CLASS LEGISLATION, FUNDAMENTAL RIGHTS, AND THE ORIGINS OF *LOCHNER* AND LIBERTY OF CONTRACT

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INTRODUCTION

Lochner v. New York[1] and its eponymous jurisprudential era have been central to constitutional discourse and debate in the United States for over a hundred years.[2] While legal scholars and historians have criticized many judicial doctrines from that time period, critics have been especially scathing in their attacks on the "liberty of contract" doctrine enforced most famously in *Lochner*.

Until recently, academics routinely asserted that the *Lochner* Court's Justices simply made up the doctrine.[3] Critics described the Court's use of the Fourteenth Amendment's Due Process Clause to protect substantive rights, including liberty of contract, as indefensible as a textual matter.[4] John Hart Ely famously quipped that "'substantive due process' is a contradiction in terms," akin to "green pastel redness."[5] This line of attack persisted even

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[1] 198 U.S. 45 (1905).

[2] *See* Thomas B. Colby & Peter J. Smith, *The Return of* Lochner, 100 CORNELL L. REV. 527, 528, 541–43 (2015) ("The critique of the *Lochner* line of cases during the Progressive Era was both relentless and multifaceted.").

[3] *See* PAUL KENS, JUSTICE STEPHEN FIELD: SHAPING LIBERTY FROM THE GOLD RUSH TO THE GILDED AGE 6 (1997) ("The Court's critics claimed that judges had constructed these theories from thin air, that liberty of contract and substantive due process were not based on the words of the Constitution . . . ."); TIMOTHY SANDEFUR, THE RIGHT TO EARN A LIVING 117–19 (2010).

[4] *See* Learned Hand, *Due Process of Law and the Eight-Hour Day*, 21 HARV. L. REV. 495, 495 (1908) ("There can be little doubt that so to construe the term 'liberty' is entirely to disregard the whole juristic history of the word."); John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 501–02 (1997). *But see* Randy E. Barnett & Evan D. Bernick, *No Arbitrary Power: An Originalist Theory of the Due Process of Law*, 60 WM. & MARY L. REV. 1599, 1603–04 (2019); Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 512 (2010) (contending that the original meaning of the Fourteenth Amendment "encompassed a recognizable form of substantive due process").

[5] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 18 (1980); *see also* Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857, 897 (2009) ("made-up, atextual invention"). Justice Antonin Scalia said that "substantive due process is babble." Vivek Krishnamurthy, *Live-Blogging: Nino Scalia*, THE REACTION (Nov. 10, 2006, 9:24 AM), http://the-reaction.blogspot.com/2006/11/live-blogging-nino-scalia.html.

though it is anachronistic; the pre–New Deal Supreme Court's approach to interpreting the Due Process Clause did not recognize the modern categories of "substantive" and "procedural" due process.[6]

Legal scholars and historians asserted for decades that the origins of the liberty of contract doctrine lay in the Justices' desire to impose their personal ideologies on American governance through constitutional law, a criticism that dates back to the so-called "*Lochner* era" itself.[7] Critics accused early-twentieth-century Justices of being motivated by laissez-faire ideology inspired by Social Darwinism and of intentionally favoring the interests of big business at the expense of workers.[8] These allegations continue to have traction in some circles[9] even though the Court upheld much more regulatory

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[6] *See* Barry Cushman, *Teaching the* Lochner *Era*, 62 ST. LOUIS U. L.J. 537, 544–45 (2018) ("Not surprisingly, sophisticated legal thinkers of the *Lochner* Era did not understand the doctrine in such readily satirized terms. Indeed, they did not use the term 'substantive due process,' which emerged as a descriptor only after the *Lochner* Era was over."); Keith Whittington, *The Troublesome Case of Lochner*, LAW & LIBERTY (Mar. 1, 2012), http://www.libertylawsite.org/2012/03/01/keith-whittington-the-troublesome-case-of-lochner ("Scholars now recognize that the phrase 'substantive due process' was anachronistic and was popularized precisely in order to provoke the kind of reaction that John Hart Ely evidenced. The catchy label was supposed to reduce a complex body of law to an oxymoron. But no one thought, let alone talked, that way prior to the Progressive critique.").

[7] For *Lochner* era critiques along these lines, see *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 633 (1936) (Stone, J., dissenting) (accusing the majority of relying on its "own personal economic predilections"), and *Adkins v. Children's Hosp.*, 261 U.S. 525, 562 (Taft, C.J., dissenting) ("[I]t is not the function of this Court to hold congressional acts invalid simply because they are passed to carry out economic views which the court believes to be unwise or unsound."), *overruled by West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). *See also* FRANK J. GOODNOW, SOCIAL REFORM AND THE CONSTITUTION 247 (1911); W. F. Dodd, *The Growth of Judicial Power*, 24 POL. SCI. Q. 193, 194 (1909) ("The Courts have now definitely invaded the field of public policy and are quick to declare unconstitutional almost any laws of which they disapprove, particularly in the fields of social and industrial legislation."). For similar modern critiques, see *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 691 (1999) (quoting *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting)) ("We had always thought that the *distinctive* feature of *Lochner*, nicely captured in Justice Holmes's dissenting remark about 'Mr. Herbert Spencer's Social Statics,' was that it sought to impose a particular economic philosophy upon the Constitution."); James E. Fleming, *Fidelity, Basic Liberties, and the Specter of* Lochner, 41 WM. & MARY L. REV. 147, 149–50, 173–75 (1999); and Paul Kens, *Dawn of the Conservative Era*, 22 J. SUP. CT. HIST. 1, 8–12 (1997).

[8] George Thomas, *When the Legend Becomes Fact*, LAW & LIBERTY (Mar. 1, 2012) (reviewing DAVID E. BERNSTEIN, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM (2011)), http://www.libertylawsite.org/2012/03/01/rehabilitating-lochner-a-law-and-liberty-symposium ("*Lochner* has been characterized as embracing laissez-faire Social Darwinism and as generally placing the Supreme Court on the side of big corporations against struggling workers."); *see also* Cushman, *supra* note 6, at 540 ("For many years, it was widely thought that the Court's economic regulation jurisprudence had been driven by the complementary factors of a commitment to laissez-faire economics, a devotion to the tenets of social Darwinism, and to a desire to shield businesses from legislation aimed at protecting workers and consumers.").

[9] For examples of relatively recent works that attribute the liberty of contract doctrine to Social Darwinism, see ANGELO N. ANCHETA, SCIENTIFIC EVIDENCE AND EQUAL PROTECTION OF THE LAW 24–25 (2006); JAMES MACGREGOR BURNS, PACKING THE COURT: THE RISE OF JUDICIAL POWER AND THE

legislation than it invalidated,[10] allowing for significant and unprecedented growth in the scope of the regulatory state at the federal, state, and local levels. Moreover, the notion that Social Darwinism had any significant impact on the development of Supreme Court jurisprudence in the relevant time period is not supported by much more than mere assertion.[11]

The traditional criticisms of *Lochner* and liberty of contract were less a product of well-considered historical research and analysis, and more of post–New Deal academics' desire to justify the massive changes to American constitutional law that accompanied the New Deal and World War II. As Professor Jack Balkin explains, "The *Lochner* narrative that we have inherited from the New Deal projects on to the Supreme Court between 1897 to 1937 a series of undesirable traits – the very opposite of those characteristics that supporters of the New Deal settlement wanted to believe about themselves."[12] New Deal supporters thought of themselves as legal realists, pragmatists, economic progressives, supporters of national regulatory authority, and believers in a restrained judiciary. They therefore depicted the Justices of the "*Lochner* era" Court as being rigidly formalist, laissez-faire absolutists, reactionary Social Darwinists hostile to the national government, and as unrestrained activists who sought to read their own views into constitutional law.[13] In short, "The Old Court's vices were the virtues of the New Deal settlement inverted."[14] Polemical accounts with little factual basis therefore became the basis for the mainstream explanation of the Court's liberty of contract decisions.

Scholarly incentives to provide simplistic and tendentious interpretations of *Lochner* and liberty of contract[15] for political reasons were reinforced when the Warren and Burger Courts used the Due Process Clause to protect

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COMING CRISIS OF THE SUPREME COURT 119–20 (2009); and CRAIG R. DUCAT, CONSTITUTIONAL INTERPRETATION, 513–14 (6th ed. 1996).

10 *See* David E. Bernstein, *Lochner*'s Legacy*'s Legacy*, 82 TEX. L. REV. 1, 23–26, 35–36 (2003); *see also* 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 741 (rev. ed. 1926); Michael J. Phillips, *How Many Times Was* Lochner*-Era Substantive Due Process Effective?*, 48 MERCER L. REV. 1049, 1049–50, 1053–54 (1997); Melvin I. Urofsky, *Myth and Reality: The Supreme Court and Protective Legislation in the Progressive Era*, 1983 SUP. CT. HIST. SOC'Y Y.B. 55.

11 *See* Joseph F. Wall, Lochner v. New York*: A Study in the Modernization of Constitutional Law*, *in* AMERICAN INDUSTRIALIZATION, ECONOMIC EXPANSION, AND THE LAW 113, 132 (Joseph R. Frese & Jacob Judd eds., 1981) ("The difficulty with this Social Darwinistic interpretation is that it was based upon no substantiating evidence."). No such evidence has presented itself since Wall wrote this over forty years ago.

12 Jack M. Balkin, *"Wrong the Day It Was Decided":* Lochner *and Constitutional Historicism*, 85 B.U. L. REV. 677, 686 (2005).

13 *Id.*

14 *Id.*

15 *Lochner* itself did not become a widely used symbol for the entire corpus of liberty of contract decisions, much less an entire era, until the 1970s. *See* DAVID E. BERNSTEIN, REHABILITATING *LOCHNER* 108, 116 (2011).

reproductive rights.[16] Supporters of those rulings found it useful to promote the myth of a laissez-faire, Social Darwinist "*Lochner* era" Supreme Court to differentiate modern liberal due process decisions from early-twentieth-century decisions.[17] Opponents of those rulings, meanwhile, sought to preserve the myth of an out-of-control, activist *Lochner* Court to associate the reproductive-rights decisions with discredited opinions of the past.[18]

Old shibboleths die hard.[19] Despite decades of revisionist research by legal historians on *Lochner* and the liberty of contract doctrine,[20] some still repeat the simplistic views that dominated discussion of the liberty of contract doctrine in the past.[21] Even some relatively sophisticated modern, progressive accounts of *Lochner*, such as Professor Cass Sunstein's Lochner*'s Legacy*, work backwards from the premise that *Lochner* and its progeny are negative icons.[22]

Many progressive law professors feel a need to strongly distinguish *Lochner*-era liberty of contract cases from modern due-process cases that progressives favor, and to associate *Lochner* with cases modern progressives abhor. Recently, this latter tendency has resulted in large and growing literature on so-called "First Amendment Lochnerism."[23] The First Amendment

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16 *See* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 300–01 (2009); Helen Garfield, *Privacy, Abortion, and Judicial Review: Haunted by the Ghost of* Lochner, 61 WASH. L. REV. 293, 305–08 (1986).

17 *See* MARKUS DIRK DUBBER, THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT 203 (2005) ("*Roe* and its predecessors came to be thought of as something completely new, having to do with novel notions like 'penumbras' of enumerated rights and 'the right to privacy,' rather than as a continuation of the struggle to define and limit state power, and the power to police in particular." (quoting Griswold v. Connecticut, 381 U.S. 479, 484 (1965))).

18 *E.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 32 (1990) (tying *Roe v. Wade* to *Lochner*); *cf.* David A. Strauss, *Why Was* Lochner *Wrong?*, 70 U. CHI. L. REV. 373, 374 (2003) (discussing the competing views of liberals and conservatives as to why *Lochner* was wrong).

19 *See* Matthew J. Lindsay, *Federalism and Phantom Economic Rights in* NFIB v. Sebelius, 82 U. CIN. L. REV. 687, 694 (2014) (noting the "remarkably durable mythology of 'laissez-faire constitutionalism' that surrounds *Lochner*").

20 *See* sources cited *infra* note 34.

21 *E.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 614, 616–17, 635 (5th ed. 2017) (stating that the Supreme Court aggressively reviewed economic regulations because of a strong commitment to laissez-faire, influenced by Social Darwinism, and a hostility by businesses to regulations meant to protect consumers and workers); DANIEL A. FARBER ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 28 (5th ed. 2013) ("[T]he Fuller Court used [the Due Process Clause] as a sharp weapon for business interests against state regulatory legislation . . . ."). The depiction of liberty of contract in these two sources may reflect the reality that language in later editions of treatises and casebooks is often not updated to reflect recent scholarship.

22 Cass R. Sunstein, Lochner*'s Legacy*, 87 COLUM. L. REV. 873, 875 (1987). For a critique, see generally Bernstein, *supra* note 10.

23 *See* John C. Coates IV, *Corporate Speech & the First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223, 248–49 (2015); Leslie Kendrick, *First Amendment Expansionism*, 56

Lochnerism literature essentially amounts to this: "here are some First Amendment decisions, such as *Citizens United*,[24] that invalidated laws we like, so we will try to associate these decisions with *Lochner* in an attempt to discredit them."[25]

Many conservatives, meanwhile, continue to associate any use of so-called substantive due process with a caricature of *Lochner*. Chief Justice John Roberts, joined by three of his colleagues, recently repeated virtually every hoary myth about *Lochner* and liberty of contract. In his dissent in *Obergefell v. Hodges*,[26] Roberts wrote that *Lochner* and like-minded cases represent an "unprincipled tradition of judicial policymaking;"[27] "required adopting as constitutional law 'an economic theory which a large part of the country does not entertain;'"[28] reflected "the philosophy of Social Darwinism;"[29] "empower[ed] judges to elevate their own policy judgments to the status of constitutionally protected 'liberty;'"[30] and involved an "unprincipled approach"[31] that "convert[ed] personal preferences into constitutional mandates."[32] Some of this is dubious, but arguable. Most of it is simply false.

Though *Lochner* mythology lives on in popular works, tendentious academic literature, and even in Supreme Court opinions, since the late 1960s[33] legal historians have gradually undermined the Manichean version of the

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WM. & MARY L. REV. 1199, 1207–09 (2015); Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 LAW & CONTEMP. PROBS. 195, 200 (2014); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1455 (2015); Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133, 135; Rebecca Tushnet, *COOL Story: Country of Origin Labeling and the First Amendment*, 70 FOOD & DRUG L.J. 25, 26 (2015).

24 Citizens United v. FEC, 558 U.S. 310 (2010).

25 As Jeremy Kessler has shown, protecting First Amendment rights has had significant implications for the commercial sphere since the Court began to aggressively protect such rights in the 1930s, even while it was rejecting liberty of contract. There has been no novel revival of so-called Lochnerism. Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915, 1918 (2016).

26 135 S. Ct. 2584 (2015).

27 *Id.* at 2616 (Roberts, C.J., dissenting).

28 *Id.* at 2617.

29 *Id.*

30 *Id.*

31 *Id.* at 2619.

32 *Obergefell*, 135 S. Ct. at 2618.

33 Important early revisionist articles include, for example, 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); William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767; Alan Jones, *Thomas M. Cooley and "Laissez-Faire Constitutionalism": A Reconsideration*, 53 J. AM. HIST. 751 (1967); Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863–1897*, 61 J. AM. HIST. 970 (1975); Charles W. McCurdy, *The Roots of "Liberty of Contract" Reconsidered: Major Premises in the Law of Employment, 1867–1937*, 1984 SUP. CT. HIST. SOC'Y Y.B. 20; William E. Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513 (1974); and Stephen A. Siegel, Lochner *Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1 (1991).

history of liberty of contract and its opponents. Today, no serious legal historian accepts the cartoonish version of history that still has traction in some circles.[34] As Professor Claudio Katz observed in 2013, "The time is long past when scholars characterized the [*Lochner*] era as a product of judges' reactionary commitments to laissez-faire or, worse, to Social Darwinism."[35]

Contemporary scholars have reconstructed the period's due-process jurisprudence, finding in it a principled commitment to a conception of justice with philosophical and jurisprudential roots dating back to the Founding and beyond. There are two primary lines of this revisionist literature. One emphasizes traditional Anglo-American hostility to "class legislation"—legislation that arbitrarily favors or disfavors particular factions.[36] The other emphasizes the influence of the natural rights tradition, tempered by precedent and historicism, on the Court's due-process decisions. This tradition includes both the notion of inherent limits on government power—including the notion that arbitrary legislation is not truly "law"[37]—and also the "free labor" tradition that evolved in response to slavery.[38]

Part I of this Article reviews the debate that emerged in the 1990s and early 2000s between partisans of the class-legislation interpretation of the Court's pre–New Deal due-process jurisprudence and partisans of a "fundamental rights" interpretation, with a particular focus on Professor Howard Gillman's book *The Constitution Besieged* and scholarly reactions to that book. Part II of this Article discusses subsequent developments in the class legislation vs. fundamental rights debate through the present time. This Article concludes by noting the broad areas of consensus that exist between the two sides of this debate, their increasing convergence, and the fact that in scholarly circles, the revisionist wave of *Lochner* scholarship has almost entirely vanquished the "laissez-faire Social Darwinism" understanding of the Supreme Court's early-twentieth-century due-process cases.

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[34] For overviews of the revisionist literature, see David E. Bernstein, Lochner *Era Revisionism, Revised:* Lochner *and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1 (2003); Barry Cushman, *Some Varieties and Vicissitudes of Lochnerism*, 85 B.U. L. REV. 881 (2005); and Stephen A. Siegel, *The Revisionism Thickens*, 20 Law & HIST. REV. 631 (2002). Prominent revisionist books include MARK WARREN BAILEY, GUARDIANS OF THE MORAL ORDER: THE LEGAL PHILOSOPHY OF THE SUPREME COURT, 1860-1910 (2004); JAMES W. ELY, JR., THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER: 1888–1910 (1995); OWEN FISS, TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910 (1993); HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836–1937 (1991); WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE (1988); and others referenced or discussed elsewhere in this Article.

[35] Claudio J. Katz, *Protective Labor Legislation in the Courts: Substantive Due Process and Fairness in the Progressive Era*, 31 LAW & HIST. REV. 275, 275 (2013).

[36] *See* Benedict, *supra* note 33, at 293–94; Nelson, *supra* note 33, at 513–14.

[37] *See* Barnett & Bernick, *supra* note 4, at 1627–28.

[38] *See* Nelson, *supra* note 33, at 537–38 (providing the source for much free-labor literature that followed).

I. THE CLASS LEGISLATION VS. FUNDAMENTAL RIGHTS DEBATE: THE ORIGINAL CONTROVERSY

The most influential[39] work of *Lochner* revision has been Howard Gillman's 1993 book, *The Constitution Besieged*.[40] Building on work by historians such as Alan Jones[41] and Michael Les Benedict,[42] Gillman argued that the Supreme Court's so-called substantive due process jurisprudence from the 1870s to the 1930s flowed from "an overarching set of well-established legal doctrines and principles governing the legitimate exercise of police powers," which distinguished between valid health laws and illegitimate "class legislation"—legislation intended to advance the wellbeing of one segment of the population rather than the welfare of the community as a whole.[43] Class legislation included what would now be called special-interest legislation, as well as legislation that violated the longstanding principle that the government may not arbitrarily take from A to give to B. Gillman's thesis was a breath of fresh historical air for *Lochner* scholarship, which despite a growing body of revisionist literature was still dominated by tendentious, politicized accounts. Many leading constitutional historians, including Barry Cushman,[44] Charles McCurdy,[45] and Ted White,[46] accepted Gillman's perspective.

There has not been any serious historical challenge to Gillman's contention that judicial concern with class legislation drove the development of Fourteenth Amendment police powers jurisprudence in the late nineteenth century. Not everyone agreed, however, that this concern also drove the Supreme Court's due-process jurisprudence in the early twentieth century from *Lochner* on. One skeptical scholar, Professor Michael Phillips, thought it unlikely that hostility to class legislation as described by Gillman could have

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39 Katz, *supra* note 35, at 275–76 (calling Gillman's "[t]he most widely accepted explanation"); Stephen A. Siegel, *Justice Holmes,* Buck v. Bell*, and the History of Equal Protection*, 90 MINN. L. REV. 106, 137 (2005) ("Presently, the dominant claim is that *Lochner*-era constitutional law originally was grounded in norms of equal treatment and an aversion to what Jacksonians called 'class legislation.'").

40 HOWARD GILLMAN, THE CONSTITUTION BESIEGED (1993).

41 *See* Jones, *supra* note 33, at 752.

42 *See* Benedict, *supra* note 33, at 305–14.

43 *See* GILLMAN, *supra* note 40, at 174–77.

44 BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT 89–90 (1998).

45 Charles W. McCurdy, *The "Liberty of Contract" Regime in American Law*, *in* THE STATE AND FREEDOM OF CONTRACT 161, 165–67 (Harry N. Scheiber ed., 1998) (adopting the view that *Lochner* was motivated by hostility to "class legislation").

46 G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 21, 246 (2000) [hereinafter WHITE, THE CONSTITUTION]; G. Edward White, *Revisiting Substantive Due Process and Holmes's* Lochner *Dissent*, 63 BROOK. L. REV. 87, 97 (1997); *see also* DAVID E. BERNSTEIN, ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS, AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL 4 (2001); MICHAEL J. BRODHEAD, DAVID J. BREWER: THE LIFE OF A SUPREME COURT JUSTICE, 1837–1910, at 120 (1994).

been the Supreme Court's operative principle in its early-twentieth-century due-process cases, because almost all legislation has unequal distributive consequences.[47] Phillips also pointed out that during the *Lochner* period, the "Court's substantive due process cases generally [did] not speak the language of class legislation. Instead they talk incessantly of property and liberty."[48]

I authored a widely cited challenge to Gillman's thesis in 2003.[49] With regard to the development of late-nineteenth-century jurisprudence, I generally agreed with Gillman's account, but found that some of the details of his thesis lacked historical support. First, Gillman sometimes conflated the nineteenth-century concept of class legislation with the modern concept of special-interest legislation.[50] In fact, the late-nineteenth-century Supreme Court understood class legislation primarily as laws that on their face created arbitrary classifications and not primarily as special-interest legislation.[51] If a legislative classification was arbitrary, then legislative motive was irrelevant. What was important was that the legislative classification was either arbitrary on its face or that reasonable people would deem it arbitrary.[52] Of course, laws that classify their targets arbitrarily will in many instances be special-interest legislation, but the Court did not have to reach such a conclusion to condemn a law as class legislation. Nor was special-interest legislation necessarily unconstitutional class legislation, so long as the classification involved was not deemed arbitrary.

Gillman also overstated the degree to which the prohibition on class legislation led the late-nineteenth-century Supreme Court to invalidate legislation. Gillman correctly cited to many *state* court decisions that invalidated regulations as class legislation.[53] The ban on class legislation, a 1904 treatise that surveyed cases nationwide concluded, is "one of the most effectual limitations upon the exercise of the police power."[54] The Supreme Court, however, adopted a much more forgiving version of the class-legislation doctrine than did many state courts.[55] By 1905, when the Court decided *Lochner*, the

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47 Michael J. Phillips, *The Progressiveness of the* Lochner *Court*, 75 DENV. U. L. REV. 453, 497 (1998).

48 *Id.* (footnote omitted).

49 Bernstein, *supra* note 34, at 12.

50 *See* GILLMAN, *supra* note 40, at 14, 27, 29, 67.

51 *See id.* at 12, 14.

52 *See* Whittington, *supra* note 6 ("[T]he idea of a forbidden 'class' was not understood in a Marxist sense of economic groups but could be applied to any set of individuals who had been arbitrarily singled out for unfair treatment by the state. As the Michigan jurist Thomas Cooley summarized, 'distinctions in these respects should be based on some reason which renders them important.' If the government is going to restrict the rights of some but not others, it better have a good reason.").

53 *See* GILLMAN, *supra* note 40, at 10.

54 ERNST FREUND, THE POLICE POWER, PUBLIC POLICY AND CONSTITUTIONAL RIGHTS § 682 (1904).

55 See Bernstein, *supra* note 34, at 14–21, for further discussion.

Court's rhetorical opposition to class legislation had not been accompanied by rulings placing significant restraints on government regulation.[56]

My more provocative criticism of Gillman's book was that he failed to recognize or acknowledge the extent to which class-legislation considerations became less significant to the Supreme Court in due-process cases over time as the Court shifted favor to a focus on fundamental rights. In the 1880s the Supreme Court announced that the "substantive" Due Process Clause only prohibited illicit class legislation.[57] In the 1890s, however, the Court announced that the Due Process Clause more broadly prohibited unreasonable limitations on liberty of contract and other liberties,[58] opening the way for the protection of fundamental rights.

Lochner v. New York exemplifies the Court's shift in emphasis in due-process cases challenging government regulations from equalitarian class-legislation concerns to liberty concerns. As Gillman acknowledges, *Lochner* "does not explicitly rely on the language of unequal, partial, or class legislation."[59] Rather, as the opinion states, *Lochner* invalidated the bakers' hours law because it violated liberty of contract without a valid police power rationale.[60] This represented a significant, perhaps even radical, shift in how the Court handled due-process cases.[61]

Justice Peckham's opinion failed to rely on class legislation considerations even though the dissenting opinion in the New York Court of Appeals below, urging invalidation of the hours law, relied on a class legislation

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56 *See id.* at 21–31.

57 *See, e.g.*, Dent v. West Virginia, 129 U.S. 114, 122–24 (1889). In *Dent*, Justice Field wrote for a unanimous Court that "legislation is not open to the charge of depriving one of his rights without due process of law, if it be general in its operation upon the subjects to which it relates." *Id.* at 124.

58 *E.g.*, Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897) (stating that the liberty provision of the Due Process Clause "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").

59 GILLMAN, *supra* note 40, at 128.

60 *See* Lochner v. New York, 198 U.S. 45, 61–62 (1905). Writing for the majority, Justice Peckham explained that the issue presented was,

> 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?

Id. at 56.

61 *Compare* Paul Kens, *The History and Implications of* Lochner v. New York, H-LAW (June 2013) (reviewing BERNSTEIN, *supra* note 15), https://www.h-net.org/reviews/showrev.php?id=36949 (calling this a "radical departure" from preceding jurisprudence), *with* Nicholas Mosvick, *Rehabilitating* Lochner*: A Study in the Limitations of a Constitutional Revolution*, 18 TEX. REV. L. & POL. 151, 153 (2013) (reviewing BERNSTEIN, *supra* note 15) ("*Lochner* was an atypical case, but not a revolutionary one.").

argument.[62] Moreover, Lochner's Supreme Court brief had relied primarily on a class legislation argument. The brief argued that the law not only applied arbitrarily only to bakers, but even more arbitrarily, it excluded between one-third and one-half of all bakers from its coverage.[63]

After *Lochner*, the Court increasingly relied on the Due Process Clauses as the basis for the protection of fundamental rights such as liberty of contract against arbitrary legislation.[64] Moreover, when reviewing federal legislation (where no equal-protection clause was available to fudge the issue) the Court repeatedly declined to hold that the Fifth Amendment's Due Process Clause contained an equality component.[65] Indeed, the Court occasionally explicitly denied that due process of law prohibited discrimination. In *District of Columbia v. Brooke*,[66] the Court rejected a claim that a federal law amounted to unconstitutional unequal legislation because the plaintiff had failed to identify "any provision of the Constitution of the United States which prohibits Congress from enacting laws which discriminate in their operation between persons or things."[67] One commentator suggested that the opinion intimated that Congress, bound only by the Fifth Amendment's due process but lacking an equal-protection restriction, "may enact class legislation," a proposition that commentator deemed correct.[68]

Constitutional change was gradual. Some Justices continued to apply class-legislation analysis under the Due Process Clauses, and legal treatises sometimes overstated the importance of class legislation under due process.[69]

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62 People v. Lochner, 177 N.Y. 145, 181 (1904) (O'Brien, J., dissenting), *rev'd sub nom.*, Lochner v. New York, 198 U.S. 45 (1905). Cushman, however, suggests that there "are suggestions sprinkled throughout Peckham's *Lochner* opinion that some members of the majority may have viewed the challenged statute as class legislation that singled out bakers for inadequate reason." Cushman, *supra* note 6, at 558. While it is possible that Justice Peckham was trying to lure the votes of other Justices with subtle allusions to class legislation or that one or more of the Justices requested that such language be added to the opinion, such possibilities are entirely speculative.

63 Brief for Plaintiff in Error at 5–6, 8–12, Lochner v. New York, 198 U.S. 45 (1905) (No. 292). Gillman notes the anti-class argument in Lochner's brief, but uses it as evidence that *Lochner* was based on hostility to class legislation. GILLMAN, *supra* note 40, at 127. It seems more logical to concentrate on the disconnect between the brief's focus on class legislation and the opinion's neglect of that issue.

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

65 The Court sometimes assumed arguendo that due process contained an equal-protection component, but declined to conclude that it did. *E.g.*, Second Emp'rs' Liab. Cases, 223 U.S. 1, 52–53 (1912) ("Even if it be assumed that [the Fifth Amendment's Due Process Clause] is equivalent to the 'equal protection of the laws' clause of the Fourteenth Amendment . . . ."); United States v. Heinze, 218 U.S. 532, 546 (1910) ("Assuming, therefore, and assuming only, not deciding that Congress may not discriminate in its legislation . . . ." (citation omitted)).

66 214 U.S. 138 (1909).

67 *Id.* at 149.

68 E. Connor Hall, *Due Process of Law and Class Legislation*, 43 AM. L. REV. 926, 927 (1909).

69 *See* Cushman, *supra* note 34, at 958; *infra* notes 143–163 and accompanying text.

In property-rights (as opposed to "liberty") cases, meanwhile, the Court continued to use the Fourteenth Amendment's Due Process Clause to invoke the traditional ban on taking property from A to give to B.[70] But class-legislation analysis in cases involving states' allegedly arbitrary classifications gradually shifted away from the Due Process Clause to find a home primarily in the Equal Protection Clause.[71]

In 1921 in *Truax v. Corrigan*,[72] the Supreme Court announced that the Due Process Clause provided a "mere minimum" of protection against unequal legislation; the primary locus of such protection, instead, was the Equal Protection Clause.[73] In 1927, the author of a treatise on due process of law noted this shift: "Since 1916," he pointed out, "less than one-third of the opinions, in decisions nullifying legislations [sic] because of the arbitrary classifications involved, mentioned due process at all."[74]

With the equality component of due process in gradual decline, the Court began to focus on "fundamental rights." In his dissent in *Powell v. Pennsylvania*,[75] Justice Field, expanding on the views he expressed in dissent in the *Slaughter-House Cases*,[76] vigorously argued that the right to pursue an occupation free from unreasonable government regulation was a liberty interest protected by the Due Process Clause.[77] Justice Field, however, was ahead of his time, and no one joined his dissent. The Supreme Court did not issue an opinion embracing the right to liberty of contract until 1895,[78] and it was not until the 1896 Supreme Court Term that the Due Process Clause began to play a prominent role in Supreme Court jurisprudence, with the Court eventually embracing the notion that the clause protected fundamental rights from government infringement.[79] These fundamental rights were understood to be specific natural rights that had proven crucial to the development of the tradition of Anglo-American liberty.[80]

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70 *See* Cushman, *supra* note 34, at 902–06.

71 *See id.* at 894–95; V.F. Nourse & Sarah A. Maguire, *The Lost History of Governance and Equal Protection*, 58 DUKE L.J. 955, 983–84 (2009); Siegel, *supra* note 39, at 109–10, 131–32, 135–36 (arguing that the hostility to class legislation was central to *Lochner*-era jurisprudence, but finding that the locus of the Court's class-legislation jurisprudence was the Equal Protection Clause).

72 257 U.S. 312 (1921).

73 *Id.* at 332–34.

74 RODNEY L. MOTT, DUE PROCESS OF LAW 278 (1926).

75 127 U.S. 678 (1888).

76 83 U.S. (16 Wall.) 36 (1873).

77 *Powell*, 127 U.S. at 691–92 (Field, J., dissenting).

78 Frisbie v. United States, 157 U.S. 160, 165–66 (1895).

79 *See* Michael G. Collins, *October Term, 1896—Embracing Due Process*, 45 AM. J. LEGAL HIST. 71, 72–74 (2001). While Collins identifies *Allgeyer* as embracing liberty of contract, the opinion actually endorsed only a right to contract with out-of-state parties and did not use the phrase "liberty of contract." *See* Allgeyer v. Louisiana, 165 U.S. 578, 590–93 (1897).

80 Stephen A. Siegel, *Historism in Late Nineteenth-Century Constitutional Thought*, 1990 WIS. L. REV. 1431, 1435; *see also* ROSCOE POUND, INTERPRETATIONS OF LEGAL HISTORY 10 (1923) (stating that "the historical school" ruled "almost uncontested during the last half of [the nineteenth century]").

II. THE CLASS LEGISLATION/FUNDAMENTAL RIGHTS DEBATE: SUBSEQUENT DEVELOPMENTS

In past writings, I used the phrase "fundamental rights" to describe the Court's Lochnerian due-process jurisprudence.[81] This has led to some misunderstandings. Professor Victoria Nourse, for example, suggests that the use of this term neglects the role of the police power, "assuming that since *Lochner* was a case about the right to contract, that right must have been a strong one—a right-as-trump," the way one understands "fundamental rights" today.[82]

I did not intend to use the phrase "fundamental rights" to suggest that the *Lochner* Court understood the scope of the Constitution's protection of fundamental rights in the same way the modern Supreme Court does. Rather, the phrase "fundamental rights" is appropriate because the early-twentieth-century Supreme Court itself regularly stated it was protecting "fundamental rights" via its due-process jurisprudence, and it would be anachronistic to ignore the Court's own framing of its rulings.[83] The focus on fundamental rights represented an important shift from the Court's previous focus on due process's limits on class legislation to a new focus on the protection of liberty interests.

The liberty of contract doctrine was never nearly as strict or doctrinaire as its critics have frequently alleged, despite the use of "fundamental rights" language. As Professor David Mayer has explained, "the test applied by the [*Lochner*] Court has been aptly characterized . . . as a 'moderate' means-ends analysis—that is, a fairly rigorous rational basis review that can be distinguished from both of the tests used by the modern Court in substantive due process cases."[84]

Lochner itself was an outlier in its result, the only case out of more than a dozen in which the Court invalidated a challenged maximum-hours law as a violation of the right to liberty of contract.[85] There were certain peculiarities

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81 Bernstein, *supra* note 34, at 12.

82 Victoria F. Nourse, *A Tale of Two* Lochners*: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CALIF. L. REV. 751, 789 (2009).

83 For examples of the Court referring to "fundamental rights" protected by the Due Process Clause, see Gitlow v. New York, 268 U.S. 652, 666 (1925) (noting that "freedom of speech and of the press" were "among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment"); Bailey v. Alabama, 219 U.S. 219, 239 (1911); Am. Land Co. v. Zeiss, 219 U.S. 47, 66 (1911); and Louisville & N. R. v. Schmidt, 177 U.S. 230, 238 (1900). *See also* Charles Grove Haines, *Judicial Review of Legislation in the United States and the Doctrine of Vested Rights and of Implied Limitations of Legislatures*, 3 TEX. L. REV. 1, 27 & n.68 (1924) ("The emerging concept of liberty of contract was soon to be grouped with the undefined fundamental rights.").

84 David N. Mayer, *The Myth of "Laissez-Faire Constitutionalism": Liberty of Contract During the* Lochner *Era*, 36 HASTINGS CONST. L.Q. 217, 262 (2009) (footnote omitted).

85 *See, e.g.*, Radice v. New York, 264 U.S. 292, 294–95 (1924) (upholding a law restricting hours of women workers in restaurants); Dominion Hotel, Inc. v. Arizona, 249 U.S. 265, 267–69 (1919)

about *Lochner* that likely resulted in this outcome: (1) the state claimed the law in question was a health law, but it was placed in the state labor code, not the health code;[86] (2) Lochner's attorney presented evidence in his brief that baking was not an especially unhealthful profession, while the state provided no rebuttal evidence;[87] and perhaps most important, but almost never remarked upon, (3) the hours law in question was unusually strict—it had no provision for overtime, and violations were subject to criminal, not civil, penalties.[88] A baker who offered triple pay to his employees to work an extra hour to finish an important holiday order could go to jail for doing so. These factors probably swayed the swing Justices to vote with the majority, even though they voted to uphold other maximum-hours laws.

The idiosyncratic nature of *Lochner* has been obscured in part because the opinion was assigned to Justice Rufus Peckham, who, along with Justice David Brewer, sought to enforce a much narrower version of the police power than did their colleagues.[89] Peckham's opinion, which likely was

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(upholding law limiting hours of women hotel workers); Bunting v. Oregon, 243 U.S. 426, 433–34, 438 (1917) (upholding maximum-hours law for industrial employees); Wilson v. New, 243 U.S. 332, 341, 359 (1917) (upholding maximum-hours law for railroad workers); Bosley v. McLaughlin, 236 U.S. 385, 388–89, 396 (1915) (upholding maximum-hours law for women); Miller v. Wilson, 236 U.S. 373, 379, 384 (1915) (upholding women-only maximum-hours law); Hawley v. Walker, 232 U.S. 718, 718 (1914) (per curiam) (upholding women-only maximum-hours law); Riley v. Massachusetts, 232 U.S. 671, 679, 681 (1914) (upholding women-only maximum-hours law); Balt. & Ohio R.R. v. Interstate Commerce Comm'n, 221 U.S. 612, 619 (1911) (concluding that Federal Hours of Service Act does not violate the right to liberty of contract); Muller v. Oregon, 208 U.S. 412, 416, 423 (1908) (upholding women-only maximum-hours law); Ellis v. United States, 206 U.S. 246, 254–55 (1907) (upholding maximum-hours law that applies to public-works employers); Cantwell v. Missouri, 199 U.S. 602, 602 (1905) (per curiam) (upholding maximum-hours law for mine workers); *cf.* Mosvick, *supra* note 61, at 154 (deeming *Lochner* an "outlier"); Collins Denny, Jr., *The Growth and Development of the Police Power of the State*, 20 MICH. L. REV. 173, 209 (1921) ("But in the case of *Bunting v. Oregon* the *Lochner* case, except for unusual violations of liberty, was overthrown." (footnote omitted)). Nor was the Court's general acquiescence to hours legislation a novel phenomenon. Even Justice Field dismissed the notion that the Fourteenth Amendment protects "the right [of a man] to work at all times." Soon Hing v. Crowley, 113 U.S. 703, 709 (1885).

86 Brief for the Plaintiff in Error, *supra* note 63, at 42–43.

87 *Id.* at 58–59.

88 Section One of the Bakeshop Act, codified as Section 110 of the Labor Law of New York, provided:

> No employé shall be required or permitted to work in a biscuit, bread or cake bakery or confectionery establishment more than sixty hours in any one week, or more than ten hours in any one day, unless for the purpose of making a shorter work day on the last day of the week; nor more hours in any one week than will make an average of ten hours per day for the number of days during such week in which such employé shall work.

Lochner v. New York, 198 U.S. 45, 46 n.1 (1905).

89 For dissents by Justices Brewer and Peckham from decisions upholding regulatory legislation, see McLean v. Arkansas, 211 U.S. 539, 552 (1909); Union Bridge Co. v. United States, 204 U.S. 364, 403 (1907); Bacon v. Walker, 204 U.S. 311, 320 (1907); Gardner v. Michigan, 199 U.S. 325, 335 (1905); Atkin v. Kansas, 191 U.S. 207, 224 (1903); Otis v. Parker, 187 U.S. 606, 611 (1903); Booth v. Illinois,

originally written as a dissent,[90] is filled with rhetoric some of the other Justices in the majority did not agree with. This lack of agreement is clear because Peckham denounced a category of laws that his colleagues had already voted to uphold.[91] The more moderate Justices failed to object to Peckham's relatively radical language, and it is unclear why. However, at the time, majority opinions often were not even circulated to the other members of the majority, and even when they were, objections were relatively rare.[92] In other words, there is no reason to assume that the reasoning or dicta in Supreme Court opinions at the time represented the views of all the Justices who joined the opinion.

Once Peckham and Brewer died in 1909 and 1910 respectively, there were no traditionalist conservative constitutionalist voices with a strong belief in natural rights left on the Court.[93] Legal historian G. Edward White helpfully refers to this traditionalist position as "Guardian Review," which "presupposed that the essentialist principles of the Constitution reinforced preordained boundaries between public power and private rights."[94] In 1874, for example, the United States Supreme Court declared that "[t]here are limitations on [government] power which grow out of the essential nature of all free governments."[95] Justice Harlan, who also invoked natural-rights limitations on law,[96] died in 1911.

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184 U.S. 425, 432 (1902); Dayton Coal & Iron Co. v. Barton, 183 U.S. 23, 25 (1901); Knoxville Iron Co. v. Harbison, 183 U.S. 13, 22 (1901); and Holden v. Hardy, 169 U.S. 366, 398 (1898).

90 *See* CHARLES HENRY BUTLER, A CENTURY AT THE BAR OF THE SUPREME COURT OF THE UNITED STATES 172 (1942) (asserting that John Maynard Harlan, the Justice's son, stated that his father told him that Harlan's opinion was originally the majority opinion); JOHN E. SEMONCHE, CHARTING THE FUTURE: THE SUPREME COURT RESPONDS TO A CHANGING SOCIETY, 1890–1920, at 181–82 (1978) (arguing that the internal construction and style of the dissent arguably indicates it was intended to be a majority opinion); Alan F. Westin, *The Supreme Court and Group Conflict: Thoughts on Seeing Burke Put Through the Mill*, 52 AM. POL. SCI. REV. 665, 667 n.3 (1958) (stating that Justice Harlan's papers show that he originally wrote a majority opinion for five Justices, but that one Justice changed his mind between conference and the final vote).

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

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

93 This is consistent with the general decline in libertarian economic thought at the time. *See* LUCIUS POLK MCGEHEE, DUE PROCESS OF LAW UNDER THE FEDERAL CONSTITUTION 362 (2d ed. 1906) ("Enlightened public opinion, as reflected by our legislatures and courts, has receded from the strict doctrine of *laissez faire*, and we can not say that a further abandonment of that position may not be advisable.").

94 WHITE, THE CONSTITUTION, *supra* note 46, at 233.

95 Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655, 663 (1875).

96 *See, e.g.*, Madisonville Traction Co. v. Saint Bernard Mining Co., 196 U.S. 239, 251–52 (1905) (proclaiming that there are limitations on all organs of government which "grows out of the essential

The Justices who are typically called "conservative" thereafter, such as the "Four Horsemen" who often voted to invlaidate New Deal legislation were actually moderate Progressives[97] who did not share the essentialist natural-rights-oriented principles of predecessors such as Justices Field, Peckham, and Brewer.[98] Rather, they sought to preserve some traditional limitations on government authority while mostly acceding to the dramatic growth of progressive regulation.[99] Their opposing colleagues, such as Justice Louis Brandeis, were more radical Progressives who were reluctant to concede that the Constitution put significant judicially enforceable general constraints on the scope of government authority.[100]

The more moderate Progressive Justices of the 1910s and 1920s naturally had little interest in invigorating anti-class-legislation jurisprudence under the Due Process Clause. With the growth of the Progressive regulatory state, a strong anti-class-legislation doctrine would have put the Justices in the thankless position of arbitrating all too many hot political debates. The political difficulties inherent in doing so were compounded by the absence of clear principles to differentiate illicit class legislation from legislation that properly relied on classifications to promote appropriate public goals.[101] Even in the relatively conservative nineteenth century, the prohibition on class legislation had done little to restrain the growth of government. Moderately strict enforcement of a ban on class legislation became untenable in the twentieth century because, as Professor Keith Whittington has noted, "[t]he

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nature of all free governments"); *see generally* MILTON R. KONVITZ, FUNDAMENTAL RIGHTS: HISTORY OF A CONSTITUTIONAL DOCTRINE 38–40 (2001) (noting Harlan's influence on the development of natural-rights jurisprudence on the Supreme Court in the years leading up to *Lochner*).

97 *See* Barry Cushman, *The Secret Lives of the Four Horsemen*, 83 VA. L. REV. 559, 559–60 (1997); Harry G. Hutchison, Lochner, *Liberty of Contract, and Paternalism: Revising the Revisionists? Review Essay: David N. Mayer, Liberty of Contract: Rediscovering a Lost Constitutional Right*, 47 IND. L. REV. 421, 423, 423 nn.16–20 (2014). For a related discussion of the fact that leading supporters of restrictions on the scope of the federal commerce power were moderate Progressives, see Logan E. Sawyer III, *Creating* Hammer v. Dagenhart, 21 WM. & MARY BILL RTS. J. 67, 88 (2012). The "conservative" Justices who served on the Court over the in the 1920s and '30s—men like George Sutherland, James McReynolds, and Willis Van Devanter—all had backgrounds in Progressive politics. *See* Cushman, *supra*, at 559–61.

98 *See* Siegel, *supra* note 33, at 6 ("*Lochner* era constitutionalism broke with tradition and anticipated the more evolutionary jurisprudence of modern constitutional law."); *id.* at 108 ("*Lochner* era jurisprudence may be seen as having much in common with the jurisprudence of its opponents and as being a transitional concept, forming a bridge from early to modern American constitutional theory.").

99 *See id.* at 107–08.

100 Brandeis even (privately) advocated repeal of the Fourteenth Amendment, to prevent what he considered judicial mischief. *See* Melvin I. Urofsky, *The Brandeis-Frankfurter Conversations*, 1985 SUP. CT. REV. 299, 320. Brandeis moderated his position over time, and I have argued that Brandeis "was responsible for guiding the Progressive wing of the Court away from the more consistently statist, deferential-to-democratic-majorities path charted by Justice Holmes to an agenda more accommodating to libertarian and equalitarian concerns." David E. Bernstein, *From Progressivism to Modern Liberalism: Louis D. Brandeis as a Transitional Figure in Constitutional Law*, 89 NOTRE DAME L. REV. 2029, 2033 (2014).

101 *See generally* Nourse & Maguire, *supra* note 71.

modern American state is premised on generating 'class legislation,' in the nineteenth century understanding of the term."[102]

Instead, a relatively narrow focus on fundamental rights allowed the Court to protect some discrete spheres of life from what the Court deemed to be overregulation. First, the Court systematized its liberty of contract jurisprudence. In 1923, the Court interpreted its precedents as allowing for the following types of statutes, despite their infringement on liberty of contract, in addition to statutes that pursued traditional police-power ends: (1) those "fixing rates and charges to be exacted by businesses impressed with a public interest"; (2) "[s]tatutes relating to contracts for the performance of public work"; (3) "[s]tatutes prescribing the character, methods and time for payment of wages"; and (4) "[s]tatutes fixing hours of labor" to preserve the health and safety of workers or the public at large.[103] Beyond those exceptions, the Court stated that "freedom of contract is . . . the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances."[104]

Second, the Court began expanding its fundamental-rights jurisprudence beyond the economic sphere, into what Professor G. Edward White calls "freedom of conscience" cases.[105] The Court therefore held that state governments may not ban the teaching of foreign languages,[106] nor ban parents from sending their kids to private schools.[107] The Court also took its first tentative steps toward protecting freedom of speech from hostile regulation.[108] These decisions had the advantage of rallying support from ethnic minorities targeted by assimilationist legislation against efforts by Progressives like Senator Robert LaFollette to strip the Court of much of its power.[109]

Third, once the Court limited its due-process-of-law focus to protecting fundamental liberty rights, it eventually began to protect those rights more stringently. The Court retrenched from broad, vague tests balancing liberty and government power. These tests had been generally ineffectual in limiting government power in a progressive age, in part because the scope of the

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102 Whittington, *supra* note 6.

103 Adkins v. Children's Hosp., 261 U.S. 525, 546–48 (1923).

104 *Id*. at 546.

105 *See* G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 330–31 (1996).

106 Farrington v. Tokushige, 273 U.S. 284, 298–99 (1927); Meyer v. Nebraska, 262 U.S. 390, 403 (1923).

107 Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925).

108 Stromberg v. California, 283 U.S. 359, 369 (1931) (invalidating a law banning the display of the Communist flag); Gitlow v. New York, 268 U.S. 652, 664 (1925) (assuming that freedom of expression was protected against the states by the Fourteenth Amendment).

109 *See* FRIEDMAN, *supra* note 16, at 221–22.

police power was so vague and easy to manipulate.[110] Instead, the Court adopted narrow, but much more specific, doctrines that tried to carve out areas of autonomy for the private sphere. As Keith Whittington explains:

> The specific idea of liberty of contract was part of a broader framework of individual right that conservative jurists were developing in the late nineteenth and early twentieth centuries. These rights claims could be deployed to question not only how legislatures distinguished between different groups of individuals affected by their laws but also how legislatures justified imposing burdens on individuals at all.[111]

In *Lochner*, Justice Peckham announced a very broad, general right to liberty of contract and also conceded that this right would be trumped by a valid assertion of a state's police power.[112] By contrast, in 1923, in *Adkins v. Children's Hospital*,[113] the Supreme Court, while formalizing major exceptions to the doctrine, proclaimed that freedom of contract is "the general rule and restraint the exception," and abridgements of that freedom could be justified "only by the existence of exceptional circumstances,"[114] a far stricter standard than merely providing a valid police-power justification.[115]

That same year, in *Meyer v. Nebraska*,[116] the Court invalidated a Nebraska law banning the teaching of foreign languages to schoolchildren as a violation of the Fourteenth Amendment's Due Process Clause.[117] The Court acknowledged that the state had a valid interest in the assimilation of immigrant populations; nevertheless, the Court held the law was invalid because it infringed on "fundamental rights which must be respected" and that "a desirable end cannot be promoted by prohibited means."[118] The Court produced a similar outcome in 1927 in *Farrington v. Tokushige*.[119] *Farrington* involved a challenge to a law designed to ban Japanese-language schools in Hawaii, which at the time was a federal territory.[120] The Supreme Court stated that it

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

111 Whittington, *supra* note 6.

112 Lochner v. New York, 198 U.S. 45, 53 (1905).

113 261 U.S. 525 (1923).

114 *Id.* at 546.

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

116 262 U.S. 390 (1923).

117 *Id.* at 403.

118 *Id.* at 401.

119 273 U.S. 284 (1927).

120 *Id.* at 291.

"appreciate[d] the grave problems incident to the large alien population of the Hawaiian Islands."[121] But the Court held that the law was nevertheless unconstitutional because it went too far in infringing on fundamental rights.[122]

In *The Constitution Besieged*, Gillman provided no explanation as to how, if at all, the *Lochner* line of due-process cases was linked to the Court's nascent fundamental-rights jurisprudence, except to deny that those cases were the antecedents of cases like *Griswold* and *Roe v. Wade*.[123] In an article published subsequent to his book, Gillman treated the rise of "fundamental rights" jurisprudence as solely an outgrowth of opinions by progressive jurists such as Justices Brandeis and Hughes.[124] Gillman made an important point: at a time when the more conservative Justices were primarily still engaged in traditional police-powers jurisprudence, and most progressives were hostile to any sort of meaningful judicial review of legislation that infringed on individual rights, the more progressive Justices began to develop a jurisprudence that accepted a broad role for government authority but sought to protect certain "preferred freedoms," such as freedom of speech, from hostile state action.[125]

Where Gillman fell short is in not recognizing that the more conservative Justices were also beginning to develop precedents that contributed to the rise of modern fundamental-rights jurisprudence. Gillman contended that cases such as *Meyer*, written by Justice James McReynolds, who by reputation was an arch-conservative, are not antecedents of modern fundamental-rights jurisprudence.[126] Rather, they are in the tradition of *Lochner* and other due-process cases, in which the Court tested the constitutionality of a law against whether the state provided a valid public-regarding (police-power) rationale for the law.[127] "[I]n a nutshell," Gillman later explained, "I wanted to say that modern 'fundamental rights' jurisprudence was just a completely different sort of thing than *Lochner* era 'public purpose' jurisprudence."[128] Gillman later reiterated that as he understood it, decisions like *Meyer* and

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121 *Id*. at 299.

122 *Id*.

123 *See* GILLMAN, *supra* note 40, at 205.

124 *See* Howard Gillman, *Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties Jurisprudence*, 47 POL. RES. Q. 623, 644 (1994); *see also* Bernstein, *supra* note 100, at 2040–49 (discussing Brandeis's important "transitional" role between old progressives who rejected constitutionalism, and modern liberal civil-liberties jurisprudence).

125 *See* Gillman, *supra* note 124, at 623.

126 *Id*. at 638–39.

127 *Id*. at 634.

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

Pierce v. Society of Sisters[129] "turned on the question of whether the legislation at issue actually promoted community health, safety, or morality."[130]

Gillman correctly contended that *Lochner*-era due-process jurisprudence was different than modern fundamental-rights jurisprudence. Nevertheless, he neglected some salient continuities. First, as previously noted, the *Lochner* Court spoke frequently of fundamental rights protected by the Fourteenth Amendment *before* the more progressive Justices began to advocate strong protection for freedom of speech as a fundamental right. In fact, there was an apparent consensus on the Court in the early 1920s that freedom of speech was a fundamental right; all of the more traditionalist Justices joined a 1923 opinion written by Justice Sanford referring to freedom of speech and press as "fundamental rights" protected by the Due Process Clause.[131] Second, nothing in opinions like *Meyer* suggested that concern with class legislation motivated the outcome, even though the opinion relied on the *Lochner* line of cases for its interpretation of the Due Process Clause. The Court's shift in focus from class legislation to "fundamental rights" in *Meyer* surely anticipates modern civil-liberties jurisprudence, even if there are significant differences.

Third, the more progressive Justices' focus on special protection for fundamental rights influenced the more moderate majority's due-process jurisprudence. In *New State Ice Co. v. Liebmann*,[132] Justice Brandeis penned a famous dissent in which he argued for upholding an Oklahoma law restricting entry into the ice business. Brandeis argued that the states should be seen as laboratories of democracy.[133] Justice Sutherland, for the majority, retorted that there are "certain essentials of liberty with which the state is not entitled to dispense in the interest of experiments."[134] Implicitly alluding to Brandeis's strong support for constitutional protection for freedom of expression, Sutherland observed that no "theory of experimentation in censorship" could justify infringing on freedom of the press.[135] He then stated that the right to pursue an ordinary occupation free from unreasonable regulation "is no less entitled to protection."[136]

Fourth, and perhaps more important, by the early 1920s the Court was moving away from automatically approving the constitutionality of laws challenged under the Due Process Clause if the government could provide valid police-power rationales for the laws. In addition to the cases previously

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129 268 U.S. 510 (1925).

130 Howard Gillman, *Regime Politics, Jurisprudential Regimes, and Unenumerated Rights*, 9 U. PA. J. CONST. L. 107, 116 (2006); *see also* Nourse, *supra* note 82, at 772 n.117 (stating that *Meyer* and *Pierce* follow "the same rule that a right or liberty may be trumped by the public welfare").

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

132 285 U.S. 262 (1932).

133 *Id.* at 311 (Brandeis, J., dissenting).

134 *Id.* at 280.

135 *Id.*

136 *Id.*

cited, in 1917 in *Buchanan v. Warley*[137] the Court invalidated a residential segregation as a violation of the "fundamental" rights to liberty and property protected by the Due Process Clause.[138] The Court did so even though it acknowledged that the state had identified legitimate police power interests that residential segregation could promote, such as reducing interracial violence.[139]

Gillman does not address the language cited above from *Adkins*, and entirely neglects *Buchanan* and *Farrington v. Tokushige*. With regard to *Meyer*, Gillman cites language from the opinion suggesting that the law at issue failed even a traditional police-powers analysis.[140] The Court wrote that "the statute as applied is arbitrary and without reasonable relation to any end within the competency of the State."[141] That language suggests a traditional police-powers analysis. The Court, however, also stated that the law was invalid even though the state had a legitimate interest in assimilating immigrants, a clear "public purpose."[142]

Justice McReynolds, writing for the Court in *Meyer*, may have been arguing in the alternative. He also may have implicitly found the law facially invalid as a violation of fundamental rights and also invalid as applied for not having a valid police-power justification. Either way, the *Meyer* Court did not defer to the legislature, even though the government had identified a valid, public-regarding police-power interest. As Professor William Araiza concludes, "one can remain agnostic about the liberty vs. class legislation debate in *Lochner* while still recognizing that, somehow, *Lochner*'s progeny [in *Meyer* and like-minded cases] became based on substantive liberty rather than on the requirement that all legislation be general."[143]

By far the most extensive critique of my thesis that fundamental-rights analysis was the key to the *Lochner* Court's post-*Lochner* due-process jurisprudence is Professor Barry Cushman's 2005 *Boston University Law Review* Article, *Some Varieties and Vicissitudes of Lochnerism*. Cushman rejects the argument that the "class legislation thesis fails to explain the bulk of the Supreme Court's *Lochnerian* jurisprudence."[144] He argues that the neutrality principal "appears to have lain at the root of a significant body of the Court's *Lochner*-era Due Process decisions."[145]

Before reaching this conclusion, Cushman undertook an extensive survey of due-process decisions by the Supreme Court between the 1890s and

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137 245 U.S. 60 (1917).

138 *Id*. at 82.

139 *Id*. at 81–82.

140 *See* Gillman, *supra* note 130, at 116.

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

142 *Id*. at 401–02.

143 William D. Araiza, *Back to the Future*, 28 CONST. COMMENT. 111, 122 (2012) (reviewing BERNSTEIN, *supra* note 15).

144 Cushman, *supra* note 34, at 943 (quoting Bernstein, *supra* note 34, at 58).

145 *Id*.

1930s, including many decisions neither Gillman nor I discussed in our respective writings. My objections to Cushman's article are mostly semantic. First, the decisions he references are primarily cases decided under the property provision of the Due Process Clause, not the liberty provision.[146] The property cases are not really "Lochnerian," in that they are not interpreting the meaning of the deprivation of *liberty* without due process, which is likely why Gillman largely did not address them.

Second, my Article had focused on rebutting the claim that post-*Lochner*, the Court relied primarily, perhaps exclusively, on hostility to class legislation in its due-process cases.[147] As noted previously, the Court interpreted class legislation to mean arbitrary *classifications*. Most of the cases cited by Cushman, though involving a neutrality principal, are not really "class legislation" cases (i.e., they do not involve arbitrary classifications).[148] Rather, they involve the arbitrary transfer of property from A to B, a principal consistent with, but separate from, the development of the class-legislation doctrine's ban on arbitrary classifications.

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

Cushman also helpfully points out that even in cases in which the Court explicitly relied on the right of liberty of contract to invalidate legislation, the Justices often displayed an undercurrent of varying degrees of subtlety of concern that the law also involved unequal or partial legislation.[149] Indeed, Cushman makes the intriguing argument that Justice McKenna, who was in the majority in all major liberty of contract cases decided between *Holden v. Hardy*[150] in 1898 and *Adkins v. Children's Hospital* in 1923, voted based on whether he believed that the law in question was uniform, and therefore constitutional, or partial and unequal, and therefore unconstitutional.[151] So even if class legislation was only a subsidiary consideration to the *Lochner* Court overall, if it was crucial to swing voter McKenna, it was also the key to many of the Court's most controversial holdings.

Historian Nicholas Mosvick, however, has made a strong case that what really motivated McKenna was the presence or absence of empirical

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146 *See generally id.* at 896–924.

147 Bernstein, *supra* note 34, at 12.

148 *See* Cushman, *supra* note 34, at 903–04, 908–15.

149 *See id.* at 885, 924–29.

150 169 U.S. 366 (1898).

151 *See* Cushman, *supra* note 34, at 936–37; *see also* Cushman, *supra* note 6, at 561–62.

evidence supporting a given labor law.[152] One point in Mosvick's favor is that McKenna appears to have had a rather narrow understanding of the prohibition on arbitrary legislative classifications. In 1909, McKenna wrote, "[W]e have repeatedly decided—so often that a citation of the cases is unnecessary—that it does not take from the States the power of classification. And also that such classification need not be either logically appropriate or scientifically accurate."[153]

Meanwhile, Cushman's use of legal treatises[154] to support the proposition that class legislation was a very significant factor in Supreme Court due-process cases after the Court decided *Lochner* is problematic. Two of the treatises Cushman cited rely only on pre-*Lochner* cases to support their positions,[155] and one cites no cases at all.[156] In another treatise Cushman relies on, the author also cites pre-*Lochner* cases.[157] Beyond that, another treatise Cushman cited discusses two Supreme Court opinions that only assumed *arguendo* (but do not conclude) that the Fifth Amendment's Due Process Clause bars arbitrary classifications and another case that stated that a baseless classification for taxation purposes might be a taking under the Fifth Amendment.[158] The author of this treatise also concedes that "[n]o federal legislation has as yet been declared as lacking in due process because it denied the equal protection of the laws."[159] In any event, treatise citations are less persuasive than the Supreme Court's explicit statements in *Brooke* and *Truax* denying that the due process of law is a significant barrier, if a barrier at all, to discriminatory legislation.

Meanwhile, Cushman and I agree on a number of points: (1) "a number of the *Lochner*-era decisions invalidating statutes on class legislation grounds relied upon the Equal Protection Clause, either alone or in conjunction with the Due Process Clause, rather than solely upon the Due Process Clause";[160] (2) "the *Lochner*-era Court sustained a number of statutes that one might possibly characterize as class legislation";[161] (3) "some of the *Lochner*-era

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152 *See* Mosvick, *supra* note 61, at 162–64.

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

154 Cushman, *supra* note 34, at 886–87.

155 *Id.* at 886 nn.21 & 23. Taylor cites several Supreme Court cases to support his point, but they predate *Lochner*. HANNIS TAYLOR, DUE PROCESS OF LAW AND THE EQUAL PROTECTION OF THE LAWS § 134, at 303–04 (1917). The other treatise cited by Cushman, MCGEHEE, *supra* note 93, at 61, was published in 1906 and therefore could not reflect the state of the post-*Lochner* constitutional landscape.

156 Cushman, *supra* note 34, at 886 n.22 (citing ERNST FREUND, STANDARDS OF AMERICAN LEGISLATION 219 (reprint ed.1965)).

157 *Id.* at 887 nn.26 & 30 (citing MOTT, *supra* note 74, at 598).

158 *Id.* at 885 n.17 (citing CHARLES K. BURDICK, THE LAW OF THE AMERICAN CONSTITUTION: ITS ORIGIN AND DEVELOPMENT § 157, at 417–18 (1922)).

159 CHARLES K. BURDICK, THE LAW OF THE AMERICAN CONSTITUTION: ITS ORIGIN AND DEVELOPMENT § 157, at 18 (1922).

160 Cushman, *supra* note 34, at 883.

161 *Id.*

decisions striking down statutes as violations of the Due Process Clause emphasized the doctrine of liberty of contract rather than class legislation analysis";[162] and (4) "such civil liberties landmarks of the era as *Meyer v. Nebraska* and *Pierce v. Society of Sisters* were cut from the same fundamental rights cloth as the doctrine of liberty of contract, and were not grounded in the principle of neutrality."[163]

CONCLUSION: THE STATE OF PLAY

Lochner, the liberty of contract line of cases, and other pre–New Deal due-process decisions continue to get an outsized amount of attention from scholars, judges, and pundits. Outside of the academy, and occasionally inside of it, the traditional, tendentious story of wildly activist judges making up doctrine to serve the interest of the rich continues to have traction. Within the academy, most scholars no longer promote or defend these old canards about *Lochner*. Many constitutional theorists on the liberal side, however, remain enamored with Cass Sunstein's approach, which is to claim that *Lochner*'s primary flaw was that the Court tried to enforce common-law baselines that would inhibit redistribution. While this is a very clever way to extend the attack on *Lochner* to an attack on modern "conservative" opinions while still defending Warren Court jurisprudence and its progeny, Sunstein's thesis lacks historical support.[164]

Among those scholars who take the historical literature seriously, the battle lines are mainly between those who believe that hostility to class legislation primarily motivated the Court's jurisprudence and those who believe that concern for protecting fundamental rights played the larger role. These lines, however, are not that sharp, and there has been some convergence in these viewpoints. Some on the class legislation side, like Cushman, acknowledge that protection of fundamental rights was an important thread in the Court's jurisprudence.[165] Those on the fundamental-rights side, like myself and David Mayer, acknowledge that opposition to class legislation helped shape the Court's liberty of contract jurisprudence and indeed dominated the Court's understanding of the scope of the due-process limitation on the police power before *Lochner*.[166]

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162 *Id*. at 883–84.

163 *Id*. at 884 (citations omitted).

164 For an extensive critique of Sunstein's thesis from a historical perspective, see Bernstein, *supra* note 10.

165 *See* Cushman, *supra* note 6, at 562–63; *supra* notes 160–163 and accompanying text.

166 *See* David N. Mayer, *Substantive Due Process Rediscovered: The Rise and Fall of Liberty of Contract*, 60 MERCER L. REV. 563, 602 (2009) ("The prohibition of class legislation is best viewed as a limitation on the police power that was conceptually related to, but jurisprudentially distinct from, the substantive use of due process clauses to protect what eventually came to be recognized as liberty of contract."); *cf.* Araiza, *supra* note 143, at 121 ("It is difficult in a short review to evaluate which side has

Overall, the class-legislation thesis still seems dominant.[167] There are several possible reasons for this. First, class legislation had the first-mover advantage; Gillman's *The Constitution Besieged* was the first book that attempted to explain *Lochner* without resort to the myths of the past, and it had the field mostly to itself for over a decade.[168] Second, Gillman's understanding of class legislation resonates strongly with a generation raised with public-choice theory as background knowledge. Thinking of the *Lochner* Court Justices as critics of rent-seeking makes it easy for modern academics to comprehend and appreciate pre–New Deal due-process jurisprudence.

Third, while Gillman's thesis is distinct from Sunstein's, there is significant overlap: both focus on the Supreme Court enforcing a type of legislative neutrality. Academics previously inclined toward Sunstein's perspective on *Lochner* naturally found Gillman's perspective similar, but far more historically grounded, thesis amendable. Fourth, the class-legislation doctrine explains much of the Court's pre-*Lochner* due-process jurisprudence, many (in)famous state cases, and continues to appear in many post-*Lochner* cases, especially those involving property. Moreover, class legislation was a key component of equal-protection jurisprudence both before and after *Lochner*, and courts, including the Supreme Court, did not always take care to differentiate between due-process and equal-protection analyses.

Finally, the widespread acceptance of Gillman's thesis has some presentist considerations. Though this was not his primary thesis or motivation, Gillman did note that his understanding of the liberty of contract line of cases utterly distinguishes them from modern liberal due-process opinions favored by the predominately progressive professoriate.[169] By contrast, an emphasis on fundamental rights highlights the continuities between the Old Court's decision and modern due-process cases.[170] Although *Lochner* is gradually

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the better of the debate, in large part because, as Bernstein himself notes, class legislation restrictions constituted part of the Court's understanding of due process.").

167 *See, e.g.*, Cushman, *supra* note 6, at 564 ("[T]he cases enforcing the principle of neutrality, and particularly those enforcing the prohibition on A-to-B laws, comprised the bulk of the Court's substantive due process decisions, and constituted the preeminent strand of its substantive due process jurisprudence."); Stephen M. Feldman, *Unenumerated Rights in Different Democratic Regimes*, 9 U. PA. J. CONST. L. 47, 49 n.11 (2006) ("I find Gillman more persuasive than Bernstein . . . ."); Kermit Roosevelt III, *What if* Slaughter-House *Had Been Decided Differently?* 45 IND. L. REV. 61, 80–81 n.126 (2011) ("I find Barry Cushman's rebuttal of Bernstein persuasive.").

168 For later books taking the contrary perspective, see DAVID N. MAYER, LIBERTY OF CONTRACT: REDISCOVERING A LOST CONSTITUTIONAL RIGHT (2011), and MICHAEL J. PHILLIPS, THE *LOCHNER* COURT, MYTH AND REALITY: SUBSTANTIVE DUE PROCESS FROM THE 1890S TO THE 1930S (2001), which were written by less well-known scholars and published by more obscure publishers. My own book, REHABILITATING *LOCHNER*, barely touches on the class legislation vs. fundamental rights debate, beyond noting that scholars have traced the roots of Lochnerian jurisprudence to both of these intellectual and jurisprudential traditions. *See* BERNSTEIN, *supra* note 15, at 117–24.

169 *See* GILLMAN, *supra* note 40, at 11.

170 *See* Lindsay, *supra* note 19, at 706 n.83 ("As Professor Bernstein has persuasively argued, the *Lochner*-era Court's recognition of an individual right to economic liberty protected by the Due Process

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

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

Second, both sides agree that the Supreme Court's fundamental-rights jurisprudence, often traced to the 1930s, in fact began to emerge in the pre–New Deal period. Finally, they agree that the Supreme Court Justices who adopted and applied the liberty of contract doctrine did not have the cartoonish reactionary motives attributed to them by Progressive and New Deal critics. Rather, the Justices, faced with constitutional challenges to novel assertions of government power, sincerely tried to protect liberty as they understood it, consistent with longstanding constitutional doctrines that reflected the notion that governmental authority had limits enforceable via the Due Process Clause.[172]

Clause of the Fifth and Fourteenth Amendments played a generative role in the subsequent development of more robust constitutional protections of civil liberties. Bernstein demonstrates how the Court extended Fourteenth Amendment protection to certain noneconomic fundamental liberties, including the right to direct the education of one's children.").

171 Balkin, *supra* note 12, at 684; *see also* Amanda Shanor, *Business Licensing and Constitutional Liberty*, 126 YALE L.J.F. 314, 318 (2016).

172 *See* PHILLIPS, *supra* note 168, at 115; Balkin, *supra* note 12, at 713; Nourse, *supra* note 82, at 756; *cf.* LAWRENCE M. FRIEDMAN, AMERICAN LAW IN THE 20TH CENTURY 24 (2002).