Lochner’s Legacy’s Legacy

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Lochner’s Legacy’s Legacy

Avoiding “Lochner’s error” remains a primary focus of constitutional law and constitutional scholarship. Debate, however, continues regarding just what that error was. In Cass Sunstein’s oft-cited 1987 Columbia Law Review article, Lochner’s Legacy, Sunstein argues that the Lochner era Court’s primary error was not its purported “judicial activism.” Rather, the primary problem with Lochner was the Justices’ belief that market ordering under the common law was part of nature rather than a legal construct, and formed a baseline from which to measure the constitutionality of state action, rendering redistributive regulations unconstitutional.

Lochner’s Legacy’s understanding of the Lochner era has been widely accepted in legal circles, including by four current Supreme Court Justices. As conservative and liberal Justices continue to battle over the meaning of Lochner and its significance for modern constitutional jurisprudence, the liberal Justices have adopted Lochner’s Legacy’s historical thesis. What is remarkable about Lochner’s Legacy’s massive influence on the current understanding of Lochner is how little evidence Sunstein provides for his historical claims. Beyond Lochner itself, the article cites only seven cases out of hundreds of relevant Lochner era cases, and discusses only two of them in any detail. Even the discussion of these two cases is tendentious. Sunstein’s argument has nevertheless thrived because until now no one has systematically scrutinized its historical underpinnings.

This Article examines three major historical claims Lochner’s Legacy makes about the Lochner era: (1) that the Lochner era Supreme Court understood the common law “to be part of nature rather than a legal construct”; (2) that the Lochner era Court sought to preserve what it saw as the “natural,” “status quo” distribution of wealth against redistributive regulations; and (3) that the abandonment of Lochner resulted from the Supreme Court’s recognition that the problem with Lochner and its progeny was that the Court in those decisions mistakenly treated government inaction as the “baseline” to determine the constitutionality of government regulations. This Article argues that all three of these propositions are demonstrably incorrect. Lochner’s Legacy provides a particularly telling example of the danger of applying an ideological construct to constitutional history for presentist purposes, while ignoring or neglecting contrary evidence.

The ghost of Lochner v. New York\(^1\) haunts American constitutional law. Almost one hundred years after the Supreme Court decided Lochner, Lochner and its progeny remain the touchstone of judicial error.\(^2\) Avoiding Lochner’s mistake is

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1. 198 U.S. 45 (1905).
2. See Seminole Tribe of Florida v. Florida, 517 U.S. 44, 176 (1996) (Souter, J., dissenting) (stating that Lochner represents the “nadir” of judicial competence); 2 Bruce Ackerman, We the People: Transformations 269 (1998) (“[M]odern judges are more disturbed by the charge of Lochnerizing than the charge of ignoring the intentions of the Federalists and Republicans who wrote the formal text.”); J.M. Balkin & Sanford Levinson, The Canons of Constitutional Law, 111 Harv. L. Rev. 963, 1018.
the “central obsession” of modern constitutional law. Supreme Court Justices are at pains to deny that their opinions declaring laws unconstitutional are *Lochnerian*., while dissenting Justices use *Lochner* as an epithet to criticize their colleagues. Conservative Justices accuse their colleagues of *Lochnerizing* when the Court curtails abortion restrictions, while liberal Justices respond in kind when property regulations are declared unconstitutional under the Takings Clause, and when the Court uses the Commerce Clause or the Eleventh Amendment to invalidate federal laws. On issues that divide the Court along atypical lines, such as the scope of the dormant commerce clause, ecumenical groups of dissenting Justices accuse their colleagues of *Lochnerizing* when the majority invalidates government regulations.\(^6\)


\(^{5}\) See 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*).

\(^{6}\) See Alden v. Maine, 527 U.S. 706, 814 (1999) (Souter, J., dissenting) (“the Court’s late essay into imm unity 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. Florida, 517 U.S. 44, 166 (1996) (Souter, J., dissenting) (“The majority today, indeed, seems to be going *Lochner* one better.”).

Despite—or perhaps because of—Lochner’s importance in American constitutional consciousness, much controversy remains over just how the Lochner Court erred. The traditional view, first expressed in Justice Oliver Wendell Holmes’s famous dissent in Lochner, is that the Court exceeded its legitimate judicial role by reading the right of “liberty of contract” into the Fourteenth Amendment’s Due Process Clause, despite the absence of textual support for this right. The Supreme Court’s liberty of contract doctrine, which seemed to expand or contract unpredictably, was said to have reflected the

10 For such criticism during the Lochner era, see, e.g., HERBERT CROLY, PROGRESSIVE DEMOCRACY 137-40 (1914) (alleging that the courts used due process to take over the policy-making function of the legislature); VERNON LOUIS PARRINGTON, 3 MAIN CURRENTS IN AMERICAN THOUGHT 118-20 (1930); Morris R. Cohen, The Bill of Rights Theory, 2 NEW REPUBLIC 222, 222 (1915); Edward S. Corwin, Book Review, 26 AM. POL. SCI. REV. 270, 271 (1912) (arguing that judges were under the misimpression that the Due Process Clause of the Fourteenth Amendment gave them a “roving commission” to “sink whatever legislative craft may appear to them to be, from the standpoint of vested interests, of a piratical tendency”); Louis M. Greeley, The Changing Attitude of the Courts Toward Social Legislation, 5 U. ILL. L. REV. 222, 226-32 (1910); Albert M. Kales, “Due Process,” The Inarticulate Major Premise and the Adamson Act, 26 YALE L.J. 519, 523 (1917); Thomas Reed Powell, Collective Bargaining Before the Supreme Court, 33 POL. SCI. Q. 396, 397-429 (1918); Thomas Reed Powell, The Judiciality of Minimum-Wage Legislation, 37 HARV. L. REV. 545, 545-46, 555-56 (1924); Margaret S. Pahr, Natural Law, Due Process and Economic Pressure, 24 AM. POL. SCI. REV. 332, 332-54 (1930); see generally PAUL KENS, JUSTICE STEPHEN FIELD 6 (1997) (“The Court’s critics claimed that judges had constructed these theories from thin air, that liberty of contract and substantive due process were not based on the words of the Constitution.”).

For modern criticism of the Lochner era Supreme Court along traditional lines, see, e.g., ROBERT BORK, THE TERRORING OF AMERICA 36-49 (1990) (arguing that the Court had no authority under the Constitution to invalidate economic legislation under the Due Process Clause); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 14-21 (1980).

Despite this longstanding criticism, 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, am biguity, indiscerniveness, 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 Court, 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); 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, 69-70 [hereinafter, Urofsky, Myth and Reality]; 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 J. AM. HIST. 63, 64 (1985) [hereinafter, Urofsky, State Courts] (concluding that state courts’ willingness to invalidate legislation during the Lochner era has also been greatly exaggerated).

11 For example, many commentators thought that Lochner was overruled sub silentio in cases such as Bunting v. Oregon, 243 U.S. 426 (1917), which upheld a maximum hours law that applied to all industrial workers. E.g., Adkins v. Children’s Hospital, 261 U.S. 525, 564 (1923) (Taft, C.J.,

SCHRADER, J., concurring), and see generally UROFSKY, STATE COURTS.
Justices’ personal ideological biases. This understanding of Lochner remained widespread in academia until the 1987 hearings on Robert Bork’s nomination.
to the Supreme Court energized the debate over judicial activism. The controversy related to those hearings firmly associated the traditional critique of *Lochner* with conservatives, among whom it remains dominant.  

Critics frequently charged the Warren and Burger Courts with *Lochneristic* judicial activism.  

With liberals in the majority, however, the Court and its defenders brushed off such criticism.  

By the late 1980s, many constitutional law scholars grew unhappy with the traditional critique of *Lochner*. 

With the ascendency of a conservative majority on the Supreme Court, they recognized that some of their most cherished Warren and Burger Courts decisions—not least, *Roe v. Wade*—were vulnerable to being overruled as *Lochnerian*. 

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15 See, e.g., *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 691 (1999) (Scalia, J.) (“We had always thought that the distinctive feature of *Lochner*, nicely captured in Justice Holmes’s dissenting remark about ‘Mr. Herbert Spencer’s *Social Statics,*’ was that it sought to impose a particular economic philosophy upon the Constitution); *Bork*, supra note 11, at 44-49, 168-69. 


17 The Court was not completely oblivious to the criticism, however, and sometimes explicitly distinguished its decisions from *Lochner*. See, e.g., *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 668 (1966) (“We agree, of course, with Mr. Justice Holmes that the Due Process Clause of the Fourteenth Amendment ‘does not enact Mr. Herbert Spencer’s *Social Statics.*’”). 

18 410 U.S. 113 (1973). 

19 See *Bork*, supra note 11, at 31-32 (arguing that modern substantive due process decisions are linked to *Lochner* and should suffer the same fate); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 7-5, at 1312 (3d ed. 1999) (“Even if one disagrees with Professor [John Hart] Ely about the constitutional indefensibility of *Roe v. Wade* . . . , one cannot lightly dismiss his interpretive concern that, in *Roe* as in *Lochner* the Supreme Court identified a purely substantive right in a provision that appears, to the naked eye, to speak solely to matters of procedure.”); CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW 289 (1986) (contending that in *Griswold*, the Court resurrected *Lochner*’s doctrine for quite different purposes, while trying to deny it was doing so). 

Martin Shapiro had warned a decade earlier that “those liberal commentators who applaud the activism of the Warren Court would do well to remember that the economic theories of the turn-of-the-century Court were as public interest-oriented, more clearly articulated, better scientifically.
Shapiro, the theories that shimmer just below the surface of much of what the Warren Court did.” Martin M. Shapiro, The Constitution and Economic Rights, in Essays on the Constitution of the United States 74, 80 (1978).

See supra note 3, at 244. Morton Horwitz argues that attacks on the substantive aspect of due process were “largely produced by later critical Progressive historians intent on delegitimizing the Lochner court.” See 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) (claiming that the original interpretation of the Due Process Clause was limited to ensuring a fair trial for accused persons); Edward S. Corwin, The Twilight of the Supreme Court: A History of Our Constitutional Theory 68-69 (1934) (hereinafter, Corwin, Twilight); 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, 440 (1926). For a contemporary work arguing that the Court was grounded, and show greater survival value than the sociological, psychological, and criminological theories that shimmer just below the surface of much of what the Warren Court did.”


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); Rowe, supra note 5, at 244. Morton Horwitz argues that attacks on the substantive aspect of due process were “largely produced by later critical Progressive historians intent on delegitimizing the Lochner court.” See 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) (claiming that the original interpretation of the Due Process Clause was limited to ensuring a fair trial for accused persons); Edward S. Corwin, The Twilight of the Supreme Court: A History of Our Constitutional Theory 68-69 (1934) (hereinafter, Corwin, Twilight); 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, 440 (1926). For a contemporary work arguing that the Court was
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explicitly relied on the *Lochner* line of cases. Liberals are particularly protective of *Griswold* because if the Supreme Court ever overrules *Bowers v. Hardwick* and articulates a right to engage in homosexual sex, it will likely do so by relying on its prior privacy rulings, as the dissenters did in *Bowers*.

“*Lochner* remains an unnerving presence,” Robert Post writes, reflecting current sentiment, “because we do not have a convincing account of the criteria by which our own aspirations to preserve constitutional rights should be compared to, and therefore distinguished from, what has become a paradigmatic example of judicial failure.”

Discomfort with the traditional critique of *Lochner* has led to something of a cottage industry of *Lochner* reinterpretation among constitutional law scholars.

Owen Fiss, for example, argues that the *Lochner* Court engaged in a coherent, albeit ideologically misguided, effort to enforce an economically libertarian vision of the Constitution based on social contract theory. Fiss concludes that “*Lochner* stands for both a distinctive body of constitutional doctrine and a distinctive conception of judicial role: One could reject one facet of *Lochner* and accept the other. . . . [W]e may wish to criticize its substantive values and yet leave unimpeached its conception of role.”

Political scientist Howard Gillman, meanwhile, contends that the *Lochner* era Court, relying on currents in American ideology flowing from the Founding and Jacksonian eras, sought to restrict “class legislation,” i.e., “attempts by competing classes to use public power to gain

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24 Post, *supra* note 16.

25 See *infra* notes 28 to 51 and accompanying text; see generally BARBARA H. FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT 207 (1998) (“It has been a perennial problem for left liberal political theorists over the past forty years . . . . To explain why the Court is not merely engaged in that most dread of all pursuits, ‘*Lochnerizing*’. . . . when, for example, it overturns state antiabortion laws or mandates school desegregation.”).

26 Post, *supra* note 16, at 12 (“the Fuller Court should be understood as an institution devoted to liberty and determined to protect that particular constitutional ideal from the social movements of the day”).

27 Id. at 19.
unfair or unnatural advantages over their market adversaries.”30 The mistake of the Lochner Court, according to Gillman, was the failure to understand that its opposition to class legislation was anachronistic in an industrializing society given by significant class conflict. In such a society, political organization around common class interests was both necessary and appropriate. Bruce Ackerman, trumping other revisionists, suggests that Lochner may have been correctly decided. Ackerman writes, “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.”31

Ifiss, Gillman, Ackerman, and other scholars effectively parry the conservative critique of Roe and like-minded decisions as Lochnerian.32 These revisionists agree that the Lochner era Justices were trying to preserve liberty, as they understood it, from government encroachment.33 The Lochner era Court, they argue, chose an appropriate role for the Court—defender of last resort of fundamental rights.34 However, from a modern perspective, the Court chose the wrong rights to emphasize. The problem, the revisionists argue, is that the Justices did not understand that social and economic changes brought about by the Industrial Revolution rendered anachronistic their vision of liberty. 35

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31 Ackerman, supra note 2, at 280. Ackerman was more tentative in his previous book. “Lochner might have been constitutionally plausible in 1905; it was only in the 1930s that the American people decisively repudiated the principles of laissez faire.” 1 Bruce Ackerman, We the People: Foundations 66 (1991).
32 On the other hand, their argument that Lochner did not involve illegitimate judicial activism per se provides an opening for libertarian scholars to argue that economic liberty is as important as civil liberties, and that Lochner was therefore correctly decided. See supra note 15 (listing sources that argue that Lochner was correctly decided).
33 For another example of this perspective, see Lawrence M. Friedman, American Law in the 20th Century 24 (2002). Friedman writes: “In short, the justices, and judges in general, were cautious and incremental. They did not consistently adhere to any economic philosophy. They simply reacted in the way that respectable, moderate conservatives of their day would naturally react. Hence it is perhaps a bit unfair to judge them by what history has come to call mistakes.” Id. For a similar perspective on the early Lochner era from a more conservative scholar, see James W. Ely, Jr., The Chief Justiceship of Melville W. Fuller, 1888-1910 (1995).
34 “By freeing us from excessive worries about the legitimacy of judicial review, revisionism promises to direct our attention to more fruitful and creative jurisprudential endeavors. It makes possible, at long last, constitutional thinking that need not [perform] strenuous backflips to distance itself from ‘Lochner’s error.’” Roe, supra note 3, at 242.
35 See Laurence H. Tribe, American Constitutional Law 1374 (2d ed. 1988) (“Lochner’s downfall did not represent a denigration of economic liberties but a recognition that such liberties were not meaningfully protected by the ‘free’ market”); Rebecca L. Brown, The Fragmented Liberty Case, 41 WM. & MARY L. REV. 65, 65 (1999) (claiming that Lochner revisionism supports her call for “a strong offensive charge on behalf of vigorous liberty protection under the Fourteenth Amendment”); see generally Planned Parenthood of Southeast Pennsylvania v. Casey, 505 U.S. 833, 862 (1992) (plurality opinion) (“the Depression had come and, with it, the lessons that seemed unmistakable to most people by 1937, that the interpretation of contractual freedom protected in Adkins rested on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare”).
honest error should not inhibit modern judges from using available constitutional tools to promote a progressive agenda that suits contemporary society’s needs.\textsuperscript{36}

In his 1987 \textit{Columbia Law Review} article, “\textit{Lochner’s Legacy},”\textsuperscript{37} Cass Sunstein provides a more critical revisionist perspective on \textit{Lochner}, albeit to similar ideological ends. \textit{Lochner’s Legacy} predates the work of Ackerman, Fiss, and Gillman, and Sunstein deserves a great deal of credit for moving scholarly discussion of \textit{Lochner} beyond the trite “received wisdom” that \textit{“Lochner was wrong because it involved ‘judicial activism’; an illegitimate intrusion by the courts into a realm properly reserved to the political branches of government.”}\textsuperscript{38}

Sunstein presents an alternative approach\textsuperscript{39} that he claims “fits the history at least as well” but has “dramatically different implications.”\textsuperscript{40} He argues that the \textit{Lochner} era Court’s primary fallacy was the Justices’ belief that “[m]arket ordering under the common law was part of nature rather than a legal construct,” and formed a baseline from which to measure the constitutionality of state action, rendering redistributive regulations unconstitutional.\textsuperscript{41} As discussed in greater detail below,\textsuperscript{42} Sunstein supports his argument largely by analyzing \textit{Lochner} itself and by comparing language in the Court’s opinion in \textit{Adkins v. Children’s Hospital},\textsuperscript{43} which invalidated a minimum wage law for women, with the

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\textsuperscript{36} Perhaps the pioneer of this way of looking at \textit{Lochner} is Laurence Tribe. \textit{See LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW} 564 (1978) (“the error of [\textit{Lochner}] lay not in judicial intervention to protect ‘liberty’ but in a misguided understanding of what liberty actually required.”); \textit{cf.} Rebecca L. Brown, \textit{Activism Is Not a Four-Letter Word}, 73 U. COLO. L. REV. 1257, 1265 (2002) (arguing that the \textit{Lochner} Court’s mistake was to see the question of individual liberty “through the lens of an outdated and inflexible notion of what the common good entailed”); Manuel Cachán, \textit{Justice Stephen Field and “Free Soil, Free Labor Constitutionalism”: Reconsidering Revisionism}, 20 L. & HIST. REV. 541, 549-50 (2002) (“The revisionist narrative at times appears to be peopled by clueless historical actors being relentlessly swept along by ideological currents that, despite their unanimous [sic?] influence on contemporaries, did not correspond to social reality.”).


\textsuperscript{38} Id. at 874.

\textsuperscript{39} In \textit{The Partial Constitution}, by contrast, Sunstein is more sympathetic to the traditional account, stating “that part of what was wrong with the \textit{Lochner} period was indeed the aggressiveness of the Court.” \textit{CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION} 45 (1993).

\textsuperscript{40} Sunstein, supra note 37, at 874 n.9.

\textsuperscript{41} Id. at 874. For a similar analysis, see Gary Peller, \textit{Neutral Principles in the 1950s}, 21 J.L. REFORM 561, 565 (1988).

\textsuperscript{42} \textit{See infra} notes 23 to 283 and accompanying text.

\textsuperscript{43} 261 U.S. 525, 557 (1923).

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reasoning of West Coast Hotel v. Parrish,44 which reversed Adkins and is widely seen as signaling the end of the Lochner era.45 Like other revisionists, Sunstein argues that his understanding of Lochner saves Roe v. Wade and other Warren and Burger Court decisions from the charge that they are Lochner’s illegitimate offspring. Sunstein also cleverly argues that his understanding of Lochner calls into question decisions interpreting the First Amendment and the Fourteenth Amendment expansively to serve what he considers conservative ends.46 In his later books that elaborate on Lochner’s Legacy, Sunstein focuses much of his criticism on Buckley v. Valeo,47 in which the Court held that campaign donations are a form of speech protected by the First Amendment.48 In addition to Buckley, Lochner’s Legacy also criticizes, among

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44 300 U.S. 379 (1937).
45 Barry Cushman, however, persuasively argues that the death knell of Lochner, at least in its aggressive form, was actually sounded three years earlier in Nebbia v. New York, 291 U.S. 502 (1934), which upheld regulation of milk prices. See BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998). On the other hand, even the West Coast Hotel majority continued to accept certain Lochnerian premises, see infra notes 271 to 278 and accompanying text, and the final end of the Lochner era did not arrive until several Roosevelt appointees joined the Court and formed a majority that entirely rejected Lochnerian reasoning. Id.; see generally ALAN J. MEENE, WILL, JUDGMENT, AND ECONOMIC LIBERTY: MR. JUSTICE SOUTER AND THE MISTRANSLATION OF THE DUE PROCESS CLAUSE, 41 WM. & MARY L. REV. 3, 41 (1999) (noting that West Coast Hotel did not overrule Lochner or any liberty of occupation case not involving an attempt to require employers to pay a subsistence wage).

In fairness to Sunstein, it should be noted that Cushman’s analysis was published over a decade after Lochner’s Legacy appeared.


Sullivan notes that left-liberal solicitude for free speech arose in part because the great free speech cases for most of the twentieth century involved left-wing constituencies under assault from the government. Anarchists, communists, labor organizers, socialists, syndicalists, pacifists, and civil right activists all benefited from the First Amendment. Sullivan, supra. Today, by contrast, “speech cases are often won by corporations, the media, and other powerful insiders. . . . Powerful private actors, such as pornographers and the media, are free to control, suppress, and distort the speech of others, and when they do, political processes cannot redress it.” Mary Becker, The Legitimacy of Judicial Review in Speech Cases, in THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE PROPAGANDA, AND PORNOGRAPHY 208 (Laura Lederer & Richard Delgado, eds. 1995).

48 See, e.g., CASS R. SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE 229 (1997) [hereinafter, SUNSTEIN, FREE MARKETS]; (“On the view reflected in both Buckley and Lochner, reliance on free markets is government neutrality and government inaction.”); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 97 (1993) [hereinafter, SUNSTEIN, DEMOCRACY] (“both cases accepted
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other cases, *Washington v. Davis* for requiring discriminatory intent before courts may deem a law with discriminatory effects on minorities a violation of the Equal Protection Clause, and *Regents of the University of California v. Bakke* for outlawing racial quotas in public universities. Sunstein contends that these opinions—and not cases such as *Brown v. Board of Education* or *Roe v. Wade*, the traditional bugaboos of Warren and Burger Court critics—are *Lochner*’s true progeny. Sunstein argues that the decisions he criticizes, like *Lochner*, rely on an inappropriate baseline that accepts existing distributions of wealth as natural and prelegal. These decisions, according to Sunstein, implicitly fail to recognize that the status quo is itself a product of legal and political choices.¹¹

*Lochner*’s Legacy is a short article—at least by law review standards—and Sunstein devotes only ten pages of it to his historical understanding of *Lochner*. The rest of the paper discusses his normative critique of the *Lochner*-like premises he claims to find in modern constitutional jurisprudence. However, Sunstein’s brief historical analysis struck a chord among constitutional law scholars. *Lochner*’s Legacy quickly became by far the most influential revisionist work on *Lochner*, at least among law professors.³² Indeed, *Lochner*’s Legacy is one of the most influential constitutional law articles of the last twenty years.

existing distributions of resources as prepolitical and just, and both cases in validated democratic efforts at reform”.


³² According to a Westlaw search in the JLR database conducted on July 15, 2002, Gillman’s *Constitution Besieged* has been cited in law reviews 129 times, Fiss’s *Troubled Beginnings* has been cited 98 times, Paul Kens’s book and articles on *Lochner* have been cited fifty times in law reviews, and Sunstein’s *Lochner*’s Legacy has been cited 341 times, a number which, as we shall presently see, underestimates the influence of the arguments in *Lochner*’s Legacy. For an example of Sunstein’s influence, see Richard E. Levy, *Escaping Lochner’s Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 N.C.L. Rev. 329, 390–91 (1995) (stating that “Lochner era jurisprudence rested on the incorporation of common-law property and contract rights as a prepolitical, natural-law baseline,” and citing only Sunstein in support). Many other similar examples where Sunstein’s interpretation of *Lochner* is taken as gospel could be provided.

The article has been cited in law reviews well over three hundred times, mostly for its historical thesis. Moreover, the themes developed in *Lochner’s Legacy* appear in many of Sunstein’s other, well-cited books and articles, and are especially prominent in *The Partial Constitution*, which has also been cited hundreds of times. Sunstein’s ideas about *Lochner* also appear in his popular coauthored constitutional law casebook, thus directly influencing the next generation of attorneys, law professors, and judges. Even authors such as Ackerman and Gillman, who have original perspectives on *Lochner*, acknowledge debts to Sunstein’s work.

*Lochner’s Legacy*’s influence can also be seen in the pages of the *United States Reports*. As conservative and liberal Justices continue to battle over the meaning of *Lochner* and its significance for modern constitutional jurisprudence, the liberals have adopted *Lochner*’s Legacy’s thesis. For example, in *Seminole Tribe of Florida v. Florida*, Justice Souter, dissenting, joined by Justices Ginsburg and Breyer, wrote:

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See supra notes 4 to 9, and a accompanying text.
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It was the defining characteristic of the Lochner era, and its characteristic vice, that the Court treated the common-law background (in those days, common-law property rights and contractual autonomy) as paramount, while regarding congressional legislation to abrogate the common law on these economic matters as constitutionally suspect. See, e.g., Adkins v. Children’s Hospital of D.C., 261 U.S. 525, 557 (1923) (finding abrogation of common-law freedom to contract for any wage an unconstitutional “compulsory exaction”); see generally Sunstein, Lochner’s Legacy, 87 Colum. L. Rev. 873 (1987). And yet the superseding lesson that seemed clear after West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), that action within the legislative power is not subject to greater scrutiny merely because it trenchers upon the case law’s ordering of economic and social relationships, seems to have been lost on the Court.61

In College Savings Bank v. Florida Prepaid Postsecondary Education Expense Bd., 62 meanwhile, Justice Breyer, dissenting, joined by Justices Stevens, Souter, and Ginsburg, implicitly adopted Sunstein’s argument that Lochner’s primary sin was constitutionalizing the common law at the expense of progressive reform. Breyer argued that “by interpreting the Constitution as rendering immutable this one common-law doctrine (sovereign immunity), Seminole Tribe threatens the Nation’s ability to enact economic legislation needed for the future in much the way that Lochner v. New York threatened the Nation’s ability to enact social legislation over 90 years ago.”63 Justice Scalia, speaking for the five-vote majority, responded with the once-standard, but now primarily conservative,64 understanding of Lochner’s mistake: “We had always thought that the distinctive feature of Lochner, nicely captured in Justice Holmes’s dissenting remark about ‘Mr. Herbert Spencer’s Social Statics,’ was that it sought to impose a particular economic philosophy upon the Constitution.”65

63 Id. at 701 (Breyer, J., dissenting) (citation omitted, emphasis supplied); cf. Planned Parenthood of Southeast Pennsylvania v. Casey, 505 U.S. 833, 862 (1992) (plurality opinion) (like Sunstein, treating Adkins v. Children’s Hospital as the paradigmatic example of Lochner-era jurisprudence).
64 In 1980, Thurgood Marshall wrote that during the “era of Lochner v. New York . . . common-law rights were . . . found immune from revision by State or Federal Government.” Pruneyard Shopping Center v. Robins, 447 U.S. 74, 93 (1980) (Marshall, J., concurring). Marshall provides no citations, so it is not clear how he came to this conclusion, especially because in the preceding paragraph of his opinion he cites Lochner era cases for the proposition that legislation may change common law rules. At first glance, Marshall’s opinion seems to suggest that the idea that Lochner was about preserving common law rules was prevalent before Lochner’s Legacy. On second glance, it is intriguing to note that Sunstein was Marshall’s clerk in 1980, see American Association of Law Schools, The AALS Directory of Law Teachers 2000-2001, at 1032 (2000). Justice Marshall’s papers, available at the Library of Congress, do not reveal whether Sunstein drafted this opinion. An inquiry sent to Professor Sunstein was met with a plea of confidentiality.
65 See supra notes 10 to 15, and accompanying text.

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Despite a deluge of historical scholarship regarding *Lochner* since the *Lochner’s Legacy* Legacy appeared sixteen years ago, Sunstein’s views are unaltered. Sunstein’s Legacy is still consistently cited by legal scholars—not to mention Supreme Court Justices—for the proposition that the *Lochner era* Supreme Court banned the government from altering common law entitlements or patterns of wealth distribution.

What is remarkable about *Lochner’s Legacy*’s massive influence is how little evidence Sunstein provides for his historical thesis. Other than *Lochner* itself, Sunstein cites only seven of the hundreds of relevant *Lochner era* cases. Of these seven cases, he relies primarily on *West Coast Hotel v. Parrish*, a 1937 case upholding a state minimum wage law for women, and *Adkins v. Children’s Hospital*, a 1923 case invalidating such a law, to support his thesis. Even then, Sunstein only discusses a small part of each case, quoting only one paragraph from each opinion, and he interprets that material in a misleading way.

Some readers might question whether a lengthy critique of Sunstein’s account of *Lochner* is worthwhile. After all, they might argue, Sunstein only uses *Lochner* to make a broader theoretical point, that constitutional interpretation should not rely on “government inaction” or “existing common law distributions of wealth” as a baseline. The value of this important contribution to constitutional theory does not seem to depend on whether Sunstein’s interpretation of *Lochner* is correct.

There are two persuasive responses. First, Sunstein purports to present an accurate interpretation of the history of the *Lochner era*, and both judges and legal scholars have accepted his claims at face value. Given the importance of *Lochner* in modern constitutional debate, correcting Sunstein’s errors is worthwhile. Second, Sunstein’s critique of *Lochner* is crucial to winning acceptance for his argument that modern “conservative” constitutional decisions such as *Buckley v. Valeo* should be condemned because they use status quo distributions as a baseline. The obvious difficulty with this thesis is that the Supreme Court has used the status quo as a baseline throughout American history,

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66 See the post-1987 books and articles cited in note 53.
67 See Cass R. Sunstein, Sunstein, J., concurring in the judgment, in What Brown v. Board of Education Should Have Said, 174, 182 (Jack M. Balkin, ed. 2000) (rejecting what Sunstein calls the *Lochner* “view that the system of common law ordering, and free market principles, should be taken as a kind of neutral or prepolitical background, against which any legislative action would be viewed with suspicion”).
69 See supra notes 61 to 65, and accompanying text.
71 See infra notes 262 to 283 and accompanying text.
72 See supra text accompanying note 40.
73 See supra notes 2 to 9 and accompanying text.
and to a large degree the Constitution seems to mandate this.\textsuperscript{74} Sunstein acknowledges that “in some cases it is hard to dispute that understandings like those reflected in the common law or the status quo are the appropriate baseline.”\textsuperscript{75} The Takings and Contracts clauses, for example, assume status quo distributions as a baseline. Sunstein admits that it would be difficult “to abandon those baselines altogether without reading the contracts and takings clauses out of the Constitution.”\textsuperscript{76}

Sunstein uses \textit{Lochner} as a rhetorical means out of this difficulty, by hypothesizing that the use of common law and anti-redistributive baselines became formalized, ossified, and inflexible during the \textit{Lochner} era. The unique, defining sin of \textit{Lochner}, Sunstein claims, was that it used common law distributions as a rigid baseline not because of interpretive convention, but because the Justices dogmatically believed that common law was natural,apolitical, and immutable. The Court, according to Sunstein, foolishly refused to heed criticism from Progressives and their Realist successors. They urged the Court to stop relying on common law norms to judge the constitutionality of legislation designed to ameliorate the conditions of workers.

Thus, Sunstein implicitly links \textit{Lochner} era constitutionism to equally discredited Langdellian common law formalism. Although this linkage is historically inaccurate,\textsuperscript{77} Sunstein is following a longstanding tradition that dates back to Progressive era critics of \textit{Lochner}ian jurisprudence. Like Sunstein, Progressives, Realists, and their successors combined critiques of private law conceptualism and aggressive judicial review—both of which developed in state and federal courts in the second half of the nineteenth century—into a single “assault on formalism.”\textsuperscript{78} Sunstein then takes the analysis a step further. He links

\textsuperscript{74} For a theoretical explanation of why such a baseline is necessary and appropriate, see Richard A. Epstein, \textit{The Ubiquity of the Benefit Principle}, 67 S. CAL. L. REV. 1369 (1994).

\textsuperscript{75} Sunstein supra note 37, at 903.

\textsuperscript{76} Id. at 891; \textit{see also} Meese, supra note 76, at 41 (noting this problem with Sunstein’s thesis). To take a few more examples, the First Amendment also assumes a status quo baseline by stating that “Congress shall make no law . . .” (emphasis supplied). The Ex Post Facto Clause, too, assumes government inaction as a baseline. Under Article I, section 8, Congress has no powers beyond those explicitly granted and those necessary and proper to carry out that grant. The Fourteenth Amendment, meanwhile, is phrased in negative terms, “No State shall,” not “All States must,” which at least implies a status quo baseline. Legal realists would question the distinction between state action and inaction, but the Fourteenth Amendment was written long before legal realism had its day.

\textsuperscript{77} In fact, as discussed below, the \textit{Lochner} era Court rejected Langdellian premises about the naturalness of the common law. Moreover, as Tom Grey has recently shown, Langdell and his followers in turn fiercely opposed \textit{Lochner}ian jurisprudence. Thomas C. Grey, Does Constitutional Judicial Review Undermine Legal Formalism? (draft of Jan. 2003) (“conceptualist common-law jurists like Langdell and Williston gave no support to constitutional ‘liberty of contract,’ which they associated with an outmoded and unscientific natural-law jurisprudence”); \textit{see also} Herbert Hovenkamp, \textit{The Political Economy of Substantive Due Process}, 40 STAN. L. REV. 379, 382-83 (1988) (suggesting that while Langdellian common law jurisprudence was clearly formalist, there was no analogous public law jurisprudence).

\textsuperscript{78} \textit{Id.}; \textit{see also} Stephen A. Siegel, \textit{The Revisionism Thickens}, 20 L. & HIST. REV. 631, 632-33 (2002) (“The central message of the scholars who established the overall unity of Gilded Age law is that laissez-faire constitutionalism was classical legal thought’s public law expression while Langdellian legal science was its private law expression.”); Steven L. Winter, \textit{Indeterminacy and Incommensurability in Constitutional Law}, 78 CAL. L. REV. 1441, 1523 n.429 (1990) (noting that Sunstein’s theory is an application of the Legal Realist critique of the private law system). For a
both *Lochner* and Langdell to modern constitutional decisions that purportedly repeat the mistakes of *Lochner*. Sunstein argues, for example, that the libertarian baseline of First Amendment and Fourteenth Amendment jurisprudence should be abandoned as *Lochnerian.*

Sunstein’s use of historical analysis for blatant presentist purposes leaves *Lochner’s* Legacy vulnerable to the charge that, as Theodore White suggests, it is “a sophisticated form of history as special pleading, in which historical data are selectively employed for the purposes of supporting contemporary legal arguments.” Yet Sunstein’s argument has thrived because no one has carefully scrutinized its historical underpinnings—until now. This Article critiques three major historical claims *Lochner’s* Legacy makes about the *Lochner* era: (1) that the *Lochner* era Supreme Court understood the common law “to be part of nature rather than a legal construct”; (2) that the *Lochner* era Court sought to preserve what it saw as the “natural,” “status quo” distribution of wealth against redistributive regulations; and (3) that the abandonment of *Lochner* in *West Coast Hotel v. Parrish* resulted from the Supreme Court’s recognition that the problem with *Lochner* and its progeny was that the Court in those decisions mistakenly treated government inaction as the “baseline” to determine the constitutionality of government regulations. This Article shows that all three of these propositions are incorrect.

Before this Article proceeds to its critique of *Lochner’s* Legacy, it should be pointed out that Sunstein’s footnotes qualify or even arguably contradict many of the points he makes in *Lochner’s* Legacy’s text about the *Lochner* era. On the one hand, Sunstein deserves praise for being sufficiently cautious about his thesis to acknowledge potential weaknesses. On the other hand, accepting Sunstein’s caveats at face value largely undermines *Lochner’s* Legacy’s historical thesis.

For example, Sunstein states that “whether there was a [n unconstitutional] departure from the requirement of neutrality . . . depended on whether the government had altered the common law distribution of entitlements.” But he then concedesthe Court did not always object to redistribution. Rather, the Court

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modern version of this critique that Sunstein likely drew upon, see Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685, 1747 (1976) (“If one could believe that the common law rules were logically derived from the idea of freedom and that there was no discretionary element in their application, it made sense to describe the legal order itself as at least neutral and nonpolitical if not really ‘natural.’”); Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 Res. Inst. L. & Soc. 3, 4-5 (1980) (linking *Lochner* to common-law formalism); see generally Winter, *supra* (noting that Sunstein’s understanding of *Lochner* is similar to Kennedy’s).

Sunstein contends that the Court should instead adopt his own vaguely Social Democratic notions of deliberative democracy and the pursuit of equality, which are discussed in some detail in *The Partial Constitution and Democracy and the Problem of Free Speech.*

*WHITE, supra* note 53, at 24 (commenting on *Lochner’s* Legacy). Sunstein himself states that whether his account “of *Lochner* should be accepted in place of one that stresses an active judicial role is an inescapably normative question.” The principal effort here is to set forth an alternative approach that fits the history at least as well and that has dramatically different implications.”

Sunstein, *supra* note 37, at 874 n.9.

300 U.S. 379 (1937).

Sunstein, *supra* note 37, at 874.

He writes that under *Lochner*, “Taxation and other measures might redistribute wealth without
opposed “redistribution on an ad hoc basis, of the sort represented by maximum hour and minimum wage laws,” unless such laws could be supported by a “justification deemed ‘general’ or ‘public.’” Sunstein’s thesis, because opposition to legislation that either arbitrarily benefits a particular special interest, or that puts unfair burdens on particular individuals or groups, is not the same thing as opposition to changing common law distributions, as such. Sunstein tries to rescue his point by claiming that “the requirement of generality might allow well-organized private groups to mobilize in defense of the status quo. In this sense the requirement fits comfortably with the broader hostility to redistribution.” Yet the reader just learned from Sunstein that the Court was not broadly hostile to redistribution, as evidenced by its tolerance of “poor laws,” that, as Sunstein acknowledges in a footnote, have far clearer and more progressive redistributive consequences than minimum wage and maximum hours laws.87

Lochner’s Legacy’s Legacy

running afoul of the Due Process Clause; and the poor laws were generally immune from constitutional attack.” Sunstein, supra note 37, at 878 n. 27. See also SUNSTEIN, supra note 39, at 361 n.8 (stating the same qualification). Sunstein puts the case too mildly; the Lochner era Supreme Court did not invalidate a single state poor law or other welfare law funded by general tax revenue. Moreover, the Court upheld federal graduated inherited and estate taxes in New York Trust v. Eisener, 256 U.S. 345 (1921), and Knowlton v. Moore, 178 U.S. 41 (1900). On the other hand, John Witt suggests that “the channeling of redistributive efforts to the tax power is precisely the kind of move that political scientists in the American Political Development tradition would pick out as seriously hamstringing government efforts to redistribute.” E-mail correspondence from Professor John Witt, Columbia Law School, to Professor David Bernstein, George Mason University School of Law, Sept. 25, 2002. Public choice and law and economics scholars, however, would argue that direct redistribution through is both far more efficient, far less likely to be a subterfuge for interest group self-dealing, and far less likely to be unintentionally counterproductive than are regulatory schemes purportedly passed for redistributive purposes. Sunstein acknowledges the latter point. See infra note 86.

84 Sunstein, supra note 37, at 878 n.27.
85 Id. Sunstein suggests that the Court may have preferred redistribution through taxation rather than regulation in part because otherwise the redistribution might be perverse (e.g., from rich to poor) or ineffectual. Id. He makes the point even more strongly in other writings. See SUNSTEIN, supra note 39, at 361 n.9 (noting that "[m]aximum hour laws do not simply transfer resources from employers to employees. Some employees are hurt by such laws—those who wish to work for longer hours and more money. The incidence of benefit and burden is difficult to predict in advance."); Sunstein, Free Speech Now, supra note 56, at 264 n.23.
86 It also seems a bit strange to implicitly critique the Court for consistently upholding poor laws that clearly redistributed wealth to the poor, while being more skeptical of regulations that had ambiguous distributive consequences, and in some cases, as with minimum wage laws, may have hurt the poor more than helped them. See Christopher T. Wonnell, Lochner v. New York as Economic Theory, unpublished manuscript available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id =259857 (visited Aug. 24, 2002) (explaining why maximum hours and especially minimum wage laws hurt the poor). Labor unions supported high, uniform national minimum wage laws in the 1930s precisely to eliminate the jobs of low-wage competitors. BRUCE J. SCHULMAN, FROM COTTON BELT TO SUN BELT: FEDERAL POLICY, ECONOMIC DEVELOPMENT, AND THE TRANSFORMATION OF THE SOUTH, 1938-1980, at 55-59, 71 (1991). Legislation directly benefiting labor unions, which the Lochner era Court disfavored, also can transfer wealth upwards, from unorganized workers to well-organized workers. HENRY HAZLITT, ECONOMICS IN ONE LESSON 140 (Arlington House ed. 1979); DOUGLASS C. NORTH, GROWTH AND WELFARE IN THE AMERICAN PAST 179 (1966); ALBERT REES, THE ECONOMICS OF TRADE UNIONS 87-89 (3d ed. 1989). For the negative effects of Progressive and
Sunstein also creates ambiguity when he suggests that the Court used common law as *the* baseline from which to judge the constitutionality of government regulations. In a footnote, Sunstein partially recants, explaining that “[n]ot every common law right was, by virtue of its status as such, immunized from collective control. Marginal and not-so-marginal adjustments were permissible.” Further confusion arises around Sunstein’s claim that during the *Lochner* era “the police power could not be used to help those unable to protect themselves in the marketplace.” He then concedes in a footnote that the scope of the police power was in fact contestable and contested, and that it perhaps could be used to help the needy.

The point here is not to nitpick or be petty, but to note that Sunstein’s caveats put his critics, including this author, in a difficult position. If one criticizes Sunstein for claiming that opposition to redistribution motivated the *Lochner* Court, for neglecting the accepted role of the police power in the common law system, or for suggesting that the Court consistently used common law rules as a baseline in making constitutional determinations, Sunstein or his defenders can rebut these criticisms with the footnoted caveats. Sunstein’s later work resolves this problem, however. Sunstein, apparently more confident about *Lochner’s* Legacy’s understanding of the *Lochner* era—which is understandable given its widespread acceptance among constitutional law scholars—consistently states that *Lochner*ian jurisprudence involved protecting what the Court saw as “prepolitical” common law distributions of wealth, and rarely notes any caveats, even in footnotes.

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He writes that “[m]arket ordering under the common law was understood to be a part of nature rather than a legal construct, and it formed the baseline from which to measure the constitutionally critical lines that distinguished action from inaction and neutrality from impermissible partisanship.” Sunstein, supra note 37, at 874.

89. Id. at 876 n.30. Interestingly, Gary Peller makes a similar point, and then puts a similar caveat in a footnote. Compare Peller, supra note 16, at 577 (“Interference with the market or (and this was the same thing) with the common law was therefore interference with liberty itself”), with id. at n.18 (“To be sure, not all common-law doctrines were constitutionalized in the way that the text suggests.”).

Sunstein also states that the protection of common law rights depended not merely on the fact that the rights at issue were protected by the common law, but also “on the fact that the common law corresponded to a widely held normative theory about the proper role of government.” Sunstein, supra note 37, at 879 n.30. The latter concession suggests the possibility that the *Lochner* Court enforced a constitutional vision of protecting liberty that overlapped to some extent with common law norms, but was not dependent on them. 80. Id. at 880; cf. Sunstein, *Naked Preferences*, supra note 56, at 1701 (“If a measure enacted by the government was not a proper exercise of the police power under common law standards, it was impermissible under the Due Process Clause as a naked preference for one group at the expense of another.”). For other “redistributive” laws upheld by the Court, see infra notes 172 to 201 and accompanying text.

81. He explains that the text quotation “oversimplifies a complicated framework; the scope of the *Lochner* era police power was by no means precisely defined.” Id. at 880 n.40.

82. See supra notes 54 to 58, and accompanying text.

83. Moreover, in private, casual conversation with this Author several years ago, before the Author started working on this Article, Sunstein repeated *Lochner’s* Legacy’s thesis in stark terms, with no caveats.
Moreover, legal scholars who favorably cite *Lochner’s Legacy* and its progeny rely on the broad assertions in the text, not the caveats in the notes. With Sunstein’s implicit and explicit assent, *Lochner’s Legacy* has come to stand for the proposition that the *Lochner* era Court constitutionalized the common law and preexisting distributions of wealth. Therefore, this Article will continue its critique of *Lochner’s Legacy* based on the text and not the footnoted caveats. The criticisms this Article will offer, of course, will be independent of and far more detailed than those that Sunstein himself provided.

**I. THE COURT RECOGNIZED THAT COMMON LAW RULES WERE CONTINGENT AND MUTABLE**

Sunstein emphasizes what he sees as the *Lochner* Court’s fealty to the common law. *Lochner’s Legacy* claims that during the *Lochner* era “[m]arket ordering under the common law was understood to be a part of nature rather than a legal construct.” The phrase “common law” is ambiguous, and could refer to either Langdellian common law rules, i.e., the specific rules of the late 19th century common law, or to the general system of Anglo-American rights and liberties. Sunstein is clearly referring to specific common law rules. These rules emphasized “freedom of contract, fault as the basis for tort liability, and simple full ownership with freedom of alienation as the normal form of property.”

Contrary to Sunstein’s claim, the Supreme Court consistently recognized the contingent nature of common law rules. For example, just seven years before *Lochner*, in *Holden v. Hardy*—an opinion written by one member of the *Lochner* majority and joined by another—the Court wrote that “the constitution of the United States, which is necessarily and to a large extent inflexible, and exceedingly difficult of amendment, should not be so construed as to deprive the states of the power to so amend their laws as to make them conform to the wishes

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44 Consent is implicit in that Sunstein has never objected to this understanding of *Lochner’s Legacy*; explicit in that he has continued to reiterate this thesis himself, often citing to *Lochner’s Legacy*.

45 Sunstein, supra note 37, at 874; cf. BETH, supra note 11, at 64 (“The construction by Justice Rufus W. Peckham and his colleagues of the doctrine of liberty of contract to stop the states from regulating wages and other working conditions was a logical deduction from the existing common law.”); Kainen, supra note 3, at 89 (contending that the *Lochner* Court relied on “an idealized vision of the common law of property and contract”). In 1908, Roscoe Pound criticized courts for relying on natural law doctrines which led them to “try statutes by the measure of common law doctrines rather than [sic] by the Constitution.” Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 467 (1908). However, Pound cites only state cases to support his point.

46 He associates the common law with the “allocation of rights of use, ownership, transfer, and possession of property associated with ‘laissez-faire’ systems and captured in the common law of the late nineteenth century.” Sunstein, supra note 37, at 882 n.49. Moreover, Sunstein feels obligated to explain why the Court upheld workers’ compensation laws and the destruction of diseased trees that were not creating a nuisance, both policies that abrogated common law rules. See Sunstein, supra note 37, at 879. Meanwhile, Sunstein never discusses cases like *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923), in which the Court sought to protect “the common law,” meaning not laissez-faire rules but the system of Anglo-American liberty. As discussed elsewhere in this Article, Sunstein’s conception of the “common law” as a set of formal rules was influenced by decades of critiques of the *Lochner* era Court that linked Langdellian common law formalism with the Court’s *Lochnerian* constitutional decisions.

47 Grey, supra note ?? (noting that this is the common law that critics such as Sunstein believe the *Lochner* Court was defending).
of the citizens.”

The Court added that its role was not to prevent the law from “adapt[ing] itself to new conditions of society, and particularly to the new relations between employers and employees, as they arise.”

Two years later, in an opinion written by Lochner author Rufus Peckham, the Court upheld a state court ruling requiring track connections at an intersection of railroads. The Court acknowledged that “at common law the courts would be without power to make such an order as was made in this case by the state court,” but the regulation was constitutionally proper because it amounted to “a fair, reasonable, and appropriate regulation.”

Even after the Court decided Lochner, it consistently noted the mutability of common law rules. Following precedents written by proto-Lochnerian Justice Stephen Field, the Lochner era Court routinely upheld laws abolishing the fellow servant rule and the contributory negligence defense, even when the reforms applied only to certain industries, and therefore were vulnerable to the charge of class legislation. The Court emphatically stated that it was “competent for the state to change and modify those [common law] principles in accord with its conceptions of public policy.” In 1927, at the very peak of the Lochner era, the Court unanimously upheld a radical Alabama law that allowed the assessment of punitive damages against an employer when the negligence of an employee caused a co-worker’s death.
Other legislative changes to common law rights upheld by the Court included the expansion of life insurance companies’ liability beyond contractual provisions; creation of a presumption of railroad negligence in crossing accidents; placement of liability on railroads for claims to damage to freight not resolved within ninety days; imposition of liability on railroads for damage to shipped property even if the loss occurred while the goods were under another carrier’s control, and even where the defendant had tried to contract out of this liability; fining of common carriers for failing to expeditiously settle claims for lost or damaged freight (the penalty was added to actual damages); imposition of liability for misdelivery of telegrams on telegram companies; criminalization of inadvertent cutting of timber on state lands; imposition of state and federal antitrust liability in situations where the common law would hold the companies in question harmless; imposition of liability against a tavern in favor of wives who suffered harm from the sale of alcoholic beverages to their husbands; and the requirement that physicians and dentists be licensed by the state.

The Court also held that the government could destroy valuable trees to prevent the spread of disease, without compensating the owner. Consistent with many earlier Supreme Court cases that upheld land use regulations not intended to remedy common law violations, the Court specifically noted that it did not matter whether the affected trees were a nuisance at common law. Rather, the Court argued that given the conflict of interests between the owner of the destroyed trees and those whose trees the spread of disease would threaten, the

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111 Waters-Pierce Oil Co. v. Texas, 212 U.S. 111-12 (1909).
112 See Alan J. Meese, Liberty and Antitrust in the Formative Era, 79 B.U. L. REV. 1, 81 (1999) ("Many of these [antitrust] decisions reached results different from those counseled by traditional articulations of the classical paradigm, and, for that matter, the common law.").
113 Eiger v. Garrity, 246 U.S. 97, 102-04 (1918).
116 See Hylton, supra note 11.
117 Miller, 276 U.S. at 280.
government’s decision to act or not to act would inevitably harm someone, and therefore acting did not require compensation.\textsuperscript{120}

The most radical assault on the common law during the \textit{Lochner} era was the replacement of common law rights and duties with federal and state statutory workers’ compensation regimes. If the \textit{Lochner} era Court defended the common law as “a part of nature,” as Sunstein argues, surely the Court should have invalidated these schemes. Yet, contrary to the New York Court of Appeals’ infamous decision in \textit{Ives} v. \textit{South Buffalo R.R.},\textsuperscript{121} the Supreme Court routinely upheld statutes that substituted statutory workers’ compensation schemes for the common law tort system.\textsuperscript{122} \textit{New York Central R.R. Co. v. White},\textsuperscript{123} a unanimous 1917 opinion, became the leading authority on the issue. Sunstein cites \textit{White} for the proposition that “one can trace” to the \textit{Lochner} era “the idea that legislative

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\textsuperscript{124} Id. at 279. Sunstein briefly discusses \textit{Miller}, using it as evidence that the Court was abandoning common law baselines in certain related areas of law even before \textit{West Coast Hotel}. Sunstein, \textit{supra} note 37, at 881. However, it is difficult to reconcile \textit{Miller} with Sunstein’s thesis, as the case was decided only five years after \textit{Adkins}, with essentially the same lineup of Justices, and at the peak of the \textit{Lochner} era, when the Court was most aggressive in its review of economic regulations.

\textsuperscript{125} 201 N.Y. 271 (1911). \textit{Ives} gets a greatly disproportionate amount of attention from legal scholars. \textit{See}, e.g., \textit{Kainen, supra} note 3, at 96-97 (discussing \textit{Ives} as a paradigmatic example of \textit{Lochner} era jurisprudence, without noting that other state courts and the United States Supreme Court rejected its reasoning). \textit{Ives} was soon overruled as a matter of state constitutional law by constitutional amendment, see N.Y. Const. art. I, § 19 (adopted Nov. 2, 1913); \textit{Jensen v. S. Pac. Co.}, 109 N.E. 600 (N.Y. 1915). five other state courts upheld their states’ workers’ compensation laws, see \textit{Urofsky, State Courts}, \textit{supra} note 11, at 87, and the Supreme Court six years later utterly rejected \textit{Ives}, see \textit{infra}. \textit{See generally} David W. Park, “Compensation or Confiscation?” Workmen’s Compensation and Legal Progressivism, 1898-1917, at 44-45, 576 (Ph.D. diss. U. Wisc. 2000) (calling \textit{Ives} (and \textit{Lochner}) aberrational, and noting that between 1911 and 1917, all courts of last resort, with the exception of the New York Court of Appeals in \textit{Ives}, upheld challenged workers’ compensation laws).

John Witt contends \textit{Ives} had a profound influence on the structure of worker’s compensation law in its formative years in the 1900s, with the laws’ drafters attempting to create moderate laws that could be distinguished from the law at issue in \textit{Ives}. Apparently, advocates of the laws feared that state courts would rely on \textit{Ives} to hold workers’ compensation laws unconstitutional under state constitutions. John Witt, \textit{The Passion of William Werner} (unpublished manuscript on file with author–chapter 6 of forthcoming book, \textit{The Accidental Republic}). Regardless, it soon became apparent that concern that \textit{Ives} would determine the constitutionality of workers’ compensation nationwide, or even in New York, was misplaced. By then, however, World War I had intervened, and the Progressive push for such laws had lost its steam, leaving the \textit{Ives}-influenced laws in place.

\textsuperscript{127} The Court did invalidate a federal law establishing new standards of liability for injuries suffered by railroad workers, but the Court did so on Commerce Clause, not \textit{Lochnerian}, grounds. The Employers’ Liability Cases, 207 U.S. 463 (1908). Indeed, the Court suggested in dictum that the Due Process Clause likely was not a barrier to such legislation. \textit{Id.} at 503-04 (“We deem it unnecessary to pass upon the merits of the contentions concerning the alleged repugnancy of the statute, if regarded as otherwise valid, to the Due Process Clause of the 5th Amendment to the Constitution, because the act classifies together all common carriers. Although we deem it unnecessary to consider that subject, it must not be implied that we question the correctness of previous decisions noted in the margin, wherein state statutes were held not to be repugnant to the 14th Amendment, although they classified steam railroads in one class for the purpose of applying a rule of master and servant.”).}

\textsuperscript{128} 243 U.S. 188 (1917). Previously, the Court had upheld laws prohibiting employers from contracting around statutory liability schemes, but had not ruled on the constitutionality of the underlying statutory regime. Second Employers’ Liab. Cases, 223 U.S. 1, 52-53 (1912) (upholding provision of federal law that voids any contract that contravene’s railroad’s statutory liability for their employees’ on-the-job injuries); Chicago, Burlington & Quincy R.R. v. McGuire, 219 U.S. 549, 563-73 (1911) (upholding a law that prevented a contract between an employer and employee from operating as a defense to statutory liability).
extinguishment of ‘core’ common law rights was permissible only if the legislature furnished an adequate alternative remedy.”\textsuperscript{124} In a parenthetical, he describes \textit{White} as “upholding workers’ compensation in part because of \textit{quid pro quo}.”\textsuperscript{125}

This is simply wrong. \textit{White} did not say this, and, as we shall soon see,\textsuperscript{126} two years later the Court explicitly rejected the argument that the constitutionality of workmen’s compensation rested on \textit{quid pro quo}. The \textit{White} opinion raised the hypothetical issue of whether it would be constitutional for a state to “suddenly set aside all common-law rules respecting liability as between employer and employee, without providing a reasonably just substitute.”\textsuperscript{127} The Court stated that such a rule might be unconstitutional, but not because the common law was a prepolitical natural baseline. Rather, \textit{White} reasoned that because the employers and employees of New York State expended their capital, human and otherwise, expecting a certain type of system to be in place, abolishing all common law actions that might be so disruptive as to violate due process.\textsuperscript{128} However, the Court concluded that “[n]o such question is here presented, and \textit{we intimate no opinion upon it}.”\textsuperscript{129}

The rest of the \textit{White} opinion shows that the Court did not see the common law as natural and prepolitical, but as manmade and mutable. \textit{White} discussed at length whether workers’ compensation laws comport with natural justice,\textsuperscript{130} whether they are reasonable,\textsuperscript{131} and whether they violate the Fourteenth Amendment right of freedom of contract.\textsuperscript{132} By contrast, the Court dismissed in a few contemptuous sentences the argument that the law was unconstitutional.

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\textsuperscript{124} Sunstein, supra note 37, at 879 n.30.  \\
\textsuperscript{125} \textit{Id.} Sunstein repeats this assertion in \textit{The Partial Constitution}. See Sunstein, supra note 39, at 361 n.8.  \\
\textsuperscript{126} See infra notes 137 to 152 and accompanying text.  \\
\textsuperscript{127} \textit{White}, 243 U.S. at 201.  \\
\textsuperscript{128} The Court wrote:  \\
Considering the vast industrial organization of the state of New York, for instance, with hundreds of thousands of plants and millions of wage earners, each employer, on the one hand, having embarked his capital, and each employee, on the other, having taken up his particular mode of earning a livelihood, in reliance upon the probable permanence of an established body of law governing the relation, it perhaps may be doubted whether the state could abolish all rights of action, on the one hand, or all defenses, on the other, without setting up something adequate in their stead.  \\
\textit{Id.} at 201.  \\
\textsuperscript{129} \textit{Id.} (emphasis supplied). While the law at issue in \textit{White} required an injured worker’s employer to pay for the injury through the statutory compensation system, a companion case upheld an even more radical departure from common law principles, a statute which required that employees be compensated from a pool into which all employers in an industry must contribute. \textit{Mountain Timber Co. v. Washington}, 243 U.S. 219 (1917). The Court explained that “it cannot be deemed arbitrary or unreasonable for the state, instead of imposing upon the particular employer entire responsibility for losses occurring in his own plant or work, to impose the burden upon the industry through a system of occupation taxes limited to the actual losses occurring in the respective classes of occupation.” \textit{Id.} at 244. Four Justices dissented from this opinion, but did so without opinion, so the reasons for their dissent are unknown.  \\
\textsuperscript{130} \textit{White}, 243 U.S. at 202-03.  \\
\textsuperscript{131} \textit{Id.} at 205-06.  \\
\textsuperscript{132} \textit{Id.} at 206-08.
\end{flushright}
because it changed common law entitlements by creating liability without fault. The Court wrote that common law rules governing relations between employers and employees may be altered “by legislation in the public interest.” “No person,” the Court declared, “has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit.”

Indeed, contrary to Sunstein’s claims that the Lochner era Court saw common law rights as natural and prelegal, the White opinion exhibited an acute awareness that common law rights are historically contingent and legislatively mutable. The Court explained that “[t]he common law bases the employer’s liability for injuries to the employee upon the ground of negligence; but negligence is merely the disregard of some duty imposed by law; and the nature and extent of the duty may be modified by legislation, with corresponding change in the test of negligence.” Liability, the Court wrote, may be imposed for the consequences of a failure to comply with a statutory duty, irrespective of negligence in the ordinary sense, safety appliance acts being a “familiar instance.” The Court also noted that the fellow servant rule and the assumption of risk doctrine, both of which helped spawned the workers’ compensation movement by making it difficult for workers to win common law actions, were of “relatively recent origin.”

Nor did White’s attitude toward the common law reflect the anomalous dicta of a wayward Justice. In 1919, in a 5-4 ruling, the Court in Arizona Copper Co. v. Hammer upheld a statutory workers’ compensation scheme which had no quid pro quo. As in other workers’ compensation systems, employees could recover for workplace injuries in the absence of negligence by the employer, and employers’ common law defenses were abolished. Unlike earlier statutory compensation laws, however, the statute did not limit damages. Instead, damages were determined under common law rules on a case by case basis. Thus, employers received no benefit in return for the abolition of the common law norms that protected them.

The Arizona Copper majority refused to “concern itself” with arguments that the law was unconstitutional because it was novel and did not follow common law norms. The majority explained that:

Novelty is not a constitutional objection, since under constitutional forms of government each state may have a legislative body endowed with authority to change the law. In what respects it shall be changed, and to what extent, is in the main confided to the several states; and it is to be presumed that their Legislatures, being chosen by the people, understand

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133 Id. at 198. Sunstein does not address this language, which seems to so directly contradict his thesis.

134 Id.; see also Hawkins v. Bleakley, 243 U.S. 210, 213 (1917) (“The employer has no vested right to have these so-called common-law defenses perpetuated for his benefit.”).

135 White, 243 U.S. at 198.

136 Id.


138 Id. at 420-31.
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and correctly appreciate their needs. The states are left with a wide range of legislative discretion, notwithstanding the provisions of the Fourteenth Amendment; and their conclusions respecting the wisdom of their legislative acts are not reviewable by the courts. 139

While this opinion drew dissents, 140 this should not obscure the consensus on the Court that more typical workers’ compensation laws were constitutional. Even arch-conservative Justice James McReynolds generally acquiesced to the replacement of common law with statutory workers’ compensation. In 1924 he wrote, “Without doubt, Congress has power to alter, amend or revise the maritime law by statutes of general application embodying its will and judgment. This power, we think, would permit enactment of a general employers’ liability law or general provisions for compensating injuries.” 141 Three years later, at the height of the Lochner era, the Court explained in dicta that “the various Workers’

139 Id. Justice Pitney, writing for the Court, acknowledged that a wholly arbitrary or unreasonable alteration in the common law would be unconstitutional. Id. at 420. However, the Court at this time thought that all arbitrary or unreasonable legislation was unconstitutional, so this was not a special rule for the common law. Justice Holmes wrote a concurring opinion, which was originally circulated as the opinion of the Court, but which was replaced by Pitney’s opinion because Pitney thought that Holmes’s opinion was too radical. ALEXANDER M. BICKEL & BENNO C. SCHMIDT, JR., THE JUDICIARY AND RESPONSIBLE GOVERNMENT, 1910-1921, at 577-78 (1984).

140 Four Justices dissented, with all four joining in two separate dissents authored by Justices McKenna and McReynolds, respectively. Justice McKenna wrote that the law was unconstitutional because it created special privileges only for injured employees, and because he believed that it was “the very foundation of right—of the essence of liberty as it is of morals—to be free from liability if one is free from fault,” a right which could only be denied if liability was in turn limited. Id. at 436 (McKenna, J., dissenting). Justice McReynolds, meanwhile, acknowledged that “the Fourteenth Amendment was never intended to render immutable any particular rule of law, nor did it by fixation immortalize prevailing doctrines concerning legal rights and liabilities.” However, he believed that the law in question was “arbitrary or oppressive upon consideration of the natural and inherent principles of practical justice which lie at the base of our traditional jurisprudence and inspirit our Constitution,” not because it changed the common law as such, but because it arbitrarily provided advantages to one side (employees) without giving the other side even a patina of benefit. Id. at 450 (McReynolds, J., dissenting).

On the surface, the dissenting opinions may seem to support the view that four Justices thought that common law rules were natural and immutable. Yet underlying both opinions is a more complex, and, in the context of the jurisprudence of the era, understandable concern. Despite potential liberty of contract and “class legislation” objections, the Supreme Court accepted on principle the replacement of common law with statutory workers’ compensation systems because the Justices believed that legislative intervention was necessary to deal with social problems created by uncompensated industrial injuries. The Arizona Copper law, however, divided the Court, in part because it was completely one-sided, but also because it allowed compensation for non-pecuniary injuries. In other words, because workers’ compensation laws were justified as a response to the problems attendant to the financial distress suffered by injured workers, some Justices thought the only legitimate role for the laws was to compensate the workers for their financial losses. By also compensating workers for pain and suffering, the Arizona Copper law seemed to these Justices like a piece of legislation arbitrarily favoring one group of plaintiffs, to the exclusion of other, equally worthy (or unworthy) plaintiffs, and the detriment of industrial employers. In any event, regardless of how one interprets the dissents in this case, it must be kept in mind that they were indeed dissents.

Compensation Acts imposing new types of liability, are familiar examples of the legislative creation of new rights and duties for the prevention of wrong or for satisfying social and economic needs. Their constitutionality may not be successfully challenged merely because a change in the common law is effected.¹⁴²

More generally, after the landmark White decision the Supreme Court consistently upheld federal and state workers’ compensation statutes,¹⁴¹ including laws with novel features. The Court upheld laws that required employers to pay into a state workers’ compensation fund instead of simply paying for their own employees’ injuries;¹⁴³ permitted an employee’s recovery for disfigurement with no loss in earnings ability;¹⁴⁴ required employers to pay into a state workers’ compensation fund when an employee without heirs died on the job;¹⁴⁵ required that compensation for a worker’s death be paid to the decedent’s relatives who were citizens of, and lived in, another country;¹⁴⁶ required payment of compensation to workers injured on their way to work;¹⁴⁷ required employees to accept workers’ compensation in lieu of tort remedies at their employers’ election;¹⁴⁸ and restricted the fees attorneys could charge in workers’ compensation cases.¹⁴⁹ In 1924, the Court upheld the federal Jones Act, which replaced the common law of maritime torts with a statutory scheme,¹⁵⁰ and in 1932 the Court upheld the federal Longshoremen’s and Harbor Worker’s Compensation Act.¹⁵¹

Most of the Court’s decisions upholding workers’ compensation law were unanimous.¹⁵² Even the dissenters objected only to particular provisions of specific workers’ compensation laws, not to the concept of replacing the common

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¹⁴¹ Louis Pizitz Dry Goods Co. v. Yeldell, 274 U.S. 112, 116 (1927); see also Truax v. Corrigan, 257 U.S. 312, 329 (1921) (“no one has a vested right in any particular rule of the common law”); cf. Siegel, supra note 59, at 78 (Lochner era Justices “found no constitutional right to particular common-law rules.”).

¹⁴² E.g., Booth Fisheries Co. v. Industrial Comm’n, 271 U.S. 208 (1926); Ward & Gow v. Krinsky, 259 U.S. 503 (1922) (McReynolds dissent); Lower Ven Coal Co. v. Industrial Bd., 255 U.S. 144 (1921); Hawkins v. Bleakly, 243 U.S. 210 (1917). The Court did hold, over two dissents joined by four Justices, that it was unconstitutional to apply New York’s workers’ compensation statute to a maritime injury. Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917). This decision, however, was reached on federalism, not due process grounds; the Court, in fact, had already upheld New York’s law as applied to non-maritime workers in White. See generally Barry Cushman, Lochner, Liquor and Longshoremen: A Puzzle in Progressive Era Federalism, 32 J. Mar. L. & Com. 1 (2000) (disputing the traditional Progressive interpretation of Jensen as one of many “anti-worker” cases decided by the states). The Court eventually upheld workers’ compensation in the maritime context, but only when it was finally made solely a matter of federal law, Panama R. R. Co. v. Johnson, 264 U.S. 375 (1924).


¹⁴⁶ Madera Sugar Pine Co. v. Industrial Accident Comm’n, 262 U.S. 499, 500-04 (1923).

¹⁴⁷ Bountiful Brick Co. v. Giles, 276 U.S. 154, 158-59 (1928); Cudahy Packing Co. v. Parramore, 263 U.S. 418, 422-26 (1923) (McReynolds, McKenna, and Butler dissent).


¹⁵¹ Crowell v. Benson, 285 U.S. 22 (1932) (Brandeis, Stone, and Roberts dissent from the holding of the case, which interpreted the Act to require de novo district court trials after administrative adjudication, but not from the notion that the Act itself was constitutional).

¹⁵² Dissents are noted in the footnotes.
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law with a statutory scheme. Moreover, the Court frequently interpreted these laws broadly, expanding further statutory law at the expense of the common law.\textsuperscript{154} All of this is not terribly surprising, considering that three of the most Lochnerian Justices—William Howard Taft,\textsuperscript{155} Pierce Butler,\textsuperscript{156} and George Sutherland—had each been strong supporters of workers’ compensation laws in their pre-Court political careers.

In sum, the Lochner era Court did not think common rights immutable, and the Court frequently upheld laws that changed or even abolished the common law.\textsuperscript{154} As a political scientist noted in 1930, “common law rights, however natural to the English judiciary, are not synonymous with the rights guaranteed by the American Constitution. Countless rules that were natural law to English judges are subject to legislative modification in the United States.”\textsuperscript{159}

To the extent that the Lochner era Court explicitly relied on common law norms, it almost always did so to justify upholding government regulations.\textsuperscript{160} by finding

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\textsuperscript{154} E.g., Internatio\nal Stevedoring Co. v. Haverty, 272 U.S. 50 (1926) (interpreting a compensation law for “seamen” to include stevedores).

\textsuperscript{155} JAMES WEINSTEIN, THE CORPORATE IDEAL IN THE LIBERAL STATE, 1900-1918, at 55 (1968).

\textsuperscript{156} DAVID J. DANIELSKY, A SUPREME COURT JUSTICE IS APPOINTED 18 (1964); FRANCIS J. BROWN, THE SOCIAL AND ECONOMIC PHILOSOPHY OF PIERCE BUTLER 96-97 (1945).

\textsuperscript{157} “We must take care that these people do not become wrecks, human driftwood in society. That is one object of this legislation. The law of negligence is hard; it is unjust, it is cruel in its operation. The law of compensation proceeds upon broad humanitarian principles.” 48 CONG. REC. 4846, 4853 (1912) (statement of Sen. Sutherland). In 1916, Sutherland introduced in Congress a workers’ compensation bill for employees of the federal government. See 53 CONG. REC. 452 (1916) (statement of Sen. Sutherland); see generally JOEL PASCHAL, MR. JUSTICE SUTHERLAND: A MAN AGAINST THE STATE 63, 65-72, 97, 125 (1951) (discussing Sutherland’s support for workers’ compensation).

\textsuperscript{158} Most of the cases cited here support this proposition are cases that changed or abolished tort rules, which led one participant in a workshop focusing on this Article to ask whether it’s clear that Sunstein in believes that the Court thought that tort rules were natural and prepolitical, or just contract and property rules. First, because most of the tort rules in question involved employer-employee relations, there is no clear line differentiating changes in tort rules from infringements on the right to contract. Second, of the seven cases cited by Sunstein to support his historical thesis, one of them is \textit{White v. New York Central R.R.}, a case involving the abolition of tort rules in favor of statutory workers’ compensation.

\textsuperscript{159} Esp., supra note 11, at 335.

\textsuperscript{160} The Court upheld many regulations because the businesses being regulated were “affected with a public interest,” a purported, though largely fictionalized, common law category. See Munn v. Illinois, 94 U.S. 113 (1876) (holding that the government could regulate prices in \textit{a de facto} monopoly that “was affected with a public interest” and therefore regulable at common law); \textit{id}. at 126 (Fidd, J., dissenting) (objecting that only \textit{de jure} monopolies were regulable at common law); \textit{cf.} CHRISTOPHER G. TIDEMAN, A TREATISE ON THE LIMITATION OF THE POLICE POWER OF THE UNITED STATES § 93, at 237 (1886) (agreeing with Field that the majority in \textit{Munn} misconstrued the common law); see generally Chas. Wolff Packing Co. v. Court of Ind. Relations, 262 U.S. 522, 535, 538 (1923) (acknowledging that the cate gory of “businesses affected with a public interest” had expanded well beyond its common law origins).

In addition to the “affected with a public interest” cases, see, e.g., Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926) (upholding residential zoning); Butler v. Perry, 240 U.S. 328, 329, 333 (1916) (upholding a Florida statute requiring males between twenty-one and forty-five years of age “to work on the roads and bridges of the several counties for six days” a year, and noting that conscription for road work was a traditional form of tax and that “to require work on public roads has never been regarded as a deprivation of either liberty or property”); Coppage v. Kansas, 236 U.S. 1, 35 (1915) (Day, J., dissenting) (arguing that there is no constitutional right to insert into an employment agreement terms that are “against public policy . . . as it is deemed by the courts to exist (continued...)

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that common law experience suggested that the regulations in question were within the scope of the police power. The Court did not invalidate regulations to preserve a common law laissez-faire system. Rather, the Court often upheld regulations that seemed to violate liberty of contract only because the regulations were consistent with preexisting regulatory norms.¹⁶¹ The common law of tort, contract, and property thus did not drive the libertarianism of the *Lochner* era. Instead, the Court’s deference to the common law police power restrained the Court’s libertarian instincts.¹⁶²

II. THE COURT ALLOWED REDISTRIBUTIVE REGULATORY LEGISLATION

In *Lochner*’s Legacy and other writings, Sunstein argues that a major mistake of the *Lochner* era Court was to treat existing distributions of resources as

¹⁶¹ (...continued)

¹⁶² Sunstein states that the reason the Court invalidated the bakers’ hours law in *Lochner* was that “the employer had committed no common law wrong, and regulatory power was largely limited to the redress of harms recognized at common law.” Sunstein, supra note 37, at 877. This statement is too broad; as we have seen, the Court did allow regulatory legislation, from antitrust law to workers’ compensation, that went well beyond common law norms. But Sunstein is correct that one category of laws upheld by the Court despite interference with liberty of contract was laws that exercised regulatory power consistent with traditional exercises of the police power. While Sunstein associates this with the Court’s deference to common law rules, a better explanation is the Court’s historicism, discussed in detail in David E. Bernstein, *Besieging “The Constitution Besieged”: Understanding the True Origins* of *Lochner* (submitted for publication 3/2003).
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“natural,” “prelegal,” “prepolitical,” and “just.” According to Sunstein, government regulations that altered the common law distribution of entitlements violated the constitutional requirement of neutrality. Recall that in Lochner’s Legacy, Sunstein associates the common law with the “allocation of rights of use, ownership, transfer, and possession of property associated with ‘laissez-faire’ systems and captured in the common law of the late nineteenth century.” Similarly, in The Partial Constitution, he claims that the Lochner era Court’s mindset “made the system of ‘laissez faire’ into a constitutional requirement.”

The latter bit of hyperbole is ahistorical. Arguing that the Lochner Court enforced a laissez-faire system is rhetorical exaggeration equivalent to arguing that the Warren Court was “socialist.” The Lochner Court, though generally

163 Cass R. Sunstein, Rights Revolution, supra note 55, at 19 (“Seeing the common law status quo as prelegal and neutral judges (and many other) did not recognize its principles as a part of the regulatory system at all, but regarded them instead as the state of nature.”); Sunstein, Democracy, supra note 48, at 97 (“Lochner accepted existing distributions of resources as prepolitical and just, and . . . invalidated democratic efforts at reform.”); Sunstein, Free Markets, supra note 48, at 229 (“A principal problem with the pre-New Deal Court was that it treated existing distributions of resources as if they were prepolitical and just.”); Sunstein, supra note 39, at 45 (Lochner “should also be understood as rooted in a particular conception of neutrality, one based on existing distributions of wealth and entitlements. The Lochner Court treated those distributions as prelegal and just.”); Sunstein, supra note 67, at 182 (rejecting the Lochner “view that the system of common law ordering, and free market principles, should be taken as a kind of neutral or prepolitical background, against which any legislative action would be viewed with suspicion”); Cass R. Sunstein, The Beard Thesis and Franklin Roosevelt, 56 Geo. Wash. L. Rev. 114, 120 (1987) (The Supreme Court’s conclusion, in Lochner v. New York, that regulatory measures should be understood as a sort of “taking” from A for the benefit of B depended on a view that the common law was natural and prepolitical.”); Cass R. Sunstein, Free Speech Now, supra note 56, at 264 (“The pre-New Deal framework treated the existing distribution of resources and opportunities as prepolitical, when in fact it was not.”); Cass R. Sunstein, Legal Interference with Private Preferences, 53 U. Chi. L. Rev. 1129 (1986) (“In the Lochner period, for example, the Supreme Court treated the system of market ordering, within the constraints of the common law, as if it were prepolitical and inviolate.”); Cass R. Sunstein, Political Equality and Unintended Consequences, 94 Colum. L. Rev. 1390, 1397-98 (1994) (“A principal problem with the pre-New Deal Court was that it treated existing distributions of resources as if they were prepolitical and just, and therefore invalidated democratic efforts at reform.”); Cass R. Sunstein, Two Faces of Liberalism, 41 U. Miami L. Rev. 245, 245 (1986) (criticizing “the Court’s assumption that the existing distribution of wealth was natural and not a proper subject of politics”); cf. Cass R. Sunstein, Standing and the Privatization of American Law, 88 Colum. L. Rev. 1432, 1434 (1988) (“The use of common-law notions, sharply distinguishing between statutory benefits and nineteenth century private rights, was the central mark of the jurisprudence of the Lochner period.”).

164 Sunstein, supra note 37, at 874.

165 Id. at 882 n.49.

166 Sunstein, supra note 39, at 40.

167 In fairness to Sunstein, over the years many other critics of the Lochner era Court have accused it of enforcing “laissez faire,” and such exaggeration continues even in erudite books of history. For example, in her recent book on Robert Hale, Barbara Fried claims that the Lochner era Supreme Court “unambiguously embraced laissez faire” by “curbing regulation both of the market return that owners could get for the use of their property, and of the terms of labor contracts.” Fried, supra note 27, at 15; see also Jack M. Balkin, Bush v. Gore and the Boundary between Law and Politics, 110 Yale L.J. 1407, 1449 (2001); Erwin Chemerinsky, Constitutional Law: Principles and Policies 480 (1997 ed.); Neil Duxbury, Patterns of American Jurisprudence 32 (1995);
sympathetic with the market system, did not attempt to enforce anything remotely resembling the night watchman state usually associated with the phrase laissez-faire. 168 Sunstein’s more modest point, that the Court sought to protect the status quo distributions of resources, is also not viable. In particular, Sunstein claims that “the police power could not be used to help those unable to protect themselves in the marketplace.”169 He asserts that the Court constitutionalized ancient Supreme Court dicta opposing taking the property “of A to give to B.”170

If Sunstein is correct, the Court should have consistently invalidated regulatory laws that had real or potential redistributive consequences. 171 With a few famous exceptions, 172 however, the Court upheld such regulations. In fact, the Court explicitly held in *Holden v. Hardy*173 that legislators could impose health and

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safety regulations to redress inequalities in bargaining power.\textsuperscript{174} Holden was decided seven years before Lochner, but the Lochner era Court consistently reaffirmed its holding.\textsuperscript{175} In one post-Holden case, for example, the Court upheld a law that was passed because “the legislature evidently deemed the laborer at some disadvantage...and...undertook to ameliorate his conditions.”\textsuperscript{176} Contrast that holding with Sunstein’s claim that “consideration of the plight of the disadvantaged” was considered “impermissible partisanship” during the Lochner era.\textsuperscript{177} A 1917 Columbia Law Review note explained that “it is now well established that the passing of measures which tend to level the inequalities of fortune is a legitimate field for legislation, and that a man may, at the expense of his liberty, be prevented from making contracts which are detrimental to his own welfare.”\textsuperscript{178}

\textsuperscript{174} The legislature has also recognized the fact, which the experience of legislators in many states has corroborated, that the proprietors of these establishments and their operatives do not stand up on an equality, and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employees, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules, and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the legislature may properly interpose its authority.

\textit{Holden}, 169 U.S. at 397. The author of this opinion, Justice Henry Brown, was a member of the Lochner majority, as was Chief Justice Melville Fuller.

The Court added that “the fact that both parties are of full age, and competent to contract, does not necessarily deprive the state of the power to interfere, where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself.”\textit{Holden}, 169 U.S. at 397. In Coppage v. Kansas, 236 U.S. 1, 17 (1915), the Court stated that inevitable inequalities in bargaining power between workers and owners did not justify legislation prohibiting employes from requiring workers to agree not to join unions. The difference is between a direct regulation of health and safety, as in\textit{Holden}, and a law designed to increase the power of labor unions, organizations that many thought were monopolistic and a threat to individual liberty, as in\textit{Coppage}. Inequalities in bargaining power could be redressed by laws directly promoting health and safety, but not by laws giving special privileges to labor unions, which may or may not use their government-granted power to promote health and safety.

\textsuperscript{175} E.g., Booth v. Indiana, 237 U.S. 391, 395-97 (1915) (upholding a law requiring mining companies to provide wash houses for their workers); Sturges & Burn Mfg. Co. v. Beauchamp, 231 U.S. 320 (1913) (upholding a state child labor law); Muller v. Oregon, 208 U.S. 412 (1908) (upholding maximum hours law for women in part because women are at a disadvantage compared to men in the struggle for survival). In\textit{Lochner} itself, Justice Peckham grudgingly acknowledged that\textit{Holden} established the government’s ability to intervene on behalf of necessitous workers as a constitutional principle.\textit{Lochner} v. New York, 198 U.S. 45, 53-57, 61 (1905); see\textit{generally} John A. Fitch,\textit{Editorial}, 4 AM. LAB. LEG. REV. 132, 133 (1914) (noting that “when the Supreme Court by a majority of one, nullified the bakers’ law, it did not in that opinion destroy or change the principles laid down in\textit{Holden vs. Hardy}.”).

\textsuperscript{176} Knoxville Iron Co. v. Harbison, 183 U.S. 13, 20 (1901); see\textit{generally} Siegel, supra note 59, at 21 (stating that\textit{Holden} “more than\textit{Lochner}, set and express the tenor of\textit{Lochner} era constitutionalism”); Urofsky,\textit{Myth and Reality}, supra note 11 (arguing that\textit{Holden} established the basic rule for the Supreme Court, with\textit{Lochner} being somewhat at anomalous).

\textsuperscript{177} Sunstein, supra note 37, at 882.

\textsuperscript{178} Note,\textit{Liberty of Contract and Social Legislation}, 17 COLUM. L. REV. 538, 541 (1917). The Court upheld such a law the same year it decided\textit{Lochner}. Cantwell v. Missouri, 199 U.S. 602 (1905) (upholding a maximum hours law for miners on the authority of\textit{Holden}).
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Some of these laws do not seem redistributive in the usual sense of the word, but Sunstein broadly construes the redistributive category to include laws such as maximum hours laws for women. At least in the long-term, in a competitive free labor market regulations cannot actually redistribute wealth from owners as a class to workers as a class, as workers will get paid something very close to their marginal product either way. See Wonneill, supra note 87. If regulations require extra benefits for workers, wages and employment levels will eventually shift to recreate equilibrium. As the market adjusts, some workers will benefit, but others will be harmed. However, the regulations noted below may still be considered redistributive because (1) in some cases, the result was to increase the effective wage of some workers, at the expense of unemployment for other workers; (2) labor markets can take some time to adjust to new regulations, creating a temporary redistributive situation; (3) some of the laws were intended to prevent fraud, which workers had trouble monitoring; (4) laws interfering with labor relations that do not seem inherently economically redistributive, such as maximum hours laws, nevertheless implied that workers needed the government to assist them in arriving at employment terms; and (5) many legislators understood little economics, and thought they are redistributing wealth to employees as a class when they were not. See generally Adkins v. Children’s Hospital, 261 U.S. 525, 563 (1923) (Taft, C.J., dissenting) (“Legislatures which adopt a requirement of maximum hours or minimum wages may be presumed to believe that when sweating employers are prevented from paying unduly low wages by positive law they will continue their business, abating that part of their profits, which were wrung from the necessities of their employees, and will concede the better terms required by the law, and that while in individual cases, hardship may result, the restriction will inure to the benefit of the general class of employees in whose interest the law is passed, and so to that of the community at large.”).

Sturge & Burn Mfg. Co. v. Beauchamp, 231 U.S. 320, 325-26 (1913). This is arguably redistributive because adult workers, facing less competition, may get paid more.

The Supreme Court invalidated a federal child labor law on federalism grounds in Hammer v. Dagenhart, 247 U.S. 251 (1918). This case has frequently been used to suggest that the Court was hostile to child labor as a violation of liberty, which Sturges shows is not true. State courts also routinely upheld child labor legislation. E.g., Ex Parte Weber, 149 Cal. 392 (1906); United Steel Co. v. Yedinak, 87 N.E. 229 (Ind. 1909); Bryan v. Skillman Hardware Co., 76 N.J. 45 (1918); People v. Taylor, 192 N.Y. 398 (1908); United Steel Co. v. Yedinak, 87 N.E. 229 (Ind. 1909); Bryan v. Skillman Hardware Co., 76 N.J. 45 (1918); People v. Taylor, 192 N.Y. 398 (1908).

Radice v. New York, 264 U.S. 292, 293-95 (1924). This is arguably redistributive because male workers, facing less competition, may get paid more. The redistribution, however, is sideways, from women to men, not from rich to poor.

Bosley v. McLaughlin, 236 U.S. 385 (1915); Miller v. Wilson, 236 U.S. 373 (1915); Riley v. Massachusetts, 232 U.S. 671 (1914); Muller v. Oregon, 208 U.S. 412 (1908).


Barrett v. Indiana, 229 U.S. 26, 28-29 (1913); see also Plymouth Coal Co. v. Pennsylvania, 232 U.S. 531 (1914) (upholding a mine safety law); Chicago Dock & Canal Co. v. Frakey, 228 U.S. 603, 615 (1913) (upholding a law requiring the endorsement of certain shafts or openings of bin building during construction).


Wilmington Star Mining Co. v. Fulton, 205 U.S. 60, 70-74 (1907).
car loads of coal they produced,\(^{187}\) requiring railroads\(^{188}\) and mining companies\(^{189}\) to pay their employees in cash, requiring railroads to pay wages due an employee on discharge regardless of contrary contractual agreement,\(^{190}\) requiring coal produced by miners be weighed for payment purposes before it passes over a screen,\(^{191}\) giving preferences to citizens in public works employment,\(^{192}\) regulating the wages and hours of workers employed on public works projects,\(^{193}\) forbidding the payment of seamen’s wages in advance,\(^{194}\) regulating the timing of wages paid to employees in specified industries,\(^{195}\) mandating an eight-hour day for federal workers or employees of federal contractors,\(^{196}\) taxing “emigrant agents”\(^{197}\) out of business, and limiting attorneys’ fees in Court of Claims cases involving Indian claims.\(^{198}\) The vast majority of these decisions were unanimous, and, among the exceptions, almost all of the dissenting votes came from Justices Brewer and Peckham, the only two *Lochner*-era Justices who more or less consistently voted to restrain government power.\(^{199}\) The Court also generally upheld antitrust laws.

\(^{192}\) Heim v. McCall, 239 U.S. 175, 191-93 (1915); Crane v. New York, 239 U.S. 195, 198 (1915).
\(^{195}\) Strathearn S.S. Co. v. Dillon, 252 U.S. 348 (1920); Erie R.R. Co. v. Williams, 233 U.S. 685 (1914).
\(^{196}\) Ellis v. United States, 206 U.S. 246, 254-56 (1907).
\(^{197}\) Emigrant agents were hired by agricultural employers to recruit African Americans from the southeast to work in Mississippi and other “southern” states. Various southeastern states contrived to tax the agents out of existence to reduce the mobility of their labor supply. These emigrant agent laws redistributed wealth, albeit from the poor to the rich. See generally Bernstein, supra note 87, ch. 1.
\(^{198}\) Williams v. Fears, 179 U.S. 270 (1900).
\(^{199}\) Margolin v. United States, 269 U.S. 93 (1925); Ball v. Halsell, 161 U.S. 72 (1896).

Unfortunately, one can’t learn anything specific from Brewer and Peckham’s dissents in these cases, because the dissents are invariably unaccompanied by opinions. See also Union Bridge Co. v. United States, 204 U.S. 364, 403 (1907) (Brewer and Peckham dissenting without opinion from a decision upholding the right of the War Department to destroy without compensation any bridge deemed “an obstruction to interstate commerce”); Bacon v. Walker, 204 U.S. 311, 320 (1907) (Brewer and Peckham dissenting without opinion from a decision finding that a law restricting grazing by sheep was not unconstitutional class legislation); 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); cf. Fiss, supra note 16, at 173 (stating, incorrectly, that it was “most uncharacteristic” of Brewer and Peckham to dissent without opinion in *Holden*). Brewer’s general worldview, however, can be discerned from his dissent in *Budd v. New York*, 143 U.S. 517, 551 (1892) (Brewer, J., dissenting), in which Brewer denied that grain elevators could be regulated even when they did not receive special privileges from the government. He wrote, “The paternal
which were among the most blatantly redistributive of laws, as they were seen as aiding small businesses at the expense of large corporations. 201

The Court, however, did invalidate one specific category of laws that might be considered redistributive: laws which it believed had no purpose other than to aid labor unions. For example, the Court twice invalidated laws that prohibited employers from forbidding their employees to join labor unions,202 Progressive

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.” See also EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION 46–56 (2001) (discussing Brewer); Robert E. Gamer, Justice Brewer and Substantive Due Process: A Conservative Court Revisited, 18 Vand. L. Rev. 615 (1965) (same). According to Purcell, “at the center of [Brewer’s] jurisprudence lay a fervent belief in the authority of the courts to enforce the nation’s fundamental moral and economic crises in a time when social conflict, destructive change, and a largely immigrant and dangerous industrial work force threatened to exploit the frailties of popular Government.” PURCELL, supra, at 51. As a state court justice, Peckham, in a dissenting opinion to what became the companion case to Budd before the Supreme Court, 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). Peckham’s opinion in this case is probably the most sophisticated political-economic defense of free markets written by an American judge in the nineteenth century.

Brewer and Peckham also sometimes exhibited libertarian tendencies in cases not involving economic liberties. See, e.g., Patterson v. Colorado, 205 U.S. 454, 465 (1907) (Brewer, J., dissenting) (dissenting on obscure grounds from an opinion upholding a conviction resulting from the defendant publishing an article calling the integrity of the Colorado Supreme Court into question); Halter v. Nebraska, 205 U.S. 34, 45 (1907) (Peckham dissenting without opinion from an opinion upholding a state law banning the use of the American flag in advertising); Jacobson v. Massachusetts, 197 U.S. 11, 39 (1905) (Brewer and Peckham dissenting without opinion from a decision upholding mandatory smallpox vaccinations). The two men were also “the most loyal friends of Asian immigrants on the Court,” and frequently dissented from decisions stripping Chinese immigrants of their rights. Gabriel J. Chin, Regulating Race: Asian Exclusion and the Administrative State, 37 Harv. Civ. Rights–Civ. Lib. L. Rev. 1, 58–59 (2002).

201 Robert Bork’s influential book, The Antitrust Paradox, incorrectly states that the original purpose of federal antitrust legislation was to protect consumers. Bork’s book is good economics, but bad history, as the original purpose of antitrust laws was primarily to protect the small proprietor from the threat of competition from big business. See ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1979); Robert Pritsker, The Political Content of Antitrust, 127 U. Pa. L. Rev. 1051 (1979) (discussing protection of small business as a historical and current purpose of antitrust law). Even laissez-faire-oriented legal theorists, such as Christopher Tiedeman, were hostile to large, concentrated, potentially monopolistic businesses. See Louise A. Halper, Christopher G. Tiedeman, ‘Laissez-Faire Constitutionalism’ and the Dilemmas of Small-Scale Property in the Gilded Age, 51 Ohio St. L.J. 1349 (1990); D avid N. Mayer, The Jurisprudence of Christopher G. Tiedeman: A Study in the Failure of Laissez-Faire Constitutionalism, 55 Mo. L. Rev. 93 (1990).


The Court upheld the Railway Labor Act in 1930, 45 U.S.C. § 151 et seq., which aided the railroad unions tremendously. However, the Court saw this legislation as a comprehensive law to protect interstate commerce from strikes and other disruptions, not as a pronun law. Texas & N. O. R. Co. v. Brotherhood of R. & S.S. Clerks, 281 U.S. 548.

Nevertheless, it seems fair to say that the Court’s attitude had matured since 1908, when it decided Adair. The pronun law invalidated in Adair was also part of a broader law, the Erdman Act,
critics of the Court have focused on these decisions as evincing the Court’s hostility to redistributive regulations that would have aided workers.\footnote{163} Undoubtedly these decisions, combined with state and lower federal court decisions unfriendly to labor unions, limited the growth of organized labor.\footnote{164} However, criticism of these decisions as intentionally anti-redistribution assumes that the Justices accepted the Progressives’ view that workers were helpless and vulnerable to exploitation without union representation, that the unions were the vanguard of the working class, and that decisions limiting the power of unions served only the interests of the corporate elite and harmed workers.\footnote{165} The Justices, however, in common with much of public opinion, saw labor unions as monopolistic organizations that threatened the freedom of both individual workers and their employers, just as monopolistic corporations threatened small businesses and consumers.\footnote{166} The Justices also argued that upholding liberty of contract was crucial for the long-term prosperity of workers, because their ability to sell their labor in a free marketplace was their primary asset. In \textit{Coppage v. Kansas}, for example, the Court invalidated a law that prohibited employers from firing workers who joined unions. Justice Pitney wrote for the Court:

\textit{If, in the judgment of the state, the people who desire insurance upon their property are put at a disadvantage when confronted by a combination or agreement among insurance companies, I do not perceive any sound reason why, preserving the individual right of contracting, it may not forbid such combinations and agreements, and thereby enable the insured and insurer to meet on terms of equality.}\footnote{167} \textit{Id.} at 414; \textit{see also New State Ice Co. v. Liebmann}, 285 U.S. 262 (1932) (invalidating a law granting an ice monopoly). The government, then, could break up monopolistic businesses, but could not respond to purported monopoly power over workers by aiding in the establishment of labor unions as a counter-monopoly.
In the Court’s view, merely helping labor unions did not satisfy the police power because, as noted above, unions were seen as potentially self-serving monopolistic organizations.

Beyond the union-related cases, at least through the 1920s the Court rarely interfered with “progressive” redistributive legislation claimed to be within the states’ police power. Moreover, the Court’s decisions upholding redistributive
regulations often did not involve “easy,” uncontroversial issues, as demonstrated by state court precedents which invalidated the sametypes of laws upheld by the Supreme Court. Congress expanded the Supreme Court’s jurisdiction in 1914

the Legislative will, but rather in a too facile readiness to confirm whatever the Legislature may have temporarily chose to decree.”; MOTT, supra note 2, at 343 (“not only was the Supreme Court very slow in recognizing the full extent of the power given them by the Fourteenth Amendment, but once they had definitely realized that power, it was exercised with extreme antipathy.”); William F. Dodd, Social Legislation and the Courts, 28 Pol. Sci. Q. 1, 5 (1913) (“Except for a rather unfortunate lapse in the New York bake-shop case, the Supreme Court of the United States has in the main taken a liberal attitude toward legislation aimed to meet new social and industrial needs.”); Felix Frankfurter, Hours of Labor and Realism in Constitutional Law, 29 Harv. L. Rev. 353, 369 (1916) (“The Lochner case, judged by its history and by more recent decisions of the Supreme Court, does not in itself furnish the yardstick to determine the constitutionality of protective legislation).

Of course, it is difficult to measure what affect the threat of Supreme Court invalidation of relatively radical regulatory legislation may have had on legislative agendas in Congress and in states with relatively quiescent courts. Also, the Supreme Court’s 1895 decision overturning a federal income tax law led to harsh criticism of the Court for its anti-redistributive effect. Pollock v. Farmers’ Loan and Trust Co, 157 U.S. 429 (1895). See, e.g., Death of the Income Tax, LITERARY DIGEST, June 1, 1895, at 4, 6 (“Today’s decision shows that the corporations and plutocrats are as securely entrenched in the Supreme Court as in the lower courts which they take such pains to control.”). However, while Pollock is often conflated with the Lochner line of cases, see, e.g., Friedman, supra note 27, at 1393 (failing to distinguish between criticism of Lochner and criticism of Pollock), it was an analytically distinct case involving a different aspect of constitutional law than the police power regulatory cases.


A 1909 article in the Political Science Quarterly provides an interesting chart enumerating the occasions on which the United States Supreme Court and state courts invalidated state laws:

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to allow the Court to review judgments from state courts enforcing federal constitutional rights, 211 that is, to serve as a check on state courts that were invalidating Progressive legislation, especially labor legislation. 212

III. SUNSTEIN’S THESIS REGARDING REDISTRIBUTION CANNOT EXPLAIN LOCHNER ERA CIVIL LIBERTIES DECISIONS

Sunstein’s theory that *Lochner*ian jurisprudence was about protecting common law distributions of wealth cannot explain the *Lochner*ian “civil liberties” decisions, most prominently *Meyer v. Nebraska*, 213 that the *Lochner* era Court decided under the Due Process Clause. In *Meyer*, the Court invalidated a Nebraska law that banned the teaching of foreign languages in private schools or by private tutors. The law was one of several of its type passed in various states in a wave of post-World War I nativism. 214 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,” 215 along with “other privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.” 216

The paragraph where the line quoted above appears is the only place where a citation to *Lochner* and the phrase “common law” appear in the same paragraph.

<table>
<thead>
<tr>
<th>Year</th>
<th>overturned state decisions</th>
<th>upheld legislation</th>
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<tbody>
<tr>
<td>1901-1902</td>
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<td>0</td>
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<tr>
<td>1902-1903</td>
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<td>1</td>
</tr>
<tr>
<td>1906-1907</td>
<td>94</td>
<td>5</td>
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Dodd, *supra* note 13, at 198. The Court had no jurisdiction at the time to review state decisions holding laws unconstitutional. But the chart is still striking, because it shows how rarely the Court overturned state decisions upholding legislation. The chart also demonstrates why much of the Progressives’ ire was directed at the state courts and not the United States Supreme Court.

212 FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 188-98 (1927). Batlan has recently argued that the New York Court of Appeals, one of the state courts most notoriously willing to invalidate legislation, actually had a liberal view of the police power, at least before 1905. Batlan, *supra* note 3. Batlan’s article, however, contains several curious distortions and omissions. For example, she engages in a lengthy discussion of the progressiveness of the New York Court of Appeals’ decision upholding the bakers’ hours law in *Lochner* without noting that three of the seven justices dissented. Batlan, *supra*, at 521-22. She also notes that the court reversed itself and upheld state regulation of wages on public works projects without noting that the reversal was a direct result of a United States Supreme Court opinion upholding such regulations on federal constitutional grounds, combined with a state constitutional amendment explicitly allowing such regulations. Batlan, *supra*, at 519-20 n.576.

213 262 U.S. 390 (1923).
215 *Meyer*, 262 U.S. at 399-400 (citations omitted).
216 *Id.* at 400.
in a *Lochner* era opinion. But the Court is obviously not referring to common law in the sense that Sunstein uses it in *Lochner’s Legacy*, i.e., a purported laissez-faire economic system governed by formalist common law rules of contract, property, and tort. Rather, the Court is using “common law” in the sense of the traditional rights and liberties of the American people. As Robert Post notes, *Meyer* “resolutely refuses to confine that realm [of liberty] to mere matters of economic exchange. This refusal is particularly striking because the passage’s assertions are supported only by the citation of a long string of substantive due process decisions dealing with specifically economic regulation ranging from *Lochner* itself to *Adkins.*”

*Meyer* was no anomaly. Two years later, in *Pierce v. Society of Sisters*, McReynolds wrote another libertarian opinion, this time invalidating a law banning private schools as a violation of fundamental liberties protected by the Due Process Clause. While this case today is often treated as a First Amendment freedom of religion case, neither the First Amendment nor freedom of religion played any role in the Court’s reasoning. Instead, McReynolds focused on “the liberty of parents and guardians to direct the upbringing and education under their control. The fundamental theory of liberty upon which all governments in the Union reposes excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only.”

In *Farrington v. Tokushige* meanwhile, the Court invalidated a Hawaii law banning Japanese language schools. Despite his notorious racism, McReynolds wrote, “The Japanese parent has the right to direct the education of his own child without unreasonable restrictions; the Constitution protects him as well as those who speak another tongue.” Relying on the *Lochner* line of cases, the Court

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217 For a contemporaneous use of the phrase common law in this sense by then-president of the American Bar Association and past and future Supreme Court Justice Charles Evans Hughes, see Charles Evans Hughes, *President Hughes Responds for the Association*, 10 A.B.A. J. 567, 569 (1924).

218 According to Hughes, the Court’s due process decisions are “an education in reasonableness after the essential method of the common law.” Common law seen “from custom” and “embodies the experience of free men.” *Id.*

219 Post, supra note 16, at 1533. Post makes a slight error here, as the Court cites *Twining v. New Jersey*, 211 U.S. 78 (1908) (refusing to apply the privilege against self-incrimination to the states), along with the economic liberty cases.

220 *See Philip B. Kurland, Religion and the Law: Of Church and State and the Supreme Court* 27 (1962) (“Probably the most abused citation in the construction of the first amendment is the case of *Pierce v. Society of Sisters*. The case raised no church-state issue; the Court decided no church-state issues.”). In fact, *Pierce* involved two consolidated cases. One plaintiff was a private Catholic school, the Society of the Sisters of the Holy Names of Jesus and Mary, and the other plaintiff was a private, non-religious school, the Hill Military Academy. The latter school could not have benefited from a religious freedom-motivated opinion.


223 *See Randall Kennedy, Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt*, 86 Colum. L. Rev. 1622, 1641 (1986).

224 *Farrington*, 273 U.S. at 298.
also invalidated an anti-Chinese law that required merchants in the American-occupied Philippines to keep their account books in English or Spanish.\footnote{Yu Cong Eng v. Trinidad, 271 U.S. 500 (1927).}

In *Gitlow v. New York*,\footnote{268 U.S. 652 (1925).} the Court declared clearly for the first time that “freedom of speech and of the press . . . are among the fundamental personal rights and ‘liberties’ protected by the Due Process Clause of the Fourteenth Amendment from impairment by the States.” The Court ruled in favor of the state in that case. As in the context of economic regulations, \textit{Lochner}ian Justices gave a broad scope to the states’ police power in regulating speech and other “civil liberties,” and were reluctant to overturn the types of regulations that had an established historical pedigree.

Meanwhile, Justices Holmes and Brandeis, who advocated broader restrictions on state regulation of speech, overcame their general reluctance to invalidate state regulations only because of the Court’s \textit{Lochner}ian decisions.\footnote{Id. at 672-73.} In *Gitlow*, Holmes, joined by Brandeis, wrote a dissent that helped establish modern free speech jurisprudence.\footnote{Stromberg v. California, 283 U.S. 359, 369 (1931).} What has not often been noticed is that Holmes conceded that free speech guarantees applied against the states only because the Court had already interpreted the word “liberty” broadly in other, more typically \textit{Lochner}ian, contexts. He wrote: “The general principle of free speech, it seems to me, must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word ‘liberty’ as there used.”\footnote{Id.}

In 1931, the Court, in a 7-2 opinion, McReynolds and Butler dissenting, invalidated California’s “red flag law,” which banned display of the Communist flag.\footnote{228 What has not often been noticed is that Holmes conceded that free speech guarantees applied against the states only because the Court had already interpreted the word “liberty” broadly in other, more typically \textit{Lochner}ian, contexts. He wrote: “The general principle of free speech, it seems to me, must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word ‘liberty’ as there used.”\footnote{Id.} Chief Justice Charles Evans Hughes acknowledged “that the State may . . . provide for the punishment of those who indulge in utterances which incite to violence and crime and threaten the overthrow of organized government by unlawful means.”\footnote{231 He added, however, “The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the 14th Amendment.”} He added, however, “The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the 14th Amendment.”
Fourteenth Amendment." Hughes thus relied on a *Lochner*ian fundamental liberties argument, not the incorporation of the First Amendment’s protection of freedom of speech. Similarly, in *Powell v. Alabama*, which recognized a right to state-provided counsel, Justice Sutherland relied not on the Sixth Amendment, but on “certain immutable principles of justice that inhere in the very idea of free government,” language taken from *Holden v. Hardy*.

The cases discussed above cannot be explained by the theory that the *Lochner* era Court protected liberty of contract because it wanted to protect common law distributions of wealth. Rather, the Court used the Due Process Clause of the Fourteenth Amendment to protect what it considered the fundamental liberties of Americans from arbitrary or unreasonable legislation.

IV. The *Lochner* Opinion Does Not Support Sunstein’s Thesis

Sunstein uses the *Lochner* decision itself, invalidating a maximum hours law for bakers, as a prime example of the Court giving deference to common law rules and status quo distributions. Using *Lochner* as a representative opinion presents difficulties. Justice Rufus Peckham, the author of *Lochner*, would undoubtedly have written a far more libertarian opinion if he had his druthers. Instead, he crafted an opinion that received the endorsement of a bare majority of the Court. *Lochner* unsurprisingly reads like a compromise opinion, with much ambiguous dicta. Even so, no one has adequately explained how Peckham and Brewer found three additional votes in *Lochner*, instead of being outvoted as they were in every other protective legislation case in which they thought the legislation unconstitutional. Nevertheless, a focus on *Lochner* itself is appropriate; even if *Lochner’s* Legacy does not explain *Lochner* era jurisprudence, perhaps it at least explains the anomalous *Lochner* opinion.

Sunstein finds “two features of the Court’s approach” in *Lochner* to be “especially distinctive.” These features, not surprisingly, track Sunstein’s

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232 *Id.*
236 This is apparent in some of Peckham’s dicta, where he favorably cites Godcharles v. Wigeman, 113 Pa. 431, 437 [6 A. 354 (1886)]; and Low v. Reis Printing Co., 41 Neb. 127, 145 [59 N.W. 362 (1884)] for their enforcement of “the right of free contract and the right to purchase and sell labor upon such terms as the parties may agree to,” a right never articulated by the United States Supreme Court, but implicitly supported by Peckham and Brewer in a series of dissents in decisions upholding regulation of labor contracts. See *supra* note 200 and accompanying text (listing Peckham’s and Brewer’s dissents in cases involving legislation that interfered with liberty of contract); cf. Siegel, *supra* note 59, at 16 n.67 (stating that Peckham likely personally believed that the hours law at issue in *Lochner* was constitutional only if it protected the public health, but that he grudgingly conceded that the law would also pass constitutional muster under *Holden v. Hardy* if it meaningfully protected the health of bakers); see generally *supra* note 200 and accompanying text (noting that Peckham and Brewer were far more libertarian than were their colleagues).
237 Sunstein, *supra* note 37, at 887.
thesis that *Lochner* era jurisprudence was about constitutionalizing common law rules and prohibiting redistributive regulations. First, "the Court sharply limited the category of permissible government ends." As Sunstein puts it, the state could not penalize *Lochner*, the protagonist in the litigation, because he had committed no "common law wrong" and "regulatory power was largely limited to the redress of harms recognized at common law." Sunstein, however, provides no citation to any language in *Lochner* that states, or even suggests, that the Court deferred to common law principles, and no such language appears in the opinion.

Second, Sunstein notes that the Court engaged in "careful scrutiny of the relationship between the permissible end invoked by the state [bakers' health] and the means chosen by the state to promote that end [a maximum hours law]." Sunstein claims that the law "was invalidated as impermissibly partisan—what might now be called special-interest legislation." Sunstein is hardly alone in reaching this conclusion (though he may have been the first to express it). The only support provided, however, is the Court's stated suspicion 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 serve the public health or welfare." The "other motive" is

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238 Id.
239 Id.
240 Id. at 879.
241 See GILLMAN, supra note 30; CUSHMAN, supra note 45, at 55; Rebecca L. Brown, *Activism is Not a Four-Letter Word*, 73 U. COLO. L. REV. 1257 (2002); Post, supra note 16, at 1513-14 (noting and accepting the "commonplace" interpretation of *Lochner* among legal historians as attempting to police the boundaries between class and public-regarding legislation); G. Edward White, *Revisiting Substantive Due Process and Holmes' *Lochner* Dissent*, 63 BROOK. L. REV. 87, 88 (1997) (describing *Lochner*-era due process decisions as predicated on "the principle that no legislature could enact 'partial' legislation, legislation that imposed burdens or conferred benefits on one class of citizens rather than the citizenry as a whole").
242 *Lochner*, 198 U.S. at 63. Later, Peckham states that "[i]t 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 unnecessary or ex cessive. *See Ernst Freund, The Police Power* 534-35 (1905). 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.

For explicit, albeit especially regrettable examples (given the authorship) of acceptance of the class
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presumed to be the desire to enact “class legislation” benefiting organized bakers.

Yet one should not vest much weight in the “other motive” language. Some scholars have given in to the temptation of anachronistically assuming that Peckham was thinking like a modern public choice scholar who would invalidate legislation because the legislature was attempting to aid special interests.\(^{244}\) 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.”\(^{245}\) 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.

The Court concluded that the law’s “real object and purpose were simply to regulate the hours of labor between the master and his employees . . . in a private business, not dangerous in any degree to morals, or in any real and substantial degree to the health of the employees.”\(^{246}\) Beyond the generality of wishing to regulate hours of labor for non-health reasons, the specific motivation the New York legislature may have had in passing the maximum hours law, including the possibility that the law was special interest legislation, played no role, or at least

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\(^{245}\) 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.”). This rule was reinserted during the Lochner era. See Coppage v. Kansas, 236 U.S. 1, 34 (1915) (Holmes, J., dissenting); Yee Gee v. City of San Francisco, 235 F. 757, 758 (N.D. Cal. 1916).

\(^{246}\) Lochner, 198 U.S. at 64.

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no formal role,\textsuperscript{247} in the \textit{Lochner} Court’s decision. Peckham declined to even directly address “class legislation” objections to the hours law, even though he had ample incentive and opportunity to do so, including the fact that Joseph Lochner’s brief focused on this issue.

Rather, as noted above, the foundation of Peckham’s opinion is the proposition that bakers and their employers had a right to liberty of contract. Under \textit{Holden v. Hardy}, liberty of contract could be infringed to protect necessitous workers or to preserve the health of either bakers or the public at large. The presumption was in favor of liberty of contract and could be overcome only if the law was a “labor law” needed to redress some deficiency in the bakers’ ability to negotiate their contracts or a “health law,” and therefore within the police power.\textsuperscript{248} But in \textit{Lochner}, the state did not argue that the health of the public was at stake.\textsuperscript{249} Peckham, meanwhile, concluded that bakers are “in no sense wards of the State.”\textsuperscript{250} Thus, unless the hours law, which “interfer[ed with bakers’] independence of judgment and of action,” was intended to redress particular health effects of baking, it was unconstitutional as “a mere meddlesome interference[ ] with the rights of the individual.”\textsuperscript{251}

Peckham first ascertained whether baking was known to be an unhealthful profession. He concluded that baking was an ordinary trade, not generally known...
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1. **To be unhealthful.** Second, Peckham found that the available scientific evidence suggested that baking was not an especially unhealthful profession. For this conclusion, he clearly relied on—but, to the detriment of his reputation, did not explicitly cite—studies discussed in Lochner’s brief showing bakers had similar mortality rates to many ordinary professions that the legislature did not regulate. Given, in the majority’s view, the absence of any sound reason to believe that the maximum hours law was in fact a health law, the law was not a valid police power

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252 Id. at 58 (“To the common understanding the trade of a baker has never been regarded as an unhealthy one.”); cf. id. at 63 (criticizing increased legislative interference with the “ordinary trades”). The New York Court of Appeals justices also relied on common knowledge in their opinions below. Compare People v. Lochner, 69 N.E. 373, 382 (1904) (arguing that unhealthfulness of baking is within common knowledge), with id. at 187 (Bardgett, J., dissenting) (claiming that “common experience” shows that baking is an ordinary trade).

By contrast, in Muller v. Oregon, the Court upheld a maximum hours law for women industrial workers, with Justice Brewer writing for unanimous Court that the Court could “take judicial cognizance of all matters of common knowledge,” including that “woman’s physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence.” Muller v. Oregon, 208 U.S. 412, 421 (1908).

253 Lochner, 198 U.S. at 58 (finding “no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health or the health of [bakers]”). Generations of commentators have thought preposterous Peckham’s claim that baking was not especially unhealthful, and attributed his views to either hardhearted Social Darwinism, ignorance of industrial conditions, or a formalism that required Peckham to ignore industrial conditions in favor of enforcing abstract rights. Indeed, Peckham’s opinion led to Roscoe Pound’s call for judges to adopt a “sociological jurisprudence” to replace Lochner’s alleged formalism, which purportedly ignored social context. Pound, supra note 95, at 479-87; see generally Roy L. Brooks, The Use of Policy in Judicial Reasoning: A Reconceptualization Before and After Bush v. Gore, 13 STAN. L. & POL’Y REV. 33, 38 (2002) (in a reflection of still-common sentiment, referring to Lochner as the “quintessential legal formalist opinion”); 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). In fact, however, the appendix to Lochner’s brief contained what one scholar calls “an incipient ‘Brandeis brief’” with a compilation of medical, scientific, and statistical data. See Brief for Plaintiff in Error at 50-61, Lochner, 198 U.S. 45 (No. 292); Siegel, supra note 59, at 19 n.77. Peckham clearly relied on this appendix in writing his opinion, as much of his dictum about the relative safety of various occupations—including his claim that if bakers’ hours could be regulated because of its effects on worker health, so could many other professions that were equally healthful (or unhealthful)—tracks information contained there. Because Peckham did not cite the brief, and constitutional scholars rarely read briefs, Peckham left himself open to the charges described in the first sentence of this footnote. Even Siegel, a historian and Lochner scholar of some renown, acknowledged that before he read Lochner’s brief he had always assumed that Peckham’s assertion that baking was not especially unhealthful was “a curmudgeonly flight of fancy.” Siegel, supra. For some reason, scholars consistently overlooked Peckham’s statement that his view of the relative healthfulness of baking was informed by “looking through statistics regarding all trades and occupations.” Lochner 198 U.S. at 58.

254 Lochner, 198 U.S. at 59-61 (comparing workers’ to a wide range of other occupations, shown by Lochner’s brief to be approximatively as healthful as workers’, that could also be regulated if the bakers’ law was upheld, but never noting any reliance on data from the brief).

Justice Harlan’s dissent vigorously disputed Peckham on the issue of the relative healthfulness of workers. Harlan cited other studies showing that baking is an unhealthful trade. He argued that given such evidence, even if disputable, the court should defer to the legislature. Id. at 70-74 (Harlan, J., dissenting). The studies cited by Harlan do not appear in the state’s brief, or in the brief the state submitted to the New York Court of Appeals, and one wonders where he came upon them. The majority did not allude to these studies, and the Justices in the majority have believed that their obligation was to only review the information provided by the parties.
measure, but a “mere meddlesome interference[] with the rights of the individual,” and an unconstitutional violation of liberty of contract.

The *Lochner* Court, then, was doing exactly what it purported to do: protecting a fundamental right to liberty of contract from what it considered arbitrary government interference. Preserving common law distributions played no role in the opinion. The *Lochner* Court’s determination that the bakers’ hours law was not a health law rendered the legislative motivation behind the law—whether it was a “self-interested deal,” as Sunstein suggests the Court believed, satisfaction of arbitrary whim, sincere (albeit mistaken) belief that bakers were in special need of government protection, a desire to make bakers dependent on government, or a desire to take a first tentative step toward maximum hours laws for all workers—irrelevant. The law was unconstitutional because the Court found that it violated liberty of contract with no valid police power justification, not because the Court suspected a particular illicit legislative motive, such as transferring resources from employers to employees.

V. THE END OF THE *Lochner* ERA WAS NOT A RESULT OF THE REJECTION OF TRADITIONAL BASELINE ANALYSIS

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254 *Lochner*, 198 U.S. at 61.
255 Some scholars have made much of Peckham’s emphasis that the baker’s law was not a “health law,” but a “labor law pure and simple.” Inferred from this is that the majority thought the law illegitimate because it sought to redistribute resources to workers at the expense of bakery owners. The more plausible inference is that Peckham was responding to Harlan’s assertion that the Court should defer to the legislature’s claim that the law was a health measure, and therefore came within the police power. Peckham quite reasonably responded that the legislature itself did not believe the measure was meant to protect bakers’ health. The hours provision was part of a broader law aimed at reforming the sanitary conditions of bakeries. Sections 2-6 of the New York Bakeshop Act regulated the sanitary conditions of bakeshops, including requirements for plumbing, floors, the storage of products, bathroom and toilets, and employee sleeping quarters. Section 1 provided for the ten hour work day for bakers, six days per week, and sections 7 and 8 established penalties and enforcement. The sanitary provisions of the law were all codified under the health section of the New York code, while the hours provisions were codified in the labor section, with enforcement by the labor inspector, not the health inspector. Thus, there was ample reason for the Court not to defer to claims made in litigation that the hours provision was actually a health measure.

Some believe that Peckham originally drafted a dissent on behalf of himself and three other Justices, but later picked up another vote. See Charles Henry Butler, A CENTURY AT THE BAR OF THE SUPREME COURT OF THE UNITED STATES 152 (1942) (claiming that John Maynard Harlan, the Justice’s son, stated that his father told him that Harlan’s opinion was originally the majority opinion); Willard L. King, Melville Weston Fuller: Chief Justice of the United States, 1888-1910, at 297 (1950) (“The case was first decided the opposite way, and Harlan’s dissent was originally prepared as the opinion of the Court.”); cf. John E. Semonche, *Charting the Future: The Supreme Court Responds to a Changing Society*, 1890-1920, at 181-82 (1978) (arguing that the style of the dissent arguably indicates it was intended to be a majority opinion).

258 As Barry Friedman points out, this is also how contemporary commentators understood the decision. Friedman, *supra* note 27, at 1417-20.
259 Sunstein, *supra* note 9, at 879.
260 This was suggested in dissent by Holmes as a justifiable rationale for the law, see *Lochner*, 198 U.S. at 73 (Holmes, J., dissenting).
261 On the other hand, it is true that if the state had attempted to justify the constitutionality of the law on the grounds that it explicitly sought to take resources from owners and give them to bakers, even though the bakers were admittedly capable of bargaining on their own, the Court would have rejected that rationale as insufficient to overcome the right of liberty of contract, and as an illicit, arbitrary classification.
Beyond *Lochner* itself, Sunstein discusses only two other *Lochner* era cases in any detail. First, Sunstein quotes one sentence from *Adkins v. Children’s Hospital*, a 5-3 decision that invalidated a minimum wage law for women:

> To the extent that the sum fixed [by the minimum wage statute] exceeds the fair value of the services rendered, it amounts to a compulsory exaction from the employer for the support of a partially indigent person, for whose condition there rests upon him no peculiar responsibility, and therefore, in effect, arbitrarily shifts to his shoulders a burden which, if it belongs to anybody, belongs to society as a whole.\(^\text{262}\)

Next, Sunstein quotes a few lines from *West Coast Hotel v. Parrish*, a 1937 case upholding a minimum wage law for women:

> The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage... casts a direct burden for their support upon the community. What these workers lose in wages the taxpayers are called upon to pay... The community is not bound to provide what is in effect a subsidy for unconscionable employers.

As Sunstein notes, *West Coast Hotel* is commonly thought to signify the end of the *Lochner* era. Sunstein contrasts the quoted language from *Adkins* and *West Coast Hotel* to show that the *Lochner* era ended when the Court shifted from using government inaction as a baseline, to understanding that existing distributions of wealth are themselves a product of government action, and therefore should not serve as the baseline for constitutional analysis. Unfortunately, according to Sunstein, the Court, failed to seize on this point to transform constitutional jurisprudence, instead ultimately concluding that the lesson of *Lochner* was to avoid judicial activism, especially in the economic realm. For the reasons discussed below, Sunstein’s interpretation of *Adkins* and *West Coast Hotel* is unpersuasive.

### A. Adkins

Sunstein’s reliance on one sentence from *Adkins* as representative of an entire constitutional era is tendentious. The quoted language from *Adkins* not only does not represent *Lochner* era jurisprudence as a whole,\(^\text{263}\) it is only partly representative of *Adkins*. *Adkins* suggested that the most constitutionally suspect aspect of the minimum wage law in question was that it placed an arbitrary, unfair burden on employers who should not be expected to bear the costs of supporting employees who lacked the skills to earn a better wage.\(^\text{264}\) The Court, however,

\(^{262}\) *Adkins* v. Children’s Hospital, 261 U.S. 525, 557-58 (1923).

\(^{263}\) Six years earlier, in *Stetler v. O’Hara*, 243 U.S. 629 (1917), the Court split 4-4 in upholding a minimum wage law for women. Had Justice Brandeis not recused himself, a clear majority would have voted to uphold the statute. *Adkins* only received five votes, and lost the votes of Taft and Sanford, who usually voted with the Court’s *Lochnerians*. Brandeis again recused himself, but would certainly have voted with the dissenters.

\(^{264}\) Sutherland also pointed out that if the law actually accomplished the end of requiring an employer to pay an employee more than she was worth, the law would ultimately fail to achieve its goal in the long term, because employers cannot indefinitely pay workers more than the workers contribute to the firm. *Adkins* v. Children’s Hosp., 261 U.S. 525, 557 (1923).
also suggested that the law was arbitrary because it (1) purported to provide a minimum living wage for women, yet assigned different wages to women in different occupations, and did not take into account the disparate needs of different women;\(^{265}\) (2) sought to protect the right to liberty of contract of both the employers and the workers subject to the minimum wage, one of the latter of whom appeared as a plaintiff before the Court after losing her job when the wage law went into effect;\(^{266}\) (3) “[the power to fix high wages connotes, by like course of reason, the power to fix maximum wages”;\(^{267}\) and (4) women were, after passage of the Nineteenth Amendment, fully equal citizens, which in turn created

\(^{265}\) Id. at 556-57.

\(^{266}\) Id. at 555 n.1 (noting that one of the plaintiffs lost her job due to the minimum wage law).

\(^{267}\) The majority suggests that “the same argument which has been here urged to strip the employer of his constitutional liberty of contract in one direction will be utilized to strip the employee of his constitutional liberty of contract in the opposite direction...” [The good of society as a whole cannot be better served than by the preservation against arbitrary restraint of the liberties of its constituent members.” Id. at 563. Chief Justice Taft, dissenting, thought this was an important consideration in the majority’s ruling. See id. at 564-65 (Taft, C.J., dissenting) (“[The majority’s] conclusion seems influenced by the fear that the concession of the power to impose a minimum wage must carry with it a concession of the power to fix a maximum wage. This, I submit, is a non sequitur. A line of distinction like the one under discussion in this case is, as the opinion elsewhere admits, a matter of degree and practical experience and not of pure logic. Certainly the wide difference between prescribing a minimum wage and a maximum wage could as a matter of degree and experience be easily affirmed.”). Fear that upholding legislation purporting to benefit workers would ultimately lead to legislation harming workers was a consistent theme during the Lochner era. See, e.g., Wilson v. New, 243 U.S. 332, 387 (1917) (Pinney, J., dissenting) (“If Congress may fix wages of trainmen in interstate commerce during a term of months, it may do so during a term of years, or indefinitely. If it may increase wages, much more certainly it may reduce them. If it may establish a minimum and a maximum wage and a maximum wage could as a matter of degree and experience be easily affirmed.”).

\(^{266}\) Id. at 389 (McReynolds, J., dissenting) (“considering the doctrine now affirmed by a majority of the court as established, it follows as of course that Congress has power to fix a maximum as well as a minimum wage for trainmen”); cf. Coppage v. Kansas, 236 U.S. 1, 20 (1915) (“can there be one rule of liberty for the labor organization and its members, and a different and more restrictive rule for employers? We think not...”); Adair v. United States, 208 U.S. 161, 175 (1908) (“The right of a person to sell his labor upon such terms as he deems proper, is in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it.”); In re Morgan, 58 P. 1071 (Colo. 1889) (“If, to protect the health of workmen engaged in these two occupations, the legislature may limit them to eight hours per day, may it reafter, up on the ground that idleness, resulting from short hours of labor, leads to drunkenness and gambling, and industry, promoted by longer hours, to happiness and health, enact that workmen must labor at these occupations fourteen or sixteen hours per day.”). The American Federation of Labor consistently opposed minimum wage laws for men, fearing that the “same law may endeavor to force men to work for a minimum wage scale.” NANCY WOLOCH, MULLER v. OREGON: A BRIEF HISTORY WITH DOCUMENTS 4 (1996) (quoting Samuel Gompers, President, American Federation of Labor). As late as the early 1930s, most union leaders opposed minimum hours laws for men. ALICE KESSLER-HARRIS, IN PERSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH-CENTURY AMERICA 71 (2001).

The fear that minimum wage laws would lead to maximum wage laws had a reasonable basis. As both the majority and the dissent acknowledged, employers would not ultimately be willing to pay workers more than their worth. If the labor market was competitive, the market wage would be approximately equal to marginal productivity. If the minimum wage law raised wages beyond the market wage, firms would necessarily fire workers now earning more than their marginal product. A logical governmental response would be to forbid firms to fire their low-wage employees. Such a ban, however, would mean that the firms would lose money and go bankrupt. The next logical response by government would be either to set a maximum wage, so that firms could use some of the money they previously paid their high-wage employees to cover the minimum wage for low-wage employees, or simply nationalize industries and determine all wages by fiat. This sort of government control over employment and wages actually did arise in countries like Argentina, resulting in the destruction of both liberty and prosperity in a formerly very prosperous nation. See generally Rome G. Brown, The Statutory Minimum Wage, 22 CASE AND COMMENT 281, 286 (1915) (explaining why minimum wage laws may lead to broad government control over wages).
a presumption that laws subjecting women to special disabilities or privileges are unconstitutional.²⁶⁸

The Court, then, noted several reasons the minimum wage law for women was unconstitutional, but Sunstein mentions only one of them. The majority opinion received just five votes. Given the rarity of concurrences at the time,²⁶⁹ it is entirely possible, perhaps likely, that not every Justice agreed with each of the Court’s rationales. Indeed, it is possible that none of the rationales, taken individually, would have received a majority.

B. West Coast Hotel

The language quoted by Sunstein from *West Coast Hotel* appears as an afterthought in that opinion, “an additional and compelling consideration which recent economic experience has brought into a strong light.”²⁷⁰ The *West Coast Hotel* Court’s primary argument did not directly contradict Lochner’s protection of liberty of contract.²⁷¹ Rather, the Court argued that liberty of contract was merely a subset of liberty. Legislatures were permitted to abrogate it in the public

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²⁶⁸ Justice Sutherland, who wrote *Adkins*, was undoubtedly sincere in his advocacy of women’s rights, having been an advocate of women’s suffrage and the Equal Rights Amendment in his earlier political career. See *Speech of Senator George Sutherland of Utah, at the Woman Suffrage Meeting, Belasco Theater 3-4* (Dec. 13, 1915) (“To my own mind the right of woman to vote is as obvious as my own. . . . women on the average are as intelligent as men, as patriotic as men, as anxious for good government as men. . . . to deprive them of the right to participate in the government is to make an arbitrary division of the citizenship of the country upon the sole ground that one class is made up of men, and should therefore rule, and the other class is made of women, who should, therefore, be ruled.”). Sutherland was an adviser to Alice Paul, leader of the National Woman’s Party, which advocated an Equal Rights Amendment that, among other things, would have banned special protective legislation for women. See Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 Harv. L. Rev. 94, 1013 (2002). Felix Frankfurter attacked Sutherland’s opinion in *Adkins* as a “triumph for the Alice Paul theory of constitutional law, which is to no little extent a reflex of the thoughtless, unconsidered assumption that in industry it makes no difference whether you are a man or woman.” *Quoted in Elizabeth Faulkner Baker, Protective Labor Legislation: With Special Reference to Women in the State of New York* (1925). Just one year after *Adkins*, the Court upheld a law banning night work for women, because common knowledge suggested that women have weaker constitutions than have men. *Racine v. New York*, 264 U.S. 292, 293-95 (1924). By contrast, in *Adkins* the Court argued that women were just as capable of negotiating a fair wage contract as were men. No doubt an additional factor in *Racine* was a disinclination by the Court to overrule *Miller v. Oregon*.


²⁷¹ See Ackerman, *supra* note 2, at 364 (“Hughes’s opinion cited Lochner with approval, accepted the idea that the Due Process Clause contains a principle of freedom of contract, and patiently reviewed the cases limiting this basic Lochnerian principle.”); Julie Novkov, *Constituting Workers, Protecting Women: Gender, Law, and Labor in the Progressive Era and New Deal Years* 12 (2001) (“West Coast Hotel represented the logical extension of a line of development that had started before the turn of the century.”); Novkov, supra, at 14 (“West Coast Hotel emerges not as a case in conflict with earlier jurisprudence, but rather as an opinion in dialogue with cases such as Lochner, *Muller v. Oregon*, and *Adkins v. Children’s Hospitals*.
interest, as other Supreme Court precedents during the Lochner era had shown.\textsuperscript{272} Given economic conditions during the Depression, the Court could not say it was unreasonable for a state legislature to try to guarantee women workers a living wage, even if the statutory means chosen harmed potential workers who could not command the minimum.\textsuperscript{273}

West Coast Hotel also exhibited less solicitude for women’s rights than did Adkins. The West Coast Hotel Court adopted a more traditional, patriarchal view of women’s place in society, stating that “though limitations upon personal and contractual rights may be removed by legislation, there is that in [women’s] disposition and habits of life which will operate against a full assertion of those rights.”\textsuperscript{274} Like the necessitous miners of Holden v. Hardy, women could not be expected to protect their own interests. The majority noted that the Court had acknowledged women’s special vulnerability in Muller v. Oregon.\textsuperscript{275} West Coast Hotel also cited Chief Justice Taft’s dissent in Adkins and the Court’s opinion in Radice v. New York,\textsuperscript{276} a 1924 case upholding a law banning women from working at night in restaurants, as further support for the view that special protection for women workers did not violate the Constitution. The women’s rights part of the Court’s holding also did not depend on a rejection of Lochner era jurisprudence, because the opinions the Court relied upon—Muller, Taft’s dissent in Adkins, and Radice—were well within the moderate Lochnerian mainstream.\textsuperscript{277}

As we have seen, Sunstein’s reliance on the quoted excerpts from Adkins and West Coast Hotel does not give the reader anything close to a full picture of what was going on in those cases, or in the Lochner era as a whole. But even considering only the language Sunstein excerpts, his interpretation of the meaning

\textsuperscript{272} See Charles W. McCurdy, The Liberty of Contract Regime in American Law, in THE STATE AND FREEDOM OF CONTRACT 161, 194 (Harry N. Scheiber, ed. 1998) (“What the Court’s 1937 decision firmly established was that in constitutional law, at least, the labor contract could not be regarded as a special one. The presumption of constitutionality applied to labor laws.”).

\textsuperscript{273} West Coast Hotel, 300 U.S. at 398-400.

\textsuperscript{274} Id. at 394-95. By contrast, Sutherland wrote in dissent: “The common law rules restricting the power of women to make contracts have, under our system, long since practically disappeared. Women today stand upon a legal and political equality with men. There is no longer any reason why they should be put in different classes in respect of their legal right to make contracts; nor should they be denied, in effect, the right to compete with men for work paying lower wages which men may be willing to accept. And it is an arbitrary exercise of the legislative power to do so.” Id. at 411-12.

\textsuperscript{275} Id. at 394 (citing Muller v. Oregon, 208 U.S. 412 (1908)).

\textsuperscript{276} Id. at 395-96 (citing Adkins v. Children’s Hosp., 261 U.S. 525 (1923) (Taft, C.J., dissenting)).

\textsuperscript{277} Id. at 397 (citing Radice v. New York, 264 U.S. 292 (1924)).

\textsuperscript{278} Taft’s opinion in Adkins fits in this category, even though it was a dissent. In 1917, the Court had split 4-4 on the issue of minimum wages for women, Stetler v. O’Hara, 243 U.S. 629 (1917), with Brandeis, who would have been the fifth vote to uphold the law, recused. Curiously, Justice McKenna, who voted with the majority in Adkins (and Lochner), also voted with the majority in Bunting v. Oregon, the 1917 case upholding a maximum hours law for industrial workers. Had McKenna switched his vote, Adkins would have been a 4-4 decision (with Brandeis again recused). Perhaps McKenna’s vote was the reason Taft raised his belief that Lochner had been overruled sub silentio in Bunting. In any event, Taft shared the general premises of Lochnerian jurisprudence, but disagreed with the majority in this instance. One must recall that Lochner was an extremely close case, and that all of the dissenters save Justice Holmes shared the underlying premise of the majority that liberty of contract is a fundamental right.
of \textit{West Coast Hotel}'s rejection of \textit{Adkins} is highly questionable. According to Sunstein:

In \textit{Adkins}, the Court saw minimum wage legislation as requiring a subsidy to the public from an innocent employer. Such legislation was thus a kind of “taking” from A to B. According to the Court, if B is needy, it is not A, but the public at large, who should pay. In \textit{West Coast Hotel}, it is the failure of a state to have minimum wage legislation that amounts to a subsidy—this time, from the public to the employer. The \textit{common law system}, for the West Coast Hotel Court, turns out to subsidize “unconscionable employers.”

Recall that Sunstein explained earlier in \textit{Lochner’s Legacy} that “the common law system” means the “allocation of rights of use, ownership, transfer, and possession of property associated with ‘laissez-faire’ systems and captured in the common law of the late nineteenth century.” Yet in \textit{West Coast Hotel}, the laissez-faire system of common law rights is not providing a subsidy to employers. Rather, the public welfare system is the source of the subsidy, a point further emphasized by the Court in language deleted by Sunstein and replaced by ellipses.

The language Sunstein quotes from \textit{West Coast Hotel}, then, assumes a baseline of government inaction. Had the government not established a welfare system, unconscionable employers would not have been able to rely on the public fisc to subsidize their exploitation of women workers by paying them less than their market wage.

\footnote{Sunstein, \textit{supra} note 37, at 876 (emphasis added).}

\footnote{Id. at 882 n.49.}

\footnote{The language deleted by Sunstein is as follows: “We may take judicial notice of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved. It is unnecessary to cite official statistics to establish what is of common knowledge through the length and breadth of the land. While in the instant case no factual brief has been presented, there is no reason to doubt that the state of Washington has encountered the same social problem that is present elsewhere.” \textit{Parrish}, 300 U.S. at 399.}

\footnote{This argument did not appear in the \textit{West Coast Hotel} briefs, but a very similar argument was made by Felix Frankfurter, albeit with less emphasis on public relief payments as the source of the subsidy, in the brief he wrote in \textit{Adkins v. Children’s Hospital}: \textit{Brief for Appellants, Adkins v. Children’s Hosp.} (Nos. 795 & 796), 261 U.S. 525 (1923). \textit{Brief for Appellants} at xlii-xlili. Frankfurter explained:

If the employer and women employees, whose wages are below the established minimum, were completely isolated from all reliance upon the outside public no bargain for employment at less than a living wage would be possible, because the deficit between the proposed payment for the labor and the cost of its production and maintenance could not be supplied—or, certainly, could not be supplied for long and maintain American standards of civilization. Without assistance from the public in some form or other no employer could obtain labor below cost nor could any woman give it. In other words, a contract for labor below its cost must inevitably rely upon a subsidy from outside, or result in human deterioration. To the extent of this subsidy, or the deterioration, the public is necessarily concerned; thereby the public is drawn into the situation; it is not an intermeddler.}

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by Sunstein, in the baseline world of a pure laissez-faire system, minimum wage laws could not logically pass constitutional muster. Precisely because the government had acted, however, employers could no longer claim the right to liberty of contract, but not because the lack of minimum wage laws is inherently a subsidy to employers, as Sunstein would have it. Rather, an employer cannot claim the right to liberty of contract when what he is really asking for is the liberty to loot the public fisc.

Moreover, later Supreme Court cases show no awareness of what Sunstein claims was the West Coast Hotel Court’s decision to reject government inaction as a baseline for constitutional analysis. Sunstein would be on solid theoretical ground if he argued that the West Coast Hotel Court missed a golden opportunity to reject traditional baseline analysis in favor of a legal realist perspective that treated the status quo as a product of government decisions, just as changes to the status quo result from government decisions. But his claim that the Court actually adopted this analysis is untenable.283

CONCLUSION

According to Cass Sunstein’s influential article, Lochner’s Legacy, the Lochner era Court believed that common law rules were immutable and prepolitical, and the Court therefore sought to protect status quo distributions of wealth from legislative intervention. Sunstein deserves credit for breaking with cruder interpretations of Lochner that dominated the legal literature before he published

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This may become still clearer if we frame the implicit terms of the negotiation which the employer demands the unconditional right to make with women employees.

Employer:

“I am to pay to you and you are to receive from me $35.00 a month (and board). You are to give to me and I am to receive from you all your working energy.”

Woman Employee:

“But, sir, this working energy, of which you are to receive the total, costs at the very least $166.50 a week. How are we to get the balance?”

Employer:

“We can get it at least in one of three ways: (1) members of your family engaged in other industries will supply it rather than see you starve, or (2) you can “go without” or (3) you can get it from public or private charity.”

This is a plain case of relying upon a public subsidy for a private interest, and a State or Congress, acting for the District, has a special right to impose conditions upon which the industry or the employee may enjoy the subsidy or even to refuse it absolutely.

283 McCurdy notes the New Deal Court’s failure to adopt the ProgressiveRealist agenda. McCurdy, supra note 272, at 196 ("At no point did the Court suggest that contracts between parties with unequal bargaining strength were inherently coercive. At no point did it endorse the concept of 'positive liberty.' And at no point did it embrace the method of 'sociological jurisprudence.'"); see generally Winter, supra note 78, at 1523 (also disputing Sunstein’s understanding of West Coast Hotel).
Lochner’s Legacy. Sunstein recognizes that the Justices were attempting to enforce what they saw as the traditional rights and liberties of the American people.

Where Sunstein errs is in arguing that the Lochner era Court’s vision of such rights was limited to, and coextensive with, the Langdellian common law. Similar understandings of Lochnerian jurisprudence had been floating around the legal academy for decades, with believers in sociological jurisprudence, Legal Realists, and Critical Legal scholars, successively, attacking Lochnerian

284 The standard view had been that the pro-Lochner Justices were either cold-hearted reactionaries or foolish buffoons (or both!) who intentionally sought to protect the interests of large corporations at the expense of workers. E.g., 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); Richard Hofstadter, 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); 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, 1887-1985, at 236 (1960); Benjamin Twiss, Lawyers and the Constitution: How LaFave Faire Came to the Supreme Court 154 (1942); Morton White, Social Thought in America: The Revolt Against Formalism 104 (1949); 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).

285 The Lochner era Court was indeed committed to preserving the “common law,” but what they meant by this was the fundamental rights of the Anglo-American people, not specific common law rules. Some of these rights were coextensive with common law rules, but the Court’s understanding of the rights it needed to preserve excluded many common law rules, and included rights not protected by common law doctrine, including the free-floating right of liberty of contract. See David E. Bernstein, Besieging “The Constitution Besieged”: Understanding the True Origins of Lochner (submitted for publication 3/2003).

286 E.g., Roscoe Pound, Common Law and Legislation, 21 Harv. L. Rev. 383 (1908). For critiques of the Lochner era Court’s purported formalism, see Louis D. Brandeis, The Living Law, 10 Ill. L. Rev. 463, 467 (1916) (bemoaning the alleged abstract reasoning and legal formalism that led judges to invalidate reform legislation); Roscoe Pound, Mechanical 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); Frankfurter, supra, note 13, at 364 (accusing courts of relying on “a priori theories” and “abstract assumptions” in liberty of contract cases).

287 E.g., Robert Hale, Coercion and Distribution in a Supposedly Noncoercive State, 38 Pol. Sci. Q. 470 (1923) (arguing that bargaining power is a function of legal rules and not part of pre-existing natural order); see generally Thomas C. Grey, Langdell’s Orthodoxy, 45 U. Pitt. L. Rev. 1, 39 (1983); (“Progressive and later New Deal lawyers saw classical orthodoxy as a form of conservative ideology. In part this was a confusion of Langdellian legal science with the laissez-faire constitutional doctrines epitomized by the Lochner decision.”); Grey, supra note 77 (“Starting with Holmes in the 1890s, reformist American legal thinkers yoked the private-law conceptualism of Langdell and his followers to the activist classical-liberal judicial review of the Lochner era. In doing so, they created a single impressive and threatening bogeyman, Holmes’s ‘fallacy of logic,’ Pound’s ‘mechanical jurisprudence,’ Cardozo’s ‘demon of formalism,’ and Felix Cohen’s ‘transcendental nonsense.’”); James Wilson, The Morality of Formalism, 33 UCLA L. Rev. 460 (1985) (noting that the Legal
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jurisprudence for its purported formalism. If Langdellian jurisprudence ossified the common law of torts, contracts, and property, by assuming that it was “natural” and could be used to create a “science of law,” the *Lochner* era Justices compounded the sin by formalistically constitutionalizing the common law.\(^{289}\) Sunstein was the first modern scholar to clearly articulate this historical understanding of *Lochner*,\(^{290}\) and, importantly, to use it to engage in a wide-ranging critique of “*Lochner*-like presumptions” in modern constitutional law.\(^{291}\)

Realists attacked *Lochner* and its progeny as formalistic).

\(^{289}\) Kennedy, *Form and Substance*, supra note 79, at 1746, 1747 (explaining that underlying the theory of laissez faire was the view that “the outcome of economic activity within a common law framework of contract and tort rule mechanically applied would be a neutral allocation of resources and distribution of income”); if this was true, “it made sense to describe the legal order itself as at least neutral and non-political if not really ‘natural!’”; Kennedy, *Toward an Historical Understanding*, supra note 79, at 9-14 (arguing that the *Lochner* Justices, minus Holmes, agreed that the Court’s main function was a limited one, to “carry out the objective task of classification”).

\(^{290}\) William P. LaPiana, *Thoughts and Lives*, 39 N.Y.L. SCH. L. REV. 607, 624 (1994) (“Langdell and to some lesser degree his colleagues at Harvard Law School were lumped with the bad guys and made exemplars of a wooden and over-intellectualized approach to law. It is as if Langdell and the early advocates of legal education founded on the case method were one with the justices of the United States Supreme Court who produced the decision in *Lochner v. New York*.”). The association of Langdellian formalism with *Lochner* remains a common one. E.g., Richard H. Pildes, *Forms of Formalism*, 66 U. CHI. L. REV. 607, 620 (1999) (“Formalism was a project of rationalizing the central principles and methods of the common law, for purposes of both common law adjudication and, in the *Lochner* era, for constitutional doctrines that drew on common law concepts.”); Gerald B. Welkauffer, *Systems of Belief in Modern American Law: A View from Century’s End*, 49 AM. U. L. REV. 1, 4 (1999) (referring to “[t]urn-of-the-century formalism of the kind associated with Christopher Columbus Langdell and his Harvard Law School associates and with the constitutional jurisprudence of the *Lochner* court”); see generally Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and The Bill of Rights*, 84 IOWA L. REV. 941, 977 (1999) (noting “the prevailing wisdom that the *Lochner*-era Court was rigidly formalistic” and explaining why this is incorrect).

\(^{291}\) Duncan Kennedy had made similar points, but not as coherently, and not as accessibly, as his work was not published in a law review. See sources cited supra note 79. Mark Tushnet and Mike Seidman both suggested to me that one reason that Sunstein’s article has been so influential is that it reflects ideas that were widespread among law professors when the article appeared, but had not been properly articulated in the law review literature.

*Lochner*’s Legacy is a brilliant and provocative work of constitutional theory, even while being weak in its claims regarding history. The brevity of his historical analysis suggests that Sunstein did not conceive of *Lochner*’s Legacy as an original work of history. In fact, Sunstein himself suggests that the primary purpose of the Article was normative, to raise doubts about the foundations of modern jurisprudence under the First and Fourteenth Amendment, with a historical analysis supplementing his normative point, rather than the normative point flowing from historical research. See Sunstein, supra note 37, at 875. And indeed, *Lochner*’s Legacy challenged complacent assumptions that the status quo is a natural baseline from which to judge the constitutionality of legislation.

Ironically, however, *Lochner*’s Legacy’s primary influence, if citations in Supreme Court cases and law reviews are any indication, has been its understanding of the *Lochner* era, not its critique of status quo baselines in modern constitutional jurisprudence. While the four liberal Justices have adopted Sunstein’s historical thesis, none has expressed a willingness to reject status quo baselines. This is true even in the context of determining the constitutionality of campaign finance laws, see, e.g., Nixon v. *Shrink Missouri Government PAC*, 528 U.S. 377 (2001) (ignoring Sunstein’s understanding of *Buckley v. Valeo* as *Lochnerian*), Sunstein’s favorite example in *Lochner*’s Legacy and other works of how modern constitutional law repeats the mistake of *Lochner*. See, e.g., Sunstein, supra note 37,
While the anti-formalist critique of *Lochner* has satisfied a host of ideological constituencies within the legal profession over the decades, there is scant evidence that the *Lochner* era Court sought to constitutionalize common law rules, or that it believed that status quo distributions of wealth were unassailable by legislation.292 Rather, the evidence strongly shows that the *Lochner* era Court permitted legislatures to change common law rules for public policy reasons. The Court even permitted the absolute abolition of common law rules, as in the case of the substitution of preemptive statutory workers’ compensation for the common law rules of employer liability for workers’ injury. Across a broad range of cases and over several decades, the *Lochner* era Court declared that “no one has a vested right in any particular rule of the common law.”293

The Court also upheld a wide range redistributive laws, ranging from antitrust laws intended to help small proprietors at the expense of large corporations to estate taxes to various ameliorative labor laws. Moreover, Sunstein’s thesis regarding *Lochner* cannot explain the Supreme Court’s civil liberties decisions of the 1920s and early 30s, which were clearly intertwined with, and dependent on, the infamous economic liberties cases, but had nothing to do with preserving common law status quo distributions. *Lochner*’s Legacy, then, shows the danger of applying an ideological construct to constitutional history for presentist purposes, while ignoring or neglecting contrary evidence.294

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292 See generally Grey, supra note 77 (“The joiner of Langdelean private-law theory and *Lochner*-type public law to create a single impressive target—the Demon of Formalism—was a creative act on the part the Progressive legal thinkers, starting with Holmes. The two tendencies were dissimilar in important ways, and could as easily have been kept distinct or even set in opposition to each other. But Holmes, Pound, Cardozo and the others got them joined in the collective mind of the profession, so that many American lawyers have come to associate the evils of *Lochner* with something called called formalism.”).

293 The precise quote is from Truax v. Corrigan, 257 U.S. 312, 329 (1921), but the sentiment is reflected in many other decisions.

294 Sunstein, however, has been more inclined to celebrate the constitutional scholar’s “special project” in loosely interpreting constitutional history than to engage in heavy historical lifting:

> The historian is trying to reimagine the past, necessarily from a present-day stand point, but subject to the discipline provided by the sources and by the interpretive conventions in the relevant communities of historians. By contrast, the constitutional lawyer is trying to contribute to the legal culture’s repertoire of arguments and political/legal narratives that place a (stylized) past and present into a trajectory leading to a desired future. On this view, the historically-minded lawyer need not be thought to be doing a second-rate or debased version of what the professional historians do well, but is working in a quite different tradition with overlapping but distinct criteria.


Sunstein has been criticized in other contexts for making broad assertions based on dubious historical analysis. Professor Martin Flaherty has dubbed Sunstein’s work on the “Republican Revival,” which was largely contemporaneous with his work on *Lochner*, as “history ‘lite.’” Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism,* 95 COLUM. L. REV. 523, 567-70 (1995). Another one of Sunstein’s ventures into history received the following assessment: “riddled with errors of fact, distortions of interpretation, and omissions of key evidence—even from the very sources cited.” John O. McGinnis, *The President, the Senate, the Constitution and the Confirmation*
Unfortunately, scholarship about the *Lochner* era has consistently been distorted by presentist concerns because *Lochner* has been the leading case in the “anti-canon,” the group of wrongly decided cases that help frame what the proper principles of constitutional interpretation should be. No scholar who wanted their work taken seriously could articulate a theory suggesting *Lochner* was correctly decided, and it was *de rigueur* to show how one’s preferred theory of constitutional interpretation was the precise opposite of *Lochner*. The tenor of *Lochner’s* Legacy, then, was what one would expect from a leading constitutional theorist circa 1987.

Today, the willingness of mainstream constitutional scholars such as Bruce Ackerman, Owen Fiss, and Rebecca Brown to use *Lochner* to support their understanding of the Fourteenth Amendment suggests that *Lochner* is finally starting to lose its anti-canonical status. Meanwhile, there has been an explosion of serious historical scholarship about *Lochner* over the last decade, which, one assumes, will ultimately preempt Sunstein’s far more casual analysis. Constitutional history does not support Mr. Cass Sunstein’s *Lochner’s* Legacy.