The Myth of "Laissez-Faire Constitutionalism": Liberty of Contract During the *Lochner* Era

by DAVID N. MAYER*

Introduction

No period in American constitutional history is as misunderstood as the so-called "era of laissez-faire constitutionalism," also known as the "*Lochner* era," for its best-known U.S. Supreme Court decision.[1] For forty years, from 1897[2] until 1937,[3] the Supreme Court used the due process clauses of the

* Professor of Law and History, Capital University, Columbus, Ohio.

1. Lochner v. New York, 198 U.S. 45 (1905). In *Lochner*, the Court held unconstitutional a New York statute prohibiting bakery employees from working more than ten hours a day or sixty hours a week. The majority of the Court considered the statute to abridge "the right of contract" between employer and employee, which was "part of the liberty of the individual" protected by the due process clause of the Fourteenth Amendment. *Id.* at 53. Although *Lochner* is the best-known Supreme Court decision from this era, it is not necessarily the case that best epitomizes the Court's jurisprudence. As noted in Part II.A., *infra*, that distinction more properly pertains to *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), which not only was arguably the best-reasoned liberty-of-contract decision but also the decision for which its reversal in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), signaled the end of the era.

2. The Supreme Court's decision in *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), generally has been regarded as the beginning of the Court's protection of liberty of contract under the due process clauses of the Constitution. In its unanimous decision, the Court held unconstitutional a Louisiana statute that prohibited marine insurance sales by companies not licensed to do business in that state. Although this Article focuses on the United States Supreme Court's protection of liberty of contract, it should be noted that state courts first began protecting the right under the due process clauses of state constitutions and even under the Fourteenth Amendment several years before the Court did so. *See* the discussion at the end of Part I.A., *infra*.

3. The *West Coast Hotel* decision in 1937 marked the so-called "New Deal Revolution," which, among other things, involved the Court's repudiation of its liberty-of-contract jurisprudence. As noted in Part III, *infra*, it is convenient and appropriate to regard 1937 as the watershed year for the transformation of the Court's substantive due process jurisprudence even though important developments occurred both before and after the *West Coast Hotel* decision.

Fifth and Fourteenth Amendments, applied substantively,[4] to hold unconstitutional various state and federal laws that abridged the right to "liberty of contract."[5] Traditionally, the *Lochner* decision has been condemned as an egregious instance of judicial activism;[6] and the *Lochner* era generally has been seen as a time when American judges, motivated by the desire to further the interests of rich capitalists, perverted the original meaning of the due process clauses in order to engraft a laissez-faire ideology—commonly caricatured as synonymous with the doctrines of "Social Darwinism"—upon the Constitution.[7] This traditional view so dominates modern scholarship that it has become the orthodoxy of constitutional law

4. Liberty of contract is one form of substantive due process protection of liberty. A convenient rule of thumb to identify a "liberty of contract" case—and the definition adopted in this Article—is that it involved use of the Fifth or Fourteenth Amendment's due process clause to provide substantive limits on legislation curtailing the freedom of persons to enter into lawful contracts of all types. The doctrine of liberty of contract generally held that the freedom of individuals capable of entering into a contract and giving consent to its terms could not be curtailed by government except for "reasonable" legislation narrowly tailored to protect the public health, safety, or morals. *See generally* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 195, 237–39 (Kermit L. Hall et al. eds., 1992) (Peter Charles Hoffer's essays on "Contract, Freedom of," and "Due Process, Substantive").

5. Although the term "liberty of contract" might be used interchangeably with "freedom of contract" in popular political discourse and some scholarly writing, *see generally* HARRY N. SCHEIBER, THE STATE AND FREEDOM OF CONTRACT 2 (Harry N. Scheiber ed., 1998), the term as used in this Article uses the word *liberty* with particular reference to the constitutional concept. The classic definition of liberty of contract was given by Justice Rufus Peckham in his opinion for the Court in *Allgeyer*, discussed in Part I.C., *infra*. Although usually characterized as "economic" substantive due process, liberty of contract had important non-economic liberty aspects as well, as shown in Part II.B., *infra*.

6. *See, e.g.*, 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."); BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 23 (1980) (*Lochner* "is one of the most condemned cases in United States history and has been used to symbolize judicial dereliction and abuse."); Aviam Soifer, *The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888–1921*, 5 LAW & HIST. REV. 249, 250 (1987) (*Lochner* "is still shorthand in constitutional law for the worst sins of subjective judicial activism."); WILLIAM M. WIECEK, LIBERTY UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE 124–25 (1988) ("We speak of 'lochnerizing' when we wish to imply that judges substitute their policy preferences for those of the legislature.").

7. For classic examples of this view of laissez-faire constitutionalism, see generally CLYDE E. JACOBS, LAW WRITERS AND THE COURTS: THE INFLUENCE OF THOMAS M. COOLEY, CHRISTOPHER G. TIEDEMAN, AND JOHN F. DILLON UPON AMERICAN CONSTITUTIONAL LAW (1954); ARNOLD M. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887–1895 (1960); BENJAMIN TWISS, LAWYERS AND THE CONSTITUTION: HOW LAISSEZ-FAIRE CAME TO THE SUPREME COURT (1942). A modern variant of the traditional view considers the *Lochner* era as one in which the Court protected a supposed laissez-faire system of "common law" rights against redistributive legislation. *See* Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987).

casebooks,[8] constitutional and legal history textbooks,[9] constitutional commentaries written by both conservatives and liberals,[10] and even opinions written by Supreme Court justices themselves.[11]

The modern orthodox view originated in legal scholarship written during the so-called "Progressive" era in the early twentieth century.[12] Progressive-era scholars and jurists such as Roscoe Pound,[13] Learned Hand,[14] and Charles

8. *See, e.g.*, GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 755 (5th ed. 2005) (describing scholars' "substantive" objection to *Lochner* as an instance of the Court having "attempted to vindicate, as a matter of constitutional law, a laissez-faire conception of the role of government that could not be sustained"); JESSE H. CHOPER ET AL., CONSTITUTIONAL LAW: CASES—COMMENTS—QUESTIONS 292 (9th ed. 2001) (summarizing the *Lochner* era as one in which the Court "frequently substituted its judgment for that of Congress and state legislatures on the wisdom of economic regulation"). The authors of another casebook more blatantly reveal their own biases in criticizing the *Lochner* era as "a rather dreary one in the Court's history" in which backward-looking judges used the Fourteenth Amendment as "a shield for businesses." DANIEL A. FARBER ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 18 (2d ed. 1998).

9. *See, e.g.*, DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888–1986, 45 (1990) ("liberty of contract found its way into the Constitution by bald fiat"); KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 190, 222 (1989) (describing laissez-faire constitutionalism as a combination of "Social Darwinist" laissez-faire ideology and legal formalism empowering "reactionary" appellate judges); MELVIN I. UROFSKY & PAUL FINKELMAN, A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES 509 (2d ed. 2002) (summarizing the traditional view of *Lochner* era judges as "intellectual prisoners, held captive by the doctrines of laissez-faire and the inverted logic of legal formalism").

10. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA 46 (1990) (criticizing both *Allgeyer* and *Lochner* as "unjustifiable assumptions of power" by the judiciary); LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 169 (1985) (maintaining that the demise of *Lochner* coincided with "judicial acceptance of positivist approaches to property and contract rights"). As is typical of modern judicial restraint conservatives, Bork rejects substantive due process altogether as inconsistent with "neutral" judicial decision making; Tribe, on the other hand, accepts substantive due process protection of certain non-economic liberty interests, such as the right to privacy. *Compare* BORK, *supra*, at 43, *with* TRIBE, *supra*, at 12–13.

11. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (characterizing the *Lochner* era as one when the Court sat "as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions"); Planned Parenthood v. Casey, 505 U.S. 833, 861–62 (1992) (maintaining that the Court's protection of contractual freedom "rested on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare").

12. Progressivism may be described as a reform movement of the early decades of the twentieth century involving a diverse coalition of Americans who shared the conviction that government at all levels should play an active role in regulating economic and social life. For the classic treatment of Progressivism in the history of American political thought, see RICHARD A. HOFSTADTER, THE AGE OF REFORM (1955). The Progressive movement and its conflict with the classical-liberal or laissez-faire philosophy in early twentieth-century public policy debates are discussed in Part I.B., *infra*.

13. *See* Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 457 (1909) (criticizing judicial protection of freedom of contract as the result of an "individualistic conception of justice, which . . . exaggerates private right at the expense of public right").

Warren[15] were not neutral in their analysis of liberty of contract; rather, as supporters of the Progressive movement, they were hostile to the individualist philosophy that they perceived in the courts' protection of liberty of contract and their personal hostility to the philosophy colored their criticism of the jurisprudence.[16] Modern scholars who interpret *Lochner* by relying on the views of such partisans as Pound, Hand, or Warren have made the same kind of mistake that future historians would make in, say, relying on the views of the National Right to Life organization to interpret *Roe v. Wade*.[17]

Justice Oliver Wendell Holmes's famous dissent in *Lochner* also has contributed to the orthodox view of liberty of contract as laissez-faire constitutionalism. His characterization of the majority's opinion as having been "decided upon an economic theory which a large part of the country does not entertain"[18] has been accepted unquestioningly by historians and constitutional scholars.[19] So pervasive has been the influence of Holmes's characterization of the *Lochner* majority, with its criticism of the majority's

14. *See* Learned Hand, *Due Process of Law and the Eight-Hour Day*, 21 HARV. L. REV. 495, 501–03 (1908) (defending an eight-hour law as within the discretion of the legislature to "make more equal the relative economic advantages of the two parties" to the labor contact, and to "promote the 'welfare' of the public").

15. *See* Charles Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431, 462 (1926) (warning that the term "liberty" as used in the Fourteenth Amendment Due Process Clause and "newly defined" by the Court, in its liberty-of-contract decisions, would "become a tremendous engine for attack on State legislation").

16. Learned Hand, for example, was "a major... figure" and "a true believer" in the Progressive movement. GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 190 (1994). Hand's efforts on behalf of the movement included helping his good friend Herbert Croly plan *The New Republic* magazine and advising Teddy Roosevelt on antitrust policy and on the "social and industrial" planks of his 1912 platform. *Id.* at 191–202, 226–27. Indeed, as an advocate of maximum hours, minimum wages, and workers' compensation legislation, Hand was especially critical of judicial decisions invalidating such legislation; he even suggested total repeal of the due process provisions of the Fifth and Fourteenth Amendments to strip the courts of their power to protect liberty of contract. *Id.* at 209, 249.

17. In *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court expanded the constitutional right to privacy to include abortion under certain circumstances. *Roe* is probably the most controversial Court decision of the last half of the twentieth century—and, like many of the decisions in the *Lochner* era—it has ignited controversy between partisans with firmly held beliefs on both sides.

18. Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

19. *See, e.g.*, BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 202 (1993) (maintaining that Justice Holmes was "surely correct" in his characterization of Justice Peckham's opinion for the *Lochner* majority); UROFSKY & FINKELMAN, *supra* note 9, at 559 (noting that Holmes "showed up Peckham and the majority for doing just what they claimed not to be doing—writing their personal preferences into law"). *But see* 2 DAVID O'BRIEN, CONSTITUTIONAL LAW AND POLITICS 257–58 (2d ed. 1995) (acknowledging that Justice Harlan's dissent provided a "rival interpretation" critiquing the majority for failing to construe New York's law as a legitimate public health measure).

alleged judicial activism,[20] that many modern commentators forget that Holmes was not condemning substantive due process per se. His declaration that "[t]he word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion" has been so often quoted out of context that scholars frequently have overlooked what Holmes wrote in the rest of the sentence: "unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and the law."[21] Thus, even Holmes recognized that certain "fundamental principles" might guide the courts in the exercise of their power of judicial review.[22]

The popularity of Justice Holmes's critique, as expressed in his *Lochner* dissent, has perpetuated yet another aspect of the orthodox view of laissez-faire constitutionalism: its association with legal formalism. According to the orthodox view, judges protected liberty of contract by applying, rather mechanically, formal rules of law that they regarded as objective and scientifically discoverable. The great treatise writers of the late nineteenth century—men such as Thomas M. Cooley, Christopher G. Tiedeman, and John Forrest Dillon—provided a rationale, combining laissez-faire with legal formalism, which "promoted an interventionist role for judges," who "treated law as frozen, with its principles and values set and its rules determined for all time."[23] In contrast to this formalist "declaratory jurisprudence," modern scholars have identified a different theory of law which, by the early twentieth century, had been embraced by the opponents of laissez-faire constitutionalism: "sociological jurisprudence." As a leading constitutional history textbook describes it, this was "a theory of law that its proponents regarded as more realistic, democratic, and humane," viewing law as "not a

20. "The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics," Holmes pithily noted, adding,

> [A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

Lochner, 198 U.S. at 75–76. As discussed in Part I.C., *infra*, however, Holmes's characterization of the majority decision was unfair: Justice Peckham did not base the Court's decision on what Holmes called the "shibboleth" of laissez-faire, *id.* at 75, but rather on traditional limits of the police power.

21. *Id.* at 76.

22. Many scholars also ignore the other dissenting opinion in *Lochner* (authored by Justice Harlan and joined by Justices White and Day) that accepted liberty of contract as an important constitutional right but which disagreed with the majority's interpretation of the New York law as a violation of that right, as discussed in Part II, *infra*.

23. HALL, *supra* note 9, at 222–23.

body of immutable principles and rules, but rather an institution shaped by social pressures that was constantly changing."[24] Sociological jurisprudence viewed the law essentially as Justice Holmes had described it in his 1881 book, *The Common Law*:

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.[25]

Hence, under the orthodox view, judicial protection of laissez-faire values has been seen as a product of formalist legal reasoning, shaped by conservative "prejudices," and out of touch with the "realities" of modern industrial society.[26]

In recent years, however, several scholars have challenged the orthodox, neo-Holmesian view of the *Lochner* era, questioning a number of the assumptions on which it has rested. In reassessing the *Lochner* era, some of these revisionist scholars have traced the origins of liberty of contract to a variety of sources in early American constitutional thought: among them, the "original meaning" of the due process clauses of the Fifth and Fourteenth Amendments;[27] a hostility to "special" or "class";[28] legislation deeply

24. ALFRED H. KELLY, WINFRED A. HARBISON & HERMAN BELZ, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 454 (7th ed. 1991). As the authors further note, by the 1920s there emerged, out of sociological jurisprudence, "a more radical and reform-oriented theory of law"—legal realism—that rejected altogether the idea of law as an objective set of rules and embraced instead a view of law as "a kind of *ad hoc* method of arbitration." *Id.* at 455. For a collection of classic Legal Realist writings of the 1920s and 1930s, see AMERICAN LEGAL REALISM (William W. Fisher III et al. eds., 1993).

25. OLIVER WENDELL HOLMES, THE COMMON LAW 5 (Mark DeWolfe Howe ed., Little, Brown & Co. 1963) (1881).

26. *See, e.g.*, Calvin Woodard, *Reality and Social Reform: The Transition from Laissez-Faire to the Welfare State*, 72 YALE L.J. 286, 327 (1962) (arguing that the laissez-faire standard "has ceased to comport with reality" in modern industrial society).

27. *See* Bernard H. Siegan, *Rehabilitating* Lochner, 22 SAN DIEGO L. REV. 453 (1985). Other scholars representing a variety of jurisprudential perspectives—conservative, libertarian, as well as liberal—have urged a revival of "natural law" in defense of substantive due process protection of unenumerated constitutional rights, including (perhaps, but not necessarily) liberty of contract. *See, e.g.*, HADLEY ARKES, THE RETURN OF GEORGE SUTHERLAND: RESTORING A JURISPRUDENCE OF NATURAL RIGHTS (1994); Randy E. Barnett, *Getting Normative: The Role of Natural Rights in Constitutional Adjudication*, 12 CONST. COMMENT. 93 (1995); Suzanna Sherry, *Natural Law in the States*, 61 U. CIN. L. REV. 171 (1992).

28. *See* sources cited *infra* note 29.

ingrained in Anglo-American law and political theory;[29] and, the "free labor" ideology of the antislavery movement and nineteenth-century Republican party.[30] Although the revisionist scholars disagree about the precise source of the doctrine, they basically all agree that the orthodox view errs in characterizing liberty of contract as, in the words of one scholar, "essentially unprincipled or rooted in extraconstitutional policy preferences for laissez-faire economics."[31] Rather, they argue, the doctrine was grounded in well-established constitutional traditions.[32] Other revisionist scholars have challenged the orthodox view by questioning other assumptions on which it rests: for example, that liberty of contract favored the economic interests of employers and those who were "well-off,"[33] that *Lochner*-era jurists were "Social Darwinists,"[34] or that laissez-faire constitutionalism was grounded in

29. *See* Benedict, *supra* note 6, at 293; HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE (1993); Alan Jones, *Thomas M. Cooley and "Laissez-Faire Constitutionalism": A Reappraisal*, 53 J. AM. HIST. 751 (1967).

30. *See* Eric Foner, *Abolitionism and the Labor Movement in Antebellum America*, *in* POLITICS AND IDEOLOGY IN THE AGE OF THE CIVIL WAR 57 (1980); William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767; 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.

31. GILLMAN, *supra* note 29, at 4. While acknowledging the contributions of scholars such as Benedict, Jones, and McCurdy to his work, Gillman specifically disassociates his interpretation from that of Siegan and other "conservative polemicists" interested in, as he characterizes it, "resurrecting the ghost of *Lochner* by citing some incantation about the importance in our constitutional tradition of rights to property and contract." *Id.* at 11.

32. *See generally* MICHAEL J. PHILLIPS, THE *LOCHNER* COURT, MYTH AND REALITY: SUBSTANTIVE DUE PROCESS FROM THE 1890S TO THE 1930S (2001) (concluding that the conventional view of *Lochner* era substantive due process jurisprudence is based on several myths); *see also* STEPHEN B. PRESSER, RECAPTURING THE CONSTITUTION (1994). In this provocative book, which challenges modern constitutional law from a conservative perspective, Professor Presser nevertheless disagrees with some fellow conservatives on the merits of the *Lochner* decision. Conservative criticism of the Supreme Court's liberty of contracts jurisprudence "misses the mark," Presser argues, because *Lochner* was "solidly grounded in a specific and historically defined American natural law tradition of the protection of private property." *Id.* at 142–43. Holmes's dissent in *Lochner* "could not have been more wrong," Presser adds, noting that "the core" of the Founders' philosophy of government was the protection of private property and contracts rights. *Id.* at 141–42.

33. *See* David E. Bernstein, *Roots of the "Underclass": The Decline of Laissez-Faire Jurisprudence and the Rise of Racist Labor Legislation*, 43 AM. U. L. REV. 85, 91 (1993) (arguing that liberty of contract "often served to protect the most disadvantaged, disenfranchised workers from monopolistic legislation sponsored by politically powerful discriminatory labor unions"); DAVID E. BERNSTEIN, ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS, AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL (2001) (maintaining that the ultimate failure of Lochnerian jurisprudence—and, with it, the triumph of the post-New Deal regulatory state—not only has strengthened racially exclusive labor unions but also has contributed to a massive loss in employment opportunities for black persons).

34. *See* Bernstein, *Roots of the Underclass*, *supra* note 33, at 88 n.11 (noting scholarship showing that "Social Darwinism actually had minimal influence on American laissez-faire liberal

a mechanical, or formalistic, jurisprudence.[35] What emerges from this revisionism is a more complex, and far more objective, picture of *Lochner*-era constitutionalism, one which attempts more fully to take into account the world view of the nineteenth century.[36]

Synthesizing the new scholarship and presenting a coherent and comprehensive overview of liberty-of-contract jurisprudence, this Article argues that the orthodox view of the so-called *Lochner* era is fundamentally flawed in a number of respects. Indeed, the Article argues that the orthodox view is wrong in virtually all its assumptions, which were based on myths originally propounded by Progressive era scholars and which have been perpetuated by modern scholars.

The most important of these myths concerns the terminology scholars have used to identify the jurisprudence of this era. Although generally regarded as synonymous with liberty of contract, "laissez-faire constitutionalism" is truly a misnomer. Judicial protection of liberty of contract never involved doctrinal application of libertarian or laissez-faire principles. Contrary to the orthodox, Holmesian view, judges did not read Herbert Spencer's *Social Statics* or any other laissez-faire writing into the Constitution. At most, what judges did in protecting liberty of contract was to apply something like a general presumption in favor of liberty, a presumption that could be rebutted by sufficient showing of reasonableness to justify a given governmental regulation. Moreover, judges applied this presumption quite inconsistently, in large part because the definition of "reasonable" government regulation, and the definition of the proper scope of government's police power on which it turned, was undergoing significant changes in the early decades of the twentieth century. Rather than limiting it to protection of public health, safety, or order, some scholars redefined the police power in terms of the amorphous concept of "general welfare" to justify the activist regulatory agenda of the Progressive movement.

When courts eventually abandoned their protection of liberty of contract as a fundamental right—a watershed signaled by the so-called "New Deal Revolution" of 1937—they did so because a sufficient number of judges had

thought, inside or outside legal circles"); Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379, 418 (1988) (finding "painfully little evidence that any members of the Supreme Court were Social Darwinists, or for that matter even Darwinian").

35. *See* David N. Mayer, *The Jurisprudence of Christopher G. Tiedeman: A Study in the Failure of Laissez-Faire Constitutionalism*, 55 MO. L. REV. 93, 99–100 (1990) [hereinafter Mayer, *Tiedeman*] (arguing that Tiedeman, who was the purest laissez-faire legal treatise writer, grounded his constitutionalism not in formalism but in the German sociological school of jurisprudence).

36. For discussions of the shift in the "world view" of American intellectuals between the 1880s and 1930s, see generally SIDNEY FINE, LAISSEZ-FAIRE AND THE GENERAL WELFARE STATE (1956); Woodard, *supra* note 26. Woodard describes the shift from the laissez-faire standard to the welfare state standard as "one of the greatest intellectual and moral upheavals in western history." *Id.* at 288.

adopted the Progressive activists' reformulation of the police power. Thus, the orthodox Holmesian view has it almost precisely backwards. Rather than focusing on pre-1937 decisions that allegedly read libertarian principles into the Constitution, critics of judicial activism ought instead to focus on post-1937 decisions in which judges unquestionably assumed the reasonableness of "social legislation."[37] The majority of the Court did not read into the Constitution Herbert Spencer's *Social Statics* or some similar laissez-faire tract in *Lochner*, but the majority of the Court in effect did follow the economic and legal theories of such proponents of social legislation as Henry W. Farnam and Ernst Freund[38] in the post-1937 cases upholding regulatory laws under a minimal rational basis test.[39] It is in the double standard of modern constitutional law, under which economic liberty and property rights are devalued compared to other favored liberty rights,[40] that improper judicial activism, which has been misleadingly branded "*Lochner*ism," truly can be found.

Part I of the Article examines the jurisprudential foundations of liberty of contract. The first section traces the roots of the doctrine to limitations on government police powers that were well established in early American constitutional law: the protection of economic liberty and property rights through substantive due process or equivalent constitutional provisions. The

37. As used here, *social legislation* is a term of art, referring to a concept first introduced into American law from Europe in the late nineteenth century but not recognized by the Supreme Court until 1940. "The term came from Germany and there originated about the beginning of the [eighteen] eighties . . . [and referred to] measures which are intended for the relief and elevation of the less favored classes of the community," such as wage and hour regulations and other factory laws. Unlike, for example, "legislation for the safety of passengers on railroads," social legislation did not fall within the traditional scope of the police power to curtail liberty in the interests of public health, safety, or order. Rather, as legislation intended for the "relief" or "elevation" of particular groups of persons, presumed to be the "less favored classes of the community," such laws were by definition unconstitutional under traditional standards. Charles W. McCurdy, *The "Liberty of Contract" Regime in American Law*, *in* SCHEIBER, *supra* note 4, at 161, 162–63 (quoting ERNST FREUND, STANDARDS OF AMERICAN LEGISLATION 22 (1917)).

38. Farnam was an economist, co-founder of the American Association for Labor Legislation (AALL), and a life-long activist for minimum wage laws, social insurance programs, and other social legislation. *Id.* at 188–89. Freund also was active in the AALL and was the author of an influential 1904 treatise advocating a broad "elastic" interpretation of the police power. *Id.* at 192–93; Mayer, *Tiedeman*, *supra* note 35, at 146–48.

39. As noted in Part III.B., *infra*, the new majority on the Supreme Court who upheld social legislation and other economic regulatory laws after the so-called "New Deal Revolution" did so by accepting unquestioningly the assumptions on which these laws were based, as exemplified by Chief Justice Hughes' majority opinion in *West Coast Hotel*.

40. *See* JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 132–34 (1992) (describing the double standard and its institutionalization in modern constitutional law through the famous footnote 4 in United States v. Carolene Prod. Co., 304 U.S. 144, 154 n.4 (1938)). The *Carolene Products* decision and the rise of the double standard are briefly discussed in Part III.B., *infra*.

second section discusses the broader philosophical context in which liberty of contract emerged by the late nineteenth century: the rise of contract law and what it revealed about the significance of individualism in American society. The third section examines two contrasting approaches by which a general right to liberty, including liberty of contract, could be protected by the courts: one is what Justice Holmes accused the majority of doing in *Lochner*; the other is what the majority actually did in that case and in other liberty-of-contract decisions. In other words, this section will describe what a true "laissez-faire constitutionalism" would have been and what the courts would have done in *Lochner* and other cases if they truly had read Herbert Spencer's Law of Equal Freedom into the Constitution, a model radically different from what the courts actually did in enforcing liberty of contract.

Part II surveys the Court's most important liberty of contract decisions, discussing not only its familiar applications in protecting economic liberty, as in cases like *Lochner*, but also some less familiar applications, including the protection of privacy rights and the prohibition of Jim Crow segregation laws.

Finally, Part III discusses the demise of liberty of contract by the late 1930s, when the so-called "New Deal Revolution" transformed substantive due process, replacing the general presumption in favor of liberty with a new paradigm incorporating the modern double standard in rights protection. As this part of the Article argues, the Court's liberty of contract jurisprudence did not end as a result of political pressures in 1937 when the so-called "switch in time that saved nine" occurred, a reference to the justices' apparent shift following Franklin Roosevelt's announced plan to "pack" the Court. Rather, liberty of contract failed because of its weak jurisprudential foundations: it was based on an ill-defined standard, a general rule riddled with exceptions, under which the vast majority of challenged government regulations were upheld by the courts. As shown here, the road from liberty of contract as it was actually enforced in the courts—which was vastly different from the laissez-faire constitutionalism stereotype—to the post-1937 minimal rational basis test, was a short road indeed.

I. Jurisprudential Foundations of Liberty of Contract

In his famous *Lochner* dissent, Justice Holmes was both right and wrong. He was right in criticizing the majority of justices of the Court for being inconsistent in their protection of liberty of contract; for, as discussed below, *Lochner* indeed was logically inconsistent with a number of the Court's decisions upholding various laws which, in Holmes' words, "equally

interfere" with liberty.[41] Nevertheless, Holmes was wrong to suggest that the majority used the Fourteenth Amendment to "enact Mr. Herbert Spencer's Social Statics."[42] Contrary to Holmes' assertion, the majority of the Court in *Lochner*—and in the other key liberty of contract decisions both before and after *Lochner*—did not base its protection of liberty of contract on "an economic theory which a large part of the country does not entertain," still less upon Herbert Spencer's Law of Equal Freedom, the "shibboleth" (in Holmes' words) favoring "[t]he liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same."[43]

When Holmes cited Herbert Spencer's *Social Statics*, he was referring to the best-known work written by the foremost English classical-liberal, or laissez-faire, theorist of his time. As this reference to the work suggests, Spencer's writings were familiar to American intellectuals but that does not mean they were widely influential. Indeed, classical-liberal ideas were as controversial at the turn of the last century as they are today, not only in popular politics but also in legal culture. True laissez-faire constitutionalism challenged established principles of Anglo-American common law and nineteenth-century American constitutional law as much as did the new sociological jurisprudence and legal realism advocated by so-called "Progressive" reformers in the early twentieth century.

Rather than consistently protecting liberty through a true laissez-faire constitutionalism, judicial protection of liberty of contract in the early twentieth century adhered to traditional principles of nineteenth-century constitutional law, including a traditional understanding of the scope of state police power. In protecting liberty of contract as a right under the due process clauses of the Fifth and Fourteenth Amendments, the Court was merely applying a general presumption in favor of liberty that could be overridden by various exercises of the police power that the justices considered legitimate. This conservative constitutionalism can easily be confused with a laissez-faire constitutionalism by modern scholars because both conservatives and laissez-faire theorists were opposed to the expansion of the police power advocated by "Progressive" reformers (and assumed to be reasonable by most modern scholars).

41. As shown in Part II.A., *infra*, however, that inconsistency can be explained by the limited scope of the Court's protection of liberty of contract.

42. Lochner v. New York, 198 U.S. 45, 75 (Holmes, J., dissenting).

43. *Id.* For more on Herbert Spencer and his "Law of Equal Freedom," see the discussion *infra* Part I.C.1.

A. Constitutional Limits on the Police Power

Constitutional protection of individual liberty in all its aspects—including economic liberty and the protection of property rights—did not suddenly appear in American law in the late nineteenth century as a result of classical-liberal, laissez-faire ideology. Rather, high regard for economic liberty and property as fundamental rights of the individual was well established in American constitutionalism quite early in the nation's history—indeed, even predating the Constitution itself. As a preeminent legal historian has noted, "Liberty was the most cherished right possessed by English-speaking people in the eighteenth-century."[44] The Patriot leaders of the Revolution, influenced profoundly by English radical Whig opposition thought,[45] made liberty even more essential by transforming it from not only the most treasured right under law but also the touchstone for the legitimacy of law itself.[46]

The framers of the early state constitutions, written during the Revolution, and the federal Constitution of 1787 included various provisions protecting individual liberty, which included economic liberty and property rights. Typical provisions of the early state constitutions explicitly recognized liberty rights, property rights, and the rights to both life and the pursuit of happiness, which were considered natural and "inherent" rights that all individuals possessed as human beings.[47]

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44. JOHN PHILLIP REID, THE CONCEPT OF LIBERTY IN THE AGE OF THE AMERICAN REVOLUTION 1 (1988).

45. On English radical Whig thought and its influence on American constitutionalism, see David N. Mayer, *The English Radical Whig Origins of American Constitutionalism*, 70 WASH. U. L.Q. 131 (1992) [hereinafter Mayer, *Whigs*].

46. Americans in the founding period saw liberty as something more than merely freedom to do what the law permitted: they followed English radical Whig philosophers of government in identifying liberty with natural freedom, i.e., the freedom of individuals to do what they will, provided they do not violate the equal right of others. *Id.* at 191 (summarizing state of nature as described in John Locke's *Second Treatise on Government* and other Whig writers). Constitutionally speaking, what was truly radical about the American Revolution was that it made the protection of individual rights (including both liberty in this broader sense and property rights) the test for government's legitimacy. *See id.* at 193.

47. For example, the bill of rights for the Virginia constitution noted "all men are by nature equally free and independent, and have certain inherent rights . . . namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety." Virginia Declaration of Rights, art. I (1776), *in* 1 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 234 (Bernard Schwartz ed. 1971). Virtually identical provisions can be found in other Revolutionary-era constitutions, including those of Pennsylvania, Massachusetts, and New Hampshire. A leading scholar of the early state constitutions has concluded from such provisions that "the acquisition of property and the pursuit of happiness were so closely connected with each other in the minds of the founding generation that naming only one of the two sufficed to evoke both. WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 193 (1980).

Although other constitutional provisions gave important protections to liberty and property rights,[48] the most significant general guarantee of liberty and property rights were the due process, or "law of the land," provisions of the state and federal constitutions. The due process clauses of the federal and state constitutions have perhaps the longest pedigree of any American constitutional provision, for they can be traced directly back to the famous clause thirty-nine of the Magna Carta: "No freeman shall be captured or imprisoned or disseised or outlawed or exiled or in any way destroyed, nor will we go against him or send against him, except by the lawful judgment of his peers or by the law of the land."[49] The "law of the land" over time became synonymous with due process of law, and the early state constitutions typically contained law-of-the-land clauses in lieu of due process clauses.[50]

Contrary to the assertions of some modern scholars that substantive due process did not originate until the middle of the nineteenth century, with the *Dred Scott* case,[51] American courts in fact began applying the doctrine of substantive due process not long after adoption of the Constitution itself. It also should be noted that only modern scholars have drawn the distinction

48. Among the most important of these other provisions were the takings clauses and ex post facto clauses of both state and federal constitutions and the provision in Article I, Section 10 of the U.S. Constitution prohibiting states from passing laws impairing the obligation of contracts.

49. Magna Carta, cl. 39, *in* 1 SOURCES OF ENGLISH CONSTITUTIONAL HISTORY 115, 121 (Carl Stephenson & Frederick George Marcham eds., rev. ed. 1972) (1215).

50. *E.g.*, Virginia Declaration of Rights, art. 8 (1776) ("that no man be deprived of his liberty except by the law of the land, or the judgment of his peers"); Pennsylvania Declaration of Rights, sec. IX (1776) ("nor can any man be justly deprived of his liberty except by the laws of the land, or the judgment of his peers"); Massachusetts Declaration of Rights, sec. XII (1780) ("no subject shall be arrested, imprisoned, despoiled, or deprived of his liberty, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate; but by the judgment of his peers, or the law of the land."), *in* 1 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY, *supra* note 47, at 235, 265, 342. In the period before the U.S. Constitution was adopted, six states plus Vermont (which governed itself as an independent republic before being admitted to the Union in 1791) adopted bills of rights as parts of their constitutional documents; each of these bills of rights contained a law of the land provision. In addition, two states inserted a law of the land clause in the body of their constitutions rather than in a separate bill of rights. For a discussion of these state constitutional provisions, see Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941, 974–75.

51. *See, e.g.*, BORK, *supra* note 10, at 32; RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 193–95, 204 n.36 (1977). The claim that due process—and specifically, the due process clause of the Fourteenth Amendment—was limited to procedural requirements may have originated with Justice Miller's opinion for the majority of the Supreme Court in *Davidson v. New Orleans*, 96 U.S. 97, 104 (1877) (complaining that "the docket of this court is crowded with cases" challenging state laws under "some strange misconception" of the scope of due process). *See* A. E. DICK HOWARD, THE ROAD FROM RUNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA 363–64 (1968). Miller's analysis in this case, like his opinion for the Court in *The Slaughterhouse Cases*, reflected the majority's desire to narrow the scope of the Fourteenth Amendment to minimize federal review of state laws, as discussed *infra*.

between "procedural" and "substantive" due process. The phrase *substantive due process* is anachronistic: it has no known use before the early 1930s[52] and has been used since that time as a pejorative oxymoron by opponents of *Lochner*-era jurisprudence and, later, opponents of the Warren Court.[53] Indeed, it can be argued that the concept of "due process of law" logically entails both procedural and substantive elements and that the substantive element in turn logically derives from the rights to life, liberty, and property that the constitutional provisions protect.[54]

By the late eighteenth-century, state courts began to view law-of-the-land clauses in state constitutions as restrictions on legislation—or, in other words, as substantive protections for property rights.[55] In a series of decisions from the 1790s to the 1850s, the highest courts of several states held that the law-of-the-land clause in their state constitutions prohibited the legislature from passing laws which deprived citizens of their property.[56] One of these decisions, *Wynehamer v. People*,[57] by the New York Court of Appeals in 1856, is particularly important. The court held that a statute outlawing the sale of liquor was a deprivation of property without due process of law; specifically, the liquor owned by tavern keepers when the law took effect.[58] The court observed that "the legislature cannot totally annihilate commerce in any species of property, and so condemn the property itself to extinction."[59]

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52. *See* G. Edward White, *Revisiting Substantive Due Process and Holmes'* Lochner *Dissent*, 63 BROOK. L. REV. 87, 108 (1997); James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315, 319 (1999).

53. *See* Gary D. Rowe, Lochner *Revisionism Revisited*, 24 L. & SOC. INQUIRY 221, 244–45 (1999).

54. *See* Roger Pilon, *Legislative Activism, Judicial Activism, and the Decline of Private Sovereignty*, *in* ECONOMIC LIBERTIES AND THE JUDICIARY 183, 197–99 (James A. Dorn & Henry G. Manne eds. 1987). Pilon argues that "[w]hile procedural correctness is a *necessary* condition for due process, it is not a *sufficient* condition," for due process of law also requires "substantive correctness." *Id.* at 197. "Due process of law," he concludes, "is more than mere process; and it is more than process plus any substance. It is process plus that substance that tells us when we may or may not deprive a person of his life, liberty, or property." *Id.* at 199. Pilon gives a simple example: "We have no right to hang a man simply because he is a Jew, even if a substantial majority of the legislature says that we may." *Id.* Due process of law requires recognition of the principle that "no man may be hanged unless he has done something to alienate his right against being hanged." *Id.* at 198–99.

55. ELY, *supra* note 40, at 78.

56. *See generally* Sherry, *supra* note 27, at 216–19; Riggs, *supra* note 50, at 980–81.

57. Wynehamer v. People, 13 N.Y. 378, 378 (1856).

58. *See id.* at 387.

59. *Id.* at 399. The Indiana Supreme Court a year earlier held that the state liquor prohibition law was invalid under the natural-rights provision in the state constitution, as an unconstitutional deprivation of liberty. In his opinion for the court, Judge Perkins declared that "the right of liberty and pursuing happiness secured by the constitution, embraces the right, in each *compos mentis* individual, of selecting what he will eat and drink, in short, his beverages, . . . and that the legislature cannot take away that right by direct enactment." Herman v. State, 8 Ind. 545, 558 (1855). This was the one

The decision not only was a striking instance of substantive use of due process but also, as a leading modern scholar of property rights has observed, was "the first time that a court determined that the concept of due process prevented the legislature from regulating the beneficial enjoyment of property in such a manner as to destroy its value."[60]

In the same year as the *Wynehamer* decision, the United States Supreme Court also adopted the view that the due process clause of the Fifth Amendment restricted Congress's powers. In *Murray's Lessee v. Hoboken Land and Improvement Co.*, Justice Benjamin R. Curtis, writing for the Court, found that the clause was "a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process 'due process of law,' by its mere will."[61] This decision anticipated the Court's controversial ruling a year later, in the *Dred Scott* case, where Chief Justice Roger Taney interpreted the due process clause as a substantive limitation on the power of Congress to prohibit slavery in the territories.[62] What made *Dred Scott* so controversial at the time was not the Court's use of substantive due process; after all, Republicans and antislavery activists had used substantive due process arguments to reach an opposite result.[63] Rather, the *Dred Scott* decision was

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decision conceded by Charles Warren, in his 1926 *Harvard Law Review* article, to be an exception to his claim that in early American history, "liberty" meant only the freedom of the person from physical restraint. Warren, *supra* note 15, at 444–45.

60. ELY, *supra* note 40, at 79. Citing *Wynehamer* among other decisions, Ely has observed, "antebellum courts employed due process as a device to safeguard economic interests." James W. Ely, Jr., *Economic Due Process Revisited*, 44 Vanderbilt L. Rev. 213, 220 & n.45 (1991) (reviewing PAUL KENS, JUDICIAL REVIEW AND REFORM POLITICS: THE ANATOMY OF *LOCHNER V. NEW YORK* (1990)).

61. Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1856). Ely observes that although *Murray's Lessee* turned on a procedural issue, the opinion "suggested a larger measure of judicial authority that could easily provide a basis for substantive review of congressional legislation." ELY, *supra* note 40, at 79.

62. Taney—writing on this issue for a majority of the Court comprised of himself and five other justices—held that the 1820 Missouri Compromise law, which barred slavery from the northern part of the territory added to the United States by the Louisiana Purchase, "could hardly be dignified with the name of due process of law." Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 450 (1857).

63. A year before the *Dred Scott* decision, the platform of the newly created Republican Party understood the Fifth Amendment to require the opposite of what Taney interpreted the Constitution to require: focusing on the due process clause's protection of liberty, rather than property, Republicans understood it to impose a "duty" on Congress to *prohibit* slavery from the territories. The Antislavery Planks of the Republican National Platform (1856), *in* SOURCES IN AMERICAN CONSTITUTIONAL HISTORY 99 (Michael Les Benedict ed. 1996). The 1860 Republican platform repeated this plank and also, without referring directly to the *Dred Scott* decision, decried "the new dogma that the Constitution, of its own force, carries Slavery" into the territories, calling the idea "a dangerous political heresy" at odds with the Constitution itself. The Republican Party Platform (May 16, 1860), *in* 1 DOCUMENTS OF AMERICAN HISTORY 9TH ED. 363, 364 (Henry Steele Commager ed., 1973). Two anti-slavery third parties, the Liberty Party in its 1843

controversial because of Taney's particular application of substantive due process, in what was arguably obiter dictum in the case,[64] to resolve a hotly contested political question.[65]

Following these precedents for substantive due process protection of property and economic liberty rights, state courts began recognizing liberty of contract in the years prior to the U.S. Supreme Court's recognition in *Allgeyer v. Louisiana*.[66] The New York Court of Appeals, in two important decisions in the year 1885, interpreted the state constitution's due process clause to protect both property and liberty rights, in a broad sense. In January 1885, in *In re Jacobs*, the court found unconstitutional a state law that prohibited the manufacture of cigars in tenement houses.[67] Six months later, in its June 1885 decision in *People v. Marx*, the New York Court of Appeals found unconstitutional a statute that prohibited the manufacture of oleomargarine, on the grounds that it deprived oleomargarine manufacturers of their economic freedom, as protected under both the state constitution and the Fourteenth Amendment.[68] Ten years later, in a decision that could be regarded as the first explicit protection of liberty of contract by an American court, the Illinois

platform and the Free Soil Party in its 1848 and 1852 platforms, also declared that the Fifth Amendment's due process clause secured the inalienable rights enumerated in the Declaration of Independence. *See* BERNARD H. SIEGAN, THE SUPREME COURT'S CONSTITUTION 71–72 (1987).

64. A seven-justice majority of the *Dred Scott* Court held that, under Missouri law, Dred Scott was still a slave—arguably making irrelevant the holding on the Missouri Compromise restriction. DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW & POLITICS 324–25 (1978). "Obiter dictum" was "the Republican battle cry in the war upon the Dred Scott decision." *Id.* at 439.

65. Abraham Lincoln, in his first inaugural address, emphasized third parties' use of Court decisions "for political purposes" when, without specifically mentioning *Dred Scott*, he denied the ability of the Supreme Court to determine for Congress or the president "the policy of the government, upon vital questions affecting the whole people," by the Court's decisions "in ordinary litigation between parties in personal actions." Lincoln, First Inaugural Address (Mar. 4, 1861), *in* 1 DOCUMENTS OF AMERICAN HISTORY, *supra* note 63, at 387.

66. Allgeyer v. Louisiana, 165 U.S. 578 (1897).

67. *In re* Jacobs, 98 N.Y. 98 (1885). Anticipating the broad definition of *liberty* that the U.S. Supreme Court would adopt twelve years later in *Allgeyer*, the New York court held that liberty "means the right not only of freedom from actual servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation." *Id.* at 106–07. The court rejected the argument that the law was a legitimate exercise of the police power, as a health measure, finding that it had "no relation whatever to the public health." *Id.* at 114. Rather, the court found, "[u]nder the guise of promoting the public health," the legislature had "arbitrarily interfere[d] with personal liberty and private property without due process of law." *Id.* at 115.

68. People v. Marx, 2 N.E. 29 (N.Y. 1885). The court rejected the state's rationale for the statute as protecting consumers against fraudulent imitations of dairy butter and understood the statute instead as a "dangerous" measure protecting the dairy industry from competition. *Id.* at 33–34. The court held that liberty, in the broad sense as it had defined it in *Jacobs*, was protected not only by the due process clause of the state constitution but also by its "law of the land" clause, as well as the Fourteenth Amendment of the U.S. Constitution. *Id.* at 33.

Supreme Court in *Ritchie v. People* held unconstitutional a statute setting maximum limits on the hours worked by women in factories.[69] The court found that the statute exceeded the legitimate scope of the state's police power by abridging the freedom of both the employer and employee "to contract with each other in reference to the hours of labor." The court based this "right to contract" on the due process clause of the Illinois Constitution, finding it to involve "both a liberty and property right."[70]

As these New York and Illinois cases suggest, state courts in the nineteenth century understood the general regulatory power of the states known as the "police power" to be broad but certainly not unlimited.[71] Just as state courts were willing to apply the due process clauses of state constitutions substantively to protect liberty or property rights when legislatures exceeded the legitimate scope of the police power, so too would the U.S. Supreme Court use the due process clause of the Fourteenth Amendment.[72] Although the Court's concern for federalism explained its exceedingly narrow

69. Ritchie v. People, 40 N.E. 454, 455 (Ill. 1895). The statute provided, "[N]o female shall be employed in any factory or workshop more than eight hours in any one day or forty-eight hours in any one week." *Id.*

70. *Id.* at 455–56. The court observed, "Labor is property, and the laborer has the same right to sell his labor, and to contract with reference thereto, as has any other property owner. In this country the legislature has no power to prevent persons who are *sui juris* from making their own contracts, nor can it interfere with the freedom of contract between the workman and the employer." *Id.* Significantly, the court explicitly rejected sexual paternalism—the state's rationale that the statute was a valid public health measure, "designed to protect woman on account of her sex and physique"—the rationale accepted by the U.S. Supreme Court as justification for a maximum-hours law applied to women in *Muller v. Oregon*, 208 U.S. 412 (1908). Instead, it found that women were sui juris and therefore "entitled to the same rights, under the constitution, to make contracts with reference to [their] labor, as are secured thereby to men. *Ritchie*, 40 N.E. at 458.

71. Traditionally, the police power comprised the authority to protect public health, safety, and morals. ELY, *supra* note 40, at 60. Thomas M. Cooley, author of *Constitutional Limitations*, the most influential constitutional law treatise in the nineteenth century, defined the police power as the "whole system of internal regulation" by which a state not only preserves public order but also establishes "for the intercourse of citizen with citizen those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of the rights by others. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 704 (6th ed. 1890). A modern commentator has traced the origins of the police power to the English common law concept that one ought to use one's property in such a way as not to injure that of another: *sic utere tuo ut alienum non laedas*. Scott M. Reznick, *Empiricism and the Principle of Conditions in the Evolution of the Police Power: A Model for Definitional Scrutiny*, 1978 WASH. U. L.Q. 2, 4 (1978).

72. Section 1, the key substantive part of the Fourteenth Amendment, provides in relevant part, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

interpretation of the amendment during the 1870s, 1880s, and early 1890s,[73] changes in the Court's membership by the late 1890s helped pave the way for a more expansive interpretation of the amendment.[74] Thus, the Court's new-found willingness to apply the Fourteenth Amendment to limit states' exercise of the police power came at the very time that the states were pushing its exercise beyond its traditional scope.

B. A Society Based on Contract

Legal historians frequently have characterized the nineteenth century as "the golden age of the law of contract" in American law.[75] Yet contract law, in its modern form, was a relatively recent development; in the words of one historian, it "began to take shape only in the eighteenth century, and the

73. The Court's concern for the traditional balance of state and federal powers was evident in its infamous decision in *The Slaughterhouse Cases*, where Justice Miller explicitly voiced the fears of the majority, that too broad an interpretation of the amendment "would constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens." The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 78 (1873). For the next two decades, the Court generally rejected Fourteenth Amendment challenges to state laws—and thus refrained from limiting the discretion of state legislatures in exercising police powers. *See, e.g.*, Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873) (refusing to interfere with a state's determination that women could not practice law); Munn v. Illinois, 94 U.S. 113 (1877) (upholding an Illinois law setting maximum rates charged by grain elevators in Chicago, on the theory they were businesses "affected with a public interest"); Mugler v. Kansas, 123 U.S. 623 (1887) (upholding a liquor prohibition law as a valid use of the police power to protect public health and morals); Powell v. Pennsylvania, 127 U.S. 678 (1888) (upholding a ban on oleomargarine as a public health law). In a series of cases during this period the Court also nearly unanimously held that the Fourteenth Amendment did not apply the federal Bill of Rights to the states. *See* United States v. Cruikshank, 92 U.S. 542 (1876) (finding that the First Amendment right to assemble and the Second Amendment right to bear arms applied only against the national government); Walker v. Sauvinet, 92 U.S. 90 (1876) (finding that the Seventh Amendment right to a jury trial in civil cases did not apply to the states); Hurtado v. California, 110 U.S. 516 (1884) (finding that the Fifth Amendment right to a grand jury indictment was not required by the due process clause of the Fourteenth Amendment).

74. As one scholar has observed, by 1892 six of the Court's justices had concluded that the Fourteenth Amendment applied the Bill of Rights to the states; but, "[u]nfortunately, they did not sit and reach their conclusions at the same time." MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 191 (1986). Among the new justices appointed in the 1890s was Rufus W. Peckham, an 1895 nominee by President Grover Cleveland. Peckham was also Clevaland's friend, a fellow New York Democrat, and would later write the opinions for the Court in both *Allgeyer* and *Lochner*.

75. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 203 (3rd ed. 2005). Friedman explains that, as "the body of law that pertained to the growing market economy," contract law "grew up in the era when the last vestiges of feudalism vanished, and a capitalist order flourished." He adds, "It became indispensable in the age of Adam Smith," and its domain steadily expanded in the nineteenth century, when it "greedily swallowed up other parts of the law." For example, although land law remained important, "land dealings were more and more treated contractually." *Id.*

modern law of contract developed only in the nineteenth century."[76] English common law had been based on property and lacked a robust notion of contract; contracts were regarded as "the handmaidens of property, a useful means of transferring title from one person to another."[77] William Blackstone's *Commentaries on the Laws of England*, first published in the late 1760s, said little about contract, which it conceptualized as part of the "rights of persons" based on special relationships.[78] It was at about the time that Blackstone's *Commentaries* were first published, in the middle of the eighteenth century, that "contract began to emerge from the shadow of property"; and with the emergence of contract, there arose in Anglo-American common law "a new way of thinking about legal relations, emphasizing intention rather than possession, voluntarism rather than vestedness."[79]

The emergence of contract law both in England and in America in the latter eighteenth century coincided with a profound shift in the role of law generally that was described in famous words by the great nineteenth-century English legal historian, Sir Henry Maine: "The movement of progressive societies has hitherto been a movement *from Status to Contract*."[80] The transition from a status-based society to a contract-based society has a dual significance. First, with regard to the evolution of the rule of law, the transition meant a movement away from a regime of special rules that single out particular persons or groups toward general, abstract rules equally applicable to all.[81] Second, with regard to evolving concepts of individual rights, the transition meant an expanded understanding of persons' rights to

76. John V. Orth, *Contract and the Common Law*, *in* THE STATE AND FREEDOM OF CONTRACT 44 (Harry N. Scheiber ed. 1998).

77. *Id.* at 48–49.

78. *Id.* at 51. Orth further notes,

> In the entire four-volume Commentaries, extending over two thousand printed pages, labor law (such as it is) occupies ten pages in Book I, on the "rights of persons." A chapter on "master and servant" leads off a series of chapters on what Blackstone calls "the great relations in private life," including, in addition to the employment relationship, familial relationships such as 'husband and wife' and 'parent and child' and the substituted family of "guardian and ward."

Id. (quoting WILLIAM BLACKSTONE, 1 COMMENTARIES *410).

79. *Id.* at 49.

80. SIR HENRY MAINE, ANCIENT LAW (Dorset Press 1986) (1861) (Eng.).

81. Recognizing this shift, Friedrich Hayek has suggested that Maitland's emphasis on contract as the opposite of status may be a little misleading. Status means that each individual occupies an assigned place in society; in law, it is reflected in legal rules which are "not fully general but single out particular persons or groups and confer upon them special rights and duties." The true contrast to such a legal regime, Hayek argues, is a system of "general and equal laws, of the rules which are the same for all, or, we might say, of the rule of *leges* in the original meaning of the Latin word for laws—*leges* that is, as opposed to the *privi-leges*." FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 154 (1960).

liberty. Under the regime of contract, each person who is *sui juris*, that is, legally competent to make a contract, becomes what the literal translation of the Latin phrase means, "of one's own right," or a law unto oneself. Thus, in the modern era, contract becomes, as one scholar aptly characterizes it, "the most important of the instruments that the law supplies to the individual to shape his own position."[82]

American lawyers and judges, at the end of the nineteenth century, frequently described contemporary American society as one based on contract, in contrast to medieval society, which was based on status. They also appreciated the significance of this shift for what it meant for individual liberty. For example, the attorneys challenging a New York rate-fixing law in 1892 argued that the American constitutional tradition rejected "medieval darkness, which permitted every detail of one's life to be regulated" and instead embraced the "modern" doctrine of "freedom of action."[83] And when the New York Court of Appeals struck down the law prohibiting cigar manufacturing in *Jacobs*, it expressed the fear that upholding the law would reverse the progress society has made from the paternalism of the past:

> Such legislation may invade one class of rights today and another tomorrow, and if it can be sanctioned under the Constitution, while far removed in time we will not be far away in practical statesmanship from those ages when government prefects supervised the building of houses, the rearing of cattle, the sowing of seed and the reaping of grain, and governmental ordinances regulated the movements and labor of artisans, the rate of wages, the price of food, the diet and clothing of the people, and a large range of other affairs long since in all civilized lands regarded as outside of government functions.[84]

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82. *Id.* The great legal historian J. Willard Hurst similarly emphasized individualism when he described the nineteenth-century American legal order as one that sought to "protect and promote the release of individual creative energy to the greatest extent compatible with the broad sharing of opportunity for such expression." JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES 6 (1956).

83. Budd v. New York, 143 U.S. 517, 524–25 (1892) (argument for plaintiffs in error). Although the majority of justices on the U.S. Supreme Court rejected this argument in *Budd*, it received a far more sympathetic response from the New York Court of Appeals when it decided to strike down the law—the decision overturned by the U.S. Supreme Court ruling. In his opinion for New York's highest court, Judge Peckham declared that continued adherence to the old ideas and practices of paternal government (like rate-fixing laws) would "wholly ignore the later and as I firmly believe the more correct ideas which an increase of civilization and a fuller knowledge of the fundamental laws of political economy, and a truer conception of the proper functions of government have given us at the present day." Richard Skolnik, *Rufus Peckham*, *in* 3 THE JUSTICES OF THE UNITED STATES SUPREME COURT, 1789–1969: THEIR LIVES AND MAJOR OPINIONS 1685, 1692–93 (Leon Friedman & Fred L. Israel eds., 1969) (quoting from People v. Budd, 117 N.Y. 1 (1889)).

84. *In re* Jacobs, 98 N.Y. 98, 114–15 (1885).

Classical-liberal, or "laissez-faire," theorists in the late nineteenth century went even further, using the concept of contract—and the policy of individualism that it implied—as virtually synonymous with progress. To them, what made America "modern" was its use of contract, in this broad sense. William Graham Sumner, perhaps the best known of the American theorists of laissez-faire,[85] in his classic work, *What Social Classes Owe to Each Other*, identified the transition this way:

> In the Middle Ages men were united by custom and prescription into associations, ranks, guilds, and communities of various kinds. These ties endured as long as life lasted. Consequently society was dependent, throughout all its details, on status, and the tie, or bond, was sentimental. In our modern state, and in the United States more than anywhere else, the social structure is based on contract, and status is of the least importance.[86]

Sumner further described contract relationships as based, not on "sentiment," but rather on "rational—even rationalistic" considerations; such modern relationships are "not permanent" but endure "only so long as the reason for [them] endures."[87] What resulted was individualism:

> A society based on contract is a society of free and independent men, who form ties without favor or obligation, and co-operate without cringing or intrigue. A society based on contract, therefore, gives the utmost room and chance for individual development, and for all the self-reliance and dignity of a free man.[88]

Sumner's notion of "a society based on contract" was somewhat reminiscent of American society as it had been described in the early 1830s by Alexis de Tocqueville, the young French aristocrat who in his classic book, *Democracy in America*, had coined the term *individualism* to identify the unique phenomenon he discerned during his travels in America.[89] Rather than

85. Sumner has been regarded as the Herbert Spencer of the United States, "the American champion of *laissez faire*," whose book, *What Social Classes Owe to Each Other*, was "a restatement in the American vernacular of the great English classicists." RALPH HENRY GABRIEL, THE COURSE OF AMERICAN DEMOCRATIC THOUGHT 231–32 (3d ed. 1986).

86. WILLIAM GRAHAM SUMNER, WHAT SOCIAL CLASSES OWE TO EACH OTHER 22–23 (Caxton Printers 1986) (1883).

87. *Id.* at 24.

88. *Id.* at 23.

89. Individualism, wrote Tocqueville, "disposes each citizen to isolate himself from the mass of his fellows and withdraw into the circle of family and friends"; individualists "owe no

being appalled at individualism, as Tocqueville was,[90] however, Sumner embraced it as the chief organizing principle of society. The son of a poor English immigrant, Sumner had high regard for such middle-class virtues as productiveness and prudence; he also appreciated the opportunities for individuals to rise or to fall according to their own merit, in the post-Industrial Revolution market society about which he wrote.[91]

A free society, as Sumner understood it, was one in which each individual is "sovereign," both free and equal, owing no political or legal duties toward others except "respect, courtesy, and good will."[92] The duty of respect—and especially respect for others' equal rights—was particularly important to Sumner:

> Rights should be equal, because they pertain to chances, and all ought to have equal chances so far as chances are provided or limited by the action of society. . . . We each owe it to the other to guarantee mutually the chance to earn, to possess, to learn, to marry, etc., etc., against any interference which would prevent the exercise of those rights by a person who wishes to prosecute and enjoy them in peace for the pursuit of happiness. If we generalize this, it means that All-of-us ought to guarantee rights to each of us.[93]

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man anything and hardly expect anything from anybody" and "imagine that their whole destiny is in their own hands." ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 506, 508 (J.P. Mayer ed., 1969) (Part II, Chapter 2).

90. After reverently describing the importance of family connections in aristocratic societies, Tocqueville, in contrast, decried the individualism prevalent in democratic societies as "based on misguided judgment," in which "[e]ach man is forever thrown back on himself alone" and thus "shut up in the solitude of his own heart." *Id.*

91. By hard work, wise management, and frugal living, Sumner's father was able to afford a college education for his son. After serving first as a clergyman, Sumner moved to academics in 1872 and became professor of political economy at Yale. He was a pioneer in the emerging field of sociology. GABRIEL, *supra* note 85, at 231–32.

92. SUMNER, *supra* note 86, at 33–34. In the final chapter of the book, entitled "Wherefore We Should Love One Another," Sumner identified a moral duty of benevolence: because of their "common participation in human frailty and folly," persons do owe "aid and sympathy" to one other. *Id.* at 136–37. Nevertheless, emphasizing the political or legal duties of respect for others' rights, he concluded that "we all owe to each other, good-will, mutual respect, and mutual guarantees of liberty and security. Beyond this nothing can be affirmed as a duty of one group to another in a free state. *Id.* at 145.

93. *Id.* at 141–42. This was Sumner's full answer to the question he raised in the book's introduction: "What ought Some-of-us do for Others-of-us? or, What do social classes owe to each other?" His short answer was that "the State" owes nothing to anybody "except peace, order, and the guarantee of rights." *Id.* at 11. In arguing that rights pertain to "chances," he emphasized that "[r]ights do not pertain to *results*"; they pertain "to the *pursuit* of happiness, not to the possession of happiness," and they will produce "unequal results," and justly so because results should be "proportioned to the merits of individuals." *Id.* at 141.

"Civil liberty," in a free society, meant that "*each man is guaranteed the use of all his own powers exclusively for his own welfare*"; moreover, "[a]ll institutions are to be tested by the degree to which they guarantee liberty."[94] Equally important to Sumner was self responsibility, for he also stressed that everyone has "one big duty" in society, "to take care of his or her own self," as well as his family, if he has dependents.[95] From this vision of a free society, Sumner arrived at "the old doctrine—*Laissez-faire*," which he translated into "blunt English" as "Mind your own business."[96]

The philosophy called "laissez-faire"[97] followed from a body of thought known as liberalism and often called "classical liberalism," to distinguish it from the term *liberalism* as used in modern American political thought.[98] Classical liberalism, or libertarianism, has been described by one of its leading twentieth-century exponents as "the great political and intellectual movement that substituted free enterprise and the market economy for the precapitalistic methods of production; constitutional representative government for the absolutism of kings or oligarchies; and freedom of all individuals from slavery, serfdom, and other forms of bondage."[99] A modern libertarian scholar has identified libertarianism as a centuries-old political tradition that emphasizes individual liberty and limited government and holds, among its

94. *Id.* at 30.

95. *Id.* at 98. Sumner emphasized self-responsibility because, as noted below, he was especially critical of social reformers who did not "mind their own business" and instead sought to take care of others—and to use the coercive powers of government to achieve their paternalistic ends.

96. *Id.* at 104.

97. The phrase *laissez-faire*, which has become a famous libertarian rallying cry, legendarily originated among a group of eighteenth-century French philosophers known as the Physiocrats (named after the Greek words *physis* (nature) and *kratos* (rule)), who advocating freeing economic markets from governmental control so that markets could be ordered by their own "natural laws." When asked by Louis XV, "How can I help you," a group of merchants was said to have responded with the Physiocratic argument, "*Laissez-nous faire, laissez-nous passer. Le monde va de lui-même.*" ("Let us do, leave us alone. The world runs by itself."). DAVID BOAZ, LIBERTARIANISM: A PRIMER 38–39 (1997).

98. The term *liberal* underwent a change in the early twentieth century, when people on the left side of the traditional political spectrum—that is, people who advocated more governmental control over economic markets—started calling themselves "liberals." Economist Joseph Schumpeter noted, "As a supreme, if unintended, compliment, the enemies of private enterprise have thought it wise to appropriate its label." Thus, modern libertarians refer to the philosophy of individualism, free markets, and limited government as "classical liberalism," although as libertarian writer David Boaz observes, "[I]n this era of historical illiteracy, if you call yourself a classical liberal, most people think you're an admirer of Teddy Kennedy!" *Id.* at 23.

99. LUDWIG VON MISES, HUMAN ACTION: A TREATISE ON ECONOMICS (3d rev. ed. 1966); *see also* LUDWIG VON MISES, LIBERALISM IN THE CLASSICAL TRADITION (3d ed. 1985) [hereinafter MISES, LIBERALISM].

key concepts, individualism and the supremacy of individual rights.[100] Liberty, under this tradition, means freedom from physical compulsion. As libertarians see it, only through the initiation of force—or fraud, which is an indirect form of force—can individuals be deprived of their liberty. Thus, libertarians see as the basic social rule the "no-harm principle": that no one ought to harm another, by using force or fraud, to the detriment of another's life, liberty, or property.[101]

In Anglo-American political thought, libertarianism originated with the seventeenth-century English radical Whig political writers, the most famous of whom was John Locke.[102] Eighteenth-century radical Whig writers on both sides of the Atlantic expanded upon Lockean ideas.[103] For example, the authors of *Cato's Letters*—political essays originally published in the 1720s which continued to influence America's founders during the Revolutionary period—restricted the legitimate power of government to the protection of "natural liberty."[104] This libertarian Whig tradition had a continuing influence on early American political thought well into the nineteenth century—for

100. BOAZ, *supra* note 97, at 2. *Individualism*, as understood by libertarians, means viewing the individual as the basic unit of social analysis, regarding each individual as an end in one's self. *Id.* at 16; *see also* DAVID CONWAY, CLASSICAL LIBERALISM: THE UNVANQUISHED IDEAL 10 (1995) (basing the classical-liberal "system of natural liberty" on individualism, with respect to both ends and means). Among the key concepts of modern libertarianism, in addition to individualism, that Boaz identifies are as follows: limited government (the legitimate function of government as limited to the protection of natural rights); the rule of law (a society of liberty under law, in which individuals are free to pursue their own lives so long as they respect the equal rights of others); free-market capitalism (including the principle of spontaneous order and the concept of a natural harmony of interests among peaceful, productive people in a just society) and non-aggression, or peace (the principle that it is wrong to initiate the use of force as a means to achieve social or political goals). BOAZ, *supra* note 97, at 16–17.

101. On the no-harm principle generally, see T. PATRICK BURKE, NO HARM: ETHICAL PRINCIPLES FOR A FREE MARKET (1993). Burke explains that the classical-liberal conception of *harm* requires, first, that a person "harmed" by some action "must be worse off after the action than he was before it," i.e., have "some *deterioration* in his condition"; and second, that "the action in question must have *caused* the harm, that is, *produced* it." Thus, for example, under the classical-liberal conception of *harm*, a worker is not "harmed" by accepting an offer of employment at low wages. *Id.* at 46–47.

102. BOAZ, *supra* note 97, at 36. Although Boaz traces the roots of libertarianism as far back as the Old Testament's Book of Samuel and sees the "first stirrings of clearly protoliberal ideas" in the English Revolution of the 1640s, he dates "the birth of liberalism" to the Glorious Revolution and specifically to the publication of Locke's *Second Treatise of Government* in 1690. *Id.* at 28, 35–37. On the radical Whig tradition generally, see Mayer, *Whigs*, *supra* note 45.

103. On the eighteenth-century radical Whigs and their support for both American independence and British Parliamentary reform, see Mayer, *Whigs*, *supra* note 45, at 164–74, 189–96.

104. "Cato," An Enquiry into the Nature and Extent of Liberty (Letter No. 62) (Jan. 20, 1721), *in* 1 JOHN TRENCHARD & THOMAS GORDON, CATO'S LETTERS: OR, ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, AND OTHER IMPORTANT SUBJECTS 244–48 (photo. reprint 1969) (1733).

example, on radical Jeffersonian Republicans and on the so-called "Locofoco" wing of the Jacksonian Democratic party.[105]

The nineteenth-century classical-liberal tradition took to its logical extremes the English radical Whig ideas about maximizing individual liberty and minimizing the role of government. Thus, the broad notion of liberty adopted by the authors of *Cato's Letters* in the 1720s.[106] was applied consistently and developed fully by nineteenth-century classical liberals into the principle that everyone ought to be free to do as they please, so long as they do not harm others or interfere with others' equal freedom. The most famous expression of this principle was Herbert Spencer's "Law of Equal Freedom": "*Every man has freedom to do all that he wills, provided he infringes not the equal freedom of any other man.*"[107] Similarly, *Cato's* notion that the role of the magistrate was confined to the preservation of "this natural Right" became, to nineteenth-century classical liberals, an absolute limitation on the legitimate scope of governmental power. John Stuart Mill espoused this principle in his popular tract *On Liberty*, first published in 1859, which maintained that government should be limited to the role of protecting individuals from harming one another:

> The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. . . . [T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant . . . .[108]

Mill then concluded, "Over himself, over his own body and mind, the individual is sovereign."[109]

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105. *See* Eric Foner, *Radical Individualism in America*, LITERATURE OF LIBERTY 5 (Cato Institute, July–Sept. 1978).

106. Cato wrote,

> [T]he Power which every Man has over his own Actions, and his Right to enjoy the Fruits of his Labour, Art, and Industry, as far as by it he hurts not the Society, or any Members of it, by taking from any Member, or by hindering him from enjoying what he himself enjoys.

"Cato," *supra* note 104, at 248.

107. HERBERT SPENCER, SOCIAL STATICS 95 (reprint, New York, Robert Schalkenbach Foundation, 1970) (London, 1877). Spencer regarded this law as the "first principle," or "the *primary* law of right relationship between man and man," and maintained it was "the prerequisite to normal life in society," just as freedom was "the prerequisite to normal life in the individual." *Id.* at 79, 95.

108. JOHN STUART MILL, ON LIBERTY, *in* JOHN STUART MILL, THREE ESSAYS (ON LIBERTY, REPRESENTATIVE GOVERNMENT, THE SUBJECTION OF WOMEN) 15 (Oxford 1975).

109. *Id.*

Like modern libertarians, nineteenth-century classical liberals differed in the philosophical foundations of their laissez-faire ideology: some grounded it in pragmatic, utilitarian justifications while others grounded it in a moral philosophy that saw individualism as an end in itself.[110] However they grounded their ideology, they nevertheless reached the same fundamental conclusion regarding the role of government. "As the liberal sees it," noted the great twentieth-century classical-liberal Ludwig von Mises, "[T]he task of the state consists solely and exclusively in guaranteeing the protection of life, health, liberty, and private property against violent attacks."[111] Libertarians believe that the legitimate functions of government are confined, at most, to those powers necessary to protect individuals from harming one another in their persons or their property.[112] Thus, "[T]he only actions that should be forbidden by law are those that involve the initiation of force against those who have not themselves used force—actions like murder, rape, robbery, kidnapping, and fraud."[113] When government goes beyond this minimal role of protecting persons or property against harm by others and instead seeks to protect persons from harming themselves—when government invades the realm of individual sovereignty described by John Stuart Mill—it loses its legitimacy and becomes an invader rather than a protector of rights. Hence, laissez-faire theorists, from nineteenth-century classical liberals to modern libertarians, have opposed all forms of "legal paternalism" as illegitimate uses of the coercive power of the law.[114]

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110. *See* BOAZ, *supra* note 97, at 82–87 (distinguishing utilitarians from neo-natural rights philosophers among modern libertarians). Albert Venn Dicey, the preeminent constitutional authority in late Victorian and Edwardian Britain, associated classical liberalism, insofar as it related to British law, with the utilitarianism of Jeremy Bentham and his disciples among the so-called philosophical Radicals, including James Mill and John Stuart Mill. Nevertheless, he recognized that important "speculative differences" distinguished the "utilitarian individualism" of such thinkers as Mill from the "absolute individualism" of Spencer. ALBERT VENN DICEY, LECTURES ON THE RELATION BETWEEN LAW AND PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY 17 (photo. reprint 1981) (1914).

111. MISES, LIBERALISM, *supra* note 99, at 52. Mises added, "Everything that goes beyond this is an evil"; a government that infringes these rights rather than protects them would be "altogether bad." *Id.*

112. The qualifier *at most* recognizes the general split among modern libertarians between anarchist libertarians (sometimes called "anarcho-capitalists"), who deny the legitimacy of government altogether, and minimal-government libertarians, or minarchists. *See generally* RANDY E. BARNETT, THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW (1998); BRUCE L. BENSON, THE ENTERPRISE OF LAW: JUSTICE WITHOUT THE STATE (1990).

113. BOAZ, *supra* note 97, at 2. The libertarian "no-harm," or non-aggression, principle views fraud as a form of theft, tantamount to the initiation of physical force against others' property. *Id.* at 74–75 (explaining, in simple terms, why fraud is a form of theft: "If I promise to sell you a Heineken for a dollar, but I actually give you a Bud Light, I have stolen your dollar.").

114. *See* John Hospers, *Libertarianism and Legal Paternalism, in* THE LIBERTARIAN READER 135 (Tibor R. Machan ed., 1982) (defining "legal paternalism" as the view supporting the use of

Like today's libertarians, the classical liberals of the early twentieth century also were radicals, not conservatives. To fully implement their vision of a free society, advocates of laissez-faire called for major changes in the law—including many traditional principles of the Anglo-American common law system.[115] Although many modern scholars—particularly non-libertarians—mistakenly identify Anglo-American common law, as it had evolved by the nineteenth century, with classical liberalism,[116] the two traditions are distinct, based on fundamentally different premises and with fundamentally different applications to the leading legal and public policy questions of the early twentieth century.[117]

Sumner's book, *What Social Classes Owe to Each Other*, illustrates how laissez-faire theorists' opposition to all forms of legal paternalism prompted them to criticize not only the new uses for the police power proposed by Progressive-era reformers but also many of the traditional uses of the police

legislation to protect people from themselves). Libertarians oppose all paternal legislation, except for laws protecting those persons who cannot take care of themselves: namely, infants and children, the senile, and mentally incompetent persons. *Id.* at 136–37. Thus, libertarians would oppose laws that prohibit competent adults from using narcotic drugs, committing or attempting to commit suicide, gambling, engaging in prostitution, or other so-called "victimless crimes." *See, e.g.*, GILBERT GEIS, NOT THE LAW'S BUSINESS: AN EXAMINATION OF HOMOSEXUALITY, ABORTION, PROSTITUTION, NARCOTICS, AND GAMBLING IN THE UNITED STATES (1979); PETER MCWILLIAMS, AIN'T NOBODY'S BUSINESS IF YOU DO: THE ABSURDITY OF CONSENSUAL CRIMES IN A FREE SOCIETY (1993).

115. Among these principles, of course, is the traditional concept of the police power and the constitutional limits that constrained it. As discussed *infra*, laissez-faire theorists would change traditional police-power jurisprudence at least as much as would "Progressive" reformers.

116. *See, e.g.*, Sunstein, *supra* note 7, at 874, 888 n.49 (identifying the common law with the "allocation of rights of use, ownership, transfer, and possession of property associated with 'laissez-faire' systems" and arguing that judges during the *Lochner* era measured the constitutionality of state action against a free-market/common law "baseline").

117. In a devastating critique of Sunstein's article, Lochner's *Legacy*, David Bernstein has argued that Sunstein misrepresented both the Supreme Court's understanding of common law rules and the Court's decisions concerning constitutional limitations on the police power during the *Lochner* era. David E. Bernstein, Lochner's *Legacy's Legacy*, 82 TEX. L. REV. 1 (2003) [hereinafter Bernstein, *Legacy*]. With regard to the former, he shows that contrary to Sunstein's claim that the Court treated common law rules as "natural and immutable," the Court rather regarded them as mutable and contingent; for example, the Court consistently upheld federal and state workers' compensation statutes even though they replaced common law rights and duties with new statutory schemes that included many novel features. *Id.* at 23–32. With regard to police powers, Bernstein also shows that the Court rarely interfered with redistributive legislation claimed to be within the states' police power. *Id.* at 34–42. Moreover, he shows that the Court's "civil liberties" decisions—including its protection for liberty of contract—during the *Lochner* era cannot be explained by the theory that the Court was protecting common law distributions of wealth; rather, the Court used substantive due process "to protect what it considered the fundamental liberties of Americans from arbitrary or unreasonable legislation." *Id.* at 47. Thus, he concludes, Sunstein's article "shows the danger of applying an ideological construct to constitutional history for presentist purposes, while ignoring or neglecting contrary evidence." *Id.* at 63. This is the vice that legal historians condemn as "lawyers' history."

power championed by conservatives of the time. Sumner devoted much of the book to his thesis that all "schemes" for government intervention advocated by "social reformers," presumably to aid certain persons or classes,[118] really violate the rights of the "Forgotten Man," the prudent, responsible, tax-paying citizen.[119] Sumner particularly condemned two types of such "schemes" that were popular in his time: liquor prohibition laws,[120] which were advocated by a coalition of "Progressive" social reformers and conservative Victorian-era moralists;[121] and the protective tariff,[122] which was

118. All the "schemes and projects" for "the organized intervention of society through the State" may be reduced to a simple formula, Sumner argued: "A and B decide what C shall do for D." A and B are the "social reformers," who are unmindful of the single great duty that all individuals owe one another in society—Sumner's version of the Golden Rule—"Mind your own business." Instead, they attempt to mind other people's business, by advocating use of the coercive power of government to come to the aid of D, the "poor man," who is Sumner's model for all persons who are "negligent, shiftless, inefficient, silly, and imprudent." The one whose interest is overlooked in such schemes is C, the "industrious and prudent," whom Sumner calls "the Forgotten Man." SUMNER, *supra* note 86, at 20–22.

119. As described by Sumner, the "Forgotten Man" is "worthy, industrious, independent, and self-supporting"; "he minds his own business and makes no complaint," *id.* at 110, and yet he is the one "threatened by every extension of the paternal theory of government" because "[i]t is he who must work and pay." *Id.* at 130. "The real victim is the Forgotten Man":

> the man who has watched his own investments, made his own machinery safe, attended to his own plumbing, and educated his own children, and who, just when he wants to enjoy the fruits of his care, is told that it is his duty to go and take care of some of his negligent neighbors, or, if he does not go, to pay an inspector to go.

Id. at 119. Noting how women had entered the workforce by the late nineteenth century, Sumner added, "We must not overlook the fact that the Forgotten Man is not infrequently a woman." *Id.* at 126. To Sumner, "the Forgotten Man and the Forgotten Woman are the real productive strength of the country," the people who work and vote—and generally pray—but whose "chief business in life," thanks to the social reformers, is "to pay." *Id.* at 128–29.

120. Sumner used liquor prohibition as the chief example in his argument that "[t]he fallacy of all prohibitory, sumptuary, and moral legislation is the same":

> A and B determine to be teetotalers, which is often a wise determination, and sometimes a necessary one. . . . But A and B put their heads together to get a law passed which shall force C to be a teetotaler for the sake of D [the "poor man"—in this case, the alcoholic], who is in danger of drinking too much. . . . Who is C? He is the man who wants alcoholic liquors for any honest purpose whatsoever, who would use his liberty without abusing it, who would occasion no public question, and trouble nobody at all. He is the Forgotten Man again.

Id. at 115. With regard to anti-vice legislation generally, Sumner maintained that "[a]lmost all legislative effort to prevent vice is really protective of vice, because all such legislation saves the vicious man from the penalty of his vice." He added, "Nature's remedies against vice are terrible" and "without pity"; and he was without pity himself with regard to alcohol abuse: "A drunkard in the gutter is just where he ought to be, according to the fitness and tendency of things." *Id.* at 113–14.

121. The coalitions that formed the temperance and prohibition movements, culminating in the Eighteenth Amendment to the U.S. Constitution, are nicely summarized in RICHARD B. BERNSTEIN & JEROME AGEL, AMENDING AMERICA 170–77 (1993).

advocated by business interests and was a key plank in the political platform of the Republican Party and its predecessor, the Whig Party, throughout the nineteenth century.[123] Both liquor prohibition laws and the protective tariff, it should be noted, comfortably fit within the traditional scope of the exercise of government regulatory powers: prohibition, as a protection of public health or morality under the police power;[124] the tariff, as a trade regulation supposed to foster domestic economic development.[125] Sumner also criticized government regulations of the labor market, regardless whether such laws were traditional exercises of the police power to protect health or morals or were the new forms of "protective" legislation advocated by Progressive reformers.[126] Maintaining that "free men in a free state" ought to "protect themselves,"[127] Sumner advocated total freedom of contract in labor: employers and employees should freely bargain over wages, hours, and working conditions, making contracts "on the best terms which they can agree

122. Sumner condemned the protective tariff as the worst form of "jobbery," which he defined as "any scheme which aims to gain, not by the legitimate fruits of industry and enterprise, but by extorting from somebody a part of his product under guise of some pretended industrial undertaking." SUMNER, *supra* note 86, at 120, 122. He called jobbery "the greatest social evil" of his time, and he considered it "the vice of plutocracy," which was corrupting the democratic and republican form of government in the United States. *Id.* at 122. In the case of the protective tariff, the "Forgotten Man" is the consumer who must pay more for the goods he imports; the "poor man" who is the supposed beneficiary of this form of "corporate welfare" (as it would be called today) is the business that benefits from the indirect government subsidy that the tariff on his competitors' goods provides.

123. *See, e.g.*, DAVID HERBERT DONALD, LIBERTY AND UNION: THE CRISIS OF POPULAR GOVERNMENT, 1830–1870, at 233–34 (1978). Donald notes that in the late nineteenth century, the tariff issue was "seldom debated in terms of free trade versus protectionism." He adds, "Except for a few doctrinaire economic theorists, everybody recognized some tariff barrier was required to protect some American industries." *Id.* at 233. Needless to say, Sumner was one of those "doctrinaire theorists" who disagreed.

124. As the Supreme Court's decision in *Mugler v. Kansas*, 123 U.S. 623 (1887), illustrates, courts generally upheld liquor prohibition laws as valid exercises of the police power to protect public health or morals.

125. Congress's authority to impose protective tariffs, either under its taxing power or its regulatory power over foreign commerce, was never successfully challenged in court, although antebellum Southerners—most famously, the "nullifiers" of South Carolina—strenuously objected to protective tariffs as an abuse of congressional power. *See, e.g.*, WILLIAM W. FREEHLING, PRELUDE TO CIVIL WAR: THE NULLIFICATION CONTROVERSY IN SOUTH CAROLINA, 1816–1836 (1966).

126. Among the laws addressed by Sumner were those providing for government inspection of workplaces, "[t]he safety of workmen from machinery, the ventilation and sanitary arrangements required by factories, the special precautions of certain processes," as well as Sunday-closing laws, laws limiting the hours of labor of women and children, and laws setting "limits of age for employed children." SUMNER, *supra* note 86, at 82–83.

127. *Id.* at 83. Sumner opposed paternal legislation even for the protection of women and children, arguing that free laborers "ought to protect their own women and children," either individually or through collective bargaining, rather than rely on government to do so. *Id.*

upon."[128] He recognized workers' freedom to strike as a legitimate last resort in the bargaining process,[129] and he regarded trade unions as "right and useful, and perhaps, necessary"[130]—and so took a far more benign view of labor unions than did the courts of his time, which tended to regard unions as unlawful combinations in restraint of trade, under Anglo-American common law precedents.[131]

The so-called Progressive movement, which arose in the late nineteenth century and became increasingly influential in the early decades of the twentieth century,[132] was itself based on the paternalistic and collectivist threads that ran through the Anglo-American common law tradition. Like the Fabian socialists, their counterparts in Britain, who harkened back to the "Tory paternalism" of the eighteenth-century,[133] American Progressives

128. *Id.* at 75. He saw labor contracts, contracts between "employers and employed," as essentially no different from other forms of contracts—those between "buyers and sellers, renters and hirers, borrowers and lenders"—and preferred that government not interfere in any contracts, leaving their terms to the parties' negotiations and the natural laws of supply and demand. *Id.*

129. *Id.* at 80. Although he maintained that "a strike is a legitimate resort at last," and that it is "like war, for it is war," he also doubted whether strikes for higher wages were "expedient." *Id.*

130. *Id.* at 83. In calling unions "right and useful," Sumner recognized workers' rights of freedom of association and saw unions' value in raising workers' wages. *Id.* He also saw them as useful in other ways: "to spread information, to maintain *esprit de corps*, to elevate the public opinion of the class." *Id.* at 81. Without saying so explicitly, Sumner's view that "it may be that [unions] are necessary" was his answer to the argument that employers and employees had unequal bargaining strength. *Id.* He did regard unions as "an exotic and imported institution" and saw many of their rules and methods, "having been developed in England to meet English circumstances," as "out of place" in America; hence, he argued, unions needed "development, correction, and perfection" in the United States. *Id.* at 82–84.

131. *See, e.g.*, Arthur F. McEvoy, *Freedom of Contract, Labor, and the Administrative State*, *in* SCHEIBER, supra note 5, at 214–16 (summarizing courts' use of labor injunctions against even peaceful union activity).

132. As briefly observed in *supra* note 12, the Progressive reform movement was a diverse coalition of persons who sought to increase government regulation of economic and social life. *See* HOFSTADTER, *supra* note 12; *see also* James W. Ely, Jr., *Melville W. Fuller Reconsidered*, 1988 J. SUP. CT. HIST. 35, 36 (observing that the Progressives "championed greater governmental intervention in American life and constructed a version of constitutional history serviceable for their purpose"). A pithy definition of a Progressive reformer was offered by the free-thinking early twentieth-century journalist H. L. Mencken as "one who is favor of more taxes instead of less, more bureaus and jobholders, more paternalism and meddling, more regulation of private affairs and less liberty." THE QUOTABLE CONSERVATIVE 145 (Rod L. Evans & Irwin M. Berent eds., 1995) (quoting Mencken in the [Baltimore] *Evening Sun*, Jan. 19, 1926).

133. Albert Venn Dicey suggested this parallel in his classic work, *Law and Public Opinion in England During the Nineteenth Century*, which divided the century into three periods based upon the dominant public opinion in each: the period of "Old Toryism or Legislative Quiescence" (1800–1830), characterized by traditionalism; the period of "Benthamism or Individualism" (1825–1870), characterized by utilitarian classical-liberal reforms; and the period of "Collectivism" (1865–1900), characterized by the forms of state intervention favored by socialist reformers. DICEY, *supra* note 110, at 62–65. As Dicey saw it, the brief mid-century period in

championed various "protective" labor laws (particularly regarding women, children, and other supposedly vulnerable classes of workers),[134] liquor prohibition and other forms of paternal morals legislation, and in general a category of laws called "social legislation" by modern scholars.[135] Not surprisingly, both traditionalist conservatives and laissez-faire reformers viewed the so-called "reform" agenda of the Progressives as a reactionary return to a form of government paternalism, turning the clock back from a society based on contract to one again based on status.[136]

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which classical-liberal reform ideas dominated gave way to the collectivism of the late Victorian period. That collectivism curtailed freedom of contract "as surely as individualism [had] extend[ed it]." *Id.* at 264. And by using collective action on behalf of the interests of organized labor—for example, in the Combination Act (Conspiracy and Protection of Property Act of 1875) and Trade Union Acts (1871–1876)—it used governmental power to favor unions just as the earliest Combination Act (1800) had favored employers by outlawing unions.† Dicey contrasted the combination laws of both the early- and late-nineteenth century (the laws of 1800 and 1875) with the "Benthamite" legislation of 1825, which he viewed as neutral with regard to employer-worker disputes, consistent with the dominant spirit of individualism in mid-century Britain: the 1825 law "was intended to establish free trade in labour, and allowed, or tolerated, trade combinations, only in so far as they were part of and conducive to such freedom of trade." *Id.* at 270. Late-Victorian laws, like the 1875 Combination Act and other labor laws, echoed the "Tory paternalism" of the first third of the century, which was in turn based on England's centuries-old tradition of paternal government. *Id.* at 101–02.

134. So-called "protective laws" for women were, in the words of one scholar, "as much as anything designed to keep them *out* of the labor market; at a minimum, their underlying premise was that women properly belonged in the private sphere and were constitutionally unsuited for the wage-labor market." McEvoy, *supra* note 131, at 218. On the harmful effects of "protective" legislation upon women's employment, see Joan Kennedy Taylor, *Protective Labor Legislation*, *in* FREEDOM, FEMINISM, AND THE STATE 187, 190 (Wendy McElroy ed., 2d ed. 1991), for the following assertion: "Protective legislation for women actually diminishes the employment opportunities of women."); *see also* Elisabeth M. Landes, *The Effect of State Maximum-Hours Laws on the Employment of Women in 1920*, 88 J. POL. ECON. 476 (1980) (an empirical study of the 1920s, showing that maximum-hours laws significantly reduced female employment in manufacturing).

135. As described *supra* note 37, the term *social legislation* is a modern term of art—not used by the Supreme Court prior to 1940—that originated in nineteenth-century Germany and referred to measures "intended for the relief and elevation of the less favored classes of the community." McCurdy, *supra* note 37, at 162–63. Not only were these laws unprecedented in that they did not fall within the traditional scope of the police power to protect public health, safety, and morality; but these laws also would be considered unconstitutional under nineteenth-century prohibitions of "partial" or "class" legislation, for by promoting the special interests of certain economic classes, they perfectly fit the traditional definition of such invalid class laws. *See* GILLMAN, *supra* note 29, at 158–59 (discussing the unprecedented nature of minimum wage legislation).

136. Christopher Tiedeman, the laissez faire constitutionalist whose views are discussed in the next section, warned in his book *The Unwritten Constitution* (1890), that

> the old superstition that government has the power to banish evil from the earth, if it could only be induced to declare the supposed causes illegal, has been revived . . . . The State is called on to protect the weak against the shrewdness of the stronger, to determine what wages a workman shall receive for his labor, and how many hours he shall labor. Many trades and occupations are being prohibited, because some are damaged incidentally by their prosecution, and many ordinary pursuits are made government monopolies. The demands of the Socialists and Communists vary in

Because the idea of pervasive government regulation of economic and social life seems to hark back to medieval, pre-industrial public policy, many modern libertarians regard the term *Progressive* as a misnomer. A truly "progressive" policy, from the libertarian perspective, would fully implement the nineteenth-century classical-liberal vision of free-market capitalism with minimal government intrusions[137]—a vision which, as William Graham Sumner's work suggests, was as far removed from the traditional understanding of the police power to regulate public health, safety, order, and morality as was the newer, virtually unlimited scope of the police power advocated by Progressive reformers. Thus, it could be argued that in early twentieth-century American debates over law and public policy, both laissez-faire and Progressivism were competing "counter-currents" of opinion,[138] both challenging the status quo, the traditional understanding of the police power.

C. Judicial Review and Two Paradigms of Liberty

Perhaps the greatest misunderstanding, or myth, concerning judicial protection of liberty of contract in the early twentieth century was that it resulted from an illegitimate "activist" jurisprudence in which judges, rather than following objective standards of constitutional law, were following their own subjective views. As discussed in this Article's Introduction section, much recent revisionist scholarship of the *Lochner* era—by both scholars who are sympathetic to, and scholars who are hostile to, liberty of contract—has challenged this myth. Even some Progressive-era scholars, who sought to

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> degree and in detail, but the most extreme of them insist upon the assumption by government of the paternal character altogether, abolishing all private property in land, and making the State the sole possessor of the working capital of the nation.

Mayer, *Tiedeman*, *supra* note 35, at 117–18 (quoting CHRISTOPHER G. TIEDEMAN, THE UNWRITTEN CONSTITUTION OF THE UNITED STATES 79–80 (1890)). Tiedeman's warning about the advent of "the absolutism of a democratic majority" was echoed by John F. Dillon, president of the then-conservative American Bar Association, in his address at the ABA's 1892 convention. "[W]hat is now to be feared and guarded against is the despotism of the many—of the majority," Dillon observed, calling upon the legal profession "to defend, protect and preserve our legal institutions unimpaired," in the face of "popular demands" threatening private property, through "unjust or discriminatory legislation in the exercise of the power of taxation, or of eminent domain, or of that elastic power known as the police power." John F. Dillon, Presidential Address to the American Bar Association (1892), *in* SOURCES IN AMERICAN CONSTITUTIONAL HISTORY, *supra* note 63, at 143.

137. Self-described "liberals" and "Progressives" who might oppose such a free-market policy as "reactionary" are the true reactionaries, from the libertarian perspective. As Isabel Paterson, the great twentieth-century laissez-faire writer, observed, "If you go back 150 years you are a reactionary; but if you go back 1,000 years, you are in the foremost ranks of progress." Isabel Paterson, *A Paterson Collection*, LIBERTY, Oct. 1993, at 39.

138. *See* DICEY, *supra* note 110, at 37 (defining *counter-current* as "a body of opinion, belief, or sentiment more or less directly opposed to the dominant opinion of a particular era").

rewrite constitutional history to advance their political agenda, did not really believe the orthodox criticism that *Lochner*-era judges were "activists."[139]

In modern debates over constitutional interpretation, the "judicial activist" label has become virtually "an all-purpose term of opprobrium," used by both the left and the right as an epithet to criticize court decisions they disagree with.[140] Notwithstanding the variety of definitions of *activism* that scholars have advanced—most of them regarding activism as bad, or even pernicious, but with a few seeing it in a more positive light[141]—it is possible to define the term, at least when used pejoratively, to describe illegitimate judicial behavior, in a conceptually meaningful way. The term originated during the late 1940s, at a time when the justices on the Supreme Court, although all New Deal "liberals," nevertheless were divided over issues of constitutional interpretation.[142] As originally used then, and as resurrected in

139. Roscoe Pound rejected the prevalent view that in protecting liberty of contract, judges were deciding cases according to their own "personal, social, and economic views," even though he criticized liberty of contract as based on what he regarded as an outmoded jurisprudence. Pound, *supra* note 13, at 457–58. On the Progressives' reshaping of constitutional interpretation and history to advance their political agenda, see generally RICHARD A. EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION (2006).

140. Arthur D. Hellman, *Judicial Activism: The Good, the Bad, and the Ugly*, 21 MISS. C. L. REV. 253 (2002). After discussing various definitions of judicial activism, the author proposes one of his own, inspired by Judge Richard Posner: decisions "that expand the power of the judiciary over political institutions." *Id.* The problem with that definition is that it equates activism with judicial review, for any decision declaring a law passed by a legislature unconstitutional may be seen as an outcome adverse to the result reached through the political process. *Id.* at 264.

141. Some modern libertarian scholars during the late 1980s, at the height of the controversy over Robert Bork's failed nomination to the Supreme Court, sought to defend a broad judicial protection of liberty rights as a so-called "principled judicial activism." *See generally* Randy E. Barnett, *Judicial Conservatism v. A Principled Judicial Activism*, 10 HARV. J.L. & PUB. POL'Y 273 (1987); STEPHEN MACEDO, THE NEW RIGHT V. THE CONSTITUTION (1987). Of course, by calling it "principled," they were really saying that it was not activism at all but rather justifiable—albeit vigorous—use of the judicial review power to protect legitimate constitutional rights. More recently, taking note how some leftists have criticized the conservative decisions of the Rehnquist Court as "activist," Barnett has argued that the term, "while clearly pejorative, is generally empty." Randy E. Barnett, *Is the Rehnquist Court an "Activist" Court? The Commerce Clause Cases*, 73 U. COLO. L. REV. 1275, 1276 (2002).

142. The first recorded use of the term *judicial activism* occurred in a popular magazine, *Fortune*, in a 1947 article by the historian Arthur Schlesinger, Jr., profiling all nine justices on the Supreme Court at that time. Schlesinger characterized Justices Black, Douglas, Murphy, and Rutledge as the "Judicial Activists" who were willing to let the Court use its judicial review powers for "wholesome social purposes," such as "to protect the underdog or to safeguard basic human rights." He called Justices Frankfurter, Jackson, and Burton the "Champions of Self-Restraint," who were skeptical of individual judges' notions of justice and who preferred to defer to the legislative will. He regarded the other two members of the Court, Justice Reed and Chief Justice Vinson, as a middle group. Keenan D. Kmiec, *The Origin and Current Meaning of "Judicial Activism,"* 92 CAL. L. REV. 1441, 1445–49 (2004) (summarizing Arthur M. Schlesinger, Jr., *The Supreme Court: 1947*, FORTUNE, Jan. 1947). Publication of Schlesinger's

recent decades by conservative critics of the Warren Court,[143] the term *judicial activism* refers to the practice of judges deciding cases according to their own subjective policy preferences or desired results, rather than according to established, objective legal principles.[144] Judge Laurence Silberman has used the term in this sense when he defined it as "policymaking in the guise of interpreting and applying law."[145] This is the sense in which "activism" is most frequently deplored, in political dialogue today, as judges who "legislate from the bench";[146] and it also used in the sense in which judicial protection of liberty of contract during the *Lochner* era was criticized by the orthodox Holmesian view, the view that coined the term "Lochnerizing" as a pejorative synonymous with improper judicial activism.

Properly speaking, then, an "activist judge" is one who decides the outcome of a given case or controversy according to subjective values—his or her personal convictions—rather than following so-called "neutral principles" or objective standards for interpreting laws and constitutional provisions.[147] The basic vice of judicial activism, as understood in this sense, is that it violates the fundamental American constitutional principle of

article preceded the famous dialogue between Justices Black and Frankfurter in their dissenting and concurring opinions, respectively, in *Adamson v. California*, 332 U.S. 46 (1947), over the incorporation of Bill of Rights guarantees in the Fourteenth Amendment.

143. *See, e.g.*, Edwin Meese III, *Construing the Constitution*, 19 U.C. DAVIS L. REV. 22, 22–30 (1985) (explaining the Reagan administration's preferred "jurisprudence of original intention," as an antidote to result-oriented "chameleon" jurisprudence of the activist Warren Court).

144. This definition combines elements of three of the five different meanings of *judicial activism* identified by Keenan Kmiec: "judicial legislation," "departures from accepted interpretive methodology," and "result-oriented judging." Kmiec, *supra* note 142, at 1471–76.

145. Laurence H. Silberman, *Will Lawyering Strangle Democratic Capitalism? A Retrospective*, 21 HARV. J.L. & PUB. POL'Y 607, 618 (1998). Judge Silberman identifies policy issues as "those questions of public concern on which the body politic or political institutions have free range of choice"; those questions are resolved by legislatures or constitutional conventions when they "crystallize" the majority view into rules. *Id.* According to Sieberman, "[I]f a judge exercises policy choice when deciding what these rules mean," that judge is an "activist." *Id.*

146. *See, e.g.*, Kmiec, *supra* note 142, at 1471 ("to appoint strict constructionists who would hew closely to the law rather than judicial activists whom he said were prone to 'legislate from the bench.' 'We want people to interpret the law, not try to make law and write law,' he said.") (quoting *Bush: No Moderate Judges*, NEWSDAY, Mar. 29, 2002, at A16).

147. The concept of "neutral principles"—the idea that judicial decision making should be based on principles that transcend the specific issue presented to the Court—has been developed by modern jurists to help justify judicial review and to reconcile it with the American commitment to democracy, or popular sovereignty. *See, e.g.*, Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982 (1978); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). In his classic 1959 *Harvard Law Review* article, Professor Wechsler identified a "genuinely principled" decision-making process as one "resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved." Wechsler, *supra*, at 15.

separation of powers, for it is an abuse of the courts' legitimate judicial power: it is an attempt to usurp the law-making, or legislative, power that our constitutions (both state and federal) vest in the legislative branch of government. To avoid this problem, American courts themselves have devised the self-limiting principle known as the nonjusticiability, or "political questions" doctrine, which holds that courts should refrain from deciding subject matter inappropriate for judicial consideration.[148] When a court disregards this doctrine, it tends to use policy arguments—the kind of arguments more appropriately made in a legislative chamber rather than in a courtroom—to support its decision.[149]

Activist jurisprudence is result oriented, focused on reaching the particular result or outcome that a judge desires in a particular case. What makes a given decision "activist," however, is not the result it reaches but the methodology it employs—the reasoning the judge gives in support of his or her decision. Although most decisions that are criticized as "activist" are decisions in which the courts strike down laws as unconstitutional, courts may be activist (i.e., violate objective principles of judicial decision-making) equally by upholding laws against constitutional challenge. A court abuses its judicial review power by being "activist" when it decides questions of constitutionality in impermissible ways, regardless whether it ultimately finds the law in question either constitutional or unconstitutional. Some of the most egregious examples of judicial

148. On the nonjusticiability doctrine, see generally JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 125–37 (7th ed. 2004). One of the clearest and most frequently cited examples of the Supreme Court violating this doctrine is the *Dred Scott* decision of 1857, when a majority of the justices took it upon themselves to decide the controversial political question of slavery in the western territories. By holding that the Fifth Amendment due process clause required Congress to permit slavery in territories—and by rejecting the equally plausible reading of the Fifth Amendment urged by Republicans, which required Congress to forbid slavery in territories—the Court, under the guise of constitutional interpretation, had decided a nonjusticiable question of policy and hence was guilty of judicial activism, at least as Republicans at the time saw it. *See supra* notes 63–65 for a discussion.

149. For example, the Ohio Supreme Court in a series of decisions beginning in 1997 has held that the state's system for funding public schools violates the provision in the Ohio Constitution empowering the legislature to fund "a thorough and efficient system of common schools throughout the State." DeRolph v. Ohio, 728 N.E. 2d 993, 1029 (Ohio 2000) (Moyer, C.J., dissenting). Chief Justice Thomas J. Moyer, writing the opinion for the three dissenting justices in the second of these decisions, accused the majority of violating the nonjusticiability doctrine by attempting to decide the policy question of what constitutes a "thorough and efficient" system. He also noted, "[D]ecisions regarding the level of educational quality to be made available to Ohio school children are dependent upon policy considerations—political, budgetary, and value judgments—that require a balancing of interests that is not appropriately struck in the Supreme Court of Ohio. 'The judicial branch is simply neither equipped nor empowered to make these kinds of decisions.'" *Id.*

activism, in the proper sense of the term, are cases where courts have upheld laws they should have found unconstitutional.[150]

Judicial protection of liberty of contract, as done by the Supreme Court in the early twentieth century, was not "activist" under this definition. Nor was it in any real sense "laissez-faire constitutionalism," protecting liberty in the broad sense advocated by classical-liberal, or libertarian, philosophers. Rather, in protecting liberty of contract, the Supreme Court followed a more moderate approach that applied neutral principles of constitutional law. To show this, the remainder of this section will examine two different approaches, or paradigms, for judicial protection of liberty. The first is the more radical, and arguably, more activist,[151] pure laissez-faire approach that the Court would have followed if it truly had done what Justice Holmes accused the majority of doing in *Lochner*, that is, of constitutionalizing the Law of Equal Freedom as articulated in Herbert Spencer's *Social Statics*. The second is the more restrained, moderately libertarian approach that the Court actually followed in protecting liberty of contract, which was nothing more than a general presumption in favor of liberty that could be rebutted by a showing that the challenged governmental action fit within one of the recognized "exceptions," as a valid exercise of the police power.

1. The Radical Paradigm: True "Laissez-faire Constitutionalism"

What would it have meant for the Supreme Court and other courts during the *Lochner* era to have interpreted the Fourteenth Amendment as if it had "enact[ed] Mr. Herbert Spencer's *Social Statics*," as Justice Holmes accused the majority of doing in *Lochner*?[152] In other words, what would be

150. In Part III of this Article, the Court's post-1937 decisions upholding federal and state New Deal legislation—and abandoning all but minimal "rational basis" substantive due process protection for economic liberty—better fit the model of activist jurisprudence than do its pre-1937 decisions protecting liberty of contract. W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). Chief Justice Hughes' opinion for the majority in *West Coast*, for example, was based largely on the justices' agreement with the policy arguments advanced by the state in favor of minimum-wage laws. *Id.*

151. Because this Article focuses on what the Court actually did in protecting liberty of contract by arguing that it did not follow the "laissez-faire constitutionalism" caricature created by the Holmesian orthodox view of the *Lochner* era, it does not address the question whether a true model of laissez-faire constitutionalism really would have been "activist," in the sense described above. That is an open question because it is not clear that consistent and rigorous protection of liberty, as defined by the classical-liberal philosophy, would have been a violation of the neutral principles doctrine. It could be argued that a true laissez-faire constitutionalism, indeed, would have better fit the neutral principles model than the model actually followed by the Court. And certainly, true laissez-faire constitutionalism would have better fit the model than the Court's post-1937 substantive due process jurisprudence, with its "double standard" and various, inconsistent tests for the protection of certain rights.

152. Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

the results of a true laissez-faire constitutionalism—one that protected liberty as an absolute, as broadly as Holmes implied, with his paraphrasing of Spencer's Law of Equal Freedom, as "[t]he liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same"?[153] Although Holmes himself in his *Lochner* dissent suggested an answer—one that exposed the falsity of his own claim[154]—one need not rely on speculation to construct a radical paradigm for the judicial protection of liberty, as laissez-faire theorists would advocate. Something close to such a paradigm may be found in the legal literature of the time.

The leading advocate of incorporating the laissez-faire philosophy into constitutional law—that is, of a true laissez-faire constitutionalism—was Christopher G. Tiedeman.[155] Tiedeman was one of the foremost American legal scholars at the turn of the last century; a respected law teacher and treatise writer, he was the author of a treatise on the limitations of the police power which commentators long have regarded as the preeminent work of laissez-faire constitutionalism.[156] Although Tiedeman shared with

153. *Id.*

154. *Id.* at 75–76. Holmes listed several laws, upheld by the Court as valid exercises of the police power, that to him seemed inconsistent with Spencer's "shibboleth," as he referred to the Law of the Equal Freedom. These included Sunday closing laws, usury laws, the prohibition of lotteries, "school laws" (probably meant as a reference to compulsory-attendance laws), the Post Office, and the Massachusetts vaccination law upheld by the Court in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). That virtually all these laws would be regarded as illegitimate paternal legislation by laissez-faire theorists (whether late-nineteenth century classical liberals or modern-day libertarians) and that the Court did uphold them as valid police powers may suggest either that the Court was inconsistent in its protection of liberty, as Holmes was implying, or rather that the Court was not following a laissez-faire approach at all. For example, in *Jacobson*, the Court upheld the Massachusetts compulsory vaccination law because the majority saw it has having a "real or substantial relation to the protection of the public health and public safety," against infectious diseases such as smallpox. *Id.* at 31. The liberty of the individual, including control over one's own body, in this case yielded to what the majority saw as "reasonable regulations" required to protect the safety of the general public. Only two justices—the most libertarian members of the Court at that time, Justices Breyer and Peckham—dissented, without opinions. Modern scholars might debate whether such a compulsory vaccination law, at least under the real threat of a public epidemic, truly violates libertarian principles; or, put another way, whether one's freedom not to be vaccinated and thus to be potentially a carrier of infectious disease falls within the legitimate scope of liberty as defined under the no-harm principle.

155. For a short biographical sketch of Christopher Gustavus Tiedeman (1857–1903), see Mayer, *Tiedeman*, *supra* note 35, at 102–03. Having studied law in Germany at a time when the German sociological school of jurisprudence was rising in influence, Tiedeman defies the stereotype associating laissez-faire constitutionalism with a rigid, formalistic conception of the law; rather, he grounded his laissez-faire views on the newer, sociological theories of jurisprudence—and particularly the German school, which saw the law as resulting from "the prevalent sense of right" (*Rechsgefuehl*), as it evolves in society. *See id.* at 102–09, 124–25.

156. *Id.* at 97–98. Tiedeman's work, first published in 1886 under the title *A Treatise on the Limitations of Police Power in the United States*, was published again in 1900 as a two-volume

conservatives of his age a general aversion to what he called "the radical experimentation of social reformers,"[157] he surely went much further than most of his contemporaries in denouncing all forms of legal paternalism. In this respect, Tiedeman outshone the other leading treatise writer of the late nineteenth century, Thomas M. Cooley, who was less consistent and far less radical in his constitutional defense of liberty.[158] Tiedeman, in short, was to constitutional law what William Graham Sumner was to political theory generally: a fairly pure exponent of the laissez-faire philosophy.

As Tiedeman understood the police power, it was limited by various constitutional provisions[159] as well as by unwritten higher law principles.[160] By far the most important limitation which Tiedeman placed on state power, however, was tied neither to the text of the Constitution nor to unwritten higher law; rather, it was a limitation which inhered in the very definition of the police power. The government's police power, "as understood in the constitutional law of the United States," he wrote, "is simply the power of the government to establish provisions for the enforcement of the common as well as civil law maxim, *sic utere tuo ut alienum non laedas.*"[161] The

work, in an expanded second edition, under the title *A Treatise on State and Federal Control of Persons and Property in the United States.*

157. 1 CHRISTOPHER G. TIEDEMAN, A TREATISE ON STATE AND FEDERAL CONTROL OF PERSONS AND PROPERTY IN THE UNITED STATES ix (The Lawbook Exchange 2002) (1900).

158. Although Progressive-movement scholars such as Clyde Jacobs and Benjamin Twiss usually identified both Tiedeman and Cooley as leading laissez-faire writers, even they recognized that Cooley at most only anticipated the purer laissez-faire constitutionalism of Tiedeman. *See* JACOBS, *supra* note 7, at 62; TWISS, *supra* note 7, *passim.* Comparing Cooley's treatise to Tiedeman's, one historian has noted that Tiedeman's narrow interpretation of the police power "revealed a much more extreme laissez-faire bias than Cooley's treatise." FINE, *supra* note 36, at 154. This comparison can be illustrated by Cooley's and Tiedeman's different conclusions regarding the constitutionality of usury laws, discussed *infra* note 167.

159. Tiedeman's list of provisions in the U.S. Constitution that limited governmental power, state or federal, included Article I, Sections 9 and 10; the Bill of Rights; and the Civil War amendments. 1 TIEDEMAN, *supra* note 157, § 4, at 18–20.

160. Citing approvingly Justice Chase's opinion in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798), that "certain vital principles in our free Republican governments" also limited the legislative power, Tiedeman added that no law could be enforced that does not "conform to the fundamental principles of free government" or which "violates reason and offends against the prevalent conceptions of right and justice" in the United States. 1 TIEDEMAN, *supra* note 157, § 2, at 8–11.

161. *Id.* § 1, at 4–5. The Latin maxim is translated literally as "so use your own so as not to harm that of another." In Anglo-American common law, especially in the law of nuisance, the word *tuo* (your own) was generally understood to refer to property, particularly to real property; but as used by Tiedeman, the word applied not only to property but also to liberty: it obliged everyone to utilize one's "own"—to use one's own property, to exercise one's own liberty—so as not to harm that (the property or the liberty) of another. Thus, to Tiedeman, the *sic utere* maxim was tantamount to Spencer's Law of Equal Freedom.

legitimate exercise of the police power thus was limited to enforcing the *sic utere* principle:

> Any law which goes beyond that principle, which undertakes to abolish rights, the exercise of which does not involve an infringement of the rights of others, or to limit the exercise of rights beyond what is necessary to provide for the public welfare and the general security, cannot be included in the police power of the government.[162]

Because Tiedeman also defined liberty in terms of the *sic utere* principle, his formulation meant that individuals should be free to act provided they do not harm others or interfere with others' like freedom—in short, legal protection for Herbert Spencer's Law of Equal Freedom.[163]

Throughout both editions of his treatise on the police power,[164] Tiedeman drew a basic distinction between legitimate regulations (i.e., regulations that affected only trespasses or other matter of legitimate governmental concerns under Tiedeman's formulation) regulations that went beyond the proper scope of the police power.[165] He sought not merely to summarize the state of the law as it had developed by his time but rather to

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162. *Id.* Tiedeman added that such a law is "a governmental usurpation," violating "the principles of abstract justice, as they have been developed under our republican institutions." *Id.*

163. In the first edition of his treatise on the police power, Tiedeman defined *liberty* as "that amount of personal freedom, which is consistent with a strict obedience" to the *sic utere* rule. He also explained why that definition led logically to Spencer's Law of Equal Freedom:

> "That man is free who is protected from injury," and his protection involves necessarily the restraint of other individuals from the commission of the injury. In the proper balancing of the contending interests of individuals, personal liberty is secured and developed; any further restraint is unwholesome and subversive of liberty. As Herbert Spencer has expressed it, "every man may claim the fullest liberty to exercise his faculties compatible with the possession of like liberty by every other man."

CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES § 30 (The Lawbook Exchange 2001) (1886) (quoting HERBERT SPENCER, SOCIAL STATICS 94 (1851)).

164. In the fourteen-year interval between the publications of the two editions of the work, case law had so expanded that Tiedeman required two volumes to "corral every important adjudication, which has been made by the State and Federal courts," on the various branches of the subject. 1 TIEDEMAN, *supra* note 157, at ix. The change in the title of the treatise, from *Limitations of Police Power* to *State and Federal Control of Persons and Property*, also reflected the growth of national government powers, especially through the interstate commerce clause. *See* Mayer, *Tiedeman*, *supra* note 35, at 128–29.

165. Significantly, Tiedeman organized his treatise not in terms of types of regulations, but rather in terms of the types of rights restricted or burdened, with a threefold general classification: personal rights (including personal security, liberty, and private property), relative rights (arising between husband and wife, parent and child, guardian and ward, or master and servant), and statutory rights. 1 TIEDEMAN, *supra* note 157, § 5, at 20–21.

show what the law should be, given his general formulation of the police power. Thus, for example, Tiedeman condemned as unconstitutional not only laws regulating the hours or wages of workers,[166] but also usury laws,[167] the protective tariff,[168] anti-miscegenation laws,[169] and even laws regulating morality through the prohibition of such vices as gambling or the use of narcotic drugs.[170] With regard to the latter, Tiedeman distinguished vice from crime,[171] arguing that actions harmful only to oneself did not fall within the legitimate scope of the police power:

> The object of the police power is the prevention of crime, the protection of rights against the assault of others. The police power of the government cannot be brought into operation for the purpose of exacting obedience to the rules of morality, and banishing vice and sin from the world. . . . The municipal law has only to do with trespasses. It cannot be called into play in order to save one from the evil consequences of his own vices, for the violation of a right by the action of another must be exist or be threatened, in order to justify the interference of law.[172]

166. On laws regulating wages, see *id.* §§ 99, 100, at 316–30; on laws regulating hours, see *id.* § 102, at 33–38; *see also* Mayer, *Tiedeman*, *supra* note 35, at 139–44.

167. On usury laws, see 1 TIEDEMAN, *supra* note 157, § 106, at 351–53. "Free trade in money is as much a right as free trade in merchandise," Tiedeman maintained, because "[i]nterest is nothing more than the price asked for the use of money," and price is determined by the law of "supply and demand." *Id.* at 351. Tiedeman noted that usury laws originated in medieval England, where the lending of money was a special privilege, conferred by Parliament, in the days when the common law condemned as usury any taking of money for the use of money. He rejected this rationale as obsolete in the modern era, when the lending of money on interest was "in no sense a privilege"; he also disagreed with Thomas M. Cooley, who similarly had found this form of government price regulation difficult to defend on principle but who nevertheless took the view (as summarized by Tiedeman) that "long acquiescence in such laws preclude[ed] an inquiry into their constitutionality," a view that Tiedeman rejected. *Id.* at 352–53.

168. On the protective tariff, see *id.* § 93, at 292–94.

169. On anti-miscegenation laws, see 2 *id.* § 188, at 894–95. Tiedeman also condemned as unconstitutional laws against polygamy, at least insofar as these laws violated the religious freedom of Mormons. *See id.* § 189, at 897.

170. On laws prohibiting vices generally, see 1 *id.* § 60, at 179–87.

171. Tiedeman defined *vice* as "an inordinate, and hence immoral, gratification of one's passions and desires," which primarily damages one's self. *Id.* at 180. So defined, vice was not a trespass on the rights of others and therefore not a criminal act, subject legitimately to police regulation. Crimes involved direct "trespasses upon rights," not the "secondary or consequential damage to others" that might result from an individuals' indulgence in their own vices. *Id.* at 180–81.

172. *Id.* at 181. Although Tiedeman acknowledged that one person's addiction to vices, even trivial ones, might be harmful to others in society, he regarded those evils as "indirect and remote," not involving "trespasses upon rights." Indeed, such evils are "so remote that many other causes co-operate to produce the result," making it "difficult, if not impossible, to ascertain what is the controlling and real cause." *Id.* Tiedeman would apply to constitutional analysis a

He acknowledged that his distinction between vice and crime "ha[d] not been endorsed by the courts," but he continued to insist upon it "because the adverse decisions have not convinced me that the distinction is unsound."[173]

As far as Tiedeman's laissez-faire constitutionalism went, it nevertheless fell short of protecting liberty rights as broadly as modern libertarian theory—or a complete and consistent adherence to Spencer's Law of Equal Freedom—would imply. Not even Tiedeman would restrict altogether the state's power to enforce rules of morality; for although he advocated decriminalization of vices per se, he nevertheless would allow government to criminalize trade in a vice.[174] Moreover, notwithstanding his generally broad view of liberty of contract in the employment context, which generally left matters such as hours and wages subject to bargaining between the parties, free of government regulation,[175] Tiedeman did concede to the government

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rule akin to the rule of proximate causation in tort law—a rule he regarded as "deduced from the accumulated experience of ages, . . . a law of nature, immutable and invarying." *Id.* at 184. To make acts criminal that did not result in trespasses upon others—acts that would not be actionable in tort because the damages they caused were too remote—would be an unconstitutional deprivation of liberty, without due process of law, he argued. *Id.* Thus, for example, "[i]t cannot be made a legal wrong for one to become intoxicated in the privacy of his own room," because the person who becomes drunk in private "has committed no wrong, *i.e.*, he has violated no right, and hence he cannot be punished" under Tiedeman's formulation. *Id.* at 184–85.

173. *Id.* at 510. One court nearly accepted Tiedeman's distinction between vice and crime: In *Ah Lim v. Territory of Washington*, 1 Wash. 156 (1890), the Washington territorial court considered the defendant's challenge to his conviction under a statute that prohibited the smoking of opium. Although a majority of three out of five judges upheld the conviction as a legitimate exercise of the government's power to control "the moral, mental, and physical condition of its citizens," the dissenting judges maintained that the statute was void, as an impermissible exercise of the police power, because it was "altogether too sweeping in its terms." *Id.* at 164, 174. By prohibiting all smoking of opium, even when done only in private and harming directly only one's own person, the statute was "an unwarranted infringement of individual rights," wrote one of the dissenting judges. *Id.* at 173; *see* Mayer, *Tiedeman*, *supra* note 35, at 134–36.

174. No one can claim the right to make a trade in vice, Tiedeman maintained; "a business may always be prohibited, whose object is to furnish means for the indulgence of a vicious propensity or desire." 1 TIEDEMAN, *supra* note 157, § 122, at 509–10. According to him, although fornication and gambling ought not to be punishable offenses, the state could prohibit the keeping of houses of prostitution, the keeping of gambling houses, or the sale of lottery tickets. *Id.* Tiedeman did not explain his position but simply asserted, "A business that panders to vice may and should be strenuously prohibited, if possible." *Id.* at 508. Tiedeman's distinction seems untenable: If personal indulgence in a vice involves (by definition) no trespass on the rights of others, how can government legitimately use its police power (as formulated by Tiedeman) to prohibit trade in the vice—i.e., business relationships that merely facilitate acts that do not harm others? In drawing this peculiar distinction, Tiedeman certainly fell short of modern libertarian arguments for the decriminalization of "victimless crimes."

175. As Tiedeman understood it, the constitutional guarantee of liberty of contract was "intended to operate equally and impartially upon both employer and employee." *Id.* § 98, at 316. Statutes which determined the hours of labor, either directly by prohibiting labor above a proscribed maximum or indirectly by requiring extra compensation for overtime, violated the constitutional liberty of contract of persons who were sui juris. *Id.* § 102, at 333–34. Tiedeman exempted children

the ability legitimately to regulate the labor contract in order to protect workers' health and safety[176] and to protect against fraud.

Under a true laissez-faire constitutionalism, the general right to liberty is absolute and can be limited only by legitimate government actions protecting persons from harmful trespasses on their rights; in other words, only by enforcement of the no-harm principle. Thus, not only the laws cited by Justice Holmes in his *Lochner* dissent would be held to be unconstitutional deprivations of liberty, but most laws that fell within the traditional scope of the police power—the protection of public health, safety, order, and morals—would be found unconstitutional, too.

2. *The Moderate Paradigm: A Presumption in Favor of Liberty*

Liberty of contract, as actually protected by the courts in the early twentieth century, did not fit the radical paradigm for the protection of liberty rights that a true laissez-faire constitutionalism would imply. Rather, it followed from a paradigm that was more moderate in at least two basic respects. First, rather than protecting, in all its aspects, a general and absolute right to liberty (limited only by the definitional constraints imposed on liberty itself by the no-harm principle or Spencer's Law of Equal Freedom), the courts protected liberty in a particular context—the freedom to make contracts. Second, the courts protected that freedom under a standard that permitted the government to limit it through various exercises of the police power, within its traditional scope. That standard, in effect, created at most a general presumption in favor of liberty that could be rebutted by a showing that the law being challenged was a legitimate police power regulation.

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from the general rule, because they were not sui juris; and he exempted government employees because government, as a party to the contract, had the right to limit the hours of employment. *Id.* at 335, 338. But he applied the guarantee of liberty of contract equally to women, married or single, as well as to men—citing with approval the Illinois Supreme Court's recognition of women's contract rights in *Ritchie v. People*, 155 N.E. 98 (Ill. 1895), discussed *supra* notes 69–70 and accompanying text; *see also* 1 TIEDEMAN, *supra* note 157, § 102, at 336. Nor did he exempt from his general rule "unwholesome employments"; in his view, the danger to the health of the employee from working long hours, regardless the type of occupation, was not a constitutional justification for interference with liberty of contract. *Id.* at 337–38. Tiedeman had a generally positive attitude toward labor unions, regarding them as legitimate means of reducing the disparity in bargaining strength between employer and employee—and therefore of helping to maintain a standard of wages and to control the terms of the labor contract, consistent with liberty of contract. *Id.* § 114, at 419–24.

176. Tiedeman regarded as legitimate exercises of the police power regulations that were "reasonable safeguards" of the health and safety of workers, provided the regulations were not in opposition to "the old common law theory of the non-liability of the employer for injuries sustained by the employee, either through accident or the carelessness or negligence of the fellow-servant." *Id.* § 103, at 339; *see also* 2 *id.* § 147, at 736–49 (discussing the constitutionality of regulations of "unwholesome and objectionable trades," and of the regulations of mines).

The scope of the right protected by liberty of contract was given its classic definition by Justice Peckham in *Allgeyer v. Louisiana*, the 1897 case that was the Supreme Court's first decision explicitly protecting the right. In his opinion for the Court, Peckham described the liberty protected by the Fourteenth Amendment's due process clause:

> The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.[177]

Although quite broad, this liberty right was not unlimited; it was a particular aspect of individuals' general right to liberty, constrained by law: specifically, the freedom to use one's own faculties "in all lawful ways" to earn a livelihood "by any lawful calling." Moreover, it pertained to those lawful exercises of one's freedom that could be realized through legally enforceable contracts that were "proper, necessary, and essential" to one's purpose. The emphasis on contract meant that this liberty right was necessarily subject to certain legal constraints, as Peckham recognized.[178] As the Illinois Supreme Court similarly had recognized in one of the earliest liberty of contract decisions, *Ritchie v. People*, "the right to contract may be subject to limitations growing out of the duties which the individual owes to society, to the public, or the government."[179]

177. Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897).

178. "[I]t may be conceded," Peckham wrote, "that this right to contract in relation to persons or property or to do business within the jurisdiction of the State may be regulated and sometimes prohibited when the contracts or business conflict with the policy of the State as contained in its statutes . . . ." *Id.* at 591.

179. Ritchie v. People, 40 N.E. 454, 456 (Ill. 1895). The court then noted some of these limitations: those "imposed by the obligation to so use one's own as not to injure another, by the character of property as affected with a public interest or devoted to a public use, by the demands of public policy or the necessity of protecting the public from fraud or injury, by the want of capacity, by the needs of the necessitous borrower as against the demands of the extortionate lender." *Id.* at 456. But, as the court added, "the power of the legislature to thus limit the right to contract must rest upon some reasonable basis, and cannot be arbitrarily exercised." *Id.* Later in the opinion, the Illinois court also noted that laws passed in pursuance of the police power "must have some relation to the ends sought to be accomplished"—to the "comfort, safety, [and] welfare of society"—and "cannot invade the rights of persons and property under the guise of a mere police regulation, when it is not such in fact." *Id.* at 458.

Liberty of contract was not absolute. Justice George Sutherland explicitly acknowledged this in his opinion for the Court in *Adkins v. Children's Hospital*,[180] one of the most important liberty of contract decisions, second only in fame and historical significance to *Lochner* itself.[181] "There is, of course, no such thing as absolute freedom of contract," Justice Sutherland wrote, noting that it was "subject to a great variety of restraints."[182] Nevertheless, he immediately added, "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."[183]

In thus protecting the right by a "general rule forbidding legislative interference with freedom of contract,"[184] the Court in effect was applying what some modern scholars have advocated as a general presumption in favor of liberty.[185] It was a presumption that could be overcome, however, by a court's finding that the law in question (the law being challenged as an abridgement of the right to liberty of contract) was a legitimate exercise of one of the many recognized functions of the police power. Courts during the *Lochner* era generally did not accept the government's rationale for a challenged law at face value. Rather, they followed what Justice Harlan had identified in *Mugler v. Kansas* as the "solemn duty" of the courts, in exercising judicial review, "to look at the substance of things"—that is, to

180. Adkins v. Children's Hospital, 261 U.S. 525, 560-01 (1923) (holding that a law fixing minimum wages for women in the District of Columbia was an unconstitutional deprivation of the liberty protected by the Fifth Amendment). The Adkins case is more fully discussed in Part II.A., *infra*.

181. Although not as famous as *Lochner*, *Adkins* is arguably the best-reasoned and most paradigmatic liberty-of-contract decision. The author of the Court's majority opinion in *Adkins*, Justice George Sutherland, has been regarded by many scholars as the most distinguished of the so-called "Four Horsemen," the block of conservative justices on the Court in the 1920s and 1930s. *See generally* G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES 178–99 (expanded ed. 1988). And as noted in *supra* text accompanying note 1, it was the reversal of *Adkins* in the 1937 *West Coast Hotel* decision that marked the end of the Court's protection of liberty of contract as a fundamental right.

182. *Adkins*, 261 U.S. at 546. Among those "great variety of restraints" was the numerous exceptions to the general rule of liberty that Sutherland identified as valid exercises of the police power, discussed more fully in Part II, *infra*.

183. *Id.*

184. *Id.* at 554.

185. Randy Barnett has argued that courts ought to apply "a general Presumption of Liberty" as a way to enforce both the Ninth Amendment's protection of unenumerated constitutional rights and the "privileges or immunities" clause of the Fourteenth Amendment. RANDY E, BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 259–69 (2004); Randy E. Barnett, *Implementing the Ninth Amendment*, *in* 2 THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT 1, 10–19 (Randy E. Barnett ed. 1993); Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1 (1988).

critically examine whether a "statute purporting to have been enacted to protect the public health, the public morals, or the public safety" had "a real or substantial relation to those objects" or instead was "a palpable invasion of rights secured by the fundamental law."[186]

The test applied by the courts in protecting liberty of contract was stated by Justice Peckham in his opinion for the Court in *Lochner*. The basic inquiry was as follows:

> Is this a fair, reasonable, and appropriate exercise of the police power of the State, or is it an unreasonable unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family?[187]

To answer this question, Peckham added, courts must apply a means-ends test:

> The mere assertion that the subject relates though but in a remote degree to the public health [or some other legitimate exercise of the police power] does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.[188]

Modern scholars are correct when they describe the test applied in *Lochner* and other liberty of contract cases as one that distinguished valid, or "reasonable," police power exercises from invalid, or "arbitrary," exercises of governmental power; but they err in assuming that the distinction between "reasonable" and "arbitrary," as applied by the courts, referred to the prohibition of "class legislation" under nineteenth-century constitutional law.[189] Rather, the distinction referred to the traditional

186. Mugler v. Kansas, 123 U.S. 623, 661 (1887).

187. Lochner v. New York, 198 U.S. 45, 56 (1905).

188. *Id.* at 57–58.

189. *See* GILLMAN, *supra* note 29, at 72–73 (arguing that *arbitrary* characterized "factional politics" while *reasonableness* denoted "class-neutral policies that advanced a public purpose"). Ironically, the very example Gillman cites to illustrate his interpretation of this distinction—*Mugler v. Kansas*, 123 U.S. 623, 611 (1887)—disproves his thesis. The Court upheld a Kansas liquor prohibition law—a measure that, by singling out a particular industry, could be considered special-interest or class legislation—because it regarded it as a valid use of the police power to

scope of the police power as a protection of public health, safety, order, and morality: "reasonable" laws fit within one or more of these traditional categories, while "arbitrary" laws did not.[190] The test applied by the old Court has been aptly characterized by one modern scholar as a "moderate" means-ends analysis[191]—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.[192]

Both in the scope of the liberty interests that it guaranteed and in the standard applied by the Court in reviewing challenged legislation, therefore, the Court's protection of liberty of contract in the early twentieth century fell short of Christopher Tiedeman's more stridently libertarian jurisprudence, with its protection of all aspects of liberty and its strict adherence to the sic utere maxim as an absolute definitional limitation on the legitimate scope of the police power. Perhaps the most telling difference between the moderate paradigm actually followed by the Court in its protection of liberty of contract and the radical paradigm of a true laissez-faire constitutionalism is the difference in the two paradigms' treatment of "morals" legislation, such as bans on lotteries and other forms of gambling,

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protect public health and morals. Moreover, the test as articulated by Justice Harlan in that case explicitly asked whether the challenged law truly "protected the public health, the public morals, or the public safety" and had a "real or substantial relation to those objects," not whether the law was class-neutral.

190. As David Bernstein and Michael Phillips have shown, Gillman's thesis fails to account for several significant *Lochner* era decisions upholding laws that would seem obvious pieces of class legislation. They include *Powell v. Pennsylvania*, 127 U.S. 678 (1888) (oleomargarine ban) and *Holden v. Hardy*, 169 U.S. 366 (1898) (maximum-hours law for miners), as well as *Lochner* itself. David E. Bernstein, Lochner *Era Revisionism, Revised:* Lochner *and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 18–24 (2003) [hereinafter Bernstein, *Revisionism*]; PHILLIPS, *supra* note 32, at 108.

191. PHILLIPS, *supra* note 32, at 4, 164. Under a means-ends analysis, the Court upholds a challenged law as constitutional "if it promotes some appropriate goal (the end) in a sufficiently direct or effective way (the means)." *Id.* at 4. Noting that, as applied by the modern Court, means-ends tests "vary considerably in their stringency"—ranging from "strict scrutiny" to the weak "rational basis" test—Phillips characterizes the test applied by Justice Peckham in *Lochner* as "fairly rigorous" rational basis review, in contrast with the weak substantive test implied by Justice Holmes' dissent. *Id.* at 4, 164.

192. *Id.* at 192–93. The modern tests—on the one hand, the minimal rational-basis test used by the Court in reviewing economic regulations; and, on the other, the strict-scrutiny test requiring laws to be "necessary" to achieve a "compelling" government purpose, used by the Court in reviewing laws restricting certain "preferred freedoms"—are discussed more fully in Part III, *infra*. Phillips argues that the old Court "applied a smorgasbord of standards and nonstandards when government action was challenged on due process grounds, but never to my recollection did it require that laws restricting economic rights be 'necessary' to achieve a 'compelling' government purpose of anything of the kind." PHILLIPS, *supra* note 32, at 192–93. In this respect, he maintains that "the supposedly doctrinaire and extremist *Lochner* Court in fact was considerably more moderate than its modern counterpart." *Id.* at 193.

Sunday-closing laws, and the regulation or prohibition of alcohol. The Court during the *Lochner* era consistently upheld such laws as valid exercises of the police power, under its traditional scope (which included protection of morality as well as public health).[193] A true laissez-faire constitutionalism would have regarded all such forms of legal paternalism as abuses of governmental power and abridgement of fundamental liberties.

II. Liberty of Contract in its Heyday: The Scope of the Right

Another flaw in the orthodox view of liberty of contract is its myopic conception of the scope of the right. Liberty of contract, as protected by the courts in the early twentieth century, protected more than just economic freedom in the context of the labor market. Rather, the freedom that it protected included not just economic, but also important non-economic aspects—aspects that are ignored today by most scholars because they do not fit the caricature of liberty-of-contract jurisprudence as "laissez-faire constitutionalism" put forward by the orthodox Holmesian view.

The scope of liberty of contract as described by Justice Peckham in *Allgeyer*—freedom "in the enjoyment of all [one's] faculties; to be free to use them in all lawful ways; to live and work where [one] will[s]; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation"[194]—was quite broad. Considering especially the status of contract in late nineteenth-century American law, the freedom to enter into contracts for the purposes mentioned by the Court in *Allgeyer* was tantamount to the legal expression—through society's protection of contracts under positive law—of the natural rights mentioned in the Declaration of Independence, of liberty and of the pursuit of happiness. It is little wonder, then, that when he anticipated liberty of contract in his dissent in *The Slaughterhouse Cases*, Justice Field spoke of such things as "the right to pursue a lawful employment in a lawful

193. Citing such decisions, David Bernstein persuasively argues that "liberty of contract was consistently limited by the invocation of common law doctrines that restricted individual freedom for the perceived social good." Bernstein, *Revisionism*, *supra* note 190, at 46 n.255 (citing, *inter alia*, Jacobson v. Massachusetts, 197 U.S. 11 (1905) (upholding compulsory smallpox vaccination law), Champion v. Ames, 188 U.S. 321 (1903) (upholding federal law barring lottery tickets from interstate commerce), Hennington v. Georgia, 163 U.S. 299 (1896) (upholding a Sunday law)). Michael Phillips discerns a similar pattern of deference when the old Court considered measures aimed at promoting public morality. PHILLIPS, *supra* note 32, at 48, 79 nn.124–25 (citing, *inter alia*, Eberle v. Michigan, 232 U.S. 700 (1914) (upholding a local option law prohibiting sale of liquor within a county), Butler v. Perry, 240 U.S. 328 (1916) (upholding law requiring able-bodied men to work on public roads), Waugh v. Board of Trustees, 237 U.S. 589 (1915) (upholding a ban on fraternities in state schools), Murphy v. California, 225 U.S. 623 (1912) (upholding a ban on billiard halls), Marvin v. Trout, 199 U.S. 212 (1905) (upholding a law prohibiting gambling)).

194. Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897).

manner," "equality of rights in the lawful pursuits of life," and "the right of free labor" as interchangeable concepts, all realizing in law "the natural and inalienable rights which belong to all citizens" in a free society.[195]

A. The Right to Economic Liberty

The best-known aspect of the Supreme Court's protection of liberty of contract as a fundamental right, under the due process clauses of the Fifth and Fourteenth Amendments, was its use to declare unconstitutional such regulations of business as legislation targeting minimum wages or maximum hours.

Clearly, the most famous decision protecting freedom of labor was *Lochner*, where the Court recognized the right of both employers and employees to bargain over the terms of labor contracts—specifically with regard to the hours of work—free of interference from the state. The regulation of maximum hours at issue in *Lochner* was just one provision of the New York Bakeshop Act of 1895, a bakery reform law that was strongly supported by unionized bakers and bakeries.[196] Justice Rufus Peckham's opinion for the five-justice majority of the Court turned on the essential question whether the provision regarding maximum hours in the Bakeshop Act was "a fair, reasonable, and appropriate exercise of the police power" or "an unreasonable, unnecessary and arbitrary interference" with the parties' liberty of contract. In holding that the law was the latter, and therefore was unconstitutional, Peckham critically examined the state's claim that it was a health law. In concluding that "the limit of the police power has been reached and passed in this case," Peckham and the majority in *Lochner* found, with ample justification, that there was "no reasonable foundation for holding this [hours provision] to be necessary or appropriate as a health law to safeguard

195. The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 97, 109–10 (1873) (Field, J., dissenting).

196. The Bakeshop Act was modeled on England's Bakehouse Regulation Act of 1863; most of its provisions were sanitary regulations. The maximum-hours provision, in Section 1 of the Act, prohibited employees in "biscuit, bread, or cake" bakeries from working "more than sixty hours in any one week, or more than ten hours in any one day." David E. Bernstein, *The Story of* Lochner v. New York: *Impediment to the Growth of the Regulatory State*, *in* CONSTITUTIONAL LAW STORIES 325, 328–34 (Michael C. Dorf ed., 2004) [hereinafter Bernstein, *Lochner*]; PAUL KENS, JUDICIAL POWER AND REFORM POLITICS: THE ANATOMY OF *LOCHNER V. NEW YORK* 44–59, 169–70 (1990). Bernstein's discussion of the case's historical background emphasizes the conflict between unionized New York bakeries—which were staffed by bakers of German descent, who came to dominate the bakers' union—and their smaller, non-unionized competitors, such as Joseph Lochner's, in Utica, New York. Bernstein, *Lochner*, *supra*, at 329–31.

the public health or the health of the individuals who are following the trade of a baker."[197]

In reaching the conclusion that the hours provision of the Bakeshop Act was not a valid health law, Justice Peckham and the majority found that it was a "labor law" that did not fall within the established limits of the police power.[198] Thus it failed to overcome the general presumption in favor of liberty of contract and, therefore, was "an illegal interference with the rights of individuals, both employers and employees, to make contracts regarding labor upon such terms as they think best, or which they may agree upon with the other parties to such contracts."[199] Contrary to the assertion in Justice Holmes' dissent,[200] Peckham's opinion for the Court was not based, either explicitly or implicitly, upon Herbert Spencer's *Social Statics* or any other laissez-faire work, still less upon any particular "economic theory." Rather, Peckham's opinion was grounded on well-established legal principles of constitutional law, including the moderate means-ends analysis that the Court had adopted as its standard of review in substantive due process cases.[201]

Although not as famous as *Lochner*, perhaps the best example of the Court's use of substantive due process to protect economic liberty is the 1923 decision in *Adkins v. Children's Hospital*.[202] At issue in *Adkins* was a federal law, enacted by Congress pursuant to its power to legislate for the District of Columbia, fixing minimum wages for women and children employed in the District.[203] A majority of five justices held that the D.C. law was an

197. Lochner v. New York, 198 U.S. 45, 58 (1905). Peckham explained that the law was not a protection of the public health, for "[c]lean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours per week." *Id.* at 57. Nor, he added, was the hours provisions necessary to protect the health of bakers, emphasizing that baking was an ordinary trade and that bakers were "in no sense wards of the State," "not equal in intelligence and capacity to men in other trades or manual occupations, or . . . not able to assert their rights and care for themselves without the protecting arm of the State, interfering with their independence of judgment and action." *Id.*

198. *Id.* at 57.

199. *Id.* at 61.

200. *Id.* at 75–76 (Holmes, J., dissenting).

201. In contrast to Holmes's pithy dissent, the principal dissenting opinion in *Lochner*—authored by Justice John Marshall Harlan, joined by two other justices—followed the same moderate means-ends analysis used by the majority but reached a different conclusion, based on a more liberal reading of the state's power to enact health laws. According to Harlan, the Court should only invalidate a purported health or safety law if it had "no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *Id.* at 65–66 (Harlan, J., dissenting).

202. Adkins v. Children's Hospital, 261 U.S. 525 (1923).

203. Rather than setting a fixed minimum wage for all jobs, as modern minimum-wage laws do, the D.C. law created a three-member board that was authorized "to investigate and ascertain the wages of women and minors in the different occupations in which are they employed." *Id.* at 539–40. The board then determined, for each type of occupation, the wage level it considered

"unconstitutional interference with the freedom of contract included within the guarantees of the due process clause of the Fifth Amendment."[204]

The Court's opinion was written by Justice George Sutherland, whom many scholars consider the most scholarly of the so-called "Four Horsemen," the four conservative justices on the Court who would be labeled with this epithet in the 1930s because of their perceived opposition to the New Deal.[205] Sutherland began by observing, "That the right to contract about one's affairs is a part of the liberty of the individual protected by [the due process] clause is settled by the decisions of this court and is no longer open to question." He added that "[w]ithin this liberty are contracts of employment of labor" and that "[i]n making such contracts, generally speaking, the parties have an equal right to obtain from each other the best terms they can as a result of private bargaining."[206] Although Sutherland conceded there was "no such thing as absolute freedom of contract"—that it was "subject to a great variety of restraints"—he also observed that "freedom of contract is, nevertheless, 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."[207] After reviewing those exceptions and finding that the D.C. minimum-wage law fit none of them,[208] Sutherland concluded that it was "simply and

adequate "to supply the necessary cost of living," for women workers, "to maintain them in good health and to protect their morals." *Id.* at 540. The law was challenged by the Children's Hospital, which employed "a large number of women in various capacities," some of whom worked for wages below the minimum fixed by the board. *Id.* at 542. In a case joined to *Adkins,* Ms. Willie Lyons, a twenty-one-year-old elevator operator employed by the Congress Hall Hotel also challenged the law; she had lost her job after the board had determined that a woman in her occupation could not be employed for less than twice what she had been paid. *Id.* at 543. Hadley Arkes, poignantly summarizing the facts of the case, has observed how the law, "in its liberal tenderness, in its concern to protect women, had brought about a situation in which women were being replaced, in their jobs, by men." ARKES, *supra* note 27, at 13.

204. *Adkins*, 261 U.S. at 545. Chief Justice Taft dissented, in an opinion joined by Justice Sanford. *Id.* at 562-67. Justice Holmes wrote a separate dissent, *id.* at 567-71, while Justice Brandeis did not participate. *Id.* at 562.

205. Sutherland had been nominated to the Court in 1922 by President Warren G. Harding. The other three were Justices Willis Van Devanter, nominated in 1910 by President William H. Taft, James C. McReynolds, nominated in 1914 by President Woodrow Wilson, and Pierce Butler, also nominated in 1922 by President Harding. On the so-called "Four Horsemen" generally, see WHITE, *supra* note 181, at 178–99; on Sutherland's jurisprudence, see ARKES, *supra* note 27.

206. *Adkins*, 261 U.S. at 545.

207. *Id.* at 546.

208. *Id.* at 546–54. Sutherland concluded that

> [i]t is not a law dealing with any business charged with a public interest or with public work, or to meet and tide over a temporary emergency. It has nothing to do with the character, methods or periods of wage payments. It does not prescribe hours of labor or

exclusively a price-fixing law, confined to adult women . . . who are legally as capable of contracting for themselves as men."[209] Sutherland continued,

> [The law] forbids two parties having lawful capacity—under penalties as to the employer—to freely contract with one another in respect of the price for which one shall render service to the other in a purely private employment where both are willing, perhaps anxious, to agree, even though the consequence may be to oblige one to surrender a desirable engagement and the other to dispense with the services of a desirable employee.[210]

The law, in other words, unjustifiably deprived both the employer and the employee of their constitutionally-protected freedom of contract.

Another kind of wage-fixing law also was held in 1923 to be an unconstitutional deprivation of liberty of contract. In *Charles Wolff Packing Co. v. Court of Industrial Relations*, the Court considered a Kansas law that declared the fuel, clothing, and food preparation industries to be businesses "affected with a public interest" and empowered a three-judge industrial court to fix wages within those industries.[211] By a unanimous decision in which Holmes and Brandeis joined, the Court concluded that this attempt to fix wages in businesses like the Wolff company deprived them of their "property and liberty of contract without due process of law."[212] Acknowledging that the category of businesses "affected with a public interest" had expanded well beyond its common law origins, Chief Justice Taft in his opinion for the Court maintained that "the circumstances which clothe a particular kind of business with a public interest . . . must be such as to create a peculiarly close relation between the public and those engaged in it" and "an affirmative obligation on [the business's] part to be reasonable in dealing with the public."[213] Here, the businesses subjected to the control of the Kansas industrial court were not within these recognized categories; hence, when the industrial court fixed wages in order to resolve disputes between employers and workers, it deprived both parties of their liberty-of-contract rights.[214]

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conditions under which labor is to be done. It is not for the protection of persons under legal disability or for the prevention of fraud.

Id. at 554.

209. *Id.*

210. *Id.* at 554–55. Sutherland's description of the harmful effects of the law explicitly referred to the *Lyons* case. *Id.* at 555 n.1.

211. Charles Wolff Packing Co. v. Court of Indus. Relations.

212. *Id.* at 544.

213. *Id.* at 536.

214. *Id.* at 540.

The Court's emphasis on equality of liberty of contract rights as between employers and employees explains its controversial decisions in two other *Lochner* era cases dealing with labor contracts. In *Adair v. United States*[215] and *Coppage v. Kansas*,[216] the Court struck down laws outlawing so-called "yellow-dog" contracts under which employees agreed not to join a union or remain a union member while in the employer's employ. Notwithstanding modern commentators' views that these two decisions were erroneous, reflecting the anti-union bias that was prevalent at the time,[217] *Adair* and *Coppage* can be explained by the Court's emphasis on equality of liberty-of-contract rights as between employers and employees. Writing the opinion for the six-justice majority of the Court holding the federal statute in *Adair* to be unconstitutional,[218] Justice John Marshall Harlan emphasized that employers had no less liberty of contract than did employees, and that this liberty included the freedom of either party to set conditions:

> [I]t is not within the functions of government—at least, in the absence of contract between the parties—to compel any person, in the course of his business and against his will to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employé to quit the service of

215. Adair v. United States, 208 U.S. 161 (1908) (invalidating a federal law prohibiting interstate carriers from discriminating against union members in various ways).

216. Coopage v. Kansas, 236 U.S. 1 (1915) (invalidating a Kansas statute forbidding yellow-dog contracts).

217. *See, e.g.*, PHILLIPS, supra note 32, at 140–41 (maintaining that both *Adair* and *Coppage* were incorrectly decided, even under the liberty-of-contract paradigm, because unionism helped alleviate unequal bargaining power between employers and employees: "Because unionism was necessary to make freedom of contract meaningful, . . . a pro-union measure should not have fallen on freedom-of-contract grounds."). As noted *supra* in Part II.B., laissez-faire writers such as William Graham Sumner and Christopher Tiedeman generally supported the right of workers to join labor unions, viewing unions as a kind of free-market solution to the problem of unequal bargaining strength. As emphasized above, however, the Court's protection of liberty of contract did not follow the "laissez-faire constitutionalism" paradigm and hence in many ways departed from a consistently libertarian jurisprudential model.

218. The statute at issue in *Adair* made it a federal crime for a railroad or other common carrier engaged in interstate transportation, or any of its officers or agents, to require any employee or any person seeking employment, as a condition of such employment, to enter into any agreement not to become or remain a member of any labor organization. *Adair*, 208 U.S. at 167. It also made it criminal for such employers to threaten any employee with loss of employment or to discriminate against any employee because of his membership in a labor organization. *Id.* at 168–69. Justices McKenna and Holmes wrote separate dissents. *Id.* at 180-91. Justice Moody did not participate in the decision of this case. *Id.* at 180.

> the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employé.[219]

"In all such particulars," Harlan stressed, "the employer and the employé have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land."[220]

The two cases illustrate another important aspect of economic freedom protected by the Court's liberty-of-contract jurisprudence, freedom of dealing, based upon the common law right of refusal to deal. Thomas M. Cooley, in his nineteenth-century treatise on tort law, described the right in this way:

> It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice. With his reasons neither the public nor third persons have any legal concern. It is also his right to have business relations with any one with whom he can make contracts, and if he is wrongfully deprived of this right by others, he is entitled to redress.[221]

In early twentieth-century American law, the right of refusal to deal was subject to few restrictions outside of antitrust legislation; further restrictions, in the form of unfair trade practices legislation and, ironically, "civil rights" legislation (such as anti-discrimination statutes), had not yet curtailed this broad common-law right.[222]

Finally, another important aspect of economic freedom protected by the Court's liberty-of-contract jurisprudence was one's freedom of entry into lawful trades or occupations. This aspect of liberty of contract had a very old history, which may be traced back to the seventeenth-century writings of Sir Edward Coke and other precedents in English law, going as far back as

219. *Id.* at 174–75.

220. *Id.* at 175.

221. *Id.* at 173 (quoting THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 278 (1879)).

222. Since the enactment of modern antitrust and unfair competition statutes, the law generally distinguishes individual refusals to deal—which are still considered "privileged," or part of one's general freedom of contract—and concerted refusals, which may be actionable as either antitrust violations or "unfair" methods of competition. Nevertheless, the general common law right of an individual to refuse to engage in business with another person for any reason has been abrogated by a number of statutes, including antidiscrimination laws such as the Civil Rights Act of 1964, 42 U.S.C. § 2000a (1974) (prohibiting discrimination on the basis of race in public accommodation). *See generally* EDWARD W. KITCH & HARVEY S. PERLMAN, INTELLECTUAL PROPERTY AND UNFAIR COMPETITION 364–66 (5th ed. 1998).

Magna Carta. Indeed, long before the Supreme Court protected liberty of contract through the Fourteenth Amendment, American courts had protected the common law right of an individual to pursue a gainful occupation, against various efforts by the government to encroach on this right.[223]

Because the Court did not follow a true laissez-faire constitutionalism, it did not protect the right to enter a market—that is, freedom to compete—absolutely. Indeed, the Court during the *Lochner* era sustained a wide variety of laws restricting entry into a lawful profession, business, trade, or calling—typically, occupational licensing laws that were justified as protections of public health or safety or as protections against fraud.[224] In several significant decisions, however, the Court found that laws restricting entry into particular markets were invalid, as "arbitrary" exercises of the police power that abridged the freedom to compete.[225]

B. Other Facets of Liberty

Given the orthodox view's close association of the Supreme Court's liberty-of-contract jurisprudence with cases like *Lochner*, modern students of constitutional law often do not realize that liberty of contract had important aspects outside the realm of labor or business regulation. Among the frequently overlooked aspects of the right were its use to protect aspects of individual autonomy that today are known as the "right to privacy," as well as its use to combat de jure segregation in the form of so-called "Jim Crow" laws.

Despite the popular assumption that the Court's protection of privacy as a fundamental right began with *Griswold v. Connecticut*,[226] some scholars have recognized that—long before the *Griswold* Court attempted to derive

223. *See* Timothy Sandefur, The Right To Earn a Living, 6 CHAPMAN L. REV. 207, 207–27 (2003); Wayne McCormack, *Economic Substantive Due Process and the Right of Livelihood*, 82 KY. L.J. 397, 399–400 (1993–1994).

224. *See* PHILLIPS, supra note 32, at 52 (concluding that "the old Court almost always upheld occupational licensing laws," but was "much tougher on other kinds of entry restrictions").

225. Allgeyer v. Louisiana, 165 U.S. 578 (1897) (striking down a Louisiana law banning insurance sales by companies not licensed to do business in Louisiana); Adams v. Tanner, 244 U.S. 590 (1917) (invalidating a Washington state law that prevented employment agencies from collecting fees for their services); Louis K. Liggett Co. v. Baldridge, 278 U.S. 105 (1928) (striking down a Pennsylvania law essentially requiring that every pharmacy or drug store be wholly owned by a licensed pharmacist or pharmacists); New State Ice Co. v. Liebman, 285 U.S. 262 (1932) (invalidating an Oklahoma statute restricting entry into the ice business, which the Court deemed to be "an ordinary business . . . essentially private in its nature," and therefore not a business "charged with a public use," as the state had claimed).

226. Griswold v. Connecticut, 381 U.S. 479 (1965) (striking down an 1897 statute prohibiting the use of any drug or device to prevent conception and prohibiting any person from advising or providing contraceptive materials, as an unconstitutional interference with the "right of privacy" of married couples and their physicians).

privacy rights from the "penumbras" that emanated from particular Bill of Rights guarantees[227]—the Court during the *Lochner* era had protected what today is regarded as an important aspect of privacy, so-called "parental rights." As one scholar has observed, "[t]he right to privacy achieved constitutional status in two cases of the *Lochner* era, the only substantive due process decisions that survived the 1937 revolution."[228] The two cases referred to were the so-called "school cases" from the 1920s, *Meyer v. Nebraska* and *Pierce v. Society of Sisters*.[229] Although these two cases are still frequently cited today as the earliest precedents for the right of privacy—and particularly for protecting the freedom of parents to determine the upbringing and education of their children—the modern reconceptualization of *Meyer* and *Pierce* as "privacy" cases distorts their true nature as liberty-of-contract decisions.

Meyer concerned one of the United States' first "English-only" laws, a statute passed by the Nebraska legislature that prohibited teaching children who had not yet passed the eighth grade in any language other than English. It was passed following World War I, during a time when anti-German prejudice was at its height in America, and targeted Nebraska's large German-speaking immigrant population.[230] The plaintiff in error, Meyer, was a teacher in a parochial school who had been convicted of violating the statute by teaching the subject of reading in the German language to a ten-year-old boy. Writing the opinion for a near-unanimous Court, Justice James C. McReynolds—ironically, the justice who has the reputation of being the *Lochner*-era Court's worst "reactionary"[231]—described the liberty guaranteed by the Fourteenth Amendment in broad terms:

227. Justice Douglas's opinion for the majority of the Court grounded the right of privacy in various "penumbras, formed by emanations" from certain Bill of Rights guarantees, in order to avoid basing the right directly on substantive due process protection of liberty, as the Court had done during the *Lochner* era. *See id.* at 484.

228. WILLIAM M. WIECEK, LIBERTY UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE 177–78 (1988).

229. Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510 (1925). Each case was "an easy one, striking down indefensible legislation," William Wiecek asserts. WIECEK, *supra* note 228, at 178. Nevertheless, the statutes at issue in the cases seem "indefensible" only to modern-day eyes; at the time, it could be argued, they were the kind of laws "purporting to advance public morality and communal solidarity" that the old Court tended to uphold, unless they conflicted with liberty-of-contract rights. *See* PHILLIPS, *supra* note 32, at 48.

230. *See, e.g.*, WILLIAM G. ROSS, FORGING NEW FREEDOMS: NATIVISM, EDUCATION, AND THE CONSTITUTION, 1917–1927, at 133 (1994).

231. In addition to being, in the words of one modern scholar, "the New Deal's most implacable foe on the Supreme Court," McReynolds has been described by a friendly biographer as a man who "'discriminated against blacks, patronized women, and disliked Jews.'" PHILLIPS,

> Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[232]

He then held that both Mr. Meyer's "right . . . to teach" the German language and "the right of parents to engage him so to instruct their children" were within the liberty protected by the Amendment and were abridged by the statute.[233]

The law at issue in *Pierce* was also the product of bigotry. The Compulsory Education Act passed by the Oregon legislature in 1922 required all children between the ages of eight and sixteen to attend public schools; passed at the insistence of the Ku Klux Klan, the law aimed to eliminate private and parochial schools in the state.[234] The owners of two schools—the Society of Sisters, a Roman Catholic charitable group, and Hill Military Academy, a private, for-profit boys' military school—brought suit to enjoin enforcement of the law.[235] Affirming the lower court's grant of a preliminary injunction, the Court—in another opinion written by Justice McReynolds—followed "the doctrine of *Meyer v. Nebraska*" in holding that the Oregon law "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."[236] McReynolds then added a stridently libertarian statement that is often quoted in modern case law as a broad explanation of parents' rights to control their children's education:

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to

supra note 32, at 48 (quoting JAMES EDWARD BOND, I DISSENT: THE LEGACY OF JUSTICE JAMES CLARK MCREYNOLDS 135 (1992)).

232. *Meyer*, 262 U.S. at 399.

233. *Id.* at 400. McReynolds also found that the Nebraska law was an unconstitutional attempt "materially to interfere with the calling of modern language teachers," as well as with the "opportunities of pupils to acquire knowledge" and "the power of parents to control the education of their own." *Id.* at 401.

234. On the Klan's influence, see PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 415–19 (2002).

235. Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 529-33 (1925).

236. *Id.* at 534–35.

> standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[237]

What is often omitted from modern summaries of the decision, however, is McReynolds' explanation for the Court's holding, affirming the injunction that had been sought by the schools, barring enforcement of the law. The plaintiffs, Society of Sisters and Hill Military Academy, were "threatened with destruction through the unwarranted compulsion which [the state of Oregon was] exercising over present and prospective patrons of their schools," the Court found; thus the injunction was properly issued to prevent irreparable injury and to protect the plaintiffs against "arbitrary, unreasonable and unlawful interference with their patrons and the consequent destruction of their business and property."[238]

Finally, the Supreme Court's 1917 decision in *Buchanan v. Warley*[239] illustrates yet another noteworthy episode in the history of the Court's protection of liberty of contract—one that is forgotten, or overlooked, because it does not accord with the caricature of laissez-faire constitutionalism presented by most legal historians and constitutional scholars.[240] In *Buchanan*, the Court used the due process clause of the Fourteenth Amendment to declare unconstitutional a Louisville, Kentucky ordinance mandating racial segregation in housing.[241] At the time, with *Plessy v.*

237. *Id.* at 535.

238. *Id.* at 535–36.

239. Buchanan v. Warley, 245 U.S. 60 (1917).

240. For example, one history of American law cites *Buchanan* erroneously as a case decided "on equal-protection grounds" and discusses the case only in the context of the NAACP campaign of litigation that culminated in *Brown v. Board of Education*, 347 U.S. 483 (1954). HALL, *supra* note 9, at 264–65. Other scholars—see, e.g., PHILLIPS, *supra* note 32, at 157–58—omit the case from their lists of liberty-of-contract decisions because they regard it as a "property rights" case, although the right to acquire or dispose of property that was involved in the case was a right also to enter into a contract for its sale.

241. As summarized by Justice Day, the ordinance prohibited persons of color from moving into or occupying "any house upon any block upon which a greater number of houses are occupied as residences, places of abode, or places of public assembly by white people than are occupied . . . by colored people." *Id.* at 70–71. In short, as Justice Day succinctly characterized the ordinance,

> This interdiction is based wholly upon color; simply that and nothing more. In effect, premises situated as are those in question in the so-called white block are effectively debarred from sale to persons of color, because if sold they cannot be occupied by the purchaser nor by him sold to another of the same color.

Id. at 73. The historical background of the Louisville ordinance and of the case (which was a test case brought by William Warley, an active African-American member of the Louisville NAACP)

Ferguson[242] as the controlling decision, the equal protection clause did not prohibit such de jure segregation and so, on equal protection grounds, the Court typically upheld such "Jim Crow" or mandatory segregation laws. As Justice William R. Day noted in his opinion for the unanimous Court,[243] however, the equal protection clause was not the only provision of the Fourteenth Amendment that limited the police power of the states:

> We think this attempt to prevent the alienation of the property in question to a person of color was not a legitimate exercise of the police power of the State, and is in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing state interference with property rights except by due process of law.[244]

In thus affirming the due process clause's protection of individual rights, Justice Day also explicitly rejected all the police power rationales that Kentucky had argued in support of state-enforced segregation, including the state's overtly racist justification that the segregation law promoted the "maintenance of the purity of the races."[245] In rejecting these arguments, the Court declined to broaden the scope of police power beyond its traditional bounds, holding that none of the state's justifications for the segregation law legitimately trumped the basic individual right at issue in the case: "the civil right of a white man to dispose of his property if he saw fit to do so to a person of color and of a colored person to make such disposition to a white

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are ably discussed in David Bernstein, *Philip Sober Controlling Philip Drunk:* Buchanan v. Warley *in Historical Perspective*, 51 VANDERBILT L. REV. 797, 839–56 (1998).

242. Plessy v. Ferguson, 163 U.S. 537 (1896) (upholding a Louisiana law requiring separate railway carriages for white and black persons, as a "reasonable regulation" not in violation of the equal protection clause of the Fourteenth Amendment). As summarized by Justice Day, segregation per se did not violate the equal protection clause under the principle of *Plessy* because "[racial] classification of accommodation was permitted upon the basis of equality for both races." *Buchanan*, 245 U.S. at 79.

243. Justice Holmes drafted a dissent in *Buchanan* that he ultimately chose not to deliver. *See* Bernstein, *supra* note 241, at 855.

244. *Buchanan*, 245 U.S. at 82. "Property is more than the mere thing which a person owns," Justice Day declared. *Id.* at 74. "It includes the right to acquire, use, and dispose of it"—which also entailed (although he did not explicitly say so) the freedom to enter into contracts for that purpose. *Id.* at 74.

245. *Id.* at 81. Other police power rationales argued by Kentucky were that the law would promote the public peace by preventing race conflict and that the law was necessary to prevent the depreciation in the value of property owned by white people when black persons became their neighbors. *Id.* at 80–82; *see also* Bernstein, *supra* note 241, at 844–45, 847–50 (discussing the overtly racist arguments in Kentucky's briefs), 853–84 (summarizing Justice Day's disposition of the state's police power arguments).

person."[246] As some modern scholars have suggested, a full appreciation for the significance of *Buchanan* sheds new light on both *Lochner*-era jurisprudence and the increasingly influential Progressive movement that was challenging it in the early twentieth century.[247]

III. The Demise of Liberty of Contract

The mythology that historians and constitutional scholars have created to support the orthodox view of *Lochner*-era jurisprudence also includes the story most frequently told to explain the demise of liberty of contract. That story, at the heart of the "laissez-faire constitutionalism" caricature, is that the right supposedly invented by "activist" judges in 1897 was killed forty years later by a different group of judges, who atoned for their jurisprudential sins by accepting social "reality"—the reality, that is, of the twentieth-century regulatory state.[248] What really doomed liberty of contract, however, was not judicial acceptance of "reality," as the Legal Realists have argued. Rather, it was doomed because of jurisprudential weaknesses in the doctrine itself, as it was applied by the courts. And the judges who overturned *Lochner*-era jurisprudence were not following "neutral principles" of constitutional adjudication; they were, in fact, judicial activists who abdicated their twin duties, of enforcing constitutional limits on government power and protecting the fundamental rights of individuals, in order to advance the New Deal policy agenda.

A. Cracks in the Foundation: The Failure of *Lochner*-Era Jurisprudence

The coalescence of several factors explains why the Supreme Court's protection of liberty of contract as a fundamental constitutional right was so

246. *Buchanan*, 245 U.S. at 81. Justice Day also held that the Fourteenth Amendment operated "to qualify and entitle a colored man to acquire property without state legislation discriminating against him solely because of color." *Id.* at 79.

247. *See* Bernstein, *supra* note 241, at 858, 870–71 (maintaining that Buchanan caused the end of explicit de jure residential segregation in the United States and may be credited with helping save the country, or at least the South, from instituting South African-style apartheid); *see also* James W. Ely, Jr., *Reflections on Buchanan v. Warley, Property Rights, and Race*, 51 VANDERBILT L. REV. 953, 972 (1998) (maintaining that Buchanan shows that the Court's substantive due process protection of individual liberty and property rights "often safeguarded the interests of vulnerable and powerless segments of society," against the efforts of the so-called "Progressive" reformers who were advocating not only segregation laws and laws that would "protect" women out of their jobs, but also a wide variety of new forms of legal restrictions on both economic and personal freedoms—all in the name of protecting "public welfare").

248. *See, e.g.*, Woodard, *supra* note 26, at 305–11 (explaining the demise of the supposedly laissez-faire standard in terms of "a clash with reality," the reality of an industrial society).

short-lived. These factors included the changing membership of the Court,[249] as well as significant changes in the law, both in constitutional law principles and in theories of jurisprudence, during the first few decades of the twentieth century.[250] By far the most important factor, however, was the standard of review used by the justices to protect liberty of contract: the moderate paradigm for the protection of liberty, with its moderately stringent means-ends analysis, as discussed in Part I.C., *supra*. Because liberty of contract in practice—as actually protected by the Supreme Court—was nothing more than a general presumption in favor of liberty, it was a right that was apparently riddled with exceptions. The broad categories of "exceptions to the general rule forbidding legislative interference with freedom of contract" that Justice Sutherland identified in *Adkins* shows how far-reaching those "exceptions" were.[251]

One of those categories—which proved to be especially troublesome for Sutherland in *Adkins*—was that of statutes fixing the hours of labor. Both before and after the *Lochner* decision—with its decisions in *Holden v. Hardy* (1898)[252] and *Muller v. Oregon* (1908)[253]—the Court had upheld maximum-hours laws that restricted the freedom of contract of particular classes of workers, namely workers in extraordinarily dangerous occupations and women workers, as valid exercises of the police power to protect health, even though these laws involved the health of those particular classes of workers rather than the health of the general public. The line that the Court apparently had drawn in *Lochner*, preserving liberty-of-contract rights for male workers

249. Noting how changes in the membership of the Supreme Court affected its substantive due process review of legislation, some scholars have suggested that the so-called "*Lochner* era" really consisted of three different eras: an early period of moderate development (1897–1911), a middle period of essentially no development (1911–1923), and a final period of expansion of the doctrine (1923 to mid-1930s). *See* Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N. C. L. REV. 1, 8–9 (1991); Bernstein, *Revisionism*, *supra* note 190, at 10–11.

250. One of the most important changes in American legal culture in the early twentieth century was the shift from "formalism" to "realism" in the law. On this shift, see generally Hovenkamp, *supra* note 34, at 381–82; Mayer, *Tiedeman*, *supra* note 35, at 151–52. A second important change in legal culture was the fundamental shift in the definition of the police power after publication of an influential new treatise, written by Ernst Freund, in the early years of the twentieth century. Freund defined the police power as "the power of promoting the public welfare by restraining and regulating the use of liberty and property." ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS, at iii (1904). Not surprisingly, Progressive reformers who championed social legislation in the early twentieth century embraced Freund's new, elastic conception of the police power, with its amorphous "public welfare" rationale.

251. Adkins v. Children's Hospital, 261 U.S. 525, 546–54 (1923).

252. Holden v. Hardy, 169 U.S. 366 (1898) (upholding a Utah law that limited the hours of workmen in underground mines, as well as in smelting and other operations).

253. Muller v. Oregon, 208 U.S. 412 (1908) (upholding a state statute limiting the hours of women employed in factories to ten hours a day).

in ordinary trades, appears to have virtually vanished in the Court's decision in a 1917 case, *Bunting v. Oregon,*[254] a decision that many commentators have seen as effectively overruling *Lochner.*[255] *Bunting* signaled that a majority of the justices, during the period between the two world wars, were unwilling to question any exercises of the police power that seemed to protect workers' health—even if legislation effectively barred certain classes of persons from particular occupations.[256]

Police-power regulations protecting health or safety consisted of a broad category of exceptions to the general rule of liberty of contract, or personal freedom generally, that extended far beyond the cases upholding hours laws listed by Sutherland in his *Adkins* opinion. It was under the rationale of protecting public health that the Court had upheld a Massachusetts law compelling citizens to be vaccinated against smallpox.[257] Moreover, in another important line of cases concerning workers' health, safety, and welfare—cases often overlooked in standard treatments of the *Lochner* era—the Court upheld workers' compensation laws and other measures regulating recovery for on-the-job injuries.[258]

Another, and the perhaps most important, category of exceptions listed by Justice Sutherland in *Adkins* was that of businesses "affected with a public interest." The Court in its decision in *Wolff Packing* (1923) had tried to

254. Bunting v. Oregon, 243 U.S. 426 (1917) (upholding as a valid health law an Oregon statute that prohibited the employment of anyone—except watchmen or employees engaged in emergency repairs—in a mill, factory, or manufacturing establishment, for more than ten hours a day, unless the employer paid time-and-a-half for extra hours).

255. Both Chief Justice Taft and Justice Holmes, in their dissents in *Adkins*, maintained that *Lochner* had been overruled by *Bunting*. *See Adkins*, 261 U.S. at 564 (Taft, C.J., dissenting) (writing that he found it "impossible" to reconcile *Bunting* with *Lochner* and adding that he had "always supposed that the Lochner case was thus overruled sub silento"); *id.* at 570 (Holmes, J., dissenting) (writing that he thought *Lochner* "would be allowed a deserved repose"). Many modern scholars agree; *see, e.g.*, CURRIE, *supra* note 9, at 103 (maintaining that *Bunting* "buried *Lochner* without even citing it").

256. Indeed, just one year after *Adkins*, the Court upheld a law banning night work for women, under the rationale that women have weaker constitutions than have men. Radice v. New York, 264 U.S. 292, 293–95 (1924) (following the *Muller* Court's recognition of "the physical limitations of women").

257. Jacobson v. Massachusetts, 197 U.S. 11, 29 (1905).

258. *E.g.*, Second Employers' Liability Cases, 223 U.S. 1 (1912) (upholding federal law governing railroads' liability for the employees' on-the-job injuries); Chicago, Burlington & Quincy R.R. v. McGuire, 219 U.S. 549 (1911) (upholding state law similarly governing railroads' liability for employees' injuries), N.Y. Cent. R.R. v. White, 243 U.S. 188 (1917); Mountain Timber v. Washington, 243 U.S. 219 (1917) (rejecting substantive due process challenges to workers' compensation laws for hazardous employments). This line of cases is nicely summarized by Michael Phillips, who concludes that the Court during the *Lochner* era "in all, . . . probably rejected eighteen substantive due process attacks on workers' compensation provisions and kindred laws." PHILLIPS, *supra* note 32, at 54–55.

articulate a clear standard to determine whether a business truly was affected with a public interest and therefore subject to government regulation, even of the price terms of its contracts. Applying the standard, the Court in a series of opinions written by Justice Sutherland in the late 1920s struck down laws fixing maximum prices for services or commodities sold to the public, holding that the businesses involved in those cases were not affected with a public interest.[259] Although the Court would continue to enforce limits defining businesses "affected with a public interest," striking down the market entry restrictions in *New State Ice* (1932)—with Sutherland again writing the Court's opinion—changes in the membership of the Court helped pave the way for abandonment of the doctrine altogether.[260] In *Nebbia v. New York*,[261] a bare majority of five justices upheld a Depression-era New York statute that created a state Milk Control Board with authority to fix minimum prices for the retail sale of milk. One of the Court's newest justices, Owen Roberts, wrote the opinion for the majority, declaring that "there is no closed class or category of businesses affected with a public interest"; virtually any business could be "subject to control for the public good," with the state regulating any aspect of the business, "including the prices to be charged for the products or commodities it sells."[262] Moreover, Roberts' opinion for the Court seemed to announce a new standard of review in substantive due process cases, at least those involving government regulation of business—a standard that seemed to turn on its head the general presumption in favor of liberty:

> So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. . . . Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty.[263]

259. *See* Tyson & Brother v. Banton, 273 U.S. 418 (1927) (resale of theater tickets); Ribnik v. McBride, 277 U.S. 350 (1928) (employment agency fees); Williams v. Standard Oil, 278 U.S. 235 (1929) (retail price of gasoline).

260. Chief Justice Taft was succeeded by Charles Evans Hughes in 1930. In the same year, Justice Sanford was succeeded by Owen J. Roberts. Two years later, in 1932, Justice Holmes was succeeded by Benjamin Cardozo.

261. Nebbia v. New York, 291 U.S. 502 (1934). The law was designed to help protect the state's dairy farmers from the spiraling fall in milk prices. *Id.* at 518 n.2.

262. *Id.* at 536–57.

263. *Id.* at 537–39.

Thus, with the *Nebbia* decision in the mid-1930s, the "public interest" category proved to be the proverbial exception that swallowed up the rule.

One additional broad category of cases, not cited in Sutherland's *Adkins* opinion, also deserve mention. These are decisions that involved exercises of police power that, as seen by the Court, fit within the traditional exercises of the police power for the protection of public morality. As noted in Part I.C. above, one of the critically important ways in which the Court's protection of liberty of contract can be distinguished from a true laissez-faire constitutionalism is its general tolerance for paternalistic legislation, particularly where morals were concerned. Thus, as one modern scholar has summed it up, "liberty of contract was consistently limited by the invocation of common law doctrines that restricted individual freedom for the perceived social good," with the Court upholding such laws as bans on lotteries and other forms of gambling, Sunday-closing laws, and laws regulating and even prohibiting alcohol consumption.[264]

With liberty of contract resting on such shaky jurisprudential grounds, it perhaps should not be surprising that the Supreme Court's protection of liberty of contract was a relatively minor part of its early twentieth-century constitutional jurisprudence and that the Court upheld many more state laws challenged under the Fourteenth Amendment than it struck down.[265] One modern scholar who has done a quantitative analysis of *Lochner*-era decisions, focused on the Court's substantive due process review of social and economic regulations during the 1897-1937 period, has concluded that liberty-of-contract decisions "were simply one category of substantive due process decision—and not the numerically most significant category either."[266]

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264. Bernstein, *Revisionism*, *supra* note 190, at 46 & n.255.

265. The Progressive historian Charles Warren did a crude empirical study of Supreme Court decisions in the years 1887–1911 that found, out of over 560 decisions based on the due process and equal protection clauses of the Fourteenth Amendment, the Court invalidated only a handful of state statutes that he called "social justice legislation." *See* Charles Warren, *The Progressiveness of the United States Supreme Court*, 13 COLUMBIA L. REV. 294, 295 (1913); *see also* 3 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 463–78 (1923). Another important study, still cited today, by Felix Frankfurter identified 220 decisions from the 1897–1938 period that invalidated state laws on Fourteenth Amendment grounds. FELIX FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 97–137 (1938) (appendix listing and describing "Cases Holding State Action Invalid under the Fourteenth Amendment"). These sources, and others, are nicely summarized in PHILLIPS, *supra* note 32, at 32–35, 62 n.1.

266. Phillips, *supra* note 32, at 5. Phillips reduces Frankfurter's list of 220 cases down to 128 cases by eliminating cases decided on privileges and immunities, equal protection, and procedural due process grounds. *Id.* at 35–36. After making some further adjustments to the list and then deleting what he classifies as "peripheral" and "borderline" substantive due process cases, *id.* at 36–40, he arrives at a list of only fifty-six "core" substantive due process cases. *Id.* at 41–58, 86–

Nor should it be surprising that the Court ceased protecting so fragile a right as liberty of contract as a fundamental right by the late 1930s. Near the end of his *Adkins* opinion, Justice Sutherland again stressed that "[t]he liberty of the individual to do as he pleases, even in innocent matters, is not absolute." He added that liberty "must frequently yield to the common good, and the line beyond which the power of interference may not be pressed is neither definite nor unalterable but may be made to move, within limits not well-defined, and with changing need and circumstance."[267] The so-called "New Deal Revolution" marked the Court's redrawing of that line in response to changed political, as well as jurisprudential, circumstances.

B. A New Paradigm: The "New Deal Revolution" of 1937

For the past seventy years, scholars have recognized the significance of the so-called "New Deal revolution" of 1937.[268] The shift that occurred, apparently so suddenly and dramatically in the spring of 1937, with a series of five-to-four decisions (in which both Chief Justice Hughes and Justice Roberts joined the majority[269]) upholding New Deal legislation,[270] was

87 n.210. Of these fifty-six, he identifies only ten cases as liberty-of-contract decisions; i.e., those in which the Court "used express freedom-of-contract reasoning to strike down government action." *Id.* at 35–58, 86–87 n.210. Phillips' classification is far too restrictive, however; it omits many significant liberty-of-contract decisions—for example, *Meyers* and *Pierce*, which he classifies as cases involving "personal rights," *id.* at 48, and *Buchanan*, which he classifies as a "land-use" case. *Id.* at 46–47, 157–58.

267. Adkins v. Children's Hospital, 261 U.S. 525, 561 (1923).

268. It is commonplace for historians and constitutional scholars to describe 1937 as a constitutional "revolution" and to associate the Supreme Court's apparently sudden reversal that year as a reaction to President Roosevelt's infamous plan to "pack" the Court—the famous "switch in time that saved nine." *See, e.g.*, MICHAEL LES BENEDICT, THE BLESSINGS OF LIBERTY: A CONCISE HISTORY OF THE CONSTITUTION OF THE UNITED STATES 280–82 (2d ed. 2006); HALL, *supra* note 9, at 281–82. Bruce Ackerman has described the New Deal Revolution as one of the "three great turning points of constitutional history"; like the other two turning points he identifies—the Founding and Reconstruction—it involved "a total repudiation of the preexisting constitutional tradition and its replacement . . . with a new comprehensive synthesis." BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 58, 114 (1991).

269. It should be noted that Justice Roberts was author of the majority opinion in the 1934 decision of *Nebbia*; Chief Justice Hughes was author of the majority opinions in *Home Building & Loan v. Blaisdell*, 290 U.S. 398 (1934) (upholding Minnesota debt moratorium law against an Article I, Section 10 contracts clause challenge) and *Ashwander v. Tenn. Valley Authority*, 297 U.S. 288 (1936) (upholding the constitutionality of the TVA as an exercise of Congress's power, under Article IV, Section 3, "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States"). Both decisions suggest that the 1937 "switch" was neither sudden nor unpredictable. Indeed, Barry Cushman has argued plausibly that *Nebbia* marks the Court's abandonment of its *Lochner*-era jurisprudence. *See* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 7 (1998).

270. W. Coast Hotel v. Parrish, 300 U.S. 379 (1937) (upholding a Washington state minimum wage law); Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)

twofold. First, with regard to the scope of federal power, the Court abandoned its previous holdings limiting Congress's powers, in effect eviscerating the Tenth Amendment as a fundamental rule of interpretation.[271] Second, with regard to limitations on both state and federal legislative powers through substantive use of the due process clause, the Court abandoned its protection of liberty of contract as a fundamental right, in *West Coast Hotel v. Parrish*;[272] and a year later, in *Carolene Products v. United States*,[273] it adopted the minimal "rational basis" test for economic legislation,[274] a test that in the eyes of many commentators established a "double standard" in modern constitutional law, affording less protection for property rights and economic liberty than for other, non-economic rights.[275]

Although obviously it is only the second aspect of the New Deal revolution that is directly relevant here, both aspects are interrelated and illustrate the fundamental nature of the Court's shift. Under the guise of judicial restraint, the majority of the justices on the Court—reflecting their own policy preferences in favor the New Deal—discarded long-established

(upholding the National Labor Relations Act (NLRA)); Nat'l Labor Relations Bd. v. Friedman-Harry Marks Clothing Co., 301 U.S. 58 (1937) (upholding the NLRA as applied to a small manufacturer with only a negligible effect upon interstate commerce); Associated Press v. Nat'l Labor Relations Bd., 301 U.S. 103 (1937) (upholding the NLRA as applied to the labor relations of newspapers and press associations); Stewart Machine Co. v. Davis, 301 U.S. 548 (1937) (upholding the Social Security Act's unemployment excise tax upon employers); Helvering v. Davis, 301 U.S. 619 (1937) (upholding the Social Security Act's old-age tax and benefit provisions).

271. On this profound shift in the Court's reading of the Tenth Amendment, see David N. Mayer, *Justice Clarence Thomas and the Supreme Court's Rediscovery of the Tenth Amendment*, 25 CAPITAL U. L. REV. 339, 379–86 (1996).

272. *W. Coast Hotel*, 300 U.S. at 397 (overruling *Adkins v. Children's Hospital* and upholding legislation setting minimum wages and/or maximum hours as reasonable exercises of the police power, not violating the due process clauses of the Fifth and Fourteenth Amendments). As legal historian James Ely notes, the decision in *West Coast Hotel* "effectively repudiated the liberty of contract doctrine" as well as "marked the virtual end of economic due process as a constitutional norm." ELY, *supra* note 40, at 127.

273. Carolene Prod. v. United States, 304 U.S. 144 (1938) (rejecting a due process challenge to a federal law prohibiting interstate shipment of "filled" milk). The most famous part of Justice Stone's opinion for the majority of the Court in *Carolene Products* is his footnote 4—called by Professor Ackerman "the most famous [footnote] in Supreme Court history." ACKERMAN, *supra* note 268, at 119.

274. Footnote 4 in *Carolene Products* suggested a standard of review with "more exacting judicial scrutiny" for legislation falling within "a specific prohibition of the Constitution, such as those of the first ten Amendments," or for legislation disadvantaging "discrete and insular minorities," or obstructing "political processes which can ordinarily be expected to bring about repeal of undesirable legislation." *Carolene Prod.*, 304 U.S. at 152–53 n.4. As Professor Currie notes, Justice Stone's footnote "established the Court's agenda for the next fifty years." CURRIE, *supra* note 9, at 244.

275. On the constitutional double standard, see ELY, *supra* note 40, at 133; SIEGAN, *supra* note 63, at 41–42; PHILLIPS, *supra* note 32, at 185–92.

constitutional precedents in order to uphold the validity of the modern regulatory and welfare state. For example, Chief Justice Hughes's opinion for the Court in *West Coast Hotel* was replete with assumptions about the "evils of the 'sweating system'" and policy arguments in favor of minimum wage laws.[276] In his dissenting opinion in the case, Justice Sutherland argued that the meaning of the Constitution "does not change with the ebb and flow of economic events" and criticized the majority for amending the Constitution "under the guise of interpretation."[277]

Contrary to the orthodox story about *Lochner*-era jurisprudence, it seems that the dissenting justices in 1937—who had supported the Court's protection of liberty of contract—were adhering to "neutral principles" in constitutional adjudication; the new majority, comprised of the Court's "liberal" justices, now joined by the moderate "swing" votes of Hughes and Roberts, seem to be the judicial activists. Indeed, notwithstanding the prevalent view that judicial restraint is neutral,[278] it is not the result of a decision—whether the court strikes down a law as unconstitutional or upholds it against a constitutional challenge—that determines whether or not it is activist; as discussed in Part I.C., *supra*, judges can be just as activist in deferring to the legislature, or upholding legislation against constitutional challenge, as they can be in exercising judicial review. What makes a decision activist is the reasoning used by the judge in support of the decision. Hughes' reasoning in support of the Washington minimum-wage statute at issue in *West Coast Hotel* was based on policy arguments; it better fit the stereotype created by Holmes' dissent in *Lochner*—a case decided upon "economic theory"—than did *Lochner*, *Adkins*, or any of the Court's other

276. *W. Coast Hotel*, 300 U.S. at 398–99. Hughes wrote: "The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage . . . casts a direct burden for their support upon the community. What these workers lose in wages the taxpayers are called upon to pay . . . . The community is not bound to provide what is in effect a subsidy for unconscionable employers." *Id.* at 399. As Richard Epstein has shown, the passage is replete not only with dubious policy arguments but with unsound economic theories. Richard A. Epstein, *The Mistakes of 1937*, 11 GEO. MASON U. L. REV. 5, 18–19 (1988). As many modern economists argue, minimum-wage laws actually harm the very groups of persons they purportedly help. *See generally* GEORGE REISMAN, CAPITALISM: A TREATISE ON ECONOMICS 382–84, 659–60 (1996) (explaining how minimum-wage laws cause unemployment and create legal barriers to entry, or monopolize the market, against the less able and the disadvantaged).

277. *W. Coast Hotel*, 300 U.S. at 402–04 (Sutherland, J., dissenting).

278. *E.g.*, EARL M. MALTZ, RETHINKING CONSTITUTIONAL LAW: ORIGINALISM, INTERVENTIONISM, AND THE POLITICS OF JUDICIAL REVIEW 3 (1994) ("[A] principle that the Court should defer generally to legislative judgments has no obvious political bias and therefore fits comfortably within the basic framework of neutral principles.").

liberty-of-contract decisions.[279] Indeed, one might argue that the notion that the modern, post-1937 Court's "neutrality" on matters of economics in constitutional adjudication is a myth—that the jurisprudential position taken by modern liberal constitutionalists is definitely not neutral but rather is based on a social or economic theory that favors government regulation of the competitive process.[280]

Conclusion

The orthodox view of the Supreme Court's protection of liberty of contract during the *Lochner* era—the view that identifies it as "laissez-faire constitutionalism"—is a myth, or perhaps more accurately, a folktale, the equivalent in constitutional law of a modern urban legend.[281] The folktale was invented by early twentieth-century Progressive-movement scholars[282] and has been perpetuated by modern-day apologists for the twentieth-century welfare/regulatory state. In each of its key parts, that folktale not only is wrong but often turns the truth entirely on its head.

First and foremost, in protecting liberty of contract as a fundamental right, the Court during the *Lochner* era was not applying a laissez-faire political or economic philosophy—"enacting Mr. Herbert Spencer's Social

279. Thus, rather than criticizing the old Court for protecting liberty of contract based on "Mr. Herbert Spencer's Social Statics," it would be fairer to criticize the Court in 1937 for abandoning liberty of contract based on, say, "Mr. Ernst Freund's *Standards of American Legislation*" or one of the economics texts of Henry W. Farnam, for it was the reasoning of such advocates of social legislation and government regulation of business as Freund and Farnam that the "liberal" justices of the 1930s seemed to be following. Indeed, one of Farnam's books, *The Economic Utilization of History* (1913), may have furnished the idea that "the states are laboratories for social experiments," that Justice Brandeis pronounced in his famous dissent in *New State Ice Company*. *See* McCurdy, *supra* note 37, at 189.

280. Michael Phillips discusses "The Myth of the Modern Court's Economic Neutrality," arguing persuasively that the post-1937 substantive due process jurisprudence embodied in the opinions of Justices Black and Douglas has not been neutral in practice but rather has sanctioned a particular political/economic theory. PHILLIPS, *supra* note 32, at 164. He describes that theory as "corporativism: a fusion of public and private power in which large groups dominate society, government serves their interests, and individuals count for relatively little as individuals." *Id.* at 164–65. He also follows Hadley Arkes in seeing corporativism as "the New Deal's main economic philosophy." *Id.* at 167. Similarly, Richard Epstein has identified the economic policy behind the Progressive movement and the New Deal as one based on government-created and regulated cartels, in lieu of free, competitive markets. *See* EPSTEIN, *supra* note 139, at 77–100.

281. On the distinction between myths, on the one hand, and folktales or legends on the other, see ENCYCLOPEDIA OF URBAN LEGENDS 111–13, 279 (Jan Harold Brunvand ed., 2001) (entries on Definition of "Legend" and Myth).

282. How the Progressives "rewrote" American constitutional law—and, in the process, unfairly caricatured the Supreme Court's liberty-of-contract jurisprudence—is nicely discussed in Richard Epstein's book, aptly titled *How the Progressives Rewrote the Constitution*. EPSTEIN, *supra* note 139.

Statics," as Justice Holmes accused the majority of doing in *Lochner*. Rather than following a "laissez-faire constitutionalism"—which would have resulted in the overturning of literally hundreds of laws that the Court upheld as valid exercises of the police power—the Court reviewed challenged laws under a moderate means-ends test, which in effect created a general presumption in favor of liberty. Through its liberty-of-contract jurisprudence, the Court protected various aspects of liberty, including not only economic freedom but also other aspects that today would be regarded as "personal" freedom; and it protected not just the wealthy or powerful but also relatively powerless individuals and members of minority groups. In protecting liberty of contract, the Court nevertheless also continued to recognize the validity of the police power in its traditional scope, as a protection of public health, safety, and morals. Virtually every law that the Court invalidated as abridging liberty of contract was a new kind of "social legislation," unprecedented and inconsistent with the traditional scope of police powers. The Court, in short, based its liberty-of-contract jurisprudence on well-established principles of American constitutional law: the use of the due process clauses, substantively, to protect property and liberty in all its dimensions, by enforcing certain recognized limits on the states' police power, limits that had become federalized with the addition of the Fourteenth Amendment to the Constitution.

Finally, it was not the *Lochner*-era Court that was guilty of "judicial activism" in protecting liberty of contract. Its liberty-of-contract jurisprudence adhered to "neutral principles" of constitutional decision making. The activism came, rather, with the Court's abandonment of liberty of contract as a fundamental right following the so-called "New Deal revolution." That activism is evident today in the so-called "double standard" that the modern Court applies in its substantive due process jurisprudence. Certain "preferred freedoms"—including not only certain rights enumerated in the Bill of Rights such as First Amendment freedom of speech or religion but also the unenumerated "right of privacy"—are more strongly protected than are economic freedom or property rights, the rights stereotypically associated with *Lochner*-era jurisprudence. The irony is that, among the aspects of liberty protected today as privacy rights, are the last remaining vestiges of the old Court's liberty-of-contract jurisprudence. Indeed, the great untold story in American constitutional law today is the degree to which modern protection of personal freedoms and civil liberties owes to the Court's pre-1937 protection of liberty of contract.