at 165-79; Forbath, *supra* note 16, at 782-86; Nelson, *supra* note 15, at 558-60.

[172] *Slaughter-House Cases*, 83 U.S. at 110 n.39. Similarly, in Butchers' Union v. Crescent City, 111 U.S. 746, 759 (1884) (Field, J., concurring), Field cited the Declaration of Independence for the proposition that men have the inalienable right

> to pursue their happiness, by which is meant that the right to pursue any lawful business or vocation, in any manner not inconsistent with the equal right of other, which may increase their prosperity or develop their faculties, so as to give to them their highest enjoyment. The common business and callings of life, the ordinary trades and pursuits, which are innocuous in themselves, and have been followed in all communities from time immemorial, must, therefore, be free in this country to all alike upon the same terms.

While Field lost on this particular issue, just one year later Justice Samuel Miller, speaking for all but one Justice, stated that there are "rights in every government beyond the control of the state. . . . The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere."[173] State courts expanded upon the Supreme Court's natural rights rhetoric in issuing some of the earliest *Lochner*ian decisions, especially in labor cases.[174]

Field retired in 1897, but his close contemporary, Justice John Marshall Harlan, and his nephew, Justice David Brewer, continued his natural rights advocacy. Harlan, for example, wrote that there are limitations on all organs of government "which grow out of the essential nature of all free governments."[175] Brewer, meanwhile, argued that liberty of contract

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As on scholar points out, what made Field's opinions "so compelling was his . . . patent conviction that the moral law was on his side." ROBERT G. MCCLOSKEY, AMERICAN CONSERVATISM IN THE AGE OF ENTERPRISE, 1865-1910, at 17 (1951)

[173] Loan Assoc. v. Topeka, 87 U.S. 655, 662-63 (1874).

[174] *See, e.g.*, Frorer v. People, 31 N.E. 395 (Ill. 1892) ("an adult person of sound mind, laboring under no legal disability, cannot be deprived of the right to make contracts in respect to labor and the acquisition of property, under the pretence [sic] of giving such person protection"); Godcharles v. Wigeman, 6 A. 354, 356 (Pa. 1886) (voiding an antiscrip law and concluding that a laborer "may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal, and any and every law that proposes to prevent him from so doing is an infringement of his constitutional privileges, and consequently vicious and void"); Vogel v. Pekoc, 42 N.E. 386, 387-88 (Ill. 1895); Low v. Rees Printing Co., 59 N.W. 362, 366-68 (Neb. 1894); *In re* Jacobs, 98 N.Y. 98 (1885) (concluding that a law banning tenement cigarmaking illicitly invaded "fundamental rights"); *see generally* Commonwealth v. Perry, 155 Mass. 117, 125 (1891) ("There are certain fundamental rights of every citizen [including the right to make reasonable contracts] which are recognized in the organic law of all our free American states. A statute which violates any of these rights is unconstitutional and void even though the enactment of is not expressly forbidden."); People v. Marx, 99 N.Y. 377, 386 (1885) ("No proposition is more firmly settled than that it is one of the fundamental rights and privileges of every American citizen to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit.").

Some judges ignored the fact that the *Slaughter-House* opinions that found a constitutional right to pursue a lawful occupation were written by the *dissenters*, and relied on the Privileges or Immunities Clause to invalidate regulatory legislation. For example, federal judge Lorenzo Sawyer wrote in the process of invalidating a law regulating laundries (and, not incidentally, implicitly targeting Chinese-owned laundries) that the right to labor is protected by the Fourteenth Amendment as "one of the highest privileges and immunities secured by the constitution to every American citizen, and to every person residing within its protection." *In re* Tie Loy (The Stockton Laundry Case), 26 F. 611, 613 (C.C.D. Cal. 1886). The following year, he invalidated another laundry ordinance because it "abridge[d] the liberty of the owner to select his own occupation and his own methods in the pursuit of happiness, and thereby prevent[ed] him from enjoying his rights, privileges, and immunities, and deprive[d] him of equal protection of the laws." *In re* Sam Kee, 31 F. 680, 681 (C.C.N.D. Cal. 1887). Neither opinion relied on the Due Process Clause.

[175] Madisonville T. Co. v. St. Bernard M. Co., 196 U.S. 239, 251 (1905) (Harlan, J.); *see also* Jacobson v. Massachusetts, 197 U.S. 11, 29 (1905) (Harlan, J.) ("There is, of course, a sphere within which the individual may assert the supremacy of his own will, and rightfully dispute the authority of any human government,—especially of any free government existing under a written constitution, to interfere with the exercise of that will."); Railway Co. v. Chicago, 206 U.S. 226, 237 (1907) (Harlan, J.) (stating that compensation for the taking of property for public use is a "settled principle

is among "the inalienable rights of the citizen."[176] Anticipating Richard Epstein's theory of the Takings Clause[177] by almost eighty years, Brewer asked,

> If it be a principle of natural justice that private property shall not be taken for public purposes without just compensation, is it not equally a principle of natural justice that no man shall be compelled to pay out money for the benefit of the public without any reciprocal compensation? What difference in equity does it make whether a piece of land is taken for public uses or so many dollars for like purposes?[178]

By the time the Court decided *Lochner*, there seems to have been a virtual consensus among the Justices that due process requirements protected fundamental rights that were antecedent to government,[179] with Justices Edward White,[180] Henry Brown,[181] Rufus Peckham,[182] and Joseph McKenna[183] all expressing such sentiments. The main dispute on the Court

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of universal law reaching back of all constitutional provisions"); Berea College v. Kentucky, 211 U.S. 45, 67 (1908) (Harlan, J., dissenting) ("The right to enjoy one's religious belief, unmolested by any human power, is no more sacred nor more fully or distinctly recognized than is the right to impart and receive instruction not harmful to the public. The denial of either right would be an infringement of the liberty inherent in the freedom secured by the fundamental law."); Monongahela B. Co. v. United States, 216 U.S. 177, 195 (1910); *see generally* MILTON R. KONVITZ, FUNDAMENTAL RIGHTS: HISTORY OF A CONSTITUTIONAL DOCTRINE 38-40 (2001) (noting Harlan's importance to the development of natural rights jurisprudence on the Supreme Court in the years leading up to *Lochner*). Bizarrely, a recent biography of Harlan has no entry in its index for "natural rights," "natural law," or "fundamental rights." YARBROUGH, *supra* note 4.

[176] Frisbie v. United States, 157 U.S. 160, 165 (1895).

[177] RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

[178] Chicago B.&Q. R.R. Co. v. People, 200 U.S. 561, 599 (1906) (Brewer, J., dissenting); *see generally* ELY, *supra* note 6, at 77 (noting the influence of natural law precepts on Brewer).

[179] Siegel, *supra* note 30, at 2-22 (noting that *Lochner*ian era jurisprudence was widely popular among jurists in late nineteenth-and early twentieth-century America, and that eight of the nine Justices on the Supreme Court in 1905 broadly agreed that constitutional principles should be drawn from a combination of common and natural law).

[180] In discussing the issue of whether there were any constitutional limits on Congressional power in conquered territory, White wrote in 1901 that there are "inherent, although unexpressed, principles which are the basis of all free government which cannot be with impunity transcended." This "signifies that even in cases where there is no direct command of the Constitution which applies, there may nevertheless be restrictions of so fundamental a nature that they cannot be transgressed." Downes v. Bidwell, 182 U.S. 244, 290-91 (1901) (White, J., concurring).

[181] Brown remarked that the Fourteenth Amendment required states to assess and collect taxes in a way that did not conflict with "natural justice." Turpin v. Lemon, 187 U.S. 51, 57 (1902).

[182] "The limit of the full control which the state has in the proceedings of its courts both in civil and criminal cases, is subject only to the qualification that such procedure must not work a denial of fundamental rights *or* conflict with specific and applicable provisions of the federal Constitution." West v. Louisiana, 194 U.S. 258, 263 (1904).

[183] Justice McKenna wrote that "the words 'due process of law,' as used in the Fourteenth Amendment, protect fundamental rights," Howard v. Kentucky, 200 U.S. 164, 173 (1906) (McKenna, J.); *cf.* Twining v. New Jersey, 211 U.S. 78, 106 (1908) (Moody, J.) (stating that the test for whether

was not over the existence of fundamental judicially-enforceable unenumerated rights, nor primarily was the dispute about the content of those rights. Even Justice Holmes grudgingly acknowledged in his *Lochner* dissent that a law would be unconstitutional if a "rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law."[184] Rather, as Holmes's comment suggests, the Justices disagreed about how vigorously fundamental right should be enforced against the states, i.e., whether there should be a presumption of constitutionality and if so, how strong.[185]

B. *Historicism*

There was no set formula for judges to determine what were the essential rights of the American people. Judges, especially Supreme Court Justices, did not use natural law as a source of constitutional norms "but as confirmation of rights they thought were embedded" in the Anglo-American tradition.[186] The Court's reliance on the traditions of Anglo-

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a right is protected by due process is whether it is "a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government?"). Justice Moody joined the Court in 1906.

[184] Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting). For criticism of Holmes's concession, see Albert M. Kales, *"Due Process," The Inarticulate Major Premise and the Adamson Act*, 26 YALE L.J. 519, 540 (1917). Freund conceded that "regulation carried to the point where it becomes prohibition, destruction or confiscation" violates due process. FREUND, *supra* note 76, § 63, at 61; *see generally* WHITE, *supra* note 3, at 249 (concluding that Holmes's dissent in *Lochner* was "consistent with the orthodox guardian review model" because "it required judges to evaluate the magnitude of particular legislative interferences with constitutionally protected liberties and to scrutinize the rationales offered in defense of the statutes under review.").

[185] Note that his was the main dispute between the majority in *Lochner* and the main dissent written by Justice Harlan. *See* McCurdy, *supra* note 18, at 179; *see generally* Coppage v. Kansas, 236 U.S. 1, 30 (1915) (Day, J., dissenting) ("Of the necessity of such legislation, the local legislature is itself the judge, and its enactments are only to be set aside when they involve such palpable abuse of power and lack of reasonableness to accomplish a lawful end that they may be said to be merely arbitrary and capricious, and hence out of place in a government of laws, and not of men, and irreconcilable with the conception of due process of law.").

[186] Siegel, *supra* note 30, at 83. The Washington Supreme Court explained judicial attitudes toward natural rights very well:

> It is common to indulge in a great deal of loose talk about natural rights and liberties, as if these were terms of well-defined and unchangeable meaning. There is no such thing as an absolute or unqualified right or liberty guarantied to any member of society. Natural rights and liberties of a subject are relative expressions, and have relative or changeable meanings. What would be a right of liberty in one state of society would be an undue license in another. The natural rights of the subject, or his rightful exercise of liberty in the pursuit of happiness, depends largely upon the amount of protection which he receives from the government. Governments, in their earlier existence, afforded but little protection to their subjects. Consequently the subject had a right to pursue his happiness without much regard to the rights of the government. The reciprocal relations were not large. He yielded up but little, and received but little. If he was strong enough to buffet successfully

American liberty suggests an implicit legal historicism. Historicism "taught that objective legal principles were discernible through historical studies, not rationalistic introspection."[187] One scholar describes the historicism of the *Lochner* era as conceiving law "as an evolving product of the mutual interaction of race, culture, reason, and events."[188] Historicists of the time believed that "societies, social norms, and institutions are the outgrowth of continuous change effected by secular causes" but "evolve according to moral ordering principles that are discoverable through historical studies."[189]

While Anglo-American tradition contained no clear right to liberty of contract, historicist-minded post-Bellum 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.[190] Justice Joseph Bradley's dissent in *Slaughter-House* is a model opinion combining a fundamental rights analysis with a historicist perspective.

Bradley wrote that "[t]he people of this country brought with them to its shores the rights of Englishmen; the rights which had been wrested from English sovereigns at various periods of the nation's history."[191] Bradley noted that "[t]he privileges and immunities of Englishmen were established and secured by long usage and by various acts of

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> with the world, all well and good. If not, he must live on the charity of individuals, or die, neglected, on the highway. But now all civilized governments make provisions for their unfortunates, and progress in this direction has been wonderful even since noted sages like Blackstone lectured upon the inalienable rights of man. Not only is the protection of individual property becoming more secure, but the vicious are restrained and controlled, and the indigent and unfortunate are maintained, at the expense of the government, in comfort and decency; and the natural liberties and rights of the subject must yield up something to each one of these burdens which advancing civilization is imposing upon the state. It is not an encroachment upon the time-honored rights of the individual, but it is simply an adjustment of the relative rights and responsibilities incident to the changing condition of society.

Territory v. Ah Lim, 24 P. 588, 590 (Wash. 1890).

[187] Stephen A. Siegel, *Historism in Late Nineteenth-Century Constitutional Thought*, 1990 WIS. L. REV. 1431, 1435; *see generally* Roscoe Pound, Interpretations of Legal History 10 (1923) (stating that "the historical school" ruled "almost uncontested during the last half of [the nineteenth century]").

[188] *Id.* Siegel refers to this mode of thought at "historism" but that is an idiosyncratic term for what is more commonly known as teleological historicism. *See* M. MANDELBAM, HISTORY, MAN, & REASON 41-51, 113-41, 163-86 (1971).

[189] Siegel, *supra* note 187, at 1438; *see generally* JONES, *supra* note 149, at 147 (discussing Cooley's historicism).

[190] *See, e.g.*, Thomas M. Cooley, *Limits to State Control of Private Business*, 1878 PRINCETON REV. 233, 269 (arguing that the progress of liberty has been the result of the gradual increase of limitations on the state's despotic regulatory powers); O. H. Myrick, *Liberty of Contract*, 61 CENTRAL L. J. 483, 488 (1905) (arguing that liberty of contract "is included in the fundamental rights of liberty and property"); *cf.* Ritchie v. People, 40 N.E. 453, 454 (Ill. 1895) (asserting that liberty of contract was one of "[t]he fundamental rights of Englishmen, brought to this country by its original settlers, and wrested, from time to time, in the progress of history, from the sovereigns of the English nation.").

[191] 83 U.S. 36, 114 (1872).

Parliament."[192] In theory, Bradley acknowledged, the English Parliament has unlimited authority, because England has no written constitution. In practice, however, violations of the fundamental principles of the unwritten English Constitution would cause a revolution "in an hour." Among those principles, inherited by the American people, was the right to be free from government-sponsored monopolies, which dates back to the "statute of 21st James, abolishing monopolies, . . . one of those constitutional landmarks of English liberty which the English nation so highly prize and so jealously preserve."[193]

Such privileges and immunities, Bradley added, were incorporated into the American constitution through the Fourteenth Amendment. "But even if the Constitution were silent," Bradley added, "the fundamental privileges and immunities of citizens, as such, would be no less real and no less inviolable than they now are."[194] American citizenship confers "the privilege of buying, selling, and enjoying property; the privilege of engaging in any lawful employment for a livelihood; the privilege of resorting to the laws for redress of injuries, and the like."[195]

In 1888, Justice Field asserted that Americans had a fundamental right to pursue a harmless occupation without unreasonable interference. Dissenting in *Powell v. Pennsylvania*,[196] which upheld a state ban on selling margarine, Field ignored the class legislation argument that was the focus of the majority's opinion and instead focused on the liberty interests involved. He wrote that liberty, as used in the Fourteenth Amendment, means "something more than freedom from physical restraint or imprisonment. It means freedom, not merely to go wherever one may choose, but to do such acts as he may judge best for his interest not inconsistent with the equal rights of others; that is, to follow such pursuits as may be best adapted to his faculties, and which will give to him the highest enjoyment."[197] Field then quoted a New York opinion stating that constitutional protection of liberty "'is not cramped into a mere freedom from physical restraint of the person of the citizen, as by incarceration, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common

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[192] *Id.* at 115.
[193] *Id*. at 120.
[194] *Slaughter-House*, 83 U.S. at 119. Bradley was not the only legal thinker of the time to combine natural rights thinking with historicism. *See* Lewis A. Grossman, *James Coolidge Carter and Mugwump Jurisprudence*, 20 L. & HIST. REV. 577, 607 (2002) (stating that Carter, a highly-influential attorney and author during the Gilded Age, "melded" "natural law notions and historical evolutionism").
[195] *Id*.
[196] Powell v. Pennsylvania, 127 U.S. 678 (1888).
[197] *Id.* at 691-92.

welfare."[198]

Opinions like Field's dissent in *Powell* served as a bridge between the older view reflected in the *Slaughter-House* dissents that there was a right to pursue an occupation free from government exclusions intended to protect monopoly, and the view reflected in *Lochner* that there a right to pursue an occupation free from all unreasonable government interference. This shift was helped along by the labor unrest and Populist agitation of the period, which fueled fears of imminent Socialism[199] and led to a desire to create Constitutional protections for private enterprise.[200]

The right to pursue an occupation free from unreasonable government interference, of course, was a subset of the more general right of liberty of contract. Justice Field's nephew, David Dudley Field, published an

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[198] *Id.* at 692, quoting People v. Marx, 99 N. Y. 377, 386 (1885). Field had expressed similar sentiments as a circuit judge. In *In re* Quong Woo, 13 F. 229 (C.C.D. Cal. 1882), Justice Field objected to a laundry licensing ordinance because San Francisco had placed unnecessary obstacles in the way of those who sought to pursue an ordinary and useful trade. A city, Field added, may not use its licensing power "as a means of prohibiting any of the avocations of life which are not injurious to public morals, nor offensive to the senses, nor dangerous to the public health and safety." *Id*. at 230.

[199] Brewer, in particular, was not shy about expressing his fear of, and disgust for, Socialism. Budd v. New York, 143 U.S. 517, 551 (Brewer, J., dissenting) (suggesting that if the Court continued to allow the destruction of property rights, Edward Bellamy's novel about a Socialist future, *Looking Backward*, would become reality); Pollock v. Farmers' Loan and Trust Co, 157 U.S. 429, 607 (1895) (Brewer, J., concurring) ("The present assault upon capital is but the beginning. It will be but the stepping-stone to others, larger and more sweeping, till our political contests will become a war of the poor against the rich,—a war growing constantly in intensity and bitterness); *cf. id.* at 674 (Harlan, J., dissenting) ("It was said in argument that the passage of the statute imposing this income tax was an assault by the poor upon the rich, and by much eloquent speech this court has been urged to stand in the breach for the protection of the just rights of property against the advancing hosts of socialism."); David J. Brewer, *An Independent Judiciary as the Salvation of the Nation,* in NEW YORK STATE BAR ASSOCIATION, PROCEEDINGS OF THE NEW YORK STATE BAR ASSOCIATION 37, 37-47 (1893); *see generally* CHRISTOPHER G. TIEDEMAN, THE UNWRITTEN CONSTITUTION OF THE UNITED STATES 80 (1890) ("The demands of the Socialists and Communists vary in degree and in detail. . . . Contemplating these extraordinary demands of the great army of discontents . . . . the conservative classes stand in constant fear of the advent of an absolutism more tyrannical and more unreasoning than any fore experienced by man,—the absolutism of a democratic majority."); William Graham Sumner, *Advancing Social and Political Organization in the United States*, in 2 ESSAYS OF WILLIAM GRAHAM SUMNER, 304, 349 (Albert G. Keller & Maurice R. Davie eds., 1934) ("[W]hile [the institutions established in the Constitution] ensure the rule of the majority of legal voters, they yet insist upon it that the will of that majority shall be constitutionally expressed and that it shall be a sober, mature, and well-considered will. This constitutes a guarantee against jacobinism.").

For a discussion of expressions fear of Socialism among conservative legal theorists during the 1890s, see SIDNEY FINE. LAISSEZ FAIRE AND THE GENERAL-WELFARE STATE: A STUDY OF CONFLICT IN AMERICAN THOUGHT, 1865-1900, at 133 (1956). Attacks on Progressive legislation as socialistic continued among conservatives for decades. *See, e.g.*, Block v. Hirsch, 256 U.S. 135, 162-63 (1921) (McKenna, J., dissenting) (writing for four Justices and warning that the majority's opinion upholding rent control opened the way for "socialism, or some form of socialism," that would destroy "personal rights for and the purposeful encouragement of individual initiative and energy"); Rome G. Brown, *Oregon Minimum Wage Cases*, 1 MINN. L. REV. 486 (1917).

[200] *See*, *e.g.*, Judson, *supra* note 146, at 26 ("the denial of free contract seems with many agitators to be the great panacea for social ills, and oftentimes the first manifestation of the strength of a voluntary labor association is in denying *vi et armis* the right of free contract on the part of others"); *id*. at 28 ("The vice of the so-called social legislation denying freedom of contract is that it deprives the individual of his 'personal rights,' and subjects him to the only tyranny which in this democratic age is possible.").

overtly historicist defense of liberty of contract in 1893.[201] Field noted that primogeniture and the remedy of distress for unpaid rent had been abolished in the United States. Chartering of corporations by special acts of the legislature had ceased, as had improvident grants of monopoly in the ordinary trades. Women were emancipated "from the thralldom of her husband."[202] Debtor's prison was abolished. Abolition of slavery, meanwhile, constituted the "nation's greatest act of deliverance." Abolition established "*the right to labor when, where, and for such reward as the laborer and his employer may agree to between themselves*."[203]

C. *The Rise of Liberty of Contract*

By the early 1890s, state courts were enforcing constitutional protection for liberty of contract,[204] and legal commentators were writing articles about the scope of the right of liberty of contract, and perhaps as significant, endorsing a strong version of the right, especially in employment cases.[205] Indeed, some authors favored a far stricter version of liberty of contract than the *Lochner* era Supreme Court ever endorsed. Frederick Judson, writing in an American Bar Association journal in 1891, criticized maximum hours laws, truck acts, and laws requiring payment of wages at certain intervals.[206] An article by D. H. Pringey in the *Central Law Journal* the following year called laws prohibiting companies from selling goods to their workers at higher prices than the goods are sold to the public at large "an unjust interference with private contracts and business."[207]

Perhaps the first overt expression in the Supreme Court of the idea that the Due Process Clause of the Fourteenth Amendment protects a general right to liberty of contract came in an opinion by Justice Brown in 1894. Brown, after noting the prohibition on class legislation, added, "The

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[201] David Dudley Field, *American Progress in Jurisprudence*, 27 AM. L. REV. 643 (1893).

[202] *Id*. at 644.

[203] *Id*. (emphasis supplied).

[204] *See, e.g.*, Commonwealth v. Perry, 28 N.E. 1126, 1126-27 (Mass. 1891) ("There are certain fundamental rights of every citizen which are recognized in the organic law of all our free American states. A statute which violates any of these rights is unconstitutional and void even though the enactment of it is not expressly forbidden. . . The right to acquire, possess, and protect property includes the right to make reasonable contracts, which shall be under the protection of law."). Justice Brewer, while still a circuit judge, in 1887 referred to that "liberty of contract which courts are so strenuous to uphold," but this case involved a contract dispute, not a constitutional claim. Wall v. Equitable Life Assur. Soc., 32 F. 273, 276 (W.D. Mo. 1887).

[205] *See, e.g.,* Judson, *supra* note 146; D. H. Pingrey, *Limiting the Right to Contract*, 34 CENTURY L. J. 91 (1892).

[206] Judson, *supra* note 146, at 23.

[207] Pringey, *supra* note 205, at 95.

legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations; in other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."[208] The following year, Justice Brewer stated even more directly that "generally speaking, among the inalienable rights of the citizen is that of the liberty of contract."[209]

In 1897, in the famous *Allgeyer* case,[210] the Court invalidated a Louisiana law that discriminated against out of state insurance companies. Justice Peckham, writing for the Court, effused in dicta that the right to liberty included in the Fourteenth Amendment

> 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.[211]

In 1898, Peckham alluded to "the liberty of contract, as referred to in *Allgeyer v. Louisiana*," which he described as "the liberty of the individual to be free, under certain circumstances from the restraint of legislative control with regard to all his contracts."[212] In another 1898 opinion, Peckham referred to the "general liberty of contract which is possessed by the citizen under the constitution."[213] In 1903, Justice Brewer repeated his view that "there is, generally speaking, a liberty of contract which is protected by the Fourteenth Amendment."[214] In 1904, Harlan made a passing reference in an antitrust case to the "constitutional guaranty of liberty of contract."[215]

Peckham's *Allgeyer* opinion was especially important because it was the only one of these opinions to declare that the statute in question was unconstitutional. It was also the only one to built on prior authority for the proposition that the Fourteenth Amendment guaranteed a right to liberty of contract. Peckham cited Bradley's dissent in *Slaughter-House*

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[208] Lawton v. Steele, 152 U.S. 133, 137 (1894).
[209] Frisbie v. U.S., 157 U.S. 160, 165-66 (1895).
[210] Allgeyer v. Louisiana, 165 U.S. 578 (1897).
[211] *Id.* at 589.
[212] Hopkins v. United States, 171 U.S. 578, 603 (1898).
[213] United States v. Joint-Traffic Ass'n, 171 U.S. 505, 572-73 (1898).
[214] Patterson v. Bark Eudora 190 U.S. 169, 173-79 (1903).
[215] Northern Securities Company v. United States, 193 U.S. 197, 351 (1904).

discussing the right of an individual to pursue an occupation.[216] He also quoted Justice Harlan's opinion in *Powell v. Pennsylvania*, that, despite upholding restrictions on the sale of margarine, recognized that a person has a Fourteenth Amendment right to "enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, is an essential part of his rights of liberty and property."[217]

These precedents, however, were dubious authority for a broad right to liberty of contract.[218] Bradley's *Slaughter-House* opinion, as Peckham acknowledged, dealt only with the question of the ancient right[219] to be free of government-sponsored monopoly. The *Powell* dicta articulated the general ban on class legislation, not the right to liberty of contract. *Allgeyer* itself, despite Peckham's broad dicta, actually held only that an individual has the right "to contract outside the state."[220]

The Supreme Court's use of liberty of contract in *Lochner v. New York* to restrain a claimed exercise of New York's police power was therefore quite a shock to many legal observers. The Court had used the Due Process Clause in the 1890s to supervise state regulation of railroad rates,[221] but *Lochner* was the first Supreme Court case to hold a labor law void because it violated due process.[222] With justification, many early *Lochner* critics argued that the liberty of contract doctrine became constitutional law by mere judicial assertion, and that the doctrine had dubious roots in natural law theory.[223] Critics accused the Court of turning the traditional Anglo-American hostility to grants of monopoly power into the "dogma" of liberty of contract.[224]

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[216] Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897).

[217] *Id.* at 590.

[218] *But cf.* Myrick, *supra* note 190, at 487 (asserting that these precedents were good authority for this right).

[219] "Generally all monopolies are against this great charter [Magna Carta], because they are against the liberty and freedom of the subject, and against the law of the land." 2 EDWARD COKE, INSTITUTE OF THE LAWES OF ENGLAND (1642), *reprinted in* ROSCOE POUND, THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY 150 (1957).

[220] *Allgeyer*, 165 U.S. at 590-91.

[221] *E.g.* Smyth v. Ames, 169 U.S. 466 (1898).

[222] MOTT, *supra* note 3, at §§ 126-27, at 341-42.

[223] Edward S. Corwin, *The Supreme Court and the Fourteenth Amendment*, 7 MICH. L. REV. 643, 657 (1909) (examining how the term "liberty" in the Fourteenth Amendment came to mean "liberty in the pursuit of freedom of contract"); Learned Hand, *Due Process of Law and the Eight-Hour Day*, 21 HARV. L. REV. 495, 495-96 (1908) (claiming that liberty to contract became part of that liberty through "successful assertion"); Roscoe Pound, *The End of Law as Developed in Juristic Thought*, 27 HARV. L. REV. 604, 626-27 (1914); Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 468 (1908) (attributing judicially-imposed limitations on the police power to the application of natural law theory).

[224] Adkins v. Children's Hosp., 261 U.S. 525, 568 (1923) (Holmes, J., dissenting) (complaining that judges started with "an unpretentious assertion of the liberty to follow the ordinary callings" and turned that "innocuous generality" into "the dogma Liberty of Contract").

Lochner was, in fact, a radical expansion of prior Supreme Court doctrine.[225] Indeed, just twenty years before *Lochner*, in *Soon Hing v. Crowley*,[226] a unanimous Court rejected the notion that the Fourteenth Amendment protects "the right of a man to work at all times."[227] Rather, Justice Field (who was hardly a statist) wrote, "However broad the right of every one to follow such calling and employ his time as he may judge most conducive to his interests, it must be exercised subject to such general rules as are adopted by society for the common welfare."[228] Unlike the majority in *Lochner*, the *Soon Hing* majority simply assumed that he state was acting reasonably, despite ample evidence that the law in question was mean to harm Chinese launderers.

Yet, despite the radicalism of the *Lochner* ruling, as *Lochner*ian jurisprudence developed the Court was far from dogmatic. Mainstream *Lochner*ian Justices—a category that excludes the more radical Brewer and Peckham—understood and were concerned about the potential for fundamental rights jurisprudence to allow judges to read their own views into constitutional law and to threaten state sovereignty. *Lochner*ian jurisprudence was therefore tempered by the norm that the scope of judicially-enforceable fundamental rights, including liberty of contract, needed to be limited to what was necessary to maintain practices and norms that were essential to the establishment and growth of [Anglo-] American liberty.

This limitation on liberty of contract was recognized from the very beginning of the doctrine in the Supreme Court, with the Court's recognition of the doctrine accompanied by caveats that the right was far from absolute.[229] Later, well into the *Lochner* era, a unanimous Court wrote that the Fourteenth Amendment "was intended to preserve and protect fundamental rights long recognized under the common law system."[230] The common law in this context means the heritage of Anglo-American liberty, including the natural rights tradition.[231] Enforcement of

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[225] *See id.; but cf.* Myrick, *supra* note 190.

[226] 113 U.S. 703 (1885).

[227] *Id*. at 709.

[228] *Id*.

[229] *E.g*., Patterson v. Bark Eudora, 190 U.S. 169, 173-79 (1903), quoting Frisbie v. United States, 157 U. S. 160, 165 (1895) ("It is within the undoubted power of government to restrain some individuals from all contracts, as well as all individuals from some contracts. It may deny to all the right to contract for the purchase or sale of lottery tickets; to the minor the right to assume any obligations, except for the necessaries of existence; to the common carrier the power to make any contract releasing himself from negligence, and, indeed, may restrain all engaged in any employment from any contract in the course of that employment which is against public policy. The possession of this power by government in no manner conflicts with the proposition that, generally speaking, every citizen has a right freely to contract for the price of his labor, services, or property.'"); United States v. Joint-Traffic Ass'n, 171 U.S. 505, 572-73 (1898) ("there are many kinds of contracts which, while not in themselves immoral or *mala in se*, may yet be prohibited by the legislation of the states").

[230] Butler v. Perry, 240 U.S. 328, 333 (1916).

[231] Commentators recognized that courts invoking common law principles were referring at least in part to natural rights principles. *See generally* Roscoe Pound, *The End of Law as Developed in Juristic Thought*, 27 HARV. L. REV. 605, 626-27 (1914) ("Perhaps nothing has contributed so much

these rights was consistently tempered by the invocation of common law doctrines that limited individual freedom for the perceived social good.[232]

Thus, as noted previously, bans on lotteries and other forms of gambling (including options trading), Sunday laws, regulation or prohibition of alcohol, and other traditional police power functions consistently trumped liberty of contract, even though the restrictions at issue violated strict natural rights principles.[233] In fact, the quotation in the previous paragraph is from an opinion upholding the ancient practice of requiring citizens to work on road projects for the public good. A more obvious violation of natural rights—in particular, the right to "free labor"—is hard to imagine, at least until one considers the 1897 case of *Robertson v. Baldwin*,[234] which upheld over a strong natural rights-oriented dissent by Harlan the traditional practice of requiring fleeing seamen to be involuntarily returned to their ship.

D. *The Expansion and Demise of* Lochner

The Supreme Court was not clear regarding what sort of regulations constituted a violation of due process, and instead issued rulings on a case by case basis.[235] As a perceptive article[236] published in the *Yale Law Journal* in 1917 pointed out, this lack of precision was intentional. The Court used the Due Process Clause to protect what it regarded as the

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to create and foster hostility to courts , . . as this conception of the courts as guardians of individual natural rights against the state. . . . of constitutions as declaratory of common-law principles, which are also natural-law principles. . . having for their purpose to guarantee and maintain natural rights of individuals against the government and all its agencies.").

[232] *See* Siegel, *supra* note 30, at 80-81.

[233] *See*, *e.g.*, Jacobson v. Massachusetts, 197 U.S. 11, 29 (1905) (upholding mandatory smallpox vaccination and stating that "in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand"); Champion v. Ames, 188 U.S. 321 (1903) (analogizing lotteries to nuisances and upholding a law banning lotteries); Hennington v. Georgia, 163 U.S. 299 (1896) (upholding a Sunday law and stating that "[f]rom the earliest period in the history of Georgia it has been the policy of that state, as it was the policy of many of the original states, to prohibit all persons, under penalties, from using the Sabbath as a day for labor and for pursuing their ordinary callings); *see generally* Otis v. Parker, 187 U.S. 606, 607 (1903) ("No court would declare a usury law unconstitutional, even if every member of it believed that Jeremy Bentham had said the last word on that subject, and had shown for all time that such laws did more harm than good. The Sunday laws, no doubt, would be sustained by a bench of judges, even if every one of them thought it superstitious to make any day holy.")

[234] 165 U.S. 275 (1897).

[235] *See* Siegel, *supra* note 30, at 25 n.109 ("throughout the *Lochner* era, the Court admitted that it had no overarching definition of due process and proceeded case by case"); *cf.* George W. Alger, *The Courts and Legislative Freedom*, 111 ATLANTIC MONTHLY 345, 347 (1913) (stating that an individual who looks for "a definition of this police power, so-called,. . . finds there is no concrete definition of it" and that it "is incapable of definition").

[236] Kales, *supra* note 184.

fundamentals of the social order. If its rulings in such cases were treated like other judicial decisions, every tentative opinion on what did or did not violate due process would become set in stone. For a historicist-minded Court, this would be problematic,

> because the court might make a mistaken decision as to what was a fundamental of the social order, or in a period of time, what the court had held to be a fundamental of the social order, might change, or it might more clearly be perceived that it was not a fundamental at all. With prior decisions being adhered to and followed on the principle of *stare decisis*, the rules as to what the legislature could not do might become too rigid and inflexible and result in a justifiable dissatisfaction with the court and its function.[237]

By keeping the "major premise" of why a particular law violated due process inarticulate, the Court gave itself "a free hand in spite of the rule of *stare decisis* to give effect at all times to what it regards as the dominant opinion with respect to what are the fundamentals of the social order."[238]

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[237] *Id.* at 538-39. The second Justice Harlan had a view of tradition and due process not that different from the views of moderate *Lochner*ians such as his grandfather:

> Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented 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. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.
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> It is this outlook which has led the Court continuingly [sic] to perceive distinctions in the imperative character of Constitutional provisions, since that character must be discerned from a particular provision's larger context. And inasmuch as this context is one not of words, but of history and purposes, the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints.

Poe v. Ullman, 367 U.S. 497, 542 (Harlan, J. dissenting).

[238] Kales, *supra* note 184, at 539. Thus, despite its historicism, the Court was not oblivious to concerns like those suggested in the following quotation from Benjamin Cardozo: "When the social needs demand one settlement rather than another, there are times when we must bend symmetry, ignore history, and sacrifice custom in pursuit of other and larger ends." BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 65 (1921); *see generally* A.C. Pritchard & Todd J. Zywicki, *Finding the Constitution: An Economic Analysis of Tradition's Role in Constitutional Interpretation*, 77 N.C. L. REV. 409, 492 (1999) (noting that "by looking to its own cases as the sole source of constitutional principles, the Supreme Court is confronted by crippling problems of path-dependence,"

In the 1920s, the conservative wing of the Court, bolstered by four Harding appointees, took firm control. The conservative majority, troubled by centralization and abuse of government power during World War I,[239] both expanded *Lochner*ian jurisprudence outside the economic realm and formally defined specific categories of economic regulations that were unconstitutional under the Due Process Clause. The Court froze and formalized various doctrinal exceptions to liberty of contract, such as the government's virtual carte blanche to regulate businesses "affected with a public interest." In *Chas. Wolff Packing Co. v. Court of Industrial Relations*,[240] the Court unanimously held that states could not require industrial disputes to be settled by government-imposed mandatory arbitration. The state claimed that the industries in question were "clothed with a public interest," which led the Court, in an opinion by Chief Justice Taft, to spell out the various categories of businesses affected with a public interest.[241]

In *Adkins v. Children's Hospital*,[242] meanwhile, the Court made it clear that "freedom of contract is . . . the general rule and restraint the

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which can be countered if the Court instead engages in ad hocery).

[239] *See* Post, *supra* note 35.

[240] Chas. Wolff Packing Co. v. Court of Industrial Relations, 262 U.S. 522 (1923).

[241] *Id.* at 535. The Court stated that the following businesses were "affected with a public interest":

> (1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities.
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> (2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or colonial Legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs, and gristmills.
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> (3) Businesses which, though not public at their inception, may be fairly said to have risen to be such and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner by devoting his business to the public use, in effect grants the public an interest in that use and subjects himself to public regulation to the extent of that interest although the property continues to belong to its private owner and to be entitled to protection accordingly.

Id. The court then added,

> In a sense, the public is concerned about all lawful business because it contributes to the prosperity and well being of the people. The public may suffer from high prices or strikes in many trades, but the expression 'clothed with a public interest,' as applied to a business, means more than that the public welfare is affected by continuity or by the price at which a commodity is sold or a service rendered. The circumstances which clothe a particular kind of business with a public interest . . . must be such as to create a peculiarly close relation between the public and those engaged in it, and raise implications of an affirmative obligation on their part to be reasonable in dealing with the public.

Id.

The Court abandoned the "business affected with a public interest" category entirely in Nebbia v. New York, 291 U.S. 502 (1934), signaling the demise of *Lochner*ian jurisprudence. *See* CUSHMAN, *supra* note 20, at 79-80.

[242] 261 U.S. 525 (1923).

exception, and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances."[243] The Court while implicitly acknowledged that government regulation could be used for traditional police power purposes. Beyond that, the Court asserted that precedent limited interference with liberty of contract to the cases involving the following issues: (1) "[t]hose dealing with statutes fixing rates and charges to be exacted by businesses impressed with a public interest"; (2) "[s]tatutes relating to contracts for the performance of public work";(3) "[s]tatutes prescribing the character, methods, and time for payment of wages"; and (4) "[s]tatutes fixing hours of labor" to preserve the health and safety for workers or the public at large.[244]

Thus, during the Taft Court era the exceptions to liberty of contract created by prior Court decisions were retained, but they were categorized to limit their scope and conformed to rather rigidly to prevent further erosion of individual liberty. The Court also resolved the ongoing ambiguity over whether the Due Process Clause protected non-economic rights. In the wake of Palmer Raids, imprisonment of antiwar dissidents, and state laws motivated by nativist hysteria, the Court broadly expanded due process protections for what today we call civil liberties.

The expansion of *Lochner*ian due process jurisprudence to civil liberties began with *Meyer v. Nebraska*,[245] in which the Court invalidated a Nebraska law that banned the teaching of German in private schools or by private tutors. Arch-*Lochner*ian Justice James McReynolds wrote a sweeping opinion holding that the Due Process Clause protects a wide range of freedoms, including not only the "right of the individual to contract," and "to engage in any of the common occupations of life," but also to acquire useful knowledge, to marry, establish a home and bring up children, [and] to worship God according to the dictates of his own conscience,"[246] along with "other privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[247] Two years later in *Gitlow v. New York*,[248] the Court for the first time clearly held that freedom of expression is protected against the states by the Fourteenth Amendment. Decisions that followed invalidated laws banning private schools,[249] forbidding private Japanese language schools,[250] and banning display of the Communist flag.[251] All of these cases were decided

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[243] *Id*. at 546.
[244] *Id*. at 546-48.
[245] 262 U.S. 390 (1923).
[246] *Id.* at 399-400 (citations omitted).
[247] *Id*. at 400.
[248] 268 U.S. 652 (1925) (holding that freedom of speech is a fundamental right protected by the Fourteenth Amendment).
[249] Pierce v. Society of Sisters, 268 U.S. 510 (1925).
[250] Farrington v. Tokushige, 273 U.S. 284 (1927).
[251] Stromberg v. California, 283 U.S. 359 (1931).

as cases involving fundamental liberties protected by the Due Process Clause, with no mention of equal protection or class legislation.[252]

The 1920s Supreme Court was hardly alone in reacting to the war by seeking a return to pre-War norms of limited government and individual rights. Warren Harding's very successful 1920 presidential campaign slogan was the promise of "A Return to Normalcy." Harding ended the Red Scare and pardoned many of its victims, including Eugene V. Debs, the Socialist leader who was serving a ten-year sentence for his antiwar activities.[253] With the cooperation of Congress, Harding lowered taxes, ended wartime controls of the economy, and cut federal spending by forty per cent, thereby largely restoring the federal government to its limited prewar role in American life. Fear that traditional libertarian American values were being eroded also led to a constitutionalist movement, spearheaded by the American Bar Association, to remind the public of the uniqueness of the American system of government.[254]

As it turned out, however, the 1920s and the Taft Court represented the last gasp of classical liberal principles in American public life for decades to come. Libertarian views, especially on economics, had already been marginalized by the 1920s among American intellectuals,[255] but they retained a tenuous foothold in elite legal circles despite the onslaught of sociological jurisprudence and legal realism.[256] The classical liberal foundations of *Lochner*ian jurisprudence, however, could not survive the

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[252] *See* Warren, *supra* note 3 (noting that all of these opinions reflected the triumph of *Lochner*).

[253] *See* ROBERT K. MURRAY & KATHERINE SPEIRS, THE HARDING ERA : WARREN G. HARDING AND HIS ADMINISTRATION (2000); EUGENE P. TRANI & DAVID L. WILSON, THE PRESIDENCY OF WARREN G. HARDING (1977).

[254] MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF, 208-54 (1988) (discussing the constitutionalist movement of the 1920s). Conservatives were especially alarmed at the growth of the idea of the "living Constitution" that changes with the times. *See, e.g.*, Thomas James Norton, *National Encroachments and State Aggressions*, in AMERICAN BAR ASSOCIATION, REPORT OF THE FIFTEENTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION, 237, 237 (1926) (stating that the Constitution is "not of a past age but for all time [because it] deals with principles of government as unchangeable as . . . the principles of morals covered by the ten commandments"); *see generally* Howard Gillman, *The Collapse of Constitutional Originalism and the Rise of the Notion of the 'Living Constitution' in the Course of American State-Building*, 11 STUDIES IN AM. POL. DEVELOPMENT 191 (1997) (discussing the conflict over the concept of a "living constitution").

On the left, the Progressive movement, which had been throughly statist, was traumatized by the repression of the war years and the post-War "Red Scare." *See* MORTON KELLER, REGULATING A NEW SOCIETY: PUBLIC POLICY AND SOCIAL CHANGE IN AMERICA, 1900-1933, at 102 (1994) ("As the assault on free speech grew, so did a civil liberties lobby"). The ACLU, for example, was founded as a civil libertarian response to the growth of government power and repression during the war. KELLER, *supra*, at 99; *see also* DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 4 (1997) (discussing the effect of the War on the left's attitude toward civil liberties).

[255] *See* ARTHUR A. EKIRCH, JR., THE DECLINE OF AMERICAN LIBERALISM (1955).

[256] For example, Charles Evans Hughes, as President of the ABA in 1924, endorsed the Supreme Court's due process jurisprudence, though not all its particulars. Charles Evans Hughes, *President Hughes Responds for the Association*, 10 A.B.A. J. 567, 569 (1924).

strains of the Great Depression. With almost no support among the intellectual class, with the unemployed and underemployed clambering for government intervention, and with statism ascendant across the globe in the forms of fascism, communism, and social democracy—each of which had its share of admirers in the United States—the Court's commitment to limited government classical liberalism seemed outlandishly reactionary to much of the public.[257] The Court's *Lochner*ian view that libertarian presumptions were fundamental to Anglo-American liberty became unsustainable as the Depression wore on, with many Americans blaming the purported laissez-faire policies of previous administrations for the continuing economic crisis.[258] Justice George Sutherland, for one, retreated from an explicit fundamental rights analysis into a defensive originalism in the 1930s.[259]

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[257] *See* Planned Parenthood v. Casey, 505 U.S. 833, 860-61 (1992) (arguing that *Lochner's* doom came because "[t]he older world of laissez faire was recognized everywhere outside the Court to be dead"), quoting ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 85 (1941).

[258] President Hoover was no supporter of laissez-faire, but was from the Progressive wing of the Republican Party. Many of Franklin Roosevelt's radical reforms were expansions of earlier Hoover initiatives. *See* MURRAY N. ROTHBARD, AMERICA'S GREAT DEPRESSION (1961). Much controversy remains regarding what caused the Great Depression, and why it took so long to end. *See, e.g.*, MILTON FRIEDMAN & ANNA J. SCHWARTZ, A MONETARY HISTORY OF THE UNITED STATES, 1867-1960 (1963) (blaming the Depression on restrictive monetary policy by the Federal Reserve). Few, if any, respectable modern economists agree with the widespread view during the New Deal years that "overproduction" was the root cause of the Depression, and that government efforts to combat this overproduction by artificially raising wages and lowering output was the appropriate solution.

[259] *See* West Coast Hotel v. Parrish, 300 U.S. 379, 402-03 (1937) (Sutherland, J., dissenting) ("[I]t is urged that the question involved should now receive fresh consideration, among other reasons, because of the "economic conditions which have supervened"; but the meaning of the Constitution does not change with the ebb and flow of economic events. We frequently are told in more general words that the Constitution must be construed in the light of the present. If by that it is meant that the Constitution is made up of living words that apply to every new condition which they include, the statement is quite true. But to say, if that be intended, that the words of the Constitution mean today what they did not mean when written—that is, that they do not apply to a situation now to which they would have applied then—is to rob that instrument of the essential element which continues it in force as the people have made it until they, and not their official agents, have made it otherwise."); Home Bldg. & Loan Ass'n. v. Blaisdell, 290 U.S. 398, 453 (1934) (Sutherland, J., dissenting) (stating that "[t]he whole aim of construction, as applied to a provision of the Constitution, is to discover the meaning, to ascertain and give effect to the intent, of its framers and the people who adopted it"); *see generally* Samuel R. Olken, *Justice George Sutherland on Economic Liberty: Constitutional Conservatism and the Problem of Factions*, 6 WM. & MARY BILL OF RTS. J. 1, 53 (1997) ("Sutherland's strict construction of constitutional limitations reflected his conviction that the meaning of the Constitution must remain the same over time in order to preserve individual rights and liberties from transient democratic majorities.").

There had always been an originalist undertone in *Lochner*ian jurisprudence. *See*, *e.g.*, THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 54 (1868) ("A principal share of the benefit expected from written constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion. It is with special reference to the varying moods of public opinion, and with a view to putting the fundamentals of government beyond their control, that these instruments are framed . . . ."). However, this originalism was focused on general principles, not specific clauses, see, e.g., Norton, *supra* note 254, and rarely explicitly appeared in judicial opinions.

Given the lack of intellectual and public support for *Lochner*ism, its demise was inevitable, but still required a change of personnel on the Court. President Hoover, a Progressive Republican, put the first nails into *Lochner's* coffin by appointing to the Court Justices Charles Evan Hughes, Owen Roberts, and Benjamin Cardozo, each of whom had views well to the left of the conservatives who dominated the Court in the 1920s. By 1934 a majority had formed willing to broadly expand the "affected with a public interest doctrine" to the point where just about any regulation of prices was constitutional.[260] Franklin Roosevelt sealed *Lochner's* fate by appointing a series of political cronies and New Deal activists to the Court.[261]

III. CONCLUSION

Howard Gillman and other scholars locate the origins of *Lochner*ian jurisprudence in opposition to "class legislation." In focusing on judicial hostility to class legislation, Gillman identifies a major concern of the Supreme Court and the (often) far more radical and activist state courts in the period just prior to *Lochner*. The state court cases, even if not followed doctrinally in later Supreme Court jurisprudence, established the judiciary as the ultimate arbiter of the constitutionality of state police power regulations. Even in the face of contrary federal precedent in the *Slaughter-House Cases*, some state courts engaged in aggressive judicial review of purported state police power legislation, sustaining a particular notion of the judicial role before the Supreme Court signaled its readiness to adopt that role in *Lochner*.

Hostility to class legislation remained a subsidiary consideration of the Supreme Court during the *Lochner* era itself, with laws that contained apparently arbitrary classifications occasionally invalidated under the Equal Protection Clause, especially in tax cases. Anti-class legislation nostrums also maintained a vestigial presence in due process cases, in the Supreme Court's refusal to expand the police power to accommodate blatant special interest legislation. The point is not that the Court inquired into legislative purpose, but that state actors knew that they could not rely on a claimed legislative prerogative to aid favored interest groups to

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[260] *See* Nebbia v. New York, 291 U.S. 502, 533 (1934) (equating the term "affected with the public interest" as simply "subject to the exercise of the police power").

[261] *See* LEUCHTENBURG, *supra* note 21, at 220 (discussing Roosevelt's choice of "faithful lieutenants" to fill the many vacancies that occurred between 1937 and 1941).

defend regulatory legislation.[262]

However, the class legislation thesis ultimately fails to explain the bulk of the Supreme Court's *Lochner*ian decisions, as the Court consistently adopted a narrow view of what constituted class legislation. Rather, the Court's *Lochner*ian decisions relied primarily on a fundamental rights theory under the Due Process Clause; class legislation analysis under the Equal Protection Cause was far less common.

The civil liberties cases of the 1920s and early 1930s are illustrative of the problems with the class legislation hypothesis. These cases were clearly *Lochner*ian decisions, as both the cases the Supreme Court relied upon and the reasoning the Justices used tracked *Lochner* and other "economic substantive due process" cases. Yet these cases were clearly decided under a fundamental rights theory, with class legislation playing no role in them. The class legislation thesis simply cannot account for them, and Gillman ignores them completely in *The Constitution Besieged*.

Despite these flaws, Gillman's work caught on quickly among constitutional historians for several reasons. First, it is a significant improvement over the less edifying theories of *Lochner* that previously dominated the field.[263] Second, it synthesized the work of prominent legal historians who had noted the importance of the concept of class legislation to nineteenth century police power jurisprudence.[264] Third, the class legislation hypothesis makes *Lochner*, which so baffled earlier generations of Progressives, New Dealers, and Great Society supporters, explicable to the current generation of legal scholars. Many of today's conservative judges and legal scholars are steeped in public choice theory. The parallels between the *Lochner* Court's purported hostility to "class legislation" and modern public choice analysis and condemnation of special interest legislation are obvious.[265]

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[262] *See generally* Ernst Freund, *Limitation of Hours of Labor and the Federal Supreme Court*, 17 GREEN BAG 411, 416 (1905) (noting that the bakers' hours law at issue in *Lochner* was justified by New York as a health measure; had the state tried to justify it as "a measure for the social and economic advancement of bakers' employees [it] would doubtless have been open to the objection of being partial or class legislation").

[263] Such as the "Social Darwinism" thesis discussed *supra*, in the Introduction.

[264] *See* Michael Les Bendedict, *Laissez-Faire and Liberty: A Re-evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 L. & HIST. REV. 293 (1985); Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez Faire Constitutionalism, 1863-1897*, 61 J. AM. HIST. 970, 973-74 (1975); Charles W. McCurdy, *The Roots of "Liberty of Contract" Reconsidered: Major Premises in the Law of Employment, 1867-1937*, 1984 SUP. CT. HIST. SOC'Y Y.B. 20, 26.

[265] This is a vigorous debate in the academic literature regarding how modern public choice theory should affect judicial review, if at all. But public choice theory suggests that much legislation benefits private interests rather than the public, leading some to suggest that it provides a rationale for more stringent judicial review of economic legislation. For the law review literature on this debate, see, e.g., Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 44 (1991); Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENTARY 279,

Gillman suggests that the *Lochner* Court's primary error was it failed to see that in a society riven with class divisions stemming from industrialization, certain types of class legislation were appropriate to equalize bargaining power. This analysis certainly appeals to the liberal mainstream of academia, who can comfort themselves with the thought that today's legal conservatives are equally myopic. However, *Lochner* is also of special interest to libertarian and law and economics-oriented scholars who tend to believe that traditional vilification of *Lochner* over the years was at best excessive, at worst misguided. The class legislation hypothesis provides a nice revisionist story for this group, as it suggests that the *Lochner* Justices do not fit their traditional portrayal as either hopeless reactionaries or clueless judicial activists. Rather, Gillman's thesis suggests they were actually such sharp thinkers that they anticipated public choice theory by over fifty years by invalidating special interest legislation as class legislation.

Finally, and perhaps most important, Gillman's thesis caught on because it is normatively appealing to many academics in a rather direct way. Gillman explicitly states his hope that *The Constitution Besieged* will disassociate *Roe v. Wade* and other controversial modern individual rights cases from being criticized by conservatives as *Lochner*ian.[266] He states that "[c]onservatives have used the lore of *Lochner* as a weapon in their struggle against the modern Court's use of fundamental rights as a trump on government power. If nothing else, I hope this study helps remove that weapon from their hands."[267] In other words, if *Lochner* can be associated with a narrow-minded understanding of class legislation, rather than as a decision in which courts read a fundamental right to liberty of contract into the Constitution, some of the Supreme Court's most beloved and controversial liberal modern fundamental rights decisions, notably *Griswold v. Connecticut* and *Roe v. Wade*, will be immunized from the longstanding charge that they are *Lochner's* illegitimate offspring.[268]

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288 (1992); Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 879 (1987); Herbert Hovenkamp, *Legislation, Well-being, and Public Choice*, 57 U. CHI. L. REV. 63, 85 (1990); Jonathan R. Macey, *Promoting Public-Regarding Legislation through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 227 (1986); Edward L. Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 66 N.Y.U. L. REV. 1, 5 (1991); *Public Choice Theme Issue*, 6 GEO. MASON L. REV. 709 (1998); Symposium, *Positive Political Theory and Public Law -- Part II*, 80 GEO. L.J. 1737 (1992); *Symposium on the Theory of Public Choice*, 74 VA. L. REV. 167 (1988).

[266] *See* GILLMAN, *supra* note 40, at 204.

[267] *Id*. at 205.

[268] That is not to say that Gillman and his supporters are intentionally distorting historical truth for political purposes. Rather, a plausible historical thesis will naturally seem more attractive and believable if it is compatible with, or, better yet, supportive of, one's worldview.

The Court eventually dispatched *Lochner* in the late 1930s. *Lochner*ian fundamental rights analysis, however, lived on. The Court, while largely abandoning review of economic regulations under the Due Process Clause, gradually incorporated most of the Bill of Rights into the Fourteenth Amendment, thereby continuing to enforce fundamental rights against the states. The incorporation doctrine both limited and expanded the scope of fundamental rights by associating them with the text of the Bill of Rights, rather than on the Justices' own understanding of fundamental rights.[269]

The post-*Lochner* reincarnation of fundamental rights began in 1938 in the famous Footnote 4 of *Carolene Products*,[270] which expressed the Court's reluctance to entirely abandon judicial review of purported police power regulations. The Court suggested that "[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth."[271]

Footnote 4 also suggested that the Court was willing to preserve the *Lochner*ian civil liberties decisions of the 1920s and 1930s by reinterpreting them as decisions protecting "discrete and insular minorities."[272] Cases cited by the Court in Footnote 4, including the civil liberties decisions of the 1920s,[273] were reinterpreted as decisions invalidating statutes because the (facially-neutral) laws in question were

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[269] For a good general overview of how fundamental rights were resurrected after the New Deal, see Kurt T. Lash, *The Constitutional Convention of 1937: The Original Meaning of The New Jurisprudential Deal*, 70 FORDHAM L. REV. 459 (2001); *see also* LEUCHTENBURG, *supra* note 21, ch. 9 (describing "The Birth of America's Second Bill of Rights"). Contrast the post-New Deal Court's focus on the Bill of Rights with the view of the *Lochner* era Court: "[I]t is possible that some of the personal rights safeguarded by the first eight Amendments against national action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law." Twining v. New Jersey, 211 U.S. 78, 99 (1908).

[270] United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

[271] *Id.*; *see also* Skinner v. Oklahoma, 316 U.S. 535 (1942) (stating that where "the basic civil rights of man" are threatened by "invidious discrimination" the court must engage in "strict scrutiny" of the law in question); Palko v. Connecticut, 302 U.S. 319 (1937) (rejecting the argument that the double jeopardy clause of the Fourteenth Amendment was "incorporated" into the Fourteenth Amendment, but holding that the prohibition of double jeopardy was nevertheless a fundamental right and therefore applied against the states under the Due Process Clause).

[272] *Id.*

[273] *See supra* notes 245 to 251 and accompanying text (discussing *Meyer v. Nebraska*, *Pierce v. Society of Sisters*, and *Farrington v. Tokushige*). Each of the statutes in question did have invidious, discriminatory origins, but nothing in the opinions invalidating them suggested that they were unconstitutional for any reason other than their infringement on the due process right to be free from arbitrary deprivations of liberty.

directed at "particular religious, national, or racial minorities."[274] Laws that threaten such groups "may call for a correspondingly more searching judicial inquiry."[275] Protection of discrete and insular minorities from hostile legislation by an equal protection analysis is a limited, modern liberal version of the older prohibition against class legislation, with the caveat that the modern version requires the Court to discover legislative intent regarding facially neutral laws.

Protection of non-textual rights under the Due Process Clause largely disappeared for a couple of decades.[276] In the 1960s, however, *Griswold v. Connecticut*[277] resurrected *Lochner*ian civil liberties decisions from the 1920s, relying on *Pierce* and *Meyer* for the proposition that the Due Process Clause protects a fundamental unenumerated right to privacy. *Griswold* could have been decided under a modern version of class legislation analysis because the birth control law in question was protected from repeal by the local power of the Catholic Church, to the detriment of those who did not share the Church's views on the issue.[278] As such, it was blatant special interest legislation, with a nagging establishment of religion issue as well. Had the *Griswold* Court relied on such an equal protection analysis, *Roe v. Wade* could have been decided based on the discriminatory harm caused to women by restrictions on abortion, instead of as a right to privacy decision.[279]

By instead resurrecting the *Lochner*ian notion that due process protects fundamental unenumerated rights, however (albeit without the accompanying historicism), the Court *Griswold* Court ensured that many of the great constitutional issues of the last forty years would be decided based on notions of unenumerated individual rights under the Due Process

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[274] *Carolene Products Co.*, 304 U.S. at 152 n.4.

[275] *Id*.

[276] An exception is Bolling v. Sharpe, 347 U.S. 497 (1954), in which the Court held that the Due Process Clause of the Fifth Amendment prohibited the federal government from mandating segregation in Washington, D.C. In reviving the equality component of the Fifth Amendment's Due Process Clause because the Equal Protection Clause is unavailable against the federal government, the *Bolling* Court was following Justice Sutherland's lead in *Adkins v. Children's Hospital*, 261 U.S. 525 (1923) (holding that a federally-mandated minimum wage for women in the District of Columbia was unconstitutional under the Fifth Amendment's Due Process Clause, because, among other things, it unfairly put the burden of support of women workers on their employers, and illicitly made women into a separate class).

[277] 381 U.S. 479 (1965).

[278] *See* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 275 n.24 (1999).

[279] Justice Ginsburg, among others, believes that this would have been a preferable outcome. Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375 (1985) (arguing that the Supreme Court should have used the Equal Protection Clause rather than the Due Process Clause to strike down restrictions on a woman's ability to obtain an abortion).

Clause, rather than being decided based on notions of equality under the Equal Protection Clause or even left to the political branches to sort out.[280] This, perhaps, is *Lochner's* primary legacy.

For better or for worse, *Griswold* and *Roe's* protection of the unenumerated right to privacy does indeed raise many of the same issue as *Lochner's* protection of the unenumerated right to liberty of contract,[281] a conclusion that cannot be glossed over with the fallacious claim that *Lochner* was really about prohibiting class legislation. Some will argue that the current Court should reassess its endorsement of *Roe*,[282] because it is in the same tradition as *Lochner*.

But perhaps the proper reaction to the conclusion that *Lochner* and *Roe* are in the same fundamental rights tradition is to reassess our understanding of *Lochner*. The *Lochner* era Court, one can argue, chose an appropriate role for the Court—defender of last resort of fundamental rights—but simply chose the wrong rights to emphasize; the Court focused on liberty of contract, a right that had become anachronistic in a modern industrial economy. Instead, the Court should have focused on the civil liberties necessary for a properly-functioning modern liberal democracy.[283] The Court eventually got it right. *Lochner*, perhaps, should be recognized as a misstep on an otherwise sound path, not an irredeemable mistake. Or perhaps we should even consider the possibility that *Griswold* and *Lochner* were *both* correctly decided.[284] This is a very interesting debate, but one that is simply solvable by reference to the history of *Lochner*.

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[280] "The reasoning of *Allgeyer* and of *Lochner* with respect to the generating force of 'liberty' guaranteed by the Constitution has been fully endorsed. The decision of these cases have been discredited, but much of the opinions is fully viable." KONVITZ, *supra* note 175, at 108.

[281] John Hart Ely famously criticized *Roe* as a *Lochner*ian decision. *See* John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 940 (1973) (concluding that "*Lochner* and *Roe* are twins").

[282] Saenz v. Roe, 526 U.S. 489 (1999).

[283] A position along these lines is advocated by Ackerman and Fiss. *See* ACKERMAN, *supra* note 20; FISS *supra* note 18.

[284] *See* Richard A. Epstein, *Liberty, Equality, and Privacy: Choosing a Legal Foundation for Gay Rights*, 2002 U. CHI. LEG. F. 73 (making this argument).