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Substantive Due Process Rediscovered: The Rise and Fall of Liberty of Contract

by David N. Mayer*

I. INTRODUCTION

Perhaps no aspect of modern American constitutional law is as misunderstood as so-called substantive due process, and no period in American constitutional history is as misunderstood as the early twentieth century, when the United States Supreme Court applied the Due Process Clauses of the Constitution substantively to protect a right known as "liberty of contract."[1] For a forty-year period[2] known as the

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1. Liberty of contract is one form of substantive due process protection of liberty. As argued in Part II.A of this Article *infra*, the distinction between substantive due process and procedural due process is not a clear one. However, 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* Peter Charles Hoffer, *Contract, Freedom of, in* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 223-24 (Kermit L. Hall et al. eds., 2d ed. 2005 [hereinafter Hoffer, *Contract*]; Peter Charles Hoffer, *Due Process, Substantive, in* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES, *supra*, at 274-77 [hereinafter Hoffer, *Due Process*].

2. The U.S. Supreme Court's protection of liberty of contract began in 1897 and ended in 1937. In *Allgeyer v. Louisiana*, the Court unanimously held unconstitutional a Louisiana statute that prohibited marine insurance sales by companies not licensed to do business in that state. 165 U.S. 578, 593 (1897). Although *Allgeyer* was the first Supreme Court decision explicitly protecting liberty of contract, judicial protection of liberty of contract began with state supreme court decisions in the 1880s and 1890s, as noted in Part II.A

"*Lochner* Era" for its best-known Supreme Court decision,[3] the Court declared unconstitutional a variety of state and federal laws that abridged a fundamental right of "liberty of contract" protected under the Due Process Clauses of the Fifth and Fourteenth Amendments.[4] The Court's protection of liberty of contract during the early twentieth century is frequently described as "economic substantive due process,"[5] both to emphasize the most famous line of *Lochner* Era decisions—those protecting economic liberty against labor legislation—and to distinguish the Court's application of substantive due process during that era from its use in the modern, post-New Deal Era.[6]

The *Lochner* Era also has been called the era of "laissez-faire constitutionalism"[7] because of a popular misconception of what the Supreme Court justices were doing in *Lochner* and other major liberty of contract decisions—a misconception that originated with Justice Oliver Wendell Holmes's dissenting opinion in *Lochner*. Justice Holmes characterized the majority's opinion as having been "decided upon an economic theory which a large part of the country does not entertain"—specifically, the laissez-faire philosophy of "Mr. Herbert Spencer's

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infra. The Court's decision in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), marked the so-called "New Deal revolution," which among other things, involved the Court's repudiation of its liberty of contract jurisprudence. *See id.* at 400. In that decision, a 5-4 majority of the Court upheld a Washington state minimum-wage law, applying a new "rational basis" due process standard, thus beginning the "double standard" in modern substantive due process jurisprudence that is discussed more fully in Part IV.B *infra*. *See Parrish*, 300 U.S. at 397-99.

3. 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. *Id.* at 52, 64. 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 III.B *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 whose reversal in *Parrish* signaled the end of the era.

4. U.S. CONST. amend V; U.S. CONST. amend. XIV; *See* Hoffer, *Contract, supra* note 1, at 223-24.

5. *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 608-29 (3d ed. 2006) (categorizing *Lochner* Era liberty of contract decisions as "economic substantive due process").

6. *See* Hoffer, *Due Process, supra* note 1, at 275-76.

7. *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 (1985).

Social Statics."[8] Although Justice Holmes's characterization was erroneous—for the majority opinion based its decision neither explicitly nor implicitly upon laissez-faire ideology, whether that of Spencer or some other theorist—his accusation of judicial activism[9] struck a responsive chord with scholars and political activists who were part of the early twentieth-century "Progressive" movement.[10] Progressive Era scholars and jurists were not neutral in their analysis of liberty of contract. As supporters of the Progressive movement and the new "social legislation"[11] it advocated, they were hostile to the individualist

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8. *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting); *see also* HERBERT SPENCER, SOCIAL STATICS (Robert Schalkenbach Foundation 1970). "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics," Holmes pithily noted. *Lochner*, 198 U.S. at 75. He continued,

> [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.

Id. at 75-76. As discussed briefly in Part III.A *infra*, Herbert Spencer was perhaps the most famous late nineteenth-century English classical liberal, or libertarian, philosopher, and *Social Statics* was his best-known work.

9. As used here, "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. *See generally* Keenan D. Kmiec, *The Origin and Current Meanings of "Judicial Activism,"* 92 CAL. L. REV. 1441, 1471-76 (2004).

10. *See, e.g.*, Learned Hand, *Due Process of Law and the Eight-Hour Day*, 21 HARV. L. REV. 495 (1908); Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909); Charles Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431 (1926). 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).

11. As used here, "social legislation" refers to a category of laws "intended for the relief and elevation of the less favored classes of the community," such as wage and hour regulations and other factory laws, that were common in Europe in the late nineteenth century but had just begun to be introduced into the United States by the early twentieth century. ERNST FREUND, STANDARDS OF AMERICAN LEGISLATION 22 (3d impression 1931) (1917); *see also* Charles W. McCurdy, *The "Liberty of Contract" Regime in American Law*, *in* THE STATE AND FREEDOM OF CONTRACT 161, 162-63 (Harry N. Scheiber ed., 1998). 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. FREUND, *supra*, at 22; *see* McCurdy, *supra*, at 163. Rather, as legislation intended for the "relief" or "elevation" of particular groups of persons, presumed to be the "less favored classes of the community," these laws were by definition unconstitutional under traditional American standards. *See* McCurdy, *supra*, at 163.

philosophy they perceived in the Court's protection of liberty of contract,[12] and their personal hostility to this philosophy colored their criticism of the jurisprudence.[13] Indeed, some Progressive activists challenged the legitimacy of substantive due process itself, advocating legislation or a constitutional amendment to strip courts of their judicial review powers to enforce the Due Process Clauses of the Constitution.[14]

So pervasive has been the influence of Justice Holmes's and the Progressive Era activists' characterizations of *Lochner* and of the Court's liberty of contract jurisprudence generally that the decision in *Lochner* has been widely condemned as an egregious instance of judicial activism.[15] The *Lochner* Era 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 to engraft a laissez-faire ideology—commonly caricatured as synonymous with the doctrines of "Social Darwinism"[16]—upon the Constitution.[17]

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12. *See, e.g.*, Pound, *supra* note 10, at 457 (criticizing judicial protection of freedom of contract as the result of an "individualist conception of justice," which "exaggerates private right at the expense of public right").

13. 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, *id.* at 190, and advising Teddy Roosevelt on antitrust policy and on the "social and industrial" planks of his 1912 platform, *id.* at 226-27.

14. GUNTHER, *supra* note 13, at 249. Charles Warren, for example, warned that the term "liberty"—as used in the Fourteenth Amendment Due Process Clause and as "newly defined" by the Court in its liberty of contract decisions—would "become a tremendous engine for attack on State legislation." Warren, *supra* note 10, at 462. Learned Hand, as an advocate of maximum hours, minimum wages, and workers' compensation legislation, was especially critical of judicial decisions invalidating such legislation; he 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. GUNTHER, *supra* note 13, at 249.

15. *See, e.g.*, Benedict, *supra* note 7, at 295 ("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.").

16. *See, e.g.*, KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 190 (1989).

17. *See* CLYDE E. JACOBS, LAW WRITERS AND THE COURTS: THE INFLUENCE OF THOMAS M. COOLEY, CHRISTOPHER G. TIEDEMAN, AND JOHN F. DILLON UPON AMERICAN CONSTITU-

Another aspect of the traditional view, inspired by Justice Holmes's criticism of legal formalism,[18] associates the Court's supposed laissez-faire constitutionalism with formalism, or the rather mechanical application of formal rules of law regarded as objective and scientifically discoverable.[19] This formalism contrasts with the "sociological jurisprudence" embraced by Progressive Era scholarship.[20]

This traditional view so dominates modern scholarship that it has become the orthodoxy of constitutional law casebooks,[21] constitutional

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TIONAL LAW (1954); ARNOLD M. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895 (1960); BENJAMIN R. TWISS, LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT (Russell & Russell Inc., 1962) (1942). A modern variant of the traditional view sees 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, 874 (1987).

18. In his 1881 book *The Common Law*, Justice Holmes famously described law as being based not on "logic" but on "experience." OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881). He wrote:

> The felt necessities of the time, the prevalent moral and political theories, intuitions 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.

Id.

19. *See* HALL, *supra* note 16, at 221-24. The author of a leading text in American legal and constitutional history sees laissez-faire constitutionalism as a synthesis of laissez-faire ideology with the formalistic theories of law found in the great legal treatises of the late nineteenth century. *Id.* at 222-23. The treatise writers—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." *Id.*

20. *See* ALFRED H. KELLY, WINFRED A. HARBISON & HERMAN BELZ, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 454 (7th ed. 1991). As a leading constitutional history textbook describes it, sociological jurisprudence was "a theory of law that its proponents regarded as more realistic, democratic, and humane," viewing law "not [as] a body of immutable principles and rules, but rather an institution shaped by social pressures that was constantly changing." *Id.* 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," which 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.

21. *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 biases in criticizing the *Lochner* Era as "a rather dreary one in the

and legal history textbooks,[22] constitutional commentaries written by both conservatives and liberals,[23] and even opinions written by Supreme Court justices themselves.[24]

Although many scholars continue to accept unquestioningly the traditional view's caricature of *Lochner* and of the Court's protection of liberty of contract during the *Lochner* Era, in recent decades some important new scholarship has called into question the neo-Holmesian orthodoxy. In reassessing the *Lochner* Era, revisionist scholars have challenged virtually all the major assumptions upon which it rests: for example, that liberty of contract favored the economic interests of employers and those who were "well-off,"[25] that *Lochner* Era jurists

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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).

22. *See, e.g.*, DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888-1986, at 45 (1990) ("liberty of contract found its way into the Constitution by bald fiat"); HALL, *supra* note 16, at 190, 222 (describing laissez-faire constitutionalism as a combination of Social Darwinist laissez-faire ideology and legal formalism empowering "reactionary" appellate judges); 2 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 justices as "intellectual prisoners, held captive by the doctrines of laissez-faire and the inverted logic of legal formalism").

23. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 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. BORK, *supra*, at 46. Tribe, on the other hand, accepts substantive due process protection of certain noneconomic liberty interests, such as the right to privacy. TRIBE, *supra*, at 12-13.

24. *See, e.g.*, Planned Parenthood of Se. Pa. 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"); 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[ed] economic problems, business affairs, or social conditions").

25. *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) [hereinafter Bernstein, *Roots of the Underclass*] (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 *Lochner* Era jurisprudence—and with it, the triumph of the post-New

were "Social Darwinists,"[26] or that laissez-faire constitutionalism generally was grounded in a mechanical, or formalistic, jurisprudence.[27] Most importantly, although disagreeing about the precise origins of liberty of contract, the revisionist scholars basically agree that the orthodox view errs in characterizing the doctrine as, in the words of one scholar, "essentially unprincipled or rooted in extraconstitutional policy preferences for laissez-faire economics."[28] Rather, they argue, the doctrine was grounded in well-established constitutional traditions.[29]

In the disagreement about the precise origins of liberty of contract, two distinct schools of thought have emerged within revisionist scholarship. One school, emphasizing substantive due process, traces 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,[30] as well as

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Deal regulatory state—not only has strengthened racially exclusive labor unions but also has contributed to a massive loss of employment opportunities for black persons).

26. *See* Bernstein, *Roots of the Underclass*, *supra* note 25, at 88 n.11 (citing scholarship arguing that "Social Darwinism actually had minimal influence on American laissez-faire liberal 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").

27. *See* David N. Mayer, *The Jurisprudence of Christopher G. Tiedeman: A Study in the Failure of Laissez-Faire Constitutionalism*, 55 MO. L. REV. 93, 99-101 (1990) (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).

28. HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 4 (1993).

29. *See* 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: RACE, RELIGION, AND ABORTION RECONSIDERED (1994). In this provocative book that challenges modern constitutional law from a conservative perspective, Professor Presser nevertheless disagrees with some fellow conservatives on the merits of the decision in *Lochner*. PRESSER, *supra*. Conservative criticism of the Supreme Court's liberty of contract 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 143. 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 contract rights. *Id.* at 141-42.

30. *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

the "free labor" ideology of the antislavery movement and nineteenth-century Republican Party.[31] The other school, de-emphasizing substantive due process, traces the origins of liberty of contract instead to a hostility against "special," or "class," legislation deeply ingrained in Anglo-American law and political theory.[32] Whatever they see as the roots of liberty of contract—whether in traditional, substantive uses of due process or in constitutional prohibitions of class legislation—the revisionist scholars nevertheless agree that rather than engaging in judicial activism on behalf of a laissez-faire ideology, judges in the *Lochner* Era were merely enforcing traditional constitutional limits on the police power.

Taking a fresh look at the Supreme Court's liberty of contract jurisprudence in light of its historical antecedents, this Article argues that the revisionist consensus is indeed correct: the orthodox view of the *Lochner* Era is fundamentally flawed in a number of respects. Indeed, this Article argues that the orthodox view is wrong about virtually all its assumptions, which were based on myths originally propounded by Progressive Era scholars and which have been perpetuated by modern scholars.

One of the most important of these myths is that early twentieth-century judges who protected liberty of contract did so by engaging in a form of judicial activism, specifically by inventing substantive due process and using it to create new constitutional protections for liberty. What this myth about so-called laissez-faire constitutionalism ignores is

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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).

31. *See* ERIC FONER, POLITICS AND IDEOLOGY IN THE AGE OF THE CIVIL WAR 57-76 (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.

32. *See* Benedict, *supra* note 7, at 305; GILLMAN, *supra* note 28, at 10; Alan Jones, *Thomas M. Cooley and "Laissez-Faire Constitutionalism": A Reconsideration*, 53 J. AM. HIST. 751, 752 (1967). Professor Gillman's emphasis on class legislation has made his interpretation particularly attractive to modern left-liberal scholars who share his desire to distinguish modern liberal substantive due process jurisprudence from the Court's protection of liberty of contract during the *Lochner* Era. *See* GILLMAN, *supra* note 28, at 11. Gillman himself has confessed to some discomfort at being associated with revisionist scholars who take a more positive view of *Lochner* Era jurisprudence. *See id.* 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 reciting some incantation about the importance in our constitutional tradition of rights to property and contract." *Id.*

the long history of substantive due process protections for liberty and property rights—a body of law concerning constitutional limits on government police powers that was well-established by the late nineteenth century. Moreover, laissez-faire constitutionalism truly is a misnomer, for judicial protection of liberty of contract never involved doctrinal application of libertarian, or laissez-faire, principles. Rather, the Court during the *Lochner* Era was merely enforcing these traditional constitutional limits on the scope of the police power.

Part II, the major part of this Article, examines the historical foundations of liberty of contract, tracing the roots of the doctrine to two lines of precedents in early American constitutional law: first, the protection of economic liberty and property rights through substantive due process or equivalent constitutional provisions; and second, the limitation of state police powers through the enforcement of certain written and unwritten constitutional rules. As Part II.C shows, the addition of the Fourteenth Amendment made it possible for courts to use the Constitution to protect individual economic liberty and property rights against state legislation and, therefore, to limit state police powers.

Part III examines the Supreme Court's protection of liberty of contract in its heyday, during the first third of the twentieth century. Part III.A analyzes the standard of review used by the Court in protecting liberty of contract. Rather than doing what Justice Holmes accused the majority of doing in *Lochner*—reading laissez-faire principles, such as Herbert Spencer's law of equal freedom, into the Constitution—the Justices instead were merely following a general presumption in favor of liberty that could be rebutted by a showing of a valid exercise of the police power in one of several recognized categories that were exceptions to the general rule favoring liberty. Part III.B surveys the Court's major liberty of contract decisions. Part III.B.1 focuses on economic liberty, not only the most familiar line of decisions, including *Lochner v. New York*[33] and *Adkins v. Children's Hospital of the District of Columbia*,[34] but also other important aspects of economic liberty. Part III.B.2 surveys other less familiar decisions, showing the Court's protection of liberty in its many other facets, including the protection of privacy rights and the prohibition of racial classifications. This part of the Article shows that what the courts protect today as "the right to privacy" really is the last vestige of liberty of contract jurisprudence. Part III.B.3 discusses a significant case from the early twentieth century in which the Supreme Court struck down a mandatory racial segregation, or "Jim

33. 198 U.S. 45 (1905).
34. 261 U.S. 525 (1923).

Crow," law on liberty of contract grounds—a case that is virtually forgotten today because it does not fit the laissez-faire constitutionalism stereotype.

Finally, Part IV 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 come to an end as a result of political pressures in 1937—the so-called switch in time that saved nine, in 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. What resulted from the demise of the Court's protection of liberty of contract as a fundamental right was modern substantive due process jurisprudence, with the post-1937 "rational basis" test barely providing minimal protection for general liberty and property rights.

II. HISTORICAL FOUNDATIONS OF LIBERTY OF CONTRACT

Contrary to Roscoe Pound's assertion that liberty of contract was a "new" doctrine that appeared suddenly in late nineteenth-century jurisprudence,[35] the roots of the doctrine can be found in two lines of precedents well-established in early American constitutional law: first, the protection of economic liberty and property rights through substantive due process or equivalent constitutional provisions; and second, the limitation of state police powers through the enforcement of certain written and unwritten constitutional rules. What was new in the late nineteenth century was judicial identification of these doctrines, taken together, as the right of liberty of contract and their protection through the Fourteenth Amendment.

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35. Pound, *supra* note 10, at 455. Pound did not accept the prevalent view that liberty of contract arose from individual judges projecting their "personal, social and economic views into the law," observing that "when a doctrine is announced with equal vigor and held with equal tenacity by courts of Pennsylvania and of Arkansas, of New York and of California, of Illinois and of West Virginia, of Massachusetts and of Missouri, we may not dispose of it so readily." *Id.* He instead identified seven "causes" for the doctrine's appearance in American jurisprudence—among them, the prevalence of "an individualist conception of justice" and of "mechanical" legal reasoning in late nineteenth century legal thought. *Id.* at 457-58.

A. *Substantive Due Process in Early American Law*

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 classic 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. In the words of one preeminent legal historian,

> Liberty was the most cherished right possessed by English-speaking people in the eighteenth century. It was both an ideal for the guidance of governors and a standard with which to measure the constitutionality of government; both a cause of the American Revolution and a purpose for drafting the United States Constitution; both an inheritance from Great Britain and a reason republican common lawyers continued to study the law of England.[36]

Thus, the concept of liberty was central to Anglo-American constitutional thought during the era of the American Revolution; indeed, it was central to early American law.[37] The Patriot leaders of the Revolution, influenced profoundly by English radical Whig opposition thought,[38] made liberty even more essential by transforming it from the most treasured right under law to the touchstone for the legitimacy of law itself.[39]

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

37. *See id.*

38. *See* David N. Mayer, *The English Radical Whig Origins of American Constitutionalism*, 70 WASH. U. L. Q. 131 (1992) (discussing English Radical Whig thought and its influence on American constitutionalism). The radical Whig thinkers on both sides of the Atlantic departed from mainstream English legal theory by conceptualizing liberty apart from law; among other key principles in radical Whiggism was its embrace of natural rights theory as the source of liberty. *See id.* at 191-94. In terms of constitutionalism, two fundamental assumptions of radical Whig thought—and of the framers of early American constitutions—were, "first, that the essential function of government was to protect the rights of individuals; and second, that the essential function of a constitution was to limit or control governmental power," which inherently threatened individual rights. *Id.* at 174.

39. *See* REID, *supra* note 36, at 120. Reid notes that the concept of liberty held by English-speaking peoples in the eighteenth century differed significantly from its meaning today. *See id.* "Liberty in the age of the American Revolution was not the sum of enumerated rights, the rights to speech, press, security, property, or isonomy. It was rather government by the rule of law, government by the customary British constitution." *Id.* Liberty, he emphasized, meant "freedom from arbitrary power, from government by will and pleasure, from government by a sovereign, unchecked monarch or from

As historian Gordon Wood has shown, the American Revolution was far more radical than commonly believed.[40] Scholars, particularly legal historians, who have focused on the constitutional arguments advanced by American Patriot leaders,[41] have overlooked the extent to which the Revolution transformed not only the form of American government but also American society and, most importantly, Americans' view of government and the law. By rejecting the British monarchical system, the Founders also rejected the paternalism through which the British system operated in the realms of law and politics.[42] The rejection of paternalism was manifest in many developments in Revolutionary Era

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government by a sovereign, unchecked Parliament." *Id.* By emphasizing the importance of mainstream thought over English radical Whig ideology, *see id.* at 8, however, Reid also overlooks the degree to which American Revolutionaries departed from mainstream British legal thought. Patriot leaders not only rejected arbitrary rule by government—whether King George III or the British Parliament—but also rejected the identification of liberty with the rule of law. *See* Mayer, *supra* note 38, at 192. As the discussion in the next several paragraphs suggests, Americans in the founding period saw liberty as something more than mere freedom to do what the law permitted: they followed English radical Whig philosophers of government in identifying liberty with natural freedom—in other words, the freedom of individuals to do what they will, provided they do not violate the equal right of others. *See id.* at 191 (summarizing the state of nature as described in John Locke's *Second Treatise on Government* and other Whig writers); *see also* JOHN LOCKE, THE SECOND TREATISE ON CIVIL GOVERNMENT (Prometheus Books 1986) (1690). Constitutionally speaking, what was truly radical about the American Revolution was that it made the protection of individual rights (including liberty in this broader sense as well as property rights) the test for a government's legitimacy. *See* Mayer, *supra* note 38, at 193.

40. *See* GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION (1992). Wood argues that the American Revolution was "as radical and social as any revolution in history," *id.* at 5, and was "the most radical and most far-reaching event in American history," altering not only the form of government—by eliminating monarchy and creating republics—but also Americans' conception of public or state power, *id.* at 8. "Most important," he adds, "it made the interests and prosperity of ordinary people—their pursuits of happiness—the goal of society and government." *Id.*

41. *See, e.g.*, JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS 9-10 (1986) (arguing that the rights regarded as essential by American Whigs during the Revolutionary period were English constitutional rights).

42. *See* WOOD, *supra* note 40, at 145-68 (discussing various ways in which traditional authority was questioned by Americans even before the Revolution). Similarly, with regard to political thought, Wood finds that

> [b]y adopting the language of the radical whig opposition and by attacking the monarchical abuse of family influence and patronage, . . . American revolutionaries were not simply expressing their resentment of corrupt political practices that had denied some of them the highest offices of colonial government. They actually were tearing at the bonds holding the traditional monarchical society together. Their assault necessarily was as much social as it was political.

Id. at 175.

society—among them the rise of contracts[43] and even the growing popularity of laissez-faire economics, perhaps best illustrated by the Philadelphia merchants' opposition to price controls in 1777-1778.[44] Moreover, Wood adds, "[t]he Revolution did not merely create a political and legal environment conducive to economic expansion; it also released powerful popular entrepreneurial and commercial energies that few realized existed and transformed the economic landscape of the country."[45]

The far-reaching social changes that came into being with the American Revolution also were accompanied by correspondingly

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43. *Id.* at 162-63. Discussing the transformations in the legal system, Wood concludes that Americans modernized and republicanized English paternalism, replacing it with a "new conception of contract as a consensual bargain between two equal parties." *Id.* at 162. The individualistic conception of contract is discussed in Part III.A. By the mid-eighteenth century, Wood notes, "positive written contracts and other impersonal legal instruments were more and more replacing the informal, customary, and personal ways people had arranged their affairs with one another." *Id.* at 163.

44. *See* ERIC FONER, TOM PAINE AND REVOLUTIONARY AMERICA 151-53 (1976). Foner notes that while Patriot leaders such as Franklin and Jefferson had long believed in freedom of trade, it was during the Revolution itself that middle-class Americans such as the Philadelphia merchants challenged the "traditional idea that government had a responsibility to regulate commerce for the common good" and instead advocated the "new doctrine of laissez-faire," the philosophical underpinnings of which were "articulated most systematically in the writings of Adam Smith." *Id.* at 152-53. Significantly, Foner finds near-universal opposition, on principle, to governmental price controls among both merchants and political writers like Thomas Paine. *Id.* at 152-53, 181. "Respectable merchant opinion had no use for price-fixing legislation; the maxim that 'trade can best regulate itself' had won virtually universal approval in the mercantile community." *Id.* at 152-53. By 1780, "[b]oth major [political] parties in Philadelphia quickly adopted the position of the merchants of 1779, that price controls flew in the face of the rights of property." *Id.* at 180. By about the same time, Paine had fully embraced what Foner calls "the 'modern' school of laissez-faire economics." *Id.* at 181. "Never again would [Paine] support the regulation of prices"; instead, he "came to accept the self-regulating market—in labor as well as in goods—as an instrument of progress." *Id. Cf.* JOHN KEANE, TOM PAINE: A POLITICAL LIFE 190 (1995) (arguing that while "Paine was no believer in self-regulating 'free markets,'" he nevertheless "certainly believed . . . that market mechanisms . . . could never be eliminated from the heart of civil societies without destroying their vitality" and that "[i]ndustry, commerce, and agriculture regulated by means of money-based private exchanges were essential for a free civil society").

45. WOOD, *supra* note 40, at 8. Wood emphasizes that "[i]n a monarchical world of numerous patron-client relations and multiple degrees of dependency, nothing could be more radical than this attempt to make every man independent. What was an ideal in the English-speaking world now became for Americans an ideological imperative." *Id.* at 179. Discussing "the myth that the American Revolution was sober and conservative while the French Revolution was chaotic and radical," Wood adds that "only if we measure radicalism by violence and bloodshed can the myth be sustained; by any other measure the American Revolution was radical." *Id.* at 231.

significant changes in law and constitutionalism. Although early American law fell short of the ideal envisioned by late nineteenth-century classical liberals,[46] it nevertheless departed radically from the British paternalistic system by the degree to which it explicitly protected and promoted individual freedom. To some extent, the uniquely individualistic premises of the American legal system did not suddenly appear in 1776; as legal historians have shown, the so-called Americanization of the English common law was a long, evolutionary process that had begun well before the Revolution.[47] With independence, however, the American legal system—and particularly the constitutional system—was free to depart dramatically from its English roots. "We have it in our power to begin the world over again," wrote Thomas Paine, succinctly describing the unprecedented opportunity Americans had after 1776 to frame new forms of government.[48]

When the Second Continental Congress adopted Thomas Jefferson's draft of the Declaration of Independence, it declared "life, liberty, and the pursuit of happiness" to be inherent and unalienable rights which government was created to secure.[49] In drafting the Declaration, Jefferson sought, as he later described it, to express the "'harmonizing sentiments'" of American Whigs.[50] Those sentiments included the "self-evident"[51] truth of the theory of natural rights as expounded by English radical Whigs, Enlightenment philosophers, and legal theorists such as Jean Jacques Burlamaqui, the Swiss jurist whose treatise[52] on natural law influenced Jefferson and his contemporaries.[53] A detailed exposi-

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46. As discussed briefly in Part II.B., notwithstanding the constitutional protections of liberty and property rights, courts in early America often upheld various types of governmental regulations as valid exercises of state police powers.

47. *See, e.g.*, WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830 (1975).

48. THOMAS PAINE, COMMON SENSE (1776), *reprinted in* COMMON SENSE, THE RIGHTS OF MAN, AND OTHER ESSENTIAL WRITINGS OF THOMAS PAINE 66 (Meridian 1984) (1969).

49. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

50. DAVID N. MAYER, THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON 25-26 (1994) (quoting a letter from Thomas Jefferson to Henry Lee, May 8, 1825). On Jefferson's draft of the Declaration generally, see *id.* at 41-45.

51. On the meaning of "self-evident," see *id.* at 42; *see also* I. BERNARD COHEN, SCIENCE AND THE FOUNDING FATHERS 122-32 (1995) ("self-evident" truths as synonymous with "axiom").

52. J.J. BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITIC LAW (7th ed., Joseph H. Riley & Co. 1859) (1747).

53. *See* COHEN, *supra* note 51, at 112; MORTON WHITE, THE PHILOSOPHY OF THE AMERICAN REVOLUTION 37-41 (1978). Burlamaqui's treatise, *The Principles of Natural and Politic Law*, was first published in French in 1747 and republished in many English language editions. WHITE, *supra*, at 37. Burlamaqui's influence on American lawyers and judges extended well into the twentieth century. *See, e.g.*, ARKES, *supra* note 30, at vi

tion of the early American understanding of natural rights theory is beyond the scope of this Article. However, in essence, one can summarize it by noting that rights such as life, liberty, and the pursuit of happiness are possessed by persons by their nature, or status as human beings, and that therefore these rights are "inalienable."[54] As Mark Hopkins, former president of Williams College, observed in a lecture he gave in Boston in 1862, "Inalienable rights are those of which a man cannot divest himself by contract; which he may not, under any circumstances, lawfully demit; but he may forfeit them by crime, and be wrongfully deprived of them by others."[55]

Both liberty and pursuit of happiness, as the terms were understood by the Founders, were rather broad concepts. Although some scholars have asserted that the Founders' conception of liberty was quite narrow, limited only to "freedom from physical restraint of the person,"[56] the concept as understood in early American political thought was quite broad, encompassing economic liberty as well as other forms of liberty less tangible than mere freedom from physical restraint.

Cato's Letters, the great radical Whig tract of the 1720s that continued to be quoted in American newspapers well into the late eighteenth century, defined liberty comprehensively as

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(frontispiece, reproducing a page from the future Justice George Sutherland's commonplace book, quoting Burlamaqui's definition of natural liberty, in 1882).

54. Randy E. Barnett, *A Law Professor's Guide to Natural Law and Natural Rights*, 20 HARV. J.L. & PUB. POL'Y 655 (1997). Although many modern scholars use the terms natural law and natural rights loosely and interchangeably, they have distinct meanings. Barnett nicely summarizes the distinction:

> Natural law refers to the given-if-then *method of analysis* where the "given" is the nature of human beings and the world in which they live. This method can be applied to a number of distinct problems, the "if." . . . When discussing the contours of the moral jurisdiction defined by principles of justice, or the problem of distinguishing *right* from *wrong* behavior, which is supposedly based on the nature of human beings and the world in which they live, the appropriate term would be *natural rights*.

Id. at 680. "[N]atural rights define a moral space or liberty, as opposed to license, in which we may act free from the interference of other persons"; natural law, or more precisely, natural-law ethics, on the other hand, "*instructs us on how to exercise the liberty that is defined and protected by natural rights.*" *Id.* (internal footnote omitted).

55. MARK HOPKINS, LECTURES ON MORAL SCIENCE 259 (1876). For a modern explanation on why inalienable rights are nevertheless forfeitable, see RANDY BARNETT, THE STRUCTURE OF LIBERTY 77 (1998).

56. Warren, *supra* note 10, at 440 (internal quotation marks omitted) (defining "liberty" without historical evidence to support his position). Some modern judicial-restraint conservatives similarly have asserted this narrow view of liberty. *See, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 270 (1977).

> the 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.[57]

Liberty included

> the Right of every Man to pursue the natural, reasonable, and religious Dictates of his own Mind; to think what he will, and act as he thinks, provided he acts not to the Prejudice of another; to spend his own Money himself, and lay out the Produce of his Labour his own Way; and to labour for his own Pleasure and Profit, and not for others who are idle, and would live and riot by pillaging and oppressing him, and those that are like him.[58]

More succinctly, "Liberty is, to live upon one's own Terms," the opposite state of "Slavery," which is "to live at the mere Mercy of another."[59]

While the authors of *Cato's Letters* acknowledged that this "natural and absolute Liberty" must be restrained by civil government, they emphasized that the restraint must be partial, or limited, consistent with the purpose for which government was established.[60] "The entering into political Society, is so far from a Departure from this natural Right, that to preserve it, was the sole Reason why Men did so; and mutual Protection and Assistance is the only reasonable Purpose of all reasonable Societies."[61] If the power of government were to go beyond this legitimate purpose—that is to say, if the restraint put upon natural liberty were to become unlimited—then tyranny would result.[62] "Free Government is the protecting the People in their Liberties by stated Rules; Tyranny is a brutish Struggle for unlimited Liberty to one or a few, who would rob all others of their Liberty, and act by no Rule

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57. Cato, Letter No. 62: An Enquiry into the Nature and Extent of Liberty (Jan. 20, 1721) *in* 1 JOHN TRENCHARD & THOMAS GORDON, CATO'S LETTERS: OR, ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, AND OTHER IMPORTANT SUBJECTS 244-45 (photo. reprint 1969) (3d ed. 1733). On the importance of this four-volume work in early American political thought, see generally CLINTON ROSSITER, SEEDTIME OF THE REPUBLIC: THE ORIGIN OF THE AMERICAN TRADITION OF POLITICAL LIBERTY 141 (1953).

58. TRENCHARD & GORDON, *supra* note 57, at 248.

59. *Id.* at 249. The juxtaposition of liberty and slavery was commonplace in eighteenth-century radical Whig thought and in the writings of American revolutionaries. *See* REID, *supra* note 36, at 38-59.

60. TRENCHARD & GORDON, *supra* note 57, at 248.

61. *Id.* at 245.

62. *Id.* at 248.

but lawless Lust."[63] Through *Cato's Letters*, Trenchard and Gordon also acknowledged the danger of majority tyranny, calling it

> a mistaken Notion in Government, that the Interest of the Majority is only to be consulted, since in Society every Man has a Right to every Man's Assistance in the Enjoyment and Defence of his private Property; otherwise the greater Number may fell the lesser, and divide their Estates amongst themselves; and so, instead of a Society, where all peaceable Men are protected, become a Conspiracy of the Many against the Minority.[64]

Burlamaqui's influential treatise on natural law similarly defined liberty quite broadly and emphasized that in civil society, positive law supplemented but did not supplant natural law and the rights held thereunder.[65] Following an analysis reminiscent of the "state of nature" posited by English radical Whig philosopher John Locke,[66] Burlamaqui defined natural liberty as essentially synonymous with individuals' freedom to do as they please provided they do not interfere with the equal freedom of others:

> Natural liberty is the right, which nature gives to all mankind, of disposing of their persons and property, after the manner they judge most convenient to their happiness, on condition of their acting within the limits of the law of nature, and of their not abusing it to the prejudice of their fellow men. To this right of liberty there is a reciprocal obligation corresponding, by which the law of nature binds all mankind to respect the liberty of other men, and not to disturb them in the use they make of it, so long as they do not abuse it.[67]

Burlamaqui then compared natural liberty to "civil liberty," which he defined as "nothing more than natural liberty, so far restrained by human laws (and no further) as is necessary for the preservation of

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63. *Id.*

64. *Id.* at 245-46.

65. *See* BURLAMAQUI, *supra* note 52, at 225-29.

66. LOCKE, *supra* note 39, ch. 2, §§ 4-6, at 8-9. John Locke was perhaps the most famous and influential of the English radical Whig philosophers in early American political thought. In his most important work of political philosophy, his *Second Treatise on Civil Government*, Locke posited a "state of Nature" in which individuals have "perfect freedom to order their actions, and dispose of their possessions and persons as they think fit, within the bounds of the law of Nature." *Id.* at 8. That law, Locke maintained, was "reason," which teaches mankind "that, being all equal and independent, no one ought to harm another in his life, health, liberty or possessions." *Id.* at 9.

67. BURLAMAQUI, *supra* note 52, at 225-26. As noted in Part III.A *infra*, Burlamaqui's view of natural liberty—like the concept of liberty in *Cato's Letters*—was strikingly similar to the view adopted by classical liberal thinkers in the nineteenth century, particularly Herbert Spencer's "law of equal freedom." *See* SPENCER, *supra* note 8, at 95.

human rights, and the maintenance of peace and order in society."[68] Burlamaqui noted that this state has two advantages over natural liberty: first, "the right of insisting that the magistrate shall confine himself within the limits of the power conferred upon him, and use it agreeably to the purposes for which he was intrusted with it"; and second, "the security which the people should reserve to themselves for the preservation of the right above named."[69] From these corollary principles of limitations on government power and the people's right of self-defense against the government itself, Burlamaqui derived his final definition: "civil liberty is natural liberty, regulated by such laws as are necessary for the maintenance of justice, and attended with the right of insisting that the government shall make the proper use of its authority, and a security that this right shall be respected."[70]

Liberty, so conceptualized, encompassed the right to property. Indeed, liberty and property were so interconnected in early American political thought that they were almost impossible to separate.[71] As historian Edmund S. Morgan has observed, "For eighteenth-century Americans, property and liberty were one and inseparable, because property was the only foundation yet conceived for security of life and liberty: without security for his property, it was thought, no man could live or be free except at the mercy of another."[72] As an essayist in a New York newspaper observed in 1735, both the full enjoyment of liberty and the full protection of property rights were essential in a well-ordered society: "As for Liberty, it cannot be bought at too great a Rate; Life itself is well imployed [sic] when 'tis hazarded for Liberty. . . . As for Property, it is so interwoven with Liberty, that whenever we perceive the latter weakened, the former cannot fail of being impaired."[73] And as a modern legal historian has noted,

> liberty in the eighteenth century was personal property. Indeed, it was the concept of property that bestowed on liberty much of its substance as a constitutional entity . . . . For, as everyone then appreciated, liberty existed through security of property and yet, as John Dickinson said, liberty itself was the *only security* of property.[74]

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68. BURLAMAQUI, *supra* note 52, at 227.

69. *Id.* at 227-28.

70. *Id.* at 228.

71. *See generally* REID, *supra* note 36, at 70-73 (discussing property as "the security of liberty"); *see also* LAWRENCE H. LEDER, LIBERTY AND AUTHORITY: EARLY AMERICAN POLITICAL IDEOLOGY, 1689-1763, at 125 (1968).

72. EDMUND S. MORGAN, THE CHALLENGE OF THE AMERICAN REVOLUTION 55 (1976).

73. Letter to the Editor, N.Y. WKLY. J., June 16, 1735, *cited in* LEDER, *supra* note 71, at 125.

74. REID, *supra* note 36, at 119.

"Pursuit of happiness," as used in the Declaration of Independence and in many early state constitutions, also encompassed economic liberty and property rights; it included the right to acquire, possess, and dispose of property.[75] The bill of rights for the Virginia state constitution, written by George Mason and adopted on June 12, 1776,[76] 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 persuing [sic] and obtaining happiness and safety."[77] Virtually identical provisions identifying property rights as natural and inalienable appeared in the Pennsylvania constitution of 1776,[78] the Massachusetts constitution of 1780,[79] the New Hampshire constitution of 1783,[80] and in many other state

75. *See generally* MAYER, *supra* note 50, at 77-80 (discussing Jefferson's theory of rights and particularly his view of property rights). Jefferson followed Burlamaqui in regarding the right to property generally as a natural right, albeit a secondary-level natural right because it was "adventitious"; that is, dependent upon civil law for its full realization. *Id.* at 80. On Burlamaqui's treatment of property rights, see WHITE, *supra* note 53, at 215-28.

76. BERNARD SCHWARTZ, 1 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 231 (1971).

77. Virginia Declaration of Rights art. I (1776), *reprinted in* 1 SCHUARTZ, *supra* note 76, at 234 (emphasis added). Jefferson had access to Mason's declaration of rights while writing the Declaration of Independence. *See* MAYER, *supra* note 50, at 78. The famous clause Jefferson drafted in the second paragraph of the Declaration expressed the same ideas as Mason's declaration but more concisely. Thus, instead of the awkwardly long phrase "rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity"—the phrase omitted in the place of the ellipsis in the quotation in the main text of this Article—Jefferson substituted the single word "inalienable." *See* THE DECLARATION OF INDEPENDENCE para. 2; Virginia Declaration of Rights art. I, *reprinted in* SCHWARTZ, *supra* note 76, at 234. Similarly, Jefferson's phrase "pursuit of happiness" was a more concise expression of the rights elaborated by Mason here and in other early state constitutions. *See* MAYER, *supra* note 50, at 78.

78. Pennsylvania Declaration of Rights art. I (1776), *reprinted in* SCHWARTZ, *supra* note 76, at 264 ("That all men are born equally free and independent, and have certain natural, inherent and inalienable rights, amongst which are, the enjoying and defending life and liberty, *acquiring, possessing and protecting property*, and pursuing and obtaining happiness and safety." (emphasis added)).

79. Massachusetts Declaration of Rights art. I (1780), *reprinted in* SCHWARTZ, *supra* note 76, at 340 ("All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of *acquiring, possessing, and protecting property*; in fine, that of seeking and obtaining their safety and happiness." (emphasis added)).

80. New Hampshire Bill of Rights art. II (1783), *reprinted in* SCHWARTZ, *supra* note 76, at 375 ("All men have certain natural, essential, and inherent rights; among which are—the enjoying and defending life and liberty—*acquiring, possessing and protecting property*—and in a word, of seeking and obtaining happiness." (emphasis added)).

constitutions in the early nineteenth century.[81] Indeed, a leading scholar of the early state constitutions has concluded from these 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."[82]

Further evidence of the interrelatedness of liberty and property rights in early American thought can be found in James Madison's 1792 essay on property.[83] According to Madison, the term *property* can be understood not only in the narrow sense, such as "a man's land, or merchandize [sic], or money" but also in a broader sense, as "every thing to which a man may attach a value and have a right; and which leaves to every one else the like advantage."[84] In this "larger and juster" sense,

> [One] has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them.
>
> He has a property very dear to him in the safety and liberty of his person.
>
> He has an equal property in the free use of his faculties and free choice of the objects on which to employ them.
>
> In [short], as a man is said to have a right to his property, he may be equally said to have a property in his rights.[85]

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81. *E.g.*, OHIO CONST. art. I, § 1 (1851), *in* 1 DOCUMENTS OF AMERICAN CONSTITUTIONAL AND LEGAL HISTORY 378 (Melvin I. Urofsky & Paul Finkelman eds., 3d ed. 2008) ("All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, *acquiring, possessing, and protecting property*, and seeking and obtaining happiness and safety." (emphasis added)).

82. WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 192 (Rita Kimber & Robert Kimber trans., Rowman & Littlefield Pubs. exp. ed. 2001) (1973).

83. James Madison, *Property*, NAT'L GAZETTE, Mar. 27, 1792, *reprinted in* 14 THE PAPERS OF JAMES MADISON 266-68 (Robert A. Rutland et al. eds., 1983). The essay was written for the *National Gazette*, the Republican Party newspaper published by Philip Freneau in Philadelphia and launched with Madison's support. *See* IRVING BRANT, JAMES MADISON: FATHER OF THE CONSTITUTION, 1787-1800 334, 336 (1950). Madison was an occasional contributor to the paper, writing nineteen unsigned essays that helped define the Republican opposition to Treasury Secretary Alexander Hamilton's measures. *See* LANCE BANNING, THE SACRED FIRE OF LIBERTY: JAMES MADISON AND THE FOUNDING OF THE FEDERAL REPUBLIC 348 (1995). In the opinion of another Madison biographer, however, Madison's essays had a tone "so scholarly that they provided no excitement for readers itching for a fight with the Hamilton crowd"—an attribute probably illustrated nicely by this particular essay. ROBERT ALLEN RUTLAND, JAMES MADISON: THE FOUNDING FATHER 108 (1987).

84. Madison, *supra* note 83, at 266 (emphasis omitted).

85. *Id.*

Madison then followed Locke in maintaining that the essential function of government is to protect property in both the narrow and broad senses—to protect all the rights of individuals: "Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*."[86] If government exercises "an excess of power," then "property of no sort is duly respected," he added.[87] "No man is safe in his opinions, his person, his faculties, or his possessions."[88]

Indeed, to Madison, the standard for measuring a good or just government was the degree to which it impartially protected property rights of all sorts: "That is not a just government, nor is property secure under it," where "a man's religious rights are violated by penalties, or fettered by tests, or taxed by a hierarchy," or where press gangs are in operation, arbitrarily seizing "one class of citizens for the service of the rest," and thereby violating "the property which a man has in his personal safety and personal liberty."[89] Madison similarly regarded with contempt governmental restrictions on individuals' economic freedom, particularly their freedom to earn a living:

> That is not a just government, nor is property secure under it, where arbitrary restrictions, exemptions, and monopolies deny to part of its citizens that free use of their faculties, and free choice of their occupations, which not only constitute their property in the general sense of the word; but are the means of acquiring property strictly so called.[90]

Nor did he favorably regard excessive or unequal taxation.[91]

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86. *Id.*

87. *Id.*

88. *Id.* Being no anarchist, Madison added, "Where there is an excess of liberty, the effect is the same, tho' from an opposite cause." *Id.* His ideal, in short, was a limited government, exercising only those powers necessary to secure individual rights. *See id.*

89. *Id.* at 266-67.

90. *Id.* at 267. The same type of "arbitrary restrictions" or "monopolies" Madison here condemned were considered unconstitutional under the Fourteenth Amendment by Justice Field and other dissenters in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 110 (1872) (Field, J., dissenting), and by the majority of the Supreme Court in *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), as discussed *infra*.

91. Madison, *supra* note 83, at 267. Madison condemned, among other things, "unequal taxes [that] oppress one species of property and reward another species[,] . . . arbitrary taxes [that] invade the domestic sanctuaries of the rich, and excessive taxes [that] grind the faces of the poor." *Id.*

In sum, Madison urged a public policy that equally and impartially protected property of all sorts, including not only freedom of expression and religion but also economic freedom and property rights in the narrow sense of the word:

> If there be a government then which prides itself in maintaining the inviolability of property; which provides that none shall be taken *directly* even for public use without indemnification to the owner, and yet *directly* violates the property which individuals have in their opinions, their religion, their persons, and their faculties; nay more, which *indirectly* violates their property, in their actual possessions, in the labor that acquires their daily subsistence, and in the hallowed remnant of time which ought to relieve their fatigues and soothe their cares, . . . such a government is not a pattern for the United States.[92]

He concluded, "If the United States mean to obtain or deserve the full praise due to wise and just governments, they will equally respect the rights of property, and the property in rights."[93]

Madison's reference to the Takings Clause of the Fifth Amendment implicitly raises the question: where in the American state or federal constitutions were liberty and property rights—respectively "property in rights" and "rights of property"—protected against legislation and other governmental acts that abridged them? The answer lies primarily in another clause in the Fifth Amendment of the United States Constitution, the Due Process Clause, and in its equivalent clauses found in state constitutions.[94]

The due process clauses of the federal and state constitutions have perhaps the longest pedigree of any American constitutional provision,

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92. *Id.* at 267-68.

93. *Id.* at 268.

94. Certain aspects of liberty and property rights also were protected by courts under particular constitutional provisions, both state and federal, such as takings clauses or ex post facto clauses. At least two state courts directly applied the natural-rights provision of their state constitutions in declaring unconstitutional laws depriving citizens of their liberty or divesting them of property rights. *See* Herman v. State, 8 Ind. 545, 558 (1855) (holding that a state liquor prohibition law was an unconstitutional deprivation of "the right of liberty and pursuing happiness secured by the constitution"); Turpin v. Locket, 10 Va. (6 Call) 113 (1804) (holding that an 1802 statute divesting the Episcopal church of some of its property violated article 1 of the Virginia Declaration of Rights). The Virginia court decision never became law, however, because the judge who had written the opinion died the night before he was to deliver it. *See* Sherry, *supra* note 30, at 192. After a replacement judge was appointed and the case reargued, an equally divided court upheld the confiscation. *Turpin*, 10 Va. (6 Call) at 157; *see also* Sherry, *supra* note 30, at 192-93. The Virginia case was one of a series of early state court decisions recognizing, in various ways, constitutional protection for natural rights through both written and unwritten constitutional limitations on governmental power. *See generally id.* at 191-93.

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."[95] 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.[96]

Contrary to the assertions of some modern scholars[97] that substantive due process did not originate until the middle of the nineteenth century with the case of *Dred Scott v. Sandford*,[98] American courts began applying the doctrine of substantive due process much earlier, not long after adoption of the Constitution itself. It also should be noted that only modern scholars have drawn the distinction between "procedural" and "substantive" due process. "The phrase 'substantive due

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95. MAGNA CARTA cl. 39 (1215), *reprinted in* SOURCES OF ENGLISH CONSTITUTIONAL HISTORY 115, 121 (Carl Stephenson & Frederick George Marcham eds. & trans. 1937).

96. *See, e.g.*, Virginia Declaration of Rights art. VIII (1776), *reprinted in* SCHWARTZ, *supra* note 76, at 235 ("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 art. IX (1776), *reprinted in* SCHWARTZ, *supra* note 76, at 265 ("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 art. XII (1780), *reprinted in* SCHWARTZ, *supra* note 76, at 342 ("no subject shall be arrested, imprisoned, despoiled, or deprived of his property, 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 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; "[e]ach of the[se] bills of rights contained a law-of-the-land provision." Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941, 974. 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. *Id.* at 975.

97. *See, e.g.*, BERGER, *supra* note 56, at 193-95, 203-04 & n.36; BORK, *supra* note 23, at 32; DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888, at 271 (1985). 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 RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA 363-64 (1968). Justice Miller's analysis in *Davidson*, like his opinion for the Court in the *Slaughter-House Cases*, reflected the majority's desire to narrow the scope of the Fourteenth Amendment to minimize federal review of state laws, as discussed in Part II.C. *infra*.

98. 60 U.S. (19 How.) 393 (1857).

process' is anachronistic": it has no known use before the early 1930s[99] and has been used since that time as a pejorative oxymoron by opponents of *Lochner* Era jurisprudence and, later, opponents of the Warren Court.[100] 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—the rights to life, liberty, and property—that the constitutional provisions protect.[101]

It may be true, as a leading modern scholar of property rights has observed, that "[h]istorically the guarantee of due process was defined largely in procedural terms, requiring simply that customary legal procedures be followed before a person could be punished for criminal offenses."[102] Nevertheless, as that scholar adds, by the late eighteenth

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

100. *See* Gary D. Rowe, Lochner *Revisionism Revisited*, 24 LAW & SOC. INQUIRY 221, 244-45 (1999).

101. *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 of law, . . . it is not a *sufficient* condition," for due process 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 200.

102. JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 78 (1992). Ely credits Alexander Hamilton with arguing in 1787 that the words "due process" had a technical meaning applicable to court proceedings. *Id.* Raoul Berger also emphasizes that the early law of the land clauses in state constitutions typically appeared in sections dealing with criminal trials. BERGER, *supra* note 56, at 199-200. Except for *Dred Scott*, however, Berger ignores the other early nineteenth-century cases, discussed *infra*, which show use of law of the land or due process clauses as limitations on legislative powers. *See id.* at 203, 205 n.36.

Careful study of late eighteenth-century legal thought reveals much evidence that due process was understood to have substantive as well as procedural content. *See generally* Riggs, *supra* note 96. Even Hamilton's oft-quoted statement, when viewed in full context, supported the proposition that the Due Process Clause prohibited the legislature from depriving persons of their legally protected rights. *Id.* at 989-90.

One might further argue that the substantive component of due process was present from its very start, with the original law of the land clause of the Magna Carta, because the grievances against King John's injustices included complaints that he had sent writs

century, state courts began to view law of the land clauses in state constitutions as restrictions on legislation—in other words, as substantive protections for property rights.[103] 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 that deprived citizens of their property.[104] One of these decisions, *Wynehamer v. People*,[105] by the New York Court of Appeals in 1856, is particularly important. The court held that a statute outlawing the sale of liquor, specifically the liquor owned by tavern-keepers when the law took effect, was a deprivation of property without due process of law.[106] The court observed that "the legislature cannot totally annihilate commerce in any species of property, and so condemn the property itself to extinction."[107] The decision not only was a

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to his sheriffs ordering seizure of the lands and chattels belonging to his enemies and had granted rebel land to his own supporters. *See* J. A. P. JONES, KING JOHN AND MAGNA CARTA 53 (1971). Hence, King John's promise not to disseise any free man or to "go against him . . . except by . . . the law of the land," MAGNA CARTA cl. 39, *reprinted in* SOURCES OF ENGLISH CONSTITUTIONAL HISTORY 115, 121, *supra* note 95, might have meant more than simply following the appropriate judicial proceedings: it might have been a promise not to arbitrarily imprison or seize property without valid legal cause to do so; that is, a substantive as well as a procedural guarantee. *See* JONES, *supra*, at 83.

103. ELY, *supra* note 102, at 78.

104. Univ. of N.C. v. Foy, 5 N.C. (1 Mur.) 53, 54-55 (1805) (holding repeal of an act granting land to university trustees violated law of the land clause in state constitution); Bowman v. Middleton, 1 S.C.L. (1 Bay) 252, 254-55 (S.C. 1792) (invalidating a 1712 act transferring property from one owner to another, holding "it was against common right, as well as against *magna charta*, to take away the freehold of one man and vest it in another . . . without any compensation, or even a trial by the jury of the country, to determine the right in question"); *cf.* Lindsay v. Commissioners, 2 S.C.L. (2 Bay) 38, 38, 62 (S.C. 1796) (an equally divided court rejected a challenge to the taking of land for building a road); Zylstra v. Corp. of Charleston, 1 S.C.L. (1 Bay) 382, 387-89, 397-98 (S.C. 1794) (reversing a conviction under a city bylaw on procedural grounds). Although the court in both *Lindsay* and *Zylstra* declined to declare laws unconstitutional, the judges in both cases understood the state constitution's law of the land clause as a protection of substantive common-law rights, even against statutes passed by the legislature. *See* Sherry, *supra* note 30, at 216-19.

105. 13 N.Y. 378 (1856).

106. *Id.* at 383-84, 398, 405-06.

107. *Id.* at 399. The Indiana Supreme Court a year earlier held that its state's liquor prohibition law was invalid under the natural-rights provision in the state constitution as an unconstitutional deprivation of liberty. Herman v. State, 8 Ind. 545, 558 (1855). 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." *Id.* This was the one 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

striking instance of substantive use of due process but also, as Professor Ely notes, 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."[108]

In the same year as the decision in *Wynehamer*, the United States Supreme Court in *Murray's Lessee v. Hoboken Land & Improvement Co.*,[109] adopted the view that the Due Process Clause of the Fifth Amendment restricted Congress's powers.[110] In *Murray's Lessee*, 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."[111] This decision anticipated the Court's controversial ruling a year later in *Dred Scott*, when Chief Justice Roger Taney interpreted the Due Process Clause as a substantive limitation on the power of Congress to prohibit slavery in the territories.[112] A majority of the Court, comprised of Chief Justice Taney and five other justices, held that the Missouri Compromise,[113] which barred slavery from the northern part of the territory added to the United States by the Louisiana Purchase,[114] "could hardly be dignified with the name of due process of law."[115]

However, Chief Justice Taney and the majority in *Dred Scott* were not the first to see the Fifth Amendment Due Process Clause as a substantive limit on Congress's power to legislate for the territories. A year

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the person from physical restraint. Warren, *supra* note 10, at 440, 444-45.

108. ELY, *supra* note 102, at 79. In another essay, Ely calls attention to the 1805 North Carolina case, *Foy*, and the *Wynehamer* decision to show that "antebellum [courts] employed due process as a device to safeguard economic interests." James W. Ely, Jr., *Economic Due Process Revisited*, 44 VAND. L. REV. 213, 220 & n.45 (1991) (reviewing PAUL KENS, JUDICIAL POWER AND REFORM POLITICS: THE ANATOMY OF *LOCHNER V. NEW YORK* (1990)).

109. 59 U.S. (18 How.) 272 (1856).

110. *Id.* at 276.

111. *Id.* 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 102, at 79.

112. *See Dred Scott*, 60 U.S. (19 How.) at 449-50.

113. Sess. I, ch. 22, 3 Stat. 545 (1820).

114. *Id.* § 8, 3 Stat. at 548.

115. *Dred Scott*, 60 U.S. (19 How.) at 450. Although Chief Justice Taney wrote for only a minority of the justices in some parts of the opinion (including the first and perhaps most controversial part, which declared that African-Americans were not citizens), in this part of the opinion he wrote for a majority of six Justices and thus expressed the true holding of the Court. DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW & POLITICS 324-25 (1978).

before the decision in *Dred Scott*, the platform of the newly created Republican Party understood the Fifth Amendment to require the opposite of what the Court interpreted the Constitution to require. By 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.[116] This position was not surprising, given that many Republicans were anti-slavery activists and that anti-slavery activists since the mid-1830s had been arguing that constitutional due process guarantees substantively protected the natural rights of life, liberty, and property of all persons.[117] Thus, it was not the Court's use of the Fifth Amendment Due Process Clause as a substantive limit on the power of Congress that made *Dred Scott* so controversial in the nineteenth century; rather, it was the Court's particular application of substantive due process, in what was arguably obiter dictum in the case,[118] to resolve a hotly-contested political question.[119]

Following this line of precedent for substantive due process protection of property and economic liberty rights, state courts began recognizing liberty of contract in the years prior to the United States Supreme

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116. The Antislavery Planks of the Republican National Platform (1856), *in* SOURCES IN AMERICAN CONSTITUTIONAL HISTORY 99, 99 (Michael Les Benedict ed., 1996). The 1860 Republican platform repeated this plank and, without referring directly to the *Dred Scott* decision, decried "the new dogma that the Constitution, of its own force, carries Slavery into . . . the Terrorities," calling the idea "a dangerous political heresy" at odds with the Constitution itself. Republican Party Platform (May 16, 1860), *in* 1 DOCUMENTS OF AMERICAN HISTORY 363, 364 (Henry Steele Commager ed., 9th ed. 1973).

117. BERNARD H. SIEGAN, THE SUPREME COURT'S CONSTITUTION 71-72 (1987). Two anti-slavery third parties, the Liberty Party in its 1843 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. *Id.* at 72.

118. *See* FEHRENBACHER, *supra* note 115, at 324-25, 439. A seven-Justice majority of the Court in *Dred Scott* held that under Missouri law, Dred Scott was still a slave, *see* 60 U.S. (19 How.) at 426-27, arguably making irrelevant the holding on the Missouri Compromise restriction, FEHRENBACHER, *supra* note 115, at 324-25. "Accordingly, '*obiter dictum*' became the Republican battle cry in the war upon the Dred Scott decision." *Id.* at 439.

119. *See, e.g.*, Lincoln's First Inaugural Address (Mar. 4, 1861), *in* 1 DOCUMENTS OF AMERICAN HISTORY, *supra* note 116, at 385. 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." *Id.* at 387.

Court's recognition in *Allgeyer v. Louisiana*.[120] The New York Court of Appeals, in two important 1885 decisions, 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*,[121] the court held unconstitutional a state law that prohibited manufacturing cigars in tenement houses.[122] Anticipating the definition of liberty that the Supreme Court would adopt in *Allgeyer* twelve years later, the New York court recognized

> one may be deprived of his liberty and his constitutional rights thereto violated without the actual imprisonment or restraint of his person. Liberty, in its broad sense as understood in this country, 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. All laws, therefore, which impair or trammel these rights, which limit one in his choice of a trade or profession, or confine him to work or live in a specified locality, or exclude him from his own house, or restrain his otherwise lawful movements (except as such laws may be passed in the exercise by the legislature of the police power . . .), are infringements upon his fundamental rights of liberty, which are under constitutional protection.[123]

The court rejected the argument that the law was a legitimate exercise of the state's police power as a health measure,[124] holding the law had "no relation whatever to the public health."[125] Rather, the court found,

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120. 165 U.S. 578 (1897).

121. 98 N.Y. 98 (1885).

122. *Id.* at 103, 115. The statute applied only to cities having over five hundred thousand inhabitants—which at the time meant only two cities, New York City and Brooklyn. *Id.* at 104.

123. *Id.* at 106-07. The scope of liberty of contract, as defined in the decision in *Allgeyer*, is discussed in Part III *infra*.

124. The court noted that the police power, "however broad and extensive, [was] not above the Constitution," *In re Jacobs*, 98 N.Y. at 108, and "that in its exercise the legislature must respect the great fundamental rights guaranteed by the Constitution," *id.* at 110. The court also reaffirmed its judicial review power, maintaining that if the legislature "passes an act ostensibly for the public health, and thereby destroys or takes away the property of a citizen, or interferes with his personal liberty, then it is for the courts to scrutinize the act and see whether it really relates to and is convenient and appropriate to promote the public health." *Id.*

125. *Id.* at 114. The court took "judicial notice of the nature and qualities of tobacco," finding no evidence that its preparation and manufacture into cigars was "even injurious to the health of those who deal in it, or are engaged in its production or manufacture," let alone dangerous to the health of the public. *Id.* at 113. "It is plain that this is not a health

"[u]nder the guise of promoting the public health,"[126] the legislature had "arbitrarily interfere[d] with personal liberty and private property without due process of law."[127] Six months later, in its June 1885 decision in *People v. Marx*,[128] 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.[129] The court held that liberty, in the broad sense as it was defined in *In re Jacobs*,[130] 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.[131]

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

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law," the court concluded. *Id.* at 114.

126. *Id.* at 114.

127. *Id.* at 115. In stating its holding, the court also clearly identified the standard of review it was applying to the statute:

> When a health law is challenged in the courts as unconstitutional on the ground that it arbitrarily interferes with personal liberty and private property without due process of law, the courts must be able to see that it has at least in fact some relation to the public health, that the public health is the end actually aimed at, and that it is appropriate and adapted to that end. This we have not been able to see in this law, and we must, therefore, pronounce it unconstitutional and void.

Id. Earlier in the opinion, the court also concluded that the statute deprived persons of their property without due process of law by depriving inhabitants of tenement houses of the right "to work at any lawful trade therein." *Id.* at 105.

128. 2 N.E. 29 (N.Y. 1885).

129. *Id.* at 29, 33-34. The court rejected the state's rationale for the statute as protecting consumers against fraudulent imitations of dairy butter. *Id.* at 32. Instead, the court understood the statute as a "dangerous" measure protecting the dairy industry from competition—"an enactment which absolutely prohibits an important branch of industry for the sole reason that it competes with another, and may reduce the price of an article of food for the human race." *Id.* at 33. The court asked,

> If the argument of the respondents in support of the absolute power of the legislature to prohibit one branch of industry for the purpose of protecting another with which it competes can be sustained, why could not the oleomargarine manufacturers, should they obtain sufficient power to influence or control the legislative councils, prohibit the manufacture or sale of dairy products?

Id. at 33-34.

130. 98 N.Y. 98 (1885).

131. *Marx*, 2 N.E. at 33. The court cited the Supreme Court's decision in *The Slaughter-House Cases* for the proposition that the right to pursue any lawful industrial pursuit was "one of the fundamental rights and privileges of every American citizen." *Id.* However, as discussed in Part II.C., *infra*, this was the view adopted by the *Slaughter-House* dissenters, not the majority. *See The Slaughter-House Cases*, 83 U.S. (16 Wall.) at 110-11 (Field, J., dissenting).

Supreme Court in *Ritchie v. People*[132] held unconstitutional a statute providing, "'No 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.'"[133] The court held 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."[134] The court based this "right to contract"[135] on the due process clause of the Illinois constitution, noting it "both a liberty and property right":[136]

> Liberty includes the right to acquire property, and that means and includes the right to make and enforce contracts. The right to use, buy, and sell property and contract in respect thereto is protected by the constitution. 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. The right to labor or employ labor, and make contracts in respect thereto upon such terms as may be agreed upon between the parties, is included in the constitutional guaranty [in section 2 of article 2 of the Illinois constitution, its due process clause].[137]

Significantly, the court explicitly rejected sexual paternalism as a rationale for the statute, holding instead 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."[138]

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132. 40 N.E. 454 (Ill. 1895).

133. *Id.* at 455 (quoting 1893 Ill. Laws 99, 101).

134. *Id.*

135. *Id.* at 456.

136. *Id.* at 455.

137. *Id.* (internal citation omitted).

138. *Id.* at 458. The court rejected the state's rationale that the statute fell within the traditional scope of the police power as "a measure for the promotion of the public health" and "designed to protect woman on account of her sex and physique," *id.*, 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), discussed *infra*, Part III.B.1.a. The Illinois court's recognition that the right to make and enforce contracts applied equally to women as to men is especially noteworthy given that Illinois had been admitting women to the bar only since 1890. Now, in 1895, the court held that a woman had "the right to gain a livelihood by intelligence, honesty, and industry in the arts, the sciences, the professions, or other vocations" and that "her right to a choice of vocations cannot be said to be denied or abridged on account of sex." *Ritchie*, 40 N.E. at 458.

B. Other Limits on the Police Power in Nineteenth-Century Constitutionalism

Substantive use of due process or law of the land constitutional clauses was but one, albeit arguably the most significant, of the limitations on the so-called police power—the regulatory power of the states—in early American constitutional law. Courts also limited the police power through other provisions in both state constitutions and the U.S. Constitution, as well as by enforcing certain unwritten constitutional limits on governmental power. They also recognized an important limitation on the police power inherent in the definition of the power itself. These various constitutional limitations provided precedents for the earliest state court decisions explicitly protecting liberty of contract.

The cases discussed in the previous section, those early precedents for substantive use of the Fifth Amendment Due Process Clause or its state constitution equivalents are especially significant given the generally broad scope that antebellum courts gave state legislatures in exercising their police power.[139] Traditionally, the police power comprised "the authority to protect public safety, health, and morals."[140] Courts have also cited public order or the general welfare along with these three traditional categories.[141]

As one modern commentator has observed, although it is by nature virtually "incapable of enduring, comprehensive definition,"[142] the police power had its origins in 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*.[143] Blackstone analogized its exercise in the state to the functioning of a well-ordered family, whose members "are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners; and to be decent, industrious, and inoffensive in their respective stations."[144] Thomas M. Cooley, author of *Constitutional Limitations*, the most influential constitutional law treatise in the nineteenth century, similarly defined the police power as the "whole system of internal regulation" by which a state not only preserves public order but also

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139. *See* ELY, *supra* note 102, at 60-61.

140. *Id.* at 60.

141. *E.g.*, Lochner v. New York, 198 U.S. 45, 53 (1905) (describing the police power as "relat[ing] to the safety, health, morals, and general welfare of the public").

142. 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. 1, 1.

143. *Id.* at 2-3 & n.4.

144. 4 WILLIAM BLACKSTONE, COMMENTARIES *162.

> establish[es] for the intercourse of citizens with citizens 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 rights by others.[145]

Massachusetts Supreme Court Chief Justice Lemuel Shaw in 1851 gave perhaps the classic nineteenth-century view of the police power in *Commonwealth v. Alger*.[146] In *Alger* the court upheld a statute limiting the length of wharves in Boston harbor as a valid exercise of the legislature's power "to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same."[147] In a well-ordered society, Chief Justice Shaw observed,

> [E]very holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community.[148]

He concluded that property rights were subject to "reasonable limitations" judged by the legislature to be "necessary to the common good and general welfare."[149]

Notwithstanding the broad scope of the police power, however, courts and legal scholars in the nineteenth century recognized a number of limitations on its exercise, as the title of Cooley's treatise suggests. Clearly, courts were willing to declare invalid statutes that directly

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145. 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).

146. 61 Mass. (7 Cush.) 53 (1851).

147. *Id.* at 85.

148. *Id.* at 84-85.

149. *Id.* at 85; *see also* State v. Paul, 5 R.I. 185, 191 (1858) (sustaining a conviction under a criminal statute prohibiting the sale and keeping of intoxicating liquors as a valid exercise of the police power, which the court declared "exists in great part for the very purpose of changing the [common law] adjustment [of rights] from time to time, as the relative circumstances of the community and individuals may require"); Thorpe v. Rutland & Burlington R.R. Co., 27 Vt. 140, 153 (1854) (upholding a statute requiring railroads to construct and maintain fences as cattle guards along their routes as a valid application of the police power according to the *sic utere* maxim, "in regard to those whose business is dangerous and destructive to other persons, property or business").

conflicted with positive constitutional prohibitions, including general protections of liberty and property rights under due process or law of the land provisions. Courts also cited other explicit limitations on state legislative powers, such as the article I, section 10 Contract Clause,[150] in limiting the police power.

The provision of the U.S. Constitution prohibiting states from enacting any law "impairing the Obligation of Contracts"[151]—one of the few restrictions on state power found in the original text of the Constitution—was an important limit on state police power in the early nineteenth century. As one modern scholar has described it, the clause was "designed to protect the idea of individuals entering into agreements to order privately their arrangements."[152] Only three years after implementation of the Constitution, a federal circuit court found a Rhode Island debtor-relief measure to be invalid under the Contract Clause,[153] in "one of the first exercises of federal judicial review."[154] Under Chief Justice John Marshall's leadership, the Supreme Court broadened the scope of contracts entitled to protection under the Constitution and thus made the Contract Clause "the most significant constitutional limitation on state power to regulate the economy" in the Antebellum Era.[155] In its landmark decision in *Fletcher v. Peck*,[156] the Court found unconstitutional a Georgia law rescinding the Yazoo land grant made by a previous legislature amidst charges of bribery and corruption.[157] The unanimous Court held that the Georgia legislature

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150. U.S. CONST. art. I, § 10, cl. 1.

151. *Id.* The clause was modeled after a provision in the Northwest Ordinance stating that "no law ought ever to be made, or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts or engagements, *bona fide*, and without fraud, previously formed." Northwest Ordinance art. II (July 13, 1787), *in* 1 DOCUMENTS OF AMERICAN HISTORY, *supra* note 116, at 128, 131.

152. Henry G. Manne, *Inequality and the Constitution*, 9 HARV. J.L. & PUB. POL'Y 31, 32 (1986).

153. U.S. CONST. art. I, § 10, cl. 1.

154. ELY, *supra* note 102, at 62-63 (citing Champion v. Casey (C.C.D.R.I. 1792) (unreported)).

155. *Id.* at 64. Ely regards the Contract Clause as "the centerpiece of Marshall Court jurisprudence" and "a powerful bulwark to property interests." *Id.* at 63-64. Noting the scholarly dispute about whether the Contract Clause was meant to apply only to contracts between private individuals or whether it extended to contracts made by state governments, Ely presents historical evidence in favor of the latter view, confirmed by a series of significant Marshall Court decisions, including *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), *New Jersey v. Wilson*, 11 U.S. (7 Cranch) 164 (1812), and *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819). ELY, *supra* note 102, at 45, 64-66.

156. 10 U.S. (6 Cranch) 87 (1810).

157. *Id.* at 139. The case is ably discussed in C. PETER MAGRATH, YAZOO: LAW AND POLITICS IN THE NEW REPUBLIC; THE CASE OF FLETCHER V. PECK (1966). Justice William

"was restrained, *either by general principles which are common to our free institutions*, or by the particular provisions of the constitution of the United States"[158]—namely, the Contract Clause, which the Court found applicable to "contracts of every description," including those made by the state.[159]

The Court's reference to "general principles which are common to our free institutions,"[160] as an alternate basis for the holding in *Fletcher*, illustrates another important category of limitations on the police power in nineteenth-century constitutional law: unwritten limitations, drawn either from natural rights theory or from general principles limiting all constitutional government. One important aspect of these limitations is the "doctrine of vested rights" for the protection of "established property rights from legislative interference."[161] In a 1795 federal circuit court case, Justice William Paterson anticipated Marshall's reasoning in *Fletcher*, implicitly linking the Contract Clause with the doctrine of natural rights.[162] Three years later, Justice Samuel Chase in *Calder v. Bull*[163] expressed perhaps the most famous statement in support of unwritten constitutional limits in early American law when he observed, "There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power."[164] Among these, the Court maintained, was the principle that the legislature could not "violate the right of an antecedent lawful private contract; or the right of private property."[165] It was not just the federal judiciary that utilized natural law or general

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Johnson, one of Jefferson's appointees to the Court and the only justice to challenge Marshall's opinions with some frequency, wrote a concurring opinion relying exclusively on natural law principles. *Id.* at 63, 80 (citing *Fletcher*, 10 U.S. (6 Cranch) at 143 (Johnson, J., concurring)).

158. *Fletcher*, 10 U.S. (6 Cranch) at 139 (emphasis added).

159. *Id.* at 137.

160. *Id.* at 139.

161. ELY, *supra* note 102, at 63.

162. *See* Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.), 304, 310 (1795); *see also* ELY, *supra* note 102, at 63. In *Vanhorne's Lessee*, the Court observed that "the right of acquiring and possessing property, and having it protected, is one of the natural, inherent and unalienable rights of man" and that "[t]he preservation of property . . . is a primary object of the social compact." *Vanhorne's Lessee*, 2 U.S. (2 Dall.) at 310. The court "ruled that the repeal of a Pennsylvania statute confirming certain land titles impaired the obligation of contract." ELY, *supra* note 102, at 63 (citing *Vanhorne's Lessee*, 2 U.S. (2 Dall.) at 320).

163. 3 U.S. (3 Dall.) 386 (1798).

164. *Id.* at 388. Among the examples of illegitimate legislative acts that the Court cited were "a law that destroys, or impairs, the lawful private contracts of citizens" and "a law that takes property from A. and gives it to B." *Id.*

165. *Id.*

constitutional principles in exercising judicial review in the late eighteenth and early nineteenth century. Many state court decisions—including several antedating the U.S. Constitution—based their holdings on both unwritten and written law. As noted in section II.A, at least two state supreme courts were willing to apply the natural rights provisions of their state constitutions in declaring unconstitutional laws that deprived citizens of their liberty or divested them of their property rights.[166]

Another important unwritten limitation on the police power was the requirement of equal treatment under the law. This requirement was frequently expressed by courts and commentators as the principle that laws must not single out specific groups or classes for special treatment unless the laws actually related to the welfare of the community as a whole—in other words, unless they actually advanced the traditional concerns of the police power in protecting public health, safety, or morality.[167] Laws that failed to meet this test were seen as advancing purely "private" interests and thus were illegitimate, categorized variously as "unequal, partial, class, or special legislation."[168]

This prohibition of class legislation, like the broader principle of equal treatment under the law from which it derived, can be traced back to John Locke, who in his *Second Treatise on Civil Government* had linked equality with liberty in his discussion of natural rights.[169] From

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166. *See Herman*, 8 Ind. 545; *Turpin*, 10 Va. (6 Call) 113. However, as discussed in *supra* note 94, the original opinion in *Turpin* that would have declared a law unconstitutional based on the natural rights provision of the Virginia constitution was never delivered, and the court reached an opposite decision after reargument. *Herman* is also discussed in *supra* note 107. For additional commentary on natural rights and the protection of liberty and property, see PRESSER, *supra* note 29, at 142, Sherry, *supra* note 30, and Riggs, *supra* note 96.

167. GILLMAN, *supra* note 28, at 49.

168. *Id.* An early example cited by Gillman was a Massachusetts Supreme Court case decided in 1828 involving a Boston bylaw that prohibited any person not licensed by the mayor and aldermen from removing "any house-dirt, refuse, offal, filth or animal or vegetable substance" from houses, Vandine's Case, 23 Mass. (6 Pick.) 187, 187 (1828). GILLMAN, *supra* note 28, at 51. Although the court affirmed the conviction and thus upheld the challenged law, it cited an English precedent as an example of an illegitimate law: a London bylaw that prohibited carmen from operating their carts within the precincts of a hospital without license from the wardens of the hospital. *Vandine's Case*, 23 Mass. (6 Pick), at 191. Such a law, the Massachusetts court observed, would be held "void" and "unreasonable," both "because it was in restraint of the liberty of the trade of a carman" and "because it went to the private benefit of the wardens of the hospital, and was in the nature of a monopoly." *Id.* Note that the Boston bylaw fit within one of the traditional categories of the police power, the protection of public health. *See id.* at 192.

169. *See* LOCKE, *supra* note 39, ch. 2, § 54, at 32. As mentioned *supra* note 66, the state of nature that Locke posited was one in which individuals were "equal and

Lockean theory, America's Founders derived the principle that "equality . . . ought to be the basis of every law."[170] Accordingly, James Madison argued in 1785 that this principle was violated when laws subject some to "peculiar burdens" or grant to others "peculiar exemptions."[171] During the Jacksonian period of the early nineteenth century, the emphasis that Andrew Jackson's Democratic Party placed on the equality principle—illustrated by Jacksonian Democrats' characteristic aversion to all forms of legally created "privilege"—was reflected in constitutional jurisprudence.[172] The Supreme Court under the leadership of Chief Justice Taney, a Jackson appointee, moved away from the Marshall Court's emphasis on vested rights and instead adopted a more flexible approach to police powers that emphasized equality under the law and prohibition of class legislation.[173] State constitutional law during the mid-nineteenth century also limited police powers by prohibiting class legislation, typically through due process or law of the

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independent." *Id.*, ch. 2, § 6, at 9. When Locke described individuals as equal with respect to their rights, he referred to "the equality which all men are in[,] in respect of jurisdiction or dominion one over another, . . . being that equal right that every man hath to his natural freedom, without being subjected to the will or authority of any other man." *Id.* ch. 2, § 54, at 32. Citing this passage from Locke in support of the "libertarian" conception of equality, Bernard Siegan has argued that Congressman John Bingham, the author of the original version of the Fourteenth Amendment, understood the equal protection provision of the amendment in this way. Siegan, *supra* note 30, at 469. "For him, equality before the law meant that all laws should apply equally, and that no person or persons would be favored or denied. When government limits liberties of certain individuals, it also denies them equality with others not so incapacitated." *Id.*

170. James Madison, *A Memorial and Remonstrance* (1785), *in* THE MIND OF THE FOUNDER 6, 8 (Marvin Meyers ed., Univ. Press of New Eng. rev. ed. 1981).

171. *Id.* at 9. This argument was part of Madison's petition to the General Assembly protesting against a proposed bill to support the Christian religion. *Id.* Thus, the equality principle was part of Madison's case for religious freedom, or specifically, in opposition to government establishment of religion. *See id.*

172. *See* GILLMAN, *supra* note 28, at 35-38, 54-55. Gillman describes Jacksonian democracy as "an ideology of market freedom protected specifically by a core value of political equality." *Id.* at 35. For more on Jacksonian ideology and the radical wing of the Jeffersonian Republican Party from which it derived, see RICHARD E. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC (1971); MARVIN MEYERS, THE JACKSONIAN PERSUASION: POLITICS AND BELIEF (1960).

173. *See* GILLMAN, *supra* note 28, at 47-48, 49. The classic example of the Taney Court's shift away from the Marshall Court's vested rights doctrine, especially in its Contract Clause jurisprudence, is the Court's decision in *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837), ably discussed in STANLEY I. KUTLER, PRIVILEGE AND CREATIVE DESTRUCTION: THE CHARLES RIVER BRIDGE CASE (1971).

land clauses,[174] or specific state constitutional provisions enforcing the equality principle.[175]

By the late nineteenth century, the prohibition of class legislation had "become a mainstay of constitutional jurisprudence," incorporated into state constitutions and enforced by the courts as a limitation on the police power.[176] Indeed, nineteenth-century jurists saw the police power, in its legitimate exercise, as limited to laws of general application that had a public purpose.[177] "Reasonable laws" were those that treated all equally, or if they treated people differently, they did so for justifiable reasons related to a legitimate public purpose.[178] Conversely, "unreasonable laws" were partial, treating people differently for

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174. *See, e.g.*, Wally's Heirs v. Kennedy, 10 Tenn. (2 Yer.) 554, 555, 557 (1831) (invalidating a law authorizing the state judiciary to dismiss certain kinds of Indian reservation cases on the grounds that it was not "a general public law" but a "partial, or private law"); Bank of the State v. Cooper, 10 Tenn. (2 Yer.) 599, 599-600, 606-08 (1831) (invalidating an act creating a special court to handle all lawsuits brought against the Bank of the State of Tennessee because the law was not "general in its operation, affecting all alike"); Durkee v. City of Janesville, 28 Wis. 464, 464-65, 470 (1871) (invalidating a law exempting the city of Janesville from the obligation to pay court costs in a previous case because "[t]he clause *'law of the land,'* is held to mean a general public law, equally binding upon every member of the community"); *see also* GILLMAN, *supra* note 28, at 53-54 & 229 nn.111-12, 59 & 231 n.130.

175. IOWA CONST. of 1846, art. I, § 6, *reprinted in* 3 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 434, 435 (William F. Swindler ed., 1974) ("the general assembly shall not grant to any citizen or class of citizens privileges or immunities which upon the same terms, shall not equally belong to all citizens"); New Hampshire Bill of Rights art. X (1783), *reprinted in* SCHWARTZ, *supra* note 76, at 376 ("Government [is] instituted for the common benefits, protection, and security of the whole community, and not for the private interest or emolument of any one man, family, or class of men"); North Carolina Declaration of Rights art. III (1776), *reprinted in* SCHWARTZ, *supra* note 76, at 286 ("[N]o man or set of men are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services").

One late-nineteenth-century author explained the inclusion of such provisions in new state constitutions adopted during the Jacksonian period reflected "a very general feeling of hostility to all local and special legislation." Charles Chauncy Binney, *Restrictions Upon Local and Special Legislation in the United States*, 41 AM. L. REG. REV. 613, 618 (1893). Furthermore, the inclusion of these provisions demonstrated a renewed commitment to general laws "designed neither for one or more particular persons, nor to operate exclusively in any particular part or parts of the State." *Id.* at 722; *see* GILLMAN, *supra* note 28, at 95. Much of the impetus behind such provisions in antebellum state constitutions was the reaction against state subsidies for roads and canals—what legal historian Kermit Hall has called the "'erosion of faith in the active state.'" HALL, *supra* note 16, at 102-03 (quoting HARRY N. SCHEIBER, OHIO CANAL ERA: A CASE STUDY OF GOVERNMENT AND THE ECONOMY, 1820-1861 297 (1968)).

176. GILLMAN, *supra* note 28, at 55.

177. *Id.* at 54.

178. *Id.*

unjustifiable reasons.[179] Thomas M. Cooley, in his influential treatise, *Constitutional Limitations*, identified as a general principle of constitutional law the maxim that lawmakers "'are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plough.'"[180] By this maxim, he added, "we may test the authority and binding force of legislative enactments."[181] Indeed, as chief justice of the Michigan Supreme Court, Cooley had applied this principle in declaring unconstitutional "a special act of the Michigan legislature [that] in 1864 authorized the town of Salem to pledge its credit in aid of the Detroit and Howell Railroad."[182]

Although some recent revisionist scholarship has interpreted *Lochner* Era jurisprudence chiefly in terms of this prohibition on class legislation,[183] that interpretation is flawed in at least two critical ways.

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179. *Id.* Gillman identifies this principle as "a jurisprudence of *public purpose*," which he contrasts with modern constitutional jurisprudence and its "theory of *preferred freedoms*." *Id.*

180. COOLEY, *supra* note 145, at 483 (quoting LOCKE, *supra* note 39, ch. 11, § 142, at 79) (misquoted in original).

181. *Id.* He explained that

> every one has a right to demand that he be governed by general rules, and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments.

Id.

182. GILMAN, *supra* note 28, at 56. In *People ex rel. Detroit & Howell R.R. Co. v. Township Board of Salem*, 20 Mich. 452 (1870), Justice Cooley wrote for the court,

> [T]he discrimination by the State between different classes of occupations, and the favoring of one at the expense of the rest, whether that one be farming or banking, merchandising or milling, printing or railroading, is not legitimate legislation, and is an invasion of that equality of right and privilege which is a maxim in State government. . . . [The business of the state] is to protect the industry of all, and to give all the benefit of equal laws.

Id. at 486-87. As such, "it is not in the power of the State . . . to subsidize" any particular industry. *Id.* at 486. Cooley's own abhorrence of subsidies was rooted in his background as a "Locofoco" Democrat, one of the more radical anti-privilege wings of the Jacksonian party. GILLMAN, *supra* note 28, at 38, 55; *see also* Jones, *supra* note 32. Alan Jones discusses Cooley's background in Locofoco Democracy more fully in his doctoral dissertation. *See* ALAN R. JONES, THE CONSTITUTIONAL CONSERVATISM OF THOMAS MCINTYRE COOLEY: A STUDY IN THE HISTORY OF IDEAS (1987).

183. *See* Benedict, *supra* note 7, at 314; GILLMAN, *supra* note 28. As Gillman states in his thesis, *Lochner* Era jurisprudence "represented a serious, principled effort to maintain one of the central distinctions in nineteenth-century constitutional law—the distinction between valid economic regulation, on the one hand, and invalid 'class' legislation, on the other—during a period of unprecedented class conflict." *Id.* at 10. Gillman recognizes that judicial standards during this era "were not illegitimate creations of unrestrained free-

First, it ignores the explicit rationale on which *Lochner* itself and other liberty of contract decisions were based: substantive due process protection of liberty and property rights.[184] Second, the interpretation fails to consider many significant liberty of contract decisions because they do not fit the class legislation model.[185] To be sure, judicial

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market ideologues" and thus rejects the Holmesian orthodox view. *Id.* However, he is explicitly unsympathetic to *Lochner* Era jurisprudence, which he sees as grounded in early American constitutional principles that were "anachronistic" in industrialized America, when economic conditions "might justify special government protections for dependent classes." *Id.* at 11. In other words, he accepts unquestioningly the rationale that Progressives gave in support of early twentieth-century social legislation.

184. Gillman interprets the two 1885 New York decisions, *In re Jacobs* and *Marx*, as if the court was concerned solely with the unequal burdens that the laws in question imposed—and fails to mention that both decisions were based explicitly on substantive due process protection of economic liberty and property rights. *See* GILLMAN, *supra* note 28, at 88. Similarly, his discussion of the 1895 Illinois Supreme Court decision, *Ritchie*, ignores the court's explicit protection of liberty of contract through a substantive use of the state constitution's due process clause. *See id.* at 92. Instead, Gillman suggests that the "partial" character of the law in question—that the maximum-hours law applied only to women—was the sole basis for its unconstitutionality. *See id.* In discussing the *Lochner* decision, Gillman overlooks Justice Peckham's explicit grounding of the Court's decision in liberty of contract, as discussed *infra* Part III. *See* GILLMAN, *supra* note 28, at 126-29. Rather, Gillman focuses on the class legislation arguments presented in the brief submitted by Lochner's lawyers and on Justice Peckham's characterization of the maximum-hours law in question as "a purely labor law." *See id.* at 127 (quoting *Lochner*, 198 U.S. at 57 (misquoted in original)). Gillman's class-legislation model applies best to nineteenth-century state court decisions, but when applied to twentieth-century U.S. Supreme Court decisions, it fails to take into account the Court's narrower application of the class legislation prohibition and confuses cases decided on due process grounds with cases decided on equal protection grounds. *See* David E. Bernstein, Lochner *Era Revisionism, Revised:* Lochner *and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 13-14, 17-19, 21, 28-30 (2003). Moreover, a legal scholar who has comprehensively surveyed the Court's decisions during the *Lochner* Era has found that class legislation rhetoric—including the terms "class legislation," "class law," "partial legislation," and "partial law"—was infrequently used in early twentieth-century decisions. PHILLIPS, *supra* note 29, at 114. He found no cases during the years 1902-1932 in which the concept was critical to the Court's decision. *Id.*

185. Among the key liberty of contract decisions not even mentioned in Gillman's book, *The Constitution Beseiged*, are the principal cases discussed in Part III.B *infra*: *Buchanan v. Warley*, 245 U.S. 60 (1917), *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). These decisions illustrate important aspects of the Supreme Court's protection of liberty of contract but fail to fit the orthodox model of *Lochner* Era jurisprudence that focuses solely on economic liberty in the business or labor context. By confining his analysis to those cases that best fit the class legislation model—particularly to cases concerned with maximum-hour laws, minimum-wage laws, and other labor laws—Gillman helps perpetuate the overly narrow, and thus misleading, view of liberty of contract jurisprudence. In a recent reply to his critics, Gillman admits that his revisionist account was intended to show that modern "'fundamental rights'

protection of equal rights under law—especially as a prohibition on class legislation enforced through the due process or law of the land clauses of state constitutions—was in nineteenth-century constitutional law closely related to judicial protection of liberty and property rights through the substantive application of those same clauses. A law deemed "arbitrary" because it conferred special benefits or imposed special burdens on one class of persons also deprived those whom it adversely affected of their liberty or property rights. However, failure to be sufficiently general was not the sole ground on which courts found laws to be arbitrary and thus unconstitutional. As Cooley noted in his discussion of "the law of the land," even a general law could be voided as arbitrary if it restricted persons' "rights, privileges, or legal capacities in a manner before unknown to the law."[186] Thus, courts in the late nineteenth century often supplemented equal rights analysis with due process analysis, or vice versa. Accordingly, modern revisionist scholars who debate *Lochner* Era jurisprudence as an either-or alternative between the prohibition on class legislation and substantive due process protection of liberty or property rights may be creating a false dichotomy.[187] The prohibition of class legislation is best viewed as a limitation on the police power that was conceptually related to, but jurisprudentially distinct from, the substantive use of due process clauses to protect what eventually came to be recognized as liberty of contract.

Finally, at least a few nineteenth-century courts recognized a broader, theoretical limitation on the police power that was implicit in its

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jurisprudence was just a completely different sort of thing [from] *Lochner* era 'public purpose' jurisprudence" in order to defend modern substantive due process decisions, particularly *Roe v. Wade*, 410 U.S. 113 (1973), against conservative critiques. *See* Howard Gillman, *De-Lochnerizing* Lochner, 85 B.U. L. REV. 859, 862 n.17 (2005).

186. COOLEY, *supra* note 145, at 484. Significantly, this statement appeared in the section dealing with "Unequal and Partial Legislation." *Id.* at 479. Cooley added, "To forbid to an individual or a class the right to the acquisition or enjoyment of property in such manner as should be permitted to the community at large, would be to deprive them of *liberty* in particulars of primary importance to their 'pursuit of happiness.'" *Id.* at 484. In support of this proposition, Cooley cites, among other sources, Burlamaqui's definition of natural liberty "as the right which nature gives to all mankind of disposing of their persons and property after the manner they judge most consonant to their happiness . . . and so as not to interfere with an equal exercise of the same rights by other men." *Id.* at 484 n.2. As one modern property-rights scholar has noted, the "Cooley synthesis" thus "linked the Jacksonian principles of equal rights and hostility to" class legislation with substantive "due process protection of [individual] rights." Ely, *Oxymoron*, *supra* note 99, at 342.

187. *Compare, e.g.*, Bernstein, *supra* note 184, at 12 (criticizing Gillman's exaggeration of "the role that concerns about class legislation played" in *Lochner* Era jurisprudence) *with* Barry Cushman, *Some Varieties and Vicissitudes of Lochnerism*, 85 B.U. L. REV. 881 (2005) (defending Gillman's class legislation thesis against Bernstein's critique).

legitimate operation in terms of the *sic utere* maxim. If the purpose of the police power was, as Cooley described it, "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 rights by others,"[188] then it followed that a statute which did not deal with a true conflict in private rights but which simply abridged them, albeit for an asserted public purpose, might be found invalid as an illegitimate exercise of the police power. For example, in the 1854 Vermont case of *Thorpe v. Rutland & Burlington Railroad Co.*,[189] the court upheld a statute requiring railroads to construct and maintain fences as cattle guards along their routes as a valid application of the police power "in regard to those whose business is dangerous and destructive to other persons, property or business."[190] Writing for the court, Chief Justice Redfield contrasted the statute in question with a hypothetical statute requiring landowners to build all their fences of a given quality or height.[191] Such a statute, the court reasoned, "would no doubt be invalid, as an unwarrantable interference with matters of exclusively private concern."[192]

Antebellum America was not a laissez-faire society. As several legal historians have observed, government, especially at the state and local levels, passed many laws regulating various aspects of citizens' lives, particularly economic activities.[193] Nevertheless, in the decades before the Civil War, courts rarely declared such regulations to be unconstitutional.[194] Perhaps there were so few decisions like *Wynehamer* or like Chief Justice Redfield's hypothetical case because state legislatures during this period generally exercised the police power within certain well-defined limits. Legislatures restricted their use of the police power to the traditional concerns of protecting public health, safety, and morals; and in exercising this power, the states imposed controls that were relatively modest and tailored to specific harmful activities that were truly matters of public concern.[195]

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188. COOLEY, *supra* note 145, at 704.

189. 27 Vt. 140 (1854).

190. *Id.* at 153.

191. *Id.*

192. *Id.*

193. *See, e.g.*, HALL, *supra* note 16, at 94-102 (discussing the "active state" and "mixed economy" in antebellum America, with state governments promoting and regulating economic activity in various ways).

194. ELY, *supra* note 102, at 61.

195. *See id.* at 61-62. Ely cites several examples of restrictions on the use of property that were sustained as valid police power regulations, including "requirements that owners of urban lots construct buildings with inflammable materials, regulations of privately

By the end of the nineteenth and the beginning of the twentieth century, two critical developments changed American constitutional law as it pertains to limits on state police power. One was the rise of social legislation during the so-called Progressive Era, in which state legislatures began regulating citizens' lives in unprecedented ways that went far beyond the traditional scope of the police power.[196] The other was the addition to the Constitution of an amendment, worded in very broad language, that authorized federal courts and Congress to impose significant limitations on the police power during the very time that the states were pushing its exercise beyond its traditional scope.

C. Federalizing Constitutional Limits: The Fourteenth Amendment

Since the publication in 1949 of a seminal article by Charles Fairman questioning the incorporation of the Bill of Rights into the Fourteenth Amendment,[197] the interpretation of Section 1 of the Fourteeenth Amendment,[198] and especially its original meaning, has been a matter of continuing controversy among constitutional scholars.[199] Neverthe-

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owned wharves in harbors, measures prohibiting the sale of liquor without a license, and statutes requiring railroads to institute safety features such as cattle guards." *Id.* at 61. With regard to controls over business activities, he cites the states' continuation of "colonial schemes to control the quality of export commodities," such as South Carolina's tobacco-inspection laws. *Id.* at 62. "Although many of these controls did impose costs on businesses or property owners, their objective was to safeguard the general public interest," he notes. *Id.*

196. *See supra* note 11.

197. Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949). Fairman's analysis supported the conclusion of his mentor at Harvard Law School, Justice Felix Frankfurter, who in his famous concurring opinion in *Adamson v. California*, 332 U.S. 46 (1947), took the position that the Amendment applied against the states none of the specific rights guaranteed by the federal Bill of Rights. *See* Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 64 & n.44, 65 (1993).

198. 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.

199. *Compare, e.g.*, BERGER, *supra* note 56, at 18, 156 n.95 (arguing that Congress intended to give the Fourteenth Amendment a relatively narrow scope) *and* JAMES E. BOND, NO EASY WALK TO FREEDOM: RECONSTRUCTION AND THE RATIFICATION OF THE FOURTEENTH AMENDMENT 254-55 (1997) (noting that the ratification debates in Southern states provide little evidence that Section 1 was intended to incorporate the Bill of Rights) *with* MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 8 (1986) (finding in the congressional debates and other historical

less, virtually all scholars who have researched the historical origins of the Amendment have found that its Privileges or Immunities Clause was intended to be the key substantive provision of Section 1.[200] Moreover, there is ample evidence that the framers of the Amendment intended it to impose significant substantive limits on the police power of the states, including, but not limited to, all the specific rights protected by the federal Bill of Rights.[201] These included economic liberty rights as well as property rights.[202]

The Fourteenth Amendment was born out of the political conflict over Reconstruction policy between Democratic President Andrew Johnson and the Republican Congress. Congress had passed, over Johnson's veto,[203] the 1866 Civil Rights Act[204] in response to the so-called Black Codes enacted by many Southern states, which deprived the newly freed slaves of many basic rights.[205] The Act was intended to invalidate

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sources ample evidence supporting full incorporation) *and* Aynes, *supra* note 197, at 61 (concluding that the Amendment's framers intended to incorporate the Bill of Rights). In the first chapter of his book on the Amendment, William Nelson nicely sums up the scholarly debate, characterizing it as largely an "interpretivist game." *See* WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 5 (1988).

200. *See, e.g.*, BERGER, *supra* note 56, at 208-09. Berger interprets the three restrictions imposed on the states in Section 1 of the Amendment as but three facets of one design: the protection of certain "fundamental rights" (the Privileges or Immunities Clause) from diminishment except by "due course of law" or "laws of the land" (the Due Process Clause) applying to all alike (the Equal Protection Clause). *Id.* at 18, 208-09, 213.

The authors of a more recent study of the Fourteenth Amendment's original meaning have concluded that "it was the Privileges or Immunities Clause that was expected to be the principal source of rights" protected against state abridgement by the Amendment. Kimberly C. Shankman & Roger Pilon, *Reviving the Privileges or Immunities Clause To Redress the Balance Among States, Individuals, and the Federal Government*, 3 TEX. REV. L. & POL. 1, 26 (1998).

201. *See infra* notes 219-28 and accompanying text.

202. *See infra* notes 229-30 and accompanying text.

203. Veto of the Civil Rights Act (Mar. 27, 1866), *reprinted in* 1 DOCUMENTS OF AMERICAN HISTORY, *supra* note 116, at 465.

204. Civil Rights Act at 1866, 14 Stat. 27 (1866), *reprinted in* 1 DOCUMENTS OF AMERICAN HISTORY, *supra* note 116, at 464.

205. The Black Codes severely restricted black persons' rights, particularly their economic freedom, in an apparent attempt to hold them in a status of "quasi-slavery." *See* DAVID HERBERT DONALD, LIBERTY AND UNION 193 (1978); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 199-205 (1988). The first of these Codes, adopted by the Mississippi legislature, prohibited black persons from renting or leasing "any lands or tenements except in incorporated cities or towns." Black Code of Mississippi, 1865 Miss. Laws 82, *reprinted in* 1 DOCUMENTS OF AMERICAN HISTORY, *supra* note 116, at 452. South Carolina's Code excluded them from practicing "'the art, trade or business of an artisan, mechanic or shop keeper, or any other trade, employment or business (besides that of husbandry, or that of a servant[]).'" Black Code of South

these state laws and give black persons equality with white persons in regard to certain rights—including the right "to make and enforce contracts."[206] Although "there was widespread agreement in the first Reconstruction Congress regarding the substance of the [A]ct," there also was "considerable unease about its constitutionality."[207] One of the clear purposes of the Fourteenth Amendment, as originally proposed by Representative John Bingham (R.-Ohio),[208] was to "'constitutionalize' the Civil Rights Act,"[209] by expressly giving Congress the power to enact laws that would secure citizens' "privileges and immunities" and

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Carolina, No. 4733, § 72, 1865 S.C. Acts 291, 299, *reprinted in* DONALD, *supra*, at 193. Louisiana's Code required freedmen who were agricultural laborers to enter into long-term contracts and to "obey all proper orders" of their employers, subject to fines or dismissal for insubordination. Black Code of Louisiana, 1865 La. Acts 3, *reprinted in* 1 DOCUMENTS OF AMERICAN HISTORY, *supra* note 116, at 455, 456. Despite these restrictions on their freedom to earn a living, in most of the Southern states black persons who were unemployed could be punished criminally for vagrancy, by imprisonment or hard labor. *E.g.*, Mississippi Vagrant Law, 1865 Miss. Laws 90, *reprinted in*, 1 DOCUMENTS OF AMERICAN HISTORY, *supra* note 116, at 454. Moreover, they were forbidden from exercising essential civil rights that white persons enjoyed; for example, they could not purchase or carry firearms, nor could they assemble after sunset. DONALD, *supra*, at 235.

206. Civil Rights Act of 1866 § 1, 14 Stat. at 27, *reprinted in* 1 DOCUMENTS OF AMERICAN HISTORY, *supra* note 116, at 464. The Act declared that persons born in the United States were citizens of the United States and provided, in relevant part, that

> such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other.

Id. To remove all doubt that the Act was meant to nullify the Black Codes, Congress added the phrase "any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding." *Id.*

207. Shankman & Pilon, *supra* note 200, at 25. President Johnson had vetoed the law on constitutional grounds, maintaining that Congress lacked the power to legislate with regard to "the internal police and economy of the respective States." Veto of the Civil Rights Act (Mar. 27, 1866), *reprinted in* 1 DOCUMENTS OF AMERICAN HISTORY, *supra* note 116, at 466.

208. Bingham was a member of the fifteen-man Joint Committee on Reconstruction, Aynes, *supra* note 197, at 80 and the principal author of the Amendment, *id.* at 61. Justice Hugo Black called him "the Madison of the first section of the Fourteenth Amendment." *Adamson*, 332 U.S. at 74 (Black, J., dissenting). For a discussion of Bingham's legal theory, which defends him against the charge by Fairman and other scholars that his views were idiosyncratic, see Aynes, *supra* note 197, at 74-94.

209. Shankman & Pilon, *supra* note 200, at 25.

guarantee "equal protection in the rights of life, liberty, and property."[210]

As ultimately adopted by Congress and ratified by the states, however, the Amendment went beyond this original purpose. Two significant changes were made in the text of the proposed amendment during the debates in Congress in the spring of 1866.[211] First, the key substantive language of what ultimately became Section 1 of the Amendment was transformed from a grant of power to Congress to a limitation on the power of the states.[212] Second, four additional sections were added, with the fifth and final section empowering Congress to enforce the Amendment's provisions "by appropriate legislation."[213]

The final version of the Amendment clearly went further than Bingham's original proposal, and Section 1 went further than the Civil Rights Act in the scope of individual rights that it protected against state abridgement.[214] Nevertheless, the Amendment's proponents, both

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210. CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866). The original resolution introduced by Congressman Bingham in February 1866 proposed that

> The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.

Id.

211. The evolution of the language of Section 1 into what became the second sentence of the Fourteenth Amendment as adopted—quoted *supra* note 198—is a complicated story. Put simply, after some debate the House voted on February 28, 1866, by a vote of 110-37, to postpone consideration of Bingham's original proposed amendment until the second week of April. Siegan, *supra* note 30, at 468. The measure was never taken up again because by early May, the Joint Committee on Reconstruction reported back to the House and the Senate a proposed five-section amendment that, with some additional changes, became the Fourteenth Amendment as adopted by Congress and sent to the states for ratification. NELSON, *supra* note 199, at 54-58. Those changes included the addition of the first sentence of Section 1, declaring all persons "born or naturalized in the United States" to be "citizens of the United States and of the State wherein they reside," to overrule that part of Chief Justice Taney's opinion in *Dred Scott* that denied citizenship to black persons. U.S. CONST. amend. XIV, § 1; *see* CURTIS, *supra* note 199, at 173; NELSON, *supra* note 199, at 55. A fairly detailed account of the evolution of the Amendment's text is given in NELSON, *supra* note 199, at 49-58.

212. NELSON, *supra* note 199, at 55; Siegan, *supra* note 30, at 468. The transformation in the format of Section 1 is significant because it meant that the Amendment did not depend on Congress for its enforcement but could also be enforced by the courts through their judicial review power. *See* NELSON, *supra* note 199, at 55. The framers of the Amendment were concerned that future Congresses, not controlled by Republicans, could change policy. *See id.*; Siegan, *supra* note 30, at 468.

213. U.S. CONST. amend. XIV; *see* NELSON, *supra* note 199, at 55.

214. *See* FONER, *supra* note 205, at 257. Eric Foner notes,

in the debates in Congress and in state ratification debates, continually downplayed its impact on federalism, the balance of powers between the national government and the states.[215] Bingham, the principal author of the final language of Section 1,[216] stated that the Fourteenth Amendment was designed to remedy a "want" in the Constitution: namely, the power in the people, by express authority of the Constitution, "to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the *unconstitutional* acts of any State."[217] Other proponents similarly maintained the Amendment merely would correct the illegitimate actions of state governments.[218]

> Unlike the Civil Rights Act, which listed numerous rights a state could not abridge, the Amendment used only the broadest language. Clearly, Republicans proposed to abrogate the Black Codes and eliminate any doubts as to the constitutionality of the Civil Rights Act. Yet to reduce their aims to this is to misconstrue the difference between a statute and a constitutional amendment.

Id. The final version of Section 1 adopted by the Joint Committee abandoned a narrower formulation proposed by Representative Robert Dale Owen, Jr. (D.-IN)—which merely would have prohibited "'discrimination . . . as to the civil rights of persons because of race, color, or previous condition of servitude,'" NELSON, *supra* note 199, at 55—and instead substituted the language proposed by Bingham, with its three familiar clauses: the Privileges or Immunities Clause, the Due Process Clause, and the Equal Protection Clause, *id.* at 54-55. As Curtis notes, the inclusion of these clauses shows that the Amendment was intended to do more than merely protect black persons from racially discriminatory state laws. *See* CURTIS, *supra* note 199, at 118-19.

215. The Amendment's opponents, on the other hand, warned that it would destroy federalism. For example, Congressman Andrew Jackson Rogers (D.-N.J.) called it "the embodiment of centralization and the disfranchisement of the States of those sacred and immutable State rights which were reserved to them by the consent of our fathers in our organic law." CONG. GLOBE, 39th Cong., 1st Sess. 1034.

216. Aynes, *supra* note 197, at 61.

217. CONG. GLOBE, 39th Cong., 1st Sess. 2542 (emphasis added). Bingham added that the Amendment "takes from no State any right that ever pertained to it. No State ever had the right . . . to deny to any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic." *Id.*

218. *See, e.g., id.* at 1054 (statement of Rep. William Higby); *see also* CURTIS, *supra* note 199, at 68-69 (discussing statements of Reps. William Higby, William Kelley, and Frederick Woodbridge). Congressman William Higby argued that the Amendment was "already embraced in the Constitution, but [was] so scattered through different portions of it" that it was ineffectual. CONG. GLOBE, 39th Cong., 1st Sess. 1054. Adoption of the amendment would only "give vitality and life to portions of the Constitution" that have been "ignored and have become as dead matter in that instrument," he maintained with obvious reference to the Article IV Privileges and Immunities Clause. *Id.* Higby was a Radical Republican from California. CURTIS, *supra* note 199, at 68. Messages from governors transmitting the proposed amendment for ratification to their state legislatures generally described it as protecting citizens' "rights" or "liberty" without interfering with

Nevertheless, the framers of the Fourteenth Amendment understood that Section 1 limited state police powers in significant ways. Senator Jacob Howard (R.-Mich.), who managed the Amendment for the Joint Committee in the Senate, maintained that "[t]he great object" of Section 1 was "to restrain the power of the States and compel them at all times to respect" the Constitution's "great fundamental guarantees" of individual rights.[219] Like Bingham and the other proponents of the Amendment, Howard identified those rights chiefly in terms of "the privileges or immunities of citizens of the United States."[220] Those privileges and immunities[221] he described in very broad terms as rights that "are not and cannot be fully defined in their entire extent and precise nature."[222] They included the rights protected by the Privileges and Immunities Clause of Article IV, Section 2, as those rights had been identified by the courts. Justice Bushrod Washington's classic decision in *Corfield v. Coryell*,[223] described them as rights "which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign."[224] Senator Howard added

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the lawful authority of the states. *See id.* at 146.

219. CONG. GLOBE, 39th Cong., 1st Sess. 2766.

220. *Id.* at 2765. In his May 23, 1866 speech presenting the proposed amendment to the Senate, Howard spoke chiefly of the Privileges or Immunities Clause, which he regarded as "very important." *Id.* Like Bingham, Howard equated the "privileges or immunities of citizens of the United States," referred to in Article I of the Amendment, with the "privileges and immunities of citizens of the several States," protected in Article IV. *Id.* at 2765-66. He thus saw the first clause of the second sentence of Section 1 as protecting the rights of citizens, while the second and third clauses protected all persons, from deprivation of their rights to life, liberty, and property without due process of law or from denial of the equal protection of the laws. *Id.* at 2766. Howard said little about the latter two clauses other than that the Equal Protection Clause "abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another." *Id.*

221. The distinction between privileges and immunities had been described by Blackstone: "immunities" were retained natural rights, or "that *residuum* of natural liberty, which is not required by the laws of society to be sacrificed to public convenience"; while "privileges" were civil rights, or rights "which society hath engaged to provide, in lieu of the natural liberties so given up by individuals." 1 WILLIAM BLACKSTONE, COMMENTARIES *125.

222. CONG. GLOBE, 39th Cong., 1st Sess. 2765.

223. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230). Justice Washington, who served on the Supreme Court from 1798 to 1829, decided the case in his capacity as a circuit judge.

224. *Id.* at 551. While acknowledging that these rights would be "more tedious than difficult to enumerate," Justice Washington categorized them under the following "heads":

> Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness

to these rights "the personal rights guarantied [sic] and secured by the first eight amendments of the Constitution," which he then partially enumerated.[225] Thus, he concluded, the proposed Amendment sought to protect against infringement by the states "a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution, [and] some by the first eight amendments of the Constitution."[226]

Thus, like Bingham and other proponents of the Amendment, Howard identified the rights enumerated in the first eight articles of the Bill of Rights as among the rights the Fourteenth Amendment was meant to protect.[227] And like the other proponents, he maintained the Amend-

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> and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state.

Id. at 551-52. These rights, together with "the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised," constitute "some of the particular privileges and immunities of citizens . . . deemed to be fundamental." *Id.* at 552. Although Senator Howard quoted approvingly this passage from the *Corfield* decision, in his speech he qualified it by exempting voting rights. *See infra* note 225.

225. CONG. GLOBE, 39th Cong., 1st Sess. 2765.

226. *Id.* Howard nevertheless excluded suffrage, noting pointedly that it was "not, in law, one of the privileges or immunities thus secured by the Constitution" but was rather "merely the creature of law," "the result of positive local law," "not regarded as one of those fundamental rights lying at the basis of all society and without which a people cannot exist except as slaves, subject to a despotism." *Id.* at 2766. Howard's understanding is consistent with the hierarchical view of rights that prevailed in nineteenth-century constitutionalism. BOND, *supra* note 199, at 255. This view distinguished natural rights from rights protected under positive law, which included civil rights and political rights. *Id.* at 255-56. Voting, like the right to hold office or serve on juries, was a privilege held only by certain classes of citizens; other classes, such as women, were excluded. *See id.* The provision in Section 2 of the Fourteenth Amendment, which sought to encourage states to grant voting rights to black persons by proportionately depriving them of their representation in Congress if they failed to do so, as well as the later protection for voting rights in the Fifteenth Amendment, provides textual support that suffrage was not intended to be among the rights protected by Section 1. *See id.* at 256-57.

227. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2765. Bingham shared Howard's broad understanding of privileges and immunities, equating the body of rights protected by Section 2 of Article IV with the body of rights protected by Section 1 of the Fourteenth Amendment, both in his original proposal and in its final version. *See* Aynes, *supra* note 197, at 69-71; CURTIS, *supra* note 199, at 64. He saw that body of rights as including, but not limited to, the particular rights guaranteed by the first eight amendments of the Constitution. Aynes, *supra* note 197, at 69-71. Among those rights were the rights of

ment was needed because the Constitution, at least as it had been interpreted by the Supreme Court in the antebellum period, did not require the states to respect these rights.[228] It is reasonably clear from the history of the Fourteenth Amendment that the civil rights it was intended to protect included economic liberty and property rights.[229] Indeed, because some of the most important civil rights denied to black persons by the Black Codes were the rights to make contracts and own property, the Fourteenth Amendment could be justly characterized as "'economic by design.'"[230]

Although the earliest federal court decisions applied the Fourteenth Amendment consistent with this broad design,[231] the Supreme Court, in its infamous decision in the *Slaughter-House Cases*,[232] temporarily thwarted Congress's intent to impose substantive limitations on the police power of the states. The Court, in a split decision, upheld—against a Fourteenth Amendment challenge—an 1869 Louisiana law chartering the Crescent City Livestock Landing and Slaughter-

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liberty and property that were protected substantively by the Due Process Clause. *See id.* As Bernard Siegan has noted, in summarizing the debates over the Amendment, "most of the Republicans probably regarded privileges and immunities as encompassing all fundamental liberties secured in the Constitution, which necessarily would include those set forth in the first eight amendments." SIEGAN, *supra* note 117, at 68.

228. CONG. GLOBE, 39th Cong., 1st Sess. 2765; *see also* SIEGAN, *supra* note 117, at 68. Both he and Bingham pointed to the Supreme Court's decision in *Barron v. Baltimore*, which held that the Fifth Amendment's Takings Clause did not apply to the states, 32 U.S. (7 Pet) 243, 250-51 (1833). Aynes, *supra* note 197, at 72. When offering his original proposal for the amendment, Bingham stated that it was needed "'to enforce the bill of rights'" and that *Barron* "'makes plain the necessity of adopting this amendment.'" Aynes, *supra* note 197, at 72 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1089-90). Thus, Bingham and Howard saw the states' obligation to obey the Bill of Rights as "legally unenforceable—just as the Court had treated other obligations of [A]rticle IV, [S]ection 2 as unenforceable." CURTIS, *supra* note 199, at 100. Notwithstanding the Supreme Court's refusal in *Barron* and other decisions to apply the Bill of Rights to the states, some state supreme courts had held that state legislatures were limited by provisions in the federal Bill of Rights, including the Second Amendment right to bear arms and the due process protections of the Fifth Amendment. *Id.* at 24-25.

229. BOND, *supra* note 199, at 255, 257; Ely, *supra* note 108, at 220.

230. Ely, *supra* note 108, at 220 (quoting Hovenkamp, *supra* note 26, at 395).

231. *See, e.g.*, Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co., 15 F. Cas. 649 (C.C.D. La. 1870) (No. 8408) (holding Fourteenth Amendment protected against state impairment of right to pursue a lawful occupation without interference by "odious monopolies"), *rev'd sub nom.* Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873); United States v. Hall, 26 F. Cas. 79 (S.D. Ala. 1871) (No. 15, 282) (holding Fourteenth Amendment protected against state impairment of right of freedom of speech); *See also* Aynes, *supra* note 197, at 97-98.

232. Butchers' Benevolent Ass'n v. Crescent City Livestock Landing & Slaughter-House Co. (*Slaughter-House Cases*), 83 U.S. (16 Wall.) 36 (1873).

House Company, which granted the company a twenty-five year monopoly on the slaughtering of cattle in the New Orleans area.[233] Justice Miller, speaking for the five-justice majority of the Court, ignored evidence of the Fourteenth Amendment's framers' intent that had been briefed to the Court[234] and instead relied on his own view of the "one pervading purpose" of the three post-Civil War amendments, which he maintained was to guarantee "the freedom of the slave race . . . and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."[235] Focusing narrowly on the language in Section 1's Privileges or Immunities Clause—and ignoring its context[236]—Justice Miller held that the

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233. *Id.* at 36, 80-81. The law was billed as a public health measure, but evidence that it was really the product of political corruption—including bribes paid by the Crescent City Company to Louisiana legislators, the governor, and the owners and editors of two newspapers—surfaced in a shareholders' suit against the company and was reported in rival papers, including the *New Orleans Picayune* and the *New Orleans Bee*. CHARLES FAIRMAN, RECONSTRUCTION AND REUNION, 1864-88, at 1322-23 (1971). The authors of a recent exhaustive study of the *Slaughter-House Cases* have concluded that "even though the claims of bribery and corruption remain uncertain," the historical evidence shows that the Crescent City Company "obtained [its] franchise by means that left a good deal to be desired" and that "it was feasible for [courts] to conclude that the act had been obtained by bribery." RONALD M. LABBÉ & JONATHAN LURIE, THE SLAUGHTERHOUSE CASES: REGULATION, RECONSTRUCTION, AND THE FOURTEENTH AMENDMENT 84, 102 (2003).

234. Aynes, *supra* note 197, at 98-99 (noting that lawyers for the butchers challenging the Crescent City monopoly had submitted portions of Bingham's congressional speeches, along with those of other members of Congress, in their brief to the Court).

235. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) at 71. By most accounts, the butchers who were challenging the Crescent City monopoly were white; therefore, they could be said to be outside the class of persons whom Justice Miller considered the intended beneficiaries of the Fourteenth Amendment's protections. However, some of the most important rights denied freedmen by the Black Codes were economic rights, including the freedom to pursue a lawful occupation unrestrained by a state-granted monopoly—the very right asserted by the plaintiffs in the *Slaughter-House Cases*. *See supra* text accompanying notes 228-29. Thus, Justice Field was correct in criticizing the majority decision for being logically inconsistent or hypocritical. *See infra* note 241 and accompanying text.

236. *See The Slaughter-House Cases*, 83 U.S. (16 Wall.) at 73-74. The first sentence of Section 1 provides that "[a]ll persons born or naturalized in the United States and subject to [its] jurisdiction" are both "citizens of the United States" and citizens "of the State wherein they reside." U.S. CONST. amend. XIV, § 1. It thus redefines state citizenship in terms of federal citizenship. Although the Court noted this clear purpose of the provision, Justice Miller drew a distinction between the two types of citizenship and maintained that because the second sentence of Section 1 referred to "the privileges or immunities of citizens of *the United States*," only those rights—and not any of the rights protecting a "citizen of a State against the legislative power of his own State"—were protected by the clause. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) at 74. After relying heavily on Justice Washington's opinion in *Corfield* to describe the "privileges and immunities of

clause protected only those few rights that pertained to national citizenship,[237] none of which were jeopardized by the Louisiana monopoly.[238]

In opposition to this narrow view of privileges and immunities, however, Justices Field, Bradley, and Swayne delivered vigorous dissents. Justice Field argued that "[t]he privileges and immunities designated are those *which of right belong to the citizens of all free*

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citizens of the States" protected by Article IV, *id.* at 76, Justice Miller concluded that because these rights "belong to citizens of the States as such," they were "left to the State governments for security and protection, and not by [the Fourteenth Amendment] placed under the special care of the Federal government," *id.* at 78. That conclusion, of course, overlooked the essential purpose of the Amendment as stated in the congressional debates by its framers. *See supra* notes 217, 219, 227.

237. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) at 74. Among those privileges or immunities of national citizenship identified by Justice Miller were the rights "'to come to the seat of [national] government,'" *id.* at 79 (quoting Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 44 (1867)); to have "'free access to its seaports, . . . to the sub-treasuries, land offices, and courts of justice,'" *id.* (misquoted in original) (quoting *Crandall*, 73 U.S. (6 Wall.) at 44); "to demand the care and protection of the Federal government over [one's] life, liberty, and property when on the high seas or within the jurisdiction of a foreign government," to "use the navigable waters of the United States," and "all rights secured to our citizens by treaties with foreign nations," *id.* Needless to say, none of these rights were jeopardized by the Black Codes that prompted Congress to pass the 1866 Civil Rights Act or to consider the need for the Fourteenth Amendment. As Justice Field observed in his dissent, explaining why the majority's interpretation rendered the Fourteenth Amendment

> a vain and idle enactment, . . . [w]ith privileges and immunities thus designated or implied no State could ever have interfered by its laws, and no new constitutional provision was required to inhibit such interference. The supremacy of the Constitution and the laws of the United States always controlled any State legislation of that character.

Id. at 96 (Field, J., dissenting).

238. *Id.* at 80 (majority opinion). Justice Miller gave scant attention to the rights claimed by the butchers who challenged the Louisiana law, blithely stating that the majority was "of opinion that the rights claimed by these plaintiffs in error, if they have any existence, are not privileges and immunities of citizens of the United States within the meaning of . . . the [F]ourteenth [A]mendment." *Id.* The Court summarily disposed of challenges under the other clauses of Section 1. *See id.* at 80-81. With regard to the Due Process Clause, the Court simply asserted that "under no construction of that provision that we have ever seen, or any that we deem admissible," can the Crescent City monopoly be regarded as a deprivation of the other butchers' property. *Id.* at 81. Regarding the Equal Protection Clause, the Court noted that in light of its previous discussion of the "pervading purpose" of the post-Civil War amendments, "[w]e doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision"—thus limiting its scope to class legislation that overtly discriminated against black persons. *Id.*

governments."[239] Justice Bradley described the privileges and immunities as the "fundamental rights" of life, liberty, property, and the pursuit of happiness.[240] Justice Field particularly exposed the logical inconsistency of the majority's opinion, noting that if the only rights protected by the Fourteenth Amendment were those few rights pertaining to national citizenship that Justice Miller identified, "it was a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage."[241] Significantly, many legal

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239. *Id.* at 97 (Field, J., dissenting). Justice Field added, "Clearly among these must be placed the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons." *Id.* "[G]rants of exclusive privileges," such as the Crescent City monopoly, "are opposed to the whole theory of free government, and it requires no aid from any bill of rights to render them void," Justice Field concluded. *Id.* at 111. "That only is a free government, in the American sense of the term, under which the inalienable right of every citizen to pursue his happiness is unrestrained, except by just, equal, and impartial laws." *Id.* Justice Field recognized that the state, by valid police regulations to protect public health, could restrict the slaughtering business by general laws regulating the places where animals were slaughtered or requiring their inspection before being slaughtered—as other parts of the Louisiana statute, not challenged in this case, provided. *Id.* at 87-88. "But under the pretence of prescribing a police regulation," he added, "the State cannot be permitted to encroach upon any of the just rights of the citizen, which the Constitution intended to secure against abridgement." *Id.* at 87.

240. *Id.* at 116 (Bradley, J., dissenting). Like Justice Field, Justice Bradley saw "the right of any citizen to follow whatever lawful employment he chooses" to be among those fundamental rights. *Id.* at 113. "[T]his right to choose one's calling is an essential part of that liberty which it is the object of government to protect; and a calling, when chosen, is a man's property and right." *Id.* at 116. Monopolies over commodities or "ordinary callings or pursuits," *id.* at 121, exclusive privileges granted by government to companies like Crescent City, thus were "an invasion of the right of others to choose a lawful calling, and an infringement of personal liberty," *id.* at 120. Like Justice Field also, he distinguished the monopoly created under the Louisiana law from valid police regulations to protect public health. *See id.* He regarded the monopoly as "one of those arbitrary and unjust laws made in the interest of a few scheming individuals, by which some of the Southern States have, within the past few years, been so deplorably oppressed and impoverished." *Id.*

241. *Id.* at 96 (Field, J., dissenting). Justice Field recognized that the first clause of the Amendment redefined citizenship, making irrelevant the distinction on which Justice Miller relied:

> A citizen of a State is now only a citizen of the United States residing in that State. The fundamental rights, privileges, and immunities which belong to him as a free man and a free citizen, now belong to him as a citizen of the United States, and are not dependent upon his citizenship of any State.

Id. at 95. Thus, as Justice Field interpreted the Constitution, what the Privileges and Immunities Clause of Article IV did for

> the protection of the citizens of one State against hostile and discriminating legislation of other States, the [F]ourteenth [A]mendment does for the protection of every citizen of the United States against hostile and discriminating legislation

experts at the time agreed with the dissenters, considering the majority's interpretation of the Amendment to be erroneous.[242]

The Justices in the *Slaughter-House* majority interpreted the Fourteenth Amendment so narrowly because they were concerned about the Amendment's effect on federalism, as Justice Miller's opinion explicitly admitted.[243] Too broad an interpretation of the Amendment, the Court warned, "would constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens."[244] To so "fetter and degrade the State governments by subjecting them to the control of Congress" or the federal courts would be to "radically change[] the whole theory of the relations of the State and Federal governments to each other and both of these governments to the people."[245]

This concern for the traditional antebellum balance of state and federal powers prompted a majority of the Supreme Court's Justices to continue interpreting the Fourteenth Amendment narrowly—and thus to refrain from limiting the autonomy of state legislatures in exercising police powers—throughout the 1870s, 1880s, and early 1890s.[246] The

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against him in favor of others, whether they reside in the same or in different States.

Id. at 100-01.

242. For example, James Bradley Thayer, the respected professor at Harvard Law School, told his students "'that so far as it relates to the construction of the 14th amend[ment] . . . the minority . . . seem to be the sounder.'" NELSON, *supra* note 199, at 159 (quoting Thayer's teaching notes for his constitutional law class). *See also* Aynes, *supra* note 197, at 99-101; CURTIS, *supra* note 199, at 177 (noting other criticisms by members of Congress and other commentators, includig some future justices of the Court).

243. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) at 78 (majority opinion).

244. *Id.*

245. *Id.* The dissenters did not share this fear. Justice Field frankly considered the amendment to have "a profound significance and consequence." *Id.* at 96 (Field, J., dissenting). Justice Bradley believed "it was the intention of the people of this country in adopting [the] amendment to provide National security against violation by the States of the fundamental rights of the citizen." *Id.* at 122 (Bradley, J., dissenting). In response to the majority's concern about opening the floodgates to challenges of state laws, Justice Bradley forecast "but a slight accumulation of business in the Federal courts," adding that if he was wrong, "[t]he National will and National interest are of far greater importance" than the "inconvenience" to the federal judiciary from an increase in its caseload. *Id.* at 124. Justice Swayne wrote a separate dissent, in part, to express his view that the post-Civil War Amendments indeed were "a new departure" from antebellum federalism and "mark an important epoch in the constitutional history of the country." *Id.* at 125 (Swayne, J., dissenting).

246. This concern for federalism also explains the Court's early narrow reading of the Sherman Act of 1890, the first federal antitrust law. *See, e.g.*, United States v. E. C. Knight Co., 156 U.S. 1, 17-18 (1895) (Chief Justice Fuller's opinion for the Court holding that a monopoly in manufacturing was not in commerce "among the States" and thus not

Court, for example, refused to interfere with a state's determination that women could not practice law,[247] and with so-called Granger laws enacted by state legislatures that set maximum rates for railroads and grain elevators.[248] Similarly, the Court rejected a brewer's challenge

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subject to federal regulation under the Commerce Clause but rather left within the jurisdiction of the police power of the states).

247. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873). Only Chief Justice Chase dissented, and the other three *Slaughter-House* dissenters concurred with the majority decision. *Id.* at 142. In his concurrence, Justice Bradley maintained that under the valid exercise of the police power, the legislature could "prescribe regulations founded on nature, reason, and experience for the due admission of qualified persons to professions and callings demanding special skill and confidence." *Id.* (Bradley, J., concurring). In Bradley's view, "[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life," including the practice of law. *Id.* at 141.

248. *E.g.*, Munn v. Illinois, 94 U.S. 113, 125-26, 130, 134-35 (1877) (upholding Illinois' maximum on the rates charged by grain elevators in Chicago, on the theory that the "virtual monopoly" held by the facilities made them subject to the police power, as businesses "'affected with a public interest'" (quoting MATTHEW HALE, DE PORTIBUS MARIS, *reprinted in* 1 A COLLECTION OF TRACTS RELATIVE TO THE LAWS OF ENGLAND 45, 78 (Frances Hargrave ed., Dublin, 1787))). Chief Justice Waite's opinion for the Court in *Munn* borrowed from English law sources—specifically, from Matthew Hale's seventeenth-century treatise, *De Portibus Maris*, which maintained that the King had broad authority to regulate ports for the common good—as the basis for the "business affected with a public interest" doctrine. *Id.* at 125-26 (quoting HALE, *supra*, at 78). Justice Field, in a dissenting opinion joined by Justice Strong, accepted the doctrine but maintained that under common law the only businesses whose rates could be regulated under it were those either "dedicated by the owner to public uses" or de jure monopolies, that is, those that held exclusive privileges granted by law—neither of which applied to the supposed de facto monopoly involved in this case. *Id.* at 139-40 (Field, J., dissenting).

Following *Munn*, the majority in *Budd v. New York*, 143 U.S. 517 (1892), held grain elevators to be "a business affected with a public interest," even though the New York elevator industry—which included "floating" elevators, or boats, in harbors as well as stationary elevators on land—lacked the character of the de facto monopoly the Court had found in *Munn*. *See Budd*, 143 U.S. at 528-29, 543-44. Emphasizing this difference, Justice Brewer's dissent (joined by Justices Field and Brown) assailed the majority's "radically unsound" application of the doctrine to a free market of competing private businesses. *Id.* at 548-49 (Brewer, J., dissenting). "[T]here are no exclusive privileges given to these elevators. They are not upon public ground. If the business is profitable, any one can build another; the field is open for all the elevators, and all the competition that may be desired," Justice Brewer observed, adding his own fears about the rise of socialism:

> The paternal theory of government is to me odious. The utmost possible liberty to the individual, and the fullest possible protection to him and his property, is both the limitation and duty of government. If it may regulate the price of one service which is not a public service, or the compensation for the use of one kind of property, which is not devoted to a public use, why may it not with equal reason regulate the price of all service, and the compensation to be paid for the use of all property? And, if so, 'Looking Backward' is nearer than a dream.

to a liquor prohibition law[249] and a grocer's challenge to a law prohibiting manufacture or sale of butter substitutes.[250] The Court also, in a

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Id. at 551. Justice Brewer's reference to *Looking Backward*, Edward Bellamy's late nineteenth-century novel about a socialist future, typified the Justice's propensity to be, in the words of one scholar, "not shy about expressing his fear of, and disgust for, socialism"—a fear that he shared with many of his contemporaries. Bernstein, *supra* note 184, at 41 n.217.

Although the Court generally upheld state regulation of railroad rates, it did hold in a series of decisions in the 1880s that the Fourteenth Amendment limited the exercise of police powers and authorized federal courts to invalidate regulations that were unequal or unreasonable, arbitrarily depriving businesses of property or liberty without due process of law. *See, e.g.*, Chi., Milwaukee & St. Paul Ry. Co. v. Minn. *ex rel.* R.R. & Warehouse Comm'n, 134 U.S. 418, 458 (1890) (holding that the reasonableness of a rate set by a state commission must be subject to judicial review); Stone v. Farmers' Loan & Trust Co., 116 U.S. 307, 331, 335-36 (1886) (upholding a Mississippi law empowering a commission to regulate railroad rates but warning that its authority would be abused if it deprived a railroad of its ability to earn a profit). In addition, when state regulation of railroad rates interfered with interstate commerce, the Court limited the exercise of police powers under what is now called the "dormant Commerce Clause." *See, e.g.*, Wabash, St. Louis & Pac. Ry. Co. v. Illinois, 118 U.S. 557, 577 (1886) (holding unconstitutional an Illinois law prohibiting long haul-short haul rate discrimination, a prohibition eventually incorporated in the federal Interstate Commerce Act of 1887).

249. Mugler v. Kansas, 123 U.S. 623, 675 (1887). Although the Court sustained the prohibition law as a valid use of the police power to protect public health and morals, Justice Harlan in his opinion for the Court cautioned that there were "limits beyond which legislation cannot rightfully go" and that courts could "look at the substance of things" to determine whether the legislature had gone outside the valid scope of the police power. *Id.* at 661. As one modern scholar notes, the significance of the decision was that it signaled the Court would not blithely accept legislation billed as police power regulations at face value. ELY, *supra* note 102, at 89. Rather, the Court's caveat asserted potentially "far-reaching federal judicial supervision of state economic legislation." *Id.*

250. Powell v. Pennsylvania, 127 U.S. 678, 687 (1888). "Pennsylvania was just one of twenty-two states that by the mid-1880s had" passed laws targeting oleomargarine—"an artificial substitute for butter, derived from animal or vegetable fats"—"through prohibitions, discriminatory taxes, or unattractive coloring or labeling requirements." GILLMAN, *supra* note 28, at 73. Although rationalized by their proponents as necessary to protect public health or to prevent consumer fraud, the oleomargarine laws were "protectionism pure and simple, enacted only because of the political influence of large dairy interests." *Id.* at 74. Justice Harlan's majority opinion in *Powell* upheld the Pennsylvania law as a valid police power regulation "to protect the public health, and to prevent the adulteration of dairy products, and fraud in the sale thereof." *Powell*, 127 U.S. at 684. Justice Field, the lone dissenter, thought the law to be an unconstitutional deprivation of economic liberty, citing *In re Jacobs* and *Marx*, the New York Court of Appeals decisions protecting liberty of contract. *Id.* at 692, 699 (Field, J., dissenting); *see also supra* notes 121-31 and accompanying text. Following *Mugler*'s sanction "to look at the substance of things," *id.* at 697 (quoting *Mugler*, 123 U.S. at 661), Field concluded, as the New York court had in *Marx* when it invalidated that state's oleomargarine law, that the law really had nothing to do with protecting public health or safety but rather was "nothing less than an unwarranted interference with the rights and liberties of the citizen,"

series of cases, nearly unanimously held that the Fourteenth Amendment did not apply the federal Bill of Rights to the states.[251]

By the late 1890s, however, changes in the Court's membership helped pave the way for a more expansive interpretation of the Amendment. As one scholar observed, by 1892 six of the Court's Justices concluded that the Privileges or Immunities Clause of 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."[252] Although the Court's evisceration of the Privileges or Immunities Clause remained as the unhappy legacy of its decision in the *Slaughter-House Cases*, the new majority on the Court in the late 1890s was able to breathe life into the other clauses of Section 1. While failing to apply the Equal Protection Clause as a broad prohibition against all class legislation, the Justices took the Clause beyond its *Slaughter-House* limits[253] and applied it to invalidate even facially neutral laws that, when enforced, adversely affected certain classes of persons on account of race.[254] More impor-

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id. at 695.

251. Hurtado v. California, 110 U.S. 516, 534-35 (1884) (holding that the Fifth Amendment right to a grand jury indictment was not required by the Due Process Clause of the Fourteenth Amendment); Walker v. Sauvinet, 92 U.S. 90, 90 (1875) (holding that the Seventh Amendment right to a jury trial in civil cases did not apply to the states); United States v. Cruikshank, 92 U.S. 542, 552-53 (1875) (holding that the First Amendment right to assemble and the Second Amendment right to bear arms applied only against the national government).

252. CURTIS, *supra* note 199, at 191. The six Justices identified by Curtis are Justice Woods, before his elevation to the Court (in his circuit court opinions before *Slaughter-House*); Justices Swayne and Bradley, dissenting in *Slaughter-House*; and Justices Field, Harlan, and Brewer, dissenting in *O'Neil v. Vermont*, 144 U.S. 323 (1892), while the majority affirmed a conviction under Vermont's prohibition law of a New York liquor merchant selling across state lines. CURTIS, *supra* note 199, at 191.

253. As observed in *supra* note 237, Justice Miller's opinion for the *Slaughter-House* majority confined the scope of the Equal Protection Clause to laws "directed by way of discrimination against the negroes as a class, or on account of their race." *The Slaughter-House Cases*, 83 U.S. (16 Wall.) at 81. By the 1880s, the Court was considering challenges to various state laws under the Equal Protection Clause, including challenges arguing that laws regulating railroads were invalid as "special" or "class" legislation. Bernstein, *supra* note 184, at 17-18. Nevertheless, unlike state courts, the Supreme Court enforced only relatively narrow restrictions on class legislation; it rejected the class legislation challenges to railroad laws just as it failed to take seriously such a claim in *Powell*, the oleomargarine case. *Id.* at 17-20.

254. *See* Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (holding that a San Francisco ordinance prohibiting operation of a laundry in a wooden building without the consent of the Board of Supervisors, which was enforced by the Board in a way that discriminated against Chinese-owned laundries, violated the Equal Protection Clause). Scholars disagree about whether *Yick Wo* was an aberration in an era when the Court's equal protection jurisprudence seemed to be typified more by its decision upholding Jim Crow segregation

tantly, with the 1895 appointment to the Court of Rufus W. Peckham[255]—the Justice who was to write the opinions for the Court in both *Allgeyer* and *Lochner*—the Court was ready to follow state court decisions of the 1880s and 1890s, using due process substantively to protect liberty of contract.[256]

III. LIBERTY OF CONTRACT: SCOPE OF THE RIGHT

What would it have meant for the United States 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*?[257] In other words, what would be 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

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laws in *Plessy v. Ferguson*, 163 U.S. 537 (1896). David Bernstein, who has studied other decisions from the period involving Chinese laundries, concludes that the Court was far less willing than state courts to invalidate laws as class legislation. *See* Bernstein, *supra* note 184, at 18; *see also* David Bernstein, Lochner, *Parity, and the Chinese Laundry Cases*, 41 WM. & MARY L. REV. 211 (1999); David Bernstein, *Two Asian Laundry Cases*, 23 J. SUP. CT. HIST. 95 (1999).

255. Peckham was nominated to the Court by President Grover Cleveland, his friend and fellow New York Democrat. Richard Skolnik, *Rufus Peckham, in* 3 THE JUSTICES OF THE UNITED STATES SUPREME COURT, 1789-1978: THEIR LIVES AND MAJOR OPINIONS 1685, 1694 (Leon Friedman & Fred L. Israel eds., 1980). Although sometimes called by scholars an ultra or "arch-conservative," *see, e.g.*, CURTIS, *supra* note 199, at 192, Peckham is more accurately described as a limited-government conservative with a high regard for economic liberty. *See generally* Skolnik, *supra*, at 1688-95. As a judge on the New York Court of Appeals between 1886 and 1895, he became known for his lucid and well-reasoned opinions. *See id.* at 1689. Perhaps the most illuminating of these was his dissent in *People v. Budd*, 22 N.E. 670 (1889), in which he regarded the rate-fixing laws for grain elevators that the majority had upheld, under the "affected with a public interest" doctrine, as paternalistic anachronisms that had no place in modern free-market societies. *See* Skolnik, *supra*, at 1692-93.

256. The Progressive movement historian Charles Warren maintained in 1926 that the Court was prompted to expand the "new liberty" under the Fourteenth Amendment Due Process Clause because of the efforts of "skilful counsel" who, thwarted by the Court's narrow interpretation of the Privileges or Immunities Clause, instead attempted to use the Due Process Clause's protection of "liberty" as "an especially convenient vehicle into which to pack all kinds of rights." Warren, *supra* note 10, at 439. Warren's thesis ignores the history of state courts' substantive use of due process to protect economic liberty and property rights throughout the nineteenth century, discussed *supra* Part II.A. It also ignores the views of Congressional Republicans—the framers of the Fourteenth Amendment—who saw due process as a substantive restraint on legislation that deprived persons of essential liberty and property rights. *See* Siegan, *supra* note 30, at 485-87.

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

Freedom[258] 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?"[259] One need not rely on speculation to construct a model for judicial protection of liberty as laissez-faire theorists would advocate. Something close to such a model 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.[260] 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 that commentators long have regarded as the preeminent work of laissez-faire constitutionalism.[261] Tiedeman rejected the traditional definition of the scope of the police power in terms of protecting public health, safety, or morality and instead defined it as "simply the power of the government to establish provisions for the

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258. Herbert Spencer, an English philosopher, was the most famous exponent of the laissez-faire, classical liberal or libertarian philosophy, in the late nineteenth century. In his most famous work, *Social Statics*, he stated his 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."* SPENCER, *supra* note 8, at 95. Spencer regarded this law as the "first principle," *id.*, 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.

259. *Lochner*, 198 U.S. at 75.

260. *See generally* Mayer, *supra* note 27. For a short biographical sketch of Christopher Gustavus Tiedeman (1857-1903), see *id.* at 102-03. Tiedeman's unique jurisprudential views were shaped by two important early influences on his intellectual life: his youth in Charleston, South Carolina and his legal studies in Germany at a time when the German sociological school of jurisprudence was rising in influence. *See id.* These dual influences were reflected in, among other things, Tiedeman's views regarding "unwritten law" and the limitations it put on governmental powers, which he discussed in his treatise *The Unwritten Constitution of the United States*. *See id.* at 108-25; *see also* CHRISTOPHER G. TIEDEMAN, THE UNWRITTEN CONSTITUTION OF THE UNITED STATES, *reprinted in* 27 CLASSICS IN LEGAL HISTORY (Roy M. Mersky & J. Myron Jacobstein eds., William S. Hein & Co. 1974) (1890). Tiedeman's jurisprudence defies the stereotype of laissez-faire constitutionalism as a rigid, formalistic conception of the law. Mayer, *supra* note 27, at 124-25. Rather, Tiedeman 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. *Id.* at 109 (quoting TIEDEMAN, *supra*, at 7).

261. Mayer, *supra* note 27, at 98; *see also* CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES (Da Capo Press 1971) (1886) [hereinafter TIEDEMAN, LIMITATIONS]; CHRISTOPHER G. TIEDEMAN, A TREATISE ON STATE AND FEDERAL CONTROL OF PERSONS AND PROPERTY IN THE UNITED STATES (1900) [hereinafter TIEDEMAN, STATE AND FEDERAL CONTROL]. Tiedeman's first treatise was published again as an expanded second edition in 1900 as a two-volume work.

enforcement of the common- as well as civil-law maxim, *sic utere tuo ut alienum non laedas.*"[262] He thus limited the legitimate exercise of the police power to enforcement of 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.[263]

Because Tiedeman also defined "liberty" in terms of the *sic utere* principle,[264] 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 Spencer's Law of Equal Freedom.[265]

Tiedeman's reformulation of the police power was truly radical; if courts had followed it during the *Lochner* Era, they would have struck down as unconstitutional many laws that fit within the traditional scope of the police powers.[266] The fact that courts generally recognized these

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262. 1 TIEDEMAN, STATE AND FEDERAL CONTROL, *supra* note 261, § 1, at 4. 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. *See* Reznick, *supra* note 142, at 2-3 & n.4. However, 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 the property or the liberty of another. *See* 1 TIEDEMAN, STATE AND FEDERAL CONTROL, *supra* note 261, § 1, at 5.

263. 1 TIEDEMAN, STATE AND FEDERAL CONTROL, *supra* note 261, § 1, at 5. 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.*

264. TIEDEMAN, LIMITATIONS, *supra* note 261, § 30, at 67 (defining "liberty" as "that amount of personal freedom, which is consistent with a strict obedience" to the *sic utere* rule).

265. Tiedeman explained why this 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."

Id. (quoting Speech Delivered at the Dinner of the Charleston Bar (May 10, 1847), *in* 2 THE WORKS OF DANIEL WEBSTER 389, 393 (Boston, Little, Brown & Co. 11th ed. 1858)); SPENCER, *supra* note 8, at 69.

266. Tiedeman condemned as unconstitutional, under his limited definition of the police power, not only laws regulating the hours or wages of workers, but also, for example, usury laws, the protective tariff, antimiscegenation laws, and even laws regulating morality

traditional exercises of the police power as legitimate demonstrates the falsity of Justice Holmes' allegation of laissez-faire constitutionalism in his *Lochner* dissent.

A. *The Standard of Review: 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 model for the protection of liberty rights that a true laissez-faire constitutionalism would imply. Rather, it followed from a model that was more moderate in at least two basic respects. First, rather than protecting a general and absolute right to liberty (limited only by the definitional constraints imposed by some principle like Spencer's Law of Equal Freedom), the courts protected liberty in a particular context: the freedom to make contracts. Second, the courts protected this freedom under a standard permitting the government to limit it through various exercises of the police power within its traditional scope. This 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.

The scope of the right protected by liberty of contract was given its classic definition by Justice Peckham in *Allgeyer v. Louisiana*,[267] the 1897 case that was the Supreme Court's first decision explicitly protecting the right.[268] 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.[269]

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through the prohibition of such vices as gambling or the use of narcotic drugs. *See* Mayer, *supra* note 27, at 129-34, 139. With regard to morals legislation, however, Tiedeman fell short of modern libertarians who advocate total decriminalization of so-called victimless crimes. *Id.* at 138-39. Although he advocated decriminalization of vices per se, he nevertheless would allow government to criminalize trade in a vice, such as the keeping of a house of prostitution or a casino. *See id.* at 132.

267. 165 U.S. 578 (1897).

268. *See id.* at 589.

269. *Id.*

Although quite broad, this liberty right was not unlimited. It was a particular aspect of individuals' general right to liberty, constrained by law—the freedom to use one's own faculties "in all lawful ways," to earn a livelihood "by any lawful calling."[270] 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.[271] The emphasis on contract meant that this liberty right was necessarily subject to certain legal constraints, as Peckham recognized.[272] As the Illinois Supreme Court similarly had recognized in one of the earliest liberty of contract decisions, *Ritchie v. People*,[273] "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."[274]

Liberty of contract was not absolute. Justice George Sutherland explicitly acknowledged this in his opinion for the Court in *Adkins v. Children's Hospital*,[275] one of the most important liberty of contract decisions, second only in fame and historical significance to *Lochner* itself.[276] "There is, of course, no such thing as absolute freedom of

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270. *Id.*

271. *Id.*

272. *See id.* at 591. ("[I]t may be conceded 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.").

273. 40 N.E. 454 (Ill. 1895).

274. *Id.* at 456. 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. 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.* The court also noted that laws passed pursuant to the police power "must have some relation to the ends sought to be accomplished"—to the "health, 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 457-58.

275. 261 U.S. 525 (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 *infra* Part IV.A.

276. 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

contract," Justice Sutherland wrote, noting that it was "subject to a great variety of restraints."[277] 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."[278]

In thus protecting the right by a "general rule forbidding legislative interference with freedom of contract,"[279] the Court in effect was applying what some modern scholars have advocated as a general presumption in favor of liberty.[280] It was a presumption that could be overcome, however, by a court's finding that 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.[281] 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*[282] as the "solemn duty" of the courts, in exercising judicial review, "to look at the substance of things"—that is, to 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."[283]

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

TRADITION: PROFILES OF LEADING AMERICAN JUDGES 178-99 (1976). As observed *supra* note 3, it was the reversal of *Adkins* in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), that marked the end of the Court's protection of liberty of contract as a fundamental right.

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

278. *Adkins*, 261 U.S. at 546.

279. *Id.* at 554.

280. *See, e.g.*, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 259 (2004). 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. *See generally id.* at 259-69; RANDY E. BARNETT, *Introduction: Implementing the Ninth Amendment, in* 2 THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT (Randy E. Barnett ed. 1993); Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1 (1988).

281. *Lochner*, 198 U.S. at 53.

282. 123 U.S. 623 (1887).

283. *Id.* at 661.

> 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?[284]

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 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.[285]

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. However, these scholars 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.[286] Rather, the distinction referred to the traditional 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.[287] The test applied by the old Court has been aptly characterized

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284. *Lochner*, 198 U.S. at 56.

285. *Id.* at 57-58.

286. *See* GILLMAN, *supra* note 28, at 72-73 (arguing that "arbitrary" characterized "factional politics" while "reasonableness" denoted "class-neutral policies that advanced a public purpose"). Ironically, Gillman cites *Mugler* to illustrate his interpretation of this distinction, but *Mugler* 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 the Court regarded the law as a valid use of the police power to protect public health and morals. *Mugler*, 123 U.S. at 661-62. Moreover, the test as articulated by Justice Harlan in that case explicitly asked whether the challenged law truly "protect[ed] 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. *Id.* at 661.

287. 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, among them *Powell v. Pennsylvania*, 127 U.S. 678 (1888) (oleomargarine ban) and *Holden v. Hardy*, 169 U.S. 366 (1898) (maximum-hours law for

by one modern scholar as a "moderate" means-ends analysis[288]—that is, a "fairly rigorous rational basis review"[289] that can be distinguished from both of the tests used by the modern Court in substantive due process cases.[290]

Therefore, both in the scope of the liberty interests the Court guaranteed and in the standard applied when reviewing challenged legislation, 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 model actually followed by the Court in its protection of liberty of contract and the radical model of true laissez-faire constitutionalism is the difference in the two models'

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miners). Bernstein, *supra* note 184, at 18-21; PHILLIPS, *supra* note 29, at 108. Moreover, *Lochner* itself shows that the Court did not use class legislation arguments to invalidate labor regulations. *Id.* at 109. The maximum-hours law at issue in *Lochner*

> could have been construed as class legislation on two grounds. First, it applied only to bakers. Second, the hours law was arguably special interest legislation that benefited established, unionized German-American bakers at the expense of more recent immigrants. Yet, as even Gillman acknowledges, *Lochner* "does not explicitly rely on the language of unequal, partial, or class legislation."

Bernstein, *supra* note 184, at 23-24 (quoting GILLMAN, *supra* note 28, at 128). Finally, as observed *supra* note 183 and accompanying text, Gillman's thesis fails to take into account many significant liberty of contract decisions outside the labor law context. *See also* PHILLIPS, *supra* note 29, at 112 (criticizing Gillman's "failure to emphasize the old Court's decisions striking down restrictions on entry, some of which are class legislation through and through").

288. PHILLIPS, *supra* note 29, at 193. 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.

289. *Id.* at 164. 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.*

290. *Id.* at 4, 192-93. As applied by the modern Court, means-ends tests "vary considerably in their stringency"—ranging from "strict scrutiny" to the weak "rational basis" test. *Id.* at 4. The modern Court uses the minimal rational-basis test to review economic regulations and the strict-scrutiny test, which requires laws to be "necessary" to achieve a "compelling" government purpose, to review laws restricting certain "preferred freedoms." *Id.*; *see also infra* Part IV. Phillips argues that "[t]he 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 or anything of the kind." PHILLIPS, *supra* note 29, 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.

treatment of "morals" legislation, such as bans on lotteries and other forms of gambling, 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 and public health.[291] A true laissez-faire constitutionalism would have regarded all such forms of legal paternalism as abuses of governmental power and abridgement of fundamental liberties.

B. The Many Facets of Liberty: Some Representative Cases

One of the fundamental flaws 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, liberty of contract protected important noneconomic 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 originally described in Justice Peckham's opinion for the Court in *Allgeyer*, was quite broad. Indeed, it encompassed not only freedom from "mere physical restraint" but also the right of a person "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 of course, as the name of the right implies, freedom "to enter into all contracts which may be proper, necessary and essential" to carrying out these purposes.[292] Considering especially the status of

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291. *See, e.g.*, 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-closing law). 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, *supra* note 184, at 46 & n.255. Michael Phillips discerns a similar pattern of deference when the old Court considered measures aimed at promoting public morality, citing, inter alia, *Butler v. Perry*, 240 U.S. 328 (1916) (upholding law requiring able-bodied men to work on public roads), *Waugh v. Board of Trustees of the University of Mississippi*, 237 U.S. 589 (1915) (upholding a ban on fraternities in state schools), *Eberle v. Michigan*, 232 U.S. 700 (1914) (upholding a local option law prohibiting sale of liquor within a county), *Murphy v. California*, 225 U.S. 623 (1912) (upholding a ban on billiard halls), and *Marvin v. Trout*, 199 U.S. 212 (1905) (upholding a law prohibiting gambling). PHILLIPS, *supra* note 29, at 48, 79 nn.124-25.

292. *Allgeyer*, 165 U.S. at 589.

contract in late nineteenth-century American law,[293] 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: liberty and the pursuit of happiness. It is little wonder, then, that when he anticipated liberty of contract in his dissent in the *Slaughter-House Cases*,[294] Justice Field spoke of such things as "the right to pursue a lawful employment in a lawful manner,"[295] "equality of right[s] . . . in the lawful pursuits of life,"[296] and "the right of free labor"[297] as interchangeable concepts, all realizing in law "the natural and inalienable rights which belong to all citizens" in a free society.[298]

The types of economic freedom illustrated by the *Allgeyer* and *Slaughter-House Cases*—freedom to enter into a business contract, for the sale and purchase of insurance, and the freedom to engage in a business such as livestock slaughtering—along with other types of economic freedom, such as the freedom of both sides in a labor contract to bargain over such terms as hours and wages, are the more obvious aspects of liberty of contract. The right as broadly described in *Allgeyer*, however, may include other aspects of freedom that could be seen as noneconomic, or "personal," including what is today regarded as the constitutional right to privacy. Just as liberty generally may be seen as one fundamental right with virtually an infinite number of various aspects, liberty of contract may be seen as a single basic right with many facets.

1. *The Right to Economic Liberty*

a. Freedom of Labor. 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

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293. Legal historians frequently have characterized the nineteenth century as "the golden age of the law of contract" in American law. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 203 (3d ed. 2005). The rising significance of contracts 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*." HENRY SUMNER MAINE, ANCIENT LAW 165 (Henry Holt & Co. 3d ed. 1888) (1861).

294. 83 U.S. (16 Wall.) 36 (1873).

295. *Id.* at 97 (Field, J., dissenting).

296. *Id.* at 109.

297. *Id.* at 110.

298. *Id.* at 96.

its use of the right to declare unconstitutional regulations of business as minimum-wage or maximum-hours legislation. Clearly, the most famous decision protecting freedom of labor was *Lochner*, when the Court recognized the rights 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.[299] The maximum-hours regulation at issue in *Lochner* was just one provision of the Bakeshop Act,[300] a bakery reform law that was strongly supported by unionized bakers and bakeries.[301] Justice Rufus Peckham's opinion for the five-Justice majority of the Court turned on the essential question of whether the maximum-hours provision 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.[302] In holding that the law was the latter, and therefore was unconstitutional, the Court critically examined the State's claim that it was a health law.[303]

In concluding that "the limit of the police power has been reached and passed in this case," Justice Peckham and the majority in *Lochner* held, 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 the public health or the health of the individuals who are following the trade of a baker."[304] The Court concluded that the

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299. *Lochner*, 198 U.S. at 52, 64.

300. Bakeshop Act, ch. 415, art. VIII, 1897 N.Y. Laws 485.

301. David E. Bernstein, *The Story of* Lochner v. New York: *Impediment to the Growth of the Regulatory State, in* CONSTITUTIONAL LAW STORIES 325, 331, 333-34 (Michael C. Dorf ed., 2004); *see generally* KENS, *supra* note 108, at 44-59, 169-70. The maximum-hours provision, in section 110 of the Bakeshop 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." Bakeshop Act, § 110, 1897 N.Y. Laws at 485. German unionized bakeries supported the ten-hour law, seeing the competitive advantage it gave them, while the smaller, non-unionized bakeries—like Joseph Lochner's, in Utica, New York—opposed the law because they frequently provided their bakers with sleeping quarters, enabling them to spend long hours on the job and could not afford to hire more workers. Bernstein, *supra*, at 329-31.

302. *Lochner*, 198 U.S. at 56.

303. *See id.* at 57.

304. *Id.* at 58. The Court explained that the law was not a protection of the public health, because "[c]lean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week." *Id.* at 57. Nor, the Court 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 of action." *Id.*

regulation was a "labor law"[305] that did not fall within the established limits of the police power and thus was "an illegal interference with the rights of individuals, both employers and employees, to make contracts regarding labor upon such terms as they may think best, or which they may agree upon with the other parties to such contracts."[306]

The aspect of liberty of contract protected in *Lochner*—the freedom of both employers and employees to bargain over hours of work—nevertheless was qualified by two important decisions, one preceding *Lochner* and the other following it within a few years, both involving hours legislation affecting special classes of workers. Prior to *Lochner*, in *Holden v. Hardy*,[307] a seven-Justice majority upheld a Utah law that limited the hours of workers in underground mines and smelting operations, emphasizing the extraordinary risks to the safety and health of the workers engaged in such occupations.[308] By rationalizing the law as a valid health law providing "special protection" to those workmen "peculiarly exposed to these dangers,"[309] the Court expanded the scope of the police power, allowing health or safety laws to extend beyond the protection of the general public to the protection of particular classes of workers, albeit those in extraordinarily dangerous occupations.[310]

Just three years after the decision in *Lochner*, the Court in *Muller v. Oregon*[311] upheld an Oregon statute limiting the hours of women employed in factories to ten hours a day.[312] The law represented a new type of legislation passed in response to new social conditions, the entry of women into occupations traditionally held by men. These so-called protective laws, as some modern scholars have observed, really did not protect women but limited their economic opportunities by pricing their labor out of the market.[313] In *Muller*, however, the Court seemed

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305. *Id.* at 57.

306. *Id.* at 61.

307. 169 U.S. 366 (1898).

308. *Id.* at 398. Justices Brewer and Peckham dissented without opinion. *Id.*

309. *Id.* at 393.

310. *Holden* also illustrates the general unwillingness of the Supreme Court to invalidate laws as class legislation, as David Bernstein has shown in response to the Gillman thesis. *See* Bernstein, *Revisionism, supra* note 184, at 22-23. Another important feature of the Court's liberty of contract jurisprudence illustrated by *Holden* is the Court's unwillingness to consider the supposed inequality of bargaining power between employers and employees as a justification for government intervention. *See* McCurdy, *supra* note 11, at 178-79.

311. 208 U.S. 412 (1908).

312. *Id.* at 416-17, 423.

313. *See* Joan Kennedy Taylor, *Protective Labor Legislation, in* FREEDOM, FEMINISM, AND THE STATE: AN OVERVIEW OF INDIVIDUALIST FEMINISM 187, 190 (Wendy McElroy ed.,

oblivious to the economic reality behind the law and instead accepted unquestioningly the sexist and paternalistic justifications offered by the state through the famous "Brandeis Brief," authored by Louis D. Brandeis, attorney for the National Consumers League and future Justice of the Supreme Court.[314] Indeed, Justice Brewer in his opinion for the Court emphasized that "woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil."[315] The very kind of argument that Justice Brewer and the other Justices in the *Lochner* majority rejected as absurd—that the state has a legitimate police power interest in protecting the physical health of its male population generally, "lest the fighting strength of the state be impaired"[316]—Justice Brewer and the majority in *Muller* accepted unquestioningly.[317] The Supreme Court was not alone in its failure to treat women as fully equal citizens entitled to the same freedom of contract as men. Many other courts joined in accepting such paternalistic arguments to justify maximum-hours legislation for women—even the Illinois Supreme Court in *W. C. Ritchie & Co. v. Wayman*,[318] which overturned that court's pioneering liberty of contract decision in *Ritchie v. People*.[319]

Although *Lochner* is more famous, perhaps the best example of the Court's use of substantive due process to protect economic liberty is the

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2d ed. 1991) ("[P]rotective 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) (empirical study of the 1920s showing that maximum-hours laws significantly reduced female employment in manufacturing).

314. *See* David E. Bernstein, *Lochner's Feminist Legacy*, 101 MICH. L. REV. 1960, 1967-68 (2003). Brandeis's famous brief consisted of hundreds of pages of documents, a "'hodge-podge'" of evidence that was anecdotal and unscientific: such things as reports of factory or health inspectors, testimony of physicians or social workers before legislative committees, and quotes from medical journals—all purporting to show the deleterious effects that long hours of work had on women's health and reproductive capability. *Id.* at 1968 (quoting OWEN M. FISS, TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910, at 175 (1993)).

315. *Muller*, 208 U.S. at 420.

316. *Lochner*, 198 U.S. at 60-61.

317. *Muller*, 208 U.S. at 421 ("[A]s healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.").

318. 91 N.E. 695 (Ill. 1910) (upholding a 1909 law limiting the employment of women in factories or laundries to no more than ten hours a day).

319. 40 N.E. 454 (Ill. 1895) (recognizing women as sui juris and legally equal to men); *see also supra* notes 131-38 and accompanying text.

1923 decision in *Adkins v. Children's Hospital.*[320] At issue in *Adkins* was a federal law, enacted by Congress pursuant to its power to legislate for the District of Columbia, authorizing a three-member board to fix minimum wages for women and children employed in the District.[321] The law authorized the board "'[t]o investigate and ascertain the wages of women and minors in the different occupations in which they are employed'"[322] and then to determine, for each type of occupation, the wage level the board considered "'unreasonably low'" for minors or "'inadequate to supply them with the necessary cost of living,'" for women workers, in order to "'maintain them in good health and protect their morals.'"[323] 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.[324]

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.[325] A majority of five Justices held that the D.C. law was "an unconstitutional interference with the freedom of contract included within the guaranties [sic] of the due process clause of the Fifth Amendment."[326] The Court observed:

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320. 261 U.S. 525 (1923).

321. *Id.* at 539-41; Act of Sept. 19, 1918, ch. 174, 40 Stat. 960.

322. *Adkins*, 261 U.S. at 540 (quoting § 8, 40 Stat. at 962).

323. *Id.* (misquoted in original) (quoting § 9, 40 Stat. at 962).

324. *Id.* at 542. In a second case joined to the hospital's challenge, Ms. Willie Lyons, a 21-year-old elevator operator employed by the Congress Hall Hotel, also challenged the law; she had lost her job after the board determined that a woman in her occupation could not be employed for less than twice what she had been paid. *Id.* at 542; ARKES, *supra* note 30, at 13. 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." *Id.* Application of the law to minors was not challenged in the case. *Adkins*, 261 U.S. at 554.

325. *See* WHITE, *supra* note 276, at 178, 194. Sutherland had been nominated to the Court in 1922 by President Warren G. Harding. The other three were Justice Willis Van Devanter, nominated in 1910 by President William H. Taft, Justice James C. McReynolds, nominated in 1914 by President Woodrow Wilson, and Justice Pierce Butler, also nominated in 1922 by President Harding. *See generally id.* at 178-99. On Sutherland's jurisprudence, see ARKES, *supra* note 30.

326. *Adkins*, 261 U.S. at 545. The majority included Justices McKenna, Van Devanter, McReynolds, Sutherland, and Butler. *See id.* at 539. Chief Justice Taft dissented, in an opinion joined by Justice Sanford. *See id.* at 562. Justice Holmes wrote a separate dissent, *see id.* at 567, and Justice Brandeis did not participate, *see id.* at 562.

> 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. Within this liberty are contracts of employment of labor. In 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.[327]

Although the Court conceded there was "no such thing as absolute freedom of contract"—that it was "subject to a great variety of restraints"—the Court 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."[328] After reviewing those exceptions and concluding that the D.C. minimum-wage law fit none of them,[329] the Court concluded that it was "simply and exclusively a price-fixing law, confined to adult women . . . who are legally as capable of contracting for themselves as men."[330] The law

> forb[ade] 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.[331]

The law, in other words, unjustifiably deprived both the employer and the employee of their constitutionally-protected freedom of contract.[332]

Another 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*,[333] the Court considered a Kansas law

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327. *Id.* at 545 (internal citations omitted).

328. *Id.* at 546.

329. *See id.* at 546-54. The Court concluded,

> It 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 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.

330. *Id.* at 555.

331. *Id.* at 554-55. The Court's description of the harmful effects of the law explicitly referred to Lyons, discussed *supra* note 324. *See Adkins*, 261 U.S. at 555 n.1.

332. *See Adkins*, 261 U.S. at 554-55.

333. 262 U.S. 522 (1923).

that declared the fuel, clothing, and food preparation industries to be businesses "affected with a public interest" and empowered a three-judge court to fix wages within those industries.[334] By a unanimous decision, the Court concluded that this attempt to fix wages in businesses like the Wolff Packing Company deprived the businesses of their "property and liberty of contract without due process of law."[335] Chief Justice Taft's opinion for the Court followed the standard of review articulated in *Adkins*—recognizing that "the right of the employer on the one hand, and of the employee on the other, to contract about his affairs" was part of the liberty protected by the Fourteenth Amendment Due Process Clause and that such contractual freedom was the "general rule," which could be abridged only by "exceptional circumstances."[336]

The exception at issue in the case was the "business affected with a public interest" doctrine.[337] Acknowledging that the category had expanded well beyond its common law origins since first recognized by the Court in *Munn v. Illinois*,[338] the Court nevertheless maintained that "[t]he 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."[339] Here, the businesses subjected to the control of the Kansas Court of Industrial Relations were not within these recognized categories; hence, when the court fixed wages in order to resolve disputes between employers and workers, it deprived both parties of their liberty of contract rights.[340]

The Court's decisions in *Lochner, Adkins,* and *Wolff Packing* illustrate perhaps the most famous aspect of its protection of economic liberty—freedom of labor—which included the rights of both employers and employees to bargain over the terms of their contracts. Two other important aspects of economic liberty, with applications well outside the realm of labor law, can be discerned in the Court's early twentieth-century decisions: freedom to compete and freedom of dealing.

b. Freedom to Compete. The freedom to compete, essentially, was one's right to enter a market; it included one's freedom of entry into

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334. *Id.* at 524.
335. *Id.* at 544.
336. *Id.* at 534.
337. *See id.* at 540.
338. 94 U.S. 113 (1877). *See supra* text accompanying note 248.
339. *Charles Wolff*, 262 U.S. at 536.
340. *Id.* at 540.

lawful trades or occupations. This aspect of liberty of contract may be traced back directly to the fundamental right identified by Justice Field in his dissent in the *Slaughter-House Cases*—"the right to pursue a lawful employment in a lawful manner"[341]—but it has an even older history, which may be traced back to the seventeenth-century writings of Sir Edward Coke and even older precedents in English law.[342] 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.[343]

Because the Court did not follow a true laissez-faire constitutionalism, it did not protect this freedom absolutely. Indeed, during the *Lochner* Era the Court 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.[344] In several significant decisions, however, the Court held that laws restricting entry into particular markets were invalid as arbitrary exercises of the police power that abridged the freedom to compete.[345] The Court protected this right in *Allgeyer v. Louisiana*,[346] its first decision explicitly protecting liberty of contract, when it held that the law at issue—a Louisiana law banning insurance sales by companies not licensed to do business in Louisiana[347]—interfered with the freedom of both the E. Allgeyer & Co. (the Louisiana firm convicted of violating the statute) and the Atlantic Mutual Insurance Company of New York (not licensed in Louisiana) to enter into a contract with each other.[348]

In another decision protecting the freedom to compete, *Adams v. Tanner*,[349] the Court invalidated a Washington state law that prevent-

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341. *The Slaughter-House Cases*, 83 U.S. 36, 97 (1872) (Field, J., dissenting).

342. *See* Timothy Sandefur, *The Right to Earn a Living*, 6 CHAP. L. REV. 207, 209-17 (2003).

343. Wayne McCormack, *Economic Substantive Due Process and the Right of Livelihood*, 82 KY. L.J. 397, 399-400 (1993).

344. PHILLIPS, *supra* note 29, at 52. Phillips concludes "the old Court almost always upheld occupational licensing laws," but "was much tougher on other kinds of entry restrictions," particularly laws that thwarted the freedom to compete by completely banning a particular business, trade, industry, or line of commerce. *Id.*

345. *See, e.g.*, Adams v. Tanner, 244 U.S. 590 (1917); Allgeyer v. Louisiana, 165 U.S. 578 (1897).

346. 165 U.S. 578 (1897).

347. *Id.* at 579.

348. *Id.* at 581, 589.

349. 244 U.S. 590 (1917).

ed employment agencies from collecting fees for their services.[350] Considering the measure, practically speaking, as a prohibition of employment agencies, the Court held it unconstitutional as an arbitrary restriction of the right to engage in a useful business.[351] Later, in two well-known decisions, the Court invalidated other forms of entry restrictions. In *Louis K. Liggett Co. v. Baldridge*,[352] the Court struck down a Pennsylvania law essentially requiring that every pharmacy or drug store be wholly owned by a licensed pharmacist or pharmacists.[353] In his opinion for the seven-Justice majority, Justice Sutherland rejected the state's rationale for the law, that it protected public health, and instead held that it was an effort by in-state pharmacists to block competition from chain stores.[354]

Four years later, in *New State Ice Co. v. Liebmann*,[355] Justice Sutherland again wrote the opinion for a six-to-two Court majority invalidating an Oklahoma statute restricting entry into the ice business.[356] The Depression Era law, purporting to help alleviate the problem of cut-throat competition among small businesses in the state, declared the manufacture, sale, and distribution of ice to be a "public business"—that is, a business "charged with a public use"—and created a government licensing commission empowered to determine the number of firms sufficient within a given territory to meet the public's need for ice.[357] The challenge to the law arose after an existing business sued to block entry by a new unlicensed competitor, Leibmann.[358] After first holding that the ice business was not affected with a public interest—that it was, rather, "an ordinary business," "essentially private in its nature"[359]—the Court concluded that the law unreasonably

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350. *Id.* at 591, 596-97.

351. *Id.* at 596-97. The Court's opinion was written by Justice James B. McReynolds. Six years after *Tanner*, Justice McReynolds would deliver the opinion of the Court in *Meyer v. Nebraska*, which held the freedom "to engage in any of the common occupations of life" was part of the liberty protected by due process, 262 U.S. 390, 399 (1923). *Meyer* is discussed *infra* Part III.B.2.

352. 278 U.S. 105 (1928).

353. *Id.* at 108, 114.

354. *Id.* at 113-14. *Liggett* was not overturned until 1973, when the Court unanimously upheld a nearly identical law regulating pharmacies in North Dakota. *See* N.D. State Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156, 167 (1973).

355. 285 U.S. 262 (1932).

356. *Id.* at 271, 279-80.

357. *Id.* at 271, 277.

358. *Id.* at 271.

359. *Id.* at 277. The Court called it

> a business as essentially private in its nature as the business of the grocer, the dairyman, the butcher, the baker, the shoemaker, or the tailor, each of whom

restricted the freedom to compete.[360] In response to Justice Brandeis's dissent defending the Oklahoma statute as a legislative experiment,[361] the Court maintained, "there are certain essentials of liberty with which the state is not entitled to dispense in the interest of experiments."[362] No "theory of experimentation in censorship" could justify interference with freedom of the press, and "[t]he opportunity to apply one's labor and skill in an ordinary occupation . . . is no less entitled to protection."[363]

c. Freedom of Dealing. The third important aspect of economic freedom protected by the Court's liberty of contract jurisprudence, freedom of dealing, was 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

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performs a service which, to a greater or less extent, the community is dependent upon and is interested in having maintained; but which bears no such relation to the public as to warrant its inclusion in the category of businesses charged with a public use.

Id. The Court sought to adhere to the standard defining a business affected with a public interest that it had articulated in *Wolff Packing*, discussed *supra* text accompanying notes 332-38, by showing through an argument *ad absurdum* that if the state could restrict entry into the ice business, then it could do so for any ordinary business. *Liebmann*, 285 U.S. at 277.

360. *Liebmann*, 285 U.S. at 279-80. The Court summarized the law:

> Stated succinctly, a private corporation here seeks to prevent a competitor from entering the business of making and selling ice. It claims to be endowed with state authority to achieve this exclusion. There is no question now before us of any regulation by the state to protect the consuming public either with respect to conditions of manufacture and distribution or to insure purity of product or to prevent extortion. The control here asserted does not protect against monopoly, but tends to foster it. The aim is not to encourage competition, but to prevent it; not to regulate the business, but to preclude persons from engaging in it.

Id. at 278-79.

361. Justice Brandeis's dissent famously championed experimentation: "There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs." *Id.* at 311 (Brandeis, J., dissenting). For a devastating critique of Brandeis's dissent, see PHILLIPS, *supra* note 29, at 101-05.

362. *Liebmann*, 285 U.S. at 280 (majority opinion).

363. *Id.*

> one with whom he can make contracts, and if he is wrongfully deprived of this right by others, he is entitled to redress.[364]

In early twentieth-century American law, the right of refusal to deal was subject to few restrictions outside of antitrust legislation.[365] Further restrictions, in the form of unfair trade practices legislation and, ironically, civil rights legislation (such as antidiscrimination statutes), had not yet curtailed this broad common law right.[366]

It is this aspect of economic liberty that explains two decisions by the Court during the *Lochner* Era that appear to contradict that freedom. In *Adair v. United States*[367] and *Coppage v. Kansas*[368] 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 service.[369] Notwithstanding modern commentators' views that these two decisions were erroneous and merely reflected the anti-union bias that was prevalent at the time,[370] *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 in *Adair*, Justice Harlan emphasized that employers had no less liberty of contract than did

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364. THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 328 (2d ed. 1888).

365. *See* EDMUND W. KITCH & HARVEY S. PERLMAN, INTELLECTUAL PROPERTY AND UNFAIR COMPETITION 364-65 (5th ed. 1998).

366. *See id.* at 364-66. 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. *See id.* at 364-65. 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, Pub. L. No. 88-352, § 201, 78 Stat. 241, 243 (codified as amended at 42 U.S.C. § 2000a (2000)) (prohibiting discrimination on the basis of race in public accommodation). *See* KITCH & PERLMAN, *supra* note 365, at 365-66.

367. 208 U.S. 161 (1908) (invalidating a federal law prohibiting interstate carriers from discriminating against union members in various ways).

368. 236 U.S. 1 (1915) (invalidating a Kansas statute forbidding yellow-dog contracts).

369. *Coppage*, 236 U.S. at 6, 26; *Adair*, 208 U.S. at 168, 180.

370. *See, e.g.*, PHILLIPS, *supra* note 29, at 140-41. Phillips maintains 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."

employees and that this liberty included the freedom of either party to set conditions.[371]

The right of refusal to deal was, in effect, the right to discriminate on whatever grounds a party to a contract chose, whether rational or, as Cooley had written, as a result of "whim, caprice, prejudice, or malice."[372] As one modern libertarian legal scholar has put it, "if any antidiscrimination laws could have been passed" before 1937, "they would have fallen . . . to the same challenges that doomed the forbidden labor statutes."[373] Similarly, this aspect of liberty of contract would have doomed labor laws like the National Labor Relations Act of 1935,[374] which "subordinates the worker's right of contract to the majority vote of his colleagues," as one modern commentator aptly suggests.[375]

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371. *Adair*, 208 U.S. at 174-75. Justice Harlan observed:

> [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.

Id. at 174. Harlan equated "[t]he right of a person to sell his labor upon such terms as he deems proper" with "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." *Id.* He added: "In all such particulars 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." *Id.* at 175.

372. COOLEY, *supra* note 364, at 328.

373. Richard A. Epstein, *Religious Liberty in the Welfare State*, 31 WM. & MARY L. REV. 375, 377 (1990). Title II of the Civil Rights Act of 1964 forbids private businesses that accommodate the public and are engaged in interstate commerce from discriminating on the ground of race, color, religion, or national origin. § 201, 78 Stat. at 243. Because of the way it thus limits freedom of contract or association, the Civil Rights Act may be seen as a "gross infringement of individual rights." Ayn Rand, *Racism, in* THE VIRTUE OF SELFISHNESS 147, 156 (Signet 1964); *see also* Roger Pilon, *The Right to Do Wrong, in* THE LIBERTARIAN READER 197, 200 (David Boaz ed., 1997). Roger Pilon argues:

> For if we do have a right to be free, to plan and live our own lives as we choose, limited only by the equal right of others, then we have a right to associate, or to refuse to associate, for whatever reasons we choose, or for no reason at all. That is what freedom is all about. Others may condemn our reasons—that too is a right. But if freedom and personal sovereignty mean anything, they mean the right to make those kinds of decisions for ourselves, even when they offend others.

Pilon, *supra*, at 200.

374. National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-69 (2000)).

375. Bruce Ramsey, *"A Naked, Arbitrary Exercise,"* LIBERTY, Nov. 1998, at 47, 68-69.

2. Origins of the Right to Privacy

Liberty of contract, notwithstanding its best-known applications in protecting economic liberty—its association with so-called economic substantive due process—had important aspects outside the realm of labor or business regulation. Among the frequently overlooked aspects of the right was the origin of the right to privacy.

Despite the popular assumption that the Court's protection of privacy as a fundamental right began with *Griswold v. Connecticut*,[376] some scholars have recognized that long before the Court in *Griswold* attempted to derive privacy rights from the "penumbras" that emanated from particular Bill of Rights guarantees,[377] 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, "The right to privacy achieved constitutional status in two cases of the *Lochner* era, the only substantive due process decisions that survived the 1937 revolution."[378] These two cases, *Meyer v. Nebraska*[379] and *Pierce v. Society of Sisters*,[380] are the so-called school cases from the 1920s.[381]

Although these two cases are still frequently cited 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

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376. 381 U.S. 479, 480, 485-86 (1965) (striking down a Connecticut 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).

377. *Id.* at 484. 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. *Id.* Justice Douglas apparently was reluctant to base the right of privacy directly on substantive due process protection of liberty or to place it among the unenumerated rights protected by the Ninth Amendment, as Justice Goldberg suggested in his concurring opinion, *id.* at 490-92 (Goldberg, J., concurring), because the Court feared a return to the *Lochner* Era, a time when (as he characterized it) 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." *Id.* at 482 (majority opinion).

378. WIECEK, *supra* note 15, at 177-78.

379. 262 U.S. 390 (1923).

380. 268 U.S. 510 (1925).

381. "Each case was an easy one, striking down indefensible legislation," William Wiecek asserts. WIECEK, *supra* note 15, 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 29, at 48.

"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.[382] 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.[383] In an opinion for a near-unanimous Court, Justice James McReynolds described the liberty guaranteed by the Fourteenth Amendment Due Process Clause in broad terms[384] and held that both 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.[385] The Oregon law at issue in *Pierce*, which was also the product of bigotry, required all children between the ages of eight and sixteen to attend public schools.[386] 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.[387] 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 interfere[d] with the liberty of

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382. *See Meyer*, 262 U.S. at 397 (quoting 1919 Neb. Laws 1019). The Nebraska law 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. *See, e.g.*, WILLIAM G. ROSS, FORGING NEW FREEDOMS: NATIVISM, EDUCATION, AND THE CONSTITUTION, 1917-1927, at 133 (1994).

383. *Meyer*, 262 U.S. at 396-97.

384. *See id.* at 399. Justice McReynolds's description of the scope of liberty of contract was reminiscent of Justice Peckham's in *Allgeyer*:

> 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.

Id.

385. *Id.* at 400-01.

386. *Pierce*, 268 U.S. at 530 (quoting the Compulsory Education Act, 1923 Or. Laws 9). The Compulsory Education Act was passed at the insistence of the Ku Klux Klan and aimed to eliminate private and parochial schools in the state. *See* PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 416-19 (2002).

387. *Pierce*, 268 U.S. at 529-33.

parents and guardians to direct the upbringing and education of children under their control."[388]

3. *Other Forgotten Aspects of the Right*

Finally, thanks to the orthodox view's caricature of liberty of contract as a narrow form of economic liberty, other aspects of the right have been overlooked by constitutional scholars and historians, including its use to combat de jure racism (government-mandated segregation) imposed by so-called Jim Crow laws. The Court's 1917 decision in *Buchanan v. Warley*[389] 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.[390] In *Buchanan* the Court used the Due Process Clause of the Fourteenth Amendment to declare unconstitutional a Louisville, Kentucky ordinance mandating racial segregation in

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388. *Id.* at 534-35. Justice McReynolds's stridently libertarian statement is often quoted in modern caselaw 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 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.

Id. at 535. What is often omitted from modern summaries of the decision, however, is the explanation for the Court's holding, affirming the injunction that had been sought by the schools, thus 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." *Id.* 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." *Id.* at 536.

389. 245 U.S. 60 (1917).

390. For example, although Kermit Hall mentions *Buchanan* in *The Magic Mirror*, his history of American law, he cites it erroneously as a case decided "on equal-protection grounds." HALL, *supra* note 16, at 265. Moreover, he mentions the case not at all in his discussion of laissez-faire constitutionalism but rather discusses it 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 16, at 264-65. Other scholars omit the case from their lists of liberty of contract decisions, *see, e.g.*, PHILLIPS, *supra* note 29, at 58 & 82-83 n.210, because they regard it as a "property rights" case, *see, e.g.*, *id.* at 157-58, although the right to acquire or dispose of property that was involved in the case was also a right to enter into a contract for its sale.

housing.[391] At the time, with *Plessy v. Ferguson*[392] 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 laws.[393] As Justice Day noted in the Court's unanimous opinion,[394] 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.[395]

In thus affirming the Due Process Clause's protection of individual rights, the Court 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

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391. *Buchanan*, 245 U.S. at 82. As summarized by Justice Day in the Court's opinion, 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 71. In short, as the Court 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) are ably discussed in David E. Bernstein, *Philip Sober Controlling Philip Drunk:* Buchanan v. Warley *in Historical Perspective*, 51 VAND. L. REV. 797, 839-56 (1998).

392. 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 the Court in *Buchanan*, segregation per se did not violate the Equal Protection Clause, under the principle of *Plessy*, because racial "classification of accommodations was permitted upon the basis of equality for both races." *Id.*

393. *See, e.g.*, *Buchanan*, 245 U.S. at 79.

394. Justice Holmes drafted a dissent in *Buchanan* that he ultimately chose not to deliver. Bernstein, *supra* note 391, at 855.

395. *Buchanan*, 245 U.S. at 82. "Property is more than the mere thing which a person owns," the Court declared; "it includes the right to acquire, use, and dispose of it." *Id.* at 74. This right also entailed (although the Court did not explicitly say so) the freedom to enter into contracts for those purposes. *See id.*

promoted the "maintenance of the purity of the races."[396] 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 person."[397]

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. *Buchanan* caused the end of explicit de jure residential segregation in the United States.[398] Despite the limited effect of *Buchanan*'s direct holding,[399] it may be credited with helping save the "United States, or at least the South, from instituting South African-style apartheid," as David Bernstein has argued.[400] Along with other nonstereotypical liberty of contract decisions, such as *Meyer* and *Pierce*, the *Buchanan* decision shows that the Court's protection of individual liberty and property rights, through

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396. *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 81-82; *see also* Bernstein, *supra* note 391, at 844-45, 847-50, 853-54 (discussing the overtly racist arguments in Kentucky's briefs and summarizing the Court's disposition of the state's police power arguments).

397. *Buchanan*, 245 U.S. at 81. The Court 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.

398. David Bernstein notes, "Relying on *Buchanan*, the NAACP persuaded the Supreme Court to invalidate segregation ordinances in New Orleans and Richmond" and that "[l]ocal branches of the NAACP successfully challenged laws passed in Indianapolis, Norfolk, and Dallas." Bernstein, *supra* note 391, at 858 n.360 (internal citations omitted).

399. In the long run, *Buchanan* failed to invalidate segregation laws outside the residential housing context because of the narrowness of its holding and the continued validity of *Plessy*. *See id.* at 861. The decision had limited longer term effects on de facto segregation in housing because white persons eventually were able to use barriers other than explicit racial zoning to keep black persons out of their neighborhoods; these devices included facially neutral zoning laws and restrictive covenants. *See id.* at 861-66.

400. *Id.* at 870-71. Bernstein notes that W.E.B. DuBois reportedly credited *Buchanan* with "'the breaking of the backbone of segregation,'" *id.* at 870 (quoting ALEXANDER M. BICKEL & BENNO C. SCHMIDT, JR., THE JUDICIARY AND RESPONSIBLE GOVERNMENT, 1910-21, at 816 (1988)) and that Leon Higginbotham has argued that if the decision "had come out the other way, in many southern states and perhaps many other parts of America the living conditions of black Americans could have been almost akin to that of black South Africans." *Id.* at 871 n.422. Bernstein himself suggests that "the road not taken," if the Court's decision had gone the other way in *Buchanan*, might have led to de jure segregation in not only housing but also occupations. *Id.* at 869-70.

a substantive application of the Due Process Clause, "often safeguarded the interests of vulnerable and powerless segments of society," as one modern scholar has aptly summarized.[401] So-called Progressive reformers 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 and all justified by new sociological theories of jurisprudence. However, conservative judges during the *Lochner* Era were able to halt, at least partially and temporarily, the Progressives' dangerous expansion of the police power by enforcing traditional limitations on governmental power and guarantees of liberty and property rights.[402]

IV. THE DEMISE OF LIBERTY OF CONTRACT AND THE RISE OF THE "DOUBLE STANDARD"

From the time of Progressive Era historian Charles Warren to the present day, many scholars have observed, with ample empirical support, that the United States 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.[403] One modern scholar who has done a quantitative analysis of

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401. James W. Ely, Jr., *Reflections on* Buchanan v. Warley, *Property Rights, and Race*, 51 VAND. L. REV. 953, 972 (1998).

402. Ely notes how the Progressive movement, with its fondness for planning and reliance on experts, "looked with disfavor on judicial efforts to enforce constitutional limits on governmental authority." *Id.* at 961. It was not just property rights that were adversely affected by Progressive ideology: "[f]or instance, Progressives displayed little interest in free speech during the years preceding World War I." *Id.* Indeed, he adds, Progressives also

> placed great faith in the use of government to police moral norms. . . . The Progressive Era saw an outpouring of morals regulation designed to strengthen the community by eliminating social problems. In areas of personal behavior, individual freedom was subordinated to the perceived needs of the society. Drawing no distinction between economic and other liberties, the Progressives viewed with suspicion all claims of individual right.

Id. at 962.

403. *See* PHILLIPS, *supra* note 29, at 31-62 & n.1. Charles Warren's crude empirical study of Supreme Court decisions in the years 1887 to 1911 found that 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. Charles Warren, *The Progressiveness of the United States Supreme Court*, 13 COLUM. L. REV. 294, 294-95 (1913); *see also* 3 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 463-78 (1924). An important standard study by Benjamin F. Wright, originally published in 1942 but still cited in some constitutional

Lochner Era decisions focused on the Court's substantive due process review of social and economic regulations during the 1897-1937 period and concludes that liberty of contract decisions "were simply one category of substantive due process decision—and not the numerically most significant category either."[404] Thus, a full account of the story of the demise of liberty of contract as a fundamental right must take into account the doctrine's relatively minor role in the Court's body of decisions in the early twentieth century.

The coalescence of several factors explains why the Supreme Court's protection of liberty of contract as a fundamental constitutional right was so limited, as well as so short-lived. These factors included the changing membership of the Court[405] as well as significant changes in

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history texts, maintained that the Court invalidated laws on substantive due process grounds in nearly 200 cases. *See* BENJAMIN F. WRIGHT, THE GROWTH OF AMERICAN CONSTITUTIONAL LAW 148 (1942). Yet another important study, also still cited today, by Felix Frankfurter, identified 220 decisions from 1897-1938 that invalidated state laws on Fourteeenth Amendment grounds. *See* FELIX FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 97-137 (1939) (appendix listing and describing "Cases Holding State Action Invalid under the Fourteenth Amendment"). These sources, and others, are nicely summarized by PHILLIPS, *supra* note 29, at 32-35 & 62 n.1.

404. PHILLIPS, *supra* note 29, at 5. Phillips reduces Frankfurter's list of 220 cases down to 128 by eliminating cases decided on privileges and immunities, equal protection, and procedural due process grounds. *See id.* at 34-36. After making some further adjustments to the list and deleting what he classifies as "peripheral" and "borderline" substantive due process cases, he arrives at a list of only fifty-six "core" substantive due process cases. *See id.* at 57. Of these fifty-six, he identifies only ten cases as liberty of contract decisions; that is, those "in which the Court used express freedom-of-contract reasoning to strike down government action." *Id.* at 58 & 86-87 n.210. Phillips' classification is far too restrictive, however. It omits many significant liberty of contract decisions—for example, *Meyer* 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.

405. *See* Bernstein, *supra* note 184, at 10-11 & nn.31-33; Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 8-23 (1991). 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. Bernstein, *supra* note 184, at 10; Siegel, *supra*, at 8-9. During the first period (1897-1911), the two most libertarian Justices of the entire era, David Brewer and Rufus Peckham, sat on the Court; but as Bernstein points out, "with the notable exception of *Lochner* itself, they rarely cobbled together a majority for their views." Bernstein, *supra* note 184, at 10 & n.31. Both were off the Court by 1911, as were the moderately libertarian Chief Justice Fuller and Justices Harlan and Brown. *Id.* During the second period (1911-1923), Presidents Theodore Roosevelt, Taft, and Wilson appointed Justices to the Court who were, relatively speaking, "*Lochner* skeptics," who helped comprise a new majority that was disinclined to use the Fourteenth Amendment to strike down state legislation and who "'frequently asserted [a] doctrine . . . of presumed constitutionality'" of laws. *Id.* at 10 & n.32 (quoting EDWARD S. CORWIN, THE TWILIGHT OF THE SUPREME COURT: A HISTORY OF OUR CONSTITUTIONAL

the law, both in constitutional law principles and in theories of jurisprudence, during the first few decades of the twentieth century.[406] 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 III.A. 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.

In Justice Sutherland's opinion for the Court in *Adkins v. Children's Hospital*,[407] the Court observed, "There is, of course, no such thing as absolute freedom of contract. It is subject to a great variety of restraints."[408] Although the Court added that "freedom of contract is, nevertheless, the general rule and restraint the exception" and that laws abridging this freedom "can be justified only by the existence of exceptional circumstances,"[409] the broad categories of such "exceptions to the general rule forbidding legislative interference with freedom of contract"[410]—identified prior to the analysis of the District of Columbia

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THEORY 86 (1934)). Finally, during the third period (1923-1937), the Court had a majority of Justices who revived liberty of contract by expanding the doctrine "to limit the power of government in both economic and noneconomic contexts." *Id.* at 10-11. It was this majority of Justices, dominated by the so-called Four Horsemen, that by striking down New Deal legislation in the early 1930s so infuriated President Franklin Roosevelt that he would propose his Court-packing plan as a way of achieving a new, pro-New Deal majority. *See generally* WHITE, *supra* note 276, at 178-99. The so-called Four Horsemen, though favorably inclined to protect liberty of contract rights, nevertheless "accepted a broader police power than did Peckham and Brewer." Bernstein, *supra* note 184, at 11 n.33. Indeed, one scholar, citing dozens of cases, has concluded that these Justices led the Court to uphold "a simply enormous array of state police power regulations." Barry Cushman, *The Secret Lives of the Four Horsemen*, 83 VA. L. REV. 559, 566 & n.56 (1997).

406. *See* ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS iii (1904); Mayer, *supra* note 27, at 150-52. 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. *See* Mayer, *supra* note 27, at 150-51 & n.191, 152. 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. *Compare* FREUND, *supra*, at iii (defining the police power as "the power of promoting the public welfare by restraining and regulating the use of liberty and property") *with* COOLEY, *supra* note 145, at 704 (discussed *supra* text accompanying note 145). 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.

407. 261 U.S. 525 (1923).

408. *Id.* at 546.

409. *Id.*

410. *Id.* at 554.

minimum-wage law involved in the case[411]—shows just how far-reaching those "exceptions" were.

One of those categories, which proved to be especially troublesome for the Court in *Adkins,* was that of statutes fixing the hours of labor.[412] Both before and after *Lochner v. New York*[413]—with its decisions in *Holden v. Hardy*[414] and *Muller v. Oregon*[415]—the Court 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.[416] The line that the Court apparently had drawn in *Lochner*, preserving liberty of contract rights for male workers in ordinary trades,[417] appears to have virtually vanished in the Court's decision in a 1917 case, *Bunting v. Oregon,*[418] a decision that many commentators have seen as effectively overruling *Lochner.*[419] *Bunting* concerned 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, with a provision permitting work up to thirteen hours a day if the employer paid time-and-a-half for the extra hours.[420] In a short opinion by Justice McKenna, the Court upheld the law as a valid health regulation.[421] *Bunting* signaled that a majority of the Justices, during

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411. *See id.* at 546-53.

412. *See id.* at 547-53.

413. 198 U.S. 45 (1905).

414. 169 U.S. 366, 380, 398 (1898) (upholding a Utah law that limited the hours of workmen in underground mines, as well as in smelting and other operations).

415. 208 U.S. 412, 416-17, 423 (1908) (upholding a state statute limiting the hours of women employed in factories to ten hours a day).

416. *See id.* at 416-17, 423; *Holden*, 169 U.S. at 380, 393-94, 398.

417. *See Lochner*, 198 U.S. at 62-64.

418. 243 U.S. 426 (1917).

419. *See, e.g.,* CURRIE, *supra* note 22, at 103 (maintaining that *Bunting* "buried *Lochner* without even citing it"). 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 thought it "impossible" to reconcile *Bunting* with *Lochner* and adding that he had "always supposed that the *Lochner Case* was thus overruled *sub silentio*"); *id.* at 570 (Holmes, J., dissenting) (writing that he thought *Lochner* "would be allowed a deserved repose" because of *Bunting*).

420. *Bunting*, 243 U.S. at 433-34 (quoting 1913 Or. Laws 169).

421. *Id.* at 437-38. Chief Justice White and Justices Van Devanter and McReynolds dissented without opinion; Justice Brandeis took no part in deciding the case. *Id.* at 439. Felix Frankfurter, the future Justice, joined the attorney general of Oregon in briefing the Court in defense of the law, *id.* at 430, just as he would also co-write the brief in defense

the period between the two world wars, were unwilling to question any exercises of police power that seemed to protect workers' health—even if legislation effectively barred certain classes of persons from particular occupations. For example, just one year after *Adkins*, the Court upheld a law banning night work for women under the rationale that women have weaker constitutions than men.[422]

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 Justice Sutherland in his opinion in *Adkins*. It was under the rationale of protecting public health that the Court upheld a Massachusetts law compelling citizens to be vaccinated against smallpox.[423] 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 employee recovery for on-the-job injuries."[424]

Two other broad categories of exceptions to the general rule of freedom of contract, as cited by Justice Sutherland in *Adkins*, concerned

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of the District of Columbia minimum-wage law in *Adkins*, 261 U.S. at 526.

422. *See* Radice v. New York, 264 U.S. 292, 293-95 (1924) (following *Muller*'s recognition of "the physical limitations of women").

423. *See* Jacobson v. Massachusetts, 197 U.S. 11, 29 (1905) (upholding mandatory smallpox vaccination). The Court held that

> in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.

Id.

424. PHILLIPS, *supra* note 29, at 54. *See, e.g.*, Mountain Timber Co. v. Washington, 243 U.S. 219, 227, 238-40 (1917) (rejecting substantive due process challenges to workers' compensation laws for hazardous employment); N.Y. Cent. R.R. v. White, 243 U.S. 192, 207 (1917); Mondu v. N.Y., New Haven, & Hartford R.R. Co., 223 U.S. 1, 6-7, 51-54 (1912) (upholding federal law governing railroads' liability for employees' on-the-job injuries); Chi., Burlington & Quincy R.R. v. McGuire, 219 U.S. 549, 560, 571 (1911) (upholding state law governing railroads' liability for employees' injuries). This line of cases is nicely summarized by Michael Phillips, who concludes that the Court during the *Lochner* Era "[i]n all, . . . probably rejected eighteen substantive due process attacks on workers' compensation provisions and kindred laws." PHILLIPS, *supra* note 29, at 54-55. David Bernstein points to this line of cases in refuting Cass Sunstein's claim that *Lochner* Era jurisprudence involved preserving a supposed "baseline" of common law rights; as he argues, "the Court did not see the common law as natural and prepolitical, but as manmade and mutable." David E. Bernstein, Lochner's Legacy's *Legacy*, 82 TEX. L. REV. 1, 26-27 (2003). He also notes that, "after the landmark *White* decision the Supreme Court consistently upheld federal and state workers' compensation statutes, including laws with novel features," and that most of these decisions were unanimous. *Id.* at 30-31 (footnote omitted).

"[s]tatutes relating to contracts for the performance of public work" and "[s]tatutes prescribing the character, methods, and time for payment of wages."[425] In the first line of cases, the Court based its rulings on "the right of the government to prescribe the conditions upon which it will permit work of a public character to be done for it."[426] In the second, the Court viewed the regulations as being aimed at preventing fraud or other abuses rather than at the substance of the deal.[427] The fraud rationale that enabled such cases to pass muster meant that the Court was upholding some forms of social legislation—laws aimed at protecting workers—without having to recognize inequality of bargaining strength as "a legitimate justification for legislative interposition between employer and employee," as one legal historian has put it.[428]

The final, and perhaps the most important, category of exceptions listed by Justice Sutherland in *Adkins* was that of businesses "impressed with a public interest."[429] Chief Justice Taft, in the opinion for the Court in *Charles Wolff Packing Co. v. Court of Industrial Relations*,[430] had tried to articulate a clear standard to determine whether a business truly was affected with a public interest and therefore subject to government regulation, even as to the price terms of its contracts.[431] Applying the standard in a series of opinions written by Justice Sutherland in the late 1920s, the Court 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.[432] Although the Court continued to enforce limits

425. *Adkins*, 261 U.S. at 547 (emphasis omitted).

426. *Id.*; *see also* Heim v. McCall, 239 U.S. 175, 176-77, 194 (1915) (upholding a state law giving citizens a preference over aliens in employment on public works); Ellis v. United States, 206 U.S. 246, 254-56 (1907) (upholding a federal statute limiting hours worked by federal workers or employees of federal contractors to eight per day); Atkin v. Kansas, 191 U.S. 207, 207-09, 224 (1903) (upholding a state law regulating wages and hours of laborers employed by municipal paving contractors).

427. *Adkins*, 261 U.S. at 547; *see also* Erie R.R. Co. v. Williams, 233 U.S. 685, 689-90, 704 (1914) (upholding a state law requiring that railroads pay their employees semimonthly in cash); McLean v. Arkansas, 211 U.S. 539, 543, 551-52 (1909) (upholding a state law requiring that, for payment purposes, coal produced by miners be weighed as it comes from the mine and before it is passed over a screen); Knoxville Iron Co. v. Harbison, 183 U.S. 13, 18, 22 (1901) (upholding a state law requiring employers to redeem scrip in cash).

428. McCurdy, *supra* note 11, at 182-83.

429. *Adkins*, 261 U.S. at 546 (emphasis omitted).

430. 262 U.S. 522 (1923).

431. *See id.* at 538-40.

432. *See* Williams v. Standard Oil, 278 U.S. 235 (1929) (retail price of gasoline); Ribnik v. McBride, 277 U.S. 350 (1928) (employment agency fees); Tyson & Bro.-United Theater Ticket Offices, Inc. v. Banton, 273 U.S. 418 (1927) (resale of theater tickets).

defining businesses as affected with a public interest,[433] changes in the membership of the Court helped pave the way for abandonment of the doctrine altogether.[434]

In *Nebbia v. New York*,[435] 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.[436] One of the Court's newest members, Justice 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," and "upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells."[437] Moreover, Justice 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. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. . . .
>
> . . . The Constitution does not secure to anyone liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people. 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.[438]

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433. *See, e.g.*, New State Ice Co. v. Liebmann, 285 U.S. 262, 271, 278-79 (1932) (striking down market entry restrictions, with Justice Sutherland again writing for the Court).

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

435. 291 U.S. 502 (1934).

436. *Id.* at 515, 539. The law clearly was designed to help protect the state's dairy farmers from the spiraling fall in milk prices. *See id.* at 515-18. Nebbia, the proprietor of a grocery store in Rochester, sold two quarts of milk and a five-cent loaf of bread for eighteen cents; he was convicted for violating the Board's order, which had fixed a minimum price of nine cents for the retail sale of a quart of milk. *Id.* at 515.

437. *Id.* at 536-37.

438. *Id.* at 537, 538-39.

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

The decision in *Nebbia* in 1934 might have marked the so-called New Deal Revolution on the Supreme Court[439] had it not been for some important decisions in 1935 and 1936 in which the Court struck down as unconstitutional major parts of President Franklin D. Roosevelt's New Deal program.[440] Because of those decisions, historians and constitutional scholars have identified 1937 as the watershed year for a constitutional revolution, based on the apparent sudden and dramatic shift that occurred, in the spring of that year with a series of 5-4 decisions (in which both Chief Justice Hughes and Justice Roberts joined the majority) upholding New Deal legislation.[441] With regard to limitations on both state and federal legislative powers through

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439. 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).

440. *See* Carter v. Carter Coal Co., 298 U.S. 238, 278, 311 (1936) (striking down the Coal Conservation Act of 1935, ch. 824, 49 Stat. 991, *repealed by* Bituminous Coal Conservation Act of 1937, ch. 127, § 20(a), 50 Stat. 75, 91); United States v. Butler, 297 U.S. 1, 53, 78 (1936) (striking down part of the Agricultural Adjustment Act, ch. 25, 48 Stat. 31 (1933)); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 521, 551 (1935) (a unanimous decision that struck down part of the National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933)).

441. *See, e.g.*, HALL, *supra* note 16, at 282-83; MICHAEL LES BENEDICT, THE BLESSINGS OF LIBERTY: A CONCISE HISTORY OF THE CONSTITUTION OF THE UNITED STATES 281-82 (2d ed. 2006); *see also* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 58, 113-14 (1991). Despite the popular legend of the "switch in time that saved nine," however, most scholars agree that President Roosevelt's "Court-packing" plan did not bring about the change; the critical shift in the views of the swing voters, Chief Justice Charles Evans Hughes and Justice Owen Roberts, really occurred prior to 1937, well before Roosevelt had announced his proposal. *See, e.g.*, CURRIE, *supra* note 22, at 236; KELLY ET AL., *supra* note 20, at 488. Justice Roberts authored the majority opinion in the 1934 *Nebbia* decision. *Nebbia*, 291 U.S. at 515. Chief Justice Hughes wrote the majority opinion in *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 416, 448 (1934) (upholding a Minnesota debt moratorium law against an Article I, Section 10 Contracts Clause challenge), and *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 330 (1936) (upholding the constitutionality of the Tennessee Valley Authority 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'" (quoting U.S. CONST. art. IV, § 3)).

Although Roosevelt's Court-packing plan was essentially dead on arrival in Congress, *see* HALL, *supra* note 16, at 282, he was eventually able to "pack" the Court with appointees favorable to the New Deal by the normal process of attrition, as most of the nine justices retired or died during the next several years, *see* KELLY ET AL., *supra* note 20, at 488. By the time of America's entry into World War II, all but one of the justices on the Court were Roosevelt appointees. *See* CURRIE, *supra* note 22, at 277; KELLY ET AL., *supra* note 20, at 489.

substantive use of the Due Process Clause, the Court abandoned its protection of liberty of contract as a fundamental right in *West Coast Hotel Co. v. Parrish*.[442] A year later, in *United States v. Carolene Products Co.*,[443] the Court adopted the minimal "rational basis" test for economic legislation,[444] 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 noneconomic rights.[445]

In *Carolene Products* the Court upheld the Federal Filled Milk Act[446] against a Fifth Amendment substantive due process challenge.[447] In the due process portion of the opinion for the Court, Justice Stone announced the Court's new standard of review for such regulatory legislation:

> [T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.[448]

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442. 300 U.S. 379, 386, 391, 398-400 (1937) (overruling *Adkins* and upholding legislation setting minimum wages as a reasonable exercise of the police power and thus not violating the Due Process Clause of the Fourteenth Amendment). 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 102, at 127.

443. 304 U.S. 144, 145-46, 154 (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 Court in *Carolene Products* is footnote 4, called by Professor Ackerman "the most famous [footnote] in Supreme Court history." ACKERMAN, *supra* note 441, at 119.

444. *See Carolene Prods.*, 304 U.S. at 152.

445. *See* ELY, *supra* note 102, at 133; PHILLIPS, *supra* note 29, at 185-92; *see also* SIEGAN, *supra* note 117, at 41-42.

446. Ch. 262, 42 Stat. 1486 (1923) (codified as amended at 21 U.S.C. §§ 61-64 (2000)).

447. *Carolene Prods.*, 304 U.S. at 154. The Act prohibited the interstate shipment of skimmed milk "compounded with [] any fat or oil other than milk fat." § c, 42 Stat. at 1486-87. As Geoffrey Miller has argued, it was "an utterly unprincipled example of special interest legislation," Geoffrey P. Miller, *The True Story of* Carolene Products, 1987 SUP. CT. REV. 397, 398, that mainly targeted skimmed milk laced with coconut oil, which was cheaper than canned milk containing milk fat. *Id.* at 401, 402. A segment of the dairy industry was the major force behind the Act, and Miller sees as one of *Carolene Products*' legacies "the unrivaled primacy of interest groups in American politics of the last half-century." *Id.* at 399.

448. *Carolene Prods.*, 304 U.S. at 152.

This meant that substantive due process review of such legislation would follow what is generally now called the "rational basis test"—sometimes called the "minimal rational basis test," to emphasize the weakness of scrutiny. The test, in effect, seems to function as a presumption in favor of the constitutionality of such legislation. In other words, it reverses the Court's old *Lochner* Era presumption in favor of liberty, replacing it with a presumption in favor of governmental action or regulation, or a presumption against liberty. Contrary to the orthodox view, which identifies formalism with judicial protection of liberty of contract and which sees Justice Holmes, Justice Brandeis, and their jurisprudential descendants as the enemies of formalism, the *Carolene Products* rational basis test, with its presumption of constitutionality, is "the very definition of formalism."[449] As one scholar has noted, "So long as the government's action bears some connection to a minimally rational economic policy, the Court refuses to look further, to the real motive or real effect of the policy."[450]

To dispel the impression that all legislation would enjoy this presumption of constitutionality, Justice Stone immediately added the famous footnote 4, which suggested that a stricter standard of scrutiny might be applied when the challenged law violated a specific provision of the Constitution, such as one of the Bill of Rights guarantees; or when it restricted political participation, in such matters as voting, speech, political organization, or peaceable assembly; or when it discriminated against particular religious, national, or racial minorities.[451] The footnote, which is technically dictum, thus became the origin of the double standard in the Court's modern substantive due process jurisprudence.[452] This double standard means the Court gives less constitutional protection to the economic liberty and property rights formerly protected by its *Lochner* Era liberty of contract jurisprudence than it gives to other rights—the modern Court's so-called preferred freedoms.[453] Further, the double standard means that even with regard to the so-called preferred freedoms, the Court has applied differing standards of review.[454] Despite what the first category of cases mentioned in Justice Stone's footnote suggests, the Court has not even given uniform protection to the rights explicitly protected by the

449. Sandefur, *supra* note 342, at 262; *see also supra* notes 18-20 and accompanying text.

450. Sandefur, *supra* note 342, at 262.

451. *Carolene Prods.*, 304 U.S. at 152-53 n.4; PHILLIPS, *supra* note 29, at 185.

452. *See* PHILLIPS, *supra* note 29, at 186.

453. *See* ELY, *supra* note 102, at 133; PHILLIPS, *supra* note 29, at 185-92.

454. *See* PHILLIPS, *supra* note 29, at 192.

Bill of Rights amendments. Beginning with Justice Cardozo's opinion for the Court in *Palko v. Connecticut*[455]—another 1937 decision—the Court has followed the doctrine of "selective incorporation" in applying some, but not all, of the rights guaranteed in the Bill of Rights against the states through the Fourteenth Amendment.[456]

The Court's double standard is evident in several aspects of modern American constitutional law. One is the way the Court and most constitutional scholars have drawn an artificial distinction between economic liberty and personal freedoms, with the rational basis test barely protecting the former while the more rigorous "strict scrutiny" standard more effectively protects the latter.[457] Justice Robert Jackson, one of President Franklin Roosevelt's new appointees to the Court, in *West Virginia Board of Education v. Barnette*,[458] the famous World War II Era civil liberties case, frankly admitted the Court was following its own subjective values in giving a higher level of protection to First Amendment rights:

> We must transplant these rights to a soil in which the laissez-faire concept or principle of non-interference has withered at least as to economic affairs, and social advancements are increasingly sought through closer integration of society and through expanded and strengthened governmental controls. These changed conditions often deprive precedents of reliability and cast us more than we would choose upon our own judgment.[459]

Perhaps the most telling illustration of the double standard has been the failed attempt to reconcile *West Coast Hotel Co.* with the Court's modern protection of right to privacy. Despite efforts by the Justices

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455. 302 U.S. 319 (1937).

456. *Palko* upheld a state criminal conviction, notwithstanding double jeopardy, because the Court ruled that the Fifth Amendment protection against double jeopardy was not so fundamental a right that its denial in state court would constitute a deprivation of due process. *See id.* at 325. Since the decision in *Palko*, the Court has incorporated the Fifth Amendment double jeopardy provision, as well as most of the other rights of accused persons guaranteed by the Fifth and Sixth Amendments. *See, e.g.*, CHEMERINSKY, *supra* note 5, at 504. However, the Fifth Amendment right to a grand jury indictment, along with a few other provisions of the Bill of Rights—such as the Seventh Amendment right to a jury trial in civil cases and the Second Amendment right to keep and bear arms—have yet to be incorporated against the states through the Fourteenth Amendment Due Process Clause. *E.g., id.* at 504-05.

457. *See* Miller, *supra* note 447, at 397; PHILLIPS, *supra* note 29, at 187.

458. 319 U.S. 624, 626, 639, 692 (1943) (invalidating a state law compelling schoolchildren to salute the United States flag, as a violation of First Amendment rights applied to the states through the Fourteenth Amendment).

459. *Id.* at 640.

themselves in major privacy decisions to distinguish their holdings from those of their predecessors in the *Lochner* Era,[460] the jurisprudential foundations of that aspect of liberty identified today as the right to privacy are virtually identical to—and thus potentially susceptible to the same demise as—the Court's pre-1937 protection of liberty of contract. As discussed in Part III.B, the modern right to privacy really is nothing but the last remaining vestige of the old Court's protection of liberty of contract, founded on the post-1937 survival and reconceptualization of the decisions in *Meyer v. Nebraska*[461] and *Pierce v. Society of Sisters*.[462] Both the right to privacy and liberty of contract involve substantive due process protection of an unenumerated right, one aspect of the general right to liberty. As between the two rights, liberty of contract arguably has a more secure foundation in "fundamental principles as they have been understood by the traditions of our people and our law," as Justice Holmes articulated the due process standard in his *Lochner* dissent.[463]

V. CONCLUSION

The orthodox view of the Supreme Court's protection of liberty of contract during the *Lochner* Era is a myth, or perhaps more accurately, a folktale—the equivalent in constitutional law of a modern urban legend.[464] The folktale was invented by early twentieth-century Progressive-movement scholars[465] and has been perpetuated by modern-day apologists for the twentieth century welfare or regulatory state. A key part of the folktale is the notion that the Court, in protecting liberty of contract as a fundamental right, was engaged in a form of judicial activism, reading into the Constitution a laissez-faire

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460. *See, e.g.*, Planned Parenthood of Se. Penn. v. Casey, 505 U.S. 833 (1992); Griswold v. Connecticut, 381 U.S. 479 (1965). Justice Douglas, in the opinion for the Court in *Griswold*, implied that by protecting the right of privacy through "penumbras" emanating from particular Bill of Rights guarantees, 381 U.S. at 484, the Court was not returning to the days when it sat "as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions," *id.* at 482. In *Planned Parenthood*, the plurality opinion of Justices O'Connor, Kennedy, and Souter maintained that the Court's protection of liberty of contract in *Lochner* "rested on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare," *Planned Parenthood*, 505 U.S. at 861-62, a disputable interpretation of history and economics.

461. 262 U.S. 390 (1923).

462. 286 U.S. 510 (1925).

463. *Lochner*, 198 U.S. at 76 (Holmes, J., dissenting).

464. On the distinction between myths on the one hand, and folktales or legends on the other, see JAN HAROLD BRUNVAND, ENCYCLOPEDIA OF URBAN LEGENDS 111-13, 279 (2001).

465. *See* RICHARD A. EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION (2006).

political or economic philosophy to "enact Mr. Herbert Spencer's *Social Statics*," as Justice Holmes accused the majority of doing in *Lochner v. New York*.[466]

In dispelling this myth, this Article has told the story of both the rise and the fall of liberty of contract as a fundamental right. It follows the emerging consensus in new scholarship about the so-called *Lochner* Era, that contrary to the laissez-faire constitutionalism stereotype, the Court's protection of liberty of contract was not a form of judicial activism but rather adhered to well-established standards of constitutional law. Notwithstanding the efforts of some revisionist scholars to explain the doctrine in terms of a nineteenth-century prohibition on class legislation,[467] the most important of the limitations on the police power that the Court enforced—and the origin of its liberty of contract jurisprudence—was its use of the Due Process Clauses of the Fifth and Fourteenth Amendments to substantively protect personal rights to liberty and property. As this Article has shown, substantive due process was not the invention of *Lochner* Era judges but was well-grounded in a series of precedents in American law antedating even the Constitution itself. 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 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.

In giving substantive due process protection to liberty of contract, the Court reviewed laws under a moderate means-ends test, which in effect created a general presumption in favor of liberty. In protecting liberty of contract, the Court continued to recognize the validity of the police power in its traditional scope as a protection of public health, safety, and morals. Hence, the Court upheld literally hundreds of laws as valid exercises of the police power. 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 scope of the Court's protection of liberty of contract, nevertheless, was much broader than the economic substantive due process stereotype would suggest. The Court protected various aspects of liberty, including not only economic freedom in the context of the employer-employee relationship but other important aspects of economic freedom, as well as other aspects of liberty that today would be regarded as personal freedom. Moreover, the Court protected not just the wealthy

466. 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

467. *See, e.g.*, GILLMAN, *supra* note 28.

or powerful but also relatively powerless individuals and members of minority groups—as illustrated by its important (but largely overlooked) decisions in *Buchanan v. Warley*,[468] *Meyer v. Nebraska*,[469] and *Pierce v. Society of Sisters*.[470]

Finally, improper judicial activism came not with the *Lochner* Era Court's protection of liberty of contract but 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 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.

468. 245 U.S. 60 (1917).
469. 262 U.S. 390 (1923).
470. 268 U.S. 510 (1925).