

# A Tale of Two *Lochners*: The Untold History of Substantive Due Process and the Idea of Fundamental Rights

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To say that the Supreme Court's decision in *Lochner v. New York*<sup>1</sup> is infamous is an understatement. Scholars remember *Lochner* for its strong right to contract and laissez-faire ideals—at least that is the conventional account of the case. Whether one concludes that *Lochner* leads to the judicial activism of *Roe v. Wade*, or foreshadows strong property rights,<sup>2</sup> the standard account depends upon an important assumption: that the *Lochner* era's conception of fundamental rights parallels that of today.<sup>3</sup> From that assumption, it appears to follow that *Lochner* symbolizes the grave political dangers of substantive due

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

2. Compare John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 939-40 (1973), with Richard A. Epstein, *The Mistakes of 1937*, 11 GEO. MASON U. L. REV., Winter 1988, at 5, 13-15.

3. Opponents in the great *Lochner* battles share this view. See, e.g., David E. Bernstein, *Lochner Era Revisionism Revised*, 92 GEO. L.J. 1, 12 (2003) ("[T]he basic motivation for Lochnerian jurisprudence was the Justices' belief that Americans had fundamental unenumerated constitutional rights."); Barry Friedman, *The History of the Counter-majoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383, 1404 (2001) ("[T]he tool for judicial usurpation was the (mis)reading into the Constitution of rights not clearly set out there, such as the liberty of contract.").

process, with its “repulsive connotation of value-laden” judicial review.<sup>4</sup>

This Article’s thesis is that the conventional account is based on presentist<sup>5</sup> notions of right imposed upon the past. Today, fundamental rights invoked under the Due Process Clause<sup>6</sup> are presumed “fatal in fact,”<sup>7</sup> but in 1905 when *Lochner* was decided, rights claims were common but rarely fatal. Today, fundamental rights trump the general welfare, whereas in 1905, under the police power of the state, the general welfare trumped rights.<sup>8</sup> Today, courts define unenumerated rights in positive terms; they struggle to define the “right to die” or the “right to reject life-saving” treatment.<sup>9</sup> Then, courts assumed rights existed prior to any written constitution, and enumeration was no grand ideal—rights were defined negatively by drawing limits on federal and state power.<sup>10</sup> As the Fourteenth Amendment itself proclaimed, liberty and property

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4. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 42 (1972); Aviam Soifer, *The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888–1921*, 5 LAW & HIST. REV. 249 (1987) (“*Lochner* . . . is still shorthand in constitutional law for the worst sins of subjective judicial activism.”).

5. By “presentist,” I mean the anachronistic injection of present-day ideas and perspectives into depictions and interpretations of the past. The formal definition of right I am using is taken from David Luban, *The Warren Court and the Concept of a Right*, in RIGHTS 7 n.13 (Robin West ed., 2001). Luban writes that “to call something a right is to assert that it is a value of such great importance that it deserves especially stringent legal protection.” *Id.* When I refer throughout the piece to a “strong” right, this is the meaning I am using.

6. My claim is limited to the Due Process Clause of the Fourteenth Amendment. It is entirely possible that other rights claims could have been viewed differently. Criminal procedure rights as applied to the federal government, for example, may not have followed the pattern I suggest here. See Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 576 (1996) (arguing that the 1886 *Boyd* case invoked the language of indefeasible and thus strong rights). In state cases, however, one can find Progressive Era precedent in which the police power trumped even criminal procedure rights. For example, the defendant’s right to be free from unreasonable search and seizure was trumped if the property seized was subject to the police power (if the property was harmful or an instrumentality of crime). See, e.g., *Adams v. New York*, 192 U.S. 585 (1904). One need not resolve that controversy to address the principal question in this article. The Fourteenth Amendment provides that the state may deprive individuals of their rights if done so in accordance with “due process of law.” Although at the time, the Court spent little time on textual language, see *infra* text accompanying note 61, today it is possible to see the “due process” limitation as the source of claims that rights under the Fourteenth Amendment might be trumped by the police power in ways that might not apply to Bill of Rights provisions applied to the federal government.

7. “Fatal in fact” is the term once used by Gerald Gunther to refer to constitutional review akin to strict scrutiny—“‘strict’ in theory and fatal in fact.” Gunther, *supra* note 4, at 8.

8. One of the persistent problems in the historiography of this period, as Robert Gordon has noted, is the gap between the theory of a “laissez-faire” court and the progressive practice which elicited vast amounts of legislation. Robert W. Gordon, *The Constitution of Liberal Order at the Troubled Beginnings of the Modern State*, 58 U. MIAMI L. REV. 373 (2003).

9. See *Washington v. Glucksberg*, 521 U.S. 702, 703 (1997).

10. The older view reflected a larger theory that has been lost. At the time, people widely believed that individual rights existed prior to the Constitution, were not given up in the creation of the Constitution, and thus did not need to be enumerated. Therefore, they thought that the limits on federal power (e.g., the commerce power) were as important protectors of rights as the Due Process Clause or specific texts in the Bill of Rights. See, e.g., OWEN M. FISS, *TROUBLED*

could be deprived subject to “due process,” which meant rights were subject to a limit defined by the courts as the “police power.” In this sense, the fundamental rights jurisprudence of the *Lochner* period was the mirror image of today’s notion of right-as-trump. Today, no constitutionalist would mistake rational basis for strict scrutiny, but this is precisely what we do when we assume that *Lochner*-era courts adopted a strong, trumping view of fundamental rights.

I do not dispute the standard claim that the *Lochner* decision betrays political bias, laissez-faire theory,<sup>11</sup> or Herbert Spencer’s *Social Statics*.<sup>12</sup> *Lochner* was wrong when it was decided—wrong because, as Justice Harlan announced in his dissent, the hours law fell within the police power. That was the run-of-the-mine doctrine of the day, one in which rights claims were easily overcome by the police power. The *Lochner* bias was not against regulation *simpliciter*; it was bias against labor and price regulation—both of which carried ominous associations with socialism at the time.<sup>13</sup> If I do not dispute many aspects of the conventional *Lochner* account, I do dispute the assumption, shared by conservative property rights advocates like Richard Epstein, and prominent liberal constitutionalists like John Hart Ely,<sup>14</sup> that the *Lochner*-era doctrine, writ large, embraced a modern notion of right-as-trump.

If we return to the *Lochner* era, without the presentist assumption of right, we find that there were two tales of *Lochner* that once lived side by side. Doctrinally, rights were relatively weak, since they could be trumped by the police power. But outside the courts, the public assumed rights were strong and absolute. These two stories once lived simultaneously. As we will see, Theodore Roosevelt is at least as important as Oliver Wendell Holmes in creating *Lochner*’s modern history. There is nothing terribly odd about this. Indeed, this *double history* reflects the structure of constitutional politics, which is simultaneously an elite discursive institution and a popular majoritarian institution.

This account of *Lochner* challenges the reigning dichotomy among historians between “internalist” and “externalist” historiography—between

BEGINNINGS OF THE MODERN STATE, 1888–1910, at 109 (1993) (“[T]he federal government was a government of limited powers. . . . The Constitution enumerated and assigned various powers to the central government . . . and the initial task for the Court was to ascertain whether [the challenged action] fell within” that power.)

11. Nor am I committing to the perspective of those legal historians who suggest that *Lochner* reflected a benign legal doctrine searching for equality and neutrality. See BARRY CUSHMAN, *RETHINKING THE NEW DEAL: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* (1998); HOWARD GILLMAN, *THE CONSTITUTION BESIEGED* (1993); G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* (2000).

12. See *Lochner v. New York*, 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting) (discussing *Social Statics*); FISS, *supra* note 10 (laissez-faire contract theory); Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 878 (1987) (status quo bias).

13. See *infra* note 256 and accompanying text.

14. Ely, *supra* note 2, at 939-40; Epstein, *supra* note 2, at 13-15.

those theories grounded, respectively, in law and in politics.<sup>15</sup> Remembering only one side of the story—the strong rights story—not only misreads doctrine, it also misreads history. Lawyers infer from the traditional *Lochner* story that the period from 1900 to 1920<sup>16</sup> was an era in which courts regularly thwarted all regulation, and thus they imagine it as a period of the night-watchman, laissez-faire state.<sup>17</sup> Few historians agree. The Progressive Era (as this period was known) was full of reform and regulation, from trust-busting to railroad regulation to labor injunctions; from consumer protection and the federal reserve to worker’s compensation; from regulations of drink, lotteries, fight films, and stolen cars to seditious speech to birth control<sup>18</sup>—and the Court’s case law did little to squelch any of these regulatory impulses, for good or ill.<sup>19</sup>

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15. Externalist histories aim to explain law by invoking external events, such as changes in society or politics or technology, while internalist explanations focus on legal doctrine. For more on this distinction, see CUSHMAN, *supra* note 11, at Introduction.

16. The *Lochner* era is generally considered the period from 1890 until 1937, an assumption that I reject in this article. Some have suggested that there are, in fact, three separate *Lochner* periods. David E. Bernstein, *Lochner’s Legacy’s Legacy*, 82 TEX. L. REV. 1, 10 (2003). Here, my focus is on the period from 1900 until World War I, which follows general historical practice, see JOHN MILTON COOPER, JR., PIVOTAL DECADES: THE UNITED STATES 1900-1920 (1990), rather than the various claims made by legal scholars about the *Lochner* era. Typically, *Lochner* critics and students include the period from as early as 1880-1900 in their claims, but legal commentators of the early twentieth century used “laissez-faire” to refer to the nineteenth, not the twentieth, century. See, e.g., LUCIUS POLK MCGEHEE, DUE PROCESS OF LAW UNDER THE FEDERAL CONSTITUTION 362 (1906) (“Enlightened public opinion, as reflected by our legislatures and courts, has receded from the strict doctrine of laissez-faire, and we cannot say that a further abandonment of that position may not be advisable.”). For a critique of laissez-faire theory, see Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 478 (1909) (“After 1900, the pendulum had clearly begun to swing the other way.”). I do note at the outset that this periodization excludes the Taft court’s revival of *Lochner* in its 1923 decision in *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923). That revival changed and considerably strengthened the notion of right regnant before World War I, in a subset of cases involving price and wage controls.

17. Gordon, *supra* note 8, at 395; see *infra* note 248.

18. COOPER, *supra* note 16, at 97 (railroad regulation), 150-51 (antitrust); WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT (1991) (labor injunctions); VICTORIA F. NOURSE, IN RECKLESS HANDS: *SKINNER V. OKLAHOMA* AND THE NEAR-TRIUMPH OF AMERICAN EUGENICS ch. 7 (2008) (eugenics); CHARLES WARREN, SUPREME COURT IN UNITED STATES HISTORY 452 (1923) (listing railroad and other commercial federal legislation including regulation of telegraph, telephone and cable companies); *id.* at 459 (food and drug regulation); Gordon, *supra* note 8, at 373 (regulation imposing gender subordination, racial segregation, and restricting political speech); Note, *Limitations on State Police Power under the “Due Process” and “Equal Protection” Clauses*, 22 COLUM. L. REV. 252, 326 (1922) (fight films and stolen cars).

19. Law students are often treated to the claim that during the *Lochner* era “over two hundred” statutes were struck down. See, e.g., GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 724 (4th ed. 2001) (“the Court invalidated approximately 200 economic regulations”). One source for this misconception may be Appendix I to FELIX FRANKFURTER, MR. HOLMES AND THE SUPREME COURT 97-137 (1938). That appendix includes cases that begin in the year 1877 and end in 1938. The vast majority of cases cited are not, however, considered modern substantive due process cases. They include procedural due process cases, jurisdiction and service of process cases, equal protection cases, and First Amendment cases. The majority of the cases are rate review, tax, and utility cases. Based on the book’s one-line descriptions, I counted 108 utility rate or tax cases, twenty-nine equal protection cases, and twenty-five procedural due process cases

This disconnect between the facts of Progressive Era regulation and the strong-rights story of *Lochner* has important consequences both for constitutional historiography<sup>20</sup> and the history of *Lochner* itself. For the past decade and more, “revisionist” historians and legal scholars have ravaged<sup>21</sup> the

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(including cases about service of process, jurisdiction, presumptions, confessions, among them *Pennoyer v. Neff*, 95 U.S. 714 (1877)). There were also several antitrust and first amendment cases and a few classic takings cases. Based on this review, I would estimate that there are less than thirty cases on the list that we think of as truly “substantive” due process cases—and the list extends over a sixty-one-year period.

This finding is consistent with more detailed empirical studies of the period. For example, in 1913, Charles Warren found that of 560 cases invoking the Due Process Clause, in “only two cases (other than the *Lochner Case*),” had the Court struck down “social justice” legislation. Charles Warren, *The Progressiveness of the United States Supreme Court*, 13 COLUM. L. REV. 294, 295 (1913). A “later Warren study, based on the years 1889–1918, found that of the 422 Supreme Court cases involving Fourteenth Amendment due process or equal protection challenges during that period, in only 53 did the Court strike down the challenged regulation. Of the 53, only 14 concerned legislation affecting the general rights of individuals.” Michael J. Phillips, *The Progressiveness of the Lochner Court*, 75 DENV. U. L. REV. 453, 454 n.8 (1998). More modern empirical studies state that “the *Lochner* Court rejected considerably more substantive due process claims than it granted.” *Id.* at 489; see also studies cited *infra* note 22.

One way of resolving this tension between the textbook story and empirical studies is to understand that these figures count different kinds of cases over different periods of time (including the Taft court, as does Phillips, for example, surely increases the numbers of regulations struck down). More importantly, the “two hundred” figure likely includes a large number of decisions that look, to modern eyes, far different from today’s fundamental rights cases. For example, the Supreme Court in this era reviewed the reasonableness of utility rates under the Due Process Clause. The Court heard a vast number of these cases. See CHRISTOPHER WOLFE, *THE RISE OF MODERN JUDICIAL REVIEW* 151 (1986) (noting that the Court of this era was a “kind of Super-Railroad-Rate-Commission”). Phillips’s empirical study shows that the rate cases along with other kinds of cases involving railroads and utilities, taxes and business entry restrictions—cases that many today would not associate with fundamental rights—constituted a significant number of statutes struck down. Phillips, *supra*, at 466, 468, 470, 473, 484 (discussing how the Court struck down forty-two utility orders, five laws on railroad damages, eight tax rules, and seven entry restrictions under substantive due process); see also *id.* at 488-89 (finding that if one eliminates these kind of decisions and sticks to “general police matters, regulation of business and trade, and employment law,” the ratio of decisions upholding the law to decisions striking it down “exceeds five to one”) (emphasis added). As Phillips notes, over 40 percent of the decisions in his sample involved price-fixing or rate-making. *Id.* at 498.

20. Legal historians generally believe that the “outside” of society (the “externalist” approach) has shaped the “inside” of law (the “internalist” approach). But if this history is correct, we can see how this causal relationship may actually operate in reverse: how the “inside” of law and even legal theory affects how lawyers (and even historians) view the “outside” of history. See Robert W. Gordon, *Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 LAW & SOC’Y REV. 9, 11-12 (1975) [hereinafter Gordon, *J. Willard Hurst*] (distinguishing the internal and external views); see also Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984) (explicating this distinction in the context of the challenge of critical legal studies). The classic exponent of the externalist view was WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM* (1956). See *infra* Part IV for further discussion on this point.

21. For an overview of the debate between the standard view and those historians who seek to revise that view (“the revisionists”), see Bernstein, *supra* note 3 (arguing that the standard story is outmoded); Paul Kens, *Lochner v. New York, Tradition or Change in Constitutional Law*, 1 N.Y.U. J.L. & LIBERTY 404 (2005) (summarizing the revisionism); Gary D. Rowe, *Lochner Revisionism Revisited*, 24 LAW & SOC. INQUIRY 221, 222 (1999) (calling revisionist reinterpretations of *Lochner* a “seismic interpretive shift”). Revisionism hails from a variety of

conventional *Lochner* story. They argue that the period was not as anti-regulatory or pro-business as claimed,<sup>22</sup> that courts did not use the concept of substantive due process now used conventionally to describe the period,<sup>23</sup> and that there is no convincing evidence that *Lochner*-era judges were motivated by economic self-interest rather than a sincere motive to protect liberty or even equality.<sup>24</sup> In the face of this revisionist onslaught, some stalwart counter-revisionists have stood by the standard *Lochner* story as a traumatic reminder of politicized judicial review.<sup>25</sup>

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works by historians examining the Gilded Age. See Stephen A. Siegel, *The Revision Thickens*, 20 LAW & HIST. REV. 631 (2002).

22. PAUL KENS, JUDICIAL POWER AND REFORM POLITICS: THE ANATOMY OF *LOCHNER V. NEW YORK* 4 (1990) (“Historians have pointed out that more regulatory statutes . . . were upheld than were overruled during the first thirty years of this century.”); Friedman, *supra* note 3, at 1386 n.9 (stating that “[m]ost of the recent revisionist effort focuses on dispelling the notion that the Supreme Court represented a mere appendage of corporate America”); Stephen A. Siegel, *Let Us Now Praise Infamous Men*, 73 TEX. L. REV. 661, 686 (1995) (stating that “old historiography” presents *Lochner* court justices “as advocates of business enterprise” while the “new presents them all as protectors of liberty”); see also Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293, 293, 311 (1985) (challenging the “orthodox view” that “the major value of the Court . . . was the protection of the business community against government” and arguing that the purpose of the decisions was not to protect the property of the “rich from the ravages of the poor,” but to “preserve liberty”); Bernstein, *supra* note 16 (rejecting the view that the Supreme Court struck down common law rules favoring business); Phillips, *supra* note 19 (arguing that the Court upheld far more business regulation than it struck down); Melvin I. Urofsky, *Myth and Reality: The Supreme Court and Protective Legislation in the Progressive Era*, 1983 SUP. CT. HIST. SOC’Y Y.B. 53 (1983) (same).

23. G. Edward White, *Revisiting Substantive Due Process and Holmes’s Lochner Dissent*, 63 BROOK. L. REV. 87, 88-89 (1997) (arguing that the concept of substantive due process is anachronistic, as it was not used by courts). In fact, the question whether due process was a substantive or procedural limitation was debated by law review commentators. See, e.g., Hugh Evander Willis, *Due Process of Law Under the United States Constitution*, 74 U. PA. L. REV. 331, 332 (1926) (asking the question whether due process applies to “substantive law or only to legal procedure”). Professors White and Ely are correct that it was not a judicial term of art until much later. See James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 319 (1999); see also White, *supra*, at 88-89.

24. See, e.g., Ely, *supra* note 23, at 318 (criticizing the “long-outdated Progressive historiographical view of the courts at the turn of the century as bastions of laissez-faire”). For the claim that the Court sought liberty, see FISS, *supra* note 10, at 18-19. For the claim that it sought to enforce equality through the idea of class legislation, see GILLMAN, *supra* note 11, at 1. For work attacking the notion that laissez-faire judges were motivated by self-interest, see Charles W. McCurdy, *The Roots of “Liberty of Contract” Reconsidered: Major Premises in the Law of Employment, 1867-1937*, 1984 SUP. CT. HIST. Y.B. 20, 24 (1984). See also LOREN BETH, *THE DEVELOPMENT OF THE AMERICAN CONSTITUTION 1877-1917* (1971) (rejecting notion that court actually implemented laissez-faire views); Alan Jones, *Thomas M. Cooley and “Laissez-Faire Constitutionalism”*: A Reconsideration, 53 J. AM. HIST. 751 (1967) (examining assumption that American constitutional law focused on property rights). On the changing historiography of this period, see Felice Batlan, *A Reevaluation of the New York Court of Appeals: The Home, the Market, and Labor, 1885-1905*, 27 LAW & SOC. INQUIRY 489, 490-91 (2002).

25. By counter-revisionist, I refer to those who have rejected attempts to rehabilitate *Lochner* as sound non-politicized doctrine. See Friedman, *supra* note 3; Paul Kens, *Lochner v. New York: Rehabilitated and Revised, but Still Reviled*, 1995 J. SUP. CT. HIST. 31, 32.

Both revisionists and their opponents have been performing the grand old debates of yesteryear, playing Dean Pound against Professor Warren. Revisionists contend that “law” decided *Lochner*, while counter-revisionists claim that the “law” was really politics. None of this work has challenged the conception of right prevalent in the legal doctrine of the past, nor unearthed the popular constitutionalist history of *Lochner*, because academics have mistakenly assumed that caselaw is either law or it is politics, as if these activities do not occur simultaneously in real life. As we will see, the claim that *Lochner* is politics does not rest upon the 1905 law of substantive due process, but on Teddy Roosevelt’s *political* opposition to *Lochner*’s result. Today’s standard *Lochner* story is Roosevelt’s story; it is not Justice Peckham’s majority story or Justice Harlan’s dissenting story.

There is more at stake here than debates among historians or a few law professors. At stake is a contemporary public debate about substantive due process and the nature of fundamental rights. If this history is correct, one does not need to accept *Lochner* to accept *Roe* or any of *Lochner*’s supposed children, for *Lochner* could have no children after 1937. The modern doctrinal notion of right-as-trump emerged in the wake of the court-packing debate and as a response to fears of fascism.<sup>26</sup> Thus, *Lochner* has nothing to say about the rights aspects of *Roe* or *Griswold*,<sup>27</sup> for the notion of substantive due process in these modern decisions simply did not exist when *Lochner* was decided. Do not mistake the argument: *Roe* and *Griswold* may be wrong, but they are not wrong because they repeat the *Lochnerian* notion of right.

If strong doctrinal rights can be traced to our fight against fascism,<sup>28</sup> rather than the dream of laissez-faire, then perhaps we need to rethink our fears of strong rights. Perhaps we should remember that it was not the Warren court’s “hippy generation,” but rather World War II’s “greatest generation,” which led the Court to apply strong rights of speech and religion to the states through the Due Process Clause—a “substantive” use of that clause that we now take for granted and even celebrate. In this process of forgetting, we have also lost early-twentieth-century ideas of right, such as public right, whose purpose was to legitimate acts for the common benefit.

In Part I, I set out briefly the debate between revisionist and counter-revisionist accounts of *Lochner*. In Part II, I challenge both accounts, presenting the “democratic detail”<sup>29</sup> that shows how the average professional

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26. For an explanation of the historical development noted in the text, see NOURSE, *supra* note 18, at ch. 7.

27. *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965). The skeptic will say that *Lochner* must have something to say about these decisions because of the so-called counter-majoritarian difficulty, but that assumes the very strong notion of right I dispute here. For a discussion of this point, see *infra* Part IV.D.

28. See NOURSE, *supra* note 18, at ch. 7; see also RICHARD A. PRIMUS, *THE AMERICAN LANGUAGE OF RIGHTS* (1999) (dating this development later, but agreeing with its premise).

29. Bob Gordon once termed Willard Hurst’s work in law as focused on “democratic

discourse used the term “right” very differently from the current notion of right-as-trump. In Part III, I tell the untold story of how Theodore Roosevelt made *Lochner* famous as the “Bakeshop Case.” In Part IV, I consider the implications of this history for new legal realist approaches to constitutional historiography, theories of popular constitutionalism, and the future of substantive due process.

## I BACKGROUND

“All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the State.”<sup>30</sup>

Justice Oliver Wendell Holmes (1908)

Critiques of *Lochner* abound. Traditionally, *Lochner* has been associated, rightly or wrongly, with everything retrograde and wrong in constitutional law, from formalism to anti-regulation to the creation of unenumerated rights. In the past twenty years, however, a different story has emerged in libertarian scholarship claiming *Lochner* represents precisely the opposite proposition: a halcyon day of strong rights,<sup>31</sup> an important foreboding of laissez-faire principles and skepticism about big government. Whether critics or proponents, commentators engaged in the *Lochner* debate share the view that “the Court exceeded its legitimate judicial role by reading the right of ‘liberty of contract’ into the Fourteenth Amendment’s Due Process Clause, despite the absence of textual support for this right.”<sup>32</sup>

This argument grounds the famous equation of *Lochner* with *Roe v. Wade*,<sup>33</sup> on the theory that both cases were misplaced substantive due process decisions creating fundamental rights out of whole cloth. This view took on public status when Judge Bork argued that *Lochner* proved the impropriety of the Warren Court’s judicial activism, dubbing substantive due process a “momentous sham” that had been used “countless times” by judges to “write

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detail” and it is in that spirit that I approach this discussion, looking not at how the mandarin academics described the law, but how the lowly practitioner might see it. Gordon, *J. Willard Hurst*, *supra* note 20, at 51.

30. *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908).

31. See, e.g., Bernstein, *supra* note 3; Epstein, *supra* note 2.

32. Bernstein, *supra* note 16, at 3-4.

33. Ely, *supra* note 2, at 939-40; see also JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 14-21 (1980) (criticizing the *Lochner*-era Court’s departure from the Constitution’s text).

their personal beliefs into” the Constitution.<sup>34</sup> Others, such as Richard Epstein, have argued that *Lochner* was in fact correct to embrace a strong notion of property rights.<sup>35</sup> Those who disagree, like Barry Friedman, nevertheless assume that *Lochner* was representative of a day in which rights discourse was used in a strong countermajoritarian fashion.<sup>36</sup> In short, although disagreement remains about whether this strong rights framework is vice or virtue, academics widely assume that *Lochner* symbolizes an entire era full of cases striking down legislation in the name of protecting strong rights.<sup>37</sup>

Of course, this is not the only ground on which scholars debate *Lochner*. *Lochner* has now moved beyond canonical status to oracular heights; it is deemed essential fodder for all constitutional theories and theorists, not to mention theorists of economy and regulation, and perhaps law itself. Cass

34. ROBERT H. BORK, *THE TEMPTING OF AMERICA* 36-49 (1990) (arguing that the Court had no authority under the Constitution to invalidate economic legislation under the Due Process Clause).

35. Epstein, *supra* note 2, at 13-15 (arguing that the Court was wrong to abandon *Lochner* during the New Deal period); see also BERNARD H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* 110-21 (1st ed. 1980) (defending *Lochner*); Michael J. Phillips, *Entry Restrictions in the Lochner Court*, 4 GEO. MASON L. REV. 405, 454-55 (1996) (embracing *Lochnerian* decisions prohibiting monopolization of certain occupations); Note, *Resurrecting Economic Rights: The Doctrine of Economic Due Process Reconsidered*, 103 HARV. L. REV. 1363, 1364 (1990) (calling for a revival of *Lochnerian* jurisprudence). See generally James W. Ely, Jr., *Melville W. Fuller*, 1998 J. SUP. CT. HIST. 35, 41-46 (defending *Lochner* and other controversial Fuller Court decisions as forward-looking and consistent with contemporary public opinion and political economy).

36. Friedman, *supra* note 3.

37. See, e.g., Bernstein, *supra* note 3, at 12 (“[T]he basic motivation for *Lochnerian* jurisprudence was the Justices’ belief that Americans had fundamental unenumerated constitutional rights.”); Friedman, *supra* note 3, at 1403 (“[T]he tool for judicial usurpation was the (mis)reading into the Constitution of rights not clearly set out there, such as the liberty of contract . . .”). Barry Friedman, relying on Richard Fallon, *id.* at 1416, argues that right and power are logically entailed by each other. But this assumes the very idea of right—the modern notion of right—that I am calling into question. Right and power are only logically correlated in a world where there is a strong notion of right—where right connotes strict scrutiny. If claims of right can be defeated in the vast majority of cases by the common welfare, then this apparently “logical” equation fails. The strength of the right does not depend upon the number of times it is claimed or even the number of times that it succeeds but in its relation to the public welfare; when lawyers talk about strong rights today, they mean rights that provoke “strict scrutiny,” not rights that provoke something like rational basis. Friedman and Fallon’s views reflect the general “liberal” theory of right asserted in modern jurisprudence, a view that tends to view rights in negative and absolutist terms, rather than positive or public terms. As Robin West has asserted, however, “[t]he notion of a positive right . . . is by no means oxymoronic.” Robin West, *Introduction: Revitalizing Rights*, in *RIGHTS* xix (Robin West ed., 2001). The idea of right has not remained fixed in constitutional doctrine or theory over the past two hundred years. See Harry N. Scheiber, *Public Rights and the Rule of Law in American Legal History*, 71 CALIF. L. REV. 217, 219 (1984) (emphasizing the “positive notions of public rights” that pervaded nineteenth century constitutional law: “American courts have been concerned, historically, to forge a set of precepts that . . . would take account of what the public . . . has a right to claim of its government.”). As Wesley Hohfeld famously noted, “the word ‘right’ is used . . . indiscriminately to denote any sort of legal advantage, whether claim, privilege, power, or immunity.” Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 26 YALE L.J. 710, 717 (1917).

Sunstein argued that *Lochner* failed to distinguish between action and inaction.<sup>38</sup> G. Edward White and Howard Gillman, in an effort to challenge political science's reigning attitudinal model's contempt for legal doctrine, have attempted to rehabilitate *Lochner* as a reflection of "class legislation" or equality ideals.<sup>39</sup> Bruce Ackerman, in his theory of constitutional moments, wrote that *Lochner* served a properly preservationist function.<sup>40</sup> Owen Fiss argued eloquently that the problem was not the role that the Court assumed in enforcing rights, but rather the Court's enforcement of the wrong right.<sup>41</sup> David Strauss, in restrained fashion, has claimed that the problem was not the right to contract but the Court's lack of humility in applying that right.<sup>42</sup>

In this Article, I do not aim to attack any or all of these theories.<sup>43</sup> Rather, I challenge the assumptions upon which much of this debate has proceeded: that *Lochner* was wrong because it resurrected an improper notion of right. That assumption is shared by both revisionists, who have tried to rehabilitate the law as doctrinally coherent, and counter-revisionists, who insist that *Lochner* reflected bare-knuckle politics. My argument is that those who either condemn or embrace *Lochner* share a presentism about the past nature of fundamental rights.<sup>44</sup> The traditional view of *Lochner* as a rights case is driven more by the present's need to justify contemporary rights discourse (and, in particular, *Roe v. Wade*) than by the past's understanding of right.

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38. Sunstein, *supra* note 12, at 878.

39. White, *supra* note 23, at 104-05; *see also* GILLMAN, *supra* note 11. In this Article, I leave to the side the question of class legislation, which is treated elsewhere. *See* V.F. Nourse & Sarah Maguire, *The Lost History of Governance and Equal Protection*, 58 DUKE L.J. 955 (2009) (rejecting Howard Gillman and others' claims that class legislation explains the *Lochner*-era cases associated with substantive due process).

40. BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 269 (1998).

41. FISS, *supra* note 10, at 1888-1910.

42. David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373, 375 (2003).

43. I do agree that the revisionists have done us a service in eliminating certain explanations that are clearly overbroad. For example, David Bernstein is correct that the Court was not always hostile to changes in all common law doctrine, even if the theory of the police power is in fact thoroughly imbued with and dependent upon the common law. *See* Bernstein, *supra* note 16, at 3-4. Bernstein and others are also correct that the Court's doctrine cannot be irretrievably described as anti-redistributive. As Charles Warren showed at the time, the *Lochner* Court did not attempt to enforce anything like a night-watchman state, and empirical and historical studies from the right and the left have since supported that proposition. *See supra* note 19; Ray A. Brown, *Due Process of Law, Police Power, and the Supreme Court*, 40 HARV. L. REV. 943, 944-45 (1927); Urofsky, *supra* note 22; Melvin I. Urofsky, *State Courts and Protective Legislation During the Progressive Era: A Reevaluation*, 72 J. AM. HIST. 63, 64 (1985); *see also* Gordon, *supra* note 8; BETH, *supra* note 24, at 190.

44. It does not follow from my attack on the conventional notion of the "rights" discourse that other doctrine of this era might not be labeled as conservative or laissez-faire. The doctrinal basis for such a claim, however, must be much broader than rights and substantive due process. As Owen Fiss's history shows, on a constellation of legal claims, from decisions about tax to ones about antitrust and, perhaps most importantly, to the Commerce Clause, the Court struggled with the great issues of industrialization in ways that today appear decidedly illiberal. Fiss, *supra* note 10.

My claim is that the legal rights discourse of the *Lochner* period was not what we assume it to be today. The strong rights we know today—the rights we associate with strict scrutiny and compelling state interests—first emerged in the period from 1937 to 1943, as a response to Franklin Roosevelt’s court-packing plan and the Court’s attempt to rehabilitate itself and address the grave wrongs of fascism that were so evident in the period before World War II. In *Marbury*-like fashion, the Court weakened itself in one area (economic legislation) only to assert itself elsewhere (speech, religion, and race).<sup>45</sup> In this period, the Due Process Clause was used to apply strong rights to the states—rights subject to strict scrutiny—raising the great questions about rights that we debate today.<sup>46</sup>

## II

### THE FORGOTTEN JURISTIC STORY

“The guaranties of life, liberty and property contained in the Federal and State Constitutions are not absolute; for all private rights, however fundamental, are enjoyed by individuals as members of organized society, and subject to the paramount right of the state, the embodiment of society, to appropriate or modify them when actual necessity or the public welfare requires such a course.”<sup>47</sup>

Lucius Polk McGehee (1906)

To understand the forgotten constitutional discourse of the early twentieth century, one must begin with power,<sup>48</sup> not right. The professional lawyer of the day believed that almost everything in constitutional law depended upon power—the “police power,” that is. As Walter Wheeler Cook (in a pre-realist moment) explained, “a work which undertakes to deal with the whole of the police power must approach very closely . . . the whole subject of constitutional law . . . .”<sup>49</sup> Harvard’s Ernst Freund similarly wrote, “The term police power . . . [is] indispensable in the vocabulary of American constitutional law . . . .”<sup>50</sup> The rule was rather simple: “In every case . . . where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair,

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45. See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938) (upholding economic regulation under a minimal standard of review); *id.* at 153 n.4 (suggesting a more intensive review for cases involving speech, religion, and race).

46. NOURSE, *supra* note 18, at ch. 9; see also PRIMUS, *supra* note 28 (dating this development later, but agreeing at least in part with its premise).

47. MCGEHEE, *supra* note 16, at 201.

48. ERNST FREUND, *THE POLICE POWER* 15 (1904) (“It thus becomes a requirement of the constitution that every statute should be the exercise of some recognised power justified by the reason and purpose of government. In order to ascertain whether legislation is constitutional or not, we must analyse the powers of government and define the nature of each.”).

49. Walter Wheeler Cook, *What Is the Police Power?*, 7 COLUM. L. REV. 322, 332 (1907).

50. FREUND, *supra* note 48, at iii.

reasonable, and appropriate exercise of the *police power* of the State . . . ?”<sup>51</sup> So states the opinion in *Lochner v. New York*.<sup>52</sup>

The question in *Lochner* was not the scope of the right to contract, or even whether the right triggered a particular kind of scrutiny, but whether the state had the police power to regulate the right. If a regulation were within the police power, the case ended. In theory, a government of limited powers did not need to enumerate rights at all. Rights were residual, the “leftovers” beyond the limits of power. In this sense, rights were not textual, because to consider them textual was to belittle them. Rather, they were held by the people prior to, and did not depend upon, textual instantiation. The constitutional discourse of the day was for the most part not clause-bound, because it operated on a premise that began with the limits on government power.<sup>53</sup>

The police power applied to matters of due process, equal protection and a variety of other constitutional provisions. It was defined as a governmental purpose to serve the general safety, health, and welfare: “the police power . . . not only . . . preserv[es] the order, peace, health, morals, and safety of the community, but also all legislation looking to the well being of society in its economic and intellectual aspects.”<sup>54</sup> This was stated in the most serious of terms:

The first right of a State, as of a man, is self-protection, and with the State that right involves the universally acknowledged power and duty to enact and enforce all such laws . . . as may rightly be deemed necessary or expedient for the safety, health, morals, comfort and welfare of its people.<sup>55</sup>

This understanding reflects an important but forgotten aspect of the police power: its association with “public right.”<sup>56</sup> Today, this seems odd because we associate rights with individuals, not communities; indeed, we associate rights with claims against—rather than by—the polity. This notion of public right was analogized specifically to the right of self-defense: just like an individual, the state could, on behalf of the community, defend its interests against the harms

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51. *Lochner v. New York*, 198 U.S. 45, 56 (1905) (emphasis added).

52. *Id.*

53. FISS, *supra* note 10, at 85 (arguing that almost all of the most important cases of the day, including *Lochner*, did not depend upon an “exercise of clause-parsing”); *see also infra* notes 61, 62 and accompanying text.

54. MCGEHEE, *supra* note 16, at 301.

55. *Knoxville Iron Co. v. Harbison*, 183 U.S. 13, 20 (1901) (quoting judgment below on the “first right of a State”); *id.* at 22 (holding that the right to contract is not absolute). As I have emphasized, due process included an equality component at the time.

56. The notion of a public right was not unusual: the police power was sometimes described as the “paramount right” of the state. MCGEHEE, *supra* note 16, at 201 (noting that all rights are “subject to the paramount right of the state” to act for the common welfare). As Dean Pound would put it, the problem was not rights *simpliciter*, it was an individualist conception of justice that exaggerated “private right at the expense of public right.” Pound, *supra* note 16, at 457. *See generally* Scheiber, *supra* note 37, at 217 (emphasizing the importance of the notion of “public rights” in legal history).

caused by the abuse of individual rights.<sup>57</sup> Based on this analogy, the police power was so central to the law of the Constitution that it was “essential to the very being of the State.”<sup>58</sup> This was clearly a form of common law constitutionalism,<sup>59</sup> since constitutional law was quite literally formed out of common law analogies.

As Owen Fiss has acknowledged, for the Justices of the late nineteenth and the early twentieth centuries, “constitutional interpretation was not an exercise in clause-parsing.”<sup>60</sup> This was “apparent in almost every major case of the period, including *Lochner*.”<sup>61</sup> I would go further and suggest that it was not interpretive at all in the modern sense.<sup>62</sup> Interpretation assumes a textualist view of the Constitution; but the police power—the most ubiquitous concept in constitutional analysis during this period—had no textual basis. Because the police power did not depend upon clause-parsing, it never demanded interpretation of texts.<sup>63</sup> Indeed, one scholar of the day went so far as to say that

57. W.P. PRENTICE, POLICE POWERS ARISING UNDER THE LAW OF OVERRULING NECESSITY 4 (1894).

58. *Id.* at 301.

59. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 884-91 (1996) (defending an idea of constitutionalism that is less focused on the text or structure of the Constitution than the Court’s own precedents, a common law form of decisionmaking).

60. FISS, *supra* note 10, at 85.

61. *Id.*; *see also id.* at 182 (“In their era, the process of constitutional interpretation was not . . . one of parsing the language of some particular provision of the Constitution . . . [N]o special effort was made to distinguish one particular clause of [the Fourteenth] amendment from another. *Lochner* was written in a similar spirit. . . . The Due Process Clause was identified . . . but there was no pretense . . . that the result flowed from an interpretation of the ‘the word liberty’ . . . The result flowed instead from a general conception of state authority. Holmes’s proffered substitute was equally general and equally without roots in the words of the Constitution.”).

62. Gilded Age constitutional theory held no particular regard for the text. *See, e.g.*, CHRISTOPHER TIEDEMAN, THE UNWRITTEN CONSTITUTION OF THE UNITED STATES: A PHILOSOPHICAL INQUIRY INTO THE FUNDAMENTALS OF AMERICAN CONSTITUTIONAL LAW 155 (1890) (urging courts not to rely upon “plain, exact, and explicit” constitutional texts but constitutional “generalities”); *id.* at 151 (arguing that a judge “need not concern himself so much with the intentions of the framers of the Constitution or a statute,” but instead should “find out what the possessors of political power now mean by the written word.”). This view was applied, by some, to the text and *enumerated* rights themselves. FRANCIS NEWTON THORPE, A CONSTITUTIONAL HISTORY OF THE AMERICAN PEOPLE 64 (1898) (stating that the rights guaranteed in the Constitution’s Bill of Rights were but generalities and “administrative measures” which were largely superfluous to the people’s actions and understandings of their rights); LUCIUS POLK MCGEHEE, DUE PROCESS OF LAW UNDER THE FEDERAL CONSTITUTION 43 (1906) (stating that even enumerated rights were not important because of their text but were “preexisting and fundamental, not created by nor dependent on the Constitution”); Kunal M. Parker, *Context in History and Law: A Study of the Late Nineteenth-Century American Jurisprudence of Custom*, 24 LAW & HIST. REV. 473, 512 (2006) (noting Tiedeman’s “refreshingly cavalier attitude toward the integrity of textual language”).

63. This anti-textualism applied to the Fourteenth Amendment itself: “The object of the Fourteenth Amendment, as has been declared in repeated decisions, is not to confer the rights enumerated in its first section directly on any one, but to guarantee all citizens or persons against being deprived of those rights by State action. The *enumerated rights* are recognized as *preexisting and fundamental*, not created by nor dependent on the Constitution . . . .” MCGEHEE, *supra* note 16, at 43 (emphasis added).

the common law method had “saved our jurisprudence” from the speculative evils of the “enumeration of ‘inalienable rights.’”<sup>64</sup> At least in some quarters, enumeration was considered a positive evil or at least irrelevant,<sup>65</sup> rather than the apparently self-evident good it is portrayed as today.<sup>66</sup>

#### A. *The Police Power in the Non-Mandarin Case*

Understanding juristic discourse on the police power requires ignoring the mandarin texts and focusing on the more mundane, professional consensus. Consider a standard regulatory challenge<sup>67</sup> decided in 1905, the same year as *Lochner*. In *Manigault v. Springs*,<sup>68</sup> the state wanted to build a dam, but owners of the land claimed that it interfered with their property rights. The Court easily disposed of the rights claim: “[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.”<sup>69</sup> The dam’s interference with preexisting rights was no bar. The Court cited familiar instances of the common welfare trumping property rights, such as “where parties enter into contracts, perfectly lawful at the time, to sell liquor, operate a brewery or distillery, or carry on a lottery, all of which are subject to impairment by a change of policy on the part of the State, prohibiting the establishment or continuance of such traffic.”<sup>70</sup>

Notice that the Court explained the police power as “paramount to any rights under contracts between individuals.”<sup>71</sup> This is an unusual expression for modern jurisprudence since it reflects the opposite of our modern notion that rights are “paramount” to the common welfare, not subject to it. However, this was the normal usage at the time. As Ernst Freund explained, “The police power is the power to restrain common rights of liberty or property.”<sup>72</sup> It emerged from nineteenth century cases like *Crowley v. Christiansen*, which upheld the state regulation of liquor.<sup>73</sup> There, Justice Field (otherwise

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64. *Id.* at 139.

65. Even those scholars who, in the 1920s, sought to support substantive elements of due process did not depend so much on unenumerated rights as on expanding various parts of the substantive due process case law, such as the “public purpose” limitation on the regulation of business. See RODNEY L. MOTT, *DUE PROCESS OF LAW* ch. 22 (1926).

66. See ANTONIN SCALIA ET AL., *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997).

67. *Manigault v. Springs*, 199 U.S. 473 (1905).

68. See McGEHEE, *supra* note 16, at 300 (citing *Manigault* as a classic police power case of the period).

69. *Manigault*, 199 U.S. at 480 (emphasis added).

70. *Id.*

71. *Id.*

72. FREUND, *supra* note 48, at 19 (distinguishing between rights that were common and thus “fundamental,” and those which may be breached by the state “as it pleases” without “observing the limitations . . . of the police power”).

73. *Crowley v. Christiansen*, 137 U.S. 86, 89 (1890).

remembered for his laissez-faire<sup>74</sup> views) emphatically asserted the preeminence of the police power: “[T]he possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed . . . essential to the safety, health, peace, good order and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one’s own will.”<sup>75</sup>

This discourse, which subjected rights to the police power, predated *Lochner*. Consider, for example, the frequently cited *Gundling v. Chicago*, decided in 1900.<sup>76</sup> The Court upheld a Chicago ordinance barring the sale of cigarettes without a license because it did not “violate the Fourteenth Amendment[’s]” Due Process Clause: “Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence . . . and what such regulations shall be . . . are questions for the state to determine . . . within the proper exercise of the police power.”<sup>77</sup> The Court qualified its deference to the police power only by a rule of arbitrariness: regulations within the police power should be upheld “unless the regulations are so utterly unreasonable and extravagant . . . that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed.”<sup>78</sup> Citing *Crowley v. Christiansen*, the Court concluded that “the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community.”<sup>79</sup>

As alluded to in *Crowley*, the police power discourse had a vast reach, applying to everything from morals legislation to contract and property rules<sup>80</sup>

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74. Lawrence M. Friedman, *Freedom of Contract and Occupational Licensing 1890-1910: A Legal and Social Study*, 53 CALIF. L. REV. 487, 492 (1965) (noting Field’s reputation as a “stern prophet of individualism”).

75. *Crowley*, 137 U.S. at 89 (1890) (upholding regulation of liquors); *see also* *Marrs v. City of Oxford*, 32 F.2d 134 (8th Cir. 1929) (quoting same principle in upholding regulation of oil).

76. *Gundling v. City of Chi.*, 177 U.S. 183 (1900).

77. *Id.* at 188.

78. *Id.*

79. *Id.* This discourse pervaded state law as well. *See, e.g.*, *Williams v. State*, 108 S.W. 838, 840 (Ark. 1908) (“It is a principle which underlies every reasonable exercise of the police power that private rights must yield to the common welfare.”); *Am. Express Co. v. S. Ind. Express Co.*, 78 N.E. 1021, 1028 (Ind. 1906) (“It has never been denied that in the exercise of the police power property rights may be sacrificed, natural privileges curtailed, and liberty restricted or taken away,” said the court. “As the public peace, safety, and well-being are the very end and object of free government, legislation which is necessary for the protection and furtherance of this object cannot be defeated on the ground that it interferes with the common-law rights of some of the citizens, or even deprives them of such rights.”); *State v. Heinemann*, 49 N.W. 818 (Wis. 1891) (“All courts agree that the police power of the state extends to all regulations affecting the lives, limbs, health, comfort, good order, morals, peace, and safety of society, and hence may be exercised on many subjects and in numerous ways.”).

80. Even one of the most famous property rights cases followed this logic. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), is today studied as a “takings” case, and yet, when read

to legislative changes of common law rules.<sup>81</sup> In *Chicago, Burlington & Quincy R.R. Co. v. McGuire*, the Court upheld a state's abrogation of the fellow servant rule (which absolves an employer of liability if a "fellow servant" committed the negligent act), explaining that the "freedom of contract is a qualified, and not an absolute, right."<sup>82</sup> Quoting *Frisbie v. United States*, the Court elaborated:

It is within the undoubted power of government to restrain some individuals from all contracts, as well as all individuals from some contracts. It may deny to all the right to contract for the purchase or sale of lottery tickets; to the minor the right to assume any obligations, except for the necessities of existence; to the common carrier the power to make any contract releasing himself from negligence, and, indeed, may restrain all engaged in any employment from any contract in the course of that employment which is against public policy.<sup>83</sup>

Finally, police power discourse appeared not only in right to contract cases, but also in cases involving the right to property. *Williams v. State*, decided by the Court in 1910, barred hotels from advertising on trains bound for the then-important resort city of Hot Springs.<sup>84</sup> In the late nineteenth century, anti-labor judges considered the right to carry on a calling one of the highest forms of property right, stemming from the free labor agitation that emerged out of the Civil War.<sup>85</sup> But until 1910, the Court neglected to consider whether advertising was an essential attribute of that right. Instead, it invoked

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in full it follows the pattern as identified in the text. The opinion aims to determine whether the "police power" has been satisfied, *id.* at 413, and applies standard police power analytics, such as a comparison with a "public nuisance." *Id.* It concludes that the "destruction" of the plaintiff's property rights were justified by no "public interest." *Id.* at 414.

81. Some critics claim that, in the *Lochner* era, courts were hostile to statutes aiming to change the common law. See Sunstein, *supra* note 12, at 878. As far as results are concerned, these critics overclaim, as the Court upheld a variety of statutes abrogating common law rules, most notably worker's compensation schemes. See Bernstein, *supra* note 16, at 3-4 (arguing against Professor Sunstein's claim that the court was anti-common law); see also Ray A. Brown, *Police Power: Legislation for Health and Safety*, 42 HARV. L. REV. 866, 889-94 (1929) (detailing the cases in which the Supreme Court had altered "common law rules of liability"); *id.* at 890 ("In no line of cases, however, has the United States Supreme Court displayed greater liberality than in the litigation respecting workmen's compensation legislation."). Nevertheless, the very idea of the police power depended upon the common law notion of nuisance; so, in that sense, it is true that the court's jurisprudence was pro-common law.

82. 219 U.S. 549, 567 (1911).

83. *Id.* (quoting *Frisbie v. United States*, 157 U.S. 160, 165-66 (1895)).

84. *Williams v. State*, 108 S.W. 838 (Ark. 1908).

85. William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767, 769 (late nineteenth-century judges who struck down state labor laws and the labor reformers who promoted them acted on behalf of a principle borrowed from anti-slavery advocates, known as "free labor"). The view that men had a right to carry on a calling persisted through the beginning of the twentieth century. See, e.g., MCGEHEE, *supra* note 16, at 141 ("Labor is the primary foundation of all wealth. The property which each one has in his own labor is the common heritage. And, as an incident to the right to acquire other property, the liberty to enter into contracts by which labor may be employed in such way as the laborer shall deem most beneficial, and of others to employ such labor, is necessarily included in the constitutional guaranty.").

the police power: “It is a principle which underlies every reasonable exercise of the police power that private rights must yield to the common welfare.”<sup>86</sup> Thus, the Court consistently made the inquiry into the police power determinative of the contours of rights.

### B. *Lochner and the Juristic Story*

Once contextualized within the discursive conventions of the day, *Lochner* becomes a case that merely acknowledges the rule we have discovered: the police power can trump rights. *Lochner* begins, but in no way ends, with a right: “The statute necessarily interferes with the right of contract between the employer and employe[e]s, concerning the number of hours in which the latter may labor in the bakery of the employer.”<sup>87</sup> Had rights been strong in the sense we understand them today, this would have concluded the opinion; the right would have triggered strict scrutiny and the near-certitude of the statute’s demise. But the *Lochner* opinion goes on for twelve pages, because it must rebut the juristic argument of the day that the statute was intended to further the police power:

There are, however, certain powers, existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public. *Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State in the exercise of those powers, and with such conditions the Fourteenth Amendment was not designed to interfere. The State, therefore, has power to prevent the individual from making certain kinds of contracts, and in regard to them the Federal Constitution offers no protection.*<sup>88</sup>

From there, the Court distinguishes as counterexamples cases in which the police power had trumped rights: *Holden v. Hardy*, upholding the regulation of the hours of miners; *Knoxville Iron v. Harbison*, permitting the regulation of coal orders; *Jacobson v. Massachusetts*, upholding a vaccination ordinance; and *Petit v. Minnesota*, affirming a Sunday-closing law.<sup>89</sup> The Court summarized: “In every case that comes before this court, therefore, where legislation of this character is concerned and where the protection of the Federal Constitution is sought, the question necessarily arises: *Is this a fair, reasonable and appropriate exercise of the police power of the State . . . ?*”<sup>90</sup>

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86. *Williams v. Arkansas*, 217 U.S. 79, 90 (1910).

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

88. *Id.* (citation omitted) (emphasis added).

89. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); *Knoxville Iron Co. v. Harbison*, 183 U.S. 13 (1901); *Petit v. Minnesota*, 177 U.S. 164 (1900); *Holden v. Hardy*, 169 U.S. 366 (1898).

90. *Lochner*, 198 U.S. at 56 (emphasis added).

The answer to that question depended upon a categorical judgment that seems odd today, but had more meaning then. The legal architecture of the late nineteenth century, which survived at least in part in the early twentieth, aimed to transcend politics through a highly categorical approach.<sup>91</sup> The law in *Lochner* would have, and in many views of the day, should have, been upheld as a proper exercise of the police power. However, the Court considered it a “labor law” masquerading as a health law, and thus outside the accepted categories of safety, health, and welfare. At the time, the Court construed labor laws as a discrete category—one that connoted partiality. Today, labor has lost the taint of violence, monopoly, and socialism with which it was once associated.<sup>92</sup> At that time, elites (including progressives) feared labor as the preeminent selfish interest group that sought, as Theodore Roosevelt warned, to foist upon the country a view of class-against-class<sup>93</sup> alien to notions of democracy.<sup>94</sup> Only in this context does it make sense for the Court to conclude that

[v]iewed in light of a purely labor law, with no reference whatever to the question of health, we think that a law like the one before us involves neither safety, the morals nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act.<sup>95</sup>

Even in dissent, Justice Harlan argued from a categorical framework, rejecting the majority’s view by claiming that the regulation was in fact not a labor law exempt from the police power, but a health law falling within it.<sup>96</sup>

None of the cases that constitutionalists typically associate with *Lochner*—such as *Muller v. Oregon*, *Adair v. United States*, or *Coppage v. Kansas*—rejected the rule that the police power trumped right.<sup>97</sup> *Muller v.*

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91. See MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960*, at 15 (1992) (“The process of generalization and abstraction in late-nineteenth-century law was identified with the goal of rendering private law more scientific and less political.”).

92. See, e.g., Andrew A. Bruce, *The Individualism of the Constitution*, 62 *CENT. L.J.* 377, 382 (1906) (“They seem to think that interference is necessary in order that the public shall not be driven to the extreme of demanding state socialism.”); W.A. Counts, *Laissez Faire in the United States*, 68 *CENT. L.J.* 118, 118 (1909) (quoting opponents of labor laws: “To place the working classes under special protection against the aggression of capital . . . is to change the government from a government of freemen, to a paternal government or a despotism, which is the same thing.”).

93. The fear of “class” helps to explain the plausibility of Howard Gillman’s thesis that “class legislation” strongly influenced the development of the Due Process Clause, but this idea cannot explain all of due process jurisprudence and makes no provision for the ways in which class legislation approximated equal protection doctrine. GILLMAN, *supra* note 11, at 1; cf. Nourse & Maguire, *supra* note 39.

94. *Roosevelt Advises Students*, *L.A. TIMES*, June 15, 1906, at 11 (class against class).

95. *Lochner v. New York*, 198 U.S. 45, 57 (1905) (emphasis added).

96. *Id.* at 65-74 (Harlan, J., dissenting).

97. *Coppage v. Kansas*, 236 U.S. 1 (1915); *Adair v. United States*, 208 U.S. 161 (1908). If there is a case that adopts language which is close to a strong right, it is *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923) (striking down the minimum wage for women), a case that emerged

*Oregon* upheld an hours law for women on the ground that the state had the police power.<sup>98</sup> The Brandeis brief became famous precisely because it persuaded the Court on the question of health categorization, thus adopting Harlan's *Lochner* dissent.<sup>99</sup> No one denied that *Muller* retained a property right in his business or that a contract right existed between the business and its female employees—the question was whether these rights would have to yield to the police power. As the Court put it, if the liberty of contract was well settled, “it [was] equally well settled that this liberty is not absolute . . . and that a state may, without conflicting with the provisions of the 14th Amendment, restrict in many respects the individual's power of contract.”<sup>100</sup>

To be sure, *Lochner* was a shadow that hung over states' attempts to pass hours laws<sup>101</sup>—one of the preeminent political goals of labor unions. However, many constitutionalists believed that *Lochner* was at least implicitly overruled, first by *Muller*, and then in 1917 by *Bunting v. Oregon*,<sup>102</sup> in which the Court let stand a more general hours limitation law.<sup>103</sup> By 1928, run-of-the-mill commentators like the University of Wisconsin's Ray Brown could write that the old “individualistic view” of the police power had long ago been replaced with the “social principle, now fundamental in the concept of the police power,” that favored the interests of the whole society.<sup>104</sup> He even wrote that

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when the Taft Court veered right after World War I. See discussion *supra* note 16 (discussing how *Adkins* transformed *Lochner*).

98. *Muller v. Oregon*, 208 U.S. 412, 423 (1908).

99. See ALPHEUS THOMAS MASON, *BRANDEIS: A FREE MAN'S LIFE* 249-50 (1946) (“In the *Muller* brief only two scant pages were given to conventional legal arguments. Over one hundred pages were devoted to the new kind of evidence drawn from hundreds of reports . . . proving that long hours are *as a matter of fact* dangerous to women's health, safety, and morals, that short hours result in social and economic benefits.”).

100. *Muller v. Oregon*, 208 U.S. 412, 421 (1908).

101. The *Lochner* language frequently quoted today by constitutionalists is the following: “The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.” *Lochner*, 198 U.S. at 57-58. Even if taken as a general statement of the rule (which it was not at the time), this at most amounts to a nod toward a rational-basis-plus standard akin to that applied in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). This standard is not strict scrutiny, which requires something more than a “legitimate end,” but at least a “compelling state interest.” *Id.* at 440-42.

102. *Bunting v. Oregon*, 243 U.S. 426 (1917).

103. See Francis. W. Bird, *The Evolution of Due Process of Law in the Decisions of the United States Supreme Court*, 13 COLUM. L. REV. 37, 49 (1913) (“The *Lochner* Case has been severely criticized, weakened very decidedly by the case sustaining the Oregon Statute limiting the hours of labor for women; and is consequently of doubtful authority.”); Charles Kellogg Burdick, *The Meaning of “Police Power”*, 214 N. AM. REV. 158, 162 (1921) (“[I]n 1917, the *Lochner* case was in effect overruled, though not mentioned, when the Oregon ten-hour law was upheld on the ground that excessive work by any person, in any field, is injurious to the individual . . . .”); 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.”).

104. Brown, *supra* note 81, at 877.

“[w]ith the exception of *Lochner v. New York*, the Supreme Court has sustained every hours of labor statute presented to it.”<sup>105</sup>

To be sure, cases in which the hostility to labor seems palpable did in fact exist. The two most often associated with *Lochner* were the “yellow dog” cases, *Coppage v. Kansas* and *Adair v. United States*,<sup>106</sup> in which employers dismissed employees because of their union membership. These cases were widely debated in the world, but nothing in them rejects the idea that a right could be trumped by the police power.<sup>107</sup> As Justice Harlan acknowledged in *Adair*: “Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State in the exercise of those powers, and with such conditions [the Fourteenth Amendment] was not designed to interfere.”<sup>108</sup> Quoting *Jacobson v. Massachusetts*, Harlan added:

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.<sup>109</sup>

The discursive conventions of the day thus reveal that *Lochner* merely affirmed the preexisting rule that the police power could trump rights.

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105. *Id.* at 884 n.76.

106. *See* *Coppage v. Kansas*, 236 U.S. 1 (1915); *Adair v. United States*, 208 U.S. 161 (1908). There were other cases of far greater significance to labor at the time, such as the Danbury Hatters Case, *Loewe v. Lawlor*, 208 U.S. 274 (1908), which barred secondary boycotts, and *Traux v. Corrigan*, 257 U.S. 312 (1921), which upheld thousands of labor injunctions issued by the lower courts. But constitutionalists today do not associate these cases with *Lochner* because they were not decided primarily on grounds of right. For the significance of these cases to the labor movement, *see* FORBATH, *supra* note 18; WILLIAM G. ROSS, A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890-1937 (1994). *See also* discussion *infra* Part III (discussing the impact).

107. In *Adair*, 208 U.S. 161, the question was whether Congress could outlaw the yellow dog contract for interstate carriers. *Adair* opens with a lengthy discussion of right, one more insistent in some ways than *Lochner* itself, suggesting to a casual reader unfamiliar with the police power that this is the end of the case. Of course, it cannot be under the given rules of the police power. *Adair* complicates the police power by the fact that it was a federal case (the federal government had no reserved police power), which explains why the *Adair* Court spent so much time on the Commerce Clause. If the right had been sufficient in itself, however, none of the discussion of power would have been necessary. *Coppage*, 236 U.S. at 15, followed *Adair* on the question of right and then acknowledged that, although the state had the undoubted police power to prohibit coercion and misrepresentation in contracts (“[w]e do not mean to say, therefore, that a State may not properly exert its police power to prevent coercion on the part of employers towards employe[e]s, or vice versa”), the actual facts of the case involved no coercion. Again, that analysis would have been unnecessary if the right announced at the opening of the decision had been enough to decide the case. In dissent, Justice Day argued that Kansas did in fact have the police power to regulate: “nothing is better settled by the repeated decisions of this court than that the right of contract is not absolute and unyielding, but is subject to limitation and restraint in the interest of the public health, safety, and welfare, and such limitations may be declared in legislation of the State.” *Id.* at 28 (Day, J., dissenting).

108. *Adair*, 208 U.S. at 172.

109. *Id.*

C. *Conventional Practice in the Lochner Era*

By the mid-1920s, the “right of state legislatures or municipalities . . . to regulate trades and callings in the exercise of the police power [was] too well settled [to require any extended discussion].”<sup>110</sup> In *Rail & River Coal Co. v. Yapple*, decided in 1915, the Court appeared near exasperation: “This court has so often affirmed the right of the State in the exercise of its police power to place reasonable restraints like that here involved, upon the freedom of contract that we need only refer to some of the cases in passing.”<sup>111</sup> By 1919, the rule that the police power could trump rights to property and to contract needed no citation. As the Court explained in *Union Dry Goods v. Georgia Public Service Corp.*,

Except for the seriousness with which this claim has been asserted and is now pursued . . . the law with respect to it would be regarded as so settled as not to merit further discussion. That private contract rights must yield to the public welfare, where the latter is appropriately declared and defined and the two conflict, has been often decided by this court.<sup>112</sup>

The average treatise writer repeatedly restated the rule that the common welfare could trump rights. For example, Professor Charles Burdick wrote:

This view, that all contracts between individuals are made subject to the police power of the State, and that legislation enacted in the reasonable exercise of that power, though it interferes with or excuses the performance of contracts, does not unconstitutionally impair their obligation, has been constantly reiterated by the United States Supreme Court.<sup>113</sup>

Burdick emphasized that, although there had been some hostility to legislation in the nineteenth century, “during the last generation the pendulum has swung, and there has been an increasing demand for social legislation and for regulation.”<sup>114</sup> He explained that the right to contract was no bar to such legislation, quoting the Court’s 1915 decision in *Chicago & Alton R.R. v. Tranbarger* to support the proposition that all rights were subject to the police power:

It is established by repeated decisions of this Court that neither of these provisions of the Federal Constitution has the effect of overriding the power of the state to establish all regulations reasonably necessary to secure the health, safety, or general welfare of the community: that this power can neither be abdicated nor bargained away, and is inalienable

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110. *Schmidinger v. City of Chi.*, 226 U.S. 578, 587 (1913).

111. 236 U.S. 338, 349 (1915).

112. 248 U.S. 372, 375 (1919).

113. CHARLES K. BURDICK, *THE LAW OF THE AMERICAN CONSTITUTION* § 197, at 473 (1922).

114. *Id.* § 196, at 469.

even by express grant; and *that all contract and property rights are held subject to its fair exercise.*<sup>115</sup>

Burdick's emphatic observation that the police power could trump rights made it perfectly clear that he and his colleagues considered the rule well-settled.

The police power would organize conventional constitutional juristic discourse well into the 1930s and beyond. Even after it became more hostile to progressive legislation in the 1920s,<sup>116</sup> the Court went so far as to claim that "the so-called police power is an inherent right on the part of the public umpire to prevent misuses of property or rights which impair the health, safety, or morals of others, or affect prejudicially the general public welfare."<sup>117</sup> Police power analysis would, in the mid-1920s, not only support takings of property

115. *Id.* § 196, at 470 (quoting *Chi. & Alton R.R. Co. v. Tranbarger*, 238 U.S. 67, 76 (1915)) (emphasis added). The bar's professional materials reflected similar views well into the 1930s. *See* 11 AM. JUR. CONSTITUTIONAL LAW, § 267, at 1006-07 (1937) ("[I]t is settled that the possession and enjoyment of all rights are subject to the police power . . . . Consequently, both persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, welfare, and prosperity of the people of the state." (footnote omitted)); *id.* at § 268, at 1009 ("No rule in constitutional law is better settled than the principle that all property is held subject to the right of the state reasonably to regulate its use under the police power . . . ."); *id.* at § 264, at 1000 ("Rights and privileges arising from contracts are subject to regulations for the protection of the public health, the public morals, and the public safety, in the same sense and to the same extent as all property . . . ."); *see also* HUGH EVANDER WILLIS, CONSTITUTIONAL LAW OF THE UNITED STATES 643 (1936) ("The great powers of government . . . are the police power, the power of eminent domain, and the power of taxation. Whenever there is a proper exercise of these powers, personal liberty is rightly delimited. . . . Property for long years made a direct appeal to due process, but its direct appeal for the most part failed."); *id.* at 707 ("[I]f the social control is a proper exercise of the police power . . . there is no violation of due process as a matter of substance."); *id.* at 715 ("[P]ersonal liberty is never protected by the due process clause as a matter of substance against the police power . . . .").

116. There is no question, for example, that after apparently increasing progressivism by the end of the war, the Court made a significant turn toward the right during the period from 1920 to 1930. This occurred, in part, because of a change in the membership of the Court. *See* Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, 48 WM. & MARY L. REV. 1, 2 (2006) ("The Taft Court was . . . dominated by conservative Justices."); James A. Henretta, *Charles Evan Hughes and the Strange Death of Liberal America*, 24 LAW & HIST. REV. 115, 118 (2006) (noting the "conservative outlook of the Taft court of the 1920s").

117. *See, e.g.*, MCGEHEE, *supra* note 16, at 345 ("Although freedom and the liberty to contract are fundamental rights within the guaranties of the Constitution, they may be limited by the State in the exercise of the police power in the interest of public safety, health, or morals, or, under certain conditions, in the exercise of the legislative power merely."). Cases like *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), decided in the 1920s, are sometimes thought to have begun the move toward a strong rights jurisprudence. This, however, is a misreading of both cases, each of which follows the same rule that a right or liberty may be trumped by the public welfare. *Id.* at 534. *Meyer* unquestionably enumerates a long list of "liberties," but these were "reserved rights" of the day, all of which could be subject to the police power. Without a claim of public harm, no reason to invoke the police power existed. This is precisely what the *Meyer* Court held: "Mere knowledge of the German language cannot reasonably be regarded as harmful." *Meyer*, 262 U.S. at 400. So, too, *Pierce* relies upon *Meyer* and the fact that the law impairs the school's property rights without a showing, again, that the parochial schools harm the "common welfare."

on the theory of public harms, as in *Miller v. Schoene*,<sup>118</sup> but also zoning regulations, as in *Village of Euclid v. Ambler Realty*.<sup>119</sup>

In fact, the police power discourse was the default rule for many areas of constitutional law,<sup>120</sup> including First Amendment cases: “[T]he freedom of speech . . . does not confer an absolute right . . . . [A] State in the exercise of its police power may punish those who abuse this freedom.”<sup>121</sup> In *Whitney v. California*, the Court allowed states to punish political speech aimed at harming the public welfare based on a police power theory.<sup>122</sup> At the time, it was not “open to question” that a “State in the exercise of its police power” could “punish those who abuse [the] freedom [of speech] by utterances inimical to the public welfare, tending to incite to crime [or] disturb the public peace . . . .”<sup>123</sup> Similarly, in *New York ex rel. Bryant v. Zimmerman*, the Court rejected the claim that a statute requiring the Ku Klux Klan to reveal its membership violated the “liberty” of the defendant “in that it prevent[ed] him from exercising his right of membership in the association.”<sup>124</sup> The Court stated that “his liberty in this regard, like most other personal rights, must yield to the rightful exertion of the police power.”<sup>125</sup>

Critics at the time wondered, rightly, how far the police power might go. One scholar asked whether it would “require all restaurants to abandon crockery” for paper cups “out of solicitude for . . . health”?<sup>126</sup> To be sure, some cases, even quite important ones, failed the police power standard.<sup>127</sup> These

118. *Miller v. Schoene*, 276 U.S. 272, 279-80 (1928) (“[W]here the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property.”).

119. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926). The zoning “ordinance now under review,” Justice Sutherland wrote, “and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare.” *Id.*

120. Novel rights claims also fell to this rationale. In Justice Holmes’s 1927 opinion in *Buck v. Bell*, 274 U.S. 200 (1927), Carrie Buck’s lawyers argued that she had a right to bodily integrity that could not be infringed by the state, which wanted to forcibly sterilize her. Justice Holmes’s five-paragraph opinion rejected the rights claim with the back of the hand, suggesting it was obviously wrong to say that in no circumstance could the state sterilize. NOURSE, *supra* note 18, at 29-30. In doing so, he implied that a strong claim of right was ridiculous, presumably because he knew that any right was subject to the police power. The rest of the opinion did not rehearse the well established police power rule, but simply applied it, explaining that there were sound reasons in public health and welfare to sterilize—“[t]hree generations of imbeciles” were enough. *Buck*, 274 U.S. at 207. As Lawrence Friedman explains, *Buck* was considered a progressive decision for its day precisely because it followed the general police power rationale. ACCORD WILLIS, *supra* note 116, at 754; see also NOURSE, *supra* note 18, at ch. 6.

121. *Gitlow v. New York*, 268 U.S. 652, 666-67 (1925).

122. 274 U.S. 357, 371 (1927).

123. *Id.*

124. 278 U.S. 63, 72 (1928).

125. *Id.*

126. *Brown*, *supra* note 81, at 878.

127. This was increasingly the case involving price regulation in the 1920s. See, e.g.,

cases concerned the great issues of the day that divided progressives and conservatives, and most importantly, labor and capital.<sup>128</sup> Cases that did not seem to add up also emerged; the “arbitrariness” restraint on the police power was widely viewed by the mid-1920s as yielding inconsistent results. Why, for example, did the Court permit the outlawing of margarine but strike down a law barring the use of shoddy in mattresses?<sup>129</sup> Why did the Court use the Due Process Clause to bar some regulations of bread and not others?<sup>130</sup> And in dozens of cases, if not hundreds, the Court found itself enmeshed in the strange process of reviewing the reasonableness of railroad and utility rate-making.<sup>131</sup>

Modern scholars correctly note that the Court’s police power analysis sometimes appeared incoherent and that cases on more than one occasion seemed irreconcilable,<sup>132</sup> but this could be said of almost any period of time and almost any doctrinal rule. The real trouble was that the juristic story was not the only story of rights told during this period. Another story, both very different and highly public, lived by its side.

### III

#### THE POPULAR CONSTITUTIONALIST CRITIQUE

“My proposal is that . . . if the court has decided that the Legislature plus the Executive has exceeded the power granted by the people to them under the Constitution, that *the people shall themselves* have the right to say whether their representatives in the Legislature and the executive office were right, or whether their representatives on the court were right.”<sup>133</sup>

Theodore Roosevelt (1912)

For many scholars, the judicial story of rights trumped by the police

Ribnik v. McBride, 277 U.S. 350 (1928); Williams v. Standard Oil Co., 278 U.S. 235 (1928); Tyson & Brother v. Banton, 273 U.S. 418 (1927).

128. See, e.g., Evans Clark, *Industry Is Setting Up Its Own Government: American Capital and Labor Interests Find a New Way to Avoid Disastrous Strikes and Lockouts*, N.Y. TIMES, Mar. 21, 1926, at XX5; *Labor Chief Urges Industrial Peace*, N.Y. TIMES, Jan. 2, 1928, at 17; *Labor Chief Plans Fight in Congress*, N.Y. TIMES, Jan. 18, 1928, at 40; John B. Andrews, *Labor and Capital*, N.Y. TIMES, Jan. 1, 1925, at 33; John B. Andrews, *Labor and Capital*, N.Y. TIMES, Jan. 1, 1927, at 9.

129. Compare Powell v. Pennsylvania, 127 U.S. 678 (1888) (margarine), with Weaver v. Palmer Bros. Co., 270 U.S. 402 (1926) (shoddy mattresses).

130. Compare Jay Burns Baking Co. v. Bryan, 264 U.S. 504 (1924), with Schmidinger v. City of Chicago, 226 U.S. 578 (1913).

131. Rate cases, which were very high in number, tend to skew the numbers of those who assert the *Lochner* Court struck down a large number of statutes. See Phillips, *supra* note 19 (discussing these cases).

132. Friedman, *supra* note 3, at 1405-13 (arguing that a number of the Court’s cases appeared inconsistent); see, e.g., cases cited *supra* notes 129-130.

133. *Roosevelt Answers Cry of Revolution*, N.Y. TIMES, Feb. 27, 1912, at 1, 3 (emphasis added).

power during the *Lochner* era will seem astonishing if not downright impossible. Modern scholars have heard a very different account of *Lochner* for over fifty years, a story in which rights were strong and not weak, and in which the Court regularly thwarted regulation and the redistribution of wealth by claims of right. Indeed, in conventional understandings, the *Lochner* era is synonymous with a regime of strong property and contract rights.<sup>134</sup> How can this story exist side by side with the juristic tale told above?

The answer is that these stories emerge from the very structure of the Constitution. In cases highly relevant to political debates, more than one branch has an incentive to engage in constitutional dialogue. If votes can depend upon it, both the courts and political players will invoke the Constitution. As Madison explained in the *Federalist Papers*, this is by design: to allow the separation of powers to work, “the interest of the man” must be wedded to the interest of the place.<sup>135</sup> In other words, two constitutional stories will always exist if constitutional actors have an incentive to make a public issue out of a case. There will be the story by courts in professional discourse, and the story by public and political actors in the public square.

Enter the second tale of *Lochner*, a tale in which rights are strong, but not because judges make them so. They are strong because they appear to thwart popular will and thus the politically powerful take them up as a call to arms. Theodore Roosevelt plays the lead in this story, one which is completely absent from traditional lawyerly accounts, yet is essential to creating the story of *Lochner* we know today.<sup>136</sup>

Roosevelt harshly criticized cases such as *Lochner*, *Adair*, and *Coppage*, which were small in number but lived an exceedingly large, public life. Such cases sent children to the mills and sweatshops,<sup>137</sup> allowed employers to

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134. See, e.g., Bernstein, *supra* note 3, at 12 (“[T]he basic motivation for *Lochnerian* jurisprudence was the Justices’ belief that Americans had fundamental unenumerated constitutional rights . . . .”); Friedman, *supra* note 3, at 1403 (“[T]he tool for judicial usurpation was the (mis)reading into the constitution of rights not clearly set out there, such as the liberty of contract . . . .”).

135. THE FEDERALIST NO. 51 (James Madison); Victoria Nourse, *Toward a “Due Foundation” for the Separation of Powers: The Federalist Papers as Political Narrative*, 74 TEX. L. REV. 447 (1996); Victoria Nourse, *The Vertical Separation of Powers*, 49 DUKE L.J. 749 (1999) [hereinafter Nourse, *Vertical Separation*].

136. See, e.g., *Roosevelt Cries War to Knife on Both Old Parties*, CHI. DAILY TRIB., Feb. 13, 1913, at 1 (“We recognize that property has its rights, but they are only incident to, they come second to, the rights of humanity. We hold that the resources of the earth were placed for the use of man in the mass; that they are to be developed for the common welfare of all, and that they are not to be seized by a few for the purposes of oppression of the many or even with disregard of the rights of the many.”).

137. *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (striking down as unconstitutional a federal law aimed at limiting child labor despite the fact that there was a massive sentiment in favor of child labor restriction; it was not until the New Deal that federal power to regulate child labor was achieved).

prevent individuals from joining unions,<sup>138</sup> restricted the ability of unions to boycott,<sup>139</sup> and kept minimum wage and hour legislation for able-bodied men in litigation limbo for thirty years.<sup>140</sup> People demonstrated, fought, and voted based on these issues; these cases left such an important impression because they were focal points for the discontent of great masses of people. One must remember that “[i]n 1900, more than half the country, perhaps 36 to 40 million men, women, and children, made up the laboring class that performed manual work for wages.”<sup>141</sup>

Thus, while the juristic story truthfully represents the elite discourse, the popular tale of *Lochner* as a strong rights decision is also true. The latter simply reflects a different type of discourse and a different institution—the public discourse of popular constitutionalism. Elite juridical discourse allowed claims of right to be trumped by the police power; the public discourse made rights strong because of their effect on people’s lives. In short, liberty and right lived simultaneously in judicial opinions and the public square, but the same terms had different meanings in different contexts, even though they purported to address the same object. Those who resisted labor’s claims invoked “liberty” and “right to contract” as political slogans. The deployment of these terms in political debate, however, did not match their deployment within legal doctrine.

For example, before his progressive conversion, future president Wilson declared that the “‘right of freedom of contract’ was the ‘most precious of all ‘the possessions of a free people,’” a political slogan signaling that he was against labor unions.<sup>142</sup> In the 1912 presidential campaign, when Theodore Roosevelt heard that Wilson had invoked the term “liberty,” he insisted that it was “the laissez-faire doctrine of English political economists three-quarters of a century ago.”<sup>143</sup> “Liberty” was a political fighting word, one used by the National Association of Manufacturers to fight “unionism,”<sup>144</sup> a rhetorical and political invocation that lasted until the “Liberty League” was created to fight the New Deal.<sup>145</sup>

These slogans not only connoted political positions, but also visions of

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138. *Coppage v. Kansas*, 236 U.S. 1 (1915); *Adair v. United States*, 208 U.S. 161 (1908).

139. The labor injunction, upheld in *Truax v. Corrigan*, 257 U.S. 312 (1921), was one of the central tools business used to thwart union action. FORBATH, *supra* note 18 (labor injunctions).

140. Andrew K. Black III, *Wages and Hours Laws in the Courts*, 5 U. PITT. L. REV. 223, 225-229 (1939) (describing the litigation history of hours laws).

141. MICHAEL MCGERR, *A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA, 1870-1920*, at 15 (2003). By the end of the World War I, progressivism had become embedded in mainstream politics. Given the onslaught, and relative popularity of Theodore Roosevelt’s Progressive Party, Woodrow Wilson had adopted the status of a reformer. *Id.* at 280. After the war, Warren Harding called himself a “rational progressive,” and Herbert Hoover described his creed as “progressive individualism.” *Id.* at 320.

142. JAMES CHACE, *1912: WILSON, ROOSEVELT, RAFT & DEBS—THE ELECTION THAT CHANGED THE COUNTRY* 51 (2004).

143. *Id.* at 196.

144. MCGERR, *supra* note 141, at 126.

145. See NOURSE, *supra* note 18, at ch. 6.

government. Conservatives and progressives alike feared trade unionism as the first step toward anarchy or socialism.<sup>146</sup> To many in the first decade of the century, organized labor meant “terrorism, tyranny, and lawlessness.”<sup>147</sup> Increasingly after World War I, people associated the fear of unionism with class war, which they associated in turn with Bolshevism after the Russian Revolution. For example, in 1920, the future chief justice William Howard Taft criticized in the *Yale Review* the “latitudinarian construction of the Constitution,” because it would “weaken the protection it should afford against socialistic raids upon property rights.”<sup>148</sup> This of course was a political claim, not a doctrinal one, but it was one of the great rhetorical moves of the day made by the Court’s supporters, who argued that property rights were the last line of defense against socialism.

For labor, the public emphasis on property rights sent precisely the opposite message. If conservatives feared that they would lose their freedom without property rights, labor believed they would lose their freedom with property rights. For labor, the public and political emphasis on property rights cruelly mimicked slavery by imagining men as things. For example, when business fought restrictions on child labor, they invoked parents’ property right in their children. To labor, property rights violated the notion of “free labor” that had inspired the Fourteenth Amendment.<sup>149</sup> Labor called for human rather than property rights, a call that would continue throughout the century. This was their symbolic claim in a battle which they would win in the New Deal, for the recognition of unions and various forms of “social” rather than “individualistic” security. But this was not a doctrinal claim made by professional lawyers. It was a claim of popular constitutionalism. This phenomenon is not terribly arcane, even if it diverges from modern understandings. No contemporary constitutionalist would confuse today’s political slogan, “the right to choose,” with the constitutional doctrine governing abortion, nor should one confuse yesterday’s political claims of

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146. See, e.g., *Should Wilson Encourage Union-Labor Anarchy*, L.A. TIMES, Nov. 15, 1914, at V13 (anarchy associated with unionism); *The Ten Hour Decision*, N.Y. TRIB., Apr. 19, 1905, at 4 (editorial on *Lochner* opening with the line: “The Supreme Court draws the line sharply between sanitation and socialism.”).

147. *Denounces Labor Unions*, N.Y. TIMES, Jan. 18, 1902, at 2 (statement of George P. Baer, President of the Philadelphia and Reading Railway, regarding labor unions); see also MCGERR, *supra* note 141, at 119; see, e.g., *The Ten-Hour Decision*, N.Y. TIMES, Apr. 28, 1905, at 8 (describing labor as “professional agitators”). This was in part a legacy from the Gilded Age, which “offered a litany of class conflict: the great railroad strike of 1877, the strike against Jay Gould’s Missouri-Pacific Railroad in 1886, the Haymarket Bombing in Chicago the same year, the Homestead strike of 1892, the Pullman strike of 1894, and countless other battles.” MCGERR, *supra* note 141, at 126; see also Malcolm H. Lauchheimer, *Imminent Constitutional Shams*, FORUM 91 (Jan. 1917) (“[T]he courts, which have been compelled to advance as far towards socialism as the minimum wage . . .”).

148. William Howard Taft, *Taft Writes About Wilson*, N.Y. TIMES, Oct. 3, 1920, at 4 (reprinting *Yale Review* article).

149. See Forbath, *supra* note 85.

liberty, right to contract, and “laissez-faire” with actual legal doctrine.

*A. Theodore Roosevelt and the Origins of the Second Lochner Tale*

The *Lochner* opinion was not immediately the subject of widespread criticism.<sup>150</sup> Many of the major newspapers, like the *New York Times*, lauded the opinion.<sup>151</sup> The *Los Angeles Times* went so far as to suggest that there could be “no two opinions” that the law violated the right to contract.<sup>152</sup> The *Dallas Morning News* embraced the Court’s reaffirmation of the right to contract, “which demagogues in practical politics seem so determined to take away.”<sup>153</sup> The *New York Herald* explained that the Supreme Court had rightly rejected the unions’ attempt to “forc[e] upon the country the hours of labor programme.”<sup>154</sup>

Public supporters of the opinion did not necessarily focus on the question of right; they were more worried about labor, socialism, and tyranny of the mob. The almost joyful *New York Tribune* explained that the *Lochner* decision was a “heavy blow to all varieties of socialists, who will see this, as in other instances, like that of the income tax, evidence that the Constitution of the United States is . . . an obstacle to the tyranny of majorities as well as the tyranny of monarchs.”<sup>155</sup> When right was mentioned, it had little resemblance to the police power formulations we saw above. The public rhetoric of right was absolute and even religious. As the *Dallas Morning News* put it: “The right of contract is one of the most sacred rights of the freeman, and any interference with such privilege by Legislatures or courts is essentially dangerous and vicious.”<sup>156</sup>

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150. See, e.g., *Right of Contract*, DALLAS MORNING NEWS, Apr. 18, 1905, at 2; *10 Hour Bakery Law Invalid*, THE SUN (N.Y.), Apr. 18, 1905, at 4; *Labor Not Restricted*, N.Y. TRIB., Apr. 18, 1905, at 1.

151. *Court Overturns The Ten Hour Law*, N.Y. TRIB., Apr. 18, 1905, at 4; *Defying the Supreme Court*, THE SUN (N.Y.), Apr. 19, 1905, at 6; *Important Decision*, PENSACOLA J. (Pensacola, Fla.), Apr. 18, 1905, at 1; *New York 10-Hour Law is Unconstitutional*, N.Y. TIMES, Apr. 18, 1905, at 1; Editorial, MOUNT-VERNON SIGNAL (Mt. Vernon, Ky.), Apr. 21, 1905, at 2 (the Supreme Court delivered a “knockout blow” to the labor unions’ effort to obtain an eight hour bill from Congress). A number of papers simply quoted large parts of the opinion. See *Bakery Law Invalid*, WASH. POST, Apr. 18, 1905, at 11; *Law Can’t Limit A Working Day*, CHI. DAILY TRIB., Apr. 18, 1905, at 1; *Ten-Hour Law Killed by Court*, BOSTON DAILY GLOBE, Apr. 18, 1905, at 3. Others reported the decision along with other Court decisions. See *U.S. Supreme Court*, WALL ST. J., Apr. 18, 1905, at 2.

152. *Stands by the Constitution*, L.A. TIMES, May 14, 1905 at VI10.

153. *In Which the Right of Contract Is Upheld*, DALLAS MORNING NEWS, Apr. 20, 1905, at 6.

154. *The Ten Hour Decision*, *supra* note 146, at 4.

155. *Id.*

156. *In Which the Right of Contract is Upheld*, *supra* note 153, at 6. Given this, it is not surprising that some of the very early legal commentary supported this view. See, e.g., *Validity of State Regulation of Hours of Labor*, 60 CENT. L.J. 401, 401-02 (1905) (*Lochner* established “a new rule of construction or limitation of the police power . . . [L]abor, even in any department, may possibly carry with it the seeds of unhealthiness. But are we all, on that account, at the mercy of legislative majorities?”).

Granted, there were those more sympathetic to labor's position, but their criticisms amounted to little more than grumbling.<sup>157</sup> The *Salt Lake Herald* decreed that the "majority of the court did not take up the humane side of the question at all."<sup>158</sup> Labor leaders insisted that they would defy the decision, and the press predicted that the bakers would strike and there would be no bread.<sup>159</sup> The labor press was quick to emphasize the hypocrisy of invoking the rights of the working man that he did not want.<sup>160</sup> Nonetheless, "[t]here were no riots, no political upheaval, no episodes of civil disobedience; even the threatened strike failed to materialize."<sup>161</sup>

It would take the indomitable Theodore Roosevelt for *Lochner* to become a legal and public icon. During his presidency, Roosevelt (who was not a lawyer) made clear that he was no friend of the courts.<sup>162</sup> Like most progressives, he insisted that the judiciary had been hostile to the regulation of trusts, protecting "property" rights rather than "human" rights (one of the great political slogans of the period).<sup>163</sup> This all reached fever pitch, however, when Roosevelt began his political comeback during Taft's presidency.<sup>164</sup> Just back from his African safari in 1910, Roosevelt delivered a sensational speech to the Colorado legislature attacking the Supreme Court.<sup>165</sup> Roosevelt specifically cited two decisions: one was *Lochner*, and the other was *United States v. E.C. Knight*, an antitrust case.<sup>166</sup> Roosevelt charged that the courts had created a "neutral zone" in which neither the state (*Lochner*) nor nation (*Knight*) could

157. See ROSS, *supra* note 106, at 41 ("Although proponents of social reform continued to grumble about the judiciary during the decade from 1897 to 1906, criticism was muted and received little national attention.").

158. *An Important Decision*, SALT LAKE HERALD, Apr. 23, 1905, § 2, at 4. Those emphasizing the dissenting opinions tended to focus on Justice Harlan's dissent, not Holmes's. See, e.g., *Ten Hour Law Killed by Court*, BOSTON DAILY GLOBE, Apr. 18, 1905, at 3 (headline: "Let State Alone," Says Harlan); *Law Can't Limit Workday*, *supra* note 151.

159. See, e.g., *85,000 Bakers May Strike*, N.Y. TIMES, Apr. 18, 1905, at 1; *Law Can't Limit Workday*, *supra* note 151.

160. PAUL KENS, *LOCHNER V. NEW YORK: ECONOMIC REGULATION ON TRIAL* 144 (1998).

161. *Id.* at 145. For a general view of Theodore Roosevelt and the courts during this period, without specific focus on *Lochner*, see ROSS, *supra* note 106, at 130-54.

162. CHACE, *supra* note 142, at 15.

163. *A Review of the World*, 49 CURRENT LITERATURE No. 4 (Oct. 1910); see also Theodore Roosevelt, *Colonel Roosevelt on the Big Stick and the Square Deal*, IDAHO DAILY STATESMAN, Feb. 1, 1914, at 2 (continuing his criticisms of the judiciary even though he lost his bid for reelection).

164. Roosevelt's articles critiquing the Court began shortly after his presidency ended. See, e.g., THEODORE ROOSEVELT, *A Judicial Experience*, in OUTLOOK EDITORIALS 13, 20 (1909) (not mentioning *Lochner* by name but criticizing the judiciary's embrace of freedom of contract); see also William Travers Jerome, *Ought Judges to Know Life*, OUTLOOK (N.Y., N.Y.), Mar. 27, 1909, at 665.

165. *Mr. Roosevelt's Attack on the Courts*, N.Y. TIMES, Aug. 31, 1910, at 8. The speech was reported widely. See, e.g., *Mr. Roosevelt Attacks Federal Supreme Court*, N.Y. HERALD Aug. 30, 1910, at 4; *Mr. Roosevelt's Speeches*, N.Y. TIMES, Aug. 30, 1910, at 2 (reprinting Denver speech); *Shots Are Sent at High Court by Roosevelt*, ATLANTA CONST., Aug. 30, 1910, at 1.

166. *United States v. E.C. Knight*, 156 U.S. 1 (1895).

express majority will and “popular rights.”<sup>167</sup> The Court had become a refuge, Roosevelt explained, for the very rich men “who wish to act against the interest of the community as a whole.”<sup>168</sup>

Roosevelt’s critique of *Lochner* was not that the courts had created a new right to contract, nor that the courts had diverged from original intent, but that the courts had ignored the “welfare of the general public.”<sup>169</sup> Echoing Justice Harlan, Roosevelt attacked *Lochner* using the police power rationale. He claimed that the Court did not know “the facts” of how the baking business was “carried on under unhygienic conditions.”<sup>170</sup> The Court had struck down the law, despite the approval of the New York legislature and the New York courts, on the theory of a “liberty to work under unhygienic conditions.”<sup>171</sup> It was a decision “nominally against State rights . . . but really against popular rights, against the democratic principle of government by the people under the forms of law.”<sup>172</sup> Roosevelt later elaborated on his position:

In the New York Bakeshop Case it is our duty to say that it is for the people of a State to decide whether they intend to be true to the school of political economy of the eighteenth-century individualistic philosophers or whether they intend to act on the principles set forth in such books (to mention two among many) as those of Professor Ross on “Social Control” and by Father Ryan on “A Living Wage.”<sup>173</sup>

Roosevelt’s attack on the Court struck a chord, and the press sharply criticized him. In the East, lawyers denounced the speech, making the issue even more salient.<sup>174</sup> The *New York Times* branded the speech “regrettable and discreditable,” undermining the authority of law and encouraging “distrust of the judiciary.”<sup>175</sup> Judge Alton B. Parker, who wrote the *Lochner* opinion in the

167. *A Review of the World*, *supra* note 163 (quoting Roosevelt’s Denver speech). As the article notes, the “neutral zone” metaphor came from William Jennings Bryan, who had used a similar metaphor, “twilight zone,” in his 1896 presidential campaign. *Id.*

168. *Id.* This view was remarkably prescient of the complaint that Franklin D. Roosevelt would make during the New Deal when the Supreme Court struck down state and national attempts to regulate wages. This speech was reported widely across the nation. *See, e.g., Roosevelt Attacks the Supreme Court United States in Denver Speech*, *MACON DAILY TELEGRAPH* (Macon, Ga.), Aug. 30, 1910, at 2.

169. *Roosevelt Attacks the Supreme Court United States in Denver Speech*, *supra* note 168, at 2.

170. *Id.*

171. *Clean Bakeshops Can Be Had*, *N.Y. TIMES*, Nov. 11, 1910, at 8.

172. *Id.*

173. Theodore Roosevelt, *Nationalism and the Judiciary*, *OUTLOOK* (N.Y., N.Y.), Mar. 18, 1911, at 574.

174. *Bar Denounces Mr. Roosevelt’s Court Attack*, *N.Y. HERALD*, Aug. 31, 1910, at 1.

175. *Mr. Roosevelt’s Attack on the Courts*, *supra* note 165, at 8; *see also Attack on Supreme Court by Mr. Roosevelt Stirs Editors*, *N.Y. HERALD*, Sept. 1, 1910, at 4. The *New York Times* editorial page did not let the issue go, referring to it twice more in urging that the “unsanitary” conditions in bakeshops could be cured by a law that focused only on sanitation. *See The Bakeshop Bill*, *N.Y. TIMES*, Mar. 18, 1911, at 12; *Clean Bakeshops Can Be Had*, *supra* note 171, at 8.

New York Court of Appeals, proclaimed that the “bench and bar” would reject Roosevelt’s critique, and that the decision, far from being obviously wrong, was exceedingly close: “The history of this case indicates how narrow was the dividing line between upholding and rejecting the statute.”<sup>176</sup> The *New York Evening Mail* thought Roosevelt’s remarks were “counsels to chaos,” and the *Philadelphia Telegraph* predicted that they were “likely to be followed by a sinister reaction.”<sup>177</sup> Labor, of course, disagreed, embracing Roosevelt’s criticism of the courts with enthusiasm. The Socialists even complained that Roosevelt’s critique showed just how timid they had been.<sup>178</sup> In the end, however, his critics recognized that Roosevelt’s speeches “in the West, much as they make the judicious grieve, are clearly in line with what the American People want.”<sup>179</sup>

Roosevelt was unfazed. In the following month, before a crowd of 40,000, Roosevelt defended his right to criticize the Court and opined, “I have not a word to retract.”<sup>180</sup> Invoking Lincoln, he reminded the crowd that the great president was “assailed” for his criticism of *Dred Scott*.<sup>181</sup> Critique of the Court was not “merely the right but the duty of citizens” who believed judicial decisions were wrong.<sup>182</sup> Judicial decisions, Roosevelt urged, should “be submitted to the intelligent scrutiny and candid criticism of their fellow men.”<sup>183</sup> The people, he argued, should be capable of reviewing judicial decisions on “certain constitutional questions” dealing with the public welfare.<sup>184</sup> Shocked at such a proposal, the *New York Times* editorialized that,

176. *Attack of Roosevelt Answered by Parker*, ATLANTA CONST., Sept. 1, 1910, at 4; see also *Mr. Parker Meets Attack on Courts by Mr. Roosevelt*, N.Y. HERALD, Sept. 1, 1910, at 1; *Parker in Court’s Defense*, WASH. POST, Sept. 1, 1910, at 11; *Parker Defends Judges*, N.Y. TIMES, Sept. 1, 1910, at 2.

177. *A Review of the World*, *supra* note 163.

178. See, e.g., *Berger Angered; Coup a Failure*, CHI. DAILY TRIB., Nov. 16, 1910, at 2 (reporting that when Missouri’s Governor Hadley embraced Roosevelt’s critique of the courts, the crowd at the American Federation of Labor convention cheered).

179. *A Review of the World*, *supra* note 163.

180. *Roosevelt Praises Some Acts of Taft*, N.Y. TIMES, Sept. 18, 1910, at 1 (reporting Syracuse speech).

181. *Id.* Roosevelt appears to have continued to refer to the “Bakeshop Case” as he toured New York. See, e.g., *Roosevelt Quotes Gaynor*, N.Y. TIMES, Oct. 30, 1910, at 4 (Roosevelt quotes an opinion in which Gaynor describes liberty as the liberty to work to death); *The Judge and the Rabbit*, N.Y. TIMES, Sept. 18, 1910, at 12.

182. *Roosevelt Challenged Enemies to Make Their Fight in the Open*, GRAND FORKS DAILY HERALD (N.D.), Sept. 18, 1910, at 1; see also *Foes are Dared to Make Fight by Roosevelt*, THE ATLANTA CONSTITUTION, Sep. 18, 1910, at B3.

183. *Foes are Dared to Make Fight by Roosevelt*, *supra* note 182, at B3. Roosevelt made similar claims in other places in New York. See, e.g., *Not in King Business*, WASH. POST, Oct 18, 1910, at 1 (Roosevelt criticizes courts and refers to the so-called “Bakeshop Case.”).

184. *People’s Rule Theme of Col. Roosevelt*, DALLAS MORNING NEWS, Mar. 21, 1912, at 1 (review of constitutional decisions). The state recall proposal was exceedingly controversial. Willard Hurst once wrote that this position was “opportunistic.” William Ross writes that “it gave [Roosevelt] an issue on which he could out-La Follette La Follette.” Ross, *supra* note 106, at 138-39. Senator La Follette tried to mobilize the progressive side of the Republican Party for his 1912

should the Court try to follow “popular opinion,” it would be like one who tries to follow a single rabbit on a particular trail after letting loose ten rabbits over a field of snow (implying that “public opinion” was in the eye of the beholder).<sup>185</sup>

The debate continued<sup>186</sup> and intensified as Roosevelt began his campaign for president in earnest; by 1912, he formalized his complaints into a proposal that state court judgments should be submitted to the people for review. Today, this is known—somewhat deceptively—as one form of “recall.” What is forgotten is that every step of the way, Roosevelt invoked the “Bakeshop Case.” In response, *Lochner*’s proponents characterized Roosevelt’s support for popular rights as support for majority tyranny.<sup>187</sup> In a 1912 speech at Carnegie Hall in New York,<sup>188</sup> Roosevelt responded to this criticism by alluding to *Lochner* as an example of judicial “tyranny.”<sup>189</sup> Expressing his “scant patience” for the view that he supported the tyranny of the majority, Roosevelt countered that a tyranny of the minority stood behind “the present law of master and servant, the sweat-shops, and the whole calendar of social and industrial injustice.”<sup>190</sup> If the majority really were tyrannous, Roosevelt claimed, “no written words” were strong enough to stay tyranny.<sup>191</sup>

All of this enraged President Taft, who insisted that the Constitution was

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presidential campaign. *Id.* There is no doubt that the judiciary was an easy political target and was likely to get Roosevelt a number of working-class votes. On the other hand, the fact that his criticism both pre- and post-dated the 1912 campaign, and reached back to his days in the New York legislature, when the New York Court of Appeals struck down attempts to regulate the cigar industry, may suggest that Roosevelt was a popular constitutionalist at heart. *See id.* at 139-40. Roosevelt would claim that he was fighting the Socialists, and indeed elimination of judicial review was part of the Socialist platform in the 1912 campaign. *Id.* at 141, 151.

185. *The Judge and the Rabbit*, *supra* note 181, at 12.

186. *T.R. Criticizes Court Again*, WASH. POST, Aug. 3, 1911, at 3 (discussing the “bakeshop case”); *T.R. for Court Curb*, WASH. POST, Oct. 21, 1911, at 1 (using the “bakeshop case” again as an example). Roosevelt’s criticisms of other decisions, such as a New York state decision against worker’s compensation legislation, ultimately came back to *Lochner*. *Extension of Popular Power*, BANKERS’ MAG., June 11, 1911, at 712 (quoting Roosevelt: “It is out of the question that the courts should be permitted permanently to shackle our hands as they would shackle them by decisions as this, as . . . the decision in the bakeshop cases shackled them.”). For other references to the Bakeshop Case during the campaign, *see* Theodore Roosevelt, *Judges and Progress*, OUTLOOK (N.Y., N.Y.), Jan. 6, 1912, at 40; Theodore Roosevelt, *The Right of the People to Rule*, OUTLOOK (N.Y., N.Y.), Mar. 23, 1912, at 618; *see also Maud Malone Stops Roosevelt*, N.Y. TIMES, Mar. 26, 1912, at 1 (Bakeshop Case); *Roosevelt Answers Cry of Revolution*, *supra* note 133, at 1 (Bakeshop Case); *Roosevelt Assails Political Enemies*, N.Y. TIMES, Aug. 18, 1912, at 1 (Bakeshop Case); *Roosevelt Hits At Taft Again*, N.Y. TIMES, Mar. 21, 1912, at 1 (Bakeshop Case); *T.R. Tears Into Taft*, WASH. POST, May 21, 1912, at 1 (Bakeshop Case); *Will Support Nominee, Declares Roosevelt*, BOSTON DAILY GLOBE, Feb. 27, 1912, at 1 (Bakeshop Case). This provoked responses from some, like Harlan’s son, who claimed to disavow Roosevelt’s reliance on his father. *See Hits T.R.’s Doctrine*, WASH. POST, July 11, 1912, at 3 (Bakeshop Case).

187. *See T.R. Tears into Taft*, *supra* note 186, at 1.

188. *Id.*

189. *Id.* at 4.

190. *Id.*

191. *People’s Rule Theme of Col. Roosevelt*, *supra* note 184, at 1.

the “supreme issue” of the election.<sup>192</sup> Taft even told campaign audiences that he was confident that the American people “will never give up the Constitution, and they are not going to be honey-fugled out of it by being told that they are fit to interpret nice questions of constitutional law just as well or better than Judges.”<sup>193</sup> Both candidates eventually lost to Woodrow Wilson, but *Lochner* remained part of Roosevelt’s speeches.<sup>194</sup>

Enter Columbia Law Professor Charles Warren, who responded to Roosevelt in a series of highly publicized articles in which he argued that the Court’s decisions were in fact quite progressive.<sup>195</sup> Given the juristic tale told in Part II, Warren could mount, without much difficulty, an empirical case that the Court was in fact fairly progressive. Rather than telling a story of rights as thwarting social progress, he told a story of evolution: “The tendency of the present-day mind is unquestionably to tolerate increased restriction of the individual by the State, in the interest of the general public welfare.”<sup>196</sup> Warren explained that “[t]he rights of an individual will vary,” depending on whether they “lie within or outside the scope of the police power.”<sup>197</sup>

Warren’s claims received a good deal of public attention for a law review article. The *New York Times* repeated his argument that, of 548 cases, the Court had only struck down three state laws, with *Lochner* being the one case of “real importance.”<sup>198</sup> Warren’s study similarly impressed the *Los Angeles Times*, which summarized the Court’s actions in great detail, noting a long list of decisions upholding laws regulating liquor, gambling, food, securities, and agriculture; permitting marketing societies; and upholding anti-trust and anti-railroad measures.<sup>199</sup> The writer, Tom Fitch, was even more impressed that Warren had unmasked Roosevelt’s claims:

The Socialists and their Progressive allies are accustomed to indulge in diatribes against the Supreme Court of the United States, and to accuse its members of being the friends if not the serfs of trusts and monopolies . . . . Those blatherskiting reformers who claim that the

192. WILLIAM HOWARD TAFT, SPEECH OF WILLIAM HOWARD TAFT ACCEPTING THE REPUBLICAN NOMINATION FOR THE PRESIDENT OF THE UNITED STATES (Aug. 1, 1912), S. DOC. No. 62-902, at 11 (1912).

193. *All Taft Wants Is A Square Deal*, N.Y. TIMES, Mar. 20, 1912, at 4 (honey-fugled); see also ROSS, *supra* note 106, at 149 (supreme issue of the campaign).

194. *Roosevelt Cries War to Knife on Both Old Parties*, *supra* note 136, at 1 (referring to Bakeshop Case); *Roosevelt Warns of Judicial Perils*, N.Y. TIMES, Nov. 8, 1913, at 6 (same).

195. Warren, *supra* note 19, at 295; see also Charles Warren, *A Bulwark to the State Police Power—The United States Supreme Court*, 13 COLUM. L. REV. 667 (1913) [hereinafter Warren, *Bulwark*].

196. Warren, *Bulwark*, *supra* note 195, at 667; see also *The Federal Supreme Court*, ATLANTA CONST., Apr. 12, 1913, at 4; Jerome Michael, *The Supreme Court A National Bulwark*, ATLANTA CONST., Apr. 12, 1913, at 4.

197. Warren, *Bulwark*, *supra* note 195, at 668.

198. *A Progressive Court*, N.Y. TIMES, Apr. 7, 1913, at 8.

199. Tom Fitch, *Our Genuinely Progressive Supreme Court*, L.A. TIMES, Apr. 18, 1913, at II-6; see also *The Federal Supreme Court*, *supra* note 196, at 4; Michael, *supra* note 196, at 4.

court is an obstacle to what they call “social justice” legislation when asked to name the decisions of the court which warrant their animadversions refer to the case of *Lochner vs. New York*, decided about eight years ago . . . . One swallow does not make a summer, and this one case, even if it be subject to criticism, ought not to put our highest tribunal under a ban.<sup>200</sup>

None of this criticism restrained Roosevelt, who continued to rail against the judicial “peril” and to cite *Lochner*.<sup>201</sup> In 1913, in setting forth his agenda for the future of the Progressive Party, Roosevelt used the “Bakeshop Case” to argue that the people needed to take back sovereignty over questions of law.<sup>202</sup> In 1914, Roosevelt lambasted or embraced judges in his *Outlook* columns depending upon whether they adopted Holmes’s views on the “New York Bakeshop Case.”<sup>203</sup> Roosevelt quoted at length from Holmes’s dissent, even as he acknowledged that by then the “Bakeshop Case has now been well-nigh repealed by various other decisions,”<sup>204</sup> presumably referring to *Muller v. Oregon*.<sup>205</sup> Ex-president Taft replied in agreement, stating that the fault lay with the elective judiciary, not the Supreme Court, and that the Court had shown its adaptability.<sup>206</sup> Taft even agreed that “if the New York bakeshop case were to come before the present court the law would not be declared unconstitutional.”<sup>207</sup>

By then, *Lochner* had a public life of its own, invoked by the press even in the absence of presidential contest. When *Muller v. Oregon* headed to the Supreme Court, journalists remembered *Lochner*.<sup>208</sup> When, in 1917, the Court in *Bunting v. Oregon* let the Oregon hours law stand, *Lochner* was remembered.<sup>209</sup> Even when the Court appeared to embrace progressivism,<sup>210</sup>

200. Fitch, *supra* note 199, at 116.

201. *Roosevelt Cries War to Knife on Both Old Parties*, *supra* note 136, at 1; *Roosevelt Warns of Judicial Perils*, *supra* note 194, at 6.

202. See, e.g., *Roosevelt Warns of Judicial Perils*, *supra* note 194, at 6.

203. Theodore Roosevelt, *The Right of the People to Review Judge-Made Law*, 97 *OUTLOOK* 843, 845 (1911).

204. See, e.g., *Colonel Roosevelt on the Big Stick and the Square Deal*, *supra* note 163, at 2. Roosevelt analogized to the Dred Scott decision: “It . . . [was] necessary to reverse the Dred Scott case in the interest of the people against slavery and privilege; just as later it became necessary to reverse the New York Bakeshop case in the interest of the people against that form of monopolistic privilege which puts human rights below property rights where wage-workers were concerned.” Theodore Roosevelt, *Chapters of a Possible Autobiography*, *BOSTON DAILY GLOBE*, Feb. 1, 1914, at SM10.

205. 208 U.S. 412 (1908).

206. *Mr. Taft on the Judiciary*, *MORNING OREGONIAN*, June 3, 1914, at 10.

207. *Id.*

208. *Building Up Industrial Liberty*, *OUTLOOK* (N.Y., N.Y.), Apr. 26, 1916, at 939 (discussing *Lochner* in relation to the Brandeis brief filed in *Muller v. Oregon*).

209. *The Oregon Ten-Hour Law for Men Appealed Again*, *OUTLOOK* (N.Y., N.Y.), Mar. 7, 1917, at 399 (discussing *Lochner*).

210. I say “appeared to embrace” because fairly salient cases of this period showed that the Court was willing to uphold social reformist legislation. See *Wilson v. New*, 243 U.S. 332 (1917) (upholding the power of the Interstate Commerce Commission, and a federal statute that mandated

commentators did not forget *Lochner*.<sup>211</sup> The Court remembered *Lochner* when it struck down Congress's first and second efforts to regulate child labor.<sup>212</sup> Senator Robert La Follette remembered *Lochner* when he proposed a constitutional amendment to permit Congress to reenact any federal statute the Court had declared unconstitutional and to prohibit any federal judge from striking it down.<sup>213</sup> Senator William Borah remembered *Lochner* when he introduced a plan to require the concurrence of at least seven members of the Court in any decision invalidating a federal law.<sup>214</sup> In 1923, *Lochner's* infamy was firmly sealed in the reaction to the Court's decision in *Adkins v. Children's Hospital*.<sup>215</sup> *Adkins* struck down a minimum wage law for women by partially relying on *Lochner*, despite Justice Holmes's admonishments, in his *Adkins* dissent, that *Lochner* should be given a rest.<sup>216</sup> By then, the epithet "notorious"<sup>217</sup> had been firmly attached to the case.<sup>218</sup>

### B. The Academic Elite and the Popular Story

The story that Roosevelt popularized—the story of strong rights—had an academic following that would form the backbone of modern academics' misunderstanding of *Lochner*. To defend himself against attacks from the bar,<sup>219</sup> Roosevelt relied upon Dean Pound's 1909 *Yale Law Journal* article,

an eight-hour day for railroad workers); *Hoke v. United States*, 227 U.S. 308 (1913) (White Slave Act); *Second Employers' Liab. Cases*, 223 U.S. 1 (1912) (worker's compensation schemes); *Hipolite Egg Co. v. United States*, 220 U.S. 45 (1911) (Pure Food and Drug Act). Hostility to labor, meanwhile, continued. *See, e.g., Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229 (1917).

211. *See Burdick, supra* note 103, at 162 ("[T]he *Lochner* case was in effect overruled . . ."); Jackson Harvey Ralston, *Shall We Curb the Supreme Court?*, 71 FORUM 561 (1924).

212. *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *see also Child Labor Law Invalid*, OUTLOOK (N.Y., N.Y.), June 12, 1918, at 245, 248 (referring to *Bakeshop Case*). According to William Ross, the Court's invalidation of child labor laws in *Dagenhart* was the spark that lit the fires of criticism against the Court in the years 1922-24. ROSS, *supra* note 106, at 169. *See, e.g., Bailey v. Drexel Furniture*, 259 U.S. 20 (1922) (second child labor case).

213. ROSS, *supra* note 106, at 194.

214. *Id.* at 218; *see also Five to Four Decisions As Menace to Respect for Supreme Court*, N.Y. TIMES, Feb. 18, 1923, at XXI (speech by Idaho Senator William Borah referring to *Lochner*).

215. 261 U.S. 525 (1923).

216. *Id.* at 570 (1923) (Holmes, J., dissenting).

217. *Does the Constitution Prevent Justice?*, OUTLOOK (N.Y., N.Y.), Apr. 18, 1923, at 694. ("It is significant that, in finding the National Minimum Wage Law invalid, the Supreme Court cited a decision which the Chief Justice assumed had been overruled and Mr. Justice Holmes supposed 'would be allowed a deserved repose.' This is the decision in the famous, or, some would say, the notorious *Lochner* case."). *See also The Minimum Wage Decision*, 96 CENT. L.J. 147 (1923) (reprinting Holmes's dissenting reference to *Lochner* as a decision he "had supposed . . . would be allowed a deserved repose"); Ralston, *supra* note 211, at 561.

218. *Law the Servant of Life*, 130 NATION 534 (1930) (criticizing the Court and using as an example a law restricting "bakeshops" to ten hours a day).

219. *See, e.g., A Review of the World, supra* note 163 ("Mr. Roosevelt is no lawyer, and his description of these two court decisions has been promptly attacked as entirely wrong and wholly misconceived.").

*Liberty of Contract*.<sup>220</sup> Pound, in turn, had quoted Roosevelt in the opening paragraphs of the article.<sup>221</sup>

Pound claimed that the Court based its holding in *Lochner* on the false belief that the right to contract had a strong history. Pioneering realist critiques of law, Pound charged that the right to contract was part of a “mechanical jurisprudence”<sup>222</sup> that exaggerated “private right at the expense of public right.”<sup>223</sup> According to Pound, the right to contract had no foundation in history other than stray remarks by philosophers about the natural right to contract and Adam Smith’s *laissez-faire* philosophy.<sup>224</sup> Modern scholars take Pound’s piece to signify that the right to contract was strong during that era.<sup>225</sup> But this is a misreading. Rather, reading the article in full makes it clear that Pound believed that by the time of *Lochner*, the law regarding the right to contract had changed. *Lochner* was a “reactionary view,” even when the Court decided it in 1905.<sup>226</sup> So, too, *Adair* was a throwback to the courts of “twenty years before,” he wrote.<sup>227</sup> By the time he was writing, in 1909, Pound had to admit that even state courts, the apparent bastion of reactionary decisions, had begun to recognize the “actual facts of inequality as between employer and employee in bargaining for labor in many sorts of employment.”<sup>228</sup> In short, Pound found *Lochner* controversial because the Court’s refusal to apply the police power in such a case was already anachronistic, not because the Court had created a new super-strong right or refused to rely upon the text of the Constitution.<sup>229</sup>

Thus, Pound never explicitly refuted the forgotten juristic story of

220. See Pound, *supra* note 16; see also HORWITZ, *supra* note 91, at 34 (“Roscoe Pound’s powerful article on ‘Liberty of Contract’ . . . represented the most important early reaction of legal Progressivism to the *Lochner* decision and its progeny.”).

221. Pound, *supra* note 16, at 454-55 (“The late President [referring to Roosevelt] has told us that it is because individual judges project their personal, social and economic views into the law.”).

222. *Id.* at 457.

223. *Id.*

224. *Id.* at 463 (“Legislation designed to give laborers some measure of practical independence, which, if allowed to operate, would put them in a position of reasonable equality with their masters, is said by courts, because it infringes on a theoretical equality, to be insulting to their manhood and degrading, to put them under guardianship, to create a class of statutory laborers, and to stamp them as imbeciles.” (footnote omitted)).

225. See Richard Pildes, *Conceptions of Value in Legal Thought*, 90 MICH. L. REV. 1520, 1531 (1992).

226. Pound, *supra* note 16, at 479 (“In *Lochner* . . . the Supreme Court . . . took the reactionary view, as it had fairly become by this time . . .”).

227. *Id.* at 481 (discussing *Adair* and similar cases and stating that the position that the public had no interest in health and safety from preventing strikes was “practically the position from which we found the courts starting twenty years before”).

228. *Id.* at 486.

229. This is not an idiosyncratic reading of the piece; as one commentator explained at the time, “it is fairly certain that Dean Pound and Mr. Justice Holmes were arguing not that liberty of contract ought not be included in the ‘liberty’ of the Fourteenth Amendment but that the concept was only relative and restricted by the demands of social well being.” Brown, *supra* note 43, at 951.

*Lochner*, in which the police power was capable of trumping rights. Moreover, after dubbing *Lochner* a throw-back, Pound came to conclusions quite consistent with the doctrinal story:

It will be seen that [the *Lochner*] opinion assumes two propositions of fact: (1) That the public has no concern in how long a baker works . . . [and] (2) that there is nothing in the trade of baking, as carried on in large cities, inimical to the health of those who are employed in it for long hours at a stretch. Here again study of the facts has shown that the legislature was right and the court was wrong. Actual investigation has shown that the output of shops in which the only kind of men who can be had to work for unreasonable hours under unsanitary conditions are employed, is not at all what the public ought to eat, and that long hours in shops of the sort are distinctly injurious to health.<sup>230</sup>

Pound was not the only academic who has left the impression that the *Lochner* Court adopted a view of strong rights; no one was more responsible for propagating this “strong rights” theory than political scientist Edward Corwin.<sup>231</sup> As early as 1909, Corwin repeatedly told the story that many modern scholars have adopted: the *Lochner* Court had reinterpreted “the Fourteenth Amendment in the light of the principles of Lockian individualism and Spencerian *Laissez Faire* . . . .”<sup>232</sup> Corwin based his view on a history of “vested rights,”<sup>233</sup> and over time, it gained vast numbers of scholarly adherents.<sup>234</sup> Ironically, academics read his work and assumed a juristic story

230. Pound, *supra* note 16, at 480. Learned Hand also inveighed against the artificiality of the Court’s distinctions in *Lochner*. Agreeing with Harlan’s *Lochner* dissent, Hand argued that the eight-hour law should fall within the state’s police power: “[I]f the measure may possibly promote the ‘welfare’ of the public, then it is valid. There would seem to be so direct a relation between the welfare of a worker and the hours of his work that no doubt could be raised about it . . . .” Learned Hand, *Due Process and the Eight-Hour Day*, 21 HARV. L. REV. 495, 503 (1908).

231. “When the Progressives took over American constitutional history they pretty well wiped out internal-doctrinal and intellectual-approaches among the historians, leaving these to be cultivated . . . by political scientists like Corwin and McIlwain.” Gordon, *J. Willard Hurst, supra* note 20, at 19.

232. Edward S. Corwin, *The Supreme Court and the Fourteenth Amendment*, 7 MICH. L. REV. 643, 646 (1909) [hereinafter Corwin, *Fourteenth Amendment*]; see also Edward S. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247 (1913); Edward S. Corwin, *The “Higher Law” Background of Constitutional Law I*, 42 HARV. L. REV. 149 (1928); Edward S. Corwin, *The “Higher Law” Background of Constitutional Law II*, 42 HARV. L. REV. 365 (1929). For other critiques, see Bruce, *supra* note 92; *Jetsam and Flotsam*, 69 CENT. L. J. 362 (1909).

233. See Corwin, *Fourteenth Amendment, supra* note 232, at 643.

234. See, e.g., Felix Frankfurter, *The Constitutional Opinions of Justice Holmes*, 29 HARV. L. REV. 683, 690 (1915) (explaining that the Court had “sought to pour into the general words of the Due Process Clause the eighteenth century ‘law of nature’ philosophy”); Walton Hamilton, *The Path of Due Process of Law*, 48 ETHICS 269, 293 (1938) (“A constitutional doctrine contrived to protect the natural rights of men against corporate monopoly was little by little commuted into a formula for safeguarding the domain of business against the regulatory power of the state.”); Lowell J. Howe, *The Meaning of “Due Process of Law” Prior to the Adoption of the Fourteenth Amendment*, 18 CALIF. L. REV. 583, 593 (1930) (“The weakness in the theory . . . is that, when made a basis for judicial review, it merely substitutes the opinion of the judge

that was more in tune with Theodore Roosevelt's account of the Court than with the Court's actual doctrine.

The academic fashion of the day—realism<sup>235</sup>—unwittingly aided in the project and enabled Corwin and Pound to triumph over Warren. For example, Professor Ray Brown criticized the Court in 1928 for making policy and argued that liberty was not an inalienable and God-given “possession[] of a sacrosanct individual,” but rather something created by social institutions.<sup>236</sup> Regardless of whether Brown or other realists correctly asserted the socially constructed nature of property rights or liberty, the “realist” attack on the courts reduced the doctrine to its particularly salient results: rights could and were thwarting popular will, and hence they were strong. In this fashion, Theodore Roosevelt's popular constitutionalist view, buttressed by academics like Pound and Corwin, ultimately would become academic orthodoxy.

#### IV IMPLICATIONS

How are we to understand the relationship between the juristic and popular stories of *Lochner*, the former in which rights were doctrinally weak, the latter in which they were politically strong? In this part, I explore four implications of this history: (1) the strong and falsely dichotomous view of law and politics held by *Lochner* critics and supporters; (2) the promise of a newly realist historiography embracing the simultaneity of law and politics, and refusing to reduce one to the other; (3) the grounding of this “double history” in constitutional structure and thus the inevitability of popular constitutionalism; and (4) the impact of this history on substantive due process theory and doctrine.

##### A. What Revisionists and Counter-revisionists Wrongly Share

*Lochner* revisionism has generated a veritable cottage industry of claims. Revisionist historians argue that *Lochner* was a product of doctrine, not laissez-faire bias, thereby challenging the conventional wisdom that *Lochner* was a politically-inspired decision.<sup>237</sup> Some, such as political scientist Howard Gillman, argue that the Court developed a coherent doctrine grounded in the

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for that of the legislator as to what is fundamentally just.”).

235. Realism, which had many manifestations, was a movement that emphasized that judicial decisions were influenced by political or social considerations; the realists challenged the notion that doctrinal reasons were complete. See generally BRIAN LEITER, NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY 24 (2007) (“The real dispute between the Formalist and the Realist then concerns whether the reasons that determine judicial decision are primarily legal reasons or non-legal reasons.”).

236. Brown, *supra* note 81, at 885.

237. For a review of some of the revisionism, see Bernstein, *supra* note 16 (summarizing this debate in the legal and historical literature); Friedman, *supra* note 3; Rowe, *supra* note 21; White, *supra* note 23. In the historical literature, this move begins a good deal earlier.

ancient concept of “class legislation,” which aimed to achieve equality of right.<sup>238</sup> David Bernstein now asserts that this is the accepted view among historians (even if most lawyers and constitutionalists would never know it).<sup>239</sup> Counter-revisionists have in turn contended that the revisionist account forgets the ways in which critics saw *Lochner* at the time.<sup>240</sup>

One of the great lacunas in this debate is the very notion of right. Lacking expertise in the law, historians and political scientists on both sides of the debate have simply misunderstood the doctrine in crucial places. Revisionist political scientists like Howard Gillman bravely and brilliantly challenged the status quo, but they failed to appreciate the nuances of the relationship between due process and equal protection.<sup>241</sup> Counter-revisionists misinterpreted the notion of the police power.<sup>242</sup> The common mistake is that both revisionists and counter-revisionists have imported a presentist doctrinal notion of right into the past, assuming that since *Lochner* was a case about the right to contract, that right must have been a strong one—a right-as-trump. Some have even suggested the anachronistic conclusion that *Lochner* foreshadowed the rights discourse of the post-World War II era.<sup>243</sup> In short, neither revisionists nor counter-revisionists have properly engaged with the historically dynamic notion of right, a serious omission.

At stake here is a larger vision of history, not just an academic debate about a single case. The scholarly consensus today views the *Lochner* era as one of strong property and contract rights, the height of laissez-faire liberalism.<sup>244</sup> A modern association of strong property rights with anti-regulation, which Richard Epstein popularized in his *Takings*, has led many to assume that the *Lochner* era was not only the age of strong property rights, but also the halcyon days of the night-watchman state, in which little or no significant regulation existed.<sup>245</sup> History defies this assumption. During the

238. See GILLMAN, *supra* note 11.

239. See Bernstein, *supra* note 3, at 12 (“historians have generally adopted Howard Gillman’s thesis”).

240. See Friedman, *supra* note 3, at 1402-28.

241. Gillman’s argument that class legislation ideals explain the cases we today dub as “substantive due process” fails to take into account that class legislation was a doctrine of equal protection as much as of due process. On Gillman’s confusion of equal protection with due process, see Nourse & Maguire, *supra* note 39.

242. Compare KENS, *supra* note 160, at 107 (describing Justice Field’s view of due process as one which depended upon a “very narrow definition of what that power encompassed”), with Justice Field’s statements in *Crowley v. Christensen*, 137 U.S. 86, 89 (1890) (“[T]he possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed . . . essential to the safety, health, peace, good order and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one’s own will.”).

243. Bernstein, *supra* note 3.

244. See, e.g., Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 788 (1994) (criticizing the “property worship” of the *Lochner* era); Cloud, *supra* note 6, at 556 (equating *Lochner* with strong rights).

245. See *supra* text accompanying notes 18-19.

Progressive Era, reformers passed statute after statute aimed at solving social problems, from food and drug to sexual morality to eugenics laws, from regulation of securities to agriculture to sanitation.<sup>246</sup> As then-professor and future justice Felix Frankfurter wrote of the period, “It was a period of legislative exuberance, both at Washington and in the states.”<sup>247</sup> No fair characterization of legislation during this period could call it the day of the night-watchman state.<sup>248</sup>

Thus, we must consider the fact that the standard historiographical views, which shun internal accounts,<sup>249</sup> have underestimated its power. The *Lochner* camps, both internalists and externalists, share a strong dichotomous view of law and politics. To them, an event or idea can only fall into a single category at a time—it is either law *or* politics. *Lochner*’s history is a central example: entire schools of thought (both revisionist and counter-revisionist historians) appear to agree that law and politics are competing, and complete, explanations.

If my account is correct, however, failure to attend to the internal may lead to gross distortions of the external. In *Lochner*’s case, the average constitutionalist assumes that the case was representative—that it stood for a much larger universe of cases imposing a strong right. At least until recently, legal historians have accepted this account, despite the rather overwhelming empirical evidence to the contrary.<sup>250</sup> This leads to a rather odd reversal. Based

246. See sources cited *supra* note 18.

247. Felix Frankfurter, *Mr. Justice Holmes and the Constitution*, 41 HARV. L. REV. 121, 128 (1927).

248. See, e.g., MCGERR, *supra* note 141; see also RICHARD ABRAMS, *CONSERVATISM IN A PROGRESSIVE ERA: MASSACHUSETTS POLITICS 1900-1912*, at 3 (1964); JOHN WHITECLAY CHAMBERS II, *THE TYRANNY OF CHANGE: AMERICA IN THE PROGRESSIVE ERA, 1900-1917* (1980); LEWIS L. GOULD, *REFORM AND REGULATION: AMERICAN POLITICS 1900-1916* (1978); RICHARD HOFSTADTER, *THE AGE OF REFORM* (1955); MARC KARSON, *AMERICAN LABOR UNIONS AND POLITICS, 1900-1918*; WILLIAM E. LEUCHTENBURG, *THE PERILS OF PROSPERITY* (1958); ARTHUR S. LINK, *WOODROW WILSON AND THE PROGRESSIVE ERA 1910-1917* (1954); GEORGE E. MOWRY, *THE ERA OF THEODORE ROOSEVELT, 1900-1912* (1958); DAVID SARASOHN, *THE PARTY OF REFORM: DEMOCRATS IN THE PROGRESSIVE ERA* (1989); ROBERT H. WIEBE, *BUSINESSMEN AND REFORM: A STUDY OF THE PROGRESSIVE MOVEMENT* (1962); MICHAEL WILLRICH, *CITY OF COURTS: SOCIALIZING JUSTICE IN PROGRESSIVE CHICAGO* (2003). Though scholars have some deep historiographic differences in approaches toward the Progressive Era, see, e.g., SARASOHN, *supra*, at vii-xvii, few argue that the era embraced a minimal state.

249. Legal historians have, for some time, had great contempt for legal doctrine on the theory that it was simply the epiphenomenal reflection of greater social movements or interests. As Bob Gordon once expressed it: “The internal legal historian stays as much as possible within the box of distinctive-appearing legal things; his sources are legal, and so are the basic matters he wants to describe or explain . . . . The external historian writes about the interaction between the boxful of legal things and the wider society . . . and he is usually looking for conclusions about those effects.” Gordon, *J. Willard Hurst*, *supra* note 20, at 11. The latter claim for an externalist view depends upon a causal assumption that society is prior to law. The questions this history raises are whether there are different, and more complex, relations at issue; how the internal and external operate in parallel; and how visions of the internal can affect our views of the external.

250. See *supra* note 19.

on an essentially internal misreading of *Lochner* as a strong rights case (one dependent upon what behavioral economists call the “focalism illusion”),<sup>251</sup> historians offer an external strong-rights account that *Lochner* is based on laissez-faire politics. That view, in turn, implies a partial and false external story that the period was starkly anti-regulation.

The truth is that historians’ internal/external distinction trades on the law/politics dichotomy, rather than making it the object of historical inquiry. Realists inspired the practice of reducing the internal to the external, which conflates the effects of the doctrine with the doctrine itself. Realist historiography rebelled against a generation that idealized the progressive evolution of the common law and replaced it instead with one that emphasized “the irrelevance of the past to the solution of current problems.”<sup>252</sup> In a world in which history was treated with contempt, it is not surprising that history would be lost or mangled.

### *B. After Law or Politics: Principles for a New Legal Realism*

The debate between *Lochnerian* revisionists and counter-revisionists performs the very drama that it seeks to study by participating in the great debate of twentieth century legal theory: law versus politics. Revisionists foreground lost doctrine, asserting that in framing the *Lochner* decision, law was more powerful than previously thought. Counter-revisionists foreground politics, seeking to hold on to the more conventional narrative that *Lochner* was influenced by politics, not by law. This very opposition is itself historically contingent; the revisionists and counter-revisionists replay the arguments of Professor Warren (the doctrine) and Professor Pound (the politics).<sup>253</sup>

If my account is correct, both stories of *Lochner* existed and occurred simultaneously. Choosing between them, or reducing one to the other, is to embrace a false history. Elite legal discourse dictated that even the *Lochner* opinion itself would have to deal with the police power and the categories of conventional legal discourse. At the same time, Theodore Roosevelt made it the subject of high-level politics. It is important to understand the implications of this double history for other theoretical debates.

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251. John Bronsteen, *Hedonic Adaptation and the Settlement of Civil Lawsuits*, 108 COLUM. L. REV. 1516, 1533 (2008) (the focalism illusion holds that people tend to think of a focal event in a vacuum, without considering the progress of other life events; the analogy here is to the tendency of lawyers to focus on a single “great case” to the exclusion of the rest of legal doctrine).

252. Gordon, *J. Willard Hurst*, *supra* note 20, at 32.

253. This claim should not be confused with Barry Friedman’s counter-revisionist argument that decisions such as *Lochner* suggest the need for judicial review to attain both social and legal legitimacy. Friedman, *supra* note 3. Friedman is correct to hint at a different history, but it is not because the strong rights *Lochner* story was true of the doctrine, as he implies. The counter-revisionist story was constructed by political reaction to the law, not the juridical understanding itself. To conclude that this was the real story of *Lochner* (as opposed to the more legal story told by Gillman and Bernstein) is to participate in the very debate that one is aiming to study, to simply take the side of law or politics, Warren or Pound.

In real life, no one supposes that law and politics are static, dichotomous alternatives that may be reduced to the other. In a post-realist world, a world that aspires to a “new legal realism,”<sup>254</sup> the question is not about law or politics, but about how these simultaneous discourses imbibe, cross, and come to constitute each other.<sup>255</sup> After all, the great irony of *Lochner* is that an essentially political critique, Roosevelt’s strong-rights view, has become the “doctrinal” understanding of the case. A meta-discursive view, one which aims to move beyond the twentieth-century law/politics dichotomy, would seek to understand how these discourses crossed, intersected, and were translated across the boundaries of law and politics. Three such meta-discursive principles stand out in the two *Lochner* tales I have examined: the principle of condensation, the principle of amplification, and the principle of switching.

*Condensation: Lochner* was a politicized decision, but it is far too broad to suggest that it was propelled by an anti-regulatory, anti-redistributive, or anti-common law bias. The great issue in the *Lochner* era was labor and its association with socialism.<sup>256</sup> Grand fears of socialism were condensed, boiled down, and embedded in the category “labor law,” and it was this condensation that kept the Court adamant about the line it drew in labor cases. Members of the Court believed that they were standing for a far more important, much

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254. For a good discussion of new legal realism, see Howard Erlanger, Bryant Garth, Jane Larson, Elizabeth Mertz, Victoria Nourse & David Wilkins, Forward, *Is It Time for a New Legal Realism?*, 2005 WIS. L. REV. 335. See also Greg Shaffer & Victoria Nourse, *Varieties of New Legal Realism: Can A New World Order Prompt A New Legal Theory?* 95 CORNELL L. REV. (forthcoming Nov. 2009) (manuscript on file with author).

255. As Mark Tushnet has put it, “[t]he idea of something that is simultaneously law and political is obviously unfamiliar to U.S. constitutional theorists today . . . .” Mark Tushnet, *Popular Constitutionalism as Political Law*, 81 CHI.-KENT L. REV. 991, 1005 (2006).

256. Relative to the alternatives, the “labor/socialism” explanation is far more parsimonious. It explains more (with less) than do explanations based on liberty, strong property rights, or a pro-business/anti-regulation bias, all of which should have led to the demise of vast numbers of laws that were in fact upheld. Simply think of the decisions typically associated with the “bad” *Lochner* era and one will find that these cases all involved unionization, wage, or hour restrictions. See *Adkins v. Children’s Hosp.*, 261 U.S. 525 (1923) (minimum wage); *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (child labor); *Coppage v. Kansas*, 236 U.S. 1 (1915) (unionization); *Adair v. United States*, 208 U.S. 161 (1908) (same); *Muller v. Oregon*, 208 U.S. 412 (1908) (hours restriction). These cases are typically vilified because majorities no longer see regulations of child labor or minimum hours restrictions as anything but benign; to the extent the Court thwarted these majoritarian measures, it reversed itself during the Depression and New Deal era. *United States v. Darby*, 312 U.S. 100 (1941); *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Nebbia v. New York*, 291 U.S. 502 (1934). My argument is not that the Court was invariably hostile to labor; in fact, the Court upheld important changes in employers’ liability laws. See, e.g., *Second Employers’ Liab. Cases*, 223 U.S. 1 (1912). The Court did, however, reject basic labor laws (wage, hour and union membership restrictions) that conservatives associated with socialism. Fear of socialism also explains the Taft Court’s hostility to price-fixing in the 1920s, which represents a significant percentage of the cases we now associate with the substantive due process jurisprudence of that period. See, e.g., *Ribnik v. McBride*, 277 U.S. 350 (1928) (striking down regulation of prices charged by employment agencies); *Williams v. Standard Oil*, 278 U.S. 235 (1928) (striking down regulation of gas prices); *Tyson & Bros. v. Banton*, 273 U.S. 418 (1923) (striking down regulation of resale price of theater tickets).

grander principle: fighting the good fight against state socialism. Thus, condensation offers both the justification for and the means of translating larger political principles into legal doctrine.

*Amplification:* when Theodore Roosevelt picked on *Lochner* and talked of “popular rights,”<sup>257</sup> he did not use the legal definition of right. Within public discourse and popular constitutionalism, terms change their meanings, and the slippage can be extraordinary. Since the country’s founding, the term “right” has always been an American call to political arms. Rights in the public sphere connote absolute privilege, but in the legal sphere, a right may be simply a claim. There should be nothing unexpected in this, since the electorate can only understand popular versions of legal concepts as they are expressed by popular figures. Given the nature of the public audience, it is not surprising that politicized versions of legal terms can end up far more simplified than their legal counterparts. Simplification can in turn lead to the amplification of the more modest claims of law.

*Switching:* Over time, *Lochner*’s political tale became its legal tale and its legal tale came to be seen as political. Theodore Roosevelt’s view of strong rights is now the standard view of *Lochner*—even within Supreme Court case law.<sup>258</sup> Meanwhile, the mainstream legal academy has claimed that a political agenda motivates those who have attempted to revise the history by returning to the doctrine.<sup>259</sup> How does this kind of switching occur? It occurs because the structure of the Constitution supports simultaneous legal and popular review. When public review reaches the height of its majoritarian success, it is entrenched in the appointment process. When Felix Frankfurter, Robert Jackson, and Hugo Black ascended to the Supreme Court in the late 1930s and early 1940s, they took with them Theodore Roosevelt’s story of *Lochner*. Once on the bench, they helped write that story into constitutional law.<sup>260</sup>

The original realists were correct when they surmised that doctrine was insufficient to explain judicial decision. But they were wrong to think of law and politics as dichotomous, substitutable, and static. The original realists troubled themselves with the “discovery” that judging was not simply doctrine. The problem with this old realism is that it focused primarily on judging, failing to recognize our Constitution as a larger system—one in which politics

257. *Supra* note 3.

258. *See, e.g.,* MeadWestvaco Corp. v. Ill. Dep’t of Revenue, 128 S. Ct. 1498, 1510 (2008) (Thomas, J., concurring) (“Indeed, divining from the Fourteenth Amendment a right against disproportionate taxation bears a striking resemblance to our long-rejected *Lochner*-era precedents.”); Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 93 (1980) (“If accepted, that claim would represent a return to the era of *Lochner v. New York*: . . . when common law rights were also found immune from revision by State or Federal Government.”).

259. Friedman, *supra* note 3, at 1387-88, 1400 (suggesting that the revisionist account is impelled by a normative agenda).

260. *See Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 90 n.23 (1948) (Frankfurter, J.).

and law not only occur simultaneously, but actually influence each other in ways that we have only begun to theorize. Any new realist approach must understand what parallel history (a thick contextual history) suggests: that our understanding of what is law and what is politics depends not only on institutional constraints, but also on the dynamic relationship between law and politics that is, in fact, decreed by our Constitution.

Once we come to believe that law and politics are not dichotomous, static alternatives, it is possible to recognize without contradiction that law is not determined by, but rather is influenced by, preferences, parties, larger ideologies, and other factors. Then and only then is it possible to give up the nihilistic and extreme position, taken by some early realists, that doctrine and rights do not matter because they are simply the product of naked preference. Then and only then is it possible to name the political theories that have failed law, such as laissez-faire economics. Then and only then is it possible to take the radically moderate position suggested by this double history, which is that realism in constitutional law requires the recognition that all law—including the law of rights—requires an understanding not only of legal doctrine but also of the history of our majoritarian political life.

### *C. Constitutional Structure and the Simultaneity of Popular and Judicial Constitutionalism*

The simultaneity of the two *Lochner* stories implies two forms of simultaneous constitutional review structurally determined by the Constitution itself. We are all familiar with the notion of a court exercising judicial review, a formalized process by which judges, using elite discourse, may strike down a legislative action. The Court exercised such review when it struck down the New York hours law in *Lochner*. Simultaneously, a popular review process occurred when Theodore Roosevelt made *Lochner* a public cause célèbre. Over time, this form of popular review won: *Lochner* was overruled.

The simultaneity story offers both good and bad news for those who support popular constitutionalism.<sup>261</sup> The good news is that historical examples, like the story told here, demonstrate that popular constitutionalism is not, as some take it, simply an ancient form of judicial review.<sup>262</sup> The bad news is that

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261. See LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999) [hereinafter TUSHNET, *TAKING THE CONSTITUTION*]. There are a variety of positions on popular constitutionalism; some emphasize the dialogic aspects of an inter-branch constitutionalism, and others emphasize social movements. See, e.g., Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027 (2004) (social movements); Tushnet, *supra* note 255 (dialogic analysis). My own view is that a form of popular constitutionalism, dualist review, is required by constitutional structure. V. F. Nourse, *Toward a New Constitutional Anatomy*, 56 STAN. L. REV. 835 (2000); Nourse, *Vertical Separation*, *supra* note 135.

262. Kramer seems to suggest that popular constitutionalism has died, a point that others

popular constitutionalism may not have the radical implications that some hope for; it may not take the Constitution away from the courts.<sup>263</sup> The truth is that popular constitutionalism in a less radical form happens all the time: if there is a political incentive to attack the Court, the Court's power of review will be attacked. History shows that on any highly salient issue—not necessarily ones that are legally controversial but rather those that affect people's lives—the Court's constitutional decisions will be debated in the public square.

Our constitutional structure creates a proliferation of voices and allows numerous places for the exercise of political dissent and deliberation. If one does not like what the President does, one can petition the House, the Senate, or the courts. Similarly, if one does not like what the courts have done, one can petition the House, the Senate, the President, or the states. Courts and politicians operate simultaneously on issues. This structure creates the continuing inevitability of popular constitutionalism, since “the electoral connection” to the people gives politicians the incentive to make popular constitutionalist arguments.<sup>264</sup>

Theodore Roosevelt targeted *Lochner* because he had a constitutional incentive to do so. One must convince vast majorities to win the presidency, and this was Roosevelt's purpose in urging majorities to rise up against a selfish Court, using the Bakeshop Case as a symbol.<sup>265</sup> As a legal matter, Roosevelt was distorting the Court's record; Charles Warren was correct that the Court from 1900 to 1920 was mildly progressive. But as a constitutional matter, Roosevelt was doing what he was supposed to be doing: mobilizing majorities to proclaim that the Court's most salient decision was deeply countermajoritarian. In this respect, he would prove to be prescient. Almost twenty years later, Franklin Roosevelt completed what Theodore Roosevelt had begun: he gained a public mandate that supported labor and used it to force the Court to reverse itself.<sup>266</sup>

Popular deliberation of constitutional issues is not a radical oddity,<sup>267</sup> but

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reject. Compare KRAMER, *supra* note 261, with William E. Forbath, *Reflections on the Dark Side, The Progressive Constitutional Imagination, and the Enduring Role of Judicial Finality in Popular Understandings of Popular Self-Rule*, 81 CHI.-KENT L. REV. 967 (2006). I would go further and argue that popular constitutionalism is structurally determined, even if it rarely works to “reverse” any particular decision and even if the public remains, as Forbath rightly notes, wedded to a form of judicial finality. See NOURSE, *supra* note 18, at ch. 7 (recounting in detail the hostility of the public to FDR's court-packing plan despite their deep disagreement with the Court's decisions).

263. TUSHNET, *TAKING THE CONSTITUTION*, *supra* note 261.

264. Nourse, *Vertical Separation*, *supra* note 135, at 781-88.

265. In this sense, I agree with William Forbath that “[p]opular constitutional politics has never been motivated” by the principle of popular constitutionalism so much as the immediate political demands of the hour. Forbath, *supra* note 262, at 968.

266. *United States v. Darby*, 312 U.S. 100 (1941) (reversing the child labor case—*Hammer v. Dagenhart*, 247 U.S. 251 (1918)); *W. Coast Hotel v. Parrish*, 300 U.S. 379 (1937) (reversing decision on minimum wage).

267. Under an extreme view of popular constitutionalism, all constitutional decisions

a constitutional inevitability in cases in which the Court's results violate prevalent majoritarian sentiments. This is the great beauty and sorrow of our constitutional structure.<sup>268</sup> It is a beauty since the people do have the power to reign in the Court—eventually. It is a sorrow because popular resistance may be latent for long periods of time, waiting for politicians to take on the Court through transformative appointments, presidential clashes, social movements, or even a formal amendment. Regardless, history reveals that popular constitutionalism and judicial review do not exclude each other. Theodore Roosevelt's campaign against *Lochner* is proof of that proposition.

#### *D. The Future of Substantive Due Process*

For over fifty years, from 1880 until 1937, American constitutional jurisprudence was neither particularly textual nor particularly focused on original intent; indeed, it was not focused on interpretation as constitutionalists are today. The country survived, railroads and markets grew, the Jazz Age flourished, and the states experimented with regulation. It was the high age of common law constitutionalism, one whose principal concept was neither precise nor enumerated: the police power. Today, we live in a different age, one in which many associate the flexibility of common law constitutionalism with danger and tout textualism as the great antidote to the failures of the past.<sup>269</sup>

Unlike those who would insist that substantive due process originated with *Lochner* and its kin, I believe it is an invented tradition,<sup>270</sup> created decades after *Lochner* was decided. Under the old juristic model used in *Lochner*, courts would not have asked whether there was a right to die or a right of privacy. They would have assumed such rights were reserved as liberty, making the question of defining rights irrelevant. Then, doubts were resolved in favor of a right and the principal inquiry was whether the police power supported regulation. In contrast, today's substantive due process cases begin by inquiring into right, not power; assert a strong rather than weak idea of right; and idealize enumeration over reserved liberty. None of this controlled the doctrine of old. In short, there is nothing remotely *Lochnerian* about the substantive due process cases of the post-1960 period. This is a descriptive claim, not a

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should be taken from the Court and given to the people, a procedure that would appear to sanction majoritarian and illiberal decisions from Japanese concentration camps to eugenics to, in the worst case scenario, a decision to one day disband the Congress or dismiss the President. This is what causes concern with the theory.

268. The first person to recognize this was, in my view, ACKERMAN, *supra* note 40, at 269. Whatever one thinks of Ackerman's history, he is right that the amendment process is a quite limited means of constitutional change and that its difficulty has forced the use of alternate means: the separation of powers.

269. See generally SCALIA, *supra* note 66 (arguing for a closer historical textual reading); see also Akhil R. Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999) (emphasizing not only textual, but intratextual, analysis).

270. See ERIC HOBBSBAWM & TERENCE RANGER, *THE INVENTION OF TRADITION* (10th ed. 2003).

normative one: today's substantive due process cases may be wrong, but they are not wrong because they apply the run-of-the-mill doctrine of the year 1905.

The following hypothetical further supports this proposition. If we were to revive *Lochnerian* notions of right today, most American citizens and judges would find rights dangerously weak rather than overly strong. Under the police power analysis, for example, Congress or the states would have the power to regulate pornography and corporate speech, since harm to the public welfare could trump rights—specifically free speech rights in this scenario. At the same time, the police power might be used to justify everything from eugenics (which was deemed a “health matter”), to a ban on political speech, to torture.<sup>271</sup>

In my own view, rights are vessels of history in two senses of the word. They are vessels in the sense that they are lessons of the past that help guide our future. They are also vessels in the sense that they are containers of memory, and in particular, memories of grave political danger, adopted by majorities to prevent themselves from repeating the lessons they have learned. The rights invoked in the early part of the twentieth century condensed widely held, majoritarian fears of socialism and communism (that wage and hour restrictions and minimum prices would lead to state-sponsored socialism). This governmental fear, based on the taking of private property, lent no urgency to rights outside the economic sphere, whether they were rights of religion or speech or privacy. The rights invoked after World War II reflected entirely different political fears—fears of fascism's racism, religious persecution, and suppression of speech.<sup>272</sup> If this is correct, when one loses history, whether modern or ancient, one loses the meaning that defines the scope of right. And as shown earlier, we have lost the real history of *Lochner*.

What does this loss mean for the future of substantive due process? It means that courts today must acknowledge that strong personal and civil rights—rights subject to strict scrutiny—do not come from the *Lochner* era, but instead the period immediately prior to and after World War II. In the late 1930s, as Hitler and Mussolini engulfed Europe, and the Supreme Court reeled from the court-packing plan, civil and personal rights appeared more pressing than they had before. This is not a history of which we should be ashamed. As I have explained at greater length elsewhere,<sup>273</sup> it is the history of a Court seeking to resist the dangers of Fascism, and it should be celebrated. Put in other words, substantive due process—in the sense of applying strict scrutiny,

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271. See, e.g., NOURSE, *supra* note 18, at ch. 7; *Buck v. Bell*, 274 U.S. 200 (1927).

272. See PRIMUS, *supra* note 28, at 180 (“It is well established that a major change in American conceptions of rights occurred sometime between the 1920s and the 1960s, but many scholars fail to give sufficient emphasis to anti-totalitarianism and especially anti-Nazism when trying to account for that transformation.”).

273. See NOURSE, *supra* note 18, at ch. 7 (explaining this history and how it begins before World War II).

strong rights to the states via the due process clause—began with neither the *Lochner* Court nor the Warren Court.<sup>274</sup>

In this sense, the conventional association of substantive due process with judicial activism invites reconsideration in three ways. First, substantive due process is frequently viewed as tainted because it is associated with grave judicial error, but if we associate it with correct decisions embracing strong civil and personal rights against fears of fascism, then the doctrine should not carry the same historical sting. Second, substantive due process is today associated with the dangers of unenumerated rights,<sup>275</sup> but this question was not one that would have been asked in 1905; at least for the *Lochner* generation, enumeration was considered a danger, not a virtue, for it limited the liberty a court could protect.<sup>276</sup> Third, substantive due process is generally considered a tainted doctrine because it is countermajoritarian. However, it is not at all clear that the early manifestations of substantive due process were in fact countermajoritarian; instead, they were an example of what Derrick Bell has called “convergence,” where majorities are ready to recognize the rights of minorities.<sup>277</sup>

That more extensive and stronger rights may have emerged from World War II does not mean, however, that all is well with substantive due process. Every historical transformation builds future memories by forgetting. Today, we have a notion of rights that is highly inflexible because all depends upon a process of rights-definition. By contrast, the old police power doctrine imagined that no one had an absolute right if its exercise interfered with the rights of others or with public rights. It required a balance between the needs of individuals and the needs of the common welfare. The need for such a balance has not disappeared: one can see its resurgence in a number of areas of current substantive due process law. For example, abortion law has moved from a strong “right to privacy” to a much more moderate “undue burden” test.<sup>278</sup> The affirmative action cases, where strict scrutiny was once very strict but now no longer is, further exemplify this trend. One can see the old idea of reserved rights emerging in cases such as *Lawrence v. Texas*,<sup>279</sup> where the Court refused to enumerate a right and instead spoke of liberty.<sup>280</sup>

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274. See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

275. See *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

276. See *supra* text accompanying notes 61-65.

277. Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

278. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992); *Roe*, 410 U.S. at 153.

279. 539 U.S. 558 (2003).

280. *Id.* at 578-79.

## CONCLUSION

Both liberals and conservatives have, for too long, embraced a false history of *Lochner*. In the 1980s, conservatives like Robert Bork charged that substantive due process was a “momentous sham” that allowed courts to politicize rights discourse.<sup>281</sup> Liberals did precious little to respond to this charge; indeed, they generally accepted it.<sup>282</sup> To the charge that substantive due process was a “momentous sham,” no one replied that the historical premise of the argument was incorrect. No one led the battle to reclaim the memories of the greatest generation, which used the Due Process Clause to make rights of speech and religion strong against fears of fascism, rights that vast majorities now support. And because no one led that battle, a false history was left intact to be revived at the end of the century. By the 1990s, neoconservatives claimed that strong rights began with *Lochner*—that *Lochner* correctly invoked a strong property right, and that this meant that vast amounts of regulation should be attacked as takings of property.<sup>283</sup> History had come full circle. A dream of laissez-faire emerged at the end of the twentieth century just as it had at the beginning. What was lost was all that happened in between: two wars, a Depression, and a constitutional revolution.

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281. I am referring here to the fact that the Fourteenth Amendment’s Due Process Clause was essential to applying the rights of speech and religion to actions by states. Very few people today, however, believe that states may take away the right to speak or to exercise religion; in short, they are unlikely to take the position that this use of the Fourteenth Amendment was an improper use of substantive due process. On Bork, see *supra* note 34.

282. See BORK, *supra* note 34; Ely, *supra* note 2.

283. See RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

