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LOCHNER V. NEW YORK: TRADITION OR CHANGE IN CONSTITUTIONAL LAW?

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As he delivered the majority opinion in *Lochner v. New York* on April 17, 1905, Justice Rufus Peckham probably had no idea a century later we would be commemorating its centennial.[1] As Supreme Court cases go, this one seemed inconsequential. In a five-to-four vote, the Court struck down a New York law that limited the hours a baker could work to ten hours a day and sixty hours a week. Yet *Lochner v. New York* became in the Progressive and New Deal eras what *Roe v. Wade* has become in ours. For people who were unhappy with the Court's direction, *Lochner* represented the entrenchment of a bad public policy based on a flawed political, economic, and social theory. They had no hesitation in describing that theory as a "do nothing philosophy" rooted in laissez-faire economics and Social Darwinism. Even worse to critics was their fervent belief that *Lochner* symbolized a major change in constitutional doctrine and that the Court had twisted the Constitution in order to equate that theory with a constitutional right. Although it may be an exaggeration to speak of any action of the Supreme Court as a revolution, critics of the time viewed *Lochner* in that light. The most vehement among them viewed the decision as a coup d'etat. They charged that the Court had usurped power that properly rested with the legislature, and ultimately in the people, in order to turn a controversial political philosophy into fundamental law of the land. Thus, *Lochner* became the ultimate symbol of judicial overreaching.

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

Lochner retains that symbolic status today. The decision is commonly ranked along with *Dred Scott* as a prime example of judicial malfunctioning and as the most discredited decision in Supreme Court history.[2] It has been described as a "negative touchstone," an "anti-canon of constitutional law," and a "paradigmatic example of judicial failure."[3] Lawyers and constitutional scholars from all sides of the political and ideological spectrum still ritualistically call upon *Lochner* to condemn decisions and ideas with which they disagree. As Robert Bork put it: "To this day, when a judge simply makes up the constitution he is said to 'Lochnerize,' usually by someone who does not like the result."[4] Even the Supreme Court itself, with debating Justices sometimes arguing over whose decision has come closer to reaching the depths of Lochnerizing, seems "haunted by the ghost of *Lochner*."[5] Perhaps David A. Strauss best captured *Lochner*'s legacy when he asked, "Would you ever cite this case in a Supreme Court brief, except to identify it with your opponents' position?"[6]

It is surprising that this image of *Lochner* has persisted so strongly, because the last twenty-five years has produced an enormous amount of scholarship that takes to task the traditional view of the decision and the era it came to symbolize. Although we are in the habit of calling these studies revisionist, that term is both unfortunate and inaccurate. Two decades ago they may have been revisionist, but the view that *Lochner* was not based upon laissez-faire and Social Darwinism has become the currently accepted academic wisdom. Observing this trend, David E. Bernstein stated, "Virtually no serious scholar of the *Lochner* era believes any longer that the *Lochner* Court simply tried to impose laissez-faire or was much influenced by Social Darwinism."[7]

Some of this revisionist scholarship is striking in the degree to which it seems to be rehashing arguments made a century ago. Just as striking, however, is the degree to which other revisionist writings demonstrate how much there is to learn about the *Lochner* era. Even if one ultimately clings to the Progressive historians' interpretation of *Lochner*, the work of these revisionists adds sophistication to

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[2] *See* WILLIAM M. WIECEK, LIBERTY UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE 123 (1988); *see also* BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 190 (1993); Aviam Soifer, *The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888-1921*, 5 LAW & HIST. REV. 249, 250 (1987).

[3] Robert C. Post, *Defending the Lifeworld: Substantive Due Process in the Taft Court Era*, 78 B.U. L. REV. 1489, 1494 (1998); *see also* David E. Bernstein, Lochner*'s Legacy's Legacy*, 82 TEX. L. REV. 1, 63 (2003) (referring to *Lochner* as "the leading case in the 'anti-canon'").

[4] ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 44 (1990).

[5] Mary Cornelia Porter, *Lochner and Company: Revisionism Revisited*, *in* LIBERTY, PROPERTY, AND GOVERNMENT: CONSTITUTIONAL INTERPRETATION BEFORE THE NEW DEAL 12 (Ellen Frankel Paul & Howard Dickman eds., 1989); *see, e.g.*, Dolan v. City of Tigard, 512 U.S. 374, 405-06 (1994) (Stevens, J., dissenting); Seminole Tribe of Florida v. Florida, 517 U.S. 44, 165-68 (1996) (Souter, J., dissenting).

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

[7] David E. Bernstein, *The Story of* Lochner v. New York, *in* CONSTITUTIONAL LAW STORIES 327 (Michael C. Dorf ed., 2004).

our understanding by forcing us to reconsider the question of why *Lochner* deserves its reputation.

To answer that question, it might be helpful to consider the broadest implication of the revisionist work. Whether growing out of a desire to explore the complexities of nineteenth century history or a desire to capture the high ground of tradition in debates over modern constitutional doctrine, all revisionist studies have one thing in common. They reject the notion that *Lochner* symbolized a judicial coup d'etat, the Court's adoption of laissez-faire, or even a major change in the direction of constitutional law. They argue, instead, that the decision reflected long-standing legal or social traditions, and they imply that the constitutional doctrine of the *Lochner* era was a natural, almost inevitable, extension of earlier views.

At its core, the debate between the traditional and revisionist interpretations of *Lochner* is a disagreement over whether the decision reflected change or continuity. Where the traditional history sees *Lochner* as a turning point or a major change in the direction of constitutional doctrine, revisionist studies see continuity in the constitutional doctrine leading up to and passing through *Lochner*. The result has been a debate about how to characterize the flow of constitutional history.

In this paper, I would like to stress the debate over whether *Lochner* represented change or continuity. I will explain why, even though revisionist studies have expanded our understanding of the era, I continue to believe that *Lochner* deserves its reputation as a symbol of judicial malfunctioning. Before doing that, however, it should be helpful to describe the background of the *Lochner* case itself and provide a short explanation of both the traditional and the modern interpretations of the decision.

Background of the Lochner *Case*

To put the *Lochner* decision in proper perspective, it is important to understand something about the environment and the conditions of labor in New York's urban bakeries. Urban bread bakeries tended to be small operations, most hiring fewer than four employees. Bread baking was not a capital-intensive industry. Although there were some labor-saving inventions available, in 1899 only ten percent of bread bakeries used power machinery, and as late as 1920, machinery was found in only a bare majority of the industry. Unlike the cracker-baking industry, which had become mechanized and centralized, bread baking continued to be labor intensive. The only major capital expense in a bread bakery was the oven. This made it possible for employees, called "journeymen bakers," to break away from their employers and open their own small shops. Most of these "boss bakers" or "master bakers" located their businesses in the cellar of tenement houses. With dirt floors

and open sewers, the cellars made for a filthy environment in which to bake bread. But the rent was cheap, and the dirt floors could stand the weight of baking ovens.[8]

The New York Bakeshop Act of 1895 contained six substantive provisions, five of which addressed sanitation. It required that bakeshops have covered sewers, for example. It also required that floors be made of cement, tile, wood, or saturated with linseed oil, that walls be plastered rather than dirt, that equipment be clean, and that flour be stored dry and off the ground. Two of the sanitation regulations also affected the conditions of labor in the bakeries. As a condition of their employment, journeymen bakers were commonly required to sleep in the bakeshop and pay for board. Typically, workers slept on the same tables on which they proofed and rolled dough. Section six of the Bakeshop Act required that workers' sleeping space be separate from the room in which products were made or stored. Another provision required that washrooms and toilets be closed and separate from the rest of the shop. These regulations, which were aimed at producing unadulterated bread, were not controversial. Only section one was controversial. It provided, "No employee shall be required, permitted or suffered to work in a biscuit, bread or cake bakery or confectionary establishment more than sixty hours in any one week, or more than ten hours in any one day . . . ."[9]

To understand the impact of this section on bakeshop employees, it is important to remember that late nineteenth century workers knew nothing of minimum hourly wages or time-and-a-half for overtime. Workers were usually hired and paid by the week or, more commonly, by the day. The typical agreement might be for wages of two dollars a day, and it would say nothing about how many hours the employee was expected to work. At the turn of the century, it was not unusual for journeymen bakers to work one hundred hours a week. The conditions in which they worked were abysmal. Workers were exposed to flour dust, gas fumes, dampness, and extremes of hot and cold. Unlike miners or jobs that courts recognized as being dangerous, the bread bakers did not work in the shadow of sudden death. But journeymen bakers claimed that working long hours in this environment produced what they called white lung disease. They complained that they suffered more than the general public a disease called consumption, which most modern medical dictionaries describe as an archaic word for tuberculosis. Although hindsight tells us that this was probably not true, at the time evidence to support the bakers' claims was available to both the New York legislature and the courts. Health and safety was not the only factor that motivated journeymen bakers to seek shorter-hours legislation. It may not have been the primary factor. Nevertheless, the

[8] This account of the background of *Lochner* is adapted from my earlier work. For more detail, see generally PAUL KENS, JUDICIAL POWER AND REFORM POLITICS: THE ANATOMY OF *LOCHNER V. NEW YORK* (1990). This book was republished in paperback, without footnotes, and the title was changed to *LOCHNER V. NEW YORK*: ECONOMIC REGULATION ON TRIAL (1998).
[9] Session Laws of New York, 1895, vol. 1, ch. 518, § 1.

bakers' claims that the conditions in which they worked were unhealthy and dangerous were not completely unfounded. [10]

On March 19, 1895, the New York Assembly passed the Bakeshop Act by a vote of 120 to 0. A few weeks later, the Senate voted 20 to 0 to approve the law.[11] The bill's limitation on workers' hours did not slip by, buried in health regulations and unnoticed. Quite to the contrary, Charles Z. Lincoln, the governor's legal secretary, expressed reservations about the first draft of section one. He worried that, as worded, the law would prevent owners from working more than ten hours in their own establishments. The sponsors of the bill changed the wording and sent it back to the legislature. With attention now drawn specifically to the ten-hour provision, both houses once again passed the bill unanimously.[12]

Seven years passed before Joseph Lochner challenged the law in court. In February 1902, Lochner, the owner of a small bakery in Utica, was convicted of violating the ten-hour limitation and fined fifty dollars.[13] Lochner appealed to the Appellate Division of the New York Supreme Court, which upheld his conviction by a vote of 3 to 2.[14] When the case went up to the state's highest court, the New York Court of Appeals, the justices voted 4-3 to uphold the conviction.[15] Lochner then filed an appeal to the United States Supreme Court.

In a 5-4 vote, the United States Supreme Court overturned the New York Court of Appeals' decision. It ruled that the Bakeshop Act was unconstitutional, because it violated the liberty of contract of both the employer and employee. Writing for the majority, Justice Peckham derided the bakeshop law as "a labor law, pure and simple."[16] In a very general sense, it was a labor law. The movement for shorter hours was the first major issue for organized labor in America. Since the middle of the nineteenth century, proponents of shorter-hours statutes had maintained that such legislation was needed to improve the family life of workers, promote citizenship, and protect health and safety. Family, citizenship, and health and safety were certainly part of the equation, but the primary goal of the shorter-hours movement was fairness. Advocates of shorter-hours statutes believed that government intervention provided the only means to assure fairness in working conditions to workers who were in no position to bargain for equitable conditions of employment.

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[10] *See* People v. Lochner, 177 N.Y. 145, 169–74 (1904) (Vann, J., concurring).
[11] NEW YORK, JOURNAL OF THE ASSEMBLY 1895, at 1380-81 (James B. Lyons ed., 1895); NEW YORK, JOURNAL OF THE SENATE 1895, at 904 (James B. Lyons ed., 1895).
[12] *See* BAKER'S JOURNAL, Apr. 28, 1895; JOURNAL OF THE ASSEMBLY 1895, at 3172; JOURNAL OF THE SENATE 1895, at 1463. Both houses passed the bill on April 25, 1895. Governor Morton signed it on May 2, 1895.
[13] UTICA OBSERVER, Feb. 10, 1902, at 6.
[14] People v. Lochner, 73 A.D. 120, 128 (N.Y. App. Div. 1902).
[15] People v. Lochner, 177 N.Y. 145 (1904).
[16] Lochner v. New York, 198 U. S. 45, 57 (1905).

The Bakeshop Act was not purely a labor law, however. The political atmosphere in late nineteenth century New York simply did not favor passing new laws to regulate the conditions of labor. A business-oriented Republican Party machine dominated the state, with political boss Thomas Collier Platt directing the show. Moreover, organized labor in turn-of-the-century New York was splintered into three factions and had little political clout.[17]

In their enthusiasm to demonstrate that the Bakeshop Act was a form of "rent seeking," some revisionist studies claim that the statute was the product of a conspiracy between large bakeries and labor unions to put small bakeries out of business.[18] This claim is not based on primary sources, but rather on a set of assumptions growing out of modern economic theory, and those assumptions do not hold up under the evidence.[19] Neither the newspapers of the time, nor personal accounts, nor legislative journals indicate that any large or powerful business was involved in passing this legislation. In fact, the law did not directly affect any big business. At the end of the nineteenth century, the baking industry was divided into two distinct sectors. The cracker industry was mechanized and was becoming consolidated. By the 1880s, it was dominated by so-called "cracker trusts." The bread and confection baking industry, by contrast, was not an industry that lent itself to consolidation. The retail bread supply in late nineteenth and early twentieth century New York came from innumerable small bakeries. The Bakeshop Act, which was expressly aimed at these "biscuit, bread, or cake bakeries or confectionary establishments," did not apply to the cracker industry. Something other than a conspiracy between large companies and labor unions must have been at work in passage of the act.[20]

New York's ten-hour limit for bakery workers resulted in part from the efforts of an opportunistic leader of the Bakers' Union named Henry Weismann. The shorter-hours law was part of a more sweeping regulation of the baking industry, however, and its enactment became possible only when other reformers took an

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[17] *See* GEORGE GORHAM GROAT, TRADE UNIONS AND THE LAW IN NEW YORK 11-15 (1965); IRWIN YELLOWITZ, LABOR AND THE PROGRESSIVE MOVEMENT IN NEW YORK STATE 26 (1965).

[18] *See* Rebecca L. Brown, *Constitutional Tragedies: The Dark Side of Judgment*, *in* CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 139, 142 (William N. Eskridge Jr. & Sanford Levinson eds., 1998); Richard A. Epstein, Pennsylvania Coal Company v. Mahon*: The Erratic Takings Jurisprudence of Justice Holmes*, 86 GEO. L.J. 875, 884-85 (1998); Alan J. Meese, *Will, Judgment, and Economic Liberty: Mr. Justice Souter and the Mistranslation of the Due Process Clause*, 41 WM. & MARY L. REV. 3, 42 (1999).

[19] Those who claim that a conspiracy of unions and large bakeries produced the Bakeshop Act provide no primary support. All trace to BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 117-18 (1980). Siegan presents no primary source as evidence of a conspiracy and, although I have searched through everything I could find on the circumstances surrounding the legislation, I have not seen anything even remotely suggesting one. *See, e.g.*, KENS, JUDICIAL POWER, *supra* note 8, at 44-59; Matthew S. Bewig, Lochner *v. The Journeymen Bakers of New York: The Journeyman Bakers, Their Hours of Labor, and the Constitution*, 38 AM. J. LEGAL HIST. 413, 427 (1994); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lessons of* Lochner, 76 N.Y.U. L. REV. 1383, 1417 (2001).

[20] *See* WILLIAM G. PANSCHAR, BAKING IN AMERICA (1956) (providing background information on baking industry); HAZEL KYRK & JOSEPH STANCLIFFE DAVIS, THE AMERICAN BAKING INDUSTRY 1849-1923; AS SHOWN IN THE CENSUS REPORTS (1925) (same).

interest. The location of big city bread bakeries is actually what brought those reformers on board. A journalist named Edward Marshall observed the squalor of the cellar bakeries while serving on the Tenement House Committee of 1894. Writing articles for the *New York Press*, Marshall began a crusade to clean up the industry and improve the conditions of labor. Marshall's influence provided the recipe for success. Placing bakeshops in the issue of tenement reform cast the issue as something more than a labor problem. It thus opened the door for prominent social reformers to take up the cause. Tenement reformers, sweatshop reformers, and members of social-settlement societies provided the clout necessary to enact the bakeshop law. These people were not radicals; they were mainstream Americans. More precisely, they were mainstream American elite who believed that government had the right to intervene in social and economic affairs in order to provide a functional balance between the rights of individuals and the needs of society.[21] These reformers may have been motivated by sympathy for the hardships endured by the less fortunate. They may have believed that shorter hours were essential to improve family and civic life. But some also had another aspect of the common good in mind. Fearing what they believed was radicalism on both the right and the left, they believed moderate reform was necessary to avoid social upheaval. Edmond Kelly, a wealthy lawyer and founder of the City Club of New York, explained why he thought reform was necessary to preserve the existing social order. Kelly believed it was possible that "the power of the workingman would line up on the side of order," but he worried that without reform a war between capital and labor "would destroy the very foundations upon which our society is built."[22]

Progressive Historians and the Traditional Interpretation of Lochner

According to the traditional interpretation of *Lochner*, that offered by Progressive Era historians, the Court's decision unequivocally rejected the ideals and philosophy of these mainstream reformers. The statute limiting hours of labor, Justice Peckham wrote, "necessarily interferes with the right of contract between the employer and employees."[23] Peckham's conclusion was the embodiment of a controversial constitutional theory that had been gaining ground in the 1880s and 1890s, but had not yet been fully sanctioned by the United States Supreme Court. This theory was based upon the Fourteenth Amendment guarantee that no state shall "deprive any person of life, liberty, or property, without due process of law,"[24] and it depended upon three interrelated concepts. First was substantive due process. In contrast to the more obvious view that "due process" was a guarantee of correct judicial procedure, this idea held that even duly enacted laws that provide procedural protections can unjustly deny a person life, liberty, or property.

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[21] *See* GERALD W. MCFARLAND, MUGWUMPS, MORALS, AND POLITICS, 1884-1920, at 137 (1975).
[22] EDMOND KELLY, EVOLUTION AND EFFORT 283-84 (1895).
[23] *Lochner v. New York*, 198 U.S. 45, 53 (1905).
[24] U.S. CONST. amend XIV.

The second concept was liberty of contract: the idea that the Fourteenth Amendment guarantee of liberty includes the freedom of two or more people to make any agreement they might desire. Of course, this liberty could not be absolute. Consequently, the third concept, a narrow view of the police powers of the states, provided a counterweight for determining whether laws that limited the right of contract were legitimate. Although this theory of limited government was vague, it was captured by the notion that a state's power was limited to making law that affected health, safety, morals, and peace and good order. According to the Progressive historians' account of Supreme Court history, the *Lochner* era Court molded these three ideas to fuse its own view of laissez–faire economics or the neutral state into constitutional doctrine.

Justice Oliver Wendell Holmes was the first to make this assessment of the majority opinion. Dissenting in *Lochner*, Holmes complained that the majority decision was based "upon an economic theory which a large part of the country does not entertain."[25] We remember Holmes's opinion because it vividly reflects complaints of Progressive and New Deal era critics that the Court had based its opinion not on the Constitution, but rather on laissez-faire economic theory. To understand the revolutionary nature of *Lochner*, however, it is equally important to emphasize Holmes' words "that a large part of the country does not entertain." The liberty-of-contract doctrine adopted in *Lochner* may have been inspired by laissez-faire economics as Progressive historians and the era's critics claim. It may have roots in longstanding American traditions as revisionist historians argue. Regardless of which of these interpretations is more accurate, one thing is clear: The Court's decision was based on a brand of individualism that was far from universally accepted in its time. To some degree, at least, it represented the entrenchment of one of several competing theories of government. Most specifically, it ran afoul of Progressive- and New Deal-era reformers' theories that would employ the state as an agent of social change. Holmes' terse comments thus captured the larger implications of the decision. He had recognized that *Lochner v. New York* touched a raw nerve connected to some deep-seated ideas about the American political system and about the extent to which people could look to government to solve the economic and social problems of their day. The Court had, in the words of Theodore Roosevelt, "strained the constitution to the utmost in order to sustain a do nothing philosophy which had everywhere completely broken down when applied to the actual conditions of modern life."[26]

The charge that the *Lochner* Court based its decision on laissez-faire economic theory does not fully explain why Progressive historians and the era's critics thought the case was revolutionary, however. Perhaps even more important was critics' belief that the Court's decision frustrated the workings of democracy. The

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[25] *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting). Holmes also argued, "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." *Id.*

[26] Theodore Roosevelt, *Judges and Progress*, OUTLOOK, Jan. 6, 1912, at 38-39.

bakeshop law overruled in *Lochner* represented a state's effort to deal with a local problem. Recall that the law unanimously passed through the state legislature and the governor signed it into law. All of New York's elected officials favored enactment of the law.

"This is not a question of substituting the judgment of the court for that of the legislature," Peckham wrote.[27] But that, critics complained, was exactly what the Court did. Justice John Harlan, dissenting from the majority opinion, agreed with the critics:

> [Granting] that there is a liberty of contract which cannot be violated even under the sanction of direct legislative enactment, but assuming, as according to settled law we may assume, that such liberty of contract is subject to such regulations as the State may reasonably prescribe for the common good and the well-being of society, what are the conditions under which the judiciary may declare such regulations to be in excess of legislative authority and void? Upon this point there is no room for dispute; for, the rule is universal that a legislative enactment, Federal or state, is never to be disregarded or held invalid unless it be, beyond question, plainly and palpably in excess of legislative power. . . ."[28]

Harlan plainly thought the majority had ignored a traditional presumption in favor of the workings of democracy. This was a theme critics picked up when they described the Court as the imperial judiciary that had usurped the legislative function and power properly abiding in the people.[29] Theodore Roosevelt was one of those who portrayed the Court as a backward-thinking institution that had overstepped its authority and imposed its will over that of the majority of American voters. He complained that the Supreme Court had "created an insurmountable barrier to reform."[30] This was an exaggeration, of course. Judges of the laissez-faire Court probably upheld as many reform statutes as they overruled. But Roosevelt accurately captured the frustration that reformers of the Progressive era and New Deal felt toward the Court. Nowhere in the Constitution could they find "liberty of contract," nowhere could they find laissez-faire economics. The Court, they believed, was fabricating constitutional doctrine out of thin air and forcing legislatures to comply. For them, *Lochner* came to represent the worst of raw judicial activism.

In the mind of Progressive historians and the era's reformers, *Lochner* was thus a revolution in two respects. First, its recognition of liberty-of-contract doc-

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[27] *Lochner*, 198 U.S. at 56-57.
[28] *Id.* at 68 (Harlan, J., dissenting). Holmes also would have applied a presumption in favor of the legislation, saying that a statute should be upheld "unless a rational and fair man would necessarily admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our laws." *Id.* at 76 (Holmes, J. dissenting).
[29] *See* OUTLOOK, Apr. 29, 1905, at 1017.
[30] Roosevelt, *supra* note 26, at 42.

trine resulted in the entrenchment of one ideology or theory of government as a matter of fundamental law.[31] Secondly, applying a presumption in favor of that liberty represented a radical shift or usurpation of power in favor of the federal courts and to the disadvantage of state legislatures.

The Revisionist Interpretation of Lochner

Many, if not most, of the legal histories written since the 1980s have challenged this traditional account of the *Lochner* case. Modern historians have taken *Lochner*'s Progressive era critics to task. Holmes was wrong, they say. *Lochner* and its genre were not the result of judges simply attaching an economic theory to the Constitution. The *Lochner* opinion did not even represent a significant change in the direction of constitutional law. The doctrine the Court followed during the *Lochner* era was, in the words of Charles McCurdy, the product of habits of thought deeply imbedded in the American consciousness well before the liberty-of-contract doctrine entered American law.[32]

Some writers find the roots to liberty of contract in antebellum free-labor thinking. This view emphasizes the fact that liberty of contract as a constitutional right grew out of Justice Stephen Field's idea that the Fourteenth Amendment's sweeping language guaranteed the right to choose a lawful profession.[33] Cast in this light, it is easy to see the connection. A laborer's right to agree to the terms of employment appears linked to free-labor thinking in its rawest form—as a contrast to slavery or indentured servitude. From this perspective, the doctrine of *Lochner v. New York* does not appear to be new or revolutionary. It was not as much a reflection of late nineteenth century laissez-faire thinking as it was a result of Justices steeped in free-labor ideology resisting the very idea of unfree-labor contracts.[34]

Other scholars have similarly sought to demonstrate that the doctrine of substantive due process was not as revolutionary as the traditional history claims. James W. Ely, Jr., and Michael G. Collins take issue with the traditional story that laissez-faire era judges invented the substantive reading of the Due Process Clause to safeguard the interests of business from legislative regulation. Ely points out that the notion of due process as a restraint on excessive legislative action was not concocted out of thin air. Rather, its evolution can be traced to antebellum state court

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[31] For a more detailed historiography covering both the traditional and revisionist interpretations of the era, see WILLIAM M. WIECEK, THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA 1886-1937, at 253-77 (1998).
[32] Charles W. McCurdy, *The Roots of "Liberty of Contract" Reconsidered: Major Premises in the Law of Employment, 1867-1937*, 1984 Y.B. SUP. CT. HIST. SOC'Y 20, 24.
[33] Slaughterhouse Cases, 83 U. S. (16 Wall.) 36, 97 (1873) (Field, J., dissenting).
[34] McCurdy, *supra* note 32, at 33.

decisions that "drew upon a heritage firmly fixed in the matrix of American legal thought."[35]

Revisionist scholars also maintain that the judges of the era were not preoccupied with the protection of private property, but rather were concerned with preserving antebellum ideas about the proper role of the state.[36] Howard Gillman observes, for example, that while judges of the laissez-faire era frequently extolled the virtues of private property and market liberty, the cases of the era "demonstrated a superior judicial commitment to the familiar Jacksonian preoccupation with political equality or government neutrality, the belief that government power could not be used by particular groups to gain special privileges or impose burdens on competing groups."[37] Accordingly, judges of the era are said to have been engaged in a process of finding the proper balance between the public sector, which was a legitimate subject of government regulation, and the private sector, which was not.[38]

Emphasizing *Lochner*'s roots in antebellum traditions allows some revisionists to claim that laissez-faire constitutionalism was merely a continuation of longstanding legal and political traditions of limited government.[39] Taking a different approach, another group of revisionist historians questions the accuracy of the traditional history's claim that the *Lochner* era Court was quick to overrule economic legislation or was tied to the status quo. After providing a detailed review of cases from the era, Melvin I. Urofsky and John E. Semonche point out that the laissez-faire Court upheld more statutes than it overruled.[40] The Supreme Court, they con-

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[35] James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315, 345 (1999) (tracing development of due process in state court decisions, most importantly *Wynehamer v. People*, 13 N.Y. 378 (1856)). Michael G. Collins, *October Term, 1896—Embracing Due Process*, 45 AM. J. LEGAL HIST. 71 (2001), finds the roots of substantive due process in earlier federal diversity cases.

[36] *See generally* HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF *LOCHNER* ERA POLICE POWERS JURISPRUDENCE (1993); DAVID M. GOLD, THE SHAPING OF NINETEENTH-CENTURY LAW: JOHN APPLETON AND RESPONSIBLE INDIVIDUALISM (1990); Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origin of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293 (1985); Alan Jones, *Thomas M. Cooley and "Laissez-Faire Constitutionalism": A Reconsideration*, 53 J. AM. HIST. 751 (1967).

[37] GILLMAN, THE CONSTITUTION BESIEGED, *supra* note 36, at 12.

[38] *See* Charles W. McCurdy, *Justice Field and the Jurisprudence of Government—Business Relations: Some Parameters of Laissez-Faire Constitutionalism*, 61 J. AMER. HIST. 970, 1004-05 (1975). This distinction between public and private spheres resonates with themes of Jacksonian Democracy. Owen Fiss links this ideal of limited government to a conception of liberty shaped by social contract tradition, with a sharp divide between the state and society, political and social, and public and private. 8 OWEN M. FISS, THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910, at 295 (1993). *See also id.* at 21, 159.

[39] *See* Cass R. Sunstein, Lochner*'s Legacy*, 87 COLUM. L. REV. 873 (1987) [hereinafter Lochner's *Legacy*] (arguing that laissez-faire economics served as inspiration for narrow view of police power but that Court's mistake was in taking status quo, or common law, as baseline for deciding whether government has engaged in some consistently troublesome intervention into existing affairs). For a debate about this theory, compare Bernstein, Lochner*'s Legacy's Legacy*, *supra* note 3, with Cass R. Sunstein, *Reply – Lochnering*, 82 TEX. L. REV. 65 (2003).

[40] *See* JOHN E. SEMONCHE, CHARTING THE FUTURE: THE SUPREME COURT RESPONDS TO A CHANGING SOCIETY, 1890-1920, at 189-92 (1978); Melvin I. Urofsky, *Myth and Reality: The Supreme Court and Protective*

clude, was hesitant to exercise the broad new powers to oversee legislation and was as progressive as most reformers could desire.

Still another approach to rehabilitating *Lochner* is reflected in the resurgence of scholarship maintaining that the case was correctly decided. This group argues that laissez-faire constitutionalism was right, or at least on the right track. Some emphasize that *Lochner* was correct as a matter of economic policy. Reflecting today's renewed interest in property rights, they maintain the function of the law ought to be to encourage economic efficiency or neutrality.[41]

A more sophisticated version of this theme maintains that the *Lochner* era Court used the Due Process Clause of the Fourteenth Amendment not merely to assure economic neutrality, but rather to protect fundamental liberties in general from arbitrary and unreasonable legislation.[42] Expanding on this theme, some modern libertarians maintain that the Ninth Amendment guarantee that "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people" affords the same protection of fundamental liberties.[43] Although it emphasizes a different provision of the Constitution, this approach bears significant similarities to *Lochner* era due process doctrine. Both emphasize individual will and idealize limited government. They believe that the Constitution guarantees not only rights that are expressly stated, but also unenumerated rights. Both depend on a particular interpretation of natural law to define the types of rights to be protected. And, most significantly, they agree that the judiciary should have broad power to define and apply those rights. The *Lochner* era is not the focus of modern libertarian thought, but the revisionist implication that *Lochner* reflects continuity in constitutional doctrine fits nicely into the libertarian vision. Thus Richard Epstein, a prominent proponent of this view, has concluded that, ". . . we should regard *Lochner* not as a constitutional horror story, but as a model for sensible constitutional deliberation."[44]

Revisionist studies are convincing in many of their details, but less so in their implication that the constitutional doctrine of the *Lochner* era was a natural extension of earlier traditions. In this regard, they tend to leave one question unanswered. If the *Lochner* decision was based on longstanding constitutional traditions

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Legislation in the Progressive Era, 1983 Y.B. SUP. CT. HIST. SOC'Y 53; Charles Warren, *The Progressiveness of the United States Supreme Court*, 13 COLUM. L. REV. 294, 295-96 (1913).

[41] *See* RICHARD POSNER, ECONOMIC ANALYSIS OF THE LAW 581-614 (3d ed. 1986); Meese, *supra* note 18, at 62-63; Bernard H. Siegan, *Rehabilitating* Lochner, 22 SAN DIEGO L. REV. 453 (1985). *But cf.* SCHWARTZ, *supra* note 2, at 200-02 (providing concise criticism of Siegan and Posner); Sunstein, Lochner's *Legacy*, *supra* note 39, at 874-75 (emphasizing neutrality).

[42] Bernstein, Lochner's *Legacy's Legacy*, *supra* note 3, at 47.

[43] *See* Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 431 (2004) (stating that Ninth and Fourteenth Amendments provide express recognition of unenumerated rights, privileges, and immunities); *see also* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 235, 254-69 (2004).

[44] Richard A. Epstein, *Liberty, Equality, and Privacy: Choosing a Legal Foundation for Gay Rights*, 2002 U. CHI. LEGAL F. 73, 84.

or habits of thought--if it did not represent a major change in the direction of constitutional law--then why did the decision and the judiciary in general become a primary target of early twentieth century reformers' barbs?

One group of revisionists directly addresses that question. This group, like others, views the history of constitutional doctrine up to and through *Lochner* as being characterized by continuity. Unlike some other modern scholars, however, they emphasize that the ideas driving that constitutional tradition did not conform to the reality of politics, economics, and social problems in a modern industrialized nation. Constitutional tradition, in their view, was on a collision course with reality. *Lochner* was part of the story because it highlighted the tension between law and reality. But revolution in the constitutional doctrine did not arrive with *Lochner* in 1905. Rather, it came in 1937, when in *West Coast Hotel v. Parrish*,[45] the Supreme Court overruled *Lochner* and rejected the tradition upon which it was based.[46]

In this view, the New Deal caused a revolutionary break "with a structure of legal thought that had crystallized over more than a century since the American Revolution."[47] Although it provides a logical response to the question of why reformers targeted the case and the Court, it fails to take into account two factors that significantly weaken any claim that *Lochner* era constitutional doctrine was a natural outgrowth of earlier American traditions. First, the link back to the earlier traditions that revisionists tend to highlight is ambiguous in the sense that the brand of individualism encapsulated in *Lochner* era doctrine was not the only theory of the Constitution that could claim to be based on those same traditions. Secondly, at least to the extent that they see continuity, the revisionist studies tend to ignore a competing tradition in American political and legal culture that emphasized the rights of the community. It is to these two factors that I would now like to turn.

An Ambiguous Tradition

Despite the revisionist discoveries of the deeper roots of *Lochner* era jurisprudence, it is wrong to conclude that American constitutional doctrine developed in anything resembling a straight line from the Framing through the *Lochner* decision and beyond.[48] The revisionists' work does not demonstrate continuity in constitutional doctrine so much as it fills in gaps and provides a better understanding

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[45] 300 U.S. 379 (1937).

[46] *See* GILLMAN, THE CONSTITUTION BESIEGED, *supra* note 36, at 190-93; Sunstein, Lochner*'s Legacy*, *supra* note 39, at 876; Friedman, *supra* note 19, at 1447 (seeming to accept idea that jurisprudence and reality were on collision course).

[47] Gary D. Rowe, Lochner *Revisionism Revisited*, 24 LAW & SOC. INQUIRY 221, 232 (1999) (citing MORTON J. HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 7 (1992)).

[48] This is a thesis of my earlier work, PAUL KENS, JUSTICE STEPHEN FIELD: SHAPING LIBERTY FROM THE GOLD RUSH TO THE GILDED AGE (1997). *See* Charles W. McCurdy, *The "Liberty of Contract" Regime in American Law*, *in* THE STATE AND FREEDOM OF CONTRACT 161 (Harry N. Scheiber ed., 1998); Stephen A. Siegel, *The Revision Thickens*, 20 LAW & HIST. REV. 631, 634-35, 637 (2002).

of how a dramatic change took place. Let me emphasize two of these deeper roots to illustrate.

One of the earliest revisionist claims is that, rather than reflecting laissez-faire economics, the *Lochner* era doctrine's concern with government neutrality and opposition to class legislation demonstrated a commitment to the principles of Jacksonian democracy. Once this had been stated, it became fairly obvious that some link existed. Jacksonian democracy was preoccupied with political equality and government neutrality. And Jacksonians did have a strong distaste for what they called "special privilege" or "special legislation"—the use of government power to benefit particular groups or individuals or impose burdens on competing groups.[49] The politicians and judges of the late nineteenth century were weaned on Jacksonian democracy. Thus, it is not surprising that it set the tone for political and legal discourse and flowed over into the later era. This does not, however, prove that the doctrine as it later developed remained true to original Jacksonian ideals. Neither does it mean that, one-half century and a civil war later, those weaned on the tradition remained in agreement about what it meant.

A closer comparison of the Jacksonian distaste for special legislation and the *Lochner* era opposition to class legislation will demonstrate the point. For Jacksonians, special legislation referred to an act of government that gave money and power to a connected elite. They opposed special legislation because it created artificial inequalities of wealth and tended to concentrate political power. To Jacksonians, a government doling out special privilege created a vicious cycle that threatened both liberty and democracy. Artificial inequalities of wealth gave those with the most money the means with which to influence government, which in turn resulted in the same people benefiting from even more special legislation. Jacksonians were worried that this cycle of privilege allowed the rich and powerful to obtain a vice grip on government. As government was the source of special privilege in the Jacksonian mind, it stood to reason their reaction was to favor limitations on the power of government. It is important to emphasize, however, that when Jacksonians took aim at government, they were not thinking of government as a regulator. They were thinking of it as a source of wealth and privilege that put too much power in the hands of too few individuals.[50]

The *Lochner* era doctrine's concern for class legislation remained true to the aspect of Jacksonian democracy that favored government neutrality, but not to its underlying ideals. *Lochner* era doctrine did not advocate government neutrality in order to reduce the power of wealth and privilege or to preserve democracy. It was driven by a fear that the workings of democracy might undermine the economic and social system that had created that wealth. In essence, it turned the ideal of Jacksonian democracy on its head. Implicit in the charge that legislation such as the

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[49] GILLMAN, THE CONSTITUTION BESIEGED, *supra* note 36, at 13.
[50] KENS, JUSTICE STEPHEN FIELD, *supra* note 48, at 8-9, 270-71.

New York Bakeshop Act[51] was class legislation was the idea that wage earners, farmers, artisans, and laborers represented the forces of political privilege, and that corporations and powerful business interests were the oppressed.[52]

It is true that a streak of libertarianism, or individualism, underlay the Jacksonian tradition. But proponents of *Lochner*-era constitutional doctrine were not the only people who could claim those Jacksonian roots. Populist and Progressive reformers found inspiration on the other side of the Jacksonian coin; fear that the wealth and special privilege threatened both democracy and individual liberty. Unlike the Jacksonians, however, these people came to believe that a business elite had replaced government as the dispenser of privilege. To them, the immense economic and political power of this business elite was the most immediate threat to individual liberty. They thus turned to government to help combat that power.

Free-labor ideology went through a similar metamorphosis. The antebellum free-labor movement was a response to traditions that gave employers legal control over an employee's labor. Slavery and indentured servitude were the most blatant examples, but legal control existed even after an employee entered into a voluntary agreement. By the later nineteenth century, most forms of legal compulsion had disappeared. But wage earners found that ending legal compulsions did not insure that they would have a fair shot to achieve the independence, choice, and opportunity that free-labor ideals promised. As the twentieth century approached, free-labor advocates realized that legal compulsion—the government—did not pose the only potential threat. For free labor, "freedom" meant economic independence.[53] In a world where concentrated corporate power was becoming predominant, wage earners, farmers, and reformers understood that economic compulsion could just as effectively threaten their liberty. They thus began to turn to government for help, and they did so in the name of individual liberty.[54]

Although there may be a link between *Lochner*-era constitutionalism and the antebellum theories of Jacksonian democracy and free labor, it is a mistake to take the revisionist discoveries as meaning that constitutional doctrine developed in a straight line from the Founding, through the antebellum era, the *Lochner* era, and on to the New Deal. Discovering roots in earlier traditions does not rule out the likelihood that *Lochner*-era doctrine infused those traditions with qualities of lais-

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[51] 1897 N.Y. Laws ch. 415, §§ 110-115.

[52] *See* William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767, 790 (observing that Jacksonian protest vocabulary had ironically been transformed into defense of the few against the many).

[53] *See id.* at 774, 785.

[54] *Id.* at 817 ("One did not have to be a Marxist to reckon with 'reification' or the way the wage form or capitalist 'property' transformed social relations into things and people into exploitable objects. By invoking the traditional republican notion of liberty and joining it with a critique of 'wage slavery' workers could point to the liberal's constitution and say 'something of slavery still remains or something of freedom has yet to come.'"); *see also* KENS, JUSTICE STEPHEN FIELD, *supra* note 48, at 9.

sez-faire economics.[55] Moreover, the doctrine's link to these antebellum roots is not unique; the opponents of *Lochner*-era doctrine derived their ideas from the same tradition. The doctrine's claim to be the heir of antebellum traditions is, at best, ambiguous.

A Parallel Tradition

The argument that the *Lochner*-era doctrine was the natural outcome of antebellum habits of thought is based on an undeniable tradition of individualism in American constitutional and legal culture. In the previous section, I have maintained that, even given this tradition, laissez-faire constitutionalism's link to those roots is ambiguous. But there is also another reason why *Lochner* represented change rather than continuity in constitutional development. Preserving individual liberty and limiting the reach of government were certainly ideas important to antebellum Americans. If this tradition of individualism meant that the Constitution placed significant limitations on the state's power to regulate economic matters, however, no one told those antebellum Americans who enacted such laws or interpreted, enforced, and followed them. As scholars like William J. Novak and Harry N. Schieber have pointed out, antebellum American economy was heavily regulated.[56] Individualism had a strong impact on early American constitutional and legal doctrine, but there must have been something else at work—some alternative or parallel traditions or habits of thought.

To explain this parallel tradition, it may be helpful to use some of the complaints reformers made against laissez-faire constitutionalism. Reformers complained about the Court, because they believed it had spearheaded a major change in the political system. The first element of this change was the entrenchment of an economic and social philosophy that they thought was a radical and misguided form of individualism. A second element of the change was that this philosophy glorified individualism at the expense of duty and the greater good of the community. Felix Adler, one of New York's prominent reformers, observed, "what [the philosophy of] individualism covers up with its doctrine of hidden harmony following from enlightened self-interest is the fact that men are not equally able to

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[55] That some link to laissez-faire exists is hard to deny. After all, in his famous dissent in the *Slaughter-house Cases*, Justice Stephen Field expressly invoked Adam Smith to support his theory of a right to pursue a lawful calling. *See* 83 U.S. (16 Wall.) 36, 110 (1872); *see* Forbath, *supra* note 52, at 780–82. For those who continue to maintain that the doctrine is tied to laissez-faire, see Manuel Cachán, *Justice Stephen Field and "Free Soil, Free Labor Constitutionalism": Reconsidering Revisionism*, 20 LAW & HIST. REV. 541, 544, 559-64, 567-69, 571-73, 576 (2002). *See also* KENS, JUSTICE STEPHEN FIELD, *supra* note 48.

[56] *See* WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW & REGULATION IN NINETEENTH-CENTURY AMERICA (1996); Harry N. Scheiber, *The Road to* Munn*: Eminent Domain and the Concept of Public Purpose in the State Courts*, *in* 5 PERSPECTIVES IN AMERICAN HISTORY: LAW IN AMERICAN HISTORY 327 (Donald Fleming & Bernard Bailyn eds., 1971).

protect their rights."[57] For reformers, government intervention was necessary not only to improve the conditions of the working class, but also to promote harmony. They believed that the radical individualism reflected in *Lochner* was just as dangerous to the existing social order as was socialism. Some predicted that oppression resulting from strict individualism would lead to violent upheaval. Moderate reform, they argued, was necessary to avoid that prospect.[58] It did not matter to Progressive Era and New Deal reformers whether the doctrine the Court applied in *Lochner* could be traced to Jacksonian democracy or if it was a version of laissez-faire and social Darwinism. The more important point to them was that it equated radical individualism—which they thought to be a flawed political philosophy—with constitutional right. The Constitution, they would complain, does not say that business practices are presumed to be insulated from government regulation. It does not adopt the common law, prohibit class legislation, or forbid redistributive legislation. Nor does it contain the phrase "liberty of contract."

The change did not mean that every alternative idea favored by mainstream reformers would automatically be rejected, but it put reformers at a major disadvantage. The reason is that it made one aspect of social and political decisionmaking—economic policy and economic reform—into claims of individual rights rather than debates about public policy. It did not matter that the claim of rights was not absolute, or that liberty of contract and substantive due process were balanced against the legitimate police power of the states. It frustrated Progressive and New Deal era critics because these claims of rights skewed political debate to their disadvantage. They believed that rather than assuring that important social and economic issues were fully debated, the misuse of judicial review handicapped the debate by abating the force of their reasoning and excluding crucial options they favored from the realm of possible outcomes. The result was that it made, or threatened to make, issues of policy into issues of law. More specifically, it made them issues of constitutional law. From the point of view of Progressive and New Deal era critics, it thus put the Supreme Court in the position of supreme policy-maker, or at least a brooding omnipresence overseeing economic and social policy. It is true, as James Ely and Michael Collins point out, that we can find instances prior to the 1890s of the courts interpreting due process in this manner. But the examples they provide tend to show the courts acting in such a manner only in exceptional circumstances. Moreover, even Collins recognizes the significance of making substantive due process a matter of federal constitutional law—that is, of the fundamental law of the land.

If this sounds familiar, it may be because these same complaints about the character of American politics, the role of the law, and the effect of individualism have been vividly brought to our attention by Mary Ann Glendon in her popular

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[57] HORACE L. FRIESS, FELIX ADLER AND ETHICAL CULTURE 145 (1981).
[58] KELLY, *supra* note 22, at 383-84.

book, *Rights Talk*.[59] Glendon sounds much like a Populist or Progressive reformer when she complains that modern American political dialogue has been undermined by an obsession with rights. This "rights talk," she says, heightens social conflict and inhibits dialogue that might lead to consensus, accommodation, and discovery of common ground. It is silent regarding responsibilities to society or the community. Rather it is characterized by a relentless individualism that promotes the short term over the long run, is inhospitable to society's losers, and creates obstacles to expression, collective enterprise, and public deliberation.[60]

Glendon is not an old-time Populist or Progressive. She is a modern conservative who blames the rights revolution on the civil rights movement of the 1950s and "the marked increase in the assertion of rights-based claims" in the 1960s.[61] Pinning the start of the rights revolution at that time may be accurate if by "rights revolution" we mean the increase of types of rights claims to include subjects other than property and their use by those elements of society that were traditionally underprivileged or underrepresented. If we are talking about the more systemic problems of rights talk—its impact on political dialogue, creating a protected sphere around the individual, or using claims of right to elevate one point of view above the political fray—it is inescapable from Populist and Progressive reformers' complaints that Glendon has missed the mark. The rights revolution really began in the 1890s.[62] The subject of that rights revolution was economic policy, and *Lochner* stands as its symbol.

Interestingly, Glendon recognizes the importance of property in American rights consciousness. At the same time, however, she emphasizes an early American tradition recognizing that property rights, rather than being absolute, are limited by overriding claims of the community. The failure to acknowledge this limit, she says, results in an "illusion of absoluteness."[63] It is unlikely that anyone believes that property rights or economic liberty are absolute. But this phrase "illusion of absoluteness" is wonderfully apt. It captures an attitude toward property that glorifies individualism and absolute dominion, an attitude in which the rights of the community and regulation in the public interest are but begrudging exceptions.

Surprisingly, in Glendon's account of history, the tradition recognizing community interest in economic matters seems to simply fade away. By the time of *Lochner v. New York* in 1905, she observes, the notion that property rights are limited by overriding claims of the community has been lost in American thinking.[64] Her explanation for why this happened leaves the impression that the absolutist idea of

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[59] MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991).
[60] *Id.* at 9-15.
[61] *Id.* at 5.
[62] *Id.* at 40.
[63] *Id.* at 18-46.
[64] *Id.* at 25-27.

property rights resulted from something in the American character. Like revisionists historians, Glendon also leaves the impression that this development in our legal culture was a natural—almost inevitable—evolution.[65]

The history of economic regulation in early America makes it clear, though, that nothing in the American character would inevitably lead to an absolutist idea of property rights. Americans accepted the distinction between the right of property and the rules of conduct under which property may be used.[66] Licensing, building, and regulating of public markets, control of prices or quality of common goods, use of and access to waterways, eminent domain law, public trust doctrine, and the law of nuisance are common examples of states regulating the economy in the public interest. And the list goes on. Although the state's power to interfere with property was not unlimited, nineteenth century Americans certainly considered regulation normal.[67]

Regulation was also considered normal in nineteenth century legal doctrine. Judges and commentators gave states wide latitude regarding economic regulation. Moreover, they justified regulation not only in terms of balancing government power against individual liberty, but also in terms of protecting the rights of the public. Harry Scheiber thus concluded, "American judges and legal commentators have given sustained, explicit, and systematic attention to the notion that the public, and not only private parties, have 'rights' that must be recognized and honored if there is to be rule of law."[68] He and others commonly use Massachusetts Chief Justice Lemuel Shaw's 1851 opinion in *Commonwealth v. Alger* to illustrate the point.

> We think it is a settled principle, growing out of the nature of a well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal

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[65] Glendon blames this in part on the pervasiveness of legal culture in American society. *Id.* at 44. She also speculates that "Blackstone's flights of fancy about property as absolute dominion stuck in the American legal imaginations more than his endless boring pages on what property owners really may or may not do with what they own." *Id.* at 43.

[66] Stephen A. Siegel, *Understanding the* Lochner *Era: Lessons from the Controversy over Railroad and Utility Rate Regulation*, 70 VA. L. REV. 187, 197-98 (1984).

[67] *See* NOVAK, *supra* note 56; Scheiber, *supra* note 56, at 327. *See also* Gregory A. Mark, *Review of William J. Novak, The People's Welfare: Law & Regulation in Nineteenth-Century America, at* http://www.h-net.msu.edu/reviews/showrev.cgi?path=5155944065677 (Nov. 1999) (observing that Novak's discussion of official markets demonstrates naturalness of both exchange and regulation).

[68] Harry N. Scheiber, *Public Rights and the Rule of Law in American Legal History*, 72 CAL. L. REV. 217, 219 (1984). A modern observer has taken a similar position. Philip A. Talmadge, *The Myth of Property Absolutism and Modern Government: The Interaction of Police Power and Property Rights*, 75 WASH. L. REV. 857 (2000).

> right to the enjoyment of their property, nor injurious to the rights of the community.[69]

It is interesting that revisionist scholars commonly rely on another state case from the same time to demonstrate that antebellum legal doctrine also placed limits on state regulatory power. That case is *Wynehamer v. People*, where in 1856 New York's highest court ruled that a statute prohibiting the sale and possession of, and authorizing the destruction of, alcoholic beverages violated the requirement of due process of law.[70] The tendency of the two sides of the debate to rely on these dueling state cases, *Alger* and *Wynehamer*, highlights one undeniable point. Defining the reach of state power to regulate the economy was, prior to the Civil War, a matter primarily left to the states themselves.

The exceptions, of course, were regulations that fell within federal jurisdiction under the Commerce Clause and Contract Clause. There, early cases demonstrate that federal judges also recognized the significance of community rights. The most famous statement of this principle is found in Chief Justice Taney's 1837 opinion in *Charles River Bridge v. Warren Bridge*.[71] Rejecting the Charles River Bridge Company's claim that its charter implied an exclusive right to operate a bridge over the Charles River, Taney reasoned, "[T]he object and end of all government is to promote the happiness and prosperity of the community by which it is established, and it can never be assumed that the government intended to diminish its power of accomplishing the ends for which it was created."[72] For Taney, the presumption in favor of the state was not just a matter of governmental power versus individual liberty. More particularly, it was a matter of balancing property rights against the rights of the community. "While the rights of private property are sacredly guarded," he observed, "we must not forget that the community also have rights, and that the happiness and well being of every citizen depends on their faithful preservation."[73]

Although the revisionist interpretation of the *Lochner* era tends to ignore this tradition, a number of today's historians and legal scholars have observed that the early nineteenth century concept of property included community rights. Gregory Alexander explains that property included an element of preserving the proper

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[69] Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 84-85 (1851). Shaw goes on to say "All property in this commonwealth . . . is derived directly or indirectly from the government, and held subject to those regulations, which are necessary to the common good and general welfare." *See* Scheiber, *supra* note 68, at 222-23; NOVAK, *supra* note 56, at 19-20. It is interesting that Shaw's language begins as a statement similar to what advocates of laissez-faire constitutionalism would later use to describe the limits of property rights. That language, which was captured by the Latin maxim *sic utere tuo ut alienum non laedas* (so use your property as not to injure the property of others), differs only in that it drops the reference to the rights of the community.

[70] 13 N.Y. 378 (1856); *see* Ely, *supra* note 35, at 338-44.

[71] Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420, 547 (1837).

[72] *Id.*

[73] *Id.*

social order. He calls this "property as propriety."[74] Noting that the majority opinion in *Charles River Bridge* was filled with the rhetoric of rights of the community, he explains that this meant more than recognizing the state's power to maintain the peace or preserve good order. It also involved the community's interest in preserving democracy.[75] Alexander's observation brings to mind one of the underlying motives driving antebellum political thought, the Jacksonian fear that accumulation of property could pose a threat to democracy if it resulted in the kind of imbalance of power that existed in past aristocratic or hierarchical political systems.

Alexander describes the history of American attitudes toward property as one of tension, or a dialectic, between the idea of "property as propriety" and a more individual-rights oriented conception of "property as commodity."[76] Other writers, notably Harry Schieber and William Novak, also describe the history of law and property as a model of tension.[77] For Novak, it is a tension between the ideals of individual liberty (*sic utere*) and the "well-regulated society" (*salus populi*). And although he notes that "as late as 1877 one can still discern the powerful influence of those ideals and practices," he also observes that, "by the end of reconstruction, new economic and social forces were eroding the moral and political authority of *salus populi* and the well-regulated society."[78]

One might add constitutional changes to the list of those eroding forces. Ratification of the Fourteenth Amendment following the Civil War provided a new vehicle for challenging states' power to regulate property. But the constitutional change did not, at first, radically change either the definition of property or the presumption that had predominated prior to the war. Both the recognition of community rights as a limit on any absolute claim of property rights and the presumption favoring the state's power survived—at least through the 1877 case of *Munn v. Illinois*.[79]

Munn was one of the so-called *Granger Cases*, most of which dealt with statutes Midwestern legislatures passed in the mid-1870s to regulate railroad rates. *Munn* differed slightly from the others in that it tested an Illinois statute that set a maximum rate for the storage of grain. But it was part of the same commercial and political dynamics that motivated the railroad regulations. The great bulk of grain shipped by rail from Midwestern states ended up in Chicago, where it was stored in fourteen immense elevators owned by nine business firms. Illinois passed the

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[74] GREGORY S. ALEXANDER, COMMODITY & PROPERTY: COMPETING VISIONS OF PROPERTY IN AMERICAN THOUGHT, 1776-1970, at 4-7 (1997).
[75] *Id.* at 207-09.
[76] *Id.* at 4-7; *see also* Gregory S. Alexander, *Property as Propriety*, 77 NEB. L. REV. 667, 668 (1998).
[77] *See* Scheiber, *Public Rights*, *supra* note 68, at 231.
[78] NOVAK, *supra* note 56, at 237-41; *see also* WIECEK, THE LOST WORLD, *supra* note 31, at 112 (observing that legal classicism grew out of tension between two poles of republican aspiration: power to regulate and liberty of individual).
[79] 94 U.S. 113 (1876). NOVAK, *supra* note 56, at 239-40, 247, recognizes this point.

maximum rate law in response to claims that these few firms routinely cooperated to fix prices and thus constituted an effective monopoly.

The partnership of Munn and Scott was one of the nine firms. Its attorneys, John N. Jewett and William C. Goudy, argued that the state's attempt to limit the amount their client could charge for storing grain violated the Fourteenth Amendment by depriving them of their property without due process of law. Reaching this conclusion depended on an expansive definition of the nature of property rights. "It is not merely the title and possession of property that the Constitution is designed to protect," they maintained, "but along with this, the control of the uses and income, the right of valuation and disposition, without which property ceases to be profitable, or even desirable."[80] Although arguments that profit, or at least investment-backed expectation, constitutes a property right are commonplace in today's interpretation of the Takings Clause, Jewett and Goudy's theory that any general regulation that interfered with its ability to make a profit is unconstitutional was unique in its time.[81] Call it what you will—laissez-faire constitutionalism, the negative state, the offspring of Jacksonian Democracy or free-labor theory—whatever the moniker and whatever the roots, there is no doubt that Jewett and Goudy's definition of property was predicated on a presumption that an owner had absolute dominion over his or her property. It was the embodiment of the illusion of absoluteness.

There is also no doubt that their definition rejected the idea that the owner's dominion over property is limited by the rights of the community. Jewett made this abundantly clear. Ignoring the long tradition of economic regulation for the good of the community, including rate and price regulation, he maintained that, "for the first time since the Union of these States, a legislature of a State has attempted to control the property, capital and labor of a private individual, by fixing the prices he may receive from other private persons, who choose to deal with him."[82] Rather than balancing individual property rights against the rights of the community, Jewett made the issue a question of individual property rights versus

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[80] John N. Jewett, *Brief for the Plaintiffs in Error,* Munn v. Illinois, *in* LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 557 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter LANDMARK BRIEFS].

[81] *See* Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978); *see* also Palazzolo v. Rhode Island, 533 U.S. 606 (2001). The idea that the Constitution protected certain rights relating to profit was not unheard of in constitutional history. In *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837), for example, a corporation that had obtained a grant from the state to build and operate a toll bridge argued unsuccessfully that allowing a free bridge to be built nearby violated the Contract Clause because it deprived them of future tolls. Even if the Court had adopted the argument, Charles River Bridge's claim was quite different from Munn's. There, the company maintained that allowing a new bridge would deny it the benefit of the earlier bargain it had made with the state. NOVAK, *supra* note 56, at 96-97, admits that, "across-the-board price controls were rare after the eighteenth century (except in the case of bread and flour)" but he goes on to demonstrate that "public markets were created to protect the public welfare from the evils of an unregulated market." That price regulation was rare does not mean it was thought to be unconstitutional.

[82] W. C. Goudy, *Brief for the Plaintiff in Error,* Munn v. Illinois, *in* LANDMARK BRIEFS, *supra* note 80, at 483.

government power. Legislation fixing prices represented an arbitrary and irresponsible power, he said, a power practically to annihilate private property by destroying the value of its use.[83]

Munn and Scott lost their appeal, and the Supreme Court upheld the Illinois rate regulation. Nevertheless, *Munn* is often treated as the launch pad for the era of laissez-faire constitutionalism that was to follow. That may be. However, as a moment of transition, *Munn* is even more interesting as a lens or porthole to the past. After recounting numerous examples of common state economic regulations that had existed in the past, Chief Justice Waite reached the following conclusion.

> From this it is apparent that down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived the owner of his property without due process of law. Under some circumstances they may, but not under all.[84]

No doubt this was a concession to Jewett and Goudy's argument and their version of substantive due process. But perhaps even more significantly, it reflected Waite's discomfort with the illusion of absoluteness upon which their argument is based.

At most, Waite's majority opinion resulted in an uncomfortable accommodation of the absolutist view of property rights. His discomfort became even more apparent when he tried to explain when substantive due process applies and when it does not; or when property can be regulated and when it cannot. To this end, he reasoned that, "we find that when private property is 'affected with public interest' it ceases to be juris privati only."[85] Property affected with public interest, then, was the type of property that could be regulated. Pointing to early eminent domain and riparian-rights cases, Harry Scheiber has reminded us that this "affected with public interest" doctrine was part of American law long before *Munn*.[86] However, Waite used it differently than it had typically been used in the past. Where old eminent domain cases tended to justify or expand state interference with property, Waite's "affected with public interest" doctrine would limit it. The limit was not on the state's power to take property for public use, but rather to regulate it for the public good. Furthermore, the principle applied not just to regulations that adversely affected land or personal goods, but also to regulation that adversely affected profit.

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[83] Jewett, *supra* note 80, at 549.
[84] *Munn*, 94 U.S. at 125.
[85] *Id.* at 126. Note that in *Nebbia v. New York*, 291 U.S. 502 (1934), the Supreme Court abandoned the "affected with public interest" doctrine so far as it applied to economic regulation.
[86] Scheiber, *supra* note 68, at 231.

Although the "affected with public interest" doctrine appeared to place a limit on both the power of the state and the rights of the community, Waite's application of the doctrine only further illustrated his discomfort with the absolutist view of property rights. At the same time that he recognized a new limit on the power of the state to regulate economic matters, his definition of "affected with public interest" rendered that limit impotent. "Property does become clothed with public interest," Waite wrote, "when used in a manner to make it of public consequence, and affect the community at large."[87] So broad was this definition that it caused Justice Stephen Field, a champion of the absolutist view of property rights, to complain:

> If this be sound law, if there be no protection, either in the principles upon which our republican government is founded, or in the prohibitions of the Constitution against such invasion of private rights, all property and all business in the State are held at the mercy of a majority of its legislature.[88]

Waite's uncomfortable accommodation of the absolutist theory of property may have produced confusion about where the Court might be going, but one aspect of his opinion is unmistakable. In rejecting Jewett and Goudy's argument, the Court continued to emphasize that property rights are limited by overriding claims of the community. Waite stated this in several ways: "When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations with others, he might retain."[89] "A body politic," he wrote, "is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good."[90] "Under the police powers," he continued, "the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his property, when such regulation becomes necessary for the public good."[91]

It is only a slight exaggeration to say that *Munn* was a last gasp for the antebellum legal tradition that emphasized rights of the community as a limit on property. The Supreme Court rapidly began to move away from Waite's reasoning and toward a doctrine that idealized an absolutist right of property. Instead of balancing property right against right of the community, it used a model of individual right versus government power, and it narrowly defined the reach of that power. In the process, it lost sight of the idea of liberty as a balance between individual free-

[87] *Munn*, 94 U.S. at 126.
[88] *Id.* at 140 (Field, J., dissenting).
[89] *Id.* at 124.
[90] *Id.*
[91] *Id.* at 125.

dom and the needs of a democratically governed society. And in the minds of reformers of the time, the protection of liberty suffered as a consequence.[92]

Justice Sutherland captured the tenor of this new doctrine when, dissenting in 1938 case of *West Coast Hotel v. Parrish*, he wrote:

> [W]hile there was no such thing as absolute freedom of contract, but that it was subject to a great variety of restraints, nevertheless, freedom of contract was the general rule and restraint the exception; and that *the power to abridge that freedom could only be justified by the existence of exceptional circumstances.*[93]

Revisionist historians maintain that, as a practical matter, Sutherland's claim that "freedom of contract is the general rule and restraint the exception" overstates the case. It may be true, as they claim, that in terms of sheer numbers of cases, the *Lochner*-era Court upheld more regulation than it overruled. But Sutherland was not talking about counting cases. He was talking about presumptions, and in that respect, his words highlight what is perhaps the most important way in which the *Lochner*-era doctrine changed, rather than followed, American legal tradition.

Both Sutherland's dissent in *West Coast Hotel v. Parrish* and Peckham's majority opinion in *Lochner* idealized the absolutist theory of property. Neither, however, claimed that economic liberty is actually absolute. Like Sutherland, Peckham admitted that, "both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the state."[94] Their endorsement of the absolutist theory was manifested in how they would determine what regulations are reasonable. Their solution to any conflict between economic liberty and community rights begins from the presumption that economic liberty is absolute and works from there. Peckham conveyed this in several ways. Speaking of New York's ten-hour limitation in the Bakeshop Act he said, "The statute necessarily interferes with the right of contract between the employer and employes [sic]."[95] For him, the state's "mere assertion"—in other words, the legislature's determination—that the

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[92] Rebecca L. Brown, *The Fragmented Liberty Clause*, 41 WM. & MARY L. REV. 65, 67 (1999). Although I have borrowed this language from Rebecca Brown, it is fair to point out that she does not necessarily use it in the same way. Brown maintains that the *Lochner*-era Court's mistake was adopting an inflexible view of what constituted the public good. She also critiques the tendency in modern constitutional jurisprudence to rank some liberties higher than others. *See also* Rebecca L. Brown, *Activism Is Not a Four-Letter Word*, 73 U. COLO. L. REV. 1257 (2002). See also Howard Gillman, *The Antinomy of Public Purposes and Private Rights in the American Constitutional Tradition, or Why Communitarianism is Not Necessarily Exogenous to Liberal Constitutionalism*, 21 LAW & SOC. INQUIRY 67, 71 (1996), who maintains that the claim that constitutional law has been unwilling to accommodate a sense of public interest as a counterbalance to the protection of liberty and property cannot be sustained in light of what we know about the history of police-powers jurisprudence.

[93] West Coast Hotel v. Parrish, 300 U.S. 379, 406 (1937) (Sutherland, J., dissenting) (emphasis added).

[94] *Lochner*, 198 U.S. 45, 53 (1905).

[95] *Id.*

legislation falls within the police power has little significance. Rather, the state must show that the regulation has "a direct relation, as a means to an end, and that the end itself must be appropriate and legitimate, before an act can be held to be valid . . . ."[96]

This *Lochner*-era presumption stands in stark contrast to *Munn*, where the Waite majority followed an antebellum legal tradition of applying a legal presumption in favor of the state's power to protect the rights of the public. Waite stated that presumption near the beginning of the opinion. "Every statute is presumed to be constitutional," he wrote.[97] "The court ought not to declare one to be unconstitutional, unless it is clearly so. If there is doubt, the express will of the legislature should be sustained."[98] While he admitted that a state regulation might deprive an individual of property without due process of law, he would uphold a regulation "if a state of facts *could* exist that would justify such legislation" and would declare a regulation void only "if *no state of circumstances could exist* to justify such a statute."[99] Waite recognized that this power—this limit on the absolute right of property—might lead to abuses. But for protection against that potential abuse, he said, "people must resort to the polls, not to the courts."[100]

The belief that state statutes regulating the economy should be presumed to be constitutional also drove Justice John Harlan's dissent in *Lochner*. Recall his words, "a legislative enactment, Federal or state, is never to be disregarded or held invalid unless it be, beyond question, plainly and palpably in excess of legislative power."[101] Harlan did not think this was a new approach. He did not think he had just made it up. Rather, he based his opinion on a strong belief that in 1905 this presumption represented tradition. Nothing else could have led him to predicate this presumption with the phrases, "upon this point there is no room for dispute" and "the rule is universal."[102]

Perhaps Harlan should instead have said, "the rule was universal." He was, after all, in the minority in *Lochner*. Peckham's presumption would reign from 1905 until the *Lochner* era ended in 1937. Some of today's legal scholars call for its return. Although this clarion comes from a variety of quarters, Randy Barnett captures the idea best. "We can protect the unenumerable rights retained by the people by shifting the background interpretive presumption of constitutionality whenever legislation restricts the liberties of the people," he writes. "We can adopt a Pre-

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[96] *Id.* at 57.
[97] *Munn v. Illinois*, 94 U.S. 113, 123 (1876).
[98] *Id.*
[99] *Id.* at 132 (emphasis added).
[100] *Id.* at 133.
[101] *Lochner*, 198 U.S. at 68.
[102] *Id.* at 68 (Harlan, J., dissenting). Strauss, *supra* note 6, at 375, takes the position that the Court acted defensibly in recognizing freedom of contract, but indefensibly in exalting it.

sumption of Liberty."[103] There may be good and logical reasons to apply this presumption of liberty in some kinds of cases. Whether all liberties should be treated alike is a question beyond the scope of this paper.[104] But history suggests that those who favor applying a presumption of liberty in cases involving economic regulation cannot rely on long-standing constitutional tradition for support. *Munn v. Illinois* reminds us that, as late as 1877, American legal culture and constitutional law recognized that property ownership included a limitation based upon the rights the community. This principle was strong enough that the Court presumed all property put into the public sphere could be regulated for the public good. It recognized that determining that a regulation was in the interest of the public welfare, public good, or rights of the public is primarily the responsibility of elected legislatures. And it presumed that legislatures' decisions were valid. In other words, in cases involving the validity of economic regulations, the Supreme Court traditionally employed a presumption of democracy. The most revolutionary aspect of *Lochner* was that it reversed this traditional doctrine.

Conclusion

It is ironic that revisionist scholarship, which began as an irreverent effort to debunk a myth, has produced a myth of its own. It is fair to say that the revisionists have largely been successful in demonstrating that the doctrine of laissez-faire constitutionalism includes ideas that can be traced to antebellum legal and political thought. They have also been successful in supplanting the Progressive account as the standard version of constitutional history. That very success, however, has created a myth that the Progressive interpretation of the *Lochner* era was nothing more than a baseless attempt to depict the Supreme Court as the handmaiden of big business. Simply dismissing the earlier historical interpretation of the era as a politically and philosophically motivated misrepresentation may shore up the contention that laissez-faire constitutionalism represented continuity in constitutional tradition. But it is subject to the same charge revisionists leveled against the Progressive historians in that it would present a mere caricature of reformers' complaints about the Court. It would, consequently, provide a version of constitutional development that is as shallow as the one revisionists rejected.

The revisionist project began as an effort to add richness and depth to our understanding of constitutional development that produced the *Lochner* era. To take seriously that goal, we must also take seriously the complaints of Progressive reformers, the legal theorists who opposed the Court's doctrine, and the historians of the era. Just as the revisionists have studied the traditions that underlay laissez-

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[103] BARNETT, RESTORING THE LOST CONSTITUTION, *supra* note 43, at 259; Barnett, *The Proper Scope of the Police Power*, *supra* note 43, at 442. The United States Supreme Court has actually moved in this direction in cases involving regulatory takings. *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374 (1994).

[104] For convenient treatment of this topic, see generally *Institute of Bill of Rights Law Symposium: Fidelity, Economic Liberty, and 1937*, 41 WM & MARY L. REV. (1999); Meese, *supra* note 18; Brown, *The Fragmented Liberty Clause*, *supra* note 92.

faire constitutionalism, we should look at the traditions that provided the roots of opposition to that doctrine. When we do, and when we compare the two, it becomes clear that regardless of its ties to antebellum legal traditions, the *Lochner*-era doctrine represented a major change in constitutional tradition.