

Lochner Revisionism: Revisiting the Class Legislation vs. Fundamental Rights Debate

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INTRODUCTION

*Lochner v. New York*² and its eponymous jurisprudential era have been central to constitutional discourse and debate in the United States for over a hundred years.³ While legal scholars and historians have criticized many judicial doctrines from that time period, critics have been especially scathing in their attacks on the “liberty of contract” doctrine epitomized by *Lochner* itself.⁴

From the 1930s through the 1990s, a hostile perspective virtually monopolized scholarly discussion of the Court’s liberty of contract decisions. Critics argued that *Lochner* and its progeny did not involve ordinary jurisprudential mistakes, but were egregious examples of willful judicial malfeasance.⁵

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² 198 U.S. 45 (1905).

³ See Thomas B. Colby & Peter J. Smith, *The Return of Lochner*, 100 *Cornell L. Rev.* 527, ___ (2015) (“The critique of the *Lochner* line of cases during the Progressive era was both relentless and multifaceted.”).

⁴ Demonization of *Lochner* began with Theodore Roosevelt’s 1912 Progressive Party presidential campaign. See Nourse, *Tale of Two Lochner*. However, it wasn’t until the 1970s that the *Lochner* case became a consistently prominent subject of constitutional law discussions and came to epitomize an era. See David E. Bernstein, *Rehabilitating Lochner* ch. 7 (2011).

⁵ See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 166 (1996) (Souter, J., dissenting) (stating that *Lochner* represents the “nadir” of judicial competence); J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 *Harv. L. Rev.* 963, 974 n.43, 1018 (1998) (noting that *Lochner* served as a negative exemplar in ten of ten constitutional law casebooks surveyed); Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 *Law & Hist. Rev.* 293, 295 (1985) (“Nothing can so damn a decision as to compare it to *Lochner* and its ilk.”); Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 *Duke L.J.* 243, 244-45 (1998) (suggesting that *Lochner* was the single most important case in constitutional law’s “anti-canon,” the group of cases that serve as icons of constitutional error).

Academics routinely asserted that the *Lochner* Court's Justices simply made up the doctrine out of whole cloth.⁶ The Court's use of the Fourteenth Amendment's Due Process Clause to protect substantive rights, including liberty of contract, was said to be indefensible as a textual matter.⁷ John Hart Ely famously quipped that "substantive due process" is a contradiction in terms, akin to "green pastel redness."⁸ This line of attack persisted even though it is anachronistic; the pre-New Deal Supreme Court's approach to interpreting the Due Process Clause did not recognize the modern categories of "substantive" and "procedural" due process.⁹

⁶ Paul Kens, Justice Stephen Field 6 (1997) ("The Court's critics claimed that judges had constructed these theories from thin air, that liberty of contract and substantive due process were not based on the words of the Constitution."); Timothy Sandefur, *The Right to Earn a Living* 117-118 (2010) (noting that in a previous book, Kens had accused the Court of inventing the right to liberty of contract out of thin air). Kens, it should be noted, while still not fully on board with *Lochner* revisionism, has at least met revisionists halfway, acknowledging that constitutional protection of liberty of contract had its antecedents in longstanding judicial and intellectual trends, rather than being a purely willful invention of Social Darwinian judges. See Paul Kens, Kens on Bernstein, 'Rehabilitating Lochner: Defending Individual Rights against Progressive Reform,' <https://networks.h-net.org/node/16794/reviews/17301/kens-bernstein-rehabilitating-lochner-defending-individual-rights>.

⁷ See John Harrison, *Substantive Due Process and the Constitutional Text*, 83 Va. L. Rev. 493 (1997); Learned Hand, *Due Process of Law and the Eight-Hour Day*, 21 Harv. L. Rev. 495, 495 (1908) ("There can be little doubt that so to construe the term 'liberty' is entirely to disregard the whole juristic history of the word."). But see Randy Barnett & Evan Bernick, *No Arbitrary Power: An Originalist Theory of the Due Process of Law*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3149590; Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 Yale L.J. 408, 512 (2010) (contending that the original meaning of the Fourteenth Amendment "encompassed a recognizable form of substantive due process").

⁸ John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 18 (1980); see also Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 102 Nw. L. Rev. 857, 897 (2009) ("made-up, atextual invention"). Justice Antonin Scalia said that "substantive due process" is "babble." Vivek Krishnamurthy, *Live-Blogging: Nino Scalia*, <http://the-reaction.blogspot.com/2006/11/live-blogging-nino-scalia.html>.

⁹ Barry Cushman, *Teaching the Lochner Era*, 62 St. Louis U. L.J. 537, 544-45 (2018) ("Not surprisingly, sophisticated legal thinkers of the Lochner Era did not understand the doctrine in such readily satirized terms. Indeed, they did not use the term 'substantive due process,' which emerged as a descriptor only after the Lochner Era was over."); Keith Whittington, *The Troublesome Case of Lochner*, <http://www.libertylawsite.org/2012/03/01/keith-whittington-the-troublesome-case-of-lochner> ("Scholars now recognize that the phrase 'substantive due process' was anachronistic and was popularized precisely in order to provoke the kind of reaction that John Hart Ely evidenced. The catchy label was supposed to reduce a complex body of law to an oxymoron. But no one thought, let alone talked, that way prior to the Progressive critique."); see also James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* 103-04 (2d ed. 1998); Lucas A. Powe, Jr., *The Supreme Court and the American Elite, 1789-2008*, at 169 (2009); Timothy Sandefur, *The Right to Earn a Living* 118-119 (2010); Edward White, *The Constitution and the New Deal* 245 (2000); Howard J. Graham, *Procedure to*

Legal scholars and historians also asserted that the origins of the liberty of contract doctrine lay in the Justices' desire to impose their personal ideologies on American governance through constitutional law.¹⁰ Critics accused early twentieth-century Justices of being motivated by laissez-faire ideology inspired by Social Darwinism,¹¹ and to have intentionally favored the

Substance—Extra-Judicial Rise of Due Process, 1830-1860, 40 Cal. L. Rev. 483 (1952); Wayne McCormick, *Economic Substantive Due Process and the Right of Livelihood*, 82 Ky. L. Rev. 397, 406-07 (1993-94); Kermit Roosevelt III, *Forget the Fundamentals: Fixing Substantive Due Process*, 8 U. Pa. J. Const. L. 883 (2006). Morton Horwitz argues that attacks on the substantive aspect of due process were “largely produced by later critical Progressive historians intent on delegitimizing the *Lochner* court.” See Morton J. Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* 158 (1992).

¹⁰ In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, Justice Scalia, joined by the other four conservative Justices, wrote: “We had always thought that the distinctive feature of *Lochner*, nicely captured in Justice Holmes's dissenting remark about ‘Mr. Herbert Spencer's Social Statics,’ was that it sought to impose a particular economic philosophy upon the Constitution.” 527 U.S. 666, 691 (1999) (quoting *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting)). See also James E. Fleming, *Fidelity, Basic Liberties, and the Specter of Lochner*, 41 Wm. & Mary L. Rev. 147, 150, 173–74 (1999); Paul Kens, *Dawn of the Conservative Era*, 1997 J. Sup. Ct. Hist. 1, 11-12; Paul Kens, *Lochner v. New York: Rehabilitated and Revised, But Still Reviled*, 1995 J. Sup. Ct. Hist. 31, 43. Gary Peller, *The Classical Theory of Law*, 73 Cornell L. Rev. 300, 301 (1988) (“[I]n the modern legal context, *Lochner* is routinely criticized because the Court is supposed to have imposed its own values in its reading of the Constitution....”); Aviam Soifer, *The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court 1888-1921*, 5 Law & Hist. Rev. 249, 250 (1987) (noting that *Lochner* “is still shorthand in constitutional law for the worst sins of subjective judicial activism”). This criticism goes back to the so-called *Lochner* era itself. See, e.g., *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 633 (1936) (Stone, J., dissenting) (accusing the majority of relying on its “own personal economic predilections”); *Adkins*, 261 U.S. at 562 (Taft, C.J., dissenting) (“It is not the function of this court to hold congressional acts invalid simply because they are passed to carry out economic views which the court believes to be unwise or unsound.”); Frank J. Goodnow, *Social Reform and the Constitution* 247 (1911) (“What the courts actually do in cases in which they declare a law of [the *Lochner*] sort unconstitutional, is to substitute their ideas of wisdom for those of the legislature....”); Louis D. Brandeis, *The Living Law*, 10 U. Ill. L. Rev. 461, 464 (1916) (denouncing the Court's application of “18th century conceptions of the liberty of the individual and of the sacredness of private property”); William F. Dodd, *The Growth of Judicial Power*, 24 Pol. Sci. Q. 193, 194 (1909) (“The Courts have now definitely invaded the field of public policy and are quick to declare unconstitutional almost any laws of which they disapprove, particularly in the fields of social and industrial legislation.”); Felix Frankfurter, *Hours of Labor and Realism in Constitutional Law*, 29 Harv. L. Rev. 353, 363 (1916) (criticizing judicial decisions as reflecting the prevailing philosophy of individualism); Ernst Freund, *Limitation of Hours of Labor and the Federal Supreme Court*, 17 Green Bag 411, 413 (1905) (“[T]here has been a marked tendency for courts to constitute themselves into censors of the legislative power, and to nullify statutes that were contrary to their own views of sound and free government....”)

¹¹ See Cushman, *supra* note __, at 540 (“For many years, it was widely thought that the Court's economic regulation jurisprudence had been driven by the complementary factors of a commitment to laissez-faire economics, a devotion to the tenets of social Darwinism, and to a desire to shield businesses from legislation aimed at protecting workers and consumers.”).

interests of big business and to have sought to suppress the working class.¹² These allegations continue to have traction in some circles,¹³ even though the Court upheld much more regulatory legislation than it invalidated,¹⁴ despite a lack of evidence that Social Darwinism had any significant impact on the development of Supreme Court jurisprudence in the relevant time period,¹⁵ and despite the fact that the regulatory state at the federal, state, and local levels grew apace during the so-called *Lochner* era.¹⁶

¹² See Loren P. Beth, *The Development of the American Constitution, 1877-1910*, at 190 (1971); James MacGregor Burns, *Packing the Court: The Rise of Judicial Power and the Coming Crisis of the Supreme Court* 99 (2009); Archibald Cox, *The Court and the Constitution* 135 (1987); Gerald Gunther, *Constitutional Law* 432 (12th ed. 1991); A.H. Kelly & W.H. Harbison, *The American Constitution: Its Origins and Development* 498 (4th ed. 1970); Robert G. McCloskey, *American Conservatism in the Age of Enterprise, 1865-1910*, at 26-30 (1951); Wallace Mendelson, *Capitalism, Democracy, and the Supreme Court* 63 (1960); Frank R. Strong, *Substantive Due Process of Law: A Dichotomy of Sense and Nonsense* 95 (1986); Steven G. Calabresi, *Introduction*, in *Originalism: A Quarter Century of Debate* 13 (Steven G. Calabresi, ed. 2007); Gary McDowell, *Debate on Judicial Activism*, in *The New Right v. The Constitution* 109 (Stephen Macedo, ed. 1987); Emily Bazelon, *The Supreme Court on Trial*, *Slate*, July 6, 2009.

¹² Gary D. Rowe, *Lochner Revisionism Revisited*, 24 *L. & Soc. Inquiry* 221, 242 (1999) (describing this understanding of *Lochner*); George Thomas, *When the Legend becomes Fact*, <http://www.libertylawsite.org/2012/03/01/rehabilitating-lochner-a-law-and-liberty-symposium> (“*Lochner* has been characterized as embracing laissez-faire Social Darwinism and as generally placing the Supreme Court on the side of big corporations against struggling workers.”)

¹³ For examples of relatively works that attribute the liberty of contract doctrine to Social Darwinism, see, Angelo N. Ancheta, *Scientific Evidence and Equal Protection of the Law* 24-25 (2006); James MacGregor Burns, *Packing the Court: The Rise of Judicial Power and the Coming Crisis of the Supreme Court* (2009); Craig R. Ducat, *Constitutional Interpretation: Powers of Government* 424 (2008); Norton Garfinkle, *The American Dream vs. The Gospel of Wealth: The Fight for a Productive Middle-Class Economy* 63 (2007); Phillip Jenkins, *A History of the United States* 168 (2007).

¹⁴ See David E. Bernstein, *Lochner’s Legacy’s Legacy*, 82 *Tex. L. Rev.* 1 (2003); 2 Charles Warren, *The Supreme Court in American History* 741 (rev. ed. 1926); Michael J. Phillips, *How Many Times Was Lochner Era Substantive Due Process Effective?*, 48 *Mercer L. Rev.* 1049 (1997); 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 (1983); Charles Warren, *A Bulwark to the State Police Power--The United States Supreme Court*, 13 *Colum. L. Rev.* 667, 669 (1913) (“‘Due process’ and the ‘police power’ both being indefinite terms, the Court has exercised a wide discretion in enlarging the scope of both in favor of the State.”); Charles Warren, *The Progressiveness of the United States Supreme Court*, 13 *Colum. L. Rev.* 294, 294-95 (1913). Even if we accept *arguendo* the claim that the numbers don’t reflect the importance of the laws that *were* invalidated, see Barry Friedman, *The History of the Counter-majoritarian Difficulty, Part Four: Law’s Politics*, 148 *U. Pa. L. Rev.* 971, 1019 (2000), the fact remains that a Court committed to anything remotely approaching “laissez-faire” would have invalidated many of the laws that the Supreme in fact upheld.

¹⁵ See Joseph F. Wall, *Lochner v. New York: A Study in the Modernization of Constitutional Law, in American Industrialization, Economic Expansion, and Law* 113, 132 (Joseph R. Frese & Jacob Judd eds.,

The traditional criticisms of *Lochner* and liberty of contract were less a product of well-considered historical research and analysis, and more of the felt need by post-New Deal academics to justify the massive changes to American constitutional law that the New Deal and World War II had wrought. As Jack Balkin explains, “The *Lochner* narrative that we have inherited from the New Deal projects on to the Supreme Court between 1897 to 1937 a series of undesirable traits--the very opposite of those characteristics that supporters of the New Deal settlement wanted to believe about themselves.”¹⁷ New Deal supporters thought of themselves as legal realists, pragmatists, economic progressives, supporters of national regulatory authority, and believers in a restrained judiciary. The Justices of the “*Lochner* era” Court were therefore depicted as rigidly formalist, laissez-faire absolutists, reactionary Social Darwinists hostile to the national government, and as unrestrained activists who sought to read their own views into constitutional law.¹⁸ In short, “the Old Court’s vices were the virtues of the New Deal settlement inverted.”¹⁹ Polemical accounts with little factual basis therefore became the basis for the mainstream explanation of the Court’s liberty-of-contract decisions.

1978) (“The difficulty with this Social Darwinistic interpretation is that it was based upon no substantiating evidence.”). No such evidence has presented itself since Wall wrote this forty years ago.

¹⁶ Consider, by contrast, the restraints the Court would have put on the regulatory state if it had followed treatise author Christopher Tiedeman’s argument that the states’ police power is “confined to the detailed enforcement of the legal maxim, sic utere tuo, ut alienum non laedas” (use your own [property] in such a manner as not to injure that of another). Christopher G. Tiedeman, *A Treatise on the Limitations of Police Power in the United States: Considered from Both a Civil and Criminal Standpoint* vii (1886). See David N. Mayer, *The Myth of “Laissez-Faire Constitutionalism”: Liberty of Contract During the Lochner Era*, 36 *Hastings Con. L. Q.* 217, 256 (2009) (noting that Tiedeman also asserted that the protective tariff, usury laws, anti-gambling laws, and laws banning narcotic drugs were unconstitutional).

¹⁷ Jack M. Balkin, “Wrong the Day It Was Decided”: *Lochner* and Constitutional Historicism, 85 *B.U. L. Rev.* 677, 686 (2005).

¹⁸ *Id.*

¹⁹ *Id.*

Scholarly incentives to provide simplistic and tendentious interpretations of *Lochner* and liberty of contract²⁰ for political reasons were reinforced when the Warren and Burger Courts used the Due Process Clause to protect reproductive rights.²¹ Supporters of those rulings found it useful to promote the myth of a laissez-faire, Social Darwinist “*Lochner* era” Supreme Court to differentiate modern liberal due process decisions from early twentieth century decisions.²² Opponents of those rulings, meanwhile, sought to preserve the myth of an out-of-control activist *Lochner* Court to associate the reproductive rights decisions with discredited opinions of the past.²³

Old shibboleths die hard.²⁴ Despite decades of revisionist research on *Lochner* and the liberty of contract doctrine by legal historians,²⁵ some still repeat the simplistic views that in the past dominated discussion of the liberty of contract doctrine.²⁶ Even some relatively sophisticated

²⁰ *Lochner* itself did not become a widely-used symbol for the entire corpus of liberty-of-contract decisions, much less an entire era, until the 1970s. See David E. Bernstein, *Rehabilitating Lochner* ch. 7 (2011).

²¹ See Barry Friedman, *The Will of the People* 300–01 (2009); Helen Garfield, *Privacy, Abortion, and Judicial Review: Haunted by the Ghost of Lochner*, 61 *Wash. L. Rev.* 293, 307–08 (1986).

²² See Markus Dirk Dubber, *The Police Power: Patriarchy and the Foundations of American Government* 203 (2005) (“*Roe* and its predecessors came to be thought of as something completely new, having to do with novel notions like ‘penumbras’ of enumerated rights and ‘the right to privacy’, rather than as a continuation of the struggle to define and limit state power, and the power to police in particular.”).

²³ E.g., Robert Bork, *The Tempting of America* __ (1987) (tying *Roe v. Wade* to *Lochner*); Cf. David A. Strauss, *Why Was Lochner Wrong?*, 70 *U. Chi. L. Rev.* 373, 374 (2003) (discussing the competing views of liberals and conservatives as to why *Lochner* was wrong).

²⁴ See Matthew J. Lindsay, *Federalism and Phantom Economic Rights in NFIB v. Sebelius*, 82 *U. Cin. L. Rev.* 687, __ (2014) (noting the “remarkably durable mythology of ‘laissez-faire constitutionalism’ that surrounds *Lochner*”).

²⁵ See *infra*.

²⁶ E.g., Erwin Chemerinsky, *Constitutional Law* 614-17, 635 (5th ed. 2017) (stating that the Supreme Court aggressively reviewed economic regulations because of a strong commitment to laissez-faire, influenced by Social Darwinism and a hostility by businesses to regulations meant to protect consumers and workers); Daniel A. Farber et al., *Cases And Materials On Constitutional Law: Themes for the Constitution's Third Century* 28 (5th ed. 2013) (“the Fuller Court used [the Due Process Clause] as a sharp weapon for business interests against state regulatory legislation”). The depiction of liberty of contract in the latter two sources may reflect the reality that language in later editions of treatises and casebooks is often not updated to reflect recent scholarship.

modern progressive accounts of *Lochner*, such as Cass Sunstein's *Lochner's Legacy*,²⁷ work backwards from the premise that *Lochner* and its progeny are negative icons. *Lochner*-era liberty of contract cases must be disassociated doctrinally and historically from modern cases progressives favor, and associated with cases modern progressives abhor. Recently, this latter tendency has resulted in large and growing literature on so-called First Amendment Lochnerism.²⁸ At base, the First Amendment Lochnerism literature amounts to this: "here are some First Amendment decisions, such as *Citizens United*, that invalidated laws we like, so will try to associate these decisions with *Lochner* in an attempt to discredit them."²⁹

Many conservatives, meanwhile, continue to insist on associating any use of so-called substantive due process with a caricature of *Lochner*. Chief Justice John Roberts, joined by three of his colleagues, recently repeated virtually every hoary myth about *Lochner* and liberty of contract. In his dissent in *Obergefell v. Hodges*,³⁰ Roberts wrote that *Lochner* and like-minded cases represent an "unprincipled tradition of judicial policymaking;"³¹ required "adopting as constitutional law 'an economic theory which a large part of the country does not entertain;'"³²

²⁷ Cass R. Sunstein, *Lochner's Legacy*, 87 Colum. L. Rev. 873 (1987). For my critique, see David E. Bernstein, *Lochner's Legacy's Legacy*, 82 Texas L. Rev. 1 (2003).

²⁸ E.g., John C. Coates IV, *Corporate Speech & the First Amendment: History, Data, and Implications*, 30 Const. Comment. 223 (2015); Kenneth D. Catkin, *First Amendment Lochnerism? Emerging Constitutional Limitations on Government Regulation of Non-Speech Economic Activity*, 33 N. Ky. L. Rev. 365 (2006); Leslie Kendrick, *First Amendment Expansionism*, 56 Wm. & Mary L. Rev. 1199 (2015); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 Colum. L. Rev. 1453 (2015); Amanda Shanor, *The New Lochner*, 2016 Wis. L. Rev. 133; Nelson Tebbe, *Religion and Marriage Equality Statutes*, 9 Harv. L. & Pol'y Rev. 25 (2015); Rebecca Tushnet, *Cool Story: Country of Origin Labeling and the First Amendment*, 70 Food & Drug L.J. 25, 26 (2015); Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 Law & Contemp. Probs., no. 4, 2014, at 195; Tim Wu, *The Right to Evade Regulation: How Corporations Hijacked the First Amendment*, New Republic (June 3, 2013),

²⁹ As Jeremy Kessler has shown, protecting First Amendment rights has had significant implications for the commercial sphere since the Court began to aggressively protect such rights in the 1930s, even while it was rejecting liberty of contract. There has been no novel revival of so-called Lochnerism. Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 Colum. L. Rev. 1915, 1917 (2016).

³⁰ 576 U.S. ___, 135 S. Ct. 2584 (2015).

³¹ At 2616.

³² Id. at 2617.

reflected “the philosophy of Social Darwinism;”³³ empowered “judges to elevate their own policy judgments to the status of constitutionally protected ‘liberty;’”³⁴ and involved an “unprincipled approach”³⁵ that “convert[ed] personal preferences into constitutional mandates.”³⁶

Though *Lochner* mythology lives on in popular works, tendentious academic literature, and even in Supreme Court opinions, since the late 1960s³⁷ legal historians have gradually undermined the Manichean version of the history of liberty of contract and its opponents, to the extent that no serious legal historian accepts the cartoonish version of history that still has traction in some circles.³⁸ As Claudio Katz wrote in 2013, “The time is long past when scholars

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 2619.

³⁶ *Id.* at 2618.

³⁷ Important early revisionist articles include Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 *L. & Hist. Rev.* 293 (1985); William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 *Wis. L. Rev.* 767; Alan Jones, *Thomas M. Cooley and “Laissez-Faire Constitutionalism”*: A Reconsideration, 53 *J. Am. Hist.* 751 (1967); Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897*, 61 *J. Am. Hist.* 970 (1975); Charles W. McCurdy, *The Roots of “Liberty of Contract” Reconsidered: Major Premises in the Law of Employment, 1867-1937*, 1984 *Sup. Ct. Hist. Soc’y Y.B.* 20; William E. Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 *Harv. L. Rev.* 513 (1974); Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 *N.C. L. Rev.* 1 (1991).

³⁸ For overviews of the revisionist literature, see David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 82 *Geo. L.J.* 1 (2003); Barry Cushman, *Some Varieties and Vicissitudes of Lochnerism*, 85 *B.U. L. Rev.* 881 (2005); Rowe, *supra* note 12; and Stephen A. Siegel, *The Revisionism Thickens*, 20 *L. & Hist. Rev.* 631 (2002). Prominent revisionist books include Mark Warren Bailey, *Guardians of the Moral Order: The Legal Philosophy of the Supreme Court, 1860-1910* (2004); Barry Cushman, *Rethinking the New Deal Court* (1998); James W. Ely, Jr., *The Chief Justiceship of Melville W. Fuller: 1888-1910* (1995); Owen Fiss, *The Troubled Beginnings of the Modern State* (1993); Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (1993); Morton J. Horowitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (1992); Herbert Hovenkamp, *Enterprise and American Law, 1836-1937* (1991); William E. Nelson, *The Fourteenth Amendment* (1988); Michael J. Phillips, *The Lochner Court, Myth and Reality: Substantive Due Process from the 1890s to the 1930s* (2000); G. Edward White, *The Constitution and the New Deal* (2000).

characterized the era as a product of judges' reactionary commitments to laissez-faire or, worse, to Social Darwinism."³⁹

Contemporary scholars have reconstructed the period's due process jurisprudence, finding in it a principled commitment to a conception of justice with philosophical and jurisprudential roots dating back to the Founding and beyond. There are two primary lines of this revisionist literature. One emphasizes traditional Anglo-American hostility to "class legislation," legislation that seems to arbitrarily favor or disfavor particular factions. The second emphasizes the influence of the natural rights tradition, tempered by precedent and historicism, on the Court's due process decisions. This tradition includes both the notion of inherent limits on government power, including the notion that arbitrary legislation is not truly "law,"⁴⁰ and also the "free labor" tradition that evolved in response to slavery.⁴¹ The next section of this Article reviews the debate between partisans of the class legislation interpretation of the Court's pre-New Deal due process jurisprudence, and the partisans of a "fundamental rights" interpretation.

I. The Class Legislation/Fundamental Rights Debate: The Original Controversy

The most influential⁴² work of *Lochner* revision has been Howard Gillman's 1993 book, *The Constitution Besieged*.⁴³ Building on work by historians such as Alan Jones⁴⁴ and Michael

³⁹ Claudio J. Katz, Protective Labor Legislation in the Courts: Substantive Due Process and Fairness in the Progressive Era, 31 Law & Hist. Rev. 275, 275 (2013).

⁴⁰ See Randy E. Barnett & Evan D. Bernick, No Arbitrary Power: An Originalist Theory of the Due Process of Law, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3149590.

⁴¹ The free labor literature flows from William E. Nelson, The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America, 87 Harv. L. Rev. 537 (1974).

⁴² Claudio Katz, *supra* note __, at 275-76 (calling Gillman's "the most widely accepted explanation"); Stephen A. Siegel, Justice Holmes, Buck v. Bell, and the History of Equal Protection, 90 Minn. L. Rev. 106, __ (2005) ("Presently, the dominant claim is that *Lochner*-era constitutional law originally was grounded in norms of equal treatment and an aversion to what Jacksonians called 'class legislation.'").

⁴³ Howard Gillman, *The Constitution Besieged* (2013).

⁴⁴ Alan Jones, Thomas M. Cooley and 'Laissez-Faire Constitutionalism': A Reconsideration, 53 J. Am. Hist. 751, 752 (1967)

Les Benedict,⁴⁵ Gillman argued that the Supreme Court's so-called substantive due process jurisprudence from the 1870s to the 1930s flowed from "an overarching set of well-established legal doctrines and principles governing the legitimate exercise of police powers" that distinguished between valid health laws and illegitimate "class legislation"--legislation intended to advance the well-being of one segment of the population rather than the welfare of the community as a whole. Class legislation included what would now be called special interest legislation, as well as legislation that violated the longstanding principle that the government may not arbitrarily take from A to give to B. Gillman's thesis was a breath of fresh historical air for *Lochner* scholarship, which despite a growing body of revisionist literature was still dominated by tendentious, politicized accounts. Gillman's perspective was rapidly accepted by many leading constitutional historians, including Barry Cushman,⁴⁶ Charles McCurdy,⁴⁷ and Ted White.⁴⁸ I also initially found Gillman's thesis persuasive.⁴⁹

Not everyone concurred, however. One skeptic, Michael Phillips, acknowledged that Gillman's thesis had surface plausibility. He added, however, that he thought it unlikely that hostility to class legislation as described by Gillman could have been the Supreme Court's operative principle in its early twentieth century due process cases, because almost all legislation has unequal distributive consequences.⁵⁰ Phillips also pointed out that during the *Lochner* period

⁴⁵ Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 *Law & Hist. Rev.* 293, 305-14 (1985).

⁴⁶ Barry Cushman, *Rethinking the New Deal Court* (1998).

⁴⁷ Charles W. McCurdy, *The Liberty of Contract Regime in American Law*, in *The State and Freedom of Contract* 161 (Harry N. Scheiber, ed. 1998) (adopting the view that *Lochner* was motivated by hostility to "class legislation").

⁴⁸ G. Edward White, *The Constitution and the New Deal* 21-29, 246 (2000); G. Edward White, *Revisiting Substantive Due Process and Holmes's Lochner Dissent*, 63 *Brook. L. Rev.* 87, 97 (1997); see also Michael J. Brodhead, *David J. Brewer: The Life of a Supreme Court Justice, 1837-1910*, at 120 (1994).

⁴⁹ 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).

⁵⁰ Michael J. Phillips, *The Progressiveness of the Lochner Court*, *Denver U. L. Rev.* 453 (1998).

of the early twentieth century, the “Court’s substantive due process cases generally do not speak the language of class legislation. Instead they talk incessantly of property and liberty.”⁵¹

I had occasion to explore the origins of the Court’s liberty-of-contract jurisprudence in 2003.⁵² In his introduction, Gillman emphasized that his study was primarily based on his understanding of late nineteenth century legal thought.⁵³ I found that, as Gillman argued, state cases in the late nineteenth century that were critical to the development of liberty of contract relied primarily on hostility to class legislation.⁵⁴ I also found that from the *Slaughter-House Cases* in 1873⁵⁵ through *Lochner v. New York* in 1905,⁵⁶ the Supreme Court also focused on opposition to class legislation when considering due process limitations on the police power.

One caveat I noted, however, was that the Court typically used due process and equal protection interchangeably, or together, or just cited “the Fourteenth Amendment” when explaining the prohibition on class legislation. For example, Justice Stephen Field wrote in his concurring opinion in *Butchers' Union v. Crescent City* that the Fourteenth Amendment was “designed to prevent all discriminating legislation for the benefit of some to the disparagement of others” and “inhibit[ed] discriminating and partial enactments, favoring some to the impairment of the rights of others.”⁵⁷ Justice Joseph Bradley, writing for the Court in *The Civil Rights Cases*,

⁵¹ *Id.*

⁵² David E. Bernstein, *Lochner Era Revisionism Revised: Lochner and the Origins of Fundamental Rights Constitutionalism.*, 92 *Geo. L.J.* 1, 12 (2003)

⁵³ Gillman, *supra* note __, at 11 (stating that he is “focusing on the legal principles and standards invoked and applied by nineteenth-century jurists”).

⁵⁴ Cf. Nathan N. Frost et al., *Courts Over Constitutions Revisited: Unwritten Constitutionalism in the States*, 2004 *Utah L. Rev.* 333, 378 (“Any true student of the history of state constitutional law could have told us that substantive due process was not an invention of the late nineteenth century, did not have its roots in social Darwinism, and was not centrally designed to aid business in avoiding any and all forms of social regulation.”).

⁵⁵ 83 U.S. (16 Wall.) 36 (1873).

⁵⁶ 198 U.S. 45 (1905).

⁵⁷ *Butchers' Union Co. v. Crescent City Co.*, 111 U.S. 746, 758-59 (1884) (Field, J., concurring).

declared that, “what is called class legislation ... would be obnoxious to the prohibitions of the fourteenth amendment.”⁵⁸

The late nineteenth century Supreme Court not only maintained that the Due Process Clause (along with the Equal Protection Clause) prohibited class legislation, but several times suggested that to the extent the Due Process Clause had what we now call “substantive” content, that content was limited to a ban on unequal legislation. In the 1889 case of *Dent v. West Virginia*, for example, Justice Field wrote for a unanimous Court that “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.”⁵⁹ In *Caldwell v. Texas*, Chief Justice Melville Fuller’s unanimous opinion asserted that due process was “secured by laws operating on all alike,” and prohibited legislation that was “special, partial, and arbitrary.”⁶⁰

There has not been any serious historical challenge to Gillman’s argument that judicial concern with class legislation drove the development of Fourteenth Amendment police powers jurisprudence in the late nineteenth century. However, I find some of the details of Gillman’s thesis lacking in historical support. First, Gillman sometimes conflates the nineteenth century concept of class legislation with the modern concept of special interest legislation.⁶¹ The late nineteenth century Supreme Court understood class legislation primarily as laws that on their face created arbitrary classifications, not primarily as special interest legislation. If a legislative classification was arbitrary, then legislative motive was irrelevant. What was important was that the legislative classification was either arbitrary on its face or that reasonable people would deem

⁵⁸ *The Civil Rights Cases*, 109 U.S. 3, 24 (1883).

⁵⁹ 129 U.S. 114, 124 (1889).

⁶⁰ 137 U.S. 692, 697-98 (1891).

⁶¹ See Gillman, *Constitution Besieged*, supra note ___, at 14, 27, 29, 67.

it arbitrary.⁶² Arbitrary legislation, as a 1913 law review article explained, means “oppressive or unjust or not based upon sufficient reason.”⁶³ Of course, laws that classify its targets arbitrarily will in many instances be special interest legislation, but reaching such a conclusion was not necessary for the Court to condemn a law as class legislation. Nor was obvious special interest legislation necessarily unconstitutional class legislation, so long as the classification involved was not deemed arbitrary.

The Court, in fact, tried to avoid the issue of legislative intent entirely, explicitly declaring that it would not examine a law’s underlying legislative intent. In *Soon Hing v. Crowley*, for example, the Court stated that judges are not competent to “penetrat[e] into the hearts of men.”⁶⁴ Therefore, “the courts cannot inquire into the motives of the legislators in passing” legislation unless such motives were “disclosed on the face of the acts, or inferable from their operation.”⁶⁵ The Court’s reluctance to inquire into legislative motivation was a severe constraint on the Court’s willingness and ability to overturn facially-neutral legislation because it was meant to benefit or harm a particular class or group.

A second objection I have to Gillman’s work is that he overstates the degree to which the prohibition on class legislation led the late-nineteenth century Supreme Court to invalidate legislation. Gillman correctly cites to many *state* court decisions that invalidated regulations as class legislation. The ban on class legislation, a 1904 treatise that surveyed cases nationwide

⁶² As Keith Whittington explains:

the idea of a forbidden “class” was not understood in a Marxist sense of economic groups but could be applied to any set of individuals who had been arbitrarily singled out for unfair treatment by the state. As the Michigan jurist Thomas Cooley summarized, “distinctions in these respects should be based on some reason which renders them important.” If the government is going to restrict the rights of some but not others, it better have a good reason.

Whittington, *supra* note ____.

⁶³ Robert P. Reeder, *Is Unreasonable Legislation Unconstitutional?*, 62 U. Pa. L. Rev. 191, 192 (1913).

⁶⁴ 113 U.S. 703, 710-11 (1885).

⁶⁵ *Id.*

concluded, is “one of the most effectual limitations upon the exercise of the police power.”⁶⁶ The Supreme Court, however, adopted a much more forgiving version of the class legislation doctrine than did many state courts.

For example, several states invalidated laws that applied to only certain industries as illicit class legislation. By contrast, in *Missouri Pacific Railway Co. v. Mackey*,⁶⁷ the Court unanimously rejected a challenge to legislation that seemed “to rest upon the theory that legislation which is special in its character is necessarily within the constitutional inhibition.”⁶⁸ Justice Field, no fan of the regulatory state, strongly rejected this notion. He wrote, “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.”⁶⁹ Special legislation is constitutional “if all persons brought under its influence are treated alike under the same conditions.”⁷⁰ So states could single out certain industries for regulation, so long as the law operated uniformly within that industry.

The Court even rejected class legislative challenges to rather blatant legislative favoritism. *Powell v. Pennsylvania*⁷¹ involved a state prohibition on the sale of margarine, obviously intended to benefit the politically powerful dairy industry. Justice Harlan, for the Court, rejected the argument that law created an arbitrary classification repugnant to the Fourteenth Amendment. Harlan concluded that the law passed constitutional muster because it placed the

⁶⁶ Ernst Freund, *The Police Power* 705 (1904).

⁶⁷ 127 U.S. 205 (1888).

⁶⁸ *Id.* at 209. See also *In re Eight-Hour Law*, 39 P. 328, 329 (Colo. 1895) (per curiam) (invalidating an eight-hour law that only applied to mining and manufacturing companies as “manifestly in violation of the constitutional inhibition against class legislation”).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ 127 U.S. 678 (1888).

same restriction on all margarine sellers.⁷² Justice Field dissented, but he did not raise a class legislation objection to the margarine ban. Instead, Field argued that the law violated liberty and property rights without a valid police power rationale.⁷³

After *Powell*, the Court rejected a series of class legislation challenges to labor laws, including an hours law that applied only to miners,⁷⁴ and a safety law that applied only to mining companies with more than five employees.⁷⁵ The first drew dissents only from the two most economically libertarian Justices at the time, Brewer and Peckham,⁷⁶ while the second was unanimous. In short, by the time *Lochner* was decided in 1905, the Supreme Court's rhetorical opposition to class legislation was not accompanied by decisions placing significant restraints on government regulation.

Another dispute I have with Gillman's book is that he does not acknowledge the extent to which class legislation considerations became less significant to the Supreme Court over time. As noted, by the 1880s the Supreme Court had announced that the "substantive" due process clause only prohibited illicit class legislation. In the 1890s, however, the Court announced that the due process more broadly prohibited unreasonable limitations on liberty of contract and other liberties.

*Lochner v. New York*⁷⁷ exemplifies the Court's shift in emphasis in cases involving freedom of contract from equalitarian class legislation concerns to liberty concerns. As Gillman

⁷² *Id.* at 686.

⁷³ *Id.* at __ (Field, J., dissenting).

⁷⁴ *Holden v. Hardy*, 169 U.S. 366 (1898).

⁷⁵ *St. Louis Consol. Coal Co. v. Illinois*, 185 U.S. 203 (1902).

⁷⁶ Brewer once wrote, "The paternal theory of government is to me odious. The utmost possible liberty to the individual, and the fullest possible protection to him and his property, is both the limitation and the duty of government." *Budd v. New York*, 143 U.S. 517, 551 (1892) (Brewer, J., dissenting). As a state court judge, Peckham spoke of "the absolute liberty of the individual to contract regarding his own property." *People ex rel. Annan v. Walsh*, 22 N.E. 682, 687 (N.Y. 1889) (Peckham, J., dissenting).

⁷⁷ 198 U.S. 45 (1905).

acknowledges *Lochner* “does not explicitly rely on the language of unequal, partial, or class legislation.”⁷⁸ Rather, as the opinion states, *Lochner* invalidated the bakers’ law because it violated liberty of contract without a valid police power rationale.⁷⁹ Justice Peckham’s opinion failed to rely on class legislation considerations even though the dissenting opinion in the New York Court of Appeals below, urging invalidation of the hours law, relied on a class legislation argument.⁸⁰ Moreover, *Lochner*’s Supreme Court brief had relied primarily on a class legislation argument. The brief argued that the law not only applied arbitrarily only to bakers, but even more arbitrarily, excluded between one-third and one-half of all bakers from its coverage.⁸¹

⁷⁸ Gillman, *supra* note __, at 128.

⁷⁹ Paul Kens has written that by explicitly relying on liberty-of-contract to invalidate a purported health law, “radical departure from *Lochner* does represent a standard constitutional doctrine.” Paul Kens, *The History and Implications of Lochner v. New York*, H-Law, June 2013, <https://www.h-net.org/reviews/showrev.php?id=36949>. I would call it a “significant” departure, rather than a radical one. For one thing, truly radical doctrines rarely surface in unanimous (*Allgeyer v. Louisiana*) or nearly unanimous (*Lochner*; eight of the nine Justices, save Holmes, accepted the liberty of contract doctrine) Supreme Court rulings. As Keith Whittington explains, “*Lochner* was not a radical departure from the past perpetuated by judicial allies of the wealthy. The jurisprudence that informed the justices on the Court in 1905 had been elaborated by judges, lawyers, and politicians since the early days of the republic and had been applied in a wide variety of circumstances. Far from attempting to read Herbert Spencer’s *Social Statics* into the law, as Justice Holmes charged, the *Lochner* Court was attempting to apply well-worn principles of American political and constitutional thought to the new circumstances of industrial labor conflict and competition.” Whittington, *supra* note __; cf. Nicholas Mosvick, Book Review, (“*Lochner* was an atypical case, but not a revolutionary one.”).

⁸⁰ *People v. Lochner*, 69 N.E. 373, 386 (N.Y. 1904) (O’Brien, J., dissenting), *rev’d sub nom.*, *Lochner v. New York*, 198 U.S. 45 (1905). Cushman, however, suggests that there “are suggestions sprinkled throughout Peckham’s *Lochner* opinion that some members of the majority may have viewed the challenged statute as class legislation that singled out bakers for inadequate reason.” Cushman, *supra* note __, at 558. I do not find these “suggestions” as pregnant with meaning as Cushman does. And while it’s possible that Justice Peckham was trying to lure the votes of other Justices with subtle allusions to class legislation, or that one or more of the Justices requested that such language be added to the opinion, such possibilities are entirely speculative.

⁸¹ Brief for Appellant at 8-12, *Lochner v. New York*, 198 U.S. 45 (1905). Gillman notes the anti-class argument in *Lochner*’s brief, but uses it as evidence that *Lochner* was based on hostility to class legislation. Gillman, *supra* note __, at 127. It seems more logical to concentrate on the disconnect between the brief’s focus on class legislation and the opinion’s neglect of that issue.

After *Lochner*, the Court increasingly relied on the due process clauses as the bases for the protection of fundamental rights such as liberty of contract against arbitrary legislation.⁸² Moreover, when reviewing federal legislation (where no equal protection clause was available to fudge the issue) the Court repeatedly declined to hold that the Fifth Amendment's Due Process Clause contained an equality component.⁸³ Indeed, the Court occasionally explicitly denied that due process of law prohibited discrimination. In *District of Columbia v. Brooke*,⁸⁴ the Court rejected a claim that a federal law constituted unconstitutional unequal legislation because the plaintiff failed to identify "any provision of the Constitution of the United States which prohibits Congress from enacting laws which discriminate in their operation between persons or things."⁸⁵ A law review commentator opined that this opinion intimated that "Congress may enact class legislation," a proposition the commentator deemed correct.⁸⁶

Constitutional change was gradual. Some Justices continued to apply class legislation analysis under the Due Process Clause, and legal treatises sometimes overstated the importance of class legislation under Due Process.⁸⁷ In property rights (as opposed to "liberty") cases, meanwhile, the Court continued to use the Due Process Clause to invoke the traditional ban on taking property from A to give to B. But class legislation analysis in cases involving allegedly

⁸² Some recognized the novelty of *Lochner* at the time. *Validity of State Regulation of Hours of Labor*, 60 Cent. L.J. 401, 401-02 (1905) (opining that *Lochner* established "a new rule of construction or limitation of the police power").

⁸³ The Court sometimes assumed *arguendo* that due process contained an equal protection component, but declined to conclude that it did. E.g., *Second Employers' Liability Cases*, 223 U.S. 1, 52 (1912) ("Even if it be assumed that [the Fifth Amendment due process] clause is equivalent to the 'equal protection of the laws' clause of the Fourteenth Amendment ..."); *United States v. Heinze*, 218 U.S. 532, 546 (1910) ("Assuming, therefore, and assuming only, not deciding that Congress may not discriminate in its legislation ...").

⁸⁴ 214 U.S. 138 (1909).

⁸⁵ *Id.* at 149.

⁸⁶ E. Connor Hall, *Due Process of Law and Class Legislation*, 43 Am. L. Rev. 926, 927 (1909)

⁸⁷ See Cushman, *Varieties and Vicissitudes*. See *infra* notes ___ to ___ and accompanying text.

arbitrary classifications gradually shifted away from the Due Process Clause to find a home primarily in the Equal Protection Clause.⁸⁸

In 1921 in *Truax v. Corrigan*, the Supreme Court announced that the Due Process Clause provided a “mere minimum” of protection against unequal legislation. The primary locus of such protection, instead, was the Equal Protection Clause.⁸⁹ In 1927, the author of a treatise on due process of law noted this shift. “Since 1916,” he pointed out, “less than one-third of the opinions, in decisions nullifying legislations [sic] because of the arbitrary classifications involved, mentioned due process at all.”⁹⁰

With the equality component of due process in gradual decline, the Court began to focus on “fundamental rights.” In his dissent in *Powell v. Pennsylvania*,⁹¹ Justice Field, expanding on the views he expressed in dissent in the *Slaughter-House Cases*,⁹² vigorously argued that the right to pursue an occupation free from unreasonable government regulation was a liberty interest protected by the Due Process Clause.⁹³ Field, however, was ahead of his time, and no one joined his dissent. The Supreme Court did not issue an opinion embracing the right to liberty of contract until 1895,⁹⁴ and it was not until the 1896 Supreme Court term that the Due Process Clause began to play a prominent role in Supreme Court jurisprudence, with the Court eventually embracing the notion that the Clause protected fundamental rights from government

⁸⁸ See *id.*; Nourse & Maguire, *supra* note __; Siegel, *supra* note __ (arguing the hostility to class legislation was central to *Lochner* era jurisprudence, but finding that the locus of the Court’s class legislation jurisprudence was the Equal Protection Clause).

⁸⁹ *Truax v. Corrigan*, 257 U.S. 312, 333-34 (1921).

⁹⁰ Randy Mott, *Due Process of Law* 278 (1926).

⁹¹ 127 U.S. 678 (1888).

⁹² *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, __ (Field, J., dissenting).

⁹³ *Powell*, 127 U.S. at __ (Field, J., dissenting).

⁹⁴ *Frisbie v. United States*, 157 U.S. 160, 165-66 (1895) (Brewer, J.).

infringement.⁹⁵ These fundamental rights were understood to be specific natural rights that had proven crucial to the development of the tradition of Anglo-American liberty.⁹⁶

II. The Class Legislation/Fundamental Rights Debate: Subsequent Developments

My use of the term fundamental rights to describe the Court's *Lochnerian* due process jurisprudence seems to have led to some misunderstandings. Victoria Nourse, for example, suggests that I neglected the role of the police power, "assuming that since *Lochner* was a case about the right to contract, that right must have been a strong one--a right-as-trump," the way we understand "fundamental rights" today.⁹⁷

My use of the phrase fundamental rights was not intended to suggest that the *Lochner* Court understood the scope of the Constitution's protection of fundamental rights the same way the modern Supreme Court does. Rather, I used the phrase fundamental rights because the early-twentieth-century Supreme Court itself regularly stated it was protecting "fundamental rights" via its due process jurisprudence, and it would be anachronistic to ignore the Court's own framing of its rulings.⁹⁸ The focus on fundamental rights represented an important shift from the

⁹⁵ See Michael G. Collins, October Term, 1896--Embracing Due Process, 45 Am. J. Legal Hist. 71 (2001). I should note that while Collins identifies *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), as embracing liberty of contract, the opinion actually endorsed only a right to contract with out-of-state parties, and did not use the phrase "liberty of contract."

⁹⁶ Stephen A. Siegel, Historism in Late Nineteenth-Century Constitutional Thought, 1990 Wis. L. Rev. 1431, 1435. See also Roscoe Pound, Interpretations of Legal History 10 (1923) (stating that "the historical school" ruled "almost uncontested during the last half of [the nineteenth century]").

⁹⁷ Victoria F. Nourse, A Tale of Two *Lochners*: The Untold History of Substantive Due Process and the Idea of Fundamental Rights, 97 Calif. L. Rev. 751, __ (2009).

⁹⁸ For examples of the Court referring to "fundamental rights" protected by the Due Process Clause, see *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (noting that "freedom of speech and of the Press" were among the "fundamental personal rights and 'liberties' protected by the Due Process Clause of the Fourteenth Amendment"); *Bailey v. Alabama*, 219 U.S. 219, __ (1911); *American Land Co. v. Zeiss*, 219 U.S. 47, 66 (1911); *Louisville & N.R. Co. v. Schmidt*, 177 U.S. 230, 238 (1900); see also C. G. Haines, *Judicial Review of Legislation in the United States and the Doctrine of Vested Rights and of Implied Limitations of Legislatures*, 3 Tex. L. Rev. 1, 27 n.68 (1924) ("The emerging concept of liberty of contract was soon to be grouped with the undefined fundamental rights.").

Court's previous focus on due process's limits on class legislation to a new focus on the protection of liberty interests.

The liberty-of-contract doctrine was never nearly as strict or doctrinaire as its critics have frequently alleged, despite the use of "fundamental rights" language. As David Mayer has explained, "the test applied by the [*Lochner*] Court has been aptly characterized ... as a 'moderate' means-ends analysis--that is, a fairly rigorous rational basis review that can be distinguished from both of the tests used by the modern Court in substantive due process cases."⁹⁹

Lochner itself was an outlier in its result, the only case out of more than a dozen in which the Court invalidated a challenged maximum hours law as a violation of the right to liberty of contract.¹⁰⁰ There were certain peculiarities about *Lochner* that likely resulted in this outcome, to wit: (1) The state claimed the law in question was a health law, but it was placed in the state

⁹⁹ David N. Mayer, The Myth of "Laissez-Faire Constitutionalism": Liberty of Contract During the *Lochner* Era, 36 *Hastings Const. L.Q.* 217, 262 (2009).

¹⁰⁰ See *Radice v. New York*, 264 U.S. 292, 294-95 (1924) (upholding a law restricting hours of women workers in restaurants); *Dominion Hotel, Inc. v. Arizona*, 249 U.S. 265, 267-69 (1919) (upholding law limiting hours of women hotel workers); *Bunting v. Oregon*, 243 U.S. 426, 433-34, 438 (1917) (upholding maximum hours law for industrial employees); *Wilson v. New*, 243 U.S. 332, 341, 359 (1917) (upholding maximum hours law for railroad workers); *Bosley v. McLaughlin*, 236 U.S. 385, 388-89, 396 (1915) (upholding maximum hours law for women); *Miller v. Wilson*, 236 U.S. 373, 379, 384 (1915) (upholding women-only maximum hours law); *Hawley v. Walker*, 232 U.S. 718, 718 (1914) (per curiam) (upholding women-only maximum hours law for women); *Riley v. Massachusetts*, 232 U.S. 671, 679, 681 (1914) (upholding women-only maximum hours law); *Balt. & Ohio R.R. Co. v. Interstate Commerce Comm'n*, 221 U.S. 612, 619 (1911) (concluding that Federal Hours of Service Act does not violate the right to liberty of contract); *Muller v. Oregon*, 208 U.S. 412, 416, 423 (1908) (upholding women-only maximum hours law for women); *Ellis v. United States*, 206 U.S. 246, 254-55 (1907) (upholding maximum hours law that applies to public works employers); *Cantwell v. Missouri*, 199 U.S. 602, 602 (1905) (per curiam) (upholding maximum hours law for mine workers); *Atkin v. Kansas*, 191 U.S. 207, 224 (1903) (upholding maximum hours law that applies to public works employers); *Holden v. Hardy*, 169 U.S. 366, 380, 398 (1898) (upholding maximum hours law for miners). Cf. Nichola Mosvick, Book Review (deeming *Lochner* an "outlier"); cf. Collins Denny, Jr., *The Growth and Development of the Police Power of the State*, 20 *Mich. L. Rev.* 173, 209 (1921) ("But in the case of *Bunting v. Oregon* the *Lochner* case, except for unusual violations of liberty, was overthrown."). Nor was the Court's general acquiescence to hours legislation a novel phenomenon. Even Justice Field dismissed the notion that the Fourteenth Amendment protects "the right of a man to work at all times." *Soon Hing v. Crowley*, 113 U.S. 703, 709 (1885).

labor code, not the health code;¹⁰¹ (2) *Lochner*'s attorney presented evidence in his brief that baking was not an especially unhealthful profession, while the state provided no rebuttal evidence;¹⁰² and (3) perhaps most important, but almost never remarked upon, the hours law in question was unusually strict—it had no provision for overtime, and violations were subject to criminal, not civil penalties.¹⁰³ A baker that offered triple pay to his workers to work an extra hour to finish an important holiday order could go to jail for doing so. These factors probably swayed the swing Justices to vote with the majority, even though they voted to uphold other maximum hours laws.

The idiosyncratic nature of *Lochner* has been obscured in part because the opinion was assigned to Justice Rufus Peckham, who, along with Justice David Brewer, sought to enforce a much narrower version of the police power than did their colleagues.¹⁰⁴ Peckham's opinion, which likely was originally written as a dissent,¹⁰⁵ is filled with rhetoric some of the other Justices in the majority did not agree with. We can be confident of this lack of agreement

¹⁰¹ Brief for the Plaintiff in Error, *supra* note 162, at 41.

¹⁰² Brief for Plaintiff in Error 57-58, *Lochner v. New York*, 198 U.S. 45 (1905) (No. 292).

¹⁰³ Section One of the Bakeshop Act, codified as Section 110 of the Labor Law of New York, provided: No employe shall be required or permitted to work in a biscuit, bread or cake bakery or confectionery establishment more than sixty hours in any one week, or more than ten hours in any one day, unless for the purpose of making a shorter work day on the last day of the week; nor more hours in any one week than will make an average of ten hours per day for the number of days during such week in which such employee shall work.

Lochner, 198 U.S. at 46 (1905).

¹⁰⁴ For dissents by Justices Brewer and Peckham from decisions upholding regulatory legislation, see *McLean v. Arkansas*, 211 U.S. 539, 552 (1909); *Bacon v. Walker*, 204 U.S. 311, 320 (1907); *Union Bridge Co. v. United States*, 204 U.S. 364, 403 (1907); *Gardner v. Michigan*, 199 U.S. 325, 335 (1905); *Atkin v. Kansas*, 191 U.S. 207, 224 (1903); *Otis v. Parker*, 187 U.S. 606, 611 (1903); *Booth v. Illinois*, 184 U.S. 425, 431 (1902); *Dayton Coal & Iron Co. v. Barton*, 183 U.S. 23, 25 (1901); *Knoxville Iron Co. v. Harbison*, 183 U.S. 13, 22 (1901); and *Holden v. Hardy*, 169 U.S. 366, 398 (1898).

¹⁰⁵ See Charles Henry Butler, *A Century at the Bar of the Supreme Court of the United States* 172 (1942) (asserting that John Maynard Harlan, the Justice's son, stated that his father told him that Harlan's opinion was originally the majority opinion); John E. Semonche, *Charting the Future: The Supreme Court Responds to a Changing Society, 1890-1920*, at 181-82 (1978) (arguing that the internal construction and style of the dissent arguably indicates it was intended to be a majority opinion); Alan F. Westin, *The Supreme Court and Group Conflict: Thoughts on Seeing Burke Put Through the Mill*, 52 *Am. Pol. Sci. Rev.* 665, 667 n.3 (1958) (stating that Justice Harlan's papers show that he originally wrote a majority opinion for five Justices, but that one Justice changed his mind between conference and the final vote).

because Peckham denounced a category of laws that his colleagues had already voted to uphold.¹⁰⁶ Why the more moderate Justices failed to object to some of Peckham's more radical language is unknown. However, at the time majority opinions often were not even circulated to the other members of the majority, and even when they were, objections were relatively rare.¹⁰⁷

Another important point, one that I didn't appreciate until recently, is that once Peckham and Brewer died in 1909 and 1910 respectively, there were no traditionalist conservative constitutionalist voices with a strong faith in natural rights left on the Court.¹⁰⁸ G. Edward White helpfully refers to this traditionalist position as "Guardian Review," which "presupposed that the essentialist principles of the Constitution reinforced preordained barriers between public power and private rights."¹⁰⁹ In 1875, for example, the United States Supreme Court declared that "[t]here are limitations on [government] power which grow out of the essential nature of all free governments."¹¹⁰ Justice Harlan, who also invoked natural rights limitations on law,¹¹¹ died in 1911.

¹⁰⁶ Peckham cited two cases in which state courts "upheld the right of free contract and the right to purchase and sell labor upon such terms as the parties may agree to." *Lochner*, 198 U.S. at 63-64. Not only had the Supreme Court never adopted such a broad understanding of the right to contract, but the first of the cases that Justice Peckham cited favorably voided a truck act. The Supreme Court had already held over Peckham and Brewer's dissent that truck acts were constitutional. *Knoxville Iron Co. v. Harbison*, 183 U.S. 13, 22 (1901).

¹⁰⁷ I thank Ted White for informing me that there was no norm on the Supreme Court of circulating majority opinions at that time.

¹⁰⁸ This is consistent with the general decline in libertarian economic thought at the time. See Lucius Polk McGehee, *Due Process of Law Under the Federal Constitution* 362 (1906) ("Enlightened public opinion, as reflected by our legislatures and courts, has receded from the strict doctrine of laissez-faire, and we cannot say that a further abandonment of that position may not be advisable.")

¹⁰⁹ G. Edward White, *The Constitution and the New Deal* 233 (2002).

¹¹⁰ *Loan Association v. Topeka* 20 Wall. (87 U.S.) 655, 662-63 (1875).

¹¹¹ See, e.g., *Madisonville T. Co. v. St. Bernard M. Co.*, 196 U.S. 239, 251 (1905) (Harlan, J.) (proclaiming that there are limitations on all organs of government "which grow out of the essential nature of all free governments"); see generally Milton R. Konvitz, *Fundamental Rights: History of a Constitutional Doctrine* 38-40 (2001) (noting Harlan's influence on the development of natural-rights jurisprudence on the Supreme Court in the years leading up to *Lochner*).

The Justices who are typically called “conservative” thereafter, such as the “Four Horsemen,” were actually moderate Progressives¹¹² who did not share the essentialist natural rights-oriented principles of predecessors such as Field, Peckham, and Brewer.¹¹³ Rather, they sought to preserve some traditional limitations on government authority while mostly acceding to the dramatic growth of progressive regulation.¹¹⁴ Their opponents, such as Louis Brandeis, were more radical Progressives who were reluctant to concede that that the Constitution put significant judicially enforceable general constraints on the scope of government authority.¹¹⁵

The more moderate Progressive Justices of the 1910s and 20s naturally had little interest in invigorating anti-class-legislation jurisprudence under the due process clause. With the growth of the Progressive regulatory state, a strong anti-class-legislation doctrine would have put the justices in the thankless position of arbitrating all-too-many hot political debates. The political difficulties inherent in doing so were compounded by the absence of clear principles to

¹¹² See Barry Cushman, *The Secret Lives of the Four Horsemen*, 83 Va. L. Rev. 559, 559-60 (1997); Harry G. Hutchison, *Lochner, Liberty of Contract, and Paternalism: Revising the Revisionists?* Review Essay: David N. Mayer, *Liberty of Contract: Rediscovering a Lost Constitutional Right*, 47 Ind. L. Rev. 421, 423 & nn.22-23 (2014). For a related discussion of the fact that leading supporters of restrictions on the scope of the federal commerce power were moderate Progressives, see Logan E. Sawyer III, *Creating Hammer v. Dagenhart*, 21 Wm. & Mary Bill of Rts. J. 67, 87 (2012). The “conservative” Justices who served on the Court over the in the 1920s and 30s--men like George Sutherland, James McReynolds, and Willis Van Devanter--all had backgrounds in Progressive politics. See Cushman, *supra*.

¹¹³ See Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. Rev. 1, 6 (1991) (“*Lochner* era constitutionalism broke with tradition and anticipated the more evolutionary jurisprudence of modern constitutional law.”); *id.* at 108 (“*Lochner* era jurisprudence may be seen as having much in common with the jurisprudence of its opponents and as being a transitional concept, forming a bridge from early to modern American constitutional theory.”).

¹¹⁴ See Siegel, *supra*.

¹¹⁵ Brandeis even (privately) advocated repeal of the Fourteenth Amendment, to prevent what he considered judicial mischief. Melvin I. Urofsky, *The Brandeis-Frankfurter Conversations*, 1985 Sup. Ct. Rev. 299, 320. Brandeis moderated his position over time, and I have argued that Brandeis “was responsible for guiding the Progressive wing of the Court away from the more consistently statist, deferential-to-democratic-majorities path charted by Justice Holmes to an agenda more accommodating to libertarian and equalitarian concerns.” David E. Bernstein, *From Progressivism to Modern Liberalism: Louis D. Brandeis as a Transitional Figure in Constitutional Law*, 89 Notre Dame L. Rev. 2029, 2033 (2014). Justice Holmes was *sui generis*, and it would be mistaken to call him a radical Progressive. Nevertheless, his opinions favoring judicial restraint and majoritarianism found great favor among young Progressive intellectuals.

differentiate illicit class legislation from legislation that properly relied on classifications to promote appropriate public goals.¹¹⁶ Even in the relatively conservative nineteenth century, the prohibition on class legislation had done little to restrain the growth of government. Moderately strict enforcement of a ban on class legislation became untenable in the twentieth century because, as Keith Whittington notes, “the modern American state is premised on generating ‘class legislation,’ in the nineteenth century understanding of the term.”¹¹⁷

Instead, a relatively narrow focus on fundamental rights allowed the Court to protect some discrete spheres of life from what the Court deemed to be overregulation. First, the Court systematized its liberty-of-contract jurisprudence. In 1923, the Court interpreted its precedents as allowing for the following types of statutes despite their infringement on liberty of contract, in addition to statutes that pursued traditional police-power ends: (1) those “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.¹¹⁸ Beyond those exceptions, the Court stated that “freedom of contract is ... the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances.”¹¹⁹

Second, the Court began expanding its “fundamental rights” jurisprudence beyond the economic sphere, into what White calls freedom of conscience cases. The Court therefore held that state governments may not ban the teaching of foreign languages,¹²⁰ or ban parents from

¹¹⁶ See generally V.F. Nourse & Sarah A. Maguire, *The Lost History of Governance and Equal Protection*, 58 *Duke L.J.* 955 (2009).

¹¹⁷ Whittington, *supra* note ____.

¹¹⁸ *Adkins v. Children's Hosp.*, 261 U.S. 525, 546-48 (1923).

¹¹⁹ *Id.*

¹²⁰ *Tokushige; Meyer v. Nebraska*, 262 U.S. 390 (1923).

sending their kids to private schools.¹²¹ The Court also took its first tentative steps toward protecting freedom of speech from hostile regulation.¹²² These decisions had the advantage of rallying support from ethnic minorities targeted by assimilationist legislation against efforts by Progressives like Senator Robert LaFollette to strip the Court of much of its power.¹²³

Third, once the Court limited its due process of law focus to protecting fundamental liberty rights, it eventually began to protect those rights more stringently. The Court retrenched from broad, vague tests balancing liberty and government power. These tests had been generally ineffectual in limiting government power in a progressive age, in part because the scope of the police power was so vague and manipulable.¹²⁴ Instead, the Court adopted narrow but much more specific doctrines that tried to carve out areas of autonomy for the private sphere. As Keith Whittington explains, “The specific idea of liberty of contract was part of a broader framework of individual right that conservative jurists were developing in the late nineteenth and early twentieth centuries. These rights claims could be deployed to question not only how legislatures distinguished between different groups of individuals affected by their laws but also how legislatures justified imposing burdens on individuals at all.”¹²⁵

In *Lochner*, Justice Peckham announced a very broad, general right to liberty of contract. But he also conceded that this right would be trumped by a valid assertion of the states’ police

¹²¹ *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

¹²² *Stromberg v. California*, 283 U.S. 359 (1931) (invalidating a law banning the display of the Communist flag); *Gitlow v. New York*, 268 U.S. 652 (1925) (assuming that freedom of expression was protected against the states by the Fourteenth Amendment).

¹²³ See Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* 221-22 (2009); M.B. Carrott, *The Supreme Court and Minority Rights in the Nineteen-Twenties*, 41 N.W. Ohio Q. 144 (1969) (suggesting that the Court was motivated in part by a desire to win political support minority groups).

¹²⁴ See George W. Alger, *The Courts and Legislative Freedom*, 111 *Atlantic Monthly* 345, 347 (1913) (stating that an individual who looks for “a definition of this police power, so-called ... finds there is no concrete definition of it” and that it “is incapable of exact definition”).

¹²⁵ Whittington *supra* note ____.

power. By contrast, in 1923, in *Adkins v. Children's Hospital*,¹²⁶ the Supreme Court, while formalizing major exceptions to the doctrine, proclaimed that freedom of contract is “the general rule and restraint the exception,” and abridgements of that freedom could be justified “only by the existence of exceptional circumstances,”¹²⁷ a far stricter standard than merely providing a valid police power justification.¹²⁸

That same year, in *Meyer v. Nebraska* the Court invalidated as a violation of the Fourteenth Amendment's Due Process Clause a Nebraska law banning the teaching of foreign languages to schoolchildren.¹²⁹ The Court acknowledged that the state a valid interest in the assimilation of immigrant populations. Nevertheless, the Court held the law was invalid because it infringed on “fundamental rights which must be respected” and that “a desirable end cannot be promoted by prohibited means.”¹³⁰

The Court produced a similar outcome in 1927 in *Farrington v. Tokushige*.¹³¹ *Farrington* involved a challenge to a law designed to ban Japanese-language schools in Hawaii, then a federal territory. The Supreme Court stated that it “appreciate[d] the grave problems incident to the large alien population of the Hawaiian Islands.” The Court held that the law was nevertheless unconstitutional because it went too far in infringing on fundamental rights.”¹³²

In *The Constitution Besieged*, Gillman provided no explanation as to how, if at all, the *Lochner* line of due process cases were linked to the Court’s nascent fundamental rights

¹²⁶ 261 U.S. 525 (1923).

¹²⁷ *Id.* at 456.

¹²⁸ Cf. *Chi., Burlington & Quincy R.R. Co. v. McGuire*, 219 U.S. 549, 567 (1911) (“There is no absolute freedom to do as one wills or to contract as one chooses.....Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.”); *Manigault v. Springs*, 199 U.S. 473, 480 (1905) (“[T]he police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals.”).

¹²⁹ *Meyer v. Nebraska*, 262 U.S. 390 (1923).

¹³⁰ *Id.* at 393.

¹³¹ 273 U.S. 284 (1927).

¹³² *Id.* at ___.

jurisprudence, except to deny that those cases were the antecedents of cases like *Griswold* and *Roe v. Wade*. In an article published subsequent to his book, Gillman treated the rise of “fundamental rights” jurisprudence as solely an outgrowth of opinions by progressive jurists such as Brandeis and Hughes.¹³³ Gillman made an important point. At a time when the more “conservative” Justices were primarily still engaged in traditional police powers jurisprudence, and most progressives were hostile to any sort of meaningful judicial review of legislation that infringed on individual rights, the more progressive justices began to develop a jurisprudence that accepted a broad role for government authority, but sought to protect certain “preferred freedoms” such as freedom of speech from hostile state action.¹³⁴

Where Gillman erred is in not recognizing that the more conservative Justices were also beginning to develop precedents that contributed to the rise of modern fundamental rights jurisprudence. Gillman contended that cases such as *Meyer*, written by James McReynolds, who by reputation was an arch-conservative, are not antecedents of modern fundamental rights jurisprudence.¹³⁵ Rather, they are in the tradition of *Lochner* and other due process cases, in which the Court tested the constitutionality of a law against whether the state provided a valid public-regarding (police power) rationale for the law.¹³⁶ “In a nutshell,” Gillman later explained, “I wanted to say that modern ‘fundamental rights’ jurisprudence was just a completely different sort of thing than *Lochner* era ‘public purpose’ jurisprudence.”¹³⁷ Gillman later reiterated that as

¹³³ Howard Gillman, Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties Jurisprudence, 47 Pol. Res. Q. 623, 649 (1994); see David E. Bernstein, From Progressivism to Modern Liberalism: Louis D. Brandeis as a Transitional Figure in Constitutional Law, 89 Notre Dame L. Rev. 2029, 2040–49 (2014) (discussing Brandeis’s important “transitional” role between old progressives who rejected constitutionalism, and modern liberal civil liberties jurisprudence).

¹³⁴ Id.

¹³⁵ Id.

¹³⁶ Id.

¹³⁷ Howard Gillman, De-*Lochnerizing* *Lochner*, 85 B.U. L. Rev. 859, 862 n.17 (2005).

he understood it, decisions like *Meyer* and *Pierce v. Society of Sisters* “turned on the question of whether the legislation at issue actually promoted community health, safety, or morality.”¹³⁸

Gillman was certainly correct in his general contention that *Lochner* era due process jurisprudence was different from modern fundamental rights jurisprudence. Nevertheless, he neglected some salient continuities. First, as noted above,¹³⁹ the *Lochner* Court spoke frequently of fundamental rights protected by the Fourteenth Amendment before the more progressive justices began to advocate strong protection for freedom of speech as a fundamental right. In fact, there was a consensus on the Court in the early 1920s that freedom of speech was a fundamental right; all of the more traditionalist justices joined a 1923 opinion written by Justice Sanford referring to freedom of speech and press as “fundamental rights” protected by the Due Process Clause.¹⁴⁰ Second, nothing in opinions like *Meyer* suggests that concern with class legislation motivated the outcome, even though the opinion relies on the *Lochner* line of cases for its interpretation of the Due Process Clause. The Court’s shift in focus from class legislation to “fundamental rights” surely anticipates modern civil liberties jurisprudence, even if there are significant differences.

Third, the more progressive Justices’ focus on special protection for fundamental rights influenced the majority’s due process jurisprudence. In *New State Ice Co. v. Liebmann*,¹⁴¹ Justice Brandeis penned a famous dissent in which he argued for upholding an Oklahoma law restricting entry into the ice business. Brandeis argued that the states should be seen as “laboratories of

¹³⁸ Howard Gillman, *Regime Politics, Jurisprudential Regimes, and Unenumerated Rights*, 9 U. Pa. J. Const. L. 107, __ (2006); see also Nourse, *Tale of Two Lochner*, supra note __, at 772 n.17 (stating that *Meyer* and *Pierce* follow “the same rule that a right or liberty may be trumped by the public welfare”).

¹³⁹ See supra.

¹⁴⁰ *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

¹⁴¹ *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

democracy.”¹⁴² Justice Sutherland, for the majority, retorted that there are “certain essentials of liberty with which the state is not entitled to dispense in the interest of experiments.”¹⁴³

Implicitly alluding to Brandeis’s strong support freedom of expression, Sutherland observed that no “theory of expression in censorship” could justify infringing on freedom of the press.¹⁴⁴ He then stated that the right to pursue an ordinary occupation free from unreasonable regulation “is no less entitled to protection.”¹⁴⁵

Fourth, and perhaps more important, and also as noted above, by the early 1920s, the Court was moving away from automatically approving the constitutionality of laws challenged under the Due Process Clause if the government could provide valid police power rationales for the laws. In addition to the cases cited above, in 1917 in *Buchanan v. Warley* the Court invalidated a residential segregation as a violation of the “fundamental” rights to liberty and property protected by the Due Process Clause.¹⁴⁶ The Court did so even though it acknowledged that the state had identified legitimate police power interests that residential segregation could promote, such as reducing interracial violence.¹⁴⁷

Gillman does not address the language cited above from *Adkins*, and entirely neglects *Buchanan* and *Farrington v. Tokushige*. With regard to *Meyer*, Gillman cites language from the opinion suggesting that the law at issue failed even a traditional police-powers analysis. The Court wrote that “the statute as applied is arbitrary and without reasonable relation to any end within the competency of the State.”¹⁴⁸ That language suggests a traditional police powers

¹⁴² Id. at __ (Brandeis, J., dissenting).

¹⁴³ Id. at 278-79.

¹⁴⁴ Id. at 280.

¹⁴⁵ Id. at 280.

¹⁴⁶ *Buchanan v. Warley*, 345 U.S. 60, 75, 79, 82 (1917).

¹⁴⁷ Id. at 81-82.

¹⁴⁸ *Meyer v. Nebraska*, 262 U. S. 390, 403 (1923).

analysis. The Court, however, also stated that the law was invalid even though the state had a legitimate interest in assimilating immigrants, a clear “public purpose”.¹⁴⁹

Justice McReynolds, writing for the Court, may have been arguing in the alternative. He also may have implicitly found the law facially invalid as a violation of fundamental rights and also invalid as applied for not having a valid police power justification. Either way, the *Meyer* Court did not simply defer to the legislature because the government identified a valid, public-regarding police power interest. As Victoria Nourse concludes, “one can remain agnostic about the liberty vs. class legislation debate in *Lochner* while still recognizing that, somehow, *Lochner's* progeny [in *Meyer* and like-minded cases] became based on substantive liberty rather than on the requirement that all legislation be general.”¹⁵⁰

By far the most extensive critique of my thesis that fundamental rights analysis was the key to the *Lochner* Court’s post-*Lochner* due process jurisprudence is Barry Cushman’s 2005 *Boston University Law Review* article, *Some Varieties and Vicissitudes of Lochnerism*. Cushman rejects my argument that “the class legislation thesis fails to explain the bulk of the Supreme Court’s *Lochnerian* decisions.”¹⁵¹ He argues that the neutrality principal “appears to have lain at the root of a significant body of the Court’s *Lochner*-era due process decisions.”¹⁵²

Before reaching this conclusion, Cushman undertook an extensive survey of due process decisions decided by the Supreme Court between the 1890s and 1930s, including many decisions neither I nor Gillman discussed. My quibble with Cushman is largely semantic. First, the decisions he references are primarily cases decided under the property provision of the Due Process Clause, not liberty. These were certainly due process cases, and I plead guilty to

¹⁴⁹ Id. at 401.

¹⁵⁰ Nourse, *Tale of Two Lochners* at 121.

¹⁵¹ Cushman, *supra* note ___, at 943, quoting Bernstein at 58.

¹⁵² Cushman at 943.

sometimes conflating the lines of cases in my own work. But they are not really “Lochnerian,” in that they are not interpreting the meaning of the deprivation of *liberty* without due process, which is likely why Gillman largely did not address them.

Second, my article had focused on rebutting the claim that post-*Lochner* the Court relied heavily on hostility to class legislation in its due process cases. As noted previously, the Court interpreted class legislation to mean arbitrary *classifications*. Most of the cases cited by Cushman, though involving a neutrality principal, are not really “class legislation” cases, i.e., they do not involve arbitrary classifications. Rather, they involve the arbitrary transfer of property from A to B, a principal consistent with, but separate from, the development of the class legislation doctrine’s ban on arbitrary classifications.

Cushman’s discussion of these cases is certainly useful and edifying, and adds some nuance to both my and Gillman’s discussions of the Court’s due process jurisprudence. Cushman’s work does not, however, do much to support the claim the *Lochner* line of cases was primarily a product of the class legislation doctrine. This is especially true if class legislation is defined per Gillman as special interest legislation, as opposed to a much broader principle of inequality or lack of neutrality.

Cushman also helpfully points out that even in cases in which the Court explicitly relied on the right to liberty of contract to invalidate legislation, the Justices often displayed an undercurrent, of varying degrees of subtlety, of concern that the law also involved unequal or partial legislation. Indeed, Cushman makes the intriguing argument that Justice McKenna, who was in the majority in all major liberty-of-contract cases decided between *Holden v. Hardy* in 1898 and *Adkins v. Children’s Hospital* in 1923, voted based on whether he believed that the law in question was uniform and therefore constitutional, or partial and unequal, and therefore

unconstitutional.¹⁵³ So even if I am right that class legislation was only a subsidiary consideration to the *Lochner* Court overall, if it was crucial to swing voter McKenna, it was also the key to many of the Court's most controversial holdings.

On the other hand, Nicholas Mosvick has made a strong contrary case that what really motivated McKenna was the presence or absence of empirical evidence supporting a given labor law.¹⁵⁴ One point in Mosvick's favor is that McKenna appears to have had a rather narrow understanding of the prohibition on arbitrary legislative classifications. In 1909, he wrote, "[W]e have repeatedly decided--so often that a citation of the cases is unnecessary--that it does not take from the states the power of classification. And also that such classification need not be either logically appropriate or scientifically accurate."¹⁵⁵

Meanwhile, I differ with Cushman in his reliance on legal treatises¹⁵⁶ to support proposition that class legislation was a very significant factor in Supreme Court due process cases after the Court decided *Lochner*. On closer examination, the treatises Cushman cites are not persuasive evidence. Two of the treatises rely only on pre-*Lochner* cases to support their position,¹⁵⁷ and one cites no cases at all.¹⁵⁸ In another treatise Cushman cites, the author relies on a Supreme Court opinion that states that a baseless classification for taxation purpose might be a taking, not a violation of liberty rights protected due process clause.¹⁵⁹ The author of this treatise also concedes that "no federal legislation has as yet been declared as lacking in due

¹⁵³ Cushman, *Varieties* supra note __, at __; see also Cushman, *Teaching*, supra note __, at 561-62.

¹⁵⁴ Mosvick, *Book Review*, at 162-63.

¹⁵⁵ *District of Columbia v. Brooke*, 214 U.S. 138, 150 (1909).

¹⁵⁶ Cushman, *Varieties* at 886-87.

¹⁵⁷ Hannes Taylor, *Due Process of Law and the Equal Protection of the Laws* 304 (1917). Taylor cites several Supreme Court cases to support his point, but they predate *Lochner*. Another treatise cited by Cushman, Lucius Polk McGehee, *Due Process of Law Under the Federal Constitution* 61 (1906), was published in 1906 and therefore could not reflect the state of the post-*Lochner* constitutional landscape.

¹⁵⁸ Ernst Freund's *Standards of American Legislation* 219 (1917).

¹⁵⁹ Charles K. Burdick, *The Law of the American Constitution* 418 (1922).

process because it denied the equal protection of the law.”¹⁶⁰ In any event, treatise citations are less persuasive than the Supreme Court’s explicit statements in *Brooke* and *Truax* denying that the due process of law is a significant barrier, if a barrier at all, to discriminatory legislation.

It’s also worth noting a number of points on which Cushman and I agree: (1) “a number of the *Lochner*-era decisions invalidating statutes on class legislation grounds relied upon the Equal Protection Clause, either alone or in conjunction with the Due Process Clause, rather than solely upon the Due Process Clause;”¹⁶¹ (2) “the *Lochner*-era Court sustained a number of statutes that one might possibly characterize as class legislation;”¹⁶² (3) “some of the *Lochner*-era decisions striking down statutes as violations of the Due Process Clause emphasized the doctrine of liberty of contract rather than class legislation analysis”;¹⁶³ and (4) “such civil liberties landmarks of the era as *Meyer v. Nebraska* and *Pierce v. Society of Sisters* were cut from the same fundamental rights cloth as the doctrine of liberty of contract, and were not grounded in the principle of neutrality.”¹⁶⁴

CONCLUSION: The State of Play

Lochner, the liberty of contract line of cases, and other pre-New Deal due process decisions continue to get an outsized amount of attention from scholars, judges, and pundits. Outside of the academy, and occasionally inside of it, the traditional, tendentious story of wildly activist judges making up doctrine to serve the interest of the rich continues to have traction.

Within the academy, most scholars no longer promote or defend the old canards about *Lochner*. Many constitutional theorists on the liberal side, however, remain enamored of Cass Sunstein’s approach, which is to claim that *Lochner*’s primary flaw was that the Court tried to

¹⁶⁰ Id. at 418.

¹⁶¹ Id. at 883.

¹⁶² Id. at 883.

¹⁶³ Id. at 883-84.

¹⁶⁴ Cushman, *Varieties*, supra note ___, at 884

enforce common-law baselines that would inhibit redistribution. While this is an exceedingly clever way to extend the attack on *Lochner* to an attack on modern “conservative” opinions while still defending Warren Court jurisprudence and its progeny, Sunstein’s thesis lacks historical support.¹⁶⁵

Among those scholars who take the historical literature seriously, the battle lines are between those who believe that hostility to class legislation primarily motivated the Court’s jurisprudence, and those who believe that concern for protecting fundamental rights played the larger role. These lines, however, are not that sharp, as there has been some convergence in these viewpoints. Some on the class legislation side like Cushman acknowledge that protection of fundamental rights was an important thread in the Court’s opinions;¹⁶⁶ those on the fundamental rights side, like myself and David Mayer, acknowledge that opposition to class legislation helped shape the Court’s liberty-of-contract jurisprudence, and indeed dominated the Court’s understanding of the scope of due process limitation on the police power before *Lochner*.¹⁶⁷

Overall, the class legislation thesis still seems dominant.¹⁶⁸ I suspect there are several reasons for this. First, class legislation had the first mover advantage; *The Constitution Besieged*

¹⁶⁵ For an extensive critique of Sunstein’s thesis from a historical perspective, see David E. Bernstein, *Lochner’s Legacy’s Legacy*, 82 Texas L. Rev. 1 (2003).

¹⁶⁶ See supra note __ and accompanying text; Cushman, Teaching, supra note __, at 562-63.

¹⁶⁷ See David N. Mayer, Substantive Due Process Rediscovered: The Rise and Fall of Liberty of Contract, 60 Mercer L. Rev. 563, 602 (2009) (“The prohibition of class legislation is best viewed as a limitation on the police power that was conceptually related to, but jurisprudentially distinct from, the substantive use of due process clauses to protect what eventually came to be recognized as liberty of contract.”); cf. William Araiza, Back to the Future, 28 Const. Comm. 111 (2012) (“It is difficult in a short review to evaluate which side has the better of the debate, in large part because, as Bernstein himself notes, class legislation restrictions constituted part of the Court’s understanding of due process.”).

¹⁶⁸ See, e.g., Cushman, Teaching, supra note __, at 563 (“the cases enforcing the principle of neutrality, and particularly those enforcing the prohibition on A-to-B laws, comprised the bulk of the Court’s substantive due process decisions, and constituted the preeminent strand of its substantive due process jurisprudence”); Stephen M. Feldman, Unenumerated Rights in Different Democratic Regimes, 9 U. Pa. J. Const. L. 47, 49 n.11 (2006) (“I find Gillman more persuasive than Bernstein”); Kermit Roosevelt III, What if Slaughter-House Had Been Decided Differently? 45 Ind. L. Rev. 61, 80 n. 126 (2011)] (“I find Barry Cushman’s rebuttal of Bernstein persuasive.”).

was the first book that attempted to explain *Lochner* without resort to the myths of the past, and it had the field mostly to itself for over a decade.¹⁶⁹ Second, Gillman's understanding of class legislation resonates strongly with a generation raised with public choice theory as background knowledge. Thinking of the *Lochner* Court Justices as critics of rent-seeking is easy for modern academics to comprehend and appreciate.

Third, while Gillman's thesis is distinct from Sunstein's, there is significant overlap; both focus on the Supreme Court enforcing a type of legislative neutrality. Academics previously inclined toward Sunstein's perspective on *Lochner* could shift to Gillman's far more historically-grounded thesis without much cognitive dissonance. Fourth, the class legislation doctrine explains much of the Court's pre-*Lochner* due process jurisprudence, many (in)famous state cases, and continues to appear in many post-*Lochner* cases, especially in property cases. Moreover, class legislation was a key component of equal protection jurisprudence both before and after *Lochner*, and courts, including the Supreme Court, did not always take care to differentiate between due process and equal protection analysis.

Finally, I suspect that the widespread acceptance of Gillman's thesis has some presentist considerations. Though this was not his primary thesis or motivation, Gillman took pains to emphasize that his understanding of the liberty of contract line of cases utterly distinguishes them from modern liberal due process opinions favored by the predominately progressive professoriate.¹⁷⁰ By contrast, an emphasis on fundamental rights highlights the continuities

¹⁶⁹ Later books taking the contrary perspective, see Mayer, *supra* note __, and Philips, *supra* note __, were written by less well-known scholars and published by more obscure publishers. My own book *Rehabilitating Lochner*, barely touches on the class-legislation vs. fundamental rights debate, beyond noting that scholars have traced the roots of Lochnerian jurisprudence to both of these intellectual and jurisprudential traditions.

¹⁷⁰ Gillman, *supra* note __, at __.

between the Old Court's decision and modern due process cases.¹⁷¹ Although *Lochner* is gradually losing its anti-canonical status,¹⁷² conservatives still allude to *Lochner* when they attack decisions like *Roe* and *Obergefell*. Meanwhile, it's far easier and more comforting for the progressive scholars who dominate the legal academy to be able to explain that the "old class legislation cases" have nothing to do with modern due process opinions they favor than to acknowledge that significant continuities exist, and then insist on *Lochner's* wrongness while trying to explain why the modern opinions are nevertheless correct.

Despite their differences, proponents of the class legislation and fundamental rights approaches to the liberty of contract cases have much in common, and where the overlap one can reasonably conclude that a historical consensus exists. First, both sides agree that the Court did not attempt enforce anything approaching a night-watchman type laissez-faire policy on government. Indeed, despite infamous battles between the Court and the Roosevelt administration during the New Deal over the scope of federal regulatory power, and despite a few famous decisions like *Lochner*, overall the Court was quite accommodating to the emerging regulatory state. *Lochner* and like-minded cases should be seen as ultimately feeble attempts to carve out some limitations on the emerging progressive state, rather than as vigorous challenges to its emergence.

Second, both sides agree that a fundamental rights jurisprudence, often traced to the 1930s, in fact began to emerge in the pre-New Deal period. Finally, they agree that the Supreme

¹⁷¹ See Lindsay, *supra* note __, at __ ("As Professor Bernstein has persuasively argued, the *Lochner*-era Court's recognition of an individual right to economic liberty protected by the Due Process Clause of the Fifth and Fourteenth Amendments played a generative role in the subsequent development of more robust constitutional protections of civil liberties. Bernstein demonstrates how the Court extended Fourteenth Amendment protection to certain noneconomic fundamental liberties, including the right to direct the education of one's children.")

¹⁷² Balkin *supra* note __, at 84; Amanda Shanor, Business Licensing and Constitutional Liberty, 126 Yale L.J. Forum 314, 318 (2016).

Court Justices who adopted and applied the liberty of contract doctrine did not have the cartoonish reactionary motives attributed to them by Progressive and New Dealer critics. Rather, the Justices, faced with constitutional challenges to novel assertions of government power, sincerely tried to protect liberty as they understood it, consistent with longstanding constitutional doctrines that reflected the notion that governmental authority had limits enforceable via the Due Process Clause.¹⁷³

¹⁷³ See Michael J. Philips, *The Lochner Court, Myth and Reality: Substantive Due Process from the 1890s to the 1930s*, at 115 (2000); Balkin, *supra* note __, at 713; Nourse, *supra* note __, at 756; cf. Lawrence M. Friedman, *American Law in the 20th Century* 24 (2002).