George Mason University
SCHOOL of LAW

Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism
David E. Bernstein
03-18

LAW AND ECONOMICS WORKING PAPER SERIES

The abstract of this paper can be downloaded without charge from the Social Science Research Network Electronic Paper Collection:
http://ssrn.com/abstract_id=395620
Lochner Era Revisionism, Revised: *Lochner* and the Origins of Fundamental Rights Constitutionalism

David E. Bernstein

* Visiting Professor, Georgetown University Law Center; Professor, George Mason University School of Law. E-mail: dbernste@gmu.edu. Jim Ely, Cynthia Estlund, Barry Friedman, Richard Friedman, Tom Grey, Renee Lerner, Michael Solimine, Nate Oman, Robert Post, Michael Seidman, and John Witt have provided helpful comments and suggestions, as did participants in faculty workshops at Columbia Law School, Georgetown University Law Center, and the University of Michigan School of Law. The author thanks the Law and Economics Center at the George Mason University School of Law for financial support for this Article. Megan Fotouros of George Mason’s library staff diligently tracked down dozens of obscure sources needed for this Article. Jeffrey Jackson (Georgetown L.L.M. 2003) and Mollie Malone (GMU 2004) provided excellent research assistance.
Lochner v. New York and its eponymous jurisprudential era have been central to constitutional discourse and debate in the United States for nearly one hundred years. Until recently, the legal community’s understanding of the Lochner era was clouded by myths left over from the ideological and political battles of the Progressive and New Deal eras. In particular, the Lochner era Justices were portrayed as reactionary Social Darwinists who sought to impose a system of economic laissez-faire on the public. More recently, revisionist historians have disproved this and other myths, and have attempted to construct a more historically-grounded understanding of the Lochner era.

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

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

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

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

Lochner v. New York\(^1\) and its eponymous jurisprudential era have been central to constitutional discourse and debate in the United States for nearly one hundred years.\(^2\) For many decades, the history of the Lochner era’s “substantive due process” jurisprudence was portrayed as a simple

---

\(^1\) 198 U.S. 45 (1905).

\(^2\) Even today, Supreme Court Justices across the political spectrum use Lochner as a negative touchstone with which they verbally bludgeon their colleagues. See Alden v. Maine, 527 U.S. 706, 814 (1999) (Souter, J., dissenting) (“the Court’s late essay into immunity doctrine will prove the equal of its earlier experiment in laissez-faire, the one being as unrealistic as the other, as indefensible, and probably as fleeting”); Seminole Tribe v. Florida, 517 U.S. 44, 166 (1996) (Souter, J., dissenting) (“The majority today, indeed, seems to be going Lochner one better.”); United States v. Lopez, 514 U.S. 549, 604 (1995) (Souter, J., dissenting) (comparing the Court’s decision limiting the scope of the Commerce Clause to Lochner); Dolan v. City of Tigard, 512 U.S. 374, 406-09 (1994) (Stevens, J., dissenting) (equating the majority’s refusal “to identify a sufficient nexus between an enlarged building with a newly paved parking lot and the state interests in minimizing the risks of flooding and traffic congestion” with the Lochner Court’s refusal to presume a connection between the maximum hours regulation in that case and the state interests in protecting the public health); C & A Carbone, Inc., v. Town of Clarkstown, 511 U.S. 383, 423-24 (1994) (Souter, J., dissenting) (“No more than the Fourteenth Amendment, the Commerce Clause ‘does not enact Mr. Herbert Spencer’s Social Statics . . . or to embody a particular economic theory, whether of paternalism . . . or of laissez faire . . . ’”), quoting Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting); Planned Parenthood v. Casey, 505 U.S. 833, 959-61 (1992) (Rehnquist, C.J., dissenting) (analogizing Roe v. Wade to Lochner). Justices in the majority feel obligated to distinguish their opinions from Lochner. E.g., College Savings Bank v. Florida Prepaid Post Secondary Educ. Expense Bd., 527 U.S. 666, 690 (1999) (“we must comment upon Justice Breyer’s comparison of our decision today with the discredited substantive-due-process case of Lochner v. New York . . . .”); United States v. Lopez, 514 U.S. 549, 601 n.9 (1995) (Thomas, J., concurring) (“Nor can the majority’s opinion fairly be compared to Lochner v. New York . . . .”); TXO Productions Corp. v. Alliance Resources Corp., 509 U.S. 443, 455 (1993) (Stevens, J.) (plurality opinion) (distinguishing reliance on specific sound Lochner era precedents with relying on Lochnerian jurisprudence more generally).

---

\(^3\) The phrase “substantive due process” is an anachronism when applied to the Lochner era. No one, including the Justices who typically dissented from the libertarian cases of the era, used this phrase. See James W. Ely, Jr., The Guardian of Every Other Right: A Constitutional History of Property Rights 103-04 (2d ed. 1998); James W. Ely, Jr., Reflections on Buchanan v. Warley, Property Rights, and Race, 51 Vand. L. Rev. 953, 956 (1998); Gary D. Rowe, Lochner Revisionism Revisited, 24 L. & Soc. Inquiry 221, 244 (1999); see also G. Edward White, The Constitution and the New Deal 245 (2000) (explaining that it was not until the 1950s that jurisprudence under the Due Process Clause was separated into “substantive” and “procedural” categories). Morton Horwitz argues that attacks on the substantive aspect of due process were “largely produced by later critical Progressive historians intent on delegitimating the Lochner court.” See
Revisionism Revised

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

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

---

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

Bernstein

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

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

6 See Bell, supra note 4, at 35 (“Called upon to decide pressing questions concerning the relations of labor and capital, the power of state legislatures, and the rights of big business, the courts foresaw impartiality and came down heavily on the side of economic interests.”); LOREN P. BETH, THE DEVELOPMENT OF THE AMERICAN CONSTITUTION, 1877-1910, at 190 (1971) (referring to the Court’s “familiar pattern of favoring employers at the expense of employees”); ARCHIBALD COX, THE COURT AND THE CONSTITUTION 135 (1987) (claiming the Supreme Court engaged in a “willful defense of wealth and power”); HAINES, supra note 3, at 207 (criticizing “judge-made constitutional doctrines supported by the conservative groups of the country and fostered by the extreme individualism of leaders of industry and finance . . . .”); Jacobs, supra note 4, at 24 (“The development of the liberty of contract as a limitation upon the powers of both the state and the national governments was a judicial answer to the demands of industrialists in the period of business expansion following the Civil War.”); A.H. KELLY & W.H. HARBISON, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 498 (4th ed. 1970) (arguing that doctrine of freedom of contract); McCloskey, supra note 4, at 84 (stating that after Lochner the liberty and equality protected by the Fourteenth Amendment amounted to “an unadorned endorsement of the strong and wealthy at the expense of the weak and poor”); ARTHUR SELWYN MILLER, THE SUPREME COURT AND AMERICAN CAPITALISM 50, 57 (1968) (stating that courts protected economic activity from adverse governmental regulation based on principles and opinions that “are singularly devoid of rational reasons for the decisions”); JOHN E. SEMONCHE, CHARTING THE FUTURE: THE SUPREME COURT RESPONDS TO A CHANGING SOCIETY, 1890-1920, at 430-31 (1978) (describing the Supreme Court’s “hostility to union activity” and to “laws that encouraged unionism”); MELVIN UROFSKY, A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES 533-55 (1988) (attributing Lochner to anti-union bias by the Supreme Court); WILLIAM M. WIECEK, LIBERTY UNDER LAW: THE SUPREME COURT AS AMERICAN LIFE 121 (1988) (finding that the Supreme Court and lower federal and state courts “distrusted labor organization[s]”); Robert L. Hale, Labor Legislation as an Enlargement of Individual Liberty, 15 AM. LAB. LEGAL REV. 155, 155 (1925) (arguing that the process of meeting the burden of proof in cases challenging labor legislation weighs in favor of big business); cf. JAMES W. ELY, JR., THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER, 1888-1910, at 1 (1995) (“Historians have been all too prone to mimic the image, fixed by the Progressives, of a bench single-mindedly devoted to safeguarding corporate interests.”); LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 589 (2d ed. 1988) (criticizing the economic, social, and judicial philosophy espoused by the Lochner Court); WIECEK, supra, at 126 (claiming that “freedom of contract meant freedom of the rich to impose terms”); cf. Michael J. Phillips, Another Look at Economic Substantive Due Process, 1987 WIS. L. REV. 265, 275 (depicting Lochner as jurisprudence as vulnerable “to the claim that [it] benefitted established economic interests at the expense of the relatively powerless”); Melvin I. Urofsky, Myth and Reality: The Supreme Court and Protective Legislation in the Progressive Era, 1983 SUP. CT. HIST. SOC’y Y.B. 53, 58 [hereinafter, Urofsky, Myth] (stating that decisions like Lochner “gave credence to charges that the bench had gone over completely to the service of big business in opposing humane reform legislation”).

7 E.g., J. M. Balkin, Ideology and Counter-Ideology from Lochner to Garcia, 54 UMKC L. REV. 175 (1986) (describing Lochner as elevating formalist logic above empirical data); Louis D. Brandeis, The Living Law, 10 ILL. L. REV. 463, 467 (1916) (bemoaning the purported abstract reasoning and legal formalism that led judges to invalidate reform legislation); Roscoe Pound, Mechanical
prominently Justices Oliver Wendell Holmes and Louis Brandeis, protested against this abuse of judicial power. These dauntless Justices’ views emerged triumphant when the heroic Franklin Roosevelt stood up to the Nine Old Men and, over time, remade the Court in his image.8

This morality tale bore only a modest relation to reality. However, it suited the political needs of the Progressive9 and New Deal10 era controversialists who initially wove it. It also played to and to some extent confirmed the political and ideological prejudices in favor of the modern welfare and regulatory state of post-World War II scholars such as Richard Hofstadter and Robert McCloskey, both of whom played significant roles in canonizing the traditional Lochner story.11
Few scholars bothered to question the received wisdom about the
Lochner era. \(^\text{12}\) Until recently, constitutional history was mostly the
province of attorneys and law professors “roaming through history
looking for one’s friends”\(^\text{13}\) to support a preconceived legal or normative
viewpoint. The academic community, meanwhile, was firmly committed
to justifying the New Deal and discrediting its opponents. In the wake
of the Depression and the horrors of Nazism, nothing could discredit the
“Old Court” as well as associating it with laissez-faire capitalism and
Social Darwinism.

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

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


\(^\text{14}\) The manifestation of this in the legal academic realm was the growing influence of Chicago School law and economics. In addition to allowing historians the opportunity to revisit Lochner shorn of the utter revulsion the case used to cause, the growing influence of libertarian economic theory created a boomlet in normative books and articles suggesting that the Supreme Court was wrong to abandon Lochner in the wake of the New Deal. See, e.g., Hadley Arkes, The Return of George Sutherland: Restoring a Jurisprudence of Natural Rights (1995) (defending Justice Sutherland and the Lochner Court’s natural rights jurisprudence); Bernard H. Siegan, Economic Liberties and the Constitution (1980) (defending Lochner and its progeny); Richard A. Epstein, The Mistakes of 1937, 11 George Mason U. L. Rev. 5 (1988) (arguing that the Supreme Court was wrong to abandon Lochner during the New Deal period); Alan J. Meese, Will, Judgment, and Economic Liberty: Mr. Justice Souter and the Mistranslation of the Due Process Clause, 41 Wash. & Mary L. Rev. 3 (1999) suggesting that the court was wrong to completely abandon Lochner; Michael J. Phillips, Entry Restrictions in the Lochner Court, 4 Geo. Mason L. Rev. 405 (1996) (contending that Lochnerian decisions prohibiting monopolization of certain occupations were correct); Note, Resurrecting Economic Rights: The Doctrine of Economic Due Process Reconsidered, 103 Harv. L. Rev. 1363-83 (1990) (calling for a revival of Lochnerian jurisprudence); see generally James W. Ely, Jr., Melville W. Fuller, 1998 J. Sup. Ct. Hist. 35 (defending Lochner and other controversial Fuller Court decisions as forward-looking and consistent with contemporary public opinion and political economy).

\(^\text{15}\) E.g., Alan Jones, Thomas M. Cooley and “Laissez-Faire Constitutionalism”: A Reconsideration,
Revisionism Revised

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


\textsuperscript{17} See \textit{Laura Kalman}, \textit{The Strange Career of Legal Liberalism} (1996) (claiming that constitutional history’s new popularity is attributable to a desire by liberal law professors to stave off conservative originalism); Barry Friedman, \textit{The Turn to History}, 72 \textit{N.Y.U. L. Rev.} 928 (1997) (discussing the increasing prominence of constitutional history).

\textsuperscript{18} E.g., Barry Cushman, \textit{Rethinking the New Deal Court} (1998) (arguing that the seeds of the New Deal era Court’s abandonment of \textit{Lochner} were sown by weaknesses and concessions in \textit{Lochnerian} jurisprudence); James W. Ely, Jr., \textit{The Chief Justiceship of Melville W. Fuller: 1888-1910} (1995) (suggesting that the Fuller Court’s historical reputation is lower than it should be);

James W. Ely, Jr., \textit{The Guardian of Every Other Right: A Constitutional History of Property Rights} 103-04 (2\textsuperscript{nd} ed. 1998) (evincing some sympathy for \textit{Lochner}); Owen Fiss, \textit{The Troubled Beginnings of the Modern State} (1993) (attributing \textit{Lochner} to the Court’s desire to set boundaries for government regulation to protect individual liberty); White, supra note 3, at 21-29 (condemning the traditional story as ahistorical, and criticizing some of the modern revisionists whose historical views are dictated by normative concerns); Charles W. McCurdy, \textit{The Liberty of Contract Regime in American Law, in The State and Freedom of Contract 161} (Harry N. Scheiber, ed. 1998) (adopting the view that \textit{Lochner} was motivated by hostility to “class legislation”); Felice Batlan, \textit{A Reevaluation of the New York Court of Appeals: The Home, the Market, and Labor, 1885-1905}, 27 \textit{L. & Soc. Inquiry} 489, 492 (2002) (claiming that the New York Court of Appeals’ reputation as a leading pro-laissez faire court during the \textit{Lochner} era is undeserved); Joseph Gordon Hylton, \textit{Prelude to Euclid: The United States Supreme Court and the Constitutionality of Land Use Regulation, 1900-1920}, 3 \textit{Wash. U. L. & Pol’y J.} 1 (2000) (concluding that the \textit{Lochner} era Court consistently upheld land use regulations challenged as violations of the Due Process Clause).

A subset of the revisionist literature is a growing body of work discussing \textit{Lochner} from the perspective of race and gender, with the overall theme that \textit{Lochner} had ambiguous, and at times helpful consequences for disenfranchised groups. \textit{E.g.}, David E. Bernstein, \textit{Only One Place of Redress: African Americans, Labor Regulations and the Courts from Reconstruction to the New Deal} (2001) (examining the effect of labor regulations on African Americans, and concluding that \textit{Lochner} generally aided them by invalidating harmful laws); Richard A. Epstein, \textit{Forbidden Grounds}, ch. 3 (1992) (noting that \textit{Lochnerian} doctrine, consistently applied, would have led to \textit{Plessy} coming out the other way); Julie Novkov, \textit{Constituting Workers, Protecting Women: Gender, Law, and Labor in the Progressive Era and New Deal Years} (2001) (discussing the debate over the constitutionality of protective legislation for working women); Nancy Woloch, \textit{Muller v. Oregon: A Brief History With Documents} 28 (1996) (same); David E. Bernstein, \textit{Lochner vs. Plessy: The Berea College Case}, 25 J. Sup. Ct. Hist. 93 (2000) (noting that

SPRING 2003 7
Bernstein

revisionist literature including, in some respects, this Article.

The deluge of *Lochner* revisionism has challenged various aspects of the conventional story, especially the idea that the origins of *Lochnerian*


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


20 E.g., Bruce Ackerman, *We The People: Transformations* 269 (1998) (“The *Lochner* Court was . . . interpreting the Constitution, as handed down to them by the Republicans of Reconstruction. *Lochner* is no longer good law because the American people repudiated Republican constitutional values in the 1930s, not because the Court was wildly out of line with them before the Great Depression.”); Segan, supra note 14 (suggesting that the regulations invalidated under *Lochner* were frequently harmful to consumers and small businesses (questioning the idea that in 1937 the Supreme Court buckled to external political pressure when it repudiated *Lochner*); Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (1998) (contending that the *Lochner* era Court was far less doctrinaire than is normally thought, and that the structure of *Lochnerian* jurisprudence made its collapse inevitable); Richard D. Friedman, *Switching in Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. Pa. L. Rev. 1891(1994) (rebutting the claim that FDR’s Court-packing plan induced Justice
Revisionism Revised

Intellectual historians have known for some time that Spencer and his laissez-faire-oriented followers had little impact on American public discourse by the time *Lochner* was decided. Legal historians, meanwhile, have been unable to discern any influence of Social Darwinism on *Lochner* era Justices, with the ironic exception of Justice Holmes, the Court’s most vociferous opponent of Roberts to vote to uphold regulatory legislation).

---

21 This claim never had much going for it. Even though the link between *Lochner* and Social Darwinism was asserted countless times, a close reading of the footnotes in various sources suggests that its purported existence was based on a misreading of Justice Holmes’s dissent in *Lochner* and little else. Holmes famously wrote that “the Fourteenth Amendment does not enact Mr. Herbert Spencer’s *Social Statics.*” *Lochner* v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

Spencer is generally considered, perhaps a bit unfairly, to have been a leading Social Darwinist. See John Gray, Liberalism 31 (1986) (contending that it is unfair to caricature Spencer as a Social Darwinist). To base a theory about an entire line of Supreme Court cases on one sentence in a dissenting opinion is hardly meticulous historical scholarship. But, worse yet, a close reading of the context of the *Social Statics* remark reveals that Holmes did not actually accuse the Court of believing in Social Darwinism, or of otherwise being influenced by Spencer. Rather, Holmes was arguing that the libertarian *sic utere tuo ut alienum non laedes* principle—“use your own property in such a manner as not to injure that of another”—could not be the basis of American constitutional law, and had indeed been rejected in previous cases by the Court itself. Holmes used Spencer as an example of a prominent intellectual who believed the *sic utero* principle should be the basis of law.

Spencer called this the “law of equal freedom.” Herbert Spencer, *Social Statics* (1848). A more apt example for Holmes would have been “Mr. Christopher Tiedeman’s *A Treatise on the Limitations of Police Power in the United States*” (1886) (“The police power of the government is shown to be confined to the detailed enforcement of the [sic utero] maxim.”). Tiedeman was a leading constitutional commentator whose views had far more influence on American early twentieth century American judges than did British philosopher Spencer’s, whose *Social Statics* was published over fifty years earlier. A focus on Tiedeman would also have been misleading, however, because Tiedeman’s views were far more libertarian than anything the *Lochner* Court was willing to enforce.

In any event, Holmes, a master of the flip aphorism, such as the unforgettable “three generations of idiots are enough,” Buck v. Bell, 274 U.S. 200, 207 (1927), chose the foreign, vaguely menacing, and more alliterative Spencer’s *Social Statics*. See Peter Irons, *A People’s History of the Supreme Court* 258 (1999) (“Holmes sprinkled his *Lochner* dissent with the pith aphorisms he delighted in crafting”); see generally William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* 19 (1995) (noting Holmes’s “disdain for facts,” “contempt for views divergent from his own,” “indifference to citing legal precedent,” “reliance on quips,” and “allegiance to elite attitudes”).

22 See, e.g., Robert C. Bannister, *Social Darwinism: Science and Myth in Anglo-American Thought* 58-60 (1979) (stating that few laissez-faire liberals based their beliefs on Social Darwinism); Thomas F. Gossett, *Race: The History of an Idea in America* 168-75 (1963) (asserting that laissez faire liberals recognized need of man to survive by cooperating with his fellow man rather than through power struggles); Donald K. Pickens, *Eugenics and the Progressives* 18-22 (1968) (explaining that the influence of Social Darwinism in the Progressive era was primarily apparent among Progressives).

23 Holmes accepted Spencer’s view of human life as involving the “survival of the fittest,” but rejected laissez-faire in favor of a vision that saw political rent-seeking as just another aspect of man’s battle for survival, in which courts should not intervene. The influence of Darwinism on Holmes was manifest from the early stages of his career. See Oliver Wendell Holmes, *The Gas Stokers’ Strike*, 7 Am. L. Rev. 558, 583 (1873) (“The more powerful interests must be more or less reflected in
Lochner and its progeny. Moreover, given the many ameliorative laws upheld by the Lochner era Court,\(^{24} \) one can hardly plausibly accuse it of supporting a laissez faire “survival of the fittest” society.\(^{25} \)

---

\(^{24}\) Although the conventional narrative ignores this fact, careful scholars have known for decades that until the mid-1920s, well into the Lochner era, the Supreme Court rarely invalidated legislation under the Due Process Clause. Even at the height of the Lochner era in the late 1920s, the Supreme Court upheld most regulatory laws challenged under the Due Process Clause. See Loren P. Beth, The Development of the American Constitution, 1877-1910, at 190 (1971) (“the cases are marked by hesitance, ambiguity, indecisiveness, and inconsistency, and in fact many more of the decisions favored the state than the other way around”); Ray A. Brown, Due Process of Law, Police Power, and the Supreme Court, 40 Harv. L. Rev. 943, 944-45 (1927); Joseph Gordon Hytton, Prelude to Euclid: The United States Supreme Court and the Constitutionality of Land Use Regulation, 1900-1920, 3 Wash. U. J. L. & Pol’y 1 (2000); Michael J. Phillips, The Progressiveness of the Lochner Court, 75 Denv. U. L. Rev. 453, 453 (1998); Urofsky, Myth, supra note 6, at 69-70; Charles Warren, The Progressiveness of the United States Supreme Court, 13 Colum. L. Rev. 294, 295 (1913); cf. Melvin I. Urofsky, State Courts and Protective Legislation During the Progressive Era: A Reevaluation, 72
Revisionism Revised

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

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

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

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

---

31 See Alexander M. Bickel & Benno C. Schmidt, Jr., *The Judiciary and Responsible Government*, 1910-1921 chs. II, V, & VI (1984) (discussing the fate of social legislation challenged in the Supreme Court between 1910 and 1921); cf. Corwin, *Twilight*, supra note 10, at 86 (“during a part of the interval between the *Lochner* and the *Adkins* cases, and especially between 1910 and 1920, the Court was generally dominated by a majority which was distinctly disinclined to interfere with state legislation on the basis of the Fourteenth Amendment, and whose members frequently asserted doctrine which to all practical intents and purposes was the doctrine of presumed constitutionality”).


33 E.g., Fiss, supra note 18.


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

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

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

41 *Gillman, supra* note 40, at 10.
42 *Id.* at 46, 127.
43 *See infra* notes 78 to 84 and accompanying text.
44 *See infra* notes 52 to 76 and accompanying text.
As noted above, the current mainstream revisionist theory among constitutional historians is that the *Lochner* era Supreme Court was motivated by hostility to so-called “class legislation.” This was also known as “partial” or “unequal” legislation. Howard Gillman deserves much praise for calling attention to the importance of hostility to class legislation in American history and in the jurisprudence of the late nineteenth century. As discussed below, between the *Slaughter-House Cases* and *Lochner v. New York* the class legislation paradigm was the primary focus of courts attempting to set forth the limits of the states’ police power to regulate the economy.

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

In practice, class legislation was primarily legislation that contained arbitrary classifications and therefore violated the Fourteenth Amendment’s equal protection guarantee by discriminating in favor of Justices’ understanding of the fundamental liberties of the American people.

I. CLASS LEGISLATION

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

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

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

Gillman would likely reply that behind the Court’s dislike of “arbitrary” classifications was the latent fear that such classifications often resulted from special interest considerations. Perhaps. Regardless, the problem that remains with the class legislation thesis is that, as discussed below, the Supreme Court, unlike many state courts, had a very narrow conception of what constituted illicit partial legislation. The Court therefore rarely invalidated regulations for constituting class legislation. While almost all of the Supreme Court’s Lochner decisions were decided solely or primarily under the Due Process Clause, class legislation was analyzed primarily under the Equal Protection Clause.

Moreover, while the class legislation thesis has more explanatory power than its cruder predecessors, it cannot explain the broad range of Lochnerian opinions, including the Court’s nascent civil liberties jurisprudence of the 1920s.

A. Class Legislation and the Courts After the Civil War

Opposition to class legislation had deep roots in post-Civil War constitutional thought. Thomas Cooley’s famous treatise on the police power argued that class legislation was unconstitutional and void. Justice Stephen Field’s concurring opinion in Butchers’ Union v. Crescent City stated that the Fourteenth Amendment was “designed to prevent all discriminating legislation for the benefit of some to the disparagement of others.” While the police power remained intact, the Amendment “inhibits discriminating and partial enactments, favoring some to the
impairment of the rights of others." Each American, Field continued, had the right to "pursue his happiness unrestrained, except by just, equal, and impartial laws."

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

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

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

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

---

54 Id.
55 Id.
57 109 U.S. 3, 24 (1883).
58 Id. at 31.
59 Id.
60 Id.
61 Id.
62 Id.
composed largely of wooden buildings like San Francisco, that occupations, in which fires are constantly required, should cease after certain hours at night until the following morning; and of the necessity of such regulations the municipal bodies are the exclusive judges; at least, any correction of their action in such matters can come only from state legislation or state tribunals.”

Field concluded that the law did not “discriminat[e] against any one. All persons engaged in the same business within it are treated alike; are subject to the same restrictions, and are entitled to the same privileges under similar conditions.”

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

The refusal to inquire regarding legislative motivation was a severe constraint on the Court’s willingness and ability to overturn facially-neutral legislation that intentionally benefitted or harmed a particular class or group.

---

63 Id. at 35.
64 Id.
65 113 U.S. 703 (1885).
66 Id. at 709 (emphasis supplied).
67 The alert leader is likely to wonder how this result squares with *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). In *Yick Wo*, the Court invalidated a laundry ordinance that required owners of wooden laundries, most of whom were Chinese, to be licensed by the Board of Supervisors. Brick or stone laundries, all owned by whites, did not require licenses. If that had been all that was involved, the Supreme Court almost certainly would have upheld the law as a valid police power measure to prevent fires. However, the Supervisors established no objective standards to determine which wood laundries could receive licenses. Instead, they granted license to all whites who owned wooden laundries, and denied them to all Chinese.

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

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

*Id.* at 373-74.

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

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

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

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

Even Yick Wo would likely have been more controversial among the Justices but for the Court’s perceived need to establish federal protection of the Chinese in the wake of anti-Chinese pogroms that broke out throughout the West after Soon Hing but before the Court decided Yick Wo. See Bernstein, supra note 45, at 273-74. Anti-Chinese forces in the West were protesting against the fact that the Chinese Exclusion Act of 1882 grandfathered in existing Chinese residents. The Supervisors argued that the laundry licensing ordinance was not discriminating against the Chinese. Rather, Chinese-owned laundries used scaffolding on their roofs, which created a fire hazard not present in white-owned wooden laundries. Id. at 367. Given the Court’s reluctance at this time to inquire into the motives of state actors, and the fact that another discriminatory measure had been upheld 9-0 the year before, this rationale may have been sufficient to persuade some of the Justices to uphold the law, but for the circumstances requiring that national authority over immigration be asserted. Cf. In re Quong Woo, 13 F. 229 (C.C.D. Cal. 1882) (Field, J.) (invalidating a laundry licensing ordinance that required all laundry owners to get the written assent of twelve of their neighbors and noting that the law tended to deny the right to pursue an occupation to Chinese immigrants, despite the United States’ treaty with China that granted the Chinese full rights).

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

127 U.S. 205 (1888).

Id. at 209.

Id.


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

State courts, meanwhile, were far more aggressive about invalidating laws on class legislation grounds. In contrast to the Supreme Court’s understanding that partial laws were constitutional so long as “all persons” subject to the law “are treated alike under the same conditions,” state courts issued a series of highly-publicized decisions invalidating regulatory legislation that applied only to certain industries. For example, the Missouri Supreme Court invalidated a “truck act” that applied only to manufacturing and mining concerns. According to the court the law was void because, *inter alia*, it “single[d] out those persons who are engaged in carrying on the pursuits of mining and manufacturing.” If such legislation were permitted to stand the government would become one “of special privileges, instead of a compact, to promote the general welfare of the people.”

The West Virginia Supreme Court quashed a similar truck act, explaining that “[i]t is not competent for the legislature, under the constitution, to single out owners and operators of mines, and manufacturers of every kind, and provide that they shall bear burdens not imposed upon the owners of other property, or employers of labor, and prohibit them from making contracts...

---

75 *Powell*, 127 U.S. at 686.
76 *Id.* at 687. As an indication of how forgiving the Court’s test was in *Powell*, even Progressive Ernst Freund later criticized the Court for upholding the margarine law. *ERNST FREUND, THE POLICE POWER* § 62, at 57 (1904) (“Even the danger to health or safety should not justify the absolute prohibition of a useful industry or practice” such as the manufacture of oleomargarine”).
77 Until 1914, the Supreme Court lacked jurisdiction to review state court decisions invalidating legislation on federal constitutional grounds, and also, like today, lacked jurisdiction to review state court interpretations of state constitutions.
78 For example, the Illinois Supreme Court voided a law prohibiting company stores in mining and manufacturing because it did not apply to “other branches of industry” such as construction, transportation, agriculture, and domestic service. *Frorer v. People*, 31 N.E. 395, 400 (Ill. 1892).
79 Truck acts required companies to pay their workers in cash, not in scrip redeemable at the company store.
80 *State v. Loomis*, 22 S.W. 350, 353 (Mo. 1893).
81 *Id.*
82 *Id.*
Bernstein

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

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

83 State v. Goodwill, 10 S.E. 285, 288 (W. Va. 1889); see also Godcharles v. Eigman, 113 Pa. St. 431 (1886).
84 The Indiana Supreme Court found unconstitutional discrimination in a truck act that only applied to corporations. Toledo, St. L. & W. R.R. Co. v. Long, 169 Ind. 316 (1907). The Illinois Supreme Court invalidated an act forbidding employers engaged in mining or manufacturing to make deductions for advances to employer unless such advances were made in cash, Kellyville Coal Co. v. Harrier, 69 N.E. 927 (Ill. 1906), and overturned a law requiring mine owners to provide washrooms for their employees. Starne v. People, 78 N.E. 61 (Ill. 1906). Both decisions rested on opposition to class legislation, and found that the acts in question denied the regulated parties equal protection of the law. The Illinois Court also voided a law prohibiting women from being employed in factories for more than eight hours a day. Ritchie v. People, 40 N.E. 454 (Ill. 1895); see also Burcher v. People, 93 P. 14 (Colo. 1907); People v. Williams, 81 N.E. 778 (N.Y. 1907) (also invalidating protective laws for women); but cf. Wenham v. State, 91 N.W. 421 (Neb. 1902); State v. Buchanan, 70 P. 502 (Wash. 1902) (upholding protective laws for women). The court found that the law was illicit class legislation, both because it only applied to factories and because it applied to women and not men.

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

83 FREUND, supra note 76, § 683, at 705.
84 Id.

20
Revisionism Revised

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

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

B. Class Legislation and the United States

Supreme Court During the Lochner Era

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

87 Id., § 502, at 539. Freund did acknowledge, however, that the “Supreme Court of Illinois has also said that chief stress should be laid upon the violation of the constitutional liberty of contract.” Id.
88 Seager, supra note 84, at 594.
89 Other legal historians had noted the class legislation issue before Benedict, but his article explored the issue in far more detail, and to far greater attention compared to previous discussions of the issue. See Benedict, supra note 16.
90 Dent v. West Virginia, 129 U.S. 114, 124 (1889) (“legislation is not open to the charge of depriving one of his rights without due process of law, if it be general in its operation upon the subjects to which it relates”).
91 E.g., Connolly v. Union Sewer Pipe Co., 184 U.S. 540 (1902) (invalidating an antitrust law that exempted only farmers and ranchers); Cotting v. Kansas City Stock Yards Co., 183 U. S. 79, 114-15 (1901) (Harlan, J., concurring for six Justices) (invalidating a mine inspection law because it applied only to one of the many mining companies in the state); Gulf C. & S.F. Ry. Co. v. Ellis, 165 U. S. 150 (1896) (invalidating a law that allowed plaintiffs with small claims against railroads to recover fees and costs if the railroad initially refused to pay the claim and then lost at trial, three Justices dissenting).
92 E.g., American Sugar Refining Co. v. Louisiana, 179 U.S. 89, 92, 95 (1900) (upholding an
For example, in 1898 the Court heard a railroad’s challenge to a law that allowed plaintiffs to collect attorneys’ fees from railroad defendants in actions arising from fires caused by railroad operations. Despite recent precedent declaring a similar law unconstitutional, and despite a vigorous dissent authored by Justice Harlan for himself and three other Justices, the Court upheld the law. Justice Brewer wrote for the Court that “the very idea of classification is that of inequality, so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality.” Brewer gave “full force to its purpose as declared by the supreme court of Kansas, to the presumption which attaches to the action of a legislature that it has full knowledge of the conditions within the state, and intends no arbitrary selection or punishment, but simply seeks to subserve the general interest of the public.”

The most substantial blow to the use of the class legislation argument to support liberty of contract came from the early Lochner era’s most representative Justice, Henry Billings Brown. In his 1898 opinion in Holden v. Hardy, Brown interpreted the ban on class legislation narrowly, preventing the class legislation prohibition from being a serious restraint on government regulation in the labor context. In Holden, the exemption for planters and farmers from a tax on the refining of sugar as a reasonable classification; finding that the law was “obviously intended as an encouragement to agriculture” but was not “pure favoritism”). Justice Field had a broader notion of class legislation, apparent in his concurring opinion invalidating the federal income tax. Pollock v. Farmers Loan and Trust, 157 U.S. 429 (1895) (Field, J., concurring) (“The legislation, in the discrimination it makes, is class legislation. Whenever a distinction is made in the burdens a law imposes or in the benefits it confers on any citizens by reason of their birth, or wealth, or religion, it is class legislation, and leads inevitably to oppression and abuses, and to general unrest and disturbance in society.”).
Court (Peckham and Brewer dissenting without opinion\textsuperscript{106}) upheld a maximum hours law that applied only to underground miners, despite the claim that the law was class legislation, not equal or uniform in its provisions. Brown acknowledged that the question was whether the statute was an “exercise of a reasonable discretion [by the legislature], or whether its action be a mere excuse for an unjust discrimination, or the oppression, or spoliation of a particular class.”\textsuperscript{101} Brown found that the law was indeed reasonable, meanwhile ignoring a Colorado case invalidating similar legislation.\textsuperscript{102}

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

The following year, the Court upheld safety regulations that were imposed only on mines with more than five employees. Justice Brown wrote for a unanimous Court that “this is a species of classification which
the legislature is at liberty to adopt, provided it be not wholly arbitrary or unreasonable.”105 Brown asserted that “[t]here was clearly reasonable foundation” for discrimination in this case because the state reasonably assumed “that mines which are worked upon so small a scale as to require only five operatives would not be likely to need the careful inspection provided for the larger mines, where the workings were carried on upon a larger scale or at a greater depth from the surface, and where a much larger force would be necessary for their successful operation.”106

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

---

106 Id. at 208.
108 GILLMAN, supra note 40, at 128.
109 Also indicating that the Court did not condemn the bakers’ hours law at issue in *Lochner* as class legislation is the Court’s reliance on the Due Process Clause and not the Equal Protection Clause in its decision. See discussion, infra. Peckham does provocatively state that the health rationale that supported the law in question was so weak that it gave rise “to at least a suspicion that there was some other motive dominating the legislature than the purpose to subserve the public health or welfare.” *Lochner*, 198 U.S. at 63. “The “other motive” is presumed by many to be the desire to enact “class legislation” benefitting organized bakers. In fact, however, Peckham followed the well-established rule “that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferable from their operation.” Soon Hing v. Crowley, 113 U.S. 703, 709 (1885); cf. Florida C. & P. R. Co. v. Reynolds, 183 U.S. 471, 480 (1902) (“We must assume that the legislature acts according to its judgment for the best interests of the state. A wrong intent cannot be imputed to it.”). The bakers hours law betrayed no facial illicit “class” motive, and the Court did not infer one. Suspecting a non-health-related motive is merely the flip side of refusing to accept the state’s claimed health rationale. But the reason the law was unconstitutional was not that the Court discerned an illicit rationale, but because once the Court rejected the state’s claim that the law was a health measure there was no valid police power rationale for the law’s interference with liberty of contract.

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

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

Second, Joseph Lochner’s brief focused primarily on an anti-class legislation argument. The Court had consistently stated that “special” legislation affecting only one industry is not illicit class legislation only “if all persons brought under its influence are treated alike under the same conditions.” Lochner’s brief therefore tried to demonstrate that the bakers’ hours law did not meet this standard. The brief’s first and most detailed argument argues that the maximum hours law at issue was illicit class legislation that violated equal protection guarantees because it “affect[ed]
but a portion of the baking trade, namely, employes [sic] in biscuit bread or cake bakeries and employes in confectionary establishments.\textsuperscript{113} According to the brief, at least one-third to one-half of people in the baking business were not within the prohibition of the statute, because they worked in pie bakeries, hotels, restaurants, clubs, boarding houses, and private homes.\textsuperscript{114} Yet, bakers in such establishments typically faced conditions less sanitary and healthful than those of the modern bakery.\textsuperscript{115}

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

Fourth, when Peckham served as a New York Court of Appeals justice he explicitly denounced class legislation of the special interest variety. In an oft-cited case, he criticized legislation which is meant to protect some class in the community against the fair, free and full competition of some other class, the members of the former class thinking it impossible to hold their own against such competition, and therefore flying to the legislature to secure some enactment which shall operate favorably to them or unfavorably to their competitors in the commercial, agricultural, manufacturing or producing fields.\textsuperscript{119}
Revisionism Revised

That he failed to articulate a similar critique in *Lochner*, despite indications that the law was passed in part to aid union members at the expense of their rivals, strongly suggests that opposition to class legislation was not the basis of his decision.

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

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

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

---

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

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

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

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

123 *243 U.S. 426* (1917).

124 *Id.* at 438.
era in 1924 the Court unanimously upheld the “recapture” provisions of the Transportation Act of 1920, under which the Interstate Commerce Commission appropriated “excess” profits from strong railroads to create a fund to aid weaker railroads. Indeed, as Barry Cushman points out, the Court generally upheld “rate regulation of railroads, grain elevators, gas, water and electric works, stockyards, fire insurance, taxis, attorneys, and rental housing.” In each case, the laws in question were intended to promote the interests of consumers at the expense of producers and thus were arguably class legislation.

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

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

---

126 CUSHMAN, supra note 20, at 89. Cushman could have added laundries to this particular “laundry list.” See Oklahoma Operating Co. v. Love, 252 U.S. 352, 356 (1920) (implying that regulation of rates charged by laundries is proper so long as the rates are not confiscatory).
127 For a contemporary attempt to resolve the cases see HANNIS TAYLOR, DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS (1917) (concluding that due process overlaps with but is not coextensive with equal protection); see also C. K. BURDICK, LAW OF THE AMERICAN CONSTITUTION 419 (1922) (concluding that due process limits legislation that inflicts inequality of burden and is clearly arbitrary).
128 See supra note 90, and accompanying text.
130 268 U.S. 510 (1925) (invalidating a law banning private schools).
131 268 U.S. 652 (1925) (holding that freedom of speech is a fundamental right protected by the Fourteenth Amendment).
132 Leeper v. Texas, 139 U.S. 462, 468 (1891) (“Due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice.”); Dent v. West
relied on due process as the basis for protection of fundamental rights such as liberty of contract against arbitrary legislation, and suggested the equality component of due process was minimal, if it existed at all. For example, several decisions suggested that because Congress is subject to due process but not equal protection limitations, federal discriminatory legislation might be constitutional.133

Meanwhile, there were no United States Supreme Court cases decided just before or during the Lochner era clearly invalidating legislation as “class,” “unequal,” “special,” “partial,” or “discriminatory” legislation that relied on the Due Process Clause alone.134 Most Supreme Court discussions of class legislation involved only the Equal Protection Clause, even in cases in which due process claims were raised.135 For example, the Court found that a law creating special, more lenient rules for torts committed by striking workers violated fundamental rights under the Due Process Clause. The Court then found that it also constituted illicit class
legislation under the Equal Protection Clause.\(^{136}\)

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

With the exception of cases involving otherwise valid regulations that the Court found were unconstitutional because they arbitrarily applied only to part of the class being regulated,\(^{139}\) the *Lochner* era Court was far

---


\(^{137}\) MOTT, *supra* note 3, at 278.

Chief Justice Taft explained in 1921:

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

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

\(^{138}\) *Truax*, 257 U.S. at 332.

\(^{139}\) See, e.g., Hartford Co. v. Harrison, 301 U.S. 459 (1937) (holding unconstitutional a statute that permitted mutual insurance companies to act through salaried resident employees, but forbidding stock companies from doing the same); Mayflower Farms, Inc. v. Ten Eyck, 297 U.S. 266 (1936) (invalidating a price-fixing scheme for milk that had provisions that benefitted incumbents and not new market entrants); Valentine v. Great Atlantic & Pacific Tea Co., 299 U.S. 32 (1936) (declaring unconstitutional a graduated sales tax on the authority of *Levy*, *infra*); Stewart Dry Goods Co. v. Levy, 294 U.S. 550 (1935) (invalidating a graduated sales tax that applied a higher rate to larger merchants); Louis K. Liggett Co. v. Lee, 288 U.S. 517 (1933) (overturning a graduated retail sales tax that rose with the number of stores a chain store company owned); Smith v. Cahoon, 283 U.S. 553 (1931) (invalidating a law that required motor carriers to obtain certificates of public convenience and to give bond or evidence of insurance, but exempting carriers of certain commodities); Quaker City Cab Co.
more inclined to invalidate legislation as a violation of fundamental rights than as class legislation. Even cases that seemed to involve the most blatant forms of class legislation were decided solely on a due process/fundamental rights theory, with the Court ignoring equal protection/class legislation elements. For example, New State Ice v. Liebmann,140 famous for Justice Brandeis’ invocation of states as the “laboratories of democracy,” involved an Oklahoma law granting a monopoly to an ice company. Not only could this easily be deemed class legislation, but it is exactly the sort of legislation—government grants of monopoly power to big business—that had motivated the Jacksonians one hundred years earlier when they established opposition to class legislation as an integral component of American political thought.141 Nevertheless, the New State Ice Court ignored the class legislation paradigm, and instead invalidated the law as a “regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business.142

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

The class legislation hypothesis also mistakenly relies on the speculative belief that even though time after time the Court rejected the opportunity to explicitly rely on a class legislation analysis when invalidating regulatory legislation, and instead claimed to be protecting fundamental individual rights under the Due Process Clause, we can nevertheless deconstruct the Court’s opinions and determine that hostility to class legislation was the Court’s “real” motive. As discussed below, a more persuasive explanation for Lochner can be found in the Court’s own
explanation for its decisions: it was seeking to protect what it saw as fundamental individual rights against excessive government intrusion.

II. FUNDAMENTAL RIGHTS ANALYSIS: NATURAL RIGHTS AND HISTORICISM

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

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

Thomas Cooley’s very influential 1868 treatise, *Constitutional
Revisionism Revised

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

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

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

\textsuperscript{147} COOLEY, supra note 51, at iv.
\textsuperscript{148} Id.
\textsuperscript{149} People v. Salem, 20 Mich. 452, 473 (1870). As Alan Jones points out, in his later years, “Cooley openly used the word ‘constitutional in the same way that he had covertly use it before—to apply to the established usages, the unwritten purposes, and the habits of thought which had historically created the great arrangements under which the English and American peoples had long rule themselves.” ALAN R. JONES, THE CONSTITUTIONAL CONSERVATISM OF THOMAS MCINTYRE COOLEY 359 (Garland Pub. ed. 1987).
\textsuperscript{150} State ex rel. St. Joseph & D.C.R. Co. v. Comm’rs of Nemaha Co., 7 Kan. 542, 555 (1871).
\textsuperscript{151} Id.
\textsuperscript{152} Id.
\textsuperscript{153} Richard C. McMurtie, A New Canon of Constitutional Interpretation, 32 Am. L. Reg. & Rev. 1, 7 (1893); see also Shattuck, supra note 3 (arguing that the Due Process Clause only gives the courts authority to protect procedural rights).
constitution is binding only on the legislature and is not to be enforced by the courts, the same rule applies in the United States.\footnote{Id.}

Other commentators insisted that the genius of the American constitutional system was precisely that it allowed courts to review the constitutionality of legislation. Prominent commentator Christopher Tiedeman asserted that natural rights protected under the English Constitution “have been incorporated into the American Constitutions, both state and federal.”\footnote{Id. at 81.} He praised the “disposition of the courts to seize hold of these general declarations of rights as an authority for them to lay their interdict upon all legislative acts which interfere with the individual’s natural rights, even though these acts do not violate any specific or special provision of the Constitution.”\footnote{A.V. Dicey, The Law of the Constitution 125 (2d ed. 1886); see also John W. Burgess, Political Science and Comparative Constitutional Law 209-32 (1890) (championing judicial review to protect constitutional guarantees as the best protection for liberty).} A. V. Dicey, the leading English commentator on constitutionalism, wrote that judicial review is “the only adequate safeguard which has hitherto been invented against unconstitutional legislation.”\footnote{DICEY, supra note 157, at 145.} “The glory of the founders of the United States,” Dicey added, “is to have devised or adopted arrangements under which the Constitution became in reality as well as in name the supreme law of the land.”\footnote{Id.}

Regardless of what jurists believed about the unwritten Constitution, before the Civil War they generally agreed that federal courts had very limited authority to review state legislation; only explicit limitations on state authority, such as the Contracts Clause, could be enforced. However, post-Bellum thinkers, despite a strong contrary statement in the \textit{Slaughter-House Cases},\footnote{Justice Miller declared for the majority: “Under no construction of that provision [due process of law] that we have ever seen, or any that we deem admissible” could the law in question be declared void. Slaughter-House Cases, 16 Wall. 36, 81 (1872). However, the due process issue was a very minor one in this case, and the quotation above is the extent of the Court’s discussion. If the due process holding had been more detailed and extensive, it likely would have inhibited future due process jurisprudence far more successfully. Justice Stephen Field, for one, always contended that the issue of due process and its relationship to the police power had not been properly presented or considered in \textit{Slaughter-House}. See 3 Charles Warren, The Supreme Court in United States History 271 (1922) (explaining Field’s view of the matter).} argued that the Fourteenth Amendment’s Due Process Clause gave courts the right and obligation to enforce against the states not just the largely procedural rights protected by the Magna Carta and long-standing Anglo-American tradition, but all fundamental individual rights deemed essential to the development of American liberty, including

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

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

Critics argued that allowing courts to protect unspecified rights under the Due Process Clause amounted to judicial usurpation.\textsuperscript{167} Nevertheless,
by the time *Lochner* was decided there was a broad consensus that the Fourteenth Amendment’s Due Process Clause protects fundamental rights from government intrusion. As discussed below, the source of the fundamental rights recognized by the United States Supreme Court during the *Lochner* era was the American natural rights tradition, tempered by a historicist perspective. The Justices’ historicism, along with concerns for federalism and of the judiciary overstepping its bounds, limited the scope of the judicial enforceability of natural rights to those rights considered fundamental to the Anglo-American heritage of liberty. Moreover, the Court would only step in when such rights were infringed upon in ways that went beyond the states’ traditional police powers.

**A. Natural Rights**

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

---

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

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


172 *Slaughter-House Cases*, 83 U.S. at 110 n.39. Similarly, in *Butchers’ Union v. Crescent City*, 111 U.S. 746, 759 (1884) (Field, J., concurring), Field cited the Declaration of Independence for the proposition that men have the inalienable right to pursue their happiness, by which is meant that the right to pursue any lawful business or vocation, in any manner not inconsistent with the equal right of other, which may increase their prosperity or develop their faculties, so as to give to them their highest enjoyment. The common business and callings of life, the ordinary trades and pursuits, which are innocuous in themselves, and have been followed in all communities from time immemorial, must, therefore, be free in this country to all alike upon the same terms.
While Field lost on this particular issue, just one year later Justice Samuel Miller, speaking for all but one Justice, stated that there are “rights in every government beyond the control of the state. . . . The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere.”173 State courts expanded upon the Supreme Court’s natural rights rhetoric in issuing some of the earliest *Lochner*ian decisions, especially in labor cases.174

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

---

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

---

173 Loan Assoc. v. Topeka, 87 U.S. 655, 662-63 (1874).
174 See, e.g., Frorer v. People, 31 N.E. 395 (Ill. 1892) (“an adult person of sound mind, laboring under no legal disability, cannot be deprived of the right to make contracts in respect to labor and the acquisition of property, under the pretence [sic] of giving such person protection”); Godcharles v. Wigeman, 6 A. 354, 356 (Pa. 1886) (voiding an antiscrip law and concluding that a laborer “may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal, and any and every law that proposes to prevent him from so doing is an infringement of his constitutional privileges, and consequently vicious and void”); Vogel v. Pekoe, 42 N.E. 386, 387-88 (Ill. 1895); Low v. Rees Printing Co., 59 N.W. 362, 366-68 (Neb. 1894); In re Jacobs, 98 N.Y. 98 (1885) (concluding that a law banning tenement cigarmaking illicitly invaded “fundamental rights”); see generally Commonwealth v. Perry, 155 Mass. 117, 125 (1881) (“There are certain fundamental rights of every citizen [including the right to make reasonable contracts] which are recognized in the organic law of all our free American states. A statute which violates any of these rights is unconstitutional and void even though the enactment of is not expressly forbidden.”); People v. Marx, 99 N.Y. 377, 386 (1885) (“No proposition is more firmly settled than that it is one of the fundamental rights and privileges of every American citizen to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit.”).

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

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

is among “the inalienable rights of the citizen.”176 Anticipating Richard Epstein’s theory of the Takings Clause177 by almost eighty years, Brewer asked,

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

By the time the Court decided Lochner, there seems to have been a virtual consensus among the Justices that due process requirements protected fundamental rights that were antecedent to government,179 with Justices Edward White,180 Henry Brown,181 Rufus Peckham,182 and Joseph McKenna183 all expressing such sentiments. The main dispute on the Court of universal law reaching back of all constitutional provisions”); Berea College v. Kentucky, 211 U.S. 45, 67 (1908) (Harlan, J., dissenting) (“The right to enjoy one’s religious belief, un molested by any human power, is no more sacred nor more fully or distinctly recognized than is the right to impart and receive instruction not harmful to the public. The denial of either right would be an infringement of the liberty inherent in the freedom secured by the fundamental law.”); Monongahela B. Co. v. United States, 216 U.S. 177, 195 (1910); see generally Milton R. Konvitz, Fundamental Rights: History of a Constitutional Doctrine 38-40 (2001) (noting Harlan’s importance to the development of natural rights jurisprudence on the Supreme Court in the years leading up to Lochner).

Bizarrely, a recent biography of Harlan has no entry in its index for “natural rights,” “natural law,” or “fundamental rights.” YARBROUGH, supra note 4.

178 Chicago B.&Q. R. Co. v. People, 200 U.S. 561, 599 (1906) (Brewer, J., dissenting); see generally ELY, supra note 6, at 77 (noting the influence of natural law precepts on Brewer).
179 Siegel, supra note 30, at 2-22 (noting that Lochnerian era jurisprudence was widely popular among jurists in late nineteenth-and early twentieth-century America, and that eight of the nine Justices on the Supreme Court in 1905 broadly agreed that constitutional principles should be drawn from a combination of common and natural law).
180 In discussing the issue of whether there were any constitutional limits on Congressional power in conquered territory, White wrote in 1901 that there are “inherent, although unexpressed, principles which are the basis of all free government which cannot be with impunity transcended.” This “signifies that even in cases where there is no direct command of the Constitution which applies, there may nevertheless be restrictions of so fundamental a nature that they cannot be transgressed.” Downes v. Bidwell, 182 U.S. 244, 290-91 (1901) (White, J., concurring).
181 Brown remarked that the Fourteenth Amendment required states to assess and collect taxes in a way that did not conflict with “natural justice.” Turpin v. Lemon, 187 U.S. 51, 57 (1902).
182 “The limit of the full control which the state has in the proceedings of its courts both in civil and criminal cases, is subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the federal Constitution.” West v. Louisiana, 194 U.S. 258, 263 (1904).
183 Justice McKenna wrote that “the words ‘due process of law,’ as used in the Fourteenth Amendment, protect fundamental rights,” Howard v. Kentucky, 200 U.S. 164, 173 (1906) (McKenna, J.). cf. Twining v. New Jersey, 211 U.S. 78, 106 (1908) (Moody, J.) (stating that the test for whether
Revisionism Revised

was not over the existence of fundamental judicially-enforceable unenumerated rights, nor primarily was the dispute about the content of those rights. Even Justice Holmes grudgingly acknowledged in his *Lochner* dissent that a law would be unconstitutional if a “rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.”

Rather, as Holmes’s comment suggests, the Justices disagreed about how vigorously fundamental right should be enforced against the states, i.e., whether there should be a presumption of constitutionality and if so, how strong.

B. Historicism

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

---

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

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

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

It is common to indulge in a great deal of loose talk about natural rights and liberties, as if these were terms of well-defined and unchangeable meaning. There is no such thing as an absolute or unqualified right or liberty guaranteed to any member of society. Natural rights and liberties of a subject are relative expressions, and have relative or changeable meanings. What would be a right of liberty in one state of society would be an undue license in another. The natural rights of the subject, or his rightful exercise of liberty in the pursuit of happiness, depends largely upon the amount of protection which he receives from the government. Governments, in their earlier existence, afforded but little protection to their subjects. Consequently the subject had a right to pursue his happiness without much regard to the rights of the government. The reciprocal relations were not large. He yielded up but little, and received but little. If he was strong enough to buffet successfully...
American liberty suggests an implicit legal historicism. Historicism “taught that objective legal principles were discernible through historical studies, not rationalistic introspection.”\textsuperscript{187} One scholar describes the historicism of the \textit{Lochner} era as conceiving law “as an evolving product of the mutual interaction of race, culture, reason, and events.”\textsuperscript{188} Historicists of the time believed that “societies, social norms, and institutions are the outgrowth of continuous change effected by secular causes” but “evolve according to moral ordering principles that are discoverable through historical studies.”\textsuperscript{189}

While Anglo-American tradition contained no clear right to liberty of contract, historicist-minded post-Bellum legal theorists believed that the right, along with general limitations on the scope of the police power, was implicit in the evolutionary history of the liberty of the Anglo-American people.\textsuperscript{190} Justice Joseph Bradley’s dissent in \textit{Slaughter-House} is a model opinion combining a fundamental rights analysis with a historicist perspective.

Bradley wrote that “[t]he people of this country brought with them to its shores the rights of Englishmen; the rights which had been wrested from English sovereigns at various periods of the nation’s history.”\textsuperscript{191} Bradley noted that “[t]he privileges and immunities of Englishmen were established and secured by long usage and by various acts of
In theory, Bradley acknowledged, the English Parliament has unlimited authority, because England has no written constitution. In practice, however, violations of the fundamental principles of the unwritten English Constitution would cause a revolution “in an hour.” Among those principles, inherited by the American people, was the right to be free from government-sponsored monopolies, which dates back to the “statute of 21st James, abolishing monopolies, . . . one of those constitutional landmarks of English liberty which the English nation so highly prize and so jealously preserve.”

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

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

\[\text{References}\]

192 Id. at 115.
193 Id. at 120.
195 Id.
197 Id. at 691-92.
Bernstein

welfare.”198

Opinions like Field’s dissent in Powell served as a bridge between the older view reflected in the Slaughter-House dissents that there was a right to pursue an occupation free from government exclusions intended to protect monopoly, and the view reflected in Lochner that there a right to pursue an occupation free from all unreasonable government interference. This shift was helped along by the labor unrest and Populist agitation of the period, which fueled fears of imminent Socialism199 and led to a desire to create Constitutional protections for private enterprise.200

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

---

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

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

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

200 See, e.g., Judson, supra note 146, at 26 (“the denial of free contract seems with many agitators to be the great panacea for social ills, and oftentimes the first manifestation of the strength of a voluntary labor association is in denying vi et armis the right of free contract on the part of others”); id. at 28 (“The vice of the so-called social legislation denying freedom of contract is that it deprives the individual of his ‘personal rights,’ and subjects him to the only tyranny which in this democratic age is possible.”).
overtly historicist defense of liberty of contract in 1893. Field noted that primogeniture and the remedy of distress for unpaid rent had been abolished in the United States. Chartering of corporations by special acts of the legislature had ceased, as had improvident grants of monopoly in the ordinary trades. Women were emancipated “from the thralldom of her husband.” Debtor’s prison was abolished. Abolition of slavery, meanwhile, constituted the “nation’s greatest act of deliverance.” Abolition established “the right to labor when, where, and for such reward as the laborer and his employer may agree to between themselves.”

C. The Rise of Liberty of Contract

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

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

202 Id. at 644.
203 Id. (emphasis supplied).
204 See, e.g., Commonwealth v. Perry, 28 N.E. 1126, 1126-27 (Mass. 1891) (“There are certain fundamental rights of every citizen which are recognized in the organic law of all our free American states. A statute which violates any of these rights is unconstitutional and void even though the enactment of it is not expressly forbidden. . . . The right to acquire, possess, and protect property includes the right to make reasonable contracts, which shall be under the protection of law.”). Justice Brewer, while still a circuit judge, in 1887 referred to that “liberty of contract which courts are so strenuous to uphold,” but this case involved a contract dispute, not a constitutional claim. Wall v. Equitable Life Assur. Soc., 32 F. 273, 276 (W.D. Mo. 1887).
205 See, e.g., Judson, supra note 146; D. H. Pingrey, Limiting the Right to Contract, 34 CENTURY L. J. 91 (1892).
206 Judson, supra note 146, at 146.
207 Pingrey, supra note 205, at 95.
legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations; in other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.\textsuperscript{208} The following year, Justice Brewer stated even more directly that “generally speaking, among the inalienable rights of the citizen is that of the liberty of contract.”\textsuperscript{209}

In 1897, in the famous \textit{Allgeyer} case,\textsuperscript{210} the Court invalidated a Louisiana law that discriminated against out of state insurance companies. Justice Peckham, writing for the Court, effused in dicta that the right to liberty included in the Fourteenth Amendment is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.\textsuperscript{211}

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

Peckham’s \textit{Allgeyer} opinion was especially important because it was the only one of these opinions to declare that the statute in question was unconstitutional. It was also the only one to built on prior authority for the proposition that the Fourteenth Amendment guaranteed a right to liberty of contract. Peckham cited Bradley’s dissent in \textit{Slaughter-House}
discussing the right of an individual to pursue an occupation.\textsuperscript{216} He also quoted Justice Harlan’s opinion in \textit{Powell v. Pennsylvania}, that, despite upholding restrictions on the sale of margarine, recognized that a person has a Fourteenth Amendment right to “enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, is an essential part of his rights of liberty and property.”\textsuperscript{217}

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

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

\begin{footnotesize}
\begin{enumerate}
\item Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897).
\item Id. at 590.
\item But cf. Myrick, supra note 190, at 487 (asserting that these precedents were good authority for this right).
\item “Generally all monopolies are against this great charter [Magna Carta], because they are against the liberty and freedom of the subject, and against the law of the land.” 2 Edward Coke, \textit{Institute of the Laws of England} (1642), \textit{reprinted in Roscoe Pound, The Development of Constitutional Guarantees of Liberty} 150 (1957).
\item Allgeyer, 165 U.S. at 590-91.
\item E.g. Smyth v. Ames, 169 U.S. 466 (1898).
\item Mott, supra note 3, at §§ 126-27, at 341-42.
\item Adkins v. Children’s Hosp., 261 U.S. 525, 568 (1923) (Holmes, J., dissenting) (complaining that judges started with “an unpretentious assertion of the liberty to follow the ordinary callings” and turned that “innocuous generality” into “the dogma Liberty of Contract”).
\end{enumerate}
\end{footnotesize}
Lochner was, in fact, a radical expansion of prior Supreme Court doctrine. Indeed, just twenty years before Lochner, in Soon Hing v. Crowley, a unanimous Court rejected the notion that the Fourteenth Amendment protects “the right of a man to work at all times.” Rather, Justice Field (who was hardly a statist) wrote, “However broad the right of every one to follow such calling and employ his time as he may judge most conducive to his interests, it must be exercised subject to such general rules as are adopted by society for the common welfare.” Unlike the majority in Lochner, the Soon Hing majority simply assumed that he state was acting reasonably, despite ample evidence that the law in question was mean to harm Chinese launderers.

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

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

---

225 See id.; but cf. Myrick, supra note 190.
226 113 U.S. 703 (1885).
227 Id. at 709.
228 E.g., Patterson v. Bark Eudora, 190 U.S. 169, 173-79 (1903), quoting Frisbie v. United States, 157 U. S. 160, 165 (1895) (“It is within the undoubted power of government to restrain some individuals from all contracts, as well as all individuals from some contracts. It may deny to all the right to contract for the purchase or sale of lottery tickets; to the minor the right to assume any obligations, except for the necessities of existence; to the common carrier the power to make any contract releasing himself from negligence, and, indeed, may restrain all engaged in any employment from any contract in the course of that employment which is against public policy. The possession of this power by government in no manner conflicts with the proposition that, generally speaking, every citizen has a right freely to contract for the price of his labor, services, or property.”); United States v. Joint-Traffic Ass’n, 171 U.S. 505, 572-73 (1898) (“there are many kinds of contracts which, while not in themselves immoral or mala in se, may yet be prohibited by the legislation of the states”).
229 Commentators recognized that courts invoking common law principles were referring at least in part to natural rights principles. See generally Roscoe Pound, The End of Law as Developed in Juristic Thought, 27 HARV. L. REV. 605, 626-27 (1914) (“Perhaps nothing has contributed so much
these rights was consistently tempered by the invocation of common law doctrines that limited individual freedom for the perceived social good.\textsuperscript{232}

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

D. \textbf{The Expansion and Demise of Lochner}

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

\textsuperscript{232} See Siegel, supra note 30, at 80-81.
\textsuperscript{233} See, e.g., Jacobson v. Massachusetts, 197 U.S. 11, 29 (1905) (upholding mandatory smallpox vaccination and stating that “in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand”); Champion v. Ames, 188 U.S. 321 (1903) (analogizing lotteries to nuisances and upholding a law banning lotteries); Hennington v. Georgia, 163 U.S. 299 (1896) (upholding a Sunday law and stating that “[f]rom the earliest period in the history of Georgia it has been the policy of that state, as it was the policy of many of the original states, to prohibit all persons, under penalties, from using the Sabbath as a day for labor and for pursuing their ordinary callings); \textit{see generally} Otis v. Parker, 187 U.S. 606, 607 (1903) (“No court would declare a usury law unconstitutional, even if every member of it believed that Jeremy Bentham had said the last word on that subject, and had shown for all time that such laws did more harm than good. The Sunday laws, no doubt, would be sustained by a bench of judges, even if every one of them thought it superstitious to make any day holy.”)
\textsuperscript{234} 165 U.S. 275 (1897).
\textsuperscript{235} See Siegel, supra note 30, at 25 n.109 (“throughout the Lochner era, the Court admitted that it had no overarching definition of due process and proceeded case by case”); \textit{cf} George W. Alger, \textit{The Courts and Legislative Freedom}, 111 ATLANTIC MONTHLY 345, 347 (1913) (stating that an individual who looks for “a definition of this police power, so-called, . . . finds there is no concrete definition of it" and that it “is incapable of definition”).
\textsuperscript{236} Kales, supra note 184.
fundamentals of the social order. If its rulings in such cases were treated like other judicial decisions, every tentative opinion on what did or did not violate due process would become set in stone. For a historicist-minded Court, this would be problematic,

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

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

---

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

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court’s decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.

It is this outlook which has led the Court continually [sic] to perceive distinctions in the imperative character of Constitutional provisions, since that character must be discerned from a particular provision’s larger context. And inasmuch as this context is one not of words, but of history and purposes, the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This “liberty” is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints.


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

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

In Adkins v. Children’s Hospital, meanwhile, the Court made it clear that “freedom of contract is . . . the general rule and restraint the

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

See Post, supra note 35.

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

Id. at 535. The Court stated that the following businesses were “affected with a public interest”: (1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities. (2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or colonial Legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs, and gristmills. (3) Businesses which, though not public at their inception, may be fairly said to have risen to be such and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner by devoting his business to the public use, in effect grants the public an interest in that use and subjects himself to public regulation to the extent of that interest although the property continues to belong to its private owner and to be entitled to protection accordingly.

Id. The court then added:

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

Id.


261 U.S. 525 (1923).
exception, and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances.”243 The Court while implicitly acknowledged that government regulation could be used for traditional police power purposes. Beyond that, the Court asserted that precedent limited interference with liberty of contract to the cases involving the following issues: (1) “[t]hose dealing with statutes fixing rates and charges to be exacted by businesses impressed with a public interest”; (2) “[s]tatutes relating to contracts for the performance of public work”; (3) “[s]tatutes prescribing the character, methods, and time for payment of wages”; and (4) “[s]tatutes fixing hours of labor” to preserve the health and safety for workers or the public at large.244

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

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

---

243 Id. at 546.
244 Id. at 546-48.
245 262 U.S. 390 (1923).
246 Id. at 399-400 (citations omitted).
247 Id. at 400.
248 268 U.S. 652 (1925) (holding that freedom of speech is a fundamental right protected by the Fourteenth Amendment).
as cases involving fundamental liberties protected by the Due Process Clause, with no mention of equal protection or class legislation.\footnote{ See Warren, supra note 3 (noting that all of these opinions reflected the triumph of \textit{Lochner}).}

The 1920s Supreme Court was hardly alone in reacting to the war by seeking a return to pre-War norms of limited government and individual rights. Warren Harding’s very successful 1920 presidential campaign slogan was the promise of “A Return to Normalcy.” Harding ended the Red Scare and pardoned many of its victims, including Eugene V. Debs, the Socialist leader who was serving a ten-year sentence for his antiwar activities.\footnote{ See ROBERT K. MURRAY & KATHERINE SPEIRS, THE HARDING ERA: WARREN G. HARDING AND HIS ADMINISTRATION (2000); EUGENE P. TRANI & DAVID L. WILSON, THE PRESIDENCY OF WARREN G. HARDING (1977).} With the cooperation of Congress, Harding lowered taxes, ended wartime controls of the economy, and cut federal spending by forty per cent, thereby largely restoring the federal government to its limited prewar role in American life. Fear that traditional libertarian American values were being eroded also led to a constitutionalist movement, spearheaded by the American Bar Association, to remind the public of the uniqueness of the American system of government.\footnote{ MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF, 208-54 (1988) (discussing the constitutionalist movement of the 1920s). Conservatives were especially alarmed at the growth of the idea of the “living Constitution” that changes with the times. See, e.g., Thomas James Norton, \textit{National Encroachments and State Aggressions}, in AMERICAN BAR ASSOCIATION, REPORT OF THE FIFTEENTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION, 237, 237 (1926) (stating that the Constitution is “not of a past age but for all time [because it] deals with principles of government as unchangeable as . . . the principles of morals covered by the ten commandments”); see generally Howard Gillman, \textit{The Collapse of Constitutional Originalism and the Rise of the Notion of the ‘Living Constitution’ in the Course of American State-Building}, 11 STUDIES IN AM. POL. DEVELOPMENT 191 (1997) (discussing the conflict over the concept of a “living constitution”).

As it turned out, however, the 1920s and the Taft Court represented the last gasp of classical liberal principles in American public life for decades to come. Libertarian views, especially on economics, had already been marginalized by the 1920s among American intellectuals,\footnote{ See ARTHUR A. EKIRCH, JR., THE DECLINE OF AMERICAN LIBERALISM (1955).} but they retained a tenuous foothold in elite legal circles despite the onslaught of sociological jurisprudence and legal realism.\footnote{ For example, Charles Evans Hughes, as President of the ABA in 1924, endorsed the Supreme Court’s due process jurisprudence, though not all its particulars. Charles Evans Hughes, \textit{President Hughes Responds for the Association}, 10 A.B.A. J. 567, 569 (1924).} The classical liberal foundations of \textit{Lochnerian} jurisprudence, however, could not survive the
strains of the Great Depression. With almost no support among the intellectual class, with the unemployed and underemployed clamoring for government intervention, and with statism ascendant across the globe in the forms of fascism, communism, and social democracy—each of which had its share of admirers in the United States—the Court’s commitment to limited government classical liberalism seemed outlandishly reactionary to much of the public. The Court’s *Lochner* view that libertarian presumptions were fundamental to Anglo-American liberty became unsustainable as the Depression wore on, with many Americans blaming the purported laissez-faire policies of previous administrations for the continuing economic crisis. Justice George Sutherland, for one, retreated from an explicit fundamental rights analysis into a defensive originalism in the 1930s.

---

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

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

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

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

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

III. CONCLUSION

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

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

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

261 See LEUCHTENBURG, supra note 21, at 220 (discussing Roosevelt’s choice of “faithful lieutenants” to fill the many vacancies that occurred between 1937 and 1941).
defend regulatory legislation.\textsuperscript{262}

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

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

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

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

\textsuperscript{263} Such as the “Social Darwinism” thesis discussed \textit{supra}, in the Introduction.


\textsuperscript{265} This is a vigorous debate in the academic literature regarding how modern public choice theory should affect judicial review, if at all. But public choice theory suggests that much legislation benefits private interests rather than the public, leading some to suggest that it provides a rationale for more stringent judicial review of economic legislation. For the law review literature on this debate, see, e.g., Einer R. Elhauge, \textit{Does Interest Group Theory Justify More Intrusive Judicial Review?}, 101 YALE L.J. 31, 44 (1991); Daniel A. Farber, \textit{Public Choice and Just Compensation}, 9 Const. Commentary 279,
Gillman suggests that the *Lochner* Court’s primary error was it failed to see that in a society riven with class divisions stemming from industrialization, certain types of class legislation were appropriate to equalize bargaining power. This analysis certainly appeals to the liberal mainstream of academia, who can comfort themselves with the thought that today’s legal conservatives are equally myopic. However, *Lochner* is also of special interest to libertarian and law and economics-oriented scholars who tend to believe that traditional vilification of *Lochner* over the years was at best excessive, at worst misguided. The class legislation hypothesis provides a nice revisionist story for this group, as it suggests that the *Lochner* Justices do not fit their traditional portrayal as either hopeless reactionaries or clueless judicial activists. Rather, Gillman’s thesis suggests they were actually such sharp thinkers that they anticipated public choice theory by over fifty years by invalidating special interest legislation as class legislation.

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

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

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

Footnote 4 also suggested that the Court was willing to preserve the *Lochner*ian civil liberties decisions of the 1920s and 1930s by reinterpreting them as decisions protecting “discrete and insular minorities.”272 Cases cited by the Court in Footnote 4, including the civil liberties decisions of the 1920s,273 were reinterpreted as decisions invalidating statutes because the (facially-neutral) laws in question were
directed at “particular religious, national, or racial minorities.” Laws that threaten such groups “may call for a correspondingly more searching judicial inquiry.” Protection of discrete and insular minorities from hostile legislation by an equal protection analysis is a limited, modern liberal version of the older prohibition against class legislation, with the caveat that the modern version requires the Court to discover legislative intent regarding facially neutral laws.

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

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

---

274 Carolene Products Co., 304 U.S. at 152 n.4.
275 Id.
276 An exception is Bolling v. Sharpe, 347 U.S. 497 (1954), in which the Court held that the Due Process Clause of the Fifth Amendment prohibited the federal government from mandating segregation in Washington, D.C. In reviving the equality component of the Fifth Amendment’s Due Process Clause because the Equal Protection Clause is unavailable against the federal government, the Bolling Court was following Justice Sutherland’s lead in *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923) (holding that a federally-mandated minimum wage for women in the District of Columbia was unconstitutional under the Fifth Amendment’s Due Process Clause, because, among other things, it unfairly put the burden of support of women workers on their employers, and illicitly made women into a separate class).
277 381 U.S. 479 (1965).
279 Justice Ginsburg, among others, believes that this would have been a preferable outcome. Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985) (arguing that the Supreme Court should have used the Equal Protection Clause rather than the Due Process Clause to strike down restrictions on a woman’s ability to obtain an abortion).
Bernstein

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

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

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

---

280 “The reasoning of *Allgeyer* and of *Lochner* with respect to the generating force of ‘liberty’ guaranteed by the Constitution has been fully endorsed. The decision of these cases have been discredited, but much of the opinions is fully viable.” *Konvitz, supra* note 175, at 108.
283 A position along these lines is advocated by Ackerman and Fiss. See *Ackerman, supra* note 20; *Fiss supra* note 18.