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# **LOCHNER AND CONSTITUTIONAL CONTINUITY**

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## *Lochner* and Constitutional Continuity

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If you want to raise eyebrows at a gathering of judges or legal scholars, try praising the Supreme Court's 1905 decision in *Lochner v. New York*. *Lochner* invalidated a state maximum hours law for bakery workers. The Court held that the law violated the right to "liberty of contract," a right implicit in the Fourteenth Amendment's ban on states depriving people of liberty without "due process of law."

*Lochner* has since become shorthand for all manner of constitutional evils, and has even had an entire discredited era of Supreme Court jurisprudence named after it. Over one hundred years after their predecessors issued the decision, Supreme Court Justices of all ideological stripes use *Lochner* as an epithet to hurl at their colleagues when they disapprove of a decision declaring a law unconstitutional. Even Barack Obama has found occasion to publicly denounce *Lochner*, pairing it with the *Dred Scott* case as examples

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of egregious Supreme Court error.<sup>1</sup> And *Lochner's* infamy has spread internationally, to the point where it plays an important role in debate over the Canadian constitution.<sup>2</sup>

Legal scholars across the political spectrum have long agreed that *Lochner* and other cases applying the liberty of contract doctrine to invalidate legislation were serious mistakes. This is hardly unusual. Many constitutional doctrines adopted by the Supreme Court have come and gone over the last two-hundred-plus years. But the ferocity and tenacity of the liberty of contract doctrine's detractors is unique. For over one hundred years, critics have argued that *Lochner* and its progeny did not involve ordinary constitutional errors, but were egregious examples of willful judicial malfeasance.

Concomitantly, jurists have long assumed that the battle between early twentieth century proponents of liberty of contract and its Progressive detractors was decisively won by the Progressives. Both liberal and conservative constitutionalists tend to see themselves as part of a generally consistent tradition tracing back to Progressives and New Dealers.

The standard liberal version of constitutional history has relied on broad caricatures of the relevant historical actors; the good guys, starting with early twentieth-century Progressive jurists, are said to have been champions of the little guy against the powerful, whether in the form of protecting civil liberties or of protecting the economically

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<sup>1</sup> Senator Barack Obama, Speech re the Nomination of Justice Janice Rogers Brown to the D.C. Circuit Court of Appeals, June 8, 2005, available at [http://www.barackobama.com/2005/06/08/remarks\\_of\\_us\\_senator\\_barack\\_o\\_1.php](http://www.barackobama.com/2005/06/08/remarks_of_us_senator_barack_o_1.php).

<sup>2</sup> See Sujit Choudhry, *The Lochner Era and Comparative Constitutionalism*, 2 Int'l J. Const. L. 1, 15 (2004).

powerless against rapacious corporations. The liberals' historical bad guys are the "reactionary" justices of the Gilded Age and their successors into the early New Deal era, who are said to have substituted crass class interest or dogmatic laissez faire ideology for constitutional principle.<sup>3</sup>

Modern conservative constitutionalists, meanwhile, though dissenters in some ways from the orthodox interpretation of American constitutional history, also want to see themselves as part of a seamless jurisprudential tradition, and they venerate some of the same Progressive heroes as their liberal adversaries do. The conservatives' preferred narrative revolves around a tradition of judicial restraint based on textualism, originalism, and respect for longstanding constitutional principle. In this tale, the good guys are Oliver Wendell Holmes, Felix Frankfurter, and other Justices with Progressive constitutional views who are said to have properly put their political views to one side to enforce the Constitution as written. The bad guys are the Supreme Court's "judicial activists" who purportedly made up the nonsensical doctrine of "substantive due process" to foist their ideology on the American public. The original sin was that of the Supreme Court in the liberty-of-contract era, but the modern Supreme Court has failed to repent. Indeed, it has aggravated matters through additional judicial activism, substituting modern liberal-left social policy preferences for the laissez-faire prejudices of the earlier period.

For various reasons, including mere happenstance, the *Lochner* case became the key

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<sup>3</sup> For a recent elaboration of the traditional liberal view, see James MacGregor Burns, *Packing the Court: The Rise of Judicial Power and the Coming Crisis of the Supreme Court* (2009).

emblematic illustration of both of these stories, the one case that encapsulates everything about the bad guys' approach. These stories, however—both in terms of overall narrative and their specific depiction of the *Lochner* case—are demonstrably false. An accurate and nuanced view of the Supreme Court's pre-World War II due process jurisprudence does not allow for blithe categorization of Justices who lived in a very different era, replete with ideological and political disputes and assumptions that are foreign and often barely comprehensible to modern scholars, into prescient heroes and narrow-minded villains.

Indeed, the most significant and perhaps most surprising aspect of the history of the liberty of contract doctrine is that modern Fourteenth Amendment jurisprudence is at least much a product of the *Lochner* line of cases as of the views of their Progressive opponents. Progressive critics of *Lochner* certainly emerged victorious on one very important issue—the Supreme Court no longer engages in serious review of economic regulations under the Due Process Clause. But despite the calumny heaped on the due process liberty of contract decisions and the Supreme Court Justices who wrote them, modern constitutional jurisprudence implicitly (and sometimes explicitly) draws a great deal from pre-New Deal due process decisions rejecting novel assertions of government power.

To assess the outcome of the conflict in the early twentieth century between proponents and opponents of the liberty of contract doctrine, it's necessary to avoid the tendency to superimpose modern ideological divisions on to the debates of past generations. Early twentieth century Progressives were not ideological twins of modern

“liberals,” and liberty of contract proponents did not share a common constitutional vision with modern “conservatives.”

In sharp contrast to modern constitutional jurisprudence, neither Progressives nor their conservative opponents typically recognized a fundamental distinction between judicial protection for civil rights and civil liberties, and judicial protection of economic liberties. Rather, both sides thought that Fourteenth Amendment due process cases raised three primary issues: whether the party challenging government regulatory authority had identified a legitimate right deserving of judicial protection; the extent to which the courts should or should not presume that the government was acting within its inherent “police power”; and, finally, taking the decided-upon presumption into account, whether any infringement on a recognized right protected by the Due Process Clause was within the scope of the states’ police power, or whether instead it was an arbitrary, and therefore, unconstitutional, infringement on individual rights.

Leading Progressive lawyers believed in strong interventionist government run by experts and responsive to developing social trends, and were hostile to countervailing claims of rights-based limits on government power. Princeton University president (and later U.S. president) Woodrow Wilson, for example, dismissed talk of “the inalienable rights of the individual” as “nonsense.” “The object of constitutional government,” according to Wilson, was not to protect liberty, but “to bring the active, planning will of each part of the government into accord with the prevailing popular thought and need.”<sup>4</sup>

Progressives blamed the “individualist” philosophy of the Constitution, as manifested in its protections for individual rights, for blocking needed Progressive reforms. In his extremely

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<sup>4</sup> Woodrow Wilson, *Constitutional Government in the United States* 14, 16 (1908).

influential book *Progressive Democracy*, Herbert Croly, whose admirers and friends included Felix Frankfurter and Learned Hand, criticized the Bill of Rights for turning the Constitution “into a monarchy of Law superior in right to the monarchy of the people.”<sup>5</sup> Morris Cohen, writing in Croly’s *New Republic*, questioned the legitimacy of judicial power to invalidate legislation that infringed on individual liberty.<sup>6</sup>

Progressive lawyers’ contempt for America’s individualist natural rights tradition naturally led to hostility to the Fourteenth Amendment. Frankfurter, writing in the *New Republic*, called for the repeal of the Fourteenth Amendment’s Due Process Clause,<sup>7</sup> and Louis Brandeis privately urged repeal of the entire Fourteenth Amendment,<sup>8</sup> a position adopted publicly by less prominent Progressives.<sup>9</sup> Brandeis later warned Frankfurter that equal protection “looms up even more menacingly than due process.”<sup>10</sup>

Not surprisingly, then, Progressive legal commentators therefore urged the courts to interpret the police power as sufficiently flexible to permit state-imposed racial segregation, sex-specific labor laws, restrictions on private schooling, and coercive eugenics. Progressive jurists, for example, were almost universally hostile to the Supreme Court’s 1917 opinion in *Buchanan v. Warley* that invalidated residential segregation

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<sup>5</sup> Herbert David Croly, *Progressive Democracy* 135 (1914).

<sup>6</sup> Morris R. Cohen, *The Bill of Rights Theory*, 2 *New Republic* 222, 222 (1915).

<sup>7</sup> Editorial, *An Unseen Reversal*, *New Republic*, Jan. 9, 1915, at 7.

<sup>8</sup> Melvin I. Urofsky, *The Brandeis-Frankfurter Conversations*, 1985 *Sup. Ct. Rev.* 299, 320.

<sup>9</sup> William G. Ross, *A Muted Fury: Populists, Progressives and Labor Unions Confront the Courts, 1890-1937*, at 65 (1994).

<sup>10</sup> Urofsky, *supra* note 8, at 330.

laws.<sup>11</sup> A student comment in the *Yale Law Journal*, reflecting broad Progressive sentiment, attacked the Court for implicitly holding that property rights were more important than the public's interest in segregation.<sup>12</sup> Columbia Professor Howard Lee McBain, a prominent Progressive scholar and author of *The Living Constitution*, criticized the Court for destroying whites' right to live in a segregated neighborhood.<sup>13</sup>

Similarly, Progressives excoriated George Sutherland's 1923 opinion in *Adkins v. Children's Hospital*, which invalidated a women-only minimum wage law.<sup>14</sup> Sutherland, a long-time supporter of women's rights, emphasized that given the recognition of women's civic equality in the Nineteenth Amendment women were entitled to the same legal rights as men. Justice Holmes replied, "It will need more than the Nineteenth Amendment to convince me that there are no differences between men and women, or that legislation cannot take those differences into account." Prominent Progressive activist Florence Kelley, reflecting the visceral hostility to *Adkins* felt by many of her compatriots, accused the Court of issuing a "new *Dred Scott* decision."<sup>15</sup>

Progressives also opposed the Supreme Court's 1923 ruling in *Meyer v. Nebraska* holding that private schools have the right to teach their students foreign languages.

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<sup>11</sup> See David E. Bernstein & Ilya Somin, *Judicial Power and Civil Rights Reconsidered*, 114 *Yale L.J.* 591, 623-28 (2006).

<sup>12</sup> Comment, *Unconstitutionality of Segregation Ordinances*, 27 *Yale L.J.* 393, 397 (1918).

<sup>13</sup> Howard Lee McBain, *Liberty of Contract* 78 (1927).

<sup>14</sup> 261 U.S. 525 (1923).

<sup>15</sup> Florence Kelley, *Progress of Labor Legislation for Women*, in *Proceedings of the National Conference of Social Work* 114 (1923).

Justice McReynolds wrote an opinion for the Court that, citing and expanding on *Lochner*, stated that the Due Process Clause protects not just liberty of contract, but the right “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,” along with “other privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”<sup>16</sup> Felix Frankfurter, for example, wrote to Learned Hand that while he regarded “such know-nothing legislation as uncivilized,” he would still have voted with Holmes rather than “lodging power in those nine gents in Washington.” Hand agreed, and added that “I can see no reason why, if a state legislature wishes to make a jackass of itself by that form of Americanization, it should not have the responsibility for doing so rather than the Supreme Court.”<sup>17</sup>

Frankfurter also strongly opposed the outcome in *Pierce v. Society of Sisters*, a 1925 case holding that states could not ban private schools. He argued that Americans were in danger of confusing unwise or unjust legislation with unconstitutional legislation. Frankfurter warned his fellow Progressives that a great deal of “highly illiberal” legislation infringing on freedom of thought and freedom of speech was “clearly constitutional.”<sup>18</sup> Justice McReynolds added fuel to

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<sup>16</sup> *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923).

<sup>17</sup> Gerald Gunther, *Learned Hand* 377-78 (1994). *See generally* Note, *Validity of Foreign Language Statutes*, 22 Mich. L. Rev. 248, 251 (1923) (accusing the majority of reverting to an “individualism now rather generally discredited” and praising Justice Holmes’s approach to the Fourteenth Amendment).

<sup>18</sup> Felix Frankfurter, *Can the Supreme Court Guarantee Toleration?*, *New Republic*, July 17, 1925, at 85, 86.

Progressive ire in *Pierce* by explicitly rebuking statist Progressive notions of educational reform. The child, McReynolds proclaimed, “is not the mere creature of the state.”<sup>19</sup>

Another civil liberties issue involving government regulation of education arose when Tennessee passed a law banning the teaching of evolution in public schools, leading to the famous Scopes Monkey Trial.<sup>20</sup> Influential journalist Walter Lippmann proposed that liberal attorneys organize a challenge to the law under the Due Process Clause. Thomas Reed Powell, Morris Cohen, Learned Hand, and other leading Progressive jurists responded that the courts should not interfere with the legislatures’ prerogative to determine educational policy.<sup>21</sup>

Even coerced sterilization of alleged defectives was more than acceptable to Progressive jurists. Justice Brandeis, who joined Justice Holmes’s infamous “three generation of imbeciles” opinion in *Buck v. Bell*, later cited *Bell* as an example of properly allowing the states “to meet modern conditions by regulations which a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive.”<sup>22</sup> Professor Robert Cushman praised Holmes’s opinion as a “trenchant” explanation of why the “substance of the law” was “a

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<sup>19</sup> *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1923).

<sup>20</sup> *See generally* Edward J. Larson, *Summer for the Gods: The Scopes Trial and America’s Continuing Debate Over Science and Religion* (1997).

<sup>21</sup> Gunther, *supra* note 18, at 582-83.

<sup>22</sup> *Olmstead v. United States*, 277 U.S. 438, 457 (1928) (Brandeis, J., dissenting).

reasonable social protection, entirely compatible with due process of law.”<sup>23</sup> Professor Fowler Harper listed *Bell* as an example of welcome “progressive trends” in law.<sup>24</sup>

In short, many Progressives, products of their prejudiced times, actively sympathized with the racism, the paternalistic and often dismissive or condescending attitudes toward women, and the hostility to immigrants and Catholics that motivated the laws mentioned above. But even unusually liberal Progressive jurists—and elite attorneys like Frankfurter tended to be more liberal-minded than other Progressive intellectuals—generally opposed judicial intervention to support any given rights claim brought under the Due Process Clause. Progressive lawyers argued that the benefits of such intervention would likely be substantially outweighed by the damage additional constitutional limits on the government’s police power might ultimately cause to their core agenda of supporting economic—especially labor—regulation.

The most significant exception to the pattern of Progressive hostility to constitutional protection for individual rights was that during and after World War I, some Progressives vigorously supported greater constitutional protection of freedom of expression.<sup>25</sup> At least

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<sup>23</sup> Robert E. Cushman, *Constitutional Law in 1926-27*, 22 Am. Pol. Sci. Rev. 92 (1928).

<sup>24</sup> Fowler V. Harper, *Scientific Method in the Application of Law*, 1 Dakota L. Rev. 110, 111 (1927).

<sup>25</sup> Justice Brandeis authored a famous dissent in the 5-4 decision in *Olmstead v. United States*, 277 U.S. 438 (1928), contending that the Fourth Amendment prohibits warrantless wiretapping. However, the most consistent advocates of Fourth Amendment and other constitutional protections against the excesses of Prohibition enforcement were “conservative” Justices Butler, McReynolds, and Sutherland, with Brandeis and Holmes

among Progressives allied with the political left, wariness of individualistic speech rights was tempered by the trauma of wartime repression of pacifists and other dissenters, and the post-War “Red Scare.”<sup>26</sup> Brandeis and Holmes eventually took up their cause, though each had significant reservations about using the Fourteenth Amendment to limit states’ infringement on freedom of speech. The Court’s conservative majority, meanwhile, acknowledged that the Fourteenth Amendment placed significant restrictions on state regulation of speech.

More generally, advocates of liberty of contract believed that the Fourteenth Amendment set inherent limits on the government’s authority to regulate the lives of its constituents. While this belief initially was adopted by the courts in the context of economic regulation, as early as 1897 in *Allgeyer v. Louisiana* the Supreme Court announced that the Fourteenth Amendment’s Due Process Clause protected an individuals’ right to be “free in the enjoyment of all his faculties [and] to be free to use them in all lawful ways.”<sup>27</sup> Through the early 1920s, however, with the exception of a few outlier decisions like *Lochner*, the Supreme Court’s majority was generally cautious about limiting the scope of the states’ police power via the Due Process Clause.

But as with their Progressive critics, “conservative” Supreme Court Justices’ views on the scope of the government’s power to infringe on constitutional protections for civil rights and civil liberties were generally consistent with their views on the government’s

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providing consistent votes for the government. Lucas A. Powe, Jr., *The Supreme Court and the American Elite, 1789-2008*, at 193 (2009).

<sup>26</sup> Mark Tushnet, *The Rights Revolution in the Twentieth Century* (2009).

<sup>27</sup> *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897).

power to interfere with liberty of contract.<sup>28</sup> Once the Court in the became more aggressive about reviewing government regulations in the economic sphere, the Justices naturally began to acknowledge the broader libertarian implications of *Lochner* and other liberty of contract cases and to enforce limits on government authority more generally. The Court relied on these cases in pioneering the protection of the right of women to compete with men for employment free from sex-based regulations; the right of African Americans to exercise liberty and property rights free from Jim Crow legislation; and civil liberties against the states ranging from freedom of expression to the right to choose a private school education for one's children.

Consider, for example, the Court's decision in *Buchanan v. Warley*. Generations of legal scholars and historians have treated *Buchanan* as a property rights case that rested on laissez-faire ideology, of little if any relevance to the later civil rights revolution. Undoubtedly, the fact that *Buchanan* involved property rights and liberty of contract played an important role in the decision; it allowed the Court to distinguish *Buchanan* from *Plessy v. Ferguson*, which involved what the Court declared were mere social rights.<sup>29</sup> But focusing myopically on the economic rights element of *Buchanan* misses the fact that even property rights and liberty of contract were subject to the police power. The Court's invocation of property rights did not resolve the issue of whether residential

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<sup>28</sup> Howard Gillman, *Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties Jurisprudence*, 47 Pol. Res. Q. 623, 640 (1994).

<sup>29</sup> See Carol Rose, *Shelley v. Kraemer*, in *Property Stories* 169, 174 (Gerald Korngold & Andrew P. Morris, eds. 2004).

segregation laws were a constitutionally proper exercise of the government's regulatory authority.<sup>30</sup>

*Plessy* had suggested that any “reasonable” segregation law would come within the police power, and the *Plessy* Court applied a lax—and racism-infused—standard of reasonableness. In contrast, after noting that property rights were subordinate to the police power, the *Buchanan* opinion favorably cited a series of antidiscrimination precedents that no Supreme Court majority had relied upon in almost four decades.<sup>31</sup> The Court specifically invoked the 1866 Civil Rights Act, which stated that African Americans had the same right to make and enforce contracts and own and alienate property as did white persons.

Most significant, the Court for the first time since *Yick Wo v. Hopkins* in 1886 held that discriminatory animus was not a proper police power justification for laws violating recognizing individual rights. The Court reached this conclusion in *Buchanan* even though popular and expert opinion, backed by contemporary social science evidence, supported the underlying prejudiced rationale for the residential segregation law, and even though the state justified the law as a response to the risk that integrated housing would lead to miscegenation, racial violence, and other social ills. And, as noted previously, the Court's opinion flew in the face of dominant “Progressive” opinion.

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<sup>30</sup> For a recent work that dismisses *Buchanan* as a mere property decision with little relevance to the rights of African Americans, see Lucas A. Powe, Jr., *The Supreme Court and the American Elite, 1789-2008*, at 189 (2009).

<sup>31</sup> Andrew Kull, *The Colorblind Constitution* 139 (1992).

Even Justices who lacked sympathy for the individuals and groups that were challenging government actions often voted in their favor out of libertarian commitment to a limited police power. The unabashed racist James McReynolds, for example, not only voted with the majority in *Buchanan*, he also wrote an opinion protecting the right of Japanese parents in Hawaii to send their children to private Japanese-language schools.<sup>32</sup>

Some of the other Justices had equalitarian reasons for their votes, as with Justice Sutherland's opinion in *Adkins*. And sometimes, a commitment to limited government seems to have led some jurists to a newfound empathy for groups suffering from what they saw as government overreaching.

When Roosevelt appointees created a growing Progressive/liberal majority on the Court in the late 1930s, the New Dealers had the opportunity to fulfill the old Progressive dream of emasculating the Due Process Clause and limiting its scope to purely procedural rights. But the Court did not abandon what soon came to be known as "substantive due process." Instead, the Court continued to protect freedom of expression rights against the states via the Due Process Clause, and soon incorporated other rights from the Bill of Rights into the Due Process Clause. The Court also continued to review state and local legislation under the Equal Protection Clause, and eventually used the Clause aggressively to protect African Americans from state-sponsored segregation.

The post-*Lochner* reincarnation of the Supreme Court's fundamental rights jurisprudence began in 1937 in *Palko v. Connecticut*. All of the Progressive and liberal Justices joined a

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<sup>32</sup> *Farrington v. Tokushige*, 273 U.S. 284 (1927).

Benjamin Cardozo opinion stating that the Fourteenth Amendment protects rights mentioned in the Bill of Rights that are “implicit in the concept of ordered liberty.”<sup>33</sup>

The famous Footnote Four of the 1938 *Carolene Products* case also reflected the new liberal majority’s reluctance to entirely abandon judicial review of purported police power regulations.<sup>34</sup> Justice Harlan Stone, writing for the Court, stated that economic regulations would have a very strong presumption of constitutionality, but that a weaker presumption applied when plaintiffs asserted rights that were enumerated in the Bill of Rights.

Stone also asserted that laws directed at particular religious, or national, or racial minorities “may call for a correspondingly more searching judicial inquiry.” The Court creatively reinterpreted—that is, intentionally misinterpreted—*Meyer* and *Pierce* as decisions invalidating laws because the laws discriminated against religious and ethnic minorities. This was the Court’s first of several attempts to preserve to preserve these precedents by disentangling them from their roots in the now-obsolete liberty-of-contract line of cases. The result was that the Court, following Brandeis’s lead, created a distinction in American constitutional law between economic rights on the one hand, and civil rights and liberties on the other. This distinction allowed liberals to preserve the Court’s role in protecting individual rights from overreaching by the government, while distinguishing their jurisprudence from that of the dreaded liberty-of-contract era.

The Court refused to completely refrain from using the Due Process Clause to protect individual liberties for several reasons. First, judicial regard for civil liberties allowed New Dealers, within and outside the Court, to plausibly claim they were committed to preserving

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<sup>33</sup> 302 U.S. 319, 325 (1937).

<sup>34</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)

individual rights even while vastly expanding the size and scope of the federal government. And while by the 1930s the Court's liberty of contract decision were very unpopular, the Court's tentative forays into civil libertarianism, ranging from *Pierce* and *Meyer* to its free speech cases to protecting the "Scottsboro Boys" from grossly unfair criminal prosecutions, had received general public approbation.<sup>35</sup> These decisions were especially popular among the ethnic groups that formed the core of the New Deal coalition.<sup>36</sup>

Second, judicial restraint always looks better when your side doesn't control the courts. Once the "left" took over the Supreme Court, the idea that the Justices should always defer to state legislatures became far less attractive to New Dealers. This was especially true because state legislatures were often dominated by rural, conservative interests with agendas that broadly conflicted with ascendant urban liberalism.

Third, the New Deal coalition included many individuals with a decidedly modern liberal, as opposed to old-fashioned Progressive, ideological bent. While these individuals supported increased government activism in the economic sphere, they were also concerned with civil rights and civil liberties. Some of these New Deal liberals were apostate classical liberals, such as Oswald Garrison Villard, whose *Nation* magazine had praised the *Lochner* decision. Others were Catholics, Jews of Eastern European descent, and African Americans who had previously been relatively marginal players in Progressive intellectual and political circles, and who tended

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<sup>35</sup> See *Powell v. Alabama*, 287 U.S. 45 (1932).

<sup>36</sup> See Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* 221-22 (2009); M.B. Carrott, *The Supreme Court and Minority Rights in the Nineteen-Twenties*, 41 *Nw. Ohio Q.* 144 (1969).

to be much more sensitive than were most Progressives to minority rights and freedom of expression.

Fourth, the enthusiasm for government activism the New Dealers inherited from the Progressives was tempered by the rise of fascism in Europe. Given the fall of liberal democracy in Germany and elsewhere to popular acclaim or at least acquiescence, the confidence Progressives like Croly had expressed in majoritarianism seemed grossly misplaced.<sup>37</sup> German legal positivism, which had strongly influenced Progressives, also lost its attraction under the weight of Naziism.

Fifth, the elite bar received part of its prestige from the prominent role the Supreme Court played in American life. Once it became clear that the old constitutional order based on property rights and limited government was dead, elite attorneys quickly became advocates of an expanded role for the Supreme Court in protecting freedom of expression and minority rights. The Justices' self-interest, meanwhile, required maintaining the Court's significance.<sup>38</sup>

Finally, and for many of the reasons noted above, the Roosevelt Administration encouraged the Supreme Court's emerging civil liberties jurisprudence. After losing a Court-packing fight in 1937, the Administration focused on changing the public's understanding of the Constitution's essence. The Constitution, the New Dealers argued, was not about protecting property and establishing limited government, but guaranteeing individual civil liberties. Not only was a large

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<sup>37</sup> William E. Nelson: *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* 200 (1988).

<sup>38</sup> John Wertheimer, *The Switch in Time" Beyond the Nine: Civil Liberties and the Interwar Constitutional Retooling*, 53 *Studies in Law, Politics & Soc'y* 3 (2010).

and active federal government not a constitutional problem, but Americans needed such a government to protect them from abuses of state and corporate power.

FDR ordered federal employees working on ceremonies related to the Constitution's 150th anniversary in 1937 to emphasize the Bill of Rights instead of the original Constitution. By the time the government celebrated the Bill of Rights' 150th anniversary in 1941, it had, consistent with the Court's emerging jurisprudence, become virtually synonymous with the First Amendment.<sup>39</sup>

While the Supreme Court beat the dead horse of liberty of contract for decades after the New Deal, civil liberties fared far better. The Court not only continued to protect freedom of expression against the states, but eventually expanded the protections of the Fourteenth Amendment's Due Process Clause to include most of the other rights found in the Bill of Rights. In contrast to the liberty of contract era, when Progressive luminaries sought to restrict the Due Process Clause to issues of judicial procedure, the liberal New Dealers on the Supreme Court unanimously agreed that the Court had some obligation to use the Clause to protect individual rights against state legislation.

In the 1940s, Justice Hugo Black developed his theory of "total incorporation." Black believed that the Supreme Court should protect individual liberty against the states, but that the liberty of contract era showed that courts must be restrained from reading their own policy preferences into the Constitution. To accomplish these twin goals, he argued that the Supreme Court should hold that the first eight amendments of the federal Bill of Rights were applicable to the states via "incorporation" into the Fourteenth

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<sup>39</sup> *Id.*

Amendment's Due Process Clause, but that the Clause did not protect any unenumerated rights.

Justice Felix Frankfurter, meanwhile, thought that Black's incorporation doctrine would "impose an eighteenth-century straightjacket" on the states.<sup>40</sup> Frankfurter, no longer committed to limiting the Due Process Clause to procedural matters, argued that the Court should continue to look to natural law and the heritage of the past to determine the scope of the rights protected by the Clause. He wanted to retain the pre-New Deal Court's protection of rights foundational to Anglo-American liberty, but thought the Court should exhibit great restraint in identifying those rights.<sup>41</sup>

The Supreme Court ultimately adopted neither Justice's position. The Court gradually applied most, but not all, of the Bill of Rights to the states, on a case-by-case basis.<sup>42</sup> To blunt criticism that they were emulating their discredited pre-New Deal predecessors, the Justices and their defenders asserted that the liberty of contract cases

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<sup>40</sup> Lucas A. Powe, Jr., *The Supreme Court and the American Elite* 227 (2009).

<sup>41</sup> The debate between Black and Frankfurter has been analyzed in great detail elsewhere. *E.g.*, Jeffrey D. Hockett, *New Deal Justice: The Constitutional Jurisprudence of Hugo L. Black, Felix Frankfurter, and Robert H. Jackson* (1996); Mark Silverstein, *Constitutional Faiths: Felix Frankfurter, Hugo Black and the Process of Judicial Decision Making* (1984); James F. Simon, *The Antagonists: Hugo Black, Felix Frankfurter and Civil Liberties in Modern America* (1989).

<sup>42</sup> As of this writing, the Supreme Court has not "incorporated" against the states the right to a jury trial in civil cases, or the right of a criminal defendant to have a grand jury indictment..

involved illegitimate “substantive due process,” while cases “incorporating” the Bill of Rights against the states did not.

Applying the concept of substantive due process to the liberty of contract cases was anachronistic, because no Justice on the pre-New Deal Court adopted the view that substance and procedure were distinct categories under the Clause.<sup>43</sup> But even if the liberty of contract cases could accurately be described as examples of substantive due process, exempting the incorporation cases from that moniker was more a matter of rhetoric than logic. For example, enforcing the First Amendment right of freedom of speech against the states via the Due Process Clause is literally an exercise in protecting a substantive right through that clause, and therefore is “substantive due process.”

The post-New Deal Justices did try mightily to differentiate their due process jurisprudence from that of their predecessors. Black, for example, insisted that incorporation of the Bill of Rights, unlike liberty of contract, was dictated by the original intent of the Fourteenth Amendment. And the Justices generally differentiated between economic *interests*, which they thought could be adequately protected by the political process, and individual and civil *rights*, which were subject to majoritarian suppression. In the end, though, it’s hard to escape the conclusion that in the most fundamental sense

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<sup>43</sup> Conceptually, the liberty of contract line of cases involved an exercise of what historian G. Edward White calls “guardian review,” policing the limits of state power, not “substantive due process.” Although critics complained for decades that the Due Process Clause should be limited to issues of procedure, the concept of substantive due process did not become firmly established in American jurisprudence until the 1950s. *See* G. Edward White, *The Constitution and the New Deal* 245 (2000).

the liberal Justices of the post-New Deal period were emulating their pre-New Deal predecessors: identifying rights they deemed fundamental to American liberty, and decreeing that the Fourteenth Amendment's Due Process Clause protects those rights against the states.

The Supreme Court also began to aggressively deploy the Equal Protection Clause to protect African Americans from state-sponsored discrimination, most famously in *Brown v. Board of Education*.<sup>44</sup> *Brown* and like-minded cases were a modern version of the Court's old class legislation jurisprudence.<sup>45</sup> The Old Court had interpreted the ban on class legislation narrowly, because it had no reliable or consistent way to differentiate between legitimate classifications with a proper legislative purpose and illegitimate classifications intended to annoy or oppress legislative losers.

The Warren Court's answer was to defer to almost all legislative classifications, and not meaningfully police economic regulations through the Equal Protection Clause. Classifications based on race and other immutable characteristics, however, would be treated as inherently suspect, and therefore would be subject to strict scrutiny. The Court would only uphold such classifications if they were "narrowly tailored" and served a "compelling government interest." And in contrast to the pre-New Deal Court, the Warren and Burger Courts considered legislative motivation when considering whether a law violated the Equal Protection Clause.

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<sup>44</sup> 347 U.S. 483 (1954).

<sup>45</sup> Cf. V. F. Nourse & Sarah A. Maguire, *The Lost History of Governance and Equal Protection*, 58 Duke L.J. 955, 995-99 (2009).

Meanwhile, the longstanding controversy over judicial protection of unenumerated rights through the Due Process Clause seemed to be over. The Supreme Court had not invalidated a law based on an unenumerated right since 1936. Putting what seemed to be a final nail in the coffin of “substantive due process,” in 1963 the Court, overruling a 1917 precedent, unanimously upheld a state law banning the profession of debt-adjustment.<sup>46</sup> Justice Black wrote for the Court that “a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution.”

In a dramatic reversal, however, judicial enforcement of unenumerated rights via the Due Process Clause returned just two years later in *Griswold v. Connecticut*.<sup>47</sup> Justice Douglas’s plurality opinion for the Court relied in part on *Meyer* and *Pierce* for the proposition that the Due Process Clause protects a right to privacy sufficiently broad to encompass the decision of a married couple to use contraceptives. Douglas denied, however, that he was relying on a *Lochner*-like understanding of the Due Process Clause. He wrote: “Overtones of some arguments suggest that *Lochner v. State of New York* should be our guide. But we decline that invitation. . . . We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.”<sup>48</sup>

He argued, in language that has been widely mocked ever since, that the right to privacy was found in “penumbras, formed by emanations” of the First, Third, Fourth,

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<sup>46</sup> 372 U.S. 726 (1963).

<sup>47</sup> 381 U.S. 479 (1965).

<sup>48</sup> *Griswold v. Connecticut*, 381 U.S. 479, 481-82 (1965) (citation omitted).

Fifth and Ninth amendments created a right to privacy.<sup>49</sup> Douglas justified relying on *Meyer* and *Pierce* by treating them as First Amendment cases, even though neither case mentioned the First Amendment specifically, nor freedom of expression more generally. *Meyer* and *Pierce*, and therefore to some extent *Lochner* and other liberty of contract cases, are the true progenitors *Griswold*, and the Court's subsequent rulings protecting the right to terminate pregnancy, and to engage in private consensual sex.

More recently, Justice David Souter, concurring in *Washington v. Glucksberg*, acknowledged modern substantive due process's debt to *Lochner*. He argued that *Lochner* was correct to apply the Due Process Clause to prohibit arbitrary legislation, but was unduly "absolutist" in its implementation of the relevant standard.<sup>50</sup> By contrast, *Meyer* and *Pierce* properly applied heightened scrutiny to truly important interests.<sup>51</sup> Most recently, Justice Kennedy's opinion in *Lawrence v. Texas*, joined by his four more liberal colleagues, enthusiastically and unabashedly cited *Meyer* and *Pierce* as "broad statements of the substantive reach of liberty under the Due Process Clause."<sup>52</sup>

Conservative judges and scholars, for their part, continue to channel Progressive critiques of liberty of contract, and condemn *Lochner* for improper "judicial activism."<sup>53</sup>

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<sup>49</sup> *Griswold*, 381 U.S. at 484–85.

<sup>50</sup> *Washington v. Glucksberg*, 521 U.S. 702, 761 (1997) (Souter, J., concurring)

<sup>51</sup> *Glucksberg*, 521 U.S. at 761–62.

<sup>52</sup> 539 U.S. 558, 564 (2003).

<sup>53</sup> *See, e.g.*, Steven G. Calabresi, *Introduction*, in *Originalism: A Quarter Century of Debate* 13 (Steven G. Calabresi, ed. 2007); A. Raymond Randolph, Barbara K. Olson

But even Justice Antonin Scalia, long the bellwether of elite conservative constitutional thought, has not challenged the incorporation doctrine even though, like *Lochner*, it involves protecting substantive rights via the Fourteenth Amendment's Due Process Clause. Nor, unlike Justice Black, has Scalia argued that the Due Process Clause only protects rights enumerated in the Bill of Rights' text. Rather, Scalia argues that only rights that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental" are eligible for the Due Process Clause's protection.<sup>54</sup>

*Lochner's* legacy, then, lives on in American constitutional law, in the application of various rights, enumerated and unenumerated, against the states via the Due Process Clause. Justice Rufus Peckham's enunciation of an expansive liberty-protective interpretation of the Clause in *Lochner* (and *Allgeyer*) begot Justice McReynolds' even more expansive opinion in *Meyer*, which in turn continues to serve as the constitutional foundation of various Fourteenth Amendment rights protected by the Supreme Court. Contemporary Fourteenth Amendment jurisprudence owes at least as much to such advocates of liberty of contract as Justices John Marshall Harlan, Rufus Peckham, George Sutherland, and James McReynolds, than to Oliver Wendell Holmes, Louis Brandeis, and Felix Frankfurter and their skepticism of constitutional protection for individual rights.

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Memorial Lecture, Federalist Society, Nov. 11, 2005, <http://www.fed-soc.org/Publications/Transcripts/andolphBKO.pdf>.

<sup>54</sup> Michael H. v. Gerald D., 491 U. S. 110, 122 (1989), quoting *Snyder v. Massachusetts*, 291 U. S. 97, 105 (1934).

