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Lochner Era Jurisprudence and the American Constitutional Tradition

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LOCHNER ERA JURISPRUDENCE AND THE AMERICAN CONSTITUTIONAL TRADITION

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Legal scholars and historians have generally depicted the Lochner *era as a deviant period during which the Supreme Court broke from the constitutionalism that the Marshall Court established and the New Deal Court restored. They maintain that the* Lochner *era Court, which struck down much legislation affecting industrial regulation, strayed from the American constitutional tradition by underconstruing the scope of congressional power and overprotecting private property.*

Several scholars have criticized this view and have presented different theories on the Lochner *era's place in American constitutionalism. In this Article Professor Stephen Siegel paints an entirely new picture, rejecting both the traditional theory and the more recent ones. Professor Siegel argues that the* Lochner *era was both similar to and different from its predecessor and successor eras: it was a transitional period in the American constitutional tradition.*

The Article examines the era's substantive due process cases in terms of their jurisprudence, which was based on a form of thinking that Professor Siegel calls "constitutional conceptualism." He argues that on the one hand, the Lochner *era Court was similar to the pre-*Lochner *era Court in that both based their decisions on constitutional conceptualism; in contrast, the New Deal Court based its decisions on pragmatic interest-balancing. On the other hand, the* Lochner *era Court was similar to the New Deal Court in that both envisioned the Constitution as evolving with the changes in American society; in contrast, the pre-*Lochner *era Court viewed the Constitution as static, determined by the unchanging norms of natural law and framer intent. Thus, the* Lochner *era was a transitional period, bridging America's development from early to modern constitutionalism.*

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I. INTRODUCTION

Until recently, the standard narrative of American constitutional development was that shortly after the nation's founding John Marshall's Supreme Court heroically established the "correct" norms of constitutional law and jurisprudence, norms that included broad power for the new national government, protection of private property, and judicial re-

straint.[1] The Court, according to this story, generally adhered to these norms until after the Civil War. Then, in the last quarter of the nineteenth century,[2] judges concerned about protecting big business from the nascent regulatory state departed from the norm of restraint and substituted their values for the principles that the Constitution's framers enshrined and John Marshall enforced. In this deviant period, known as the *Lochner* era, the Court underconstrued the scope of congressional power and overprotected private property. The final chapter in this story is that after years of national economic collapse and threats of "court packing,"[3] the Court ceased its aberrant behavior. The Court, newly reconstituted as the "New Deal Court," restored the founders' principles, and (as always) truth, justice, and the American way triumphed.

Now that the political consensus surrounding New Deal constitutionalism is coming apart,[4] this narrative is appreciated as a myth created by scholars wishing to justify the New Deal Court's departure from

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1. *See* Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 457-58 (1989); Morton J. Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57, 57-63 (1987) [hereinafter Horwitz, *Republicanism*]; Morton J. Horwitz, *History and Theory*, 96 YALE L.J. 1825, 1827-30 (1987) [hereinafter Horwitz, *History and Theory*]; Sanford Levinson, Book Review, 75 VA. L. REV. 1429, 1449-50 (1989). In light of such cases as Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), which seems to go out of its way to address whether President Jefferson should have delivered Marbury's commission and whether high executive branch officials are amenable to judicial process, *see* William W. Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1, 6-8, contemporary scholars may doubt that Chief Justice Marshall practiced judicial restraint. The standard narrative, however, does not admit that Marshall was an activist justice. *See, e.g.*, James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 149, 151 (1893). Perhaps it is a measure of the distance we have moved from the standard narrative that Marshall's activism now is more apparent.

2. The conventional wisdom dates the *Lochner* era from the early twentieth century, when the Court, in Lochner v. New York, 198 U.S. 45 (1905), first voided industrial regulation legislation based upon the doctrine of "liberty of contract." *Id.* at 64. This view overlooks the facts that by the 1880s the state courts had fully embraced laissez-faire principles and that the Court clearly was moving in that direction. *See infra* note 9.

3. "Court packing" refers to President Franklin D. Roosevelt's proposal to expand the Court to allow him to appoint enough new and ideologically correct justices to uphold New Deal legislation. *See, e.g.*, DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888-1986, at 235-36 (1990).

4. Until the 1970s, commentators usually supported the New Deal Court's decision to legitimate the regulatory state by giving minimal scrutiny to economic legislation. *See, e.g.*, Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 59-62. Now conservative scholars attack the New Deal Court's stance on economic regulation and propose a return to rigorous scrutiny of legislation affecting property rights. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 280-82 (1985). Left-liberal scholars, in turn, criticize the New Deal Court for not going far enough in redistributing property rights. *See, e.g.*, J.M. Balkan, *The Footnote*, 83 NW. U. L. REV. 275, 310-13 (1989) (criticizing the 1937 Court for not mandating government enactment of laws establishing economic equality among individuals).

Lochner Court norms by picturing its rebellion as a restoration.[5] A welter of new narratives presently compete to replace the old, standard story. Scholars representing the political left and the political right say that American constitutional law presents a story of continuity with Marshall Court norms until the New Deal, and that the New Deal marks a break with tradition.[6] Scholars representing the liberal center offer two different analyses. One analysis describes important continuities between the *Lochner* and post-*Lochner* eras.[7] The other, which divides American constitutional history into three distinct periods, tells a story of multiple breaks, not continuity.[8]

This Article argues for a substantially different narrative of American constitutional development. It does so by considering the place of the *Lochner* era in the American constitutional tradition. Focusing on the *Lochner* era is appropriate because it is the linchpin of all the competing narratives. Together, they frame a central question of current constitutional historiography: Was the *Lochner* era continuous or discontinuous with pre- or post-*Lochner* era development? This Article, however, rejects the question as presenting a false choice. It shows that the *Lochner* era was both similar to and different from its predecessor and successor eras. It presents the *Lochner* era as a transitional era that blended the tenets of early and modern American constitutionalism.

This Article examines the transitional nature of *Lochner* era constitutionalism by exploring the jurisprudence of substantive due process cases decided in the early and middle periods[9] of the *Lochner* era. These

5. Ackerman, *supra* note 1, at 458; Horwitz, *Republicanism*, *supra* note 1, at 61-63; Horwitz, *History and Theory*, *supra* note 1, at 1827-30; Levinson, *supra* note 1, at 1449.

6. *See, e.g.*, Richard A. Epstein, *The Mistakes of 1937*, GEO. MASON U. L. REV., Winter 1988, at 1, 5 (libertarian scholar); Horwitz, *Republicanism*, *supra* note 1, at 57-63 (Critical Legal Studies scholar); Levinson, *supra* note 1, at 1449-50 (discussing Richard Epstein's and Bernard Siegan's libertarian constitutionalism). The right portrays the New Deal Court as a break with tradition by characterizing the Warren Court's liberalism as unwarranted and unprecedented judicial legislation. The left portrays the Court as a break with the past by casting the Warren Court as a long-needed defender of constitutional liberties.

7. *See* Cass R. Sunstein, Lochner's *Legacy*, 87 COLUM. L. REV. 873, 883-902 (1987).

8. *See* Ackerman, *supra* note 1, at 453-61.

9. The *Lochner* era is divided into three periods: early (1870-1900), middle (1900-1920), and late (1920-1937). In the early phase, *Lochner* era principles gestated in scholarly commentary and appeared in state court decisions and Supreme Court dissents. *See, e.g.*, *In re* Jacobs, 98 N.Y. 98, 115 (1885); Godcharles v. Wigeman, 113 Pa. 431, 437, 6 A. 354, 356 (1886); THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 351-413 (repr. ed. 1972) (1st ed. 1868); *infra* text accompanying notes 453-94 (discussing The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), and Munn v. Illinois, 94 U.S. 113 (1877)). In the middle phase, a majority of the Supreme Court adopted *Lochner* era principles; this touched off a dissenting scholarly tradition. *See, e.g.*, Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 615-16 (1908); Thayer, *supra* note 1, at 148, 151, 156. The precedents of the

cases exemplify *Lochner* era constitutionalism. They have long been described (and decried) as attempting to resolve constitutional questions by application of abstract concepts drawn from a blend of natural and common law.[10] Thus, this Article's task is twofold: to defend discussing the *Lochner* era in terms of its jurisprudence and to situate the *Lochner* era in terms of its conceptualism and its use of natural and common law as the source of its concepts.

Part II of the Article discusses the late nineteenth- and early twentieth-century industrial regulation cases to show that the dominant justices of the *Lochner* era were a substantively diverse, but methodologically unified, group. By discussing the extent to which jurisprudence, rather than substance, identifies the proponents of *Lochner* era constitutional law, this part establishes jurisprudence as central to understanding the popularity, longevity, and place in American constitutional history of *Lochner* era constitutionalism.

Part III discusses *Lochner* era conceptualism, arguing that from the early nineteenth century until 1937 a core facet of American constitutional jurisprudence was a mode of thought that this Article calls "constitutional conceptualism."[11] This part defines "constitutional conceptualism," traces it in Chief Justice Marshall's opinions in *Marbury v. Madison*[12] and *Fletcher v. Peck*,[13] and uses it to show the antebellum state court origins of *Lochner* era substantive due process.[14] Part III maintains that *Lochner* era conceptualism establishes the era's consistency with prior American constitutional jurisprudence. It implies that

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middle period, however, were fairly liberal. *See infra* text accompanying notes 48-63. The Court did not become trenchantly conservative until the late phase of the *Lochner* era, when it lost its jurisprudential moorings. *See* Stephen A. Siegel, *Understanding the* Lochner *Era: Lessons from the Controversy over Railroad and Utility Rate Regulation*, 70 VA. L. REV. 187, 240-43, 249-50, 257-58 (1984); *infra* note 48. *But see* WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT 10-11, 197-200 (1988) (using the year 1900 to divide the *Lochner* era into only two periods). This Article draws from cases decided between 1870 and 1920. In large measure, the post-1920 *Lochner* era jurists carried on the precedents of the pre-1920 *Lochner* era Court. Thus, an interpretation of the early and middle phases is sufficient to establish the general nature of *Lochner* era constitutionalism and its place in American constitutional development. A full understanding of the *Lochner* era, however, requires an understanding of the unique late phase. Nonetheless, for brevity's, if not accuracy's, sake, this Article will speak of *Lochner* era constitutionalism, not just the early and middle periods.

10. *See, e.g.*, Pound, *supra* note 9, at 615-16; Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 462-70 (1909); *infra* notes 392-494 and accompanying text (discussing *Lochner* era jurists' blending of natural and common law).

11. "Constitutional conceptualism" is defined and described *infra* text accompanying notes 101-08.

12. 5 U.S. (1 Cranch) 137 (1803), discussed *infra* text accompanying notes 181-229.

13. 10 U.S. (6 Cranch) 87 (1810), discussed *infra* text accompanying notes 230-71.

14. *See infra* text accompanying notes 279-320.

the New Deal Court's shift to constitutionalism premised upon pragmatic interest-balancing[15] was a departure from the legacy established by the Marshall Court. The ramifications of Part III, however, are countered by Part IV, which discusses the *Lochner* era jurists' use of the common law as the source of their concepts.

Part IV argues that prior to the *Lochner* era, jurists drew their constitutional concepts from traditional natural law and framer intent in an effort to establish an essentially static body of constitutional law. By discussing late nineteenth-century social theory[16] and Justice Stephen Field's dissents in *The Slaughter-House Cases*[17] and *Munn v. Illinois*,[18] Part IV shows that the *Lochner* era jurists' version of the common law was evolutionary. It was, in Rudolf Stammler's phrase, "natural law with a changing content,"[19] derived from history, not reason. Part IV maintains that *Lochner* era common law and the constitutional law predicated upon it were not static. In this way, *Lochner* era constitutionalism broke with tradition and anticipated the more evolutionary jurisprudence of modern constitutional law.

Part V extends the analysis of Parts III and IV. It depicts the *Lochner* era as a transitional era that bridged America's passage from early to modern constitutionalism.

II. THE THREE APPROACHES TO *Lochner* ERA SUBSTANTIVE DUE PROCESS

In the late nineteenth century, the rise of large-scale enterprise and the related creation of a regulatory state[20] posed many challenges to

15. *See infra* text accompanying notes 35-47, 504-08 (discussing the opponents of *Lochner* era jurisprudence, who established the norms that the New Deal Court adopted).

16. *See infra* text accompanying notes 343-91.

17. 83 U.S. (16 Wall.) 36, 83-111 (1873) (Field, J., dissenting), discussed *infra* text accompanying notes 453-72.

18. 94 U.S. 113, 136-54 (1876) (Field, J., dissenting), discussed *infra* text accompanying notes 473-94.

19. RUDOLF STAMMLER, WIRTSCHAFT UND RECHT NACH DER MATERIALISTISCHELN GESCHICTSAUFFASSUNG § 33, at 181 (1906) ("Naturrecht mit wechselnden Inhalte"). The phrase is quoted in English in a translation of chapter six of 2 FRANÇOIS GENY, SCIENCE ET TECHNIQUE EN DROIT PRIVÉ POSITIF 128 (1915), *appearing in* RUDOLF STAMMLER, THE THEORY OF JUSTICE app. I, at 494 (Isaac Husik trans. 1925). *See also* JULIUS STONE, THE PROVINCE AND FUNCTION OF LAW 327 (1946) (attributing phrase to Stammler); *infra* text accompanying notes 419-40 (describing the era's emergent evolutionary consciousness).

Stammler did not discuss the common law. He described the fundamental precepts of law in general. The writings of late nineteenth-century jurists reflect Stammler's vision of law because the jurists shared his historist presuppositions. *See infra* note 340 (distinguishing historism from historicism); *infra* text accompanying notes 343-440 (discussing historism).

20. The essential link between these two institutions in liberal political theory is discussed in Siegel, *supra* note 9, at 259-63.

American constitutional law. Not surprisingly, among them was a need to establish and delimit the regulatory power of the state, known as the "police power."[21] Previously, in an economy typified by small-scale undertakings, government tended to promote and subsidize economic activity, relying on market mechanisms for its control. In a basically nonregulatory environment, jurists did not focus much attention on the constitutional limits of regulation.[22] Early American courts protected property from unconstitutional interference by the government. Prior to the rise of the regulatory state, however, constitutional law generally protected private property only from seizure, not regulation.[23] The effect of a century of litigation under state and federal takings, contract, and due process clauses was to guarantee property holders the title and possession of their wealth, but not its use and value.[24] Stated in other terms, early-

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21. The police power is the authority to abridge rights of liberty and property when doing so reasonably promotes the public health, safety, morals, or general welfare, or protects other property. *See, e.g.*, Berman v. Parker, 348 U.S. 26, 32 (1954); Lochner v. New York, 198 U.S. 45, 53 (1905); City of Aurora v. Burns, 319 Ill. 84, 92, 149 N.E. 784, 788 (1925); ERNST FREUND, THE POLICE POWER, PUBLIC POLICY AND CONSTITUTIONAL RIGHTS 2-3, 57-61 (repr. ed. 1976) (1st ed. 1904); 1 NORMAN WILLIAMS, AMERICAN PLANNING LAW §§ 7.01-.05 (1974).

22. Of course, regulation was not entirely absent during the early part of American history; seminal discussions of the police power date to the mid-1800s. *See, e.g.*, Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 84-88 (1851); Thorpe v. Rutland & B. R.R., 27 Vt. 140, 149-56 (1854). Nonetheless, until the last third of the nineteenth century, courts rarely discussed the doctrine of police power, and when they did, then only in a sketchy manner. Late nineteenth-century jurists were well aware that they were writing on an almost blank slate:

> The 1898 edition of Bouvier's *Law Dictionary* says that the law on this subject [police power] is all of recent growth, and most of it is in the last half of the nineteenth century. It could not consistently say otherwise. The work as originally published in 1839 did not define the phrase . . . nor even contain it . . . . It was only in 1883 that this standard dictionary of law first explained the phrase.

W.G. Hastings, *The Development of the Law as Illustrated by the Decisions Relating to the Police Power of the State*, 39 PROC. AM. PHIL. SOC. 359, 359-60 (1900); *see also* CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES vi-viii, 569-70 (St. Louis, F.H. Thomas Law Book Co. 1886) (explaining the recent rise of regulatory legislation). Justice Harlan, dissenting in *Lochner*, noted that the police power

> "has doubtless been greatly expanded in its application during the past century, owing to an enormous increase in the number of occupations which are dangerous, or so far detrimental to the health of the employés as to demand special precautions for their well-being and protection, or the safety of adjacent property."

Lochner, 198 U.S. at 66 (1905) (Harlan, J., dissenting) (quoting Holden v. Hardy, 169 U.S. 366, 391-92 (1898)); *see also Holden*, 169 U.S. at 392-93 ("While [the police] power is necessarily inherent in every form of government, it was, prior to the adoption of the Constitution, but sparingly used in this country. As we were then almost purely an agricultural people, the occasion for any special protection of a particular class did not exist.").

23. Before the eighteenth century, seizure was the traditional way for governments to abuse property holders. Less complex governments, it seems, must resort to less complex means of spoliation.

24. Stephen A. Siegel, *Understanding the Nineteenth Century Contract Clause: The Role*

and mid-nineteenth-century constitutional law protected vested, not substantive, property rights.[25] Wealth acquired under the law was sacrosanct, but the state was virtually free to make changes in the law no matter how those changes devalued extant holdings.

By the late nineteenth century, this facet of constitutional law was almost universally viewed as anachronistic. The rise of market-dominating industry and the creation of the regulatory state placed constitutional jurists on the horns of a fundamental dilemma: Unless they properly defined the police power and ascertained its appropriate limits, either the regulatory state would strip the right of property of any meaning, or the right of property would triumph over the just claims of society.[26]

In an effort to resolve this apparent dilemma, all *Lochner* era jurists[27] joined in an effort to create a substantive right of property. None of them believed that the courts should continue to limit the rights of property owners to protection of title and possession without protection from intrusive, substantive regulation.[28] In implementing their common

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of the Property-Privilege Distinction and "Takings" Clause Jurisprudence, 60 S. CAL. L. REV. 1, 75-103 (1986); Siegel, *supra* note 9, at 210-15.

25. *See* Edward S. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247, 255-58 (1914) (describing nineteenth-century constitutional law as focused on protection of "vested" rights). The difference between vested and substantive rights involves the distinction between rights relating to past acts and rights relating to future acts. In this regard, rights acquired under an existing contract seem to differ from rights to be acquired under a contract that is not yet signed; wealth acquired through past acts seems to differ from wealth to be acquired through acts in the future. The dichotomy, and the connections of vested rights to possession of property and substantive rights to use and value of property, are discussed in Siegel, *supra* note 24, at 80-81.

26. Just as defining the police power too broadly allowed too much governmental control of private wealth, defining the police power too narrowly allowed government insufficient power to prevent property holders from using their wealth to harm fellow citizens. The constitutional limits of zoning laws, for example, simultaneously define the extent to which government may control an owner's use of her land and the extent to which an owner may use her land in ways harmful to surrounding land and residents without government interference.

27. At this point, the term "*Lochner* era jurists" encompasses both the proponents and the opponents of laissez-faire constitutionalism. *See infra* notes 29-47 and accompanying text (discussing the three schools of thought within *Lochner* era jurisprudence). In later parts of this Article, the term will be used to refer only to the proponents. *See infra* note 110 (discussing the distinction between proponents and opponents of laissez-faire constitutionalism).

28. All early *Lochner* era jurists struggled to elaborate a doctrine of substantive due process as the doctrinal expression of a substantive right of property. Consider, for example, that in his *Lochner* dissent Justice Holmes advocated substantive limitations when "a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law." Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting); *see also* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414-16 (1922) (Holmes, J.) (invalidating an otherwise valid regulation because the financial loss it imposed was too extreme).

It was not until the 1920s that due process began to protect substantive rights other than the right of property. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925) (assuming for the

recognition, however, the jurists fractured into three competing schools of thought. At one extreme were strict laissez-faire constitutionalists. These jurists limited the legislature's regulatory power to the protection of the public's health, safety, and morals and the prevention of fraud.[29] Government, they said, had no power to protect a party from the consequences of his own act, except when he was subject to an incapacity, such as infancy or lunacy, or when another party was perpetrating a fraud against which he could not protect himself.[30] These were the jurists who found paternal government "odious"[31] and argued for the "nightwatchman" state.[32] They approached constitutional law conceptualistically,[33] and drew their constitutional concepts from a blend of

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sake of argument that free speech is a protected right); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (recognizing parents' right to direct their children's upbringing); Meyer v. Nebraska, 262 U.S. 390, 399-403 (1923) (protecting parental control of children's education). Although Justice Brandeis objected to the doctrine of substantive due process, he urged its use in Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring), *overruled by* Brandenburg v. Ohio, 395 U.S. 444, 449 (1969), to protect speech. With regard to the right of property, Brandeis indicated that the police power has limits. *Pennsylvania Coal*, 260 U.S. at 416 (Brandeis, J., dissenting).

29. Strict laissez-faire constitutionalists required that legislation meet stringent standards of equality; they believed that all individuals except those laboring under legally cognizable incapacities should be accorded similar treatment. *See infra* note 47.

30. *In re* Morgan, 26 Colo. 415, 426-31, 58 P. 1071, 1075-77 (1899); State v. Loomis, 115 Mo. 307, 314, 22 S.W. 350, 351 (1893); Godcharles v. Wigeman, 113 Pa. 431, 437, 6 A. 354, 356 (1886); A. LAWRENCE LOWELL, ESSAYS ON GOVERNMENT 15-16 (1892 & reprint 1968); TIEDEMAN, *supra* note 22, at vi, 150-51, 178-88, 194-98, 301-07, 569-72; 1 CHRISTOPHER G. TIEDEMAN, A TREATISE ON STATE AND FEDERAL CONTROL OF PERSONS AND PROPERTY IN THE UNITED STATES 325-26 (repr. ed. 1975) (1st ed. 1900). Some strict laissez-faire constitutionalists exempted those interferences with private contract, such as usury laws, that were sanctioned by continuous use up to and including the time of the Constitution's adoption. *See* People v. Budd, 117 N.Y. 1, 45-48, 22 N.E. 670, 686-87 (1889) (Peckham, J., dissenting); State v. Goodwill, 33 W. Va. 179, 181-82, 10 S.E. 285, 287 (1889), *overruled by* White v. Raleigh Wyoming Mining Co., 113 W. Va. 522, 523-24, 168 S.E. 798, 799 (1933); TIEDEMAN, *supra* note 22, at 238-41 ("[E]nactment [of usury laws] has so long been recognized . . . and the fact that they become dead letters as soon as enacted, render[s] it very unlikely that the courts will pronounce them unconstitutional, however questionable legal writers and authorities may consider them.").

31. Budd v. New York, 143 U.S. 517, 551 (1892) (Brewer, J., dissenting); *see also Godcharles*, 113 Pa. at 437, 6 A. at 356 (criticizing paternal legislation); *Goodwill*, 33 W. Va. at 186-87, 10 S.E. at 288 (same); *see generally* Aviam Soifer, *The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888-1921*, 5 LAW & HIST. REV. 249 (1987) (exploring critically the *Lochner* era's animus against paternalism).

32. For an example of a jurist advocating a "nightwatchman" state limited to minimal functions such as protecting citizens from crime and nuisance, see TIEDEMAN, *supra* note 22, at vi-vii, 148-53, 299-307, 569-72.

33. *See, e.g.*, Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 RES. L. & SOC. 3, 9-12 (1980) (discussing Justice Peckham's approach to the *Lochner* opinion); *infra* text accompanying notes 101-08 (defining "constitutional conceptualism"). This Article describes Peckham as

natural- and common-law principles.[34]

At the other extreme of the *Lochner* era jurists were liberal constitutionalists. These jurists claimed that the Constitution allows legislatures to enact all regulations that reasonable people think appropriate.[35] They defended this standard on substantive and jurisprudential grounds. Substantively, these jurists thought that private market ordering is neither efficient nor just under modern industrial conditions. Corporate concentration, they claimed, gives some entrepreneurs too much power over their less organized competitors, and certainly over their employees, for contractual agreements to represent the uncoerced choices of both parties.[36] Jurisprudentially, they thought law should be derived from a pragmatic, functional analysis of contemporary society—its needs and the operation of the law in it.[37] In their view, legislatures are better suited for determining the propriety of laws than are courts, partially because they are more in touch with the people's wishes. Consequently,

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a strict laissez-faire constitutionalist. *See infra* notes 56, 58, 60; *infra* text accompanying note 66.

34. *See, e.g.*, TIEDEMAN, *supra* note 22, at vii, 4 (defining police power by common-law maxim *sic utere tuo ut alienum non laedas*, which means "use your own so as not to injure another"); Sunstein, *supra* note 7, at 877 (in the *Lochner* era, "regulatory power was largely limited to the redress of harms recognized at common law"); *infra* text accompanying notes 392-440.

35. *See, e.g.*, Lochner v. New York, 198 U.S. 45, 74-76 (1905) (Holmes, J., dissenting); Learned Hand, *Due Process of Law and the Eight-Hour Day*, 21 HARV. L. REV. 495, 498-501, 508 (1908); Pound, *supra* note 10, at 482-87; Thayer, *supra* note 1, at 146-52. It is important to note that despite their deferential approach to governmental power, liberal constitutionalists still supported some substantive protection of property rights. Justice Holmes's majority opinion in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), and his support of constitutional limits to utility rate regulation, San Diego Land & Town Co. v. Jasper, 189 U.S. 442 (1903), illustrate the point.

36. *See, e.g.*, JOHN R. COMMONS, LEGAL FOUNDATIONS OF CAPITALISM 11-64, 283-312 (1923); John P. Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253, 254-62, 282-90 (1947); Horwitz, *Republicanism*, *supra* note 1, at 61.

37. See, for example, the string of brilliant articles by Dean Pound: Roscoe Pound, *The Need of a Sociological Jurisprudence*, 31 A.B.A. REP. 911 (1907) [hereinafter Pound, *The Need*]; Roscoe Pound, *Do We Need a Philosophy of Law?*, 5 COLUM. L. REV. 339 (1905) [hereinafter Pound, *Philosophy of Law*]; Pound, *supra* note 9; Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence* (pts. 1-3), 24 HARV. L. REV. 591 (1911), 25 HARV. L. REV. 140 (1911), 25 HARV. L. REV. 489 (1912) [hereinafter Pound, *The Scope and Purpose*]; Pound, *supra* note 10; and his essay, ROSCOE POUND, INTERPRETATIONS OF LEGAL HISTORY 151-65 (1923) [hereinafter POUND, INTERPRETATIONS]. *See also* Hand, *supra* note 35, at 498-500 (arguing that judicial review should test a statute in the same way it reviews a discretionary decision of a lower court); William D. Lewis, *The Social Sciences as the Basis of Legal Education*, 61 U. PA. L. REV. 531, 532-34 (1913) [hereinafter Lewis, *Social Sciences*] (arguing that since the law is an expression of social ideas, it must change with those ideas); William D. Lewis, *Civil Liberty and a Written Constitution*, 41 AM. L. REG. 1064, 1070-71 (1893) [hereinafter Lewis, *Civil Liberty*] (arguing that while some powers are so extraordinary in nature that they are withheld from the legislature unless expressly granted, others that seem natural and right should be considered granted if not expressly withheld).

these jurists argued that courts should review legislative enactments deferentially.[38] With these thoughts, the constitutionalism of the welfare state was born.

Between these two schools of thought were moderate laissez-faire constitutionalists. Unsympathetic to the wealth redistributions that the liberal constitutionalists' modern welfare state required and unimpressed by the philosophy of pragmatism, these jurists spurned the notion that courts should fashion constitutional law by balancing interests and validating anything that "has a sufficient force of public opinion behind it."[39] Like the strict laissez-faire constitutionalists, these jurists were conceptualists who drew their constitutional concepts from natural and common law.[40] Yet their reading of the common law was different from that of the strict laissez-faire constitutionalists. The moderate laissez-faire constitutionalists did not think common-law principles completely proscribed paternalistic legislation. Instead, they thought the police power extended to all acts tending to harm health, safety, and morals, and to those causing fraud.[41] In their view, laws could forbid individuals from

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38. For example, when Massachusetts prohibited employers from fining weavers for imperfections in their work, Justice Holmes, who was then a judge on the state supreme court, voted to uphold the legislation, saying:

> I suppose that this act was passed because the operatives, or some of them, thought that they often were cheated out of a part of their wages under a false pretense that the work done by them was imperfect, and persuaded the legislature that their view was true. If their view was true, I cannot doubt that the legislature could deprive the employers of an honest tool which they were using for a dishonest purpose, and I cannot pronounce the legislation void, as based on a false assumption, since I know nothing about the matter one way or the other.

Commonwealth v. Perry, 155 Mass. 117, 124-25, 28 N.E. 1126, 1127 (1891) (Holmes, J., dissenting). Holmes concluded his remarks by citing the majority opinion in The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 80-81 (1872), in support of his position. *Perry*, 155 Mass. at 125, 28 N.E. at 1128 (Holmes, J., dissenting). *The Slaughter-House Cases* and their relation to *Lochner* era constitutionalism are discussed *infra* text accompanying notes 453-72.

39. Tyson & Bro. v. Banton, 273 U.S. 418, 446 (1927) (Holmes, J., dissenting). Holmes exempted "express prohibition[s] in the Constitution" from these remarks. *Id.* Such prohibitions are few and, in any event, are susceptible to varying interpretations. *See, e.g.*, JOHN H. ELY, DEMOCRACY AND DISTRUST 13 (1980).

This Article maintains that the proponents of *Lochner* era constitutionalism did recognize the legitimacy of public opinion in fashioning constitutional norms, but they sought to distinguish between the people's temporary "whims" and their permanent "will." *See infra* text accompanying notes 510-33.

40. *See, e.g.*, Kennedy, *supra* note 33, at 12-14 (discussing Justice Harlan's dissent in *Lochner*); *infra* text accompanying notes 94-96 (discussing proponents of laissez-faire constitutionalism). This Article describes Harlan as a moderate laissez-faire constitutionalist. *See infra* notes 74, 76.

41. *See, e.g.*, New York Cent. R.R. v. White, 243 U.S. 188, 207 (1917), discussed *infra* note 46; Holden v. Hardy, 169 U.S. 366, 397 (1897), discussed *infra* text accompanying notes 44-46; *infra* text accompanying notes 59-61.

concluding agreements that harmed their own health, safety, or morals. Some jurists justified such regulations, at least when applied to corporations, on the ground that the "compulsory power" that corporations have over their employees derives from corporations being "artificial combination[s] of capital, which special State legislation has originated and rendered possible."[42] With regulation, the state simply was redressing an imbalance in contractual bargaining power it had created.[43] Other jurists justified the regulations on more general grounds, such as those stated by Justice Brown in *Holden v. Hardy*.[44] In upholding legislation regulating the hours miners could work underground, Justice Brown distinguished the statute from paternalistic legislation by noting that

> proprietors . . . and their operatives do not stand upon an equality, and . . . their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employés, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the legislature may properly interpose its authority.[45]

Justice Brown argued, moreover, that regardless of paternalism " '[t]he State . . . retains an interest in [an individual], however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety and welfare are sacrificed or neglected, the State must suffer.' "[46] Moderate laissez-faire constitutionalists envisioned, in short, a more organic, less individualistic society than what their strict laissez-faire colleagues sought.[47]

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42. State v. Peel Splint Coal Co., 36 W. Va. 802, 820, 15 S.E. 1000, 1005 (1892); *see generally id.* at 811-14, 15 S.E. at 1002-04 (discussing the state as enabling corporations to dominate individuals).

43. Significantly, even the strict laissez-faire constitutionalist Christopher Tiedeman accepted this position and described it as an "advanced, but apparently sound position." 2 TIEDEMAN, *supra* note 30, at 957. The property/privilege distinction underlies this line of thought. *See* Siegel, *supra* note 24, at 57-66.

44. 169 U.S. 366 (1897).

45. *Id.* at 397.

46. *Id.* (author of original quotation not given); *see also* New York Cent. R.R. v. White, 243 U.S. 188, 207 (1917) ("It cannot be doubted that the state may prohibit and punish self-maiming and attempts at suicide; it may prohibit a man from bartering away his life or his personal security; indeed, the right to these is often declared in bills of rights, to be 'natural and inalienable.' "). The language in the parenthetical directly follows the quotation in *Holden* that appears in the text.

47. Another important difference between the three schools of constitutionalism is their

Distinguishing the three approaches to *Lochner* era substantive due process sheds new light on a variety of facets of *Lochner* era constitutionalism and its widespread, long-lived appeal. Scholars have long noted that until the 1920s the Supreme Court took a fairly permissive stance on industrial regulation laws,[48] upholding such paternal enactments as Sun-

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position on the norm of "equality" in substantive due process litigation. All three schools opposed laws that unreasonably burdened or benefited different segments of the public. Strict laissez-faire constitutionalists required stringent reasons for treating groups unequally. *See, e.g.*, Frorer v. People, 141 Ill. 171, 188, 31 N.E. 395, 400 (1892) (voiding a law prohibiting company stores in mining and manufacturing because it did not apply to "other branches of industry" such as construction, transportation, agriculture, and domestic service); State v. Loomis, 115 Mo. 307, 316, 22 S.W. 350, 353 (1893) (en banc) (voiding an antiscript law applicable only to manufacturing and mining concerns); Low v. Rees Printing Co., 41 Neb. 127, 136-43, 59 N.W. 362, 364-66 (1894) (reviewing other recent decisions); *In re* Jacobs, 98 N.Y. 98, 104, 114-15 (1885) (voiding legislation that prohibited manufacture of cigars in tenements in cities with more than 500,000 people because no sufficient reason existed to exempt cities with smaller populations); FREUND, *supra* note 21, at 705 (observing that the ban on unequal laws is "one of the most effectual limitations upon the exercise of the police power"); *id.* at 749-55 (reviewing equality principle and labor legislation).

Liberal constitutionalists required only minimal justifications for treating groups unequally. *See, e.g.*, Gerard C. Henderson, *Railway Valuation and the Courts* (pt. 2), 33 HARV. L. REV. 1031, 1056 (1920) (arguing that courts should void only those rate regulations that are "so outrageous as to shock the common sense of justice"); Thayer, *supra* note 1, at 148-50 (arguing that courts should review legislation deferentially, in the same manner that they review jury verdicts).

Moderate laissez-faire constitutionalists imposed a middle standard. *See, e.g.*, Bunting v. Oregon, 243 U.S. 426, 439 (1917) (upholding differential treatment of certain employers in setting maximum hours); St. Louis Consol. Coal Co. v. Illinois, 185 U.S. 203, 207-08 (1902) (upholding safety regulations imposed on mines with more than five employees); Petit v. Minnesota, 177 U.S. 164, 168 (1900) (upholding differential treatment of barbers and other occupations in Sunday closing law).

The strict and moderate laissez-faire constitutionalists also differed in their approaches to the problem of price regulation. Both groups of jurists allowed price regulation when a business was "affected with a public interest." Siegel, *supra* note 9, at 202. The strict group thought only businesses that exercised governmental privileges or were de jure monopolies fell within this category. The moderate group extended the category to encompass de facto monopolies as well. *See id.* at 200-07.

48. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 567-68 (2d ed. 1988) (Note, however, that material cited presents an inadequate explanation because it is limited to the 1910s. *See id.* at 567 n.2.); Soifer, *supra* note 31 (discussing decisions that reveal the paradox of the Court's paternalistic role); Charles Warren, *The Progressiveness of the United States Supreme Court*, 13 COLUM. L. REV. 294 (1913) (reviewing wide variety of regulatory laws that the *Lochner* era Court upheld). The Court's liberality was present from the *Lochner* era's inception until the 1920s. It is inaccurate to depict the Court as aggressively conservative before the 1920s. *See, e.g.*, Ray A. Brown, *Due Process of Law, Police Power, and the Supreme Court*, 40 HARV. L. REV. 943, 945 n.11 (1927) (calculating the Court's rate of voiding social and industrial legislation as six percent from 1868 to 1912, seven percent from 1913 to 1920, and twenty-eight percent from 1921 through 1927). Professor Brown, however, calculated these statistics without providing an explanation for them. *See also* Siegel, *supra* note 9, at 238-43 (discussing the conservative and liberal approaches to rate regulation).

day closing laws,[49] antiscript laws,[50] workers' compensation acts,[51] maximum hours legislation,[52] and rent control.[53] These decisions, when balanced against the Court's famous decisions voiding regulatory legislation,[54] show that moderate laissez-faire constitutionalists dominated the Court in the middle *Lochner* period.[55] Between 1897 and 1908, for example, when the Court handed down its seminal substantive due process decisions, only two justices were strict laissez-faire constitutionalists[56] and only one was a liberal constitutionalist.[57] The eleven other justices who served during that time were moderates; at no time were there fewer than six moderates on the Court.[58] Moderates governed, for example, in

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49. *Petit*, 177 U.S. at 168.

50. Knoxville Iron Co. v. Harbison, 183 U.S. 13, 22 (1901). Antiscript laws, also known as "truck acts," compelled employers to pay their employees in cash rather than in script redeemable only in goods purchased from company stores. *Id.* at 18.

51. New York Cent. R.R. v. White, 243 U.S. 188, 209 (1917).

52. Bunting v. Oregon, 243 U.S. 426, 439 (1917). This decision, in effect, overruled Lochner v. New York, 198 U.S. 45, 64 (1905) (voiding maximum hours legislation for bakers). *See infra* text accompanying notes 78-88.

53. Block v. Hirsh, 256 U.S. 135, 158 (1921).

54. *See, e.g.*, Adams v. Tanner, 244 U.S. 590, 597 (1917) (voiding state law construed as prohibiting employment agencies); Coppage v. Kansas, 236 U.S. 1, 26 (1915) (voiding state law prohibiting contractual agreements not to join a union); Adair v. United States, 208 U.S. 161, 180 (1908) (voiding federal law prohibiting contractual agreements not to join a union); *Lochner*, 198 U.S. at 64 (voiding state regulation of maximum hours in bakeries); Allgeyer v. Louisiana, 165 U.S. 578, 592-93 (1897) (voiding state law prohibiting out-of-state contracts to insure property temporarily within the state made with out-of-state companies not complying with the state's regulatory legislation).

55. *See generally* Warren, *supra* note 48, at 296-313 (providing extensive listing of regulatory laws that the Court upheld).

56. Justices Brewer and Peckham were the only two strict laissez-faire constitutionalists on the Court during this period. They voted with the majority in every case employing substantive due process to void laws. In cases that upheld regulations preventing employees from contracting in a way that injured only their health or subjected only them to fraud, Brewer and Peckham were the only justices to dissent. Unfortunately, they did so without opinion. *See, e.g.*, Knoxville Iron Co. v. Harbison, 183 U.S. 13, 22 (1901) (upholding antiscript laws); Holden v. Hardy, 169 U.S. 366, 398 (1898) (upholding maximum hours regulation for miners). Brewer and Peckham dissented, again without opinion or support from any other justice, even in Jacobson v. Massachusetts, 197 U.S. 11, 39 (1905), which upheld mandatory smallpox vaccinations. Brewer is the author of the famous line, "The paternal theory of government is to me odious." Budd v. New York, 143 U.S. 517, 551 (1892) (Brewer, J., dissenting).

57. Holmes is famous for his adherence to the liberal constitutionalist view. *See Lochner*, 198 U.S. at 74-76 (Holmes, J., dissenting); Commonwealth v. Perry, 155 Mass. 117, 123-25, 28 N.E. 1126, 1127-28 (1891) (Holmes, J., dissenting); Pound, *supra* note 10, at 480-81 (commending Holmes for his liberal constitutionalism).

58. *Holden*, a paradigmatic moderate laissez-faire constitutional opinion, *see supra* text accompanying notes 44-47 and *infra* text accompanying notes 59-61, was decided by a vote of seven to two, with only Brewer and Peckham dissenting. Similarly, in *Adair*, 208 U.S. at 161-90, seven of the nine justices adhered to moderate principles. *See infra* text accompanying

Holden v. Hardy,[59] which upheld regulations preventing miners from contracting in ways that harmed only their health, and decisively rejected the strict laissez-faire approach[60] that, until then, had been preferred by the state courts.[61] Moderates also carried the day in *Adair v. United States*,[62] which voided regulations preventing railroad workers from contracting in ways that harmed their ability to unionize, decisively rejecting the liberal approach to constitutional law.[63] In *Lochner v. New*

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notes 62-63. In *Lochner*, 198 U.S. 45, six justices adhered to moderate principles. *See infra* text accompanying notes 64-76.

The moderates generally prevailed in industrial regulation litigation. *See supra* and *infra* text accompanying notes 48-93. The moderates also generally prevailed in the litigation, discussed *supra* note 47, over the ban on unequal laws and over what constituted a "business affected with a public interest." *See, e.g.*, Bunting v. Oregon, 243 U.S. 426, 439 (1917) (upholding differential treatment of certain employers in setting maximum hours); St. Louis Consol. Coal Co. v. Illinois, 185 U.S. 203, 207-08 (1902) (upholding safety regulations imposed on mines with more than five employees); Petit v. Minnesota, 177 U.S. 164, 168 (1900) (upholding differential treatment of barbers and other occupations in Sunday closing law); Atchison, T. & S. F. R. Co. v. Matthews, 174 U.S. 96, 103-06 (1899) (upholding, in an opinion by Justice Brewer, differential treatment of railroads in awarding of attorney fees); Siegel, *supra* note 9, at 200-07 (discussing "business affected with public interest").

59. 169 U.S. 366 (1898).

60. *See supra* text accompanying notes 44-47. *Holden* was decisive because it had the support of seven of the nine justices. Peckham and Brewer, who were strict laissez-faire constitutionalists, dissented without opinion. *Holden*, 169 U.S. at 398. The case was so decisive that when Peckham wrote for the majority in *Lochner*, 198 U.S. at 53-57, he specifically reiterated the Court's acceptance of the moderate approach. *See infra* text accompanying note 67.

61. *See, e.g.*, Vogel v. Pekoc, 157 Ill. 339, 344-45, 42 N.E. 386, 387-88 (1895) (explaining earlier cases based on liberty of contract, not just their unequal application); Low v. Rees Printing Co., 41 Neb. 127, 143-47, 59 N.W. 362, 366-68 (1894) (same); Godcharles v. Wigeman, 113 Pa. 431, 437, 6 A. 354, 356 (1886) (voiding antiscript law). Professor Mott implied this conclusion when he mentioned that the Supreme Court faced very few police-power limitation cases because of the "conservatism" of the state courts. RODNEY MOTT, DUE PROCESS OF LAW § 127, at 342 (1926); *see also* FREUND, *supra* note 21, at 749-53 (reviewing the application of the demand for equal laws in the labor context). In addition to state courts, leading commentators advocated the strict laissez-faire approach. *See* LOWELL, *supra* note 30, at 8-12; TIEDEMAN, *supra* note 22, at vi, 1-2, 148-51, 178-88, 194-98, 299-307, 569-72; 1 TIEDEMAN, *supra* note 30, at 325-26.

The decision in *Holden* did not end state courts' allegiance to the strict laissez-faire approach. *See, e.g.*, *In re* Morgan, 26 Colo. 415, 426-31, 58 P. 1071, 1075-77 (1899) (voiding maximum hours law for miners). It did have great influence on them, however. For example, after the Supreme Court validated a maximum hours law for women in Muller v. Oregon, 208 U.S. 412, 423 (1908), the Illinois Supreme Court reversed its contrary holding. *See* W.C. Ritchie & Co. v. Wayman, 244 Ill. 509, 529, 91 N.E. 695, 699 (1910), *rev'g* Ritchie v. People, 155 Ill. 98, 40 N.E. 454 (1895). In any event, had the Supreme Court adopted the strict laissez-faire approach, it would have precluded states from being more liberal and dramatically altered the tenor of the *Lochner* era.

62. 208 U.S. 161 (1908).

63. *Id.* at 180. *Adair* showed that seven of the nine justices had rejected liberal constitutionalism. Justice Holmes dissented in *Adair* on liberal constitutional grounds. *Id.* at 190-92 (Holmes, J., dissenting). Justice McKenna was the only other dissenter. He had voted with the majority in *Lochner* and *Holden*. McKenna dissented in *Adair* on the limited grounds that

York,[64] however, the moderates split over a problematic application of their approach.

Constitutional historiography's singular emphasis on *Lochner* has clouded the recognition not only that the proponents of laissez-faire constitutionalism were split into strict and moderate camps, but also that in *Lochner* a difference within the dominant moderate group allowed the strict group temporarily to apply moderate principles in a strict manner. In deciding that regulation of bakers' hours was beyond the police power, the *Lochner* Court addressed the important but subsidiary issue of the nexus required for the state to present an acceptable claim that legislation pursues a legitimate government purpose.[65] Speaking for the majority, Justice Peckham, who personally favored strict laissez-faire constitutionalism,[66] nonetheless wrote an opinion affirming the Court's decision in *Holden* that laws preventing individuals from harming their own health, safety, or morals are valid.[67] Yet Peckham also wrote, after

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railroads are quasi-public corporations and, consequently, are subject to more intrusive regulation than is private property. *Id.* at 190 (McKenna, J., dissenting). Because Justice Moody did not participate in the decision, *Adair* represents only seven justices' rejection of liberal constitutionalism, not eight. Moody was on the Court from December 1906 to November 1910, but illness drastically limited his participation in the Court's business, and he became a rather insignificant figure during this period. He certainly was not a strict laissez-faire constitutionalist; he seems to have been a liberal member of the moderate school. *See* James F. Watts, Jr., *William Moody*, *in* 3 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969: THEIR LIVES AND MAJOR OPINIONS 1801, 1816-21 (Leon Friedman & Fred L. Israel eds. 1969) [hereinafter THE JUSTICES].

Of course, *Lochner*, which was decided before *Adair*, already had indicated that a majority of the justices rejected liberal constitutionalism. *Lochner*, however, was decided by a one-vote majority. Although the holding decisively rejected liberal constitutionalism, it did not firmly establish moderate laissez-faire constitutionalism, because three of the four dissenting justices disagreed with the application of moderate laissez-faire principles. *See infra* text accompanying notes 74-76.

64. 198 U.S. 45 (1905).

65. Unlike *Holden* and *Adair*, *Lochner* set no principles that defined permissible interests. *See* Sunstein, *supra* note 7, at 877-79 (discussing importance of a means-ends analysis in ferreting out governmental pursuit of impermissible ends).

66. *See supra* notes 56, 58, 60. Justice Brewer was the other adherent of strict principles. *Id.*

67. *Lochner*, 198 U.S. at 53-57, 61. Admittedly, the obeisance to *Holden* is somewhat submerged in Peckham's text. In addition, Peckham's opinion suggests that *Holden* stood for the proposition that the "character" of miners uniquely required special protection. *Id.* at 54. Peckham, an adherent of the strict school, *see supra* notes 56, 58, 60, probably was doing the least he could to hold the moderate votes he needed for his majority. Peckham would have liked the principle to be that the hours legislation at bar had to promote the *public's* health by making the bread more healthful. See People v. Lochner, 177 N.Y. 145, 181-82, 69 N.E. 373, 387 (1904) (O'Brien, J., dissenting), *rev'd sub nom.* Lochner v. New York, 198 U.S. 45 (1905), for a jurist who objected to the law on this ground.

Interestingly, the remark in Peckham's opinion implying the unique incompetence of miners to protect themselves is even more submerged than his remarks admitting a broader read-

allowing that working excessive hours at any occupation inevitably affects health,[68] that statistics and common knowledge failed to support the claim that long working hours sufficiently affect the health of bakers to support legislative concern.[69] That the legislation trenched on a legitimate concern "in a remote degree,"[70] Peckham said, was insufficient. Otherwise,

> [s]carcely any law but might find shelter under such assumptions . . . . Not only the hours of employés, but the hours of employers, could be regulated, and doctors, lawyers, scientists, all professional men, as well as athletes and artisans, could be forbidden to fatigue their brains and bodies by prolonged hours of exercise, lest the fighting strength of the State be impaired.[71]

Consequently, Peckham concluded, "[t]he act is not, within any fair meaning of the term, a health law."[72]

These arguments convinced three moderate laissez-faire constitutionalists to join Peckham and Brewer, the Court's two proponents of strict laissez-faire principles, to void the law.[73] The Court's three other

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ing of *Holden*. Yet, liberal constitutionalists have long emphasized the former remark and overlooked the latter. *See, e.g.*, TRIBE, *supra* note 48, at 569-70, 574. This common reading reflects a failure to realize that moderate constitutional principles, which governed both cases, found nothing improper with paternal legislation protecting traditional common-law police-power subjects. Also, not by coincidence, Peckham's remark helps liberal constitutionalists to lampoon the entire line of early substantive due process decisions for involving ridiculous judgments about real world facts. Of course, liberal constitutionalists could read *Holden* correctly when it suited their interests. *See infra* note 85.

68. Peckham wrote that

> there are [no occupations] . . . which might not come under the power of the legislature to supervise and control the hours of working therein, if the mere fact that the occupation is not absolutely and perfectly healthy is to confer that right upon the legislative department of the Government. It might be safely affirmed that almost all occupations more or less affect the health. There must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty.

Lochner, 198 U.S. at 59.

69. *Id.*

70. *Id.* at 57.

71. *Id.* at 60-61.

72. *Id.* at 61.

73. The three moderates were Chief Justice Fuller and Justices Brown and McKenna, all of whom had voted with the majority in *Holden*. Indeed, Justice Brown had written the opinion in that case, vigorously expressing moderate principles. *See supra* text accompanying notes 44-46. It seems more reasonable to assume that Justice Brown and the others maintained their moderate principles and genuinely agreed with the nonhealth rationale—especially given Peckham's concessions to them in the text, *see Lochner*, 198 U.S. at 54-55 (acknowledging the rationale in *Holden*)—than to assume that they shifted allegiances to the strict laissez-faire camp.

moderates were not convinced.[74] Significantly, they did not join in Justice Holmes's liberal constitutionalist dissent[75] but issued their own opinion, authored by Justice Harlan, finding enough of a nexus between long hours and bakers' health to support the state's claim that it had enacted a health protection law.[76]

Because statistics used by the Court placed bakers in the middle of the mortality tables,[77] the decision in *Lochner* placed most occupations

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74. The three other moderates were Justices Day, Harlan, and White, all of whom voted with the majority in *Adair*. Harlan wrote the *Adair* opinion, which clearly expresses laissez-faire constitutionalist principles. *See* Adair v. United States, 208 U.S. 161, 173-74 (1908) (stating that the government should not interfere with the people's liberty to contract for services); *supra* notes 62-63 and accompanying text.

75. *Lochner*, 198 U.S. at 74-76 (Holmes, J., dissenting). Holmes was the only justice to dissent in both *Lochner* and *Adair*, which clearly expresses his liberal constitutionalist views.

76. *Id.* at 65-74 (Harlan, J., dissenting). Harlan specifically discussed the health rationale. *Id.* at 69-73 (Harlan, J., dissenting). More important, he acknowledged that the statute might have been enacted to redress the inequality of bargaining power between baking employers and employees. He then indicated that the only relevant inquiry for the Court was whether the statute redressed the power balance with regard to an end in which the state had a legitimate interest, such as the protection of the employees' health. *Id.* at 69 (Harlan, J., dissenting). On a single page of the opinion, Harlan twice makes the point that promoting the health of the employees is a sufficient interest, and on one of those occasions he cites *Holden*. *Id.* (Harlan, J., dissenting) (citing Holden v. Hardy, 169 U.S. 366, 398 (1898)). Support for the statement that Harlan's dissent is an exemplar of moderate laissez-faire constitutionalism is found in Holmes's failure to join in the opinion (as Harlan had not joined in his). *See also* Kennedy, *supra* note 33, at 9-14 (analyzing the jurisprudential similarities between Peckham's and Harlan's opinions).

If we put aside the substantive differences between strict and moderate laissez-faire constitutionalists, Harlan was as much a proponent of *Lochner* era constitutionalism as was Peckham. Indeed, given the dominance of moderate sensibilities on the Court, Harlan, although the dissenter in *Lochner*, was even more typical of *Lochner* era justices than was Peckham, the author of the majority opinion.

My candidate for the most typical of all *Lochner* era justices, however, is Henry Billings Brown, who sat on the Court from 1890 to 1906. Having left the Court, he did not participate in *Adair*. But he not only wrote for the majority in *Holden*, over Peckham's and Brewer's dissents, and voted with the majority in *Lochner*, over Harlan's and Holmes's dissents, he also wrote for the Court in Robertson v. Baldwin, 165 U.S. 275, 277-88 (1897) (upholding, over Harlan's dissent, imprisonment of merchant sailors who breached their employment contracts); Plessy v. Ferguson, 163 U.S. 537, 540-52 (1896) (upholding, over Harlan's dissent, segregation in public facilities), *overruled by* Brown v. Board of Educ., 347 U.S. 483, 495 (1954); and Lawton v. Steele, 152 U.S. 133, 135-43 (1894) (upholding, over the dissent written by Fuller and joined by Brewer and Field, summary destruction of property of little value constituting a public nuisance). His mentalité may well represent that of the typical *Lochner* era jurist. Perhaps because of his ordinariness, Brown has attracted little scholarly attention. *But see* CHARLES A. LOFGREN, THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION 174-200 (1987) (discussing Brown's opinion in *Plessy*); Robert J. Glennon, Jr., *Justice Henry Billings Brown: Values in Tension*, 44 U. COLO. L. REV. 553 (1973) (analyzing Brown's career as a Supreme Court jurist); Joel Goldfarb, *Henry Billings Brown*, *in* 2 THE JUSTICES, *supra* note 63, at 1553-63 (discussing Brown's jurisprudence during his tenure on the Court).

77. Peckham commented: "In looking through statistics regarding all trades and occupations, it may be true that the trade of a baker does not appear to be as healthy as some other

beyond the reach of maximum-hours legislation and indicated that the Court demanded a stringent means-ends nexus for police-power legislation. Thus, *Lochner* engendered a significant limiting application of the *Holden* principle that laws could prevent individuals from contracting in ways that harmed themselves. Yet from a moderate laissez-faire standpoint, so clearly did *Lochner* involve a debatable application of an issue subsidiary to *Holden*'s general principle that *Lochner*'s reversal in 1917 in *Bunting v. Oregon*[78] was a fairly insignificant event in the life of the constitutional law era that bears the case's name.[79] Felix Frankfurter,

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trades, and is also vastly more healthy than still others." *Lochner*, 198 U.S. at 59. The statistics evidently were drawn from Lochner's brief, which contains in its appendix an incipient "Brandeis brief" compilation of medical, scientific, and statistical data. *See* Brief for Plaintiff in Error at 50-61, *Lochner* (No. 292). Included in that material is a chart of comparative mortality figures from England in 1890 through 1892, which gave bakers a score of 920. *Id.* at 54. Dock laborers scored highest at 1829, and clergymen scored lowest at 533. *Id.* at 53-55. Railway engine drivers scored 810; barristers and solicitors scored 821; commercial clerks scored 915; publishers scored 833; master musicians scored 1214; and general laborers scored 1221. *Id.* at 54-55. The residual category of "other occupied males" scored 847. *Id.* at 53-56. Bakers, in other words, were healthier than musicians and nearly as healthy as clerks and those in the residual category. Under this approach lawyers would be as regulable as railway engineers. Peckham used this argument in *Lochner*, 198 U.S. at 59-61, and until reading Lochner's brief, I always regarded it as a curmudgeonous flight of fancy.

Lochner's brief also contains a variety of comments about recent changes in the baking industry and its generally comfortable conditions. Brief for Plaintiff in Error at 10-11, 19-20. The state's brief, both by comparison and by absolute standards, is pathetic, presenting weak or irrelevant legal arguments and no data. *See* Brief for Defendants in Error at 5-19. One wonders who did the research that resulted in Justice Harlan's quotations from Professor Hirt's treatise *Diseases of the Workers* and the *Eighteenth Annual Report by the New York Bureau of Statistics of Labor*, *Lochner*, 198 U.S. at 70-71 (Harlan, J., dissenting), or Judge Vann's snippets from a wide range of standard references, People v. Lochner, 177 N.Y. 145, 169-74, 69 N.E. 373, 382-84 (1904) (Vann, J., concurring), *rev'd sub nom.* Lochner v. New York, 198 U.S. 45 (1905).

The New York opinion included its own comparative mortality data drawn from the 1900 U.S. Census. *Id.* at 173, 69 N.E. at 383-84 (Vann, J., concurring). Those statistics say that "deaths among bakers and confectioners were three and two-tenths per cent greater than the average of general industrial occupations." *Id.* (Vann, J., concurring). Judge Vann felt he could take judicial notice of material in "such sources of information as were open to the legislature" to determine whether or not "from common knowledge . . . [baking] is an unhealthy employment." *Id.* at 169, 69 N.E. at 382 (Vann, J., concurring). Adherence to "common knowledge" is a theme that runs throughout both the majority and the minority opinions and briefs. *See, e.g.*, *id.* (Vann, J., concurring) (arguing that the validity of the regulation in question depends on whether it is common knowledge that baking is unhealthy); *id.* at 187, 69 N.E. at 389 (Bartlett, J., dissenting) (citing "common experience").

78. 243 U.S. 426, 438 (1917) (upholding maximum-hours legislation applicable to "mills, factories and manufacturing establishments").

79. *Lochner*'s eventual overruling was presaged by the Court's retreat, after a change in Court personnel, from *Lochner*'s demand for a stringent means-ends nexus to uphold police-power legislation. *See* MOTT, *supra* note 61, §§ 226-27, at 569-73. The Court's shift on the strength of the means-ends nexus was a significant event in the history of the *Lochner* era, for that shift enabled the Court to establish clearly its permissive stance toward industrial regulation. But *Bunting* did not mark that shift; it belatedly illustrated it. Although the overruling

who argued *Bunting* for the State, was a leading liberal constitutionalist.[80] Yet he fashioned arguments to show that overruling *Lochner* was consistent with the *Lochner* era's matrix of constitutional assumptions and doctrines.[81] Frankfurter read *Lochner* as reflecting the then " 'common understanding' " that length of work does not affect health.[82] He argued that subsequent scientific research, amply documented in his extensive "Brandeis brief," had shown this to be untrue.[83] Consequently, he trumpeted, "judgment by speculation must yield."[84]

Frankfurter's was an argument with which many moderate laissez-faire constitutionalists could agree.[85] Indeed, Justice McKenna, who voted to void the New York law in *Lochner*, wrote for the Court upholding the Oregon law in *Bunting*.[86] Many moderate laissez-faire constitu-

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of *Lochner*'s more specific holding on the validity of maximum-hours legislation was tremendously significant for the labor movement, it was insignificant in terms of legal theory or consciousness. The fact that *Lochner* was overruled only 12 years after it was decided is not noticed by many law scholars.

80. *Bunting*, 243 U.S. at 430-33 (argument of Felix Frankfurter on behalf of Defendant in Error).

81. *See id.*

82. *Id.* at 432 (quoting *Lochner*, 198 U.S. at 59).

83. *Id.* at 432-33. Louis Brandeis drafted a two-volume brief with over 1,021 pages, containing only seven pages of legal argument paginated with Roman numerals to emphasize their prefatory nature. *See* Brief for Defendant in Error at iv-xv, 1-1021, *Bunting* (No. 228). Data and statistics from around the world began on page one. *See id.* at 1. Most of the data had been published since 1905, and Frankfurter emphasized in his argument that such scientific knowledge of the subject could not have been before the *Lochner* Court "because it was not heretofore in existence. Inasmuch as the application of the contending principles must vary with the facts to which they are sought to be applied, of course new facts are the indispensable basis to the determination of the validity of specific new legislation." *Bunting*, 243 U.S. at 432-33 (citing People v. Schweinler Press, 214 N.Y. 395, 412, 108 N.E. 639, 644 (1915), *appeal dismissed sub nom.* Press v. New York, 242 U.S. 618 (1916)). Brandeis did not argue *Bunting* because between the drafting of the brief and the argument of the case he was appointed to the Court; he took no part, however, in consideration of the case.

84. *Bunting*, 243 U.S. at 432.

85. Frankfurter's following remark is telling of his appeal to moderate laissez-faire constitutionalism:

> This is precisely what *Holden v. Hardy* . . . looked forward to.
>
> The insight expressed in that case has now been amply justified by experience. What in 1898 presented a specific, and apparently, exceptional instance . . . is now disclosed to be of far wider and deeper application. It is now demonstrable that the considerations that were patent as to miners in 1898 are to-day operative, to a greater or less degree, throughout the industrial system.

Id. Of course, some moderates would say Frankfurter's argument artfully understated the truth because *Lochner* always had been an incorrect application of principle to the facts. *See, e.g.*, Lochner v. New York, 198 U.S. 45, 65-74 (1905) (Harlan, J., dissenting); *infra* text accompanying note 87.

86. *Bunting*, 243 U.S at 433. Incredibly, McKenna's opinion did not mention or even vaguely refer to *Lochner*, much less explain that the Court was overruling it.

Chief Justice White, who joined Harlan's dissent in *Lochner*, dissented without opinion in

tionalists could accept that *Lochner*, the case, was "strikingly erroneous" and "illogical,"[87] while insisting that *Lochner*, the approach to constitutional law, was "vital[]" and "based on sound legal principles."[88]

Distinguishing the three approaches to *Lochner* era substantive due process thus affirms that, despite the close vote in *Lochner*, *Lochner* era constitutionalism was widely popular among jurists in late nineteenth and early twentieth century America.[89] It also confirms that laissez-faire constitutionalists were not a monolithic bloc, but differed significantly over matters of fundamental principles and their application.[90] In addition, a study of the interplay between the three approaches to *Lochner* era substantive due process establishes that *Holden* and *Adair*, more than *Lochner*, set and express[91] the tenor of *Lochner* era constitutionalism,[92] and that the principles dominating *Lochner* era constitutionalism were

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Bunting. *Id.* at 439. Justices Van Devanter and McReynolds joined his opinionless dissent. *Id.* Van Devanter's and McReynolds's dissents are more understandable than White's, as they later achieved fame as two of the "Four Horsemen of Reaction," the ultra-conservative justices who led the Court into aggressive conservatism in the 1920s and early 1930s. *See* FRED RODELL, NINE MEN 217-21 (1955).

87. MOTT, *supra* note 61, §§ 127, 220, at 343, 560 (the latter remark is based on Mott's reading of the case to say that the "health of workers is not public health").

88. *Id.* Mott made the latter remark with specific reference to Coppage v. Kansas, 236 U.S. 1, 26 (1914), which extended to the states the ruling in Adair v. United States, 208 U.S. 161, 180 (1908), striking down federal legislation. Inferentially, Mott was praising *Adair* and distinguishing it from *Lochner*, as this Article does.

89. The vote in *Lochner* was five to four. Clearly, if the vote had been on the general viability of *Lochner* era constitutionalism, the vote would have been eight to one, with Justice Holmes dissenting. In addition, though many states pursued some variety of laissez-faire constitutionalism, I am aware of no state or state court judge demonstrating liberal constitutionalist sensibilities much before the 1920s.

90. *See supra* note 47 and text accompanying notes 29-34, 39-47, 64-76. *Lochner* concerned a further dispute among laissez-faire constitutionalists: whether legislation had to promote legitimate state interests substantially or minimally. *Lochner*, 198 U.S. at 61, 64 (opinion of the Court); *id.* at 65-74 (Harlan, J., dissenting).

These remarks are not intended to deny that strict and moderate laissez-faire constitutionalists shared the goal of preventing the emergent regulatory state from becoming a redistributionist state. *See* Horwitz, *Republicanism*, *supra* note 1, at 57-60; Sunstein, *supra* note 7, at 874. The point is that they differed significantly on the substantive principles that this commitment implied.

91. Admittedly, *Coppage*, which extended *Adair* to the states, may be an even better vehicle for showing the bases of moderate laissez-faire constitutionalism because it more fully articulates the reasons for voiding the legislation. *See Coppage*, 236 U.S. at 9-21.

92. Perhaps the historians' focus on *Lochner* is something of winner's history. Because *Lochner* was a controversial (and revealing) application of widely accepted principles, it was a good target for liberal constitutionalist attacks. Compare, for example, Frankfurter's use of *Holden* as a paradigm in his argument in *Bunting*, *see supra* note 85, with the usual liberal constitutionalist dismissal of *Holden* as representing the laughable judgment that miners, but not bakers, are incompetent to protect themselves (like infants and women) and therefore require special judicial protection, *see supra* note 67. This comparison shows that liberal constitutionalists knew the true import of *Lochner* when it served their purposes.

more liberal and humane than previously thought.[93] Finally, studying the judicial philosophies underlying the three competing approaches reveals the importance of jurisprudence as a means of understanding the *Lochner* era, its substantive law, and its widespread appeal among *Lochner* era jurists.

Though substantively diverse, laissez-faire constitutionalists were jurisprudentially unified. With few exceptions,[94] both strict and moderate laissez-faire constitutionalists were conceptualists who claimed to draw their abstract concepts from a blend of natural and common law.[95] More than any agreement on matters of doctrine, jurisprudence bound laissez-faire constitutionalists into a group and distinctly separated them from liberal constitutionalists, who argued that legal doctrine should be fashioned by pragmatic interest-balancing.[96]

Because liberal constitutionalists were aware of the importance of jurisprudence in justifying, unifying, and even defining laissez-faire constitutionalism,[97] methodological critiques of the *Lochner* era always were a prominent part of their assaults on the *Lochner* era Court.[98] Yet in the late nineteenth and early twentieth centuries there was something unde-

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93. The underlying liberality of *Lochner* era laissez-faire constitutionalism partially explains its general popularity. It also shows that its fundamental principles are more curious than generally appreciated.

Holden asserts, on the one hand, that the state may redress bargaining power and prevent employers from extracting contracts that harm their employees' health, safety, or morals, while *Adair*, on the other hand, asserts that the state may not redress bargaining power and prevent employers from extracting contracts that harm any other of their employees' interests (such as union organizing). *Cf.* MOTT, *supra* note 61, § 220, at 560 (asserting that guarding the health of workers is a legitimate end of police-power regulation but that promoting "industrial efficiency" is not). To modern minds, which seem able to grasp the logic of liberal constitutionalism and the logic (though frequently not the justice) of strict laissez-faire constitutionalism, this is a baffling position. This Article indirectly explains the appeal of this position to early *Lochner* era jurists: its attraction derived from the jurists' belief that the historical process justified it. *See infra* text accompanying notes 392-440.

94. *See* George W. Wickersham, *The Police Power, A Product of the Rule of Reason*, 27 HARV. L. REV. 297, 315 (1914) (explaining that the exercise of police power should be subject to a test of reasonableness and should not exceed constitutional boundaries).

95. Of course, as a reflection of their substantive disagreements, strict and moderate laissez-faire constitutionalists read the common law differently. *See supra* note 47; *supra* text accompanying notes 29-34, 39-47, 64-76.

96. *See supra* text accompanying notes 35-38; *infra* text accompanying notes 504-08.

97. *See, e.g.*, Kennedy, *supra* note 33, at 9-14 (discussing Peckham's and Harlan's jurisprudence). Jurisprudence helped express these substantively diverse justices' kinship as it helped ground the legitimacy of their common substantive opposition to the redistributionist state. *See supra* note 90.

98. *See, e.g.*, Hand, *supra* note 35, at 498-500, 508; Horwitz, *Republicanism*, *supra* note 1, at 61-63 (tracing this phenomenon to liberal constitutionalists' wish to present their principles as a restoration of pre-*Lochner* era constitutionalism); Pound, *supra* note 9, at 615-16; Pound, *supra* note 10, at 462-64, 469-70.

niably attractive about the jurisprudence that liberal constitutionalists decried—something attractive about conceptualism and the use of common law suffused with natural law as the source of constitutional concepts. The remainder of this Article attempts to account for the popularity of *Lochner* era jurisprudence,[99] shows its ability to legitimate substantive due process doctrine, and discusses the *Lochner* era's place in the American constitutional tradition.[100]

III. CONSTITUTIONAL CONCEPTUALISM AND THE AMERICAN CONSTITUTIONAL TRADITION

A. Constitutional Conceptualism

Scholars have long said that conceptualism was a fundamental, distinguishing aspect of *Lochner* era constitutional law.[101] That conceptualism, which this Article calls "constitutional conceptualism" to distinguish it from the related conceptualism that dominated private law in the same period,[102] rested upon three tenets. The first was that courts could and should use fairly abstract concepts, definitions, and principles to resolve legal disputes.[103] This tenet correlated with *Lochner* era pri-

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99. "*Lochner* era jurisprudence" is defined as the jurisprudence of the proponents of laissez-faire constitutionalism—the jurisprudence of the jurists whose substantive and methodological commitments dominated courts in the *Lochner* era. The term is something of a misnomer because it does not encompass the jurisprudence of the liberal constitutionalists of that era, discussed *supra* text accompanying notes 35-38 and *infra* text accompanying notes 504-08. The term "*Lochner* era jurisprudence" is used because the term "laissez-faire constitutionalism" or "laissez-faire jurisprudence" has an inappropriate antiregulatory emphasis. *See infra* note 110 (discussing term "*Lochner* era jurist").

100. Implicitly, the remainder of the Article will shed light on the question of how *Lochner* era jurists could think it sensible to propound a substantive law that allowed the state to prevent citizens from harming their own health, safety, or morals, but not their other interests. *See also supra* note 93 (discussing the popularity of laissez-faire principles).

101. *See, e.g.*, Kennedy, *supra* note 33, at 9-14; Pound, *supra* note 9, at 615-16.

102. On private law conceptualism during the *Lochner* era, see GRANT GILMORE, THE DEATH OF CONTRACT 3-53 (paperback ed. 1974); Kennedy, *supra* note 33, at 9-14; Pound, *supra* note 9, at 615-16; Joseph W. Singer, *The Legal Rights Debate in Analytic Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 1015-17.

103. *See* Singer, *supra* note 102, at 1015-17; *infra* text accompanying notes 111-18.

One way to understand conceptualism is to compare it with a modern nonconceptualist jurisprudence, such as "balancing of interests." Compare, for example, *Lochner* era reasoning with contemporary approaches to determining when government may regulate private property. Modern constitutional analysis assumes that government has nearly plenary power to regulate private property, except when the regulation goes "too far." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). Going "too far" is determined by balancing a wide variety of interests, including the importance and extent of the intrusion and the importance and extent of the public interest served. *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 485-502 (1987); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123-28 (1978). *Lochner* era courts, in contrast, claimed to ask only if the regulation served a legitimate governmental goal. Governmental goals were abstract categories; the issue became

vate-law jurisprudence, which taught that all law rests upon a few basic concepts[104] that supposedly are self-applicable or capable, more or less, of deductive application.[105] All mature legal systems, *Lochner* era jurists claimed, assume a geometric shape in which the myriad rules of law are the elaboration of a few initial concepts.[106] Public law is not distinct from private law in this regard.

The second tenet upon which constitutional conceptualism rested was that the concepts used to resolve constitutional disputes must be contained in the Constitution, or must so clearly effectuate goals contained in the Constitution that for all intents and purposes they may be conceived of as being contained in the Constitution.[107] This tenet reflected *Lochner* era political theory, which maintained that the source of American public law is the will of the sovereign people as expressed in their written Constitution. Constitutional law's operative concepts, therefore, must be given to, not chosen by, the courts. Judges were to discover and disclose these basic concepts as a means of effectuating the intent of the nation's founding generation in drafting and ratifying the national covenant. Constitutional law's basic norms were not the product of judicial will and policymaking.

The third tenet underlying constitutional conceptualism was that the purpose of constitutional law is to separate spheres in which government (or more specifically the branch that has acted) has untrammeled, unreviewable discretionary power from spheres in which it has no power.[108] Judicial review entitled courts to allocate power among the branches of government, not to scrutinize its substantive exercise. This

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whether acts by their nature fit into them. *See, e.g.*, Lochner v. New York, 198 U.S. 45, 57-63 (1905) (discussing whether regulation of bakers' hours is a "health" regulation). Christopher Tiedeman, a leading nineteenth-century constitutional theorist, asserted that regulation was unconstitutional whenever it prevented a nontrespassory harm. TIEDEMAN, *supra* note 22, at 148-51. In his view, a single concept, remorselessly applied, properly adjudicated all cases. *See id.*

104. "Concepts" hereinafter includes both principles and definitions.

105. *See* articles cited *supra* notes 101-02. As Dean Langdell commented,

> Law, considered as a science, consists of certain principles or doctrines. . . . [T]he number of fundamental legal doctrines is much less than is commonly supposed; the many different guises in which the same doctrine is constantly making its appearance, and the great extent to which legal treatises are a repetition of each other, [are] the cause of much misapprehension.

C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS viii-ix (2d ed., Boston, Little, Brown 1879) (1st ed. 1871).

106. For a review of the history of the "geometric paradigm" in law, see M.H. Hoeflich, *Law & Geometry: Legal Science from Leibniz to Langdell*, 30 AM. J. LEGAL HIST. 95 (1986).

107. *See* Stephen A. Siegel, *Historism in Late Nineteenth Century Constitutional Thought*, 1990 WIS. L. REV. 1431, 1505-14.

108. *See* Thomas M. Cooley, *Limits to State Control of Private Business*, 1878 PRINCETON

tenet derived from both jurisprudence and political theory. Jurisprudence taught that law should be determinate; political theory taught that American courts were coordinate branches of government entitled to act according to their understanding of the Constitution. In constitutional cases, therefore, judges should not have discretion. Judges should determine the existence of power, which was perceived as a question of kind, and not the reasonableness of its exercise, which was a question of degree. Ideally, this was to be done through an analysis characterized by bright-line tests.

There is little doubt that *Lochner* era constitutionalism was conceptualistic.[109] *Lochner* era jurists[110] perceived every organ of government together with government as a whole as possessing distinct powers, each defined by a determinate concept and dependent subconcepts. In approaching Commerce Clause disputes, for example, *Lochner* era judges

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REV. 233, 243-44; Siegel, *supra* note 9, at 192-93, 198, 200, 204-05; *infra* text accompanying notes 473-94 (discussing Munn v. Illinois, 94 U.S. 113 (1876)).

109. In establishing the conceptualistic foundations of *Lochner* era jurisprudence, scholars have overstated the presence of conceptualism, particularly after 1910. For example, after 1910 the less formal "substantial effect" test replaced the conceptualistic "direct/indirect effect" test. *See, e.g.*, The Shreveport Rate Case, 234 U.S. 342, 351 (1914) (holding that the federal government may regulate aspects of intrastate commerce that have a "close and substantial relation" to interstate commerce); TRIBE, *supra* note 48, at 308-09 (discussing *The Shreveport Rate Case*); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1415-21 (1987). In addition, throughout the *Lochner* era, the Court admitted that it had no overarching definition of due process and proceeded case by case. *See, e.g.*, Lochner v. New York, 198 U.S. 45, 53 (1905). Decay of conceptualism was itself part of the transitional nature of the *Lochner* era.

Nevertheless, judges and jurists maintained a strong commitment to conceptualism throughout the *Lochner* era. *See, e.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926) (explaining growth in law as changing application of constant principles); Pierce Butler, *"Valuation of Railway Property for Purposes of Rate Regulation,"* 23 J. POL. ECON. 17 (1915) (future Supreme Court justice explaining that in railroad ratemaking the "value" of the railroad is "a fact" and not a matter of choice or policy). Discussing conceptualism as the link to the past is appropriate, on the one hand, because its decay was against the will of *Lochner* era jurists, given their commitment to it. Discussing the Lochner era jurists' rejection of a natural-law foundation, on the other hand, emphasizes the *Lochner* era's link to the future because the change from a static to an evolutionary natural-law was a change *Lochner* era jurists embraced.

110. The term "*Lochner* era jurists" refers to the proponents of laissez-faire constitutionalism. It embraces both the strict and the moderate laissez-faire constitutionalists; it excludes liberal constitutionalists. Until this point I have generally avoided using the term "*Lochner* era jurists" and its cognates. Part II showed that late nineteenth- and early twentieth-century lawyers, judges, and commentators were divided into three camps, *see supra* text accompanying notes 29-47, only two of which were proponents of laissez-faire constitutionalism. The proponents were the dominant group and they are the focus of this Article; therefore, brevity counsels referring to them as "*Lochner* era jurists." I will refer to opponents of laissez-faire constitutionalism as such. When comments apply not to the entire group of proponents of laissez-faire constitutionalism but only to the strict or moderate camp, the text will so state. *See also supra* note 99 (discussing the term "*Lochner* era jurisprudence").

allocated power between the states and the national government by distinguishing the concepts of "commerce" and "manufacturing" and the concepts of "direct" and "indirect" effects.[111] In Due Process Clause disputes, the judges delimited governmental power over private property by fleshing out the concepts of "property" and "liberty of contract."[112]

Unfortunately, scholars who have described *Lochner* era conceptualism have not noted that in fashioning constitutional law according to these tenets, *Lochner* era jurists were carrying forward the jurisprudence of their predecessors.[113] From the early nineteenth century, constitutional conceptualism had been a hallmark of constitutional analysis.[114] In the nineteenth century, constitutional conceptualism shaped many of the core doctrines of the Constitution's two most litigated provisions, the Commerce Clause and the Contract Clause. Well before the *Lochner* era the Supreme Court developed, for purposes of applying the Commerce Clause, the concept of an "original package" to determine when goods were in interstate commerce and, therefore, immune from state taxation.[115] Similarly, the Court devised the concept of "subjects [that] . . . in

111. *See, e.g.*, United States v. E.C. Knight Co., 156 U.S. 1, 11-13 (1895); Smith v. Alabama, 124 U.S. 465, 474-75 (1888).

112. *See, e.g.*, Coppage v. Kansas, 236 U.S. 1, 14-19 (1915); Adair v. United States, 208 U.S. 161, 172-75 (1908); Lochner v. New York, 198 U.S. 45, 53-57 (1905). During the *Lochner* era, jurists defined other governmental powers over property conceptualistically. A conceptualistic "use by the public test" defined eminent domain. JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN 415-20 (2d ed. 1900). The concept of "business affected with a public interest" limited rate regulation. Siegel, *supra* note 9, at 194-207. The power of rate regulation was itself limited by a constitutional concept of value as equivalent to the replacement cost of the property. *Id.* at 224-32.

113. *But see* CRAIG R. DUCAT, MODES OF CONSTITUTIONAL INTERPRETATION 42-51 (1978) (explaining that for Chief Justice Marshall, law existed prior to the adjudication of a matter); T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 948-52 (1987) (stating that nineteenth-century constitutional cases were decided categorically rather than through a balancing approach).

114. Professor Sherry contends that when discussing early American constitutional jurisprudence it is important to distinguish between structure-of-government cases and civil liberties cases. According to Sherry, shortly after the nation's founding, structure-of-government cases were adjudicated positivistically according to the meaning of the constitutional text, while civil liberties cases continued to be adjudicated on a natural-law foundation. *See* Suzanne Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1167-68 (1987). In this Article I argue that nineteenth-century judges used constitutional conceptualism when discussing governmental structure and civil liberties issues. *See, e.g.*, *infra* notes 181-229 and accompanying text (governmental structure); *infra* notes 230-71 and accompanying text (civil liberties).

115. Goods in transit or held for resale by an importer in their "original package" were immune from state taxation. This doctrine stems from Chief Justice Marshall's opinion in Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 442 (1827), as described by Chief Justice Taney in The License Cases, 46 U.S. (5 How.) 504, 574-75 (1847). The conceptualism of the doctrine is illustrated in several student notes, which discuss such topics as how and when a ship, built in one state and delivered to another, leaves its original package; and whether the original

their nature . . . imperatively demand[] a single uniform rule"[116] to decide when state commercial legislation[117] intrudes upon the exclusive jurisdiction of the national Congress.[118]

Pre-*Lochner* era Contract Clause analysis turned upon a particular concept of contract that embraced executed land grants made by a state but not by an individual.[119] A highly conceptualistic notion of "inalienable powers," which included eminent domain and police power but not taxation, narrowed application of the Contract Clause.[120] It was also limited by a distinction between contract "rights" and contract "remedies" that Chief Justice Marshall said "exists in the nature of things" but which eludes modern understanding.[121]

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package of separately wrapped bottles of liquor that are shipped in an open box is the bottles or the box. *See* E.S. Cohen, Note, *Constitutional Law—Interstate Commerce—Original Package Doctrine*, 21 VA. L. REV. 433, 436-42 (1935); Note, *The Doctrine of Original Packages*, 18 HARV. L. REV. 530, 531 (1905); Note, *Recent Cases—Constitutional Law—Interstate Commerce—Original Package*, 14 HARV. L. REV. 542, 542 (1901); Note, *Recent Cases—Interstate Commerce—Burdens Imposed by States—Application of "Original Package" Doctrine to Interstate Aspect of New York Milk Control Law*, 48 HARV. L. REV. 1437, 1438 (1935). The following question further illustrates the conceptualistic nature of the doctrine: What is the original package if the box containing the separately wrapped bottles is closed to protect its contents during shipping?

116. Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 319 (1851).

117. The notion of state commercial, as opposed to police, legislation is another example of nineteenth-century constitutional conceptualism that had a problematic application in a variety of cases. *See, e.g.*, The License Cases, 46 U.S. (5 How.) 504, 577-78 (1847) (holding that state liquor regulatory scheme was commercial legislation); *id.* at 588 (McLean, J.) (arguing that it was police legislation); *id.* at 608 (Catron, J.) (commerce); *id.* at 617 (Daniel, J.) (commerce); *id.* at 632 (Grier, J.) (police); Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102, 136-37 (1837) (holding that state tax to defray cost of examining and hospitalizing passengers for disease was a police regulation); *id.* at 155-57 (Story, J., dissenting) (arguing that it was a commercial regulation). In general, Professor (later Justice) Frankfurter wrote that the Commerce Clause cases after Marshall's death, but well before the *Lochner* era, comprised "obscuring formulas." FELIX FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE 31 (1937).

118. This was the area of the "dormant Commerce Clause." Professor Epstein traces the conceptualistic commerce/manufacturing dichotomy back to Chief Justice Marshall. Epstein, *supra* note 109, at 1410, 1433.

119. *See* Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810), discussed *infra* text accompanying notes 230-71. The pre-*Lochner* era concept of a contract embraced state corporate charters but not the tenure or salaries of public officials. *See* Butler v. Pennsylvania, 51 U.S. (10 How.) 402, 416, 418 (1851); Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 630 (1819); *id.* at 657-59 (Washington, J., concurring).

120. *See* Siegel, *supra* note 24, at 31, 41-54.

121. *See* Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 200 (1819); TRIBE, *supra* note 48, at 615 (quoting Justice Cardozo in W.B. Worthen Co. v. Kavenaugh, 295 U.S. 56, 60 (1935)); Siegel, *supra* note 24, at 9, 22-25. Modern jurists believe that the distinction was fashioned to effectuate judicial policy preferences. The Court's decision in Bronson v. Kinzie, 42 U.S. (1 How.) 311 (1843), to void legislation that unduly burdened contract rights seems to be an example of balancing rather than conceptualistic thinking. *Id.* at 317-18. *See, e.g.*, TRIBE, *supra* note 48, at 615 (stating that *Bronson* test was based on "reasonableness"). In

In general, the tenets of constitutional conceptualism shaped almost every important area of constitutional law—not only the clauses mentioned above, but also the law of such diverse areas as intergovernmental tax immunities,[122] corporate diversity jurisdiction,[123] and fugitive slaves.[124] In addition, constitutional conceptualism provided fundamental assumptions in legal argument well before the *Lochner* era. Take, for example, the assumption that the Court allocates power among the various branches of government through the elaboration of bright-line tests turning upon questions of kind and not degree.[125] This assumption converts Chief Justice Marshall's observation in *McCulloch v. Maryland*[126] that the "power to tax involves the power to destroy"[127] from a quotable but irrelevant comment to a potent argument for voiding Maryland's moderate tax on the bank notes of the federally chartered Bank of the United States.[128] Clearly, Marshall took for granted that if Maryland had any power to tax those bank notes, the degree of its exercise was not reviewable and not controllable.[129]

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fleshing out this doctrine, however, the Court generally seemed to ask not whether the legislation at bar *did* unduly burden contract rights but whether the *type* of legislation could do so.

122. Collector v. Day, 78 U.S. (11 Wall.) 113, 126-27 (1870) (holding state employees immune from federal taxation), *overruled by* Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466, 486 (1939); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 432, 436 (1819) (holding federal instrumentalities immune from state taxation).

123. Ohio & M. R.R. v. Wheeler, 66 U.S. (1 Black) 286, 296 (1861) (holding that corporations "inhabit" and, for purposes of diversity jurisdiction, are citizens of their state of incorporation); Louisville, C. & C. R.R. v. Letson, 43 U.S. (2 How.) 497, 555 (1844) (same). The conceptualism of this approach is evident when one contrasts it with the many considerations involved in the principal-place-of-doing-business approach discussed in Kelly v. United States Steel Corp., 284 F.2d 850, 852-54 (3d Cir. 1960). Consider also the conceptualism of the shareholder-residence approach of Justice Marshall in Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 86-87, 90-92 (1809).

124. Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 612-13 (1842). *Prigg* held that any state law that "delays" return of a fugitive slave pending adjudication of his status is a "discharge" of the slave from his master's ownership and violates the Fugitive Slave Clause because "[t]he question can never be, how much the slave is discharged from; but whether he is discharged from any [obligation] . . . . The question is not one of quantity or degree, but of withholding, or controlling the incidents of a positive and absolute right." *Id.*

125. *See supra* text accompanying note 108.

126. 17 U.S. (4 Wheat.) 316 (1819).

127. *Id.* at 431.

128. Maryland's tax varied between one percent and two percent depending on the face value of the bank note. *Id.* at 321.

129. *Id.* at 430 (describing attempts to adjudicate questions of degree as "perplexing" and "unfit for the judicial department"). Marshall adopted this argument from Daniel Webster, counsel for the Bank, who explained it more thoroughly:

> A question of constitutional power can hardly be made to depend on a question of more or less. If the States may tax, they have no limit but their discretion; and the bank, therefore, must depend on the *discretion* of the State governments for its existence. This consequence is inevitable.

Likewise, the tenets of constitutional conceptualism make sense of Chief Justice Waite's ruling in *Munn v. Illinois*[130] that since the Illinois legislature could regulate the rates charged by Munn and Scott's grain elevator, the legislature could set whatever rates it chose, even rates that were unreasonable and confiscatory.[131] Indeed, one may say that the tenets of constitutional conceptualism shaped the argument and decision of every major pre-*Lochner* era constitutional case from *Marbury v. Madison*[132] at the beginning of the century, to *Dred Scott v. Sandford*[133] in mid-century, to *Pennoyer v. Neff*[134] on the eve of the *Lochner* era.

Id. at 327 (argument of counsel).

It is revealing of the distance separating modern constitutional jurisprudence from Marshall's conceptualism that this famous part of Marshall's opinion has been the object of severe criticism from twentieth-century jurists precisely because they assume courts not only may allocate power but also may review the reasonableness of its exercise. Justice Frankfurter, concurring in a case that departed from *McCulloch*'s approach to intergovernmental tax immunities, described Marshall's statement as "a flourish of rhetoric," a "free use of absolutes," and a "seductive cliché." Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466, 489 (1939) (Frankfurter, J., concurring). Justice Holmes responded to Marshall's claim by saying, "[N]ot . . . while this Court sits." Panhandle Oil Co. v. Mississippi *ex rel.* Knox, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting). Holmes explained that in Marshall's time

> it was not recognized as it is today that most of the distinctions of the law are distinctions of degree. If the States had any power it was assumed that they had all power, and that the necessary alternative was to deny it altogether. But this Court . . . can defeat an attempt to . . . go too far without wholly abolishing the power to tax.

Id. (Holmes, J., dissenting). Holmes then gave rate regulation as an example of the Court supervising the exercise of state power rather than denying it entirely. *Id.* (Holmes, J., dissenting). Modern constitutional law, in short, adjudicates the exercise of power as well as its allocation, and it does this by considering questions of degree as well as questions of kind.

130. 94 U.S. 113 (1877).

131. *Id.* at 134. For another example of this stance, see Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 431-33 (1827) (argument of Roger Taney as counsel).

132. 5 U.S. (1 Cranch) 137 (1803), discussed *infra* text accompanying notes 181-229.

133. 60 U.S. (19 How.) 393 (1857). Under *Dred Scott*, the definition of American people at the time of the Revolution and the founding of the Constitution excluded blacks. Thus, freed slaves and their free descendants—even those who were citizens of the state in which they resided—were not "citizens" entitled to federal diversity jurisdiction, and Congress could not "naturalize" them and make them "citizens" of the United States. *Id.* at 403-07, 410-12, 416-27. The Court also held that under the Constitution a property interest—whether in a slave or anything else—represented a unitary concept. This meant Congress could not prohibit slaveholders from bringing their slaves into the territories of the United States. *Id.* at 451-52; *id.* at 527-29 (Catron, J., concurring).

134. 95 U.S. 714, 722-24 (1877) (holding that sovereignty means a state has jurisdiction over everything within, and over nothing without, its borders), *overruled in part by* Shaffer v. Heitner, 433 U.S. 186, 212 n.39 (1977). It is instructive, for understanding conceptualism, to contrast the approach of *Pennoyer* with the functional "minimum contacts" approach of International Shoe Co. v. Washington, 326 U.S. 310, 318-19 (1945) and *Shaffer*, 433 U.S. at 205-09. *Pennoyer*'s approach deductively applies rigid concepts, while *International Shoe*'s approach involves practical, functional, case-by-case judgments.

For another landmark decision handed down on the eve of the *Lochner* era that exempli-

One reason for the early appearance of constitutional conceptualism as a fundamental aspect of constitutional law is that it mediated the tension produced by the developing awareness that constitutional interpretation could not adhere to the historic Anglo-American norm of nondiscretionary adjudication.[135] Constitutional conceptualism arose as a device to allow, yet control, judicial discretion. As the late Professor Cover discussed in his book *Justice Accused*,[136] nineteenth-century judges and jurists appreciated that judicial power to declare legislation unconstitutional necessarily involved judicial lawmaking.[137] Dissonance between constitutional text and statutes was rarely self-evident. As Chief Justice Marshall pointed out in *McCulloch v. Maryland*,[138] a constitution "intended to endure for ages to come"[139] could not be drafted with the detail of a legal code. "Its nature," Marshall said, "requires . . . that only its great outlines should be marked, its important objects designated."[140] Of necessity, jurists were left to "deduce[ ] from the nature of the objects themselves"[141] what was within and without them. Fleshing out the structure of government contained in the federal constitution and the various state constitutions was a creative act. Judicial creativity, and therefore judicial discretion and lawmaking, were inescapable corollaries of judicial review. Conceptualism, in short, functioned as a device to confine judicial creativity. Although originating in the discretionary act of deciding upon the fundamental concepts, it was thought that establishing more or less self-applicable concepts would constrain judicial discretion in later cases.

In addition to controlling judicial lawmaking, conceptualism rose to dominate constitutional analysis for another reason that the scholarly literature has developed insufficiently: a conceptualist approach was supposed to restrain legislative omnipotence. When the American tradition of judicial review first emerged in the 1780s,[142] it was dominated by a

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fies constitutional conceptualism, see Munn v. Illinois, 94 U.S. 113 (1877), discussed *infra* text accompanying notes 473-94.

135. *See* Stephen A. Siegel, *The Aristotelian Basis of English Law, 1450-1800*, 56 N.Y.U. L. REV. 18, 51-58 (1981) (tracing the roots of the norm of nondiscretionary adjudication to at least the late fifteenth century and finding it fully established by the mid-sixteenth century).

136. ROBERT M. COVER, JUSTICE ACCUSED (1975).

137. *Id.* at 140-43.

138. 17 U.S. (4 Wheat.) 316 (1819).

139. *Id.* at 415.

140. *Id.* at 407.

141. *Id.*

142. *See, e.g.*, The "Ten-Pound Act" cases, *described in* 2 WILLIAM W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 969-71 (1953); Symsbury Case, 1 Kirby 444, 447 (Conn. 1785); Rutgers v. Waddington (N.Y. City Mayor's Ct. 1784), *reprinted in* 1 JULIUS GOEBEL, JR., THE LAW PRACTICE OF ALEXANDER HAMILTON:

jurisprudence of extratextual limitations on legislative power, the sources of which were natural law, custom, and usage.[143] By the 1790s, judicial review based on natural law retreated before an emerging strict constructionist version of textual positivism.[144] The famous Chase-Iredell colloquy in 1798 in *Calder v. Bull*[145] is the classic expression of this struggle.[146]

Scholarly opinion of the outcome of the struggle between these two approaches to judicial review is varied. In the early twentieth century, Edward Corwin wrote that textual positivism had prevailed in theory and that natural law had prevailed in fact. In Corwin's view, although nineteenth-century American judges claimed to use judicial review to enforce only those norms that the framers enshrined in the Constitution, they frequently read the norms of natural law and the Anglo-American tradition into various parts of the Constitution's text.[147] More recently, Paul Kahn has said that a "cyclical" alternation has occurred between judicial review premised upon natural law and judicial review based upon textual positivism.[148] G. Edward White has intimated that antebellum judges selected between the two approaches to constitutional jurispru-

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DOCUMENTS AND COMMENTARY 393, 414-17 (1964); Bayard v. Singleton, 1 N.C. 15, 17-18, 1 Mart. 5, 7 (1787); Ham v. M'Claws, 1 S.C.L. 38, 40, 1 Bay 93, 98 (1789) (ultimately interpreting statute to avoid issue of constitutionality); Commonwealth v. Caton, 9 Va. 634, 635-37, 4 Call 5, 9-13 (1782).

Historians have traced the pre-Revolutionary origins of judicial review to understand its rather quick emergence after the nation's break from England. *See, e.g.*, 1 JULIUS GOEBEL, JR., THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 1-142 (1971). There is no doubt that John Marshall's landmark ruling in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), crystallized, at the federal level, a facet of American constitutionalism that the states had established in the 1780s. *But see* SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION 3-5, 113, 172-73 (1990) (arguing that *Marbury* was innovative).

143. *See, e.g.*, EDWARD S. CORWIN, LIBERTY AGAINST GOVERNMENT; THE RISE, FLOWERING AND DECLINE OF A FAMOUS JUDICIAL CONCEPT 58-75 (1948); Sherry, *supra* note 114, at 1155-77 (arguing that in the 1780s textual positivism, defined *infra* note 144, was an emergent norm of constitutional interpretation limited to structure-of-government cases, and that natural law, custom, and usage were the prevalent sources of constitutional argument and decision in civil liberty cases).

144. "Textual positivism" refers to a style of constitutional analysis that limits itself to norms explicitly manifested by the constitutional text and intended by the text's draftsmen to limit government. It is an analogue of modern "originalism," but it does not, for example, use the records of the Constitutional Convention to plumb the meaning of constitutional text.

145. 3 U.S. (3 Dall.) 386 (1798).

146. *See id.* at 388-89 (Chase, J.); *id.* at 398-400 (Iredell, J., concurring in judgment); *see also* CORWIN, *supra* note 143, at 59-64 (discussing the importance of this colloquy).

147. CORWIN, *supra* note 143, at 63-68.

148. Paul W. Kahn, *Community in Contemporary Constitutional Theory*, 99 YALE L.J. 1, 1 (1989) (stating that periods of constitutionalism based on natural law have alternated with periods of jurisprudence based on framer intent).

dence according to the demands of the issue at hand.[149]

These scholars are correct in their view that the outcome of the struggle in the early Republic between judicial review premised upon natural law and judicial review based on textual positivism was the triumph of neither approach. Yet the struggle resulted in the persistence of simultaneous commitments to both approaches and the development of a third style of constitutional interpretation—"constitutional conceptualism"—to resolve the tension between America's contradictory commitments to higher law and textual positivism.

There is, of course, no necessary conflict between natural law and textual positivism. Societies may draft constitutional texts to reflect fully the values that they believe are the eternal verities of social order. But early American constitutions were not so well or fully crafted. Many early American constitutions contained little text protecting civil liberties or property rights.[150] The federal Bill of Rights applied only to the rather inactive national legislature.[151] The more active state legislatures were prohibited only from adopting a few types of laws, such as "any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts."[152] Many state constitutions provided little more express protection of personal or property rights.

A survey of state constitutions shows that in 1800[153] five of the six-

149. 3 G. EDWARD WHITE, THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835, at 745-46, 838 (1988). Professor Sherry has described Chief Justice Marshall's approach as "ultimately rel[ying] on some unfathomable combination of unwritten law and the written Constitution." Sherry, *supra* note 114, at 1171. I hope this Article explains the "unfathomable" combination Professor Sherry acutely observes in Marshall's approach. *See supra* text accompanying notes 101-21.

150. Civil liberties and property rights are separated here only for purposes of exposition. Until the twentieth century, civil liberty included, indeed emphasized, property rights. From a nineteenth-century perspective, the term "civil liberty" should encompass property rights.

151. *See* Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 250-51 (1833) (holding the Bill of Rights inapplicable to the states and asserting that this holding reflects long-felt public sentiment).

152. U.S. CONST. art. I, § 10, cl. 1.

153. In 1800 the Union consisted of Connecticut, Delaware, Georgia, Kentucky, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, and Virginia. The remarks in these paragraphs apply to these 16 states for the period from 1800 through 1818. Connecticut in 1818 and New York in 1821 adopted new constitutions that substantially increased their protection of civil liberties. *See* CONN. CONST. of 1818, art. I, §§ 1-17, 19, 21 (guaranteeing equal rights among men, the right of the people to alter the government as necessary, freedom of religion, freedom of speech, freedom of the press, the right to a jury trial, freedom from unreasonable searches and seizures, rights of the criminally accused, the writ of habeas corpus, the right to assembly, the right to bear arms, and the prohibition of uncompensated takings and excessive bails and fines); N.Y. CONST. of 1821, art. VII, §§ 1-3, 6-8 (guaranteeing due process

teen states had virtually no civil liberties[154] protection drafted into their constitutions.[155] Legislative omnipotence was subject to only minor textual checks in these states. In the eleven states[156] whose constitutions contained extensive bills of rights, five provided little or no protection of property rights,[157] despite the importance of private property in that era's scheme of civil liberty.[158] In all, ten of the sixteen states had no clause barring uncompensated takings of property;[159] six states did not even have a clause guaranteeing the absolutely basic norm of due process protection of property rights.[160] Only five states had significant textual

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of law, the right to a jury trial, freedom of religion, the writ of habeas corpus, the right to a grand jury in trials for capital or infamous crimes, rights of the criminally accused, freedom of speech, and freedom of the press).

154. Civil liberties encompass both personal and property rights. Indeed, in nineteenth-century America, property was considered among the most important civil liberties. *See, e.g.*, Siegel, *supra* note 9, at 187; Siegel, *supra* note 24, at 57-66; Mark Tushnet, *The Politics of Equality in Constitutional Law: The Equal Protection Clause, Dr. Du Bois, and Charles Hamilton Houston*, 74 J. AM. HIST. 884, 884-90 (1987) (discussing nineteenth-century differentiation between civil, political, and social rights). It was not until the twentieth century that legal scholars began to contrast civil liberties with economic liberties.

155. The five states were Georgia, Rhode Island, and the major states of New York, New Jersey, and Connecticut. Connecticut had only a due process provision. CONN. CONST. of 1776, para. 2. Rhode Island was governed by its colonial charter and guaranteed only the right to jury trial and religious freedom. R.I. CHARTER of 1663. New Jersey guaranteed a jury trial, access to counsel in criminal trials, freedom of worship, and no escheat to the crown for estates of persons who committed suicide. N.J. CONST. of 1776, arts. XVI-XIX, XXII. New York guaranteed jury trial, freedom of worship, voting, and access to counsel in criminal trials, and it proscribed bills of attainder. N.Y. CONST. of 1777, arts. VII, XXXIV, XXXVIII-XXXIX, XLI. New York also had a vague due process provision. *Id.* art. XIII. In comparison, Georgia protected a moderate number of rights, including jury trial, freedom of worship, freedom of the press, the right to seek habeas corpus relief, the right to vote, and proscription of contract impairment and imprisonment of debtors. GA. CONST. of 1798, art. IV, §§ 1, 5, 7, 9, 10. Georgia did not, however, protect property from uncompensated takings or guarantee persons or property due process.

156. These states were Delaware, Kentucky, Maryland, Massachusetts, New Hampshire, North Carolina, Pennsylvania, South Carolina, Tennessee, Vermont, and Virginia.

157. Maryland, New Hampshire, North Carolina, and South Carolina had no provision against uncompensated takings of property. Virginia had no provision against uncompensated takings and no due process protection of property. Maryland, North Carolina, and South Carolina had no provision whatsoever on takings. New Hampshire and Virginia each had a provision that limited eminent domain to public use takings but did not mention compensation. N.H. CONST. of 1784, Bill of Rts., art. XIII; VA. CONST. of 1776, Bill of Rts., § 6. Virginia also had a due process clause that mentioned liberty but not property. *Id.* § 8.

158. *See infra* note 168 and accompanying text.

159. The ten states were Connecticut, Georgia, Maryland, New Hampshire, New Jersey, New York, North Carolina, Rhode Island, South Carolina, and Virginia. New Hampshire and Virginia had clauses limiting takings to public uses, but with no express requirement of just compensation. *See supra* note 157.

160. Georgia, New Jersey, and Rhode Island had no due process clause. Vermont and Virginia each had a due process clause that spoke only of liberty, not property. *See* VT. CONST. of 1793, ch. 1, art. X; VA. CONST. of 1776, Bill of Rts., § 8. New York had a due

protection of both persons and property.[161]

Moreover, the state constitutions with elaborate bills of rights had no sufficient textual provisions to enforce those rights. The problem was not that these constitutions failed to provide for the power of judicial review. Judicial enforcement of the constitutional text may well have been expected even without express textual authority.[162] Rather, the problem stemmed from the power of early American legislatures to act as courts of last resort. The celebrated controversy of *Calder v. Bull*[163] illustrates this point. In *Calder* the Supreme Court upheld the right of the Connecticut Legislature to order a new trial when it was dissatisfied with the outcome of litigation.[164] The Supreme Court pointed out that the English Parliament had the power to act judicially, that the Connecticut legislature had always exercised the power, and that there was no text in the state constitution separating legislative from judicial powers.[165] Hence, at the least, a state legislature that had exercised judicial powers before the Revolution could continue to do so unless the state constitution denied the practice. By implication, perhaps all state legislatures had judicial power unless the power was denied expressly. In only half of the state constitutions was there an express provision indicating that one

process provision that prohibited the deprivation "of any of the rights or privileges secured to the subjects of this State by this constitution, unless by the law of the land, or the judgment of his peers." N.Y. CONST. of 1777, art. XIII. The constitution did not, however, secure the right of property.

161. The five states that constitutionally protected both persons and property were Delaware, Kentucky, Massachusetts, Pennsylvania, and Tennessee. This list includes those constitutions that had significant protection of personal liberties and a provision proscribing uncompensated takings. *See, e.g.*, DEL. CONST. of 1792, art. I, §§ 1, 6-8, 11, 13 (guaranteeing the right to trial by jury, freedom from unreasonable searches and seizures, rights of the criminally accused, and the writ of habeas corpus; and prohibiting double jeopardy, takings for public use without just compensation, and cruel punishment); PA. CONST. of 1790, art. IV, §§ 1, 6, 8-10 (guaranteeing the right to a jury trial, freedom from unreasonable searches and seizures, due process of law, and rights of the criminally accused; prohibiting double jeopardy and takings for public use without just compensation; and recognizing that "all men . . . have certain . . . rights, among which are those of enjoying life and liberty, [and] of acquiring, possessing, and protecting property").

162. *See, e.g.*, THE FEDERALIST No. 78 (Alexander Hamilton); RAOUL BERGER, CONGRESS V. THE SUPREME COURT 335-37 (1969). In the early republic, controversy regarding judicial review was over how, not whether, to conduct judicial review. *See supra* text accompanying notes 142-46 (discussing struggle between constitutionalism premised upon natural law and textual positivism).

163. 3 U.S. (3 Dall.) 386 (1798) (Chase, Paterson, Iredell, Cushing, JJ., *seriatim*).

164. *Id.* at 395, 398, 401.

165. Three of the four justices who rendered separate opinions relied on this analysis. *Id.* at 395-96 (Paterson, J.); *id.* at 398 (Iredell, J.); *id.* at 401 (Cushing, J.). The fourth, Justice Chase, did not express any opinion on the point because he believed it was a matter of state constitutional law, which the federal courts had no power to review. *Id.* at 387, 392-93 (Chase, J.).

branch of government must never exercise the powers of another.[166]

In the other half of the states, therefore, the emergent tradition of judicial review, which was the bedrock of all other American constitutional norms, was of doubtful utility since neither constitutional text nor common-law tradition barred the legislature from acting as the court of last resort.[167] Only four states had constitutions containing both a significant catalogue of provisions protecting civil liberties and a provision that spoke to judicial independence.[168]

In other words, the texts of early American constitutions, both state and federal, were inadequate to protect values that either initially were, or by 1800 had become, central to American society.[169] The rising norm

166. GA. CONST. of 1798, art. I, § 1; KY. CONST. of 1799, art. I, §§ 1-2; MD. CONST. of 1776, Dec. of Rts., art. VI; MASS. CONST. of 1780, Dec. of Rts., art. XXX; N.H. CONST. of 1784, Bill of Rts., art. XXXVII; N.C. CONST. of 1776, Dec. of Rts., art. IV; VT. CONST. of 1793, ch. 2, § 6; VA. CONST. of 1776, Bill of Rts., § 5. An express provision is one that explicitly indicates that one branch of government may not exercise the powers of another. *See, e.g.*, MD. CONST. of 1776, Dec. of Rts., art. VI ("[t]hat the legislative, executive and judicial powers of government, ought to be forever separate and distinct from each other"). An introductory provision to an article structuring a branch of government saying only that legislative (or executive or judicial) power is vested in that branch is not considered an express provision. *See infra* text accompanying note 285.

167. This was true in perhaps more than half of the states. The New Hampshire legislature exercised judicial powers despite its constitution's explicit separation-of-powers provision. *See* Merrill v. Sherburne, 1 N.H. 199, 271 (1818) (ruling the practice of legislative adjudication unconstitutional). There is also evidence of interference with the judicial process by the Massachusetts legislature, another legislature laboring under an express separation-of-powers provision. *See* Holden v. James, 11 Mass. 396, 398-405 (1814). Indiana, a state not included in this study because it was admitted to the Union in 1816, had an express separation-of-powers provision. *See* IND. CONST. of 1816, art II. Yet its legislature also interfered with judicial processes. Thus, legislatures in states with explicit separation-of-powers provisions in their constitutions nonetheless interfered with adjudicative processes. *See* ROSCOE POUND, THE FORMATIVE ERA OF AMERICAN LAW 39-40 nn.8-10 (2d prtg. 1939).

In sum, the absence of a tradition of separation of powers substantially threatened the entire enterprise of judicial protection of civil liberties through judicial review. The point of this Article, however, is more limited: assuming constitutional text would have been respected, the extent to which the text protected rights was quite minimal.

168. These states were Kentucky, Massachusetts, Vermont, and Virginia. "Civil liberties" encompass both personal and property rights. A state is considered to have had extensive protection of personal and property rights if it had an extensive bill of rights that included a provision against uncompensated takings. Due process protection of property was not required; otherwise, Vermont and Virginia would be excluded from the list of protective states because their due process clauses addressed only personal liberty. *See* VT. CONST. of 1793, ch. 1, art. X; VA. CONST. of 1776, Bill of Rights, § 8.

169. Other scholars recently have addressed directly and indirectly the question why early American constitutions were so bereft of textual protection of civil and property rights. One commentator stated that early American constitutions expressed the norms of Republican communitarianism rather than liberal individualism. William Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 694 (1985); *see also* Horwitz, *Republicanism*, *supra* note 1, at 68 (discussing and expanding on Treanor's analysis). Professor Sherry points to the then-prevalent assumption that

of textual positivism may have had wide appeal because it reflected the democratic view that American law was grounded in the will of the popular sovereign, which courts (as well as all organs of government) served. Given the paucity of constitutional text protecting individual liberties and property rights, however, textual positivism's appeal was tempered by its threat to permit legislative omnipotence as thoroughgoing in theory, and more so in practice, as that of the British Parliament.[170] The result of this tension was the rise of constitutional conceptualism as the conduit for infusing natural law into an otherwise inadequate constitutional text.[171]

B. Constitutional Conceptualism Illustrated in the Opinions of John Marshall

No single individual created constitutional conceptualism. It was, in Karl Llewellyn's phrase, a "period style."[172] Focusing on John Marshall's conceptualism, however, is important to an understanding of the significance of constitutional conceptualism because of his preeminence in establishing and exemplifying early American constitutional jurisprudence. That constitutional conceptualism was a significant strand in Marshall's judicial philosophy strongly supports the view that constitutional conceptualism was well established long before the *Lochner* era.

John Marshall's commitment to constitutional conceptualism already has been demonstrated partially. His opinions in *Brown v. Maryland*[173] and *Sturges v. Crowninshield*[174] authoritatively established the "original package" doctrine in Commerce Clause cases and the right/remedy distinction in Contract Clause jurisprudence.[175] Similarly, his

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the judiciary would draw from extra-textual norms founded in custom or natural law to void inappropriate legislation. *See* Sherry, *supra* note 114. The purpose of this Article is not to explain the early constitutions' textual shortcomings. Rather, it is to note them in order to show the development of the American constitutional tradition.

170. Blackstone's classic discussion of the English Parliament described it as legislatively omnipotent yet totally respectful of property rights. 1 WILLIAM BLACKSTONE, COMMENTARIES *160-61.

171. This reason for constitutional conceptualism's rise complements the reason previously discussed: the specification of useful meaning in an ambiguous text. *See supra* text accompanying notes 135-41.

172. KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 36 (1960).

173. 25 U.S. (12 Wheat.) 419 (1827).

174. 17 U.S. (4 Wheat.) 122 (1819).

175. *See supra* text accompanying notes 115-21; *see also* Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 350-53 (1827) (Marshall, C.J., dissenting) (clarifying that while contractual obligations are created by an act of the contracting parties, contractual remedies are created by the government through its enforcement powers).

opinion in *McCulloch v. Maryland*[176] not only depended on constitutional conceptualism for its claim that the "power to tax involves the power to destroy,"[177] but also contained a general explanation of the need for a conceptualistic style of analysis in American constitutional law.[178]

An extended analysis of two landmark opinions, *Marbury v. Madison*[179] and *Fletcher v. Peck*,[180] best illustrates the role of constitutional conceptualism in Marshall's thought. These opinions are Marshall's earliest constitutional pronouncements—one adjudicates the structure of government, the other demarcates civil liberties. Together, the opinions initiated these two branches of American constitutional jurisprudence and placed constitutional conceptualism at the founding of the American constitutional tradition.

1. *Marbury v. Madison*: Conceptualism in a Structure-of-Government Case

Marshall's conceptualist approach in *Marbury* is seen in his analysis of the case's two most important constitutional issues: the amenability of high executive officials to legal process and the judiciary's power of judicial review.[181] Marshall confronted the problem that the Constitution's text addresses neither of these important structure-of-government issues. His response illustrates his general approach to legal analysis. For both controversies, Marshall had historical grounds and prudential arguments for reaching his conclusions. With respect to subjecting high executive officials to legal process, English tradition held that although the King is immune from suit, he must act through officials who are suable.[182] A wealth of discussion on judicial review surrounded the drafting and ratifying of the Constitution, and state and federal court opinions provided

176. 17 U.S. (4 Wheat.) 316 (1819).

177. *See supra* text accompanying notes 126-29.

178. *See supra* text accompanying notes 138-41.

179. 5 U.S. (1 Cranch) 137 (1803).

180. 10 U.S. (6 Cranch) 87 (1810).

181. Whether high executive officials are amenable to legal process may well have been the more controversial issue in Marshall's day, especially since the Court's ruling on the issue of judicial review had a variety of antecedents. *See* Van Alstyne, *supra* note 1, at 11, 16 n.28, 38-45.

In *Marbury* Marshall discussed a variety of other issues, including whether Marbury's appointment to office was complete, whether mandamus is the appropriate remedy for violation of Marbury's right, whether the Judiciary Act authorizes the Supreme Court to issue that remedy, and whether the Act violates the Constitution for doing so. *Marbury*, 5 U.S. (1 Cranch) at 153-80. It is tedious and unnecessary to review all these issues to show Marshall's conceptualism.

182. *See, e.g.*, 3 BLACKSTONE, *supra* note 170, at *254-55.

precedents for the practice.[183] Rather than draw and rely on these materials, Marshall argued from the nature of things—the nature of civil liberty[184] and the nature of written constitutions.[185] Previous scholars have noticed this fact and discussed it as an illustration of Marshall's general practice of ignoring precedent.[186] It does evidence that, but it also shows his preference for constitutional conceptualism as a form of analysis.

a. The Amenability of High Executive Officials to Legal Process

Marshall's discussion of whether high-level officials of the executive branch are subject to legal process begins with the claim that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury,"[187] and the legal principle implied by this claim: " '[E]very right when withheld must have a remedy, and every injury it's [sic] proper redress.' "[188] To Marshall, these propositions established that high executive officials, no less than other persons, are amenable to legal process unless their cases fit within recognized exceptions to the "remedy for every right" principle.

In analyzing whether Marbury's case fit within exceptions to the general rule, Marshall discussed two categories of exceptions. One is "that class of cases which come[s] under the description of *damnum absque injuria*—a loss without an injury."[189] Marshall summarily rejected this exception because it never applies to losses involving "offices of trust, of honor or of profit."[190] Losses may be irremediable due to the "worthlessness of the thing pursued,"[191] but Marbury's position as justice of the

183. *See, e.g.*, THE FEDERALIST No. 78, at 465-72 (Alexander Hamilton) (Clinton Rossiter paperback ed. 1961); DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789-1888, at 69-70 (1985); Sherry, *supra* note 114, at 1135-55.

184. *See infra* text accompanying note 187.

185. *See infra* text accompanying notes 210-11. Marshall argued from the text of the Constitution, but as more of an afterthought to support his conclusions derived from general reasoning. *Marbury*, 5 U.S. (1 Cranch) at 178-80. In any event, his textual arguments are conceptualistically handled. No requirement exists that conceptualists not argue from text, history, or any other source. Indeed, this Article maintains that late nineteenth-century jurists argued conceptualistically from history. *See infra* text accompanying notes 381-84. Conceptualism may organize material from a variety of sources; conceptualism arises from the way sources are handled, not from the sources themselves.

186. *See, e.g.*, CURRIE, *supra* note 183, at 70.

187. *Marbury*, 5 U.S. (1 Cranch) at 163.

188. *Id.* (quoting 3 BLACKSTONE, *supra* note 170, at *109).

189. *Id.* at 164.

190. *Id.*

191. *Id.*

peace was inherently "worthy of the attention and guardianship of the laws."[192]

The other category of exceptions is executive acts that are "political" rather than "ministerial."[193] Through examples, Marshall showed that some executive acts are amenable to legal process;[194] but he posited that some are not.[195] Given this dichotomy, he assumed "there must be some rule of law to guide the court in the exercise of its jurisdiction,"[196] a rule that courts may have some "difficulty in applying . . . to particular cases," but which there is not "much difficulty in laying down."[197] Indeed, the rule is so free from difficulty that Marshall simply announced it without further discussion: Parties aggrieved by executive decisions involving the exercise of discretion may not complain to the courts; parties aggrieved by executive decisions involving mere peremptory duties affecting their vested rights may complain.[198] Marshall ended his discussion of the amenability of high executive officials to legal process by showing that Marbury's right to his commission as justice of the peace clearly is of the latter type. Consequently, Marbury could compel the commission's delivery through legal process, even though that process runs against a member of the cabinet of the United States.[199]

Marshall's analysis is thoroughly conceptualistic. The discussion begins and turns upon first principles and mutually exclusive categories governed by principles that comprehend all possible cases. These general principles and categories are not just window dressing; they resolve the issue at bar. The principle that for every right there is a remedy settles the important issues of sovereign immunity and separation of powers. It decides the general rule that high executive officials are amenable to legal process. It compels those officials to come within recognized exceptions to the general rule to escape legal process in particular cases. Similarly, the postulate that *damnum absque injuria* applies to cases in which the objective sought is "worthless" decides the inapplicability of this exception to Marbury's suit. The premise that "discretion" underlies the polit-

192. *Id.*

193. *Id.* at 166. Marshall described the latter as "peremptory," rather than "ministerial," as the category has come to be known. *Id.*

194. *Id.* at 164-65 (citing creation of pension lists by the Secretary of War and issuance of patents for land sales by the Secretary of State).

195. *Id.* Regrettably, Marshall gave no specific instances of executive acts that are immune from legal redress.

196. *Id.* at 165.

197. *Id.*

198. *Id.* at 166.

199. *Id.* at 167-68.

ical/ministerial dichotomy determines its applicability.[200] A century later, Justice Holmes would opine that "[g]eneral propositions do not decide concrete cases,"[201] but Marshall evidently disagreed.

In addition, Marshall's analysis creates mutually exclusive categories, in which all possible cases may be located, of total liability and no liability. Acts within the *damnum absque injuria* or political discretion categories are never remediable, while acts involving ministerial duties are wholly remediable. Marshall never conceived that an act might be partially remediable or that *some* officials with statutorily defined tenures might be immune from presidential removal while others might not.[202] Similarly, he never conceived that the multiplicity of considerations involved in separation-of-powers cases might suggest that officials improperly removed by the President receive damages but not reinstatement.[203] On both these issues, Marshall's entire approach is to create water-tight categories of all or nothing, which are entailed by abstract first principles and concepts. That post-*Lochner* era justices overturned Marshall on these points demonstrates the distance between his jurisprudential assumptions and theirs.[204]

b. The Judiciary's Power of Judicial Review

Marshall's discussion of the Court's power of judicial review also shows his conceptualist jurisprudence. The discussion consists of two arguments. First, Marshall established that a law contrary to the Constitution is void; then, he concluded that courts must follow the Constitution, not the void law. Both issues, Marshall observed, are important but not difficult to resolve. In his view, "[i]t seems only necessary to recognise [sic] certain principles, supposed to have been long and well

200. The last element in the ministerial duty category, that the official's decision also affects private vested rights, implicitly establishes the "private rights" model of judicial review in preference to the "public law" model. *See* Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 276-304, 318-19 (1990) (discussing private- and public-law models). Thus, Marshall's categories are debatable policy preferences rather than undebatable truths.

201. Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

202. Current constitutional law does not treat all officials alike. It balances a variety of functional considerations including whether the official is primarily executive, legislative, or judicial; whether the official's term is long or short; and whether provisions by which the office was created indicate that its occupant serves at the President's pleasure. *See* TRIBE, *supra* note 48, at 249-51; Van Alstyne, *supra* note 1, at 10 n.16.

203. No "improper removal" case has yet resulted in reinstatement, although it remains a possibility. *See* TRIBE, *supra* note 48, at 250 n.20.

204. *See id.* at 249-50; Van Alstyne, *supra* note 1, at 10 n.16. Modern law takes a functional, balancing approach to jurisprudence, which stands in stark contrast to Marshall's absolute reliance on static concepts.

established, to decide [them]."[205]

The first principles of Marshall's discussion of the validity of a law contrary to the Constitution are the unlimited sovereignty of the people and their ability to establish a government with either limited or unlimited powers.[206] Both types of governments have constitutions but, in Marshall's view, "it is a proposition too plain to be contested"[207] that the constitution of an unlimited government is changeable by ordinary legislative acts, while the constitution of a limited government is a "superior, paramount law, unchangeable by ordinary means."[208] "Between these alternatives," Marshall said, "there is no middle ground."[209]

Having divided governments into mutually exclusive categories depending upon whether their powers are limited or unlimited, Marshall sought to establish that written constitutions always are associated with the creation of a limited government. On this pivotal issue Marshall stated, "Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation. . . . This theory is essentially attached to a written constitution."[210] From these ipse dixits, Marshall's conclusion necessarily and quickly follows: "[T]he theory of every . . . government [with a written constitution] must be, that [legislation] repugnant to the constitution, is void."[211]

With the conclusion that laws contrary to the Constitution are void, Marshall turned to discuss whether they nonetheless bind courts. Courts are not bound by such laws, he decided, for a variety of reasons. First, he argued from general reasoning. If courts were bound by void laws, it would subvert the principle of written constitutions and allow in practice the legislative omnipotence that is forbidden in theory.[212] Second, he drew a number of arguments from the Constitution's text.[213] The core of

205. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803). Given the difficulty twentieth-century scholars have had justifying judicial review, *e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 1-33 (1962); LEARNED HAND, THE BILL OF RIGHTS 1-18, 27-30 (1958), this statement might well serve to satirize conceptualistic thought.

206. *See Marbury*, 5 U.S. (1 Cranch) at 176.

207. *Id.* at 177.

208. *Id.*

209. *Id.*

210. *Id.* Marshall also asked a series of rhetorical questions designed to show that written constitutions are wholly useless—indeed "absurd"—instruments that no one would adopt unless they are meant to create limited government. *Id.* at 176-77.

211. *Id.* at 177.

212. *Id.* at 177-78.

213. *Id.* at 178-80. These specific arguments are described, and their weaknesses lucidly explained, by Van Alstyne, *supra* note 1, at 16-29 (concluding that the whole of Marshall's argument is stronger than the sum of its parts).

these arguments is the existence of constitutional provisions that the Court "must"[214] consider;[215] indeed, some provisions are addressed specifically to courts.[216] Evidently, judges must regard the Constitution "in some cases."[217] To Marshall, this meant that judges must regard the Constitution in all cases.[218]

The conceptualism of Marshall's analyses of whether laws repugnant to the Constitution are void and whether they still bind the courts is evident. Both analyses proceed from first principles that are said to resolve the concrete disputes.[219] Both analyses also proceed in terms of mutually exclusive dichotomies that cover the universe of possible cases.[220] Finally, both Marshall's analyses proceed on the theory that conclusions follow necessarily from fundamental principles. Modern jurists, in contrast, see Marshall as drawing from his premises only the inferences that he needed in order to reach the results he desired.[221] Indeed, it is fair to say that most modern criticisms of Marshall's defense of judicial review in *Marbury* arise from his seeing necessary postulates and logical entailments where modern commentators see multiple possibilities and preferences.[222] Marshall's arguments in *Marbury* are conceptu-

214. *Marbury*, 5 U.S. (1 Cranch) at 179 ("In some cases then, the constitution must be looked into by the judges.").

215. *Id.* at 179-80. An example includes the provision that "[n]o Tax or Duty shall be laid on Articles exported from any State." U.S. CONST. art I, § 9, cl. 5.

216. *Marbury*, 5 U.S. (1 Cranch) at 179. Marshall instanced the provision requiring two witnesses or a confession in open court in treason trials. *See* U.S. CONST. art. III, § 3.

217. *Marbury*, 5 U.S. (1 Cranch) at 179.

218. *Id.* ("[I]f [the judges] can open it at all, what part of it are they forbidden to read, or obey?"); *see also id.* at 179-80 (concluding that because the Constitution is "a rule for the government of *courts*, as well as of the legislature" in some cases, it is a rule for the courts in all cases). Marshall also argued from the Constitution's Oath and Supremacy Clauses. *Id.* at 180. Ironically, these clauses do not necessarily support Marshall's conclusion. *See* Van Alstyne, *supra* note 1, at 20-26.

219. *See supra* text accompanying notes 187-88, 205-09. *Cf.* Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) (giving a modernist admonition that "general propositions do not decide concrete cases").

220. *See supra* text accompanying notes 189-98, 202-03, 206-09.

221. *See supra* notes 213, 218. As Professor Powell wrote concerning Marshall's view of intergovernmental tax immunities, discussed *supra* text accompanying notes 122, 126-29, "[s]uch a political theory may or may not have been wise judicial statesmanship . . . . It nevertheless was not an imperative but a preferential postulate." Thomas R. Powell, *The Waning of Tax Immunities*, 58 HARV. L. REV. 633, 652 (1945).

222. *See, e.g.*, CURRIE, *supra* note 183, at 73; Van Alstyne, *supra* note 1, at 17 (describing one argument as presenting a "false dilemma"); *id.* at 20-21 (recognizing alternative interpretations of the Constitution's text); *id.* at 24 (depicting another argument as "only partly true, and . . . otherwise misleading"); *id.* at 25-26 (noting alternative interpretations of the Constitution's text). *See generally* BICKEL, *supra* note 205, at 1-14 & n.2 (citing criticisms by Judge Hand, Justice Holmes, Professor Thayer, and Professor Powell).

alistic, and modern analysts have practiced techniques for spotting the flaws in arguments so premised.

Consider, for example, Marshall's linchpin argument on each issue in *Marbury*. With respect to the validity of laws that contravene the Constitution, Marshall's key point is that written constitutions necessarily establish limited governments.[223] Modern jurists know this is not so; constitutions have been, and in Marshall's time the French Constitution of 1789 already had been, written as statements of political principles subject to change through ordinary legislative acts.[224] Written constitutions are not entirely "absurd" or "nugatory" if they are changeable through ordinary legislative acts. Marshall, however, saw no gray, only black and white. He assumed that all people must conceive written constitutions as statements of binding, rather than admonitory, principles. Thus, to Marshall, the intent of the drafters and ratifiers of the national charter is clear. On the issue regarding the power of courts to disregard unconstitutional laws, Marshall's central argument is the notion that since the Constitution was written as directives to the Court in some instances, it was written as directives to the Court in all instances.[225] Again, the logic is of dichotomous "all or nothing" categories. A comparison with Hamilton's famous discussion of the propriety of judicial review in *The Federalist* No. 78 is informative. Scholars often say that Marshall's discussion parallels this tract.[226] But Hamilton argued presumptively[227] and prudentially[228] where Marshall argued imperatively. In light of the Constitution's textual silence on the issue, Hamilton categorized judicial review as only a "far more rational[ ] suppos[ition],"[229] not a necessary consequence.

In sum, in *Marbury*, Chief Justice Marshall established that high executive officials are subject to legal process and that unconstitutional laws do not bind the courts through analysis dependent upon constitutional conceptualism. *Marbury* shows constitutional conceptualism as the jurisprudence by which Marshall fleshed out America's complex structure of government from the Constitution's meager text.

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223. *See supra* text accompanying notes 210-11.

224. *See* CURRIE, *supra* note 183, at 71; Van Alstyne, *supra* note 1, at 17.

225. *See supra* text accompanying notes 214-18.

226. *See, e.g.*, CURRIE, *supra* note 183, at 71.

227. THE FEDERALIST No. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed. 1961) (arguing that legislative supremacy is not the "natural presumption").

228. *Id.* at 526 (Alexander Hamilton) (arguing that constitutional supremacy "ought to be preferred").

229. *Id.* at 525 (Alexander Hamilton).

2. *Fletcher v. Peck*: Conceptualism in a Civil Liberties Case

In 1795 four land companies corrupted the Georgia legislature into granting them, at a bargain price, millions of acres of the state's public domain.[230] When the corruption was revealed, a newly elected legislature repealed the prior legislature's grant. *Fletcher v. Peck*[231] arose when, in an obvious test case,[232] Fletcher purchased 15,000 acres of the land from Peck, a remote purchaser from one of the land companies, and sued, claiming that Peck failed to convey good title.[233] Peck's title turned upon the original sale's validity and the effect of Georgia's unilateral rescission.[234] The Court, speaking through Chief Justice Marshall, ruled in Peck's favor.[235]

As in *Marbury*, Marshall's disposition of the case addressed a wide variety of issues.[236] Once again, Marshall's conceptualism is best reflected in his analysis of the case's central constitutional question: whether the federal Contract Clause[237] voided Georgia's repeal act with regard to land resold to innocent third parties.[238]

Marshall commenced his discussion of the Contract Clause issue in

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230. The background of *Fletcher* is ably retold in C. PETER MAGRATH, YAZOO: LAW AND POLITICS IN THE NEW REPUBLIC 1-19 (paperback ed. 1967).

231. 10 U.S. (6 Cranch) 87 (1810).

232. *See, e.g., id.* at 147-48 (Johnson, J., concurring); MAGRATH, *supra* note 230, at 54.

233. *Fletcher*, 10 U.S. (6 Cranch) at 87-91.

234. The case was in federal court under diversity jurisdiction. Fletcher was a citizen of New Hampshire; Peck was a citizen of Massachusetts. MAGRATH, *supra* note 230, at 53.

235. *Fletcher*, 10 U.S. (6 Cranch) at 142-43.

236. In addition to the Contract Clause issue discussed *infra* text accompanying notes 237-70, Marshall discussed whether the Georgia Constitution prohibited the state legislature from disposing of state lands; whether the original grant from Georgia was void because it was procured by fraud; whether the United States, rather than Georgia, held title to the land at the time of the original grant; and whether the Indian title to the land prevented its alienation by the state. In addition, Marshall prefaced his Contract Clause analysis with a lengthy but speculative discussion of whether the law at bar was void because it was not in its nature a law and, therefore, not within the competence of a legislature to enact. *See Fletcher*, 10 U.S. (6 Cranch) at 133-36. This argument helped crystallize the pre-*Lochner* era "legislative powers" doctrine, which was the direct precursor of the *Lochner* era doctrine of substantive due process. *See infra* text accompanying notes 279-320.

237. U.S. CONST. art. I, § 10 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts.").

238. This part of the opinion is regarded (incorrectly) as the first case in which a state statute was voided under the federal Constitution. *Compare, e.g.*, Levinson, *supra* note 1, at 1453 (implying *Fletcher* was the first case voiding a state law) *with* CURRIE, *supra* note 183, at 39-41 (crediting Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796) as the first case to invalidate a state statute). Nonetheless, this part of the opinion is justly famous as the first authoritative exegesis of the Contract Clause, which in the remainder of the nineteenth century was to be at the center of so much constitutional struggle. *See* Siegel, *supra* note 24, at 3-6 (discussing the importance of Contract Clause cases in the nineteenth century).

Fletcher by asking two questions: "[W]hat is a contract?" and "Is a grant a contract?"[239] These queries are answered forthwith by the following assertion:

> [A] contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing. . . . A contract executed is one in which the object of the contract is performed; and this, says Blackstone, differs in nothing from a grant.[240]

Marshall then applied this postulated definition, without further discussion, to resolve the issue at bar. "Since," Marshall wrote, "a grant is a contract executed . . . and since the constitution uses the general term contract, without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former."[241]

The remainder of Marshall's Contract Clause argument consists of a defense of the interpretive technique of understanding constitutional language according to the "natural meaning of words"[242] and an attack on the technique of "presuming an intention to except a case, not excepted by the words of the constitution."[243] Marshall also took time to connect his definitional exegesis with the intent of the founding generation. First, he did so rationalistically by appealing to "everyman's" (which includes the founding generation) common sense, saying: "It would be strange if a contract to convey was secured by the constitution, while an absolute conveyance remained unprotected."[244] Later, he did so historically by reminding his readers that the people adopted the Constitution "to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed."[245] This historical argument is unsubstantial because it presents no strong connection between the abstract concerns of the people "to shield themselves and their property"[246] and the specific abuse at bar. Nonetheless, it is all Marshall offered.

Marshall's Contract Clause argument in *Fletcher* clearly illustrates most of the norms of constitutional conceptualism. It uses an abstract

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239. *Fletcher*, 10 U.S. (6 Cranch) at 136.

240. *Id.* at 137-38.

241. *Id.* at 137.

242. *Id.* at 138; *see also id.* at 137 (referring to "a fair construction").

243. *Id.* at 139. Marshall's argument consists primarily of illustrations of other constitutional provisions, such as the Bill of Attainder Clause, which allow no implied exceptions. *Id.* at 137-39.

244. *Id.* at 137.

245. *Id.* at 138.

246. *Id.*

definition of "contract" to resolve whether Georgia's rescission of its grant is valid or void.[247] It also claims to tie its abstract definition of contract, and the resolution of the case, to the intent of the Constitution's framers and ratifiers.[248] Marshall presented his abstract definition of contract not as an extratextual principle but as a principle implicit in the constitutional text. Marshall, accordingly, presented himself not as reading his policy preferences into the Constitution, but as discovering and elaborating an abstract concept the founders placed in the nation's fundamental law.[249]

Not so manifestly, *Fletcher* illustrates one of this Article's claims concerning the reasons for the turn in American constitutional jurisprudence to constitutional conceptualism.[250] Marshall's use of the Contract Clause in *Fletcher* illustrates the resort to constitutional conceptualism for resolving the problem of controlling legislative omnipotence. In *Fletcher*, Marshall began the arduous task of culling a sufficient compendium of civil liberties from the Constitution's meager text rather than from the copious but unwritten principles of natural law. In deciding *Fletcher*, Marshall could have rested on natural-law grounds. As pointed out repeatedly in his opinion, the actions of the Georgia legislature amounted to an uncompensated taking of property—a retrospective divesting of property rights that had vested in the land company's allegedly bona fide purchasers.[251] Clearly, Georgia's legislation violated a value that by 1810 was at the core of American society, a value thought to be guaranteed by the natural-law tradition.

Reflecting the viability of a ruling premised on natural law, Justice Johnson wrote a concurrence that specifically disavowed Marshall's Contract Clause *ratio decidendi*[252] and rested instead upon "general princi-

247. This is the first tenet of constitutional conceptualism, discussed *supra* text accompanying notes 103-06.

248. This is the second tenet of constitutional conceptualism, discussed *supra* text accompanying note 107.

249. *Fletcher* does not explicitly illustrate the third tenet of constitutional conceptualism, discussed *supra* text accompanying note 108, that government and its branches act wholly within specifically defined spheres of power. In later Contract Clause cases, however, Marshall tellingly illustrated his commitment to erecting mutually exclusive spheres in which states have total power or no power over civil liberties. *See, e.g.*, Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 340-41, 352-53 (1827) (Marshall, C.J., dissenting) (struggling with problems implicit in the view that states have no power over contract rights but total power over contract remedies); Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 200-01 (1819).

250. *See supra* text accompanying notes 142-71.

251. *Fletcher*, 10 U.S. (6 Cranch) at 132, 134-35, 138. Justice Johnson made the same point in his concurrence. *Id.* at 143 (Johnson, J., concurring).

252. *Id.* at 144 (Johnson, J., concurring). Johnson's persuasive reasons for disagreeing with Marshall's reasoning are discussed *infra* text accompanying notes 266-68.

ple, on the reason and nature of things: a principle which will impose laws even on the deity."[253] Marshall chose only to preface his Contract Clause analysis with a lengthy disquisition suggesting Georgia's repeal act was void for violating principles drawn from "the nature of society and of government."[254] Exemplifying the decreasing viability of premising constitutional analysis upon unwritten principles of natural law and anticipating (and certainly influencing) the future direction of American constitutional law, Marshall, in the end, did not rest his constitutional analysis upon natural law.[255] Instead, Marshall turned his attention to the Constitution's text.[256]

Unfortunately, the Constitution to which Marshall turned did not vindicate clearly the fundamental norm at bar.[257] The Fifth Amendment

253. *Fletcher*, 10 U.S. (6 Cranch) at 143 (Johnson, J., concurring).

254. *Id.* at 135. For the entirety of Marshall's discussion, see *id.* at 132-36.

255. For the clear turning point in the opinion, when Marshall shifts from natural law to his Contract Clause analysis, see *id.* at 136. Marshall did say in his conclusion that both natural law and constitutional text underlie the Court's unanimous ruling. *Id.* at 139. He may have made this statement to incorporate the views of Justice Johnson, who specifically rested on natural law principles. *See id.* at 143 (Johnson, J., concurring).

256. In Contract Clause litigation, justices rested upon unwritten principles as late as 1815. *See, e.g.*, Terrett v. Taylor, 13 U.S. (9 Cranch) 43, 50-51 (1815) (Story, J.) (striking down one law that violated natural justice and the principles of republican government and upholding two laws that did not violate the letter and spirit of the Constitution, without specifying which letter of the Constitution was implicated). Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819), marks an important turning point because the case was disposed of with multiple opinions that draw from only the Constitution's text, not unwritten principles. *See id.* at 625. Marshall's dissent in Ogden v. Saunders, 25 U.S. (12 Wheat.) 213 (1827), in which he explicitly draws from natural-rights concepts, is consistent with the claim because he uses natural-rights to elaborate the meaning of the Contract Clause. *Id.* at 344-48 (Marshall, J., dissenting). *Ogden* illustrates constitutional conceptualism's ability to infuse natural law principles into ambiguous constitutional text.

257. The Georgia Constitution also failed to protect the norm at bar. Georgia was one of the states whose constitutions contained minimal protection for individual liberty and no protection for property rights. *See* GA. CONST. of 1789, art. IV, §§ 3-6 (guaranteeing only freedom of the press, trial by jury, the writ of habeas corpus, freedom of religion, and rights of intestate succession). Both the land grant and the repeal law were enacted under the Georgia Constitution of 1789, which contained neither a takings nor a due process clause. In 1798 Georgia adopted a new organic law, but this charter also failed to contain either clause. Thus, if Marshall had considered *Fletcher* under the Georgia Constitution and had taken a textual approach, he would have been hard pressed to strike down the law.

Marshall, of course, did not consider *Fletcher* under Georgia law. Most scholars would say that this strategy reflected the Court's approach at the time to constitutional questions raised in diversity suits. Except for the most local matters, diversity suits were considered under general principles of law, not the law of the state. *See, e.g.*, WHITE, *supra* note 149, at 606, 741-43, 745-46, 778-79, 833-35. Professor White shows, however, that the Court considered land titles matters of local concern and adjudicated them according to local law. *Fletcher* may be thought of as a land title case. In addition, in *Fletcher* itself, Marshall relied entirely on the Georgia Constitution when he discussed whether the legislature had power to make the original grant. *Fletcher*, 10 U.S. (6 Cranch) at 128-29. Thus, even under the prevailing view

expressly prohibits uncompensated takings,[258] but relying on the Fifth Amendment risked implying that most of the national Bill of Rights operated as limitations on the state governments. Marshall apparently never was willing to consider such a dramatic change in federal-state relations.[259] The Constitution also contains in its original text an express prohibition of state-enacted ex post facto laws.[260] Although some have argued that the framers intended this clause to bar all retrospective legislation that divested vested rights, *Calder v. Bull*[261] had limited it to retrospective criminal legislation.[262] Accordingly, Marshall focused on the Contract Clause. Yet to void Georgia's uncompensated taking in *Fletcher*, Marshall had to graft onto that clause a concept of "contract" that was novel and portentous.[263]

Marshall's concept of "contract" took on these qualities not because, as many might think today, it brought contracts to which the state was a party within the Contract Clause, nor because it treated a state statute as a contract.[264] Rather, the concept's disturbing aspect was its inclusion of *executed* contracts in the Contract Clause. Subjecting exe-

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toward diversity cases, one might have thought Marshall would have decided *Fletcher* under state principles. Marshall may have elected to ignore the validity of the repeal act in *Fletcher* under the Georgia Constitution because that ground was not pleaded. Alternatively, he could have believed that the repeal act was invalid under the federal charter and that an analysis of state law upholding the act was therefore superfluous. By ignoring the Georgia Constitution Marshall sidestepped the dilemma of early American jurists over whether uncompensated takings are perfectly valid under a textual approach to many state constitutions. *See supra* notes 153-61 and accompanying text.

258. U.S. CONST. amend V.

259. Eventually, Marshall expressly held that the Bill of Rights is not effective against the states. *See* Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 249-51 (1833).

260. U.S. CONST. art I, § 10.

261. 3 U.S. (3 Dall.) 386 (1798).

262. *Id.* at 390. *Contra* Satterlee v. Matthewson, 27 U.S. (2 Pet.) 380, 681-87 app. 1 (1829) (Johnson, J., concurring) (addressing his concerns about limitations placed on ex post facto). For an analysis of the history leading to *Calder*, see generally 1 CROSSKEY, *supra* note 142, at 324-51 (explaining why the *Calder* Court decided to limit ex post facto to criminal cases); Oliver P. Field, *Ex Post Facto in the Constitution*, 20 MICH. L. REV. 315 (1922) (same).

263. Marshall's reading of the Contract Clause was unexpected and troubling for the reasons discussed *infra* text accompanying notes 264-68. Whether that reading resulted from an unanticipated definition of the term "contract" or the term "obligation" is debatable. Justice Johnson, who objected to Marshall's reading of the clause, accepted Marshall's definition of "contract," though his reasoning sounded more in traditional usage than in natural meaning. *Fletcher*, 10 U.S. (6 Cranch) at 144 (Johnson, J., concurring). Johnson claimed that Marshall implicitly gave an unexpected scope to the term "obligation." *Id.* at 145 (Johnson, J., concurring). For the reason given *infra* text accompanying note 265, it is fair to say that Marshall's definition of "contract" is at least a debatable rendering of the intent of the founding generation. Justice Johnson, however, would certainly have agreed that Marshall gave a problematic reading to the Contract Clause.

264. The framers anticipated both of these holdings, but they did not clearly intend them. *See* Siegel, *supra* note 24, at 26-28.

cuted contracts to the Contract Clause was novel because the events of the Confederation era had focused the founding generation's concern on state interference with debtor-creditor relations—that is, on state interference with executory contracts.[265] As Justice Johnson pointed out in his concurrence, the Contract Clause protects only the "obligation" of contracts, and a contract's obligation does not continue after it is performed.[266] Johnson justly recognized that Marshall's interpretation of the clause guaranteed both the " 'obligation and *effect* of contracts.' "[267] This enlarged guarantee, Johnson continued, was undesirable. Marshall's interpretation threatened, for example, to remove from the state the sovereign power of eminent domain.[268] By transferring title from an individual to the state, eminent domain necessarily interferes with rights the condemnee acquired under an executed contract. That eminent domain involves the provision of just compensation for the taking altered nothing because the Contract Clause proscribes *any* impairment of rights acquired by contract, not just uncompensated impairments. The danger with Marshall's reading of the Contract Clause in *Fletcher* was that it proved too much.

Thus, Marshall's concept of "contract" and his construction of the Contract Clause in *Fletcher* were problematic. His definitional treatment of the matter certainly was not natural and necessary; the founding generation probably did not intend it. Yet future generations of lawyers came to celebrate the case while they strained to limit its untoward impli-

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265. *See* BENJAMIN F. WRIGHT, JR., THE CONTRACT CLAUSE OF THE CONSTITUTION 4-6, 8-9, 12-16 (1938).

266. *Fletcher*, 10 U.S. (6 Cranch) at 144-45 (Johnson, J., concurring); *see also* West River Bridge Co. v. Dix, 47 U.S. (6 How.) 507, 517 (1848) (argument of counsel) (arguing that obligation of contract refers only to executory contract; executed contract does not impose obligation on either party); Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.), 420, 573-74 (1837) (McLean, J., concurring) (saying the Contract Clause was not intended to apply to executed contracts). Marshall's reply to this point was the ipse dixit that a grant "implies a contract not to reassert" the grantor's right to the land. *Fletcher*, 10 U.S. (6 Cranch) at 137. Even if it were true, this assertion is insufficient to meet Johnson's point because when the state condemns land or franchises it has granted, it interferes with the same implied contract, whether or not it pays compensation. Also, the assertion is insufficient because it does not exempt condemnations whenever the state is in the land's chain of title, even if the condemnee is a remote purchaser from the state. Marshall's argument is especially unavailing if we accept, as nineteenth-century lawyers did, the fiction that all property is derived mediately from the state. *See, e.g.*, *Dix*, 47 U.S. (6 How.) at 522 (argument of counsel) (arguing that all real estate is held by grant from the state); *id.* at 539 (Woodbury, J., concurring) (arguing that all property in the state derived from the state and is subject to use by the state for public purposes). For the Court's eventual answer to the dilemma, see *infra* note 269.

267. *Fletcher*, 10 U.S. (6 Cranch) at 144 (Johnson, J., concurring) (citation omitted) (quoting for emphasis to compare phrase with phrase, " 'acts impairing the obligations of contracts.' " *See* U.S. CONST. art. I, § 9.).

268. *Id.* at 145 (Johnson, J., concurring).

cations.[269] The shortcomings of *Fletcher* were accepted, and eventually forgotten, because of its strength: it used a meager constitutional text to protect the fundamental civil liberty of private property.[270]

Fletcher v. Peck was a seminal case in the emergence of constitutional conceptualism from the conflict between natural law and textual positivism. In *Fletcher*, textual positivism dictated that the Georgia legislature prevail; natural law dictated that the bona fide purchasers prevail. Marshall used conceptualism to resolve this tension by arguing that the Constitution's text protected the bona fide purchasers.[271] The tension between textual positivism and natural law, a tension with which Marshall expressly toyed before moving to his Contract Clause analysis, spurred the tradition of constitutional conceptualism.

3. Conclusion

This review of Marshall's early opinions shows that the long-held view that Marshall exemplified a pragmatic,[272] empiricist,[273] or balancing[274] constitutional jurisprudence is in serious need of revision.[275] As

269. Lawyers in the first half of the nineteenth century attempted at first to limit *Fletcher*'s impact on eminent domain law by drawing from Marshall's argument that the state's grant implied a contract not to reassert title. *See supra* note 266. Attorneys argued that *Fletcher* applied only to uncompensated seizures of land that the state itself had granted. *See Charles River Bridge*, 36 U.S. (11 Pet.) at 457 (argument of counsel). They also argued that *Fletcher* applied to all uncompensated seizures if the state constitution required compensation. *Dix*, 47 U.S. (6 How.) at 523 (argument of counsel). In resolving the issue, the Court held that eminent domain does not interfere with contract rights because in every land grant there is an implied clause that the land is subject to eminent domain, *id.* at 532-33; because eminent domain acts on the property and not the contract, *id.* at 536 (McLean, J., concurring); and because the power of eminent domain and the power to make and breach contracts are separate powers, *id.* at 539 (McLean, J., concurring).

270. Once again, the problem Marshall faced was that *Fletcher* represented an uncompensated takings case, not an "obligation of contract" case, and neither the federal Constitution nor the Georgia Constitution proscribed state-initiated uncompensated takings. The texts of all the relevant constitutions were inadequate to protect the norm at bar. *See supra* notes 257-63 and accompanying text. If the Court had not read some constitutional text creatively, it would have had to uphold Georgia's uncompensated taking.

271. *Fletcher*, 10 U.S. (6 Cranch) at 137-39.

272. FRANKFURTER, *supra* note 117, at 14.

273. TRIBE, *supra* note 48, at 309.

274. GERALD GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 264 (10th ed. 1980).

275. This discussion is too brief to give a full account of the massive corpus of Marshall's constitutional opinions. It illustrates conceptualism in Marshall's thought, but is not a definitive account of it. If this analysis were extended, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), would be the next case discussed. In terms of subsequent development, one can see constitutional conceptualism gestating in *Marbury* and *Fletcher*. As compared to the mature style exemplified by *McCulloch*, *Marbury* contains too little focus on constitutional text, while *Fletcher* contains too much focus on general principles of natural law independent of constitu-

Professor Richard Epstein recently wrote after showing that the *Lochner* era distinction between commerce and manufacturing[276] is implicit in Marshall's seminal ruling in *Gibbons v. Ogden*,[277] "If this is true, then Chief Justice Marshall was the great formalist, not the precursor of the modern realists."[278]

More generally, this review of Marshall's opinions shows that two forces supported the rise of constitutional conceptualism. In structure-of-government cases the problem was to flesh out relationships that the Constitution's text expressed only in general outline. In civil liberty cases the problem was to find appropriate rights, or in many states, any rights at all. In civil liberty cases a tension existed between the inadequacy of the constitutional text and the desire to immunize certain rights from legislative power, especially (and in practice almost exclusively) the right of property. In civil liberty cases constitutional conceptualism's appeal was that, unlike textual positivism, it promised appropriate limits to legislative omnipotence. Moreover, unlike natural law, it promised to find those limits within the Constitution's text. Constitutional conceptualism purported to be faithful to the framers' and ratifiers' intent; it did not intimate that the moral musings of the judiciary were above the will of the people expressed in their fundamental charters.

In sum, constitutional conceptualism triumphed in the early nineteenth century. Whether constitutional conflict focused on the structure of government or on civil liberties, conceptualism promised a way to supplement the obvious shortcomings of the constitutional text with sufficient fidelity to traditional or emergent norms of Anglo-American society and to the judicial role. Constitutional conceptualism arose from the ten-

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tional text. Mature constitutional conceptualism attempts to find those principles in the text and not mention them separate from it.

To be sure, Marshall stated in *McCulloch* that the Constitution was to be "adapted to the various crises of human affairs." *McCulloch*, 17 U.S. (4 Wheat.) at 415 (emphasis omitted). This meant only that the national government should have plenary power over the "means" by which it pursues its allocated "ends." The way to allocate the ends could be discerned neither from unwritten principles nor from the Constitution's sparse text. Conceptualism was the key to allocating power. Perhaps this is but another way of saying that, as the third tenet of constitutional conceptualism requires, the Court can review only the existence of power, not its discretionary use. *See infra* note 331 (discussing Marshall's view that the Constitution's allocation of power is static).

276. *See supra* text accompanying note 111.

277. 22 U.S (9 Wheat.) 1, 193-96, 203-05 (1824) (discussing commercial regulation and denying that it includes inspection laws).

278. Epstein, *supra* note 109, at 1406; *see also* DUCAT, *supra* note 113, at 42-51 (discussing what Ducat designated as "absolutism," a mode of constitutional interpretation similar to Marshall's conceptualism). Indeed, can less be said of a jurist whose standard form of argument is that, as Professor Balkin pointed out to me, "it is inherent in the nature of *X* that it has *Y* property"?

sion between America's commitment to constitutional law predicated upon both the sovereign will of the people and eternal moral truths. From *Marbury v. Madison* and *Fletcher v. Peck* through the end of the *Lochner* era in 1937, constitutional conceptualism flourished: American judges and jurists used conceptualism both to ferret out a richly textured and complex governmental structure from the Constitution's sparse words and to discover nature's copious norms in the framers' meager text.

C. *Constitutional Conceptualism and the Origin of Substantive Due Process*

Lochner era and pre-*Lochner* era jurists shared not only the general jurisprudential method of conceptualism, but also many specific concepts.[279] Among them was the doctrine of substantive due process. Between 1800 and 1850, American jurists developed a concept of "legislative power" that, with minor modification, became the *Lochner* era concept of substantive due process. Shared concepts, especially the hallmark notion of legislative power-substantive due process, tellingly illustrate the unity between the *Lochner* and pre-*Lochner* eras.[280]

The existence, let alone the importance, of the pre-*Lochner* era concept of "legislative power" is entirely forgotten today[281] because it tended to appear in state, not federal, controversies. Yet, the nineteenth-century notion of "legislative power" was central to early constitutional development, providing the foundation for the doctrines of judicial independence, equal protection, and substantive due process.[282]

Current conventional wisdom teaches that state constitutions are

279. *See supra* text accompanying notes 111, 119; *supra* note 115 and accompanying text (discussing the manufacturing/commerce distinction and the "original package" doctrine).

280. The pre-*Lochner* era origin of substantive due process is discussed not only because substantive due process is a key *Lochner* era doctrine, but also because prior scholarship tends to depict the doctrine as one of the most novel departures and egregious impositions of that era.

281. *See infra* note 284. Progressive era scholars discussed the doctrine of "legislative power" under different rubrics. *See* CORWIN, *supra* note 143, at 67-68, 72; Edward S. Corwin, *Due Process Before the Civil War*, 24 HARV. L. REV. 366, 373-80 (1911) (discussing doctrine of "vested rights"); Charles Haines, *Judicial Review of Legislation in the United States and the Doctrines of Vested Rights and of Implied Limitations on Legislatures* (pts. 1-3), 2 TEX. L. REV. 257, 387 (1924), 3 TEX. L. REV. 1 (1924) (discussing the doctrine of "implied limitations"). These scholars treat the doctrine dismissively, as part of their claim that *Lochner* era jurisprudence marked a departure from traditional norms. *See* CORWIN, *supra* note 143, at 68 (describing the "legislative power" doctrine as a ruse); CHARLES HAINES, THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY 403-04 (1st ed. 1932) (presenting the doctrine as a minority position).

282. *See infra* text accompanying notes 294-320. For another discussion of the importance of the concept of "legislative power" to the development of substantive due process, see Wal-

documents of limitation, not grant; therefore, a state government possesses all the powers of sovereignty except those exclusively granted to the national government or denied to it in its constitution.[283] In fact, the opposite is the traditional doctrine of state constitutional law. Throughout the nineteenth century, the dominant theory of American constitutional law, with reference to the powers of state legislatures, was

> [t]hat absolute despotick [sic] power, which it is said must, in all governments, reside somewhere . . . was, by the people, in the formation of our [state] government[s], carefully retained. And it is a fundamental principle, engrafted into the [state] constitution[s], that all power is originally inherent in the people; and that all officers of government, whether legislative or executive, are their trustees and servants—therefore, such power, and such only, as is delegated to them, can they exercise.[284]

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lace Mendelson, *A Missing Link in the Evolution of Due Process*, 10 VAND. L. REV. 125 (1956) (finding its importance in the development of the notion of separation of powers).

283. *See, e.g.*, Iowa Loan & Trust Co. v. Fairweather, 252 F. 605, 612 (S.D. Iowa 1918) (citing Hawkeye Ins. Co. v. French, 109 Iowa 585, 588, 80 N.W. 660, 660 (1899)); Orlander v. Hollowell, 193 Iowa 979, 984, 188 N.W. 667, 669 (1922), *appeal dismissed*, 262 U.S. 731 (1923); Gangemi v. Berry, 25 N.J. 1, 6-7, 134 A.2d 1, 4 (1957); Shepherd v. San Jacinto Junior College Dist., 363 S.W.2d 742, 743 (Tex. 1963); EDWARD S. CORWIN, COURT OVER CONSTITUTION 21 (repr. ed. 1957); 16 C.J.S. *Constitutional Law* § 54, at 141-42 (1984). Courts and commentators make this comment to contrast state constitutions with the federal Constitution, which is a document that grants, as well as limits, power.

284. Ward v. Barnard, 1 Aik. 121, 127 (Vt. 1825); *accord* COOLEY, *supra* note 9, at 87-129; THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW 126-53 (2d ed., Littleton, Colo., F.B. Rothman 1874) (1st ed. 1857). The views espoused in these materials are directly contrary to the conventional view that nineteenth-century jurists approached state constitutions not as grants but as organizations of powers. *See supra* note 283 and accompanying text. The inference of the conventional view is that state governments had all sovereign power except as expressly denied in their constitutions or granted to the federal government. If sovereign—absolute and despotic—power resided somewhere, it resided in the legislature. Hence, state legislatures were omnipotent but for the express limitations in their constitutions and the express grants to the federal government.

One strand in early American constitutional thought did assert that state legislatures exercised the sovereign powers of the English Parliament, limited only by express constitutional limitations and implications necessarily derived from them. This view was held by a distinct minority of jurists, however, and it exercised no real effect on American constitutional development after the second decade of the nineteenth century. In addition to Justice Iredell's famous comments in Calder v. Bull, 3 U.S. (3 Dall.) 386, 398-99 (1798), I have seen it voiced only in Billings v. Hall, 7 Cal. 1, 19-26 (1857) (Terry, J., dissenting); Cochran v. Van Surlay, 20 Wend. 365, 381-82 (N.Y. 1838) (opinion of Sen. Verplanck); and Dash v. Van Kleeck, 7 Johns. 477, 488 (N.Y. Sup. Ct. 1811) (Spencer, J.). Judges Spencer and Terry later recanted their views. *See Ex parte* Newman, 9 Cal. 502, 509-10 (1858) (Terry, J.); Dradshaw v. Rogers, 20 Johns. 103, 105-06 (N.Y. Sup. Ct. 1822) (Spencer, J.). In 1825, Justice (later Chief Justice) Gibson of Pennsylvania went beyond Justice Iredell's principle and declared that the judiciary has no power to pronounce statutes void even for clear violations of express state constitutional

Under the dominant nineteenth-century view of state constitutional law, the legislature had been granted only legislative power. Any act that was not in its nature legislative was void as ultra vires (outside the legislature's authority). Part of the strength of this reasoning was its textual basis and its general applicability. In all but three state constitutions, the article describing the legislature began with some prefatory phrase such as "legislative power is hereby vested in a general assembly."[285] Under this doctrine, therefore, nearly all state legislatures were laboring under a limited grant of authority.

This view of limited state legislative authority, which was gestating[286] in the judicial discussions in *Calder v. Bull*,[287] *Cooper v. Telfair*,[288]

provisions. Eakin v. Raub, 12 Serg. & Rawle 330, 344-48 (Pa. 1825) (Gibson, J., dissenting). But two decades later Gibson, too, recanted and joined in voiding state legislation. *See* Norris v. Clymer, 2 Pa. 277, 280-81 (1845).

In general, conventional wisdom confuses this minority view with the dominant view because the minority view appears in federal Commerce Clause precedent in the second quarter of the nineteenth century. The federal Commerce Clause cases, however, were concerned only with the question whether state law could regulate or affect interstate commerce despite the limitations of the dormant Commerce Clause. Because these cases did not concern the limits of state power as a matter of state law, they assumed the state could do anything except exercise power forbidden to it by the federal Constitution. This assumption was appropriate because the issue before the federal court was not whether the state violated its own constitution. Without an awareness of these contextual differences, it is easy to misread such sentences as "[t]he legislature of a State may exercise all powers which are properly legislative, unless they are forbidden by the State or National Constitution." Railroad Co. v. County of Otoe, 83 U.S. (16 Wall.) 667, 673 (1872); *see* EDWARD S. CORWIN, LIBERTY AGAINST GOVERNMENT 67-68 (1948) (describing Thomas Cooley's treatment of state constitutional interpretation). This Article maintains that, in the nineteenth century, the phrase "properly legislative" was as pregnant with meaning, and as much a limitation on legislative power, as the phrase "unless they are forbidden."

285. *See, e.g.*, N.Y. CONST. of 1777, art. II ("supreme legislative power within this State shall be vested in two separate and distinct bodies . . . the assembly [and] the senate . . . who together shall form the legislature"); S.C. CONST. of 1790, art. I, § 1 ("[t]he legislative authority of this State shall be vested in a general assembly, which shall consist of a senate and house of representatives"). The exceptions are Connecticut and Rhode Island, which operated under their colonial charters until 1818 and 1842, respectively. CONN. CHARTER of 1662, para. 1 (establishing only a political and corporate body called the *Governor and Company* to govern and oversee the needs of the colony, without establishing separate branches of government); R.I. AND PROVIDENCE PLANTATIONS CHARTER of 1663, para. 3 (same); *see also* CONN. CONST. of 1818 (superseding CONN. CHARTER of 1662); R.I. CONST. of 1842 (superseding R.I. AND PROVIDENCE PLANTATIONS CHARTER of 1663). The third exception is New Jersey, whose constitution provided only that "the government of this Province shall be vested in a Governor, Legislative Council, and General Assembly." N.J. CONST. of 1776, art. I.

286. For example, in *Calder* Justice Chase stated the whole theory although he did not base it on the grant of legislative power to the legislature. Calder v. Bull, 3 U.S. (3 Dall.) 386, 387-89 (1798). For another example, see Chief Justice Marshall's discussion of the point in the preface of his Contract Clause discussion in Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 133-35 (1810), discussed *supra* note 236 and text accompanying notes 252-56.

287. 3 U.S. (3 Dall.) 386, 387-89 (1798).

288. 4 U.S. (4 Dall.) 14, 18-19 (1800).

Ellis v. Marshall,[289] *Fletcher v. Peck*,[290] and *Dash v. Van Kleeck*,[291] burst into prominence in 1818 in the New Hampshire decision of *Merrill v. Sherburne*.[292] *Merrill* was the first case to present the theory shorn of its natural law origins and based wholly in constitutional text. By 1829, when Justice Story articulated the view in *Wilkinson v. Leland*,[293] it was a truism.

During the first half of the nineteenth century, courts employed the concept of legislative power to establish judicial independence. Following English parliamentary precedents, various colonial legislatures arrogated to themselves the power to supervise the judiciary by granting new trials, enacting special procedural rules for particular litigants or controversies, and passing declaratory acts.[294] Legislatures in at least five states carried on these practices after the Revolution. Legislative exercise of these powers did not end until each of these states' judiciaries had declared them judicial in nature and held that the power to exercise them was not vested in the legislature by the state constitution's grant of "legislative power."[295] During the same period, some courts used the delegation theory to proscribe special legislation. "A law," the Maine Supreme Judicial Court wrote, citing Blackstone's famous definition, is " 'a rule of civil conduct.'. . . Hence it must in its nature be general[;] . . . a rule for all, and binding on all."[296]

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289. 2 Mass. 269, 276-77 (1807).

290. 10 U.S. (6 Cranch) 87, 133-35 (1810), discussed *supra* note 236 and text accompanying notes 252-56.

291. 7 Johns. 477 (N.Y. Sup. Ct. 1811).

292. 1 N.H. 199, 206-17 (1818).

293. 27 U.S. (2 Pet.) 627, 658 (1829). In addition, Chancellor Walworth of New York stated:

> But, as I have frequently had occasion to observe, an act of the legislature which would have the effect to divest an individual of his own property and transfer it to others for their own benefit . . . would be void, as being against the spirit of our state constitution, and not within the powers delegated to the legislature by the people of this state.

Cochran v. Van Surlay, 20 Wend. 365, 373 (N.Y. 1838).

294. *See supra* text accompanying notes 163-67.

295. *See* Lewis v. Webb, 3 Me. 326, 331 (1825); *Merrill*, 1 N.H. at 203-17; De Chastellux v. Fairchild, 15 Pa. 18, 20-21 (1850); Greenough v. Greenough, 11 Pa. 489, 494-95 (1849); Bates v. Kimball, 2 D. Chip. 77, 83-87 (Vt. 1824); *see also* POUND, *supra* note 167, at 73 nn.8-10 (referring to the practice in Indiana, but not indicating when the judiciary ended it).

296. *Lewis*, 3 Me. at 333 (quoting 1 BLACKSTONE, *supra* note 170, at *44). In Ward v. Barnard, 1 Aik. 121 (Vt. 1825), the Vermont Supreme Court said:

> Though . . . justice may, in particular cases, have been promoted, sure it is, that those equal rights, so dear and sacred in the estimation of a free and enlightened people, are not secured by a constitution, yielding to the legislature the high prerogative of imposing restraints, and conferring favours not common to all.

Id. at 128. Even though it was decided on a peculiar clause in the Massachusetts Constitution

Finally, in the eleven years between *Merrill* and *Wilkinson*, most, if not all, courts used the concept of legislative power to build a textually based constitutional prohibition of retrospective laws that divested property rights.[297] From the early years of the Republic, jurists had struggled with the validity of retrospective laws in a "free Republican government[ ]."[298] These discussions provoked the sharpest controversies over the theory and propriety of judicial review, because the jurists arguing against retrospective laws grounded their opinions in extratextual principles derived from natural law or "the great first principles of the social compact."[299] With the elaboration of the legislative power concept, resolution of the controversy over retrospective laws was at hand. "We know," Justice Story wrote, in *Wilkinson v. Leland* in 1829,

> of no case, in which a legislative act to transfer the property of A. to B. without his consent, has ever been held a constitutional exercise of legislative power in any state in the union. . . . We are not prepared therefore to admit that the people of [the state] have ever delegated to their legislature the power to divest the vested rights of property, and transfer them without the assent of the parties.[300]

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and not on the general theory described here, the seminal case on judicial proscription of special legislation is Holden v. James, 11 Mass. 396 (1814).

297. Some courts employed the theory to ban all retrospective legislation. *See, e.g.*, *Ward*, 1 Aik. at 128 (reasoning that since "[a] prescribed rule of civil conduct, is the correct, and universally approved definition, of municipal law . . . [s]o far as an act of the legislature is retrospective . . . it is not a prescribed rule of conduct"). Nevertheless, most courts found that the sovereign people's grant of legislative power to their legislative agents did not imply a total ban on retrospective legislation. Experience had shown the necessity and the morality of some retrospective alterations of the law. *See, e.g.*, Town of Goshen v. Town of Stonington, 4 Conn. 209, 221-22 (1822); Foster v. President, Directors & Co. of Essex Bank, 16 Mass. 245, 252-74 (1819).

298. Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (emphasis omitted).

299. *Id.* (emphasis omitted). In *Fletcher*, Justice Johnson was willing to void retrospective legislation "on the reason and nature of things: a principle which will impose laws even on the deity." Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 143 (1810) (Johnson, J., concurring). As long as the claim that vested rights are immune from legislative spoliation was based upon natural law, it was an unpopular theory because it purported to bind even the sovereign people. Basing the claim on the absence of authorization in the grant of legislative power acknowledged (1) that the ultimate power rested with the sovereign people; (2) that law was based upon will and force, not reason; and (3) that the judiciary was empowered only to enforce positive law. It turned the issue into one of constitutional interpretation. Legislative violation of "natural" rights was presumptively impermissible. The judiciary would uphold it, however, if the constitutional text clearly authorized it. *See, e.g.*, Ives v. Southern B. Ry., 201 N.Y. 271, 294, 94 N.E. 431, 439-40 (1911) ("The right of property rests not upon philosophical or scientific speculations nor upon the commendable impulses of benevolence or charity, nor yet upon the dictates of natural justice. The right has its foundation in the fundamental law. That can be changed by the people, but not by legislatures.").

300. Wilkinson v. Leland, 27 U.S. (2 Pet.) 627, 658 (1829). Proscription of divesting property rights was not the only substantive application of "legislative power" theory. Even before

In terms of the protection of private property, the crystallization of the delegation theory came none too soon. The next twenty years, from 1830 through 1850, witnessed a tremendous upsurge in legislative activity divesting vested rights of property. Legislatures accomplished divestiture not through the enactment of retrospective laws, but through condemnation to build internal improvements (chiefly railroads under private ownership) and through taxation by municipalities to subscribe to stock or donate funds to construct these improvements.[301] Especially with the economic collapse of 1837, case after case pressed on the courts to adjudicate the validity of the legislative exercise of these two sovereign powers. Immediately, courts elaborated their concept of legislative power into a law of limitation on the use of eminent domain and taxation. Although no constitution in the land said so, courts barred condemnation or taxation for private, as opposed to public, uses or purposes. With regard to eminent domain, as early as 1834 Chief Justice Savage of New York voided the condemnation of land that was not needed for a street construction project, grounding himself in natural right and the spirit of the constitution.[302] The following year, Chancellor Walworth brought the thought within the constitutional text by declaring taking for private use "an abuse of the right of *eminent domain* . . . and, therefore, not within the general powers delegated by the people to the legislature."[303]

Judicial proscription of taxes used to raise funds for private purposes began in 1837.[304] Chief Justice Black of Pennsylvania gave the classic statement of the theory in 1853 when, in upholding taxation to fund municipal subscription to railroad stock, he conceded:

> The taxing power . . . is given to [the legislature] without any restriction whatever. . . .

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the theory was clearly articulated, the Massachusetts Supreme Judicial Court voided a statute compelling someone to join a street improvement corporation. The court stated: "No apprehension exists in the community that the legislature has such power. . . . [I]t was never before known that they have power over the person, to make him a member of a corporation, and subject him to taxation, *nolens volens*, for the promotion of private enterprise." Ellis v. Marshall, 2 Mass. 269, 276-77 (1807); *see also* Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655, 663 (1874) ("No court, for instance, would hesitate to declare void a statute which enacted that A. and B. who were husband and wife to each other should be so no longer, but that A. should thereafter be the husband of C., and B. the wife of D."); Sweet v. Hulbert, 51 Barb. 312, 318 (N.Y. App. Div. 1868) ("[I]n delegating to [the legislature] . . . the power to make laws, . . . the people did not . . . intend to . . . invest that body with authority to make laws inconsistent with natural right.").

301. *See infra* text accompanying notes 302-05.

302. *In re* Albany Street, 11 Wend. 148, 151 (N.Y. Sup. Ct. 1834).

303. Varick v. Smith, 5 Paige Ch. 137, 159 (N.Y. Ch. 1835).

304. *See* Hooper v. Emery, 14 Me. 375, 381 (1837).

> But I do not mean to assert that every act which the legislature may choose to call a tax is constitutional. . . . The whole of a public burden cannot be thrown on a single individual, under pretence [sic] of taxing him . . . .
>
> . . . .
>
> Neither has the legislature any constitutional right to create a public debt, or to lay a tax, or to authorize any municipal corporation to do it, in order to raise funds for a mere *private* purpose. No such authority passed to the Assembly by the general grant of legislative power. This would not be legislation. Taxation is a mode of raising revenue for *public* purposes. When it is prostituted to objects in no way connected with the public interests or welfare, it ceases to be taxation, and becomes plunder. Transferring money from the owners of it, into the possession of those who have no title to it, though it be done under the name and form of a tax, is unconstitutional for all the reasons which forbid the legislature to usurp any other power not granted to [it].[305]

With the establishment of the proposition that divesting property rights was not within the concept of legislation, the so-called oxymoron of substantive due process was ready to be born. The thought is simple: The Due Process Clause says that no one may be deprived of life, liberty, or property without due process of law. The clause is violated if a legislative act that is not "legislation" and therefore not a "law" causes the deprivation.[306] Accordingly, legislative acts granting new trials, construing statutes, or in any way exercising a judicial power are not, in their nature, laws; their enforcement creates a deprivation without due process

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305. Sharpless v. Mayor of Philadelphia, 21 Pa. 147, 167-69 (1853); *see also* Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655, 665-67 (1874) (voiding tax to aid industrial construction); Allen v. Inhabitants of Jay, 60 Me. 124, 142 (1872) (voiding loan of credit to subsidize industrial construction); Lowell v. City of Boston, 111 Mass. 454, 472-73 (1873) (voiding loan of credit to subsidize private reconstruction from fire damage); Philadelphia Ass'n for the Relief of Disabled Firemen v. Wood, 39 Pa. 73, 82-84 (1861) (voiding tax for donation to corporation for charitable purposes); Curtis's Adm'r v. Whipple, 24 Wis. 350, 353-56 (1869) (voiding tax to aid private school). A few opinions, written mostly by judges who were proponents of *Lochner* era jurisprudence later in their careers, even voided, or argued for voiding, taxation to aid railroad construction. *See* Hanson v. Vernon, 27 Iowa 28, 56-60 (1869) (Dillon, C.J.) (per curiam); State *ex rel.* Saint Joseph & D. C. R.R. v. Comm'rs of Nemaha County, 7 Kan. 542, 549 (1871) (Brewer, J., dissenting); People *ex rel.* Detroit & H. R.R. v. Township Bd. of Salem, 20 Mich. 452, 493-94 (1870) (Cooley, J.).

306. *See, e.g.*, SEDGWICK, *supra* note 284, at 138 n.(a). The thought is even easier to grasp under the alternative rendering of the Due Process Clause, a rendering that proscribes deprivations not in accord with the "law of the land." Since this phrasing is more clearly focused on substance than on process, it is easier to accept the view that an act beyond the legislature's power to enact into law—an act that in its nature is not legislation—cannot be the law of the land.

of law.[307] Similarly, partial and unequal legislative acts are not, in their nature, laws.[308] Finally, legislative acts divesting vested property rights or taking or taxing property for private purposes are in their nature "plunder," as Pennsylvania Chief Justice Black said in 1853.[309] Legislative acts taking or taxing property for private purposes are not, therefore, laws; their enforcement creates a deprivation without due process of law.

In 1829 the Tennessee Supreme Court drew a connection between special legislation and a denial of due process of law.[310] As early as 1833, the Supreme Court of North Carolina found a nexus between acts divesting vested rights and violations of the state constitution's "law of the land" provision.[311] This view came to the legal profession's general attention in 1840 when the respected Justice Bronson of the Supreme Court of New York adopted it.[312] In voiding an act of condemnation for purposes he thought private, Justice Bronson elaborated the doctrine of legislative power and the due process theory as alternative holdings.[313] The doctrine of legislative power, Bronson said, follows from the state constitution's positive words of grant; the due process theory follows from its words of limitation.[314] From there the due process theory passed into general legal consciousness.[315] When post-Civil War legislatures began to regulate private property actively, there was a well-estab-

307. This is procedural due process, perhaps, but only if civil rights are distinguished into procedural and substantive rights. Nineteenth-century jurists did not make this distinction. Both the right to a jury trial and the right to private property were sacrosanct constitutional rights.

308. On the procedural-substantive cusp, perhaps.

309. *See supra* text accompanying note 305.

310. Vanzant v. Waddel, 10 Tenn. 259, 269-71 (1829); *see also* Fisher's Negroes v. Dabbs, 14 Tenn. 119, 152-56 (1834) (holding that legislation that mandates striking a particular case from a court's docket represents a denial of due process); Bank of the State v. Cooper, 10 Tenn. 599, 605-08 (1831) (holding that legislation that applies only to one bank is not "law of the land"); Wally's Heirs v. Kennedy, 10 Tenn. 554, 555-58 (1831) (holding that legislation restricted to a small section of the state and affecting the rights of one group is void).

311. Hoke v. Henderson, 15 N.C. (4 Dev.) 1, 11-28 (1833) (per curiam), *overruled on other grounds by* Mial v. Ellington, 134 N.C. 131, 46 S.E. 961 (1903).

312. Taylor v. Porter, 4 Hill 140, 146 (N.Y. Sup. Ct. 1840).

313. *Id.* at 143-47.

314. *Id.* The case concerned a taking for private use. In his opinion, Judge Bronson wrote: "[T]he question does not necessarily turn on the section granting legislative power. The people have added negative words, which should put the matter at rest." *Id.* at 145. He then cited and argued from the constitution's "law of the land" clause. *Id.*

315. *See, e.g.*, Westervelt v. Gregg, 12 N.Y. 202, 209 (1854); Ervine's Appeal, 16 Pa. 256, 256-64 (1851); Norman v. Heist, 5 Watts & Serg. 171, 173 (Pa. 1843); COOLEY, *supra* note 9, at 351-413; SEDGWICK, *supra* note 284, at 474-82. It is interesting to note that when Chief Justice Taney rested on the Due Process Clause in the notorious case of Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 449-51 (1857), Justice Curtis accepted the notion of substantive due process implicit in Taney's opinion but exempted slave property from the normal laws of property. *Id.* at 624-27 (Curtis, J., dissenting).

lished tradition by which the text of state constitutions had been found to protect private property from untoward exercises of the legislative powers of eminent domain and taxation. It was a foregone conclusion that courts would limit the exercise of the power of regulation—the last of the three great governmental powers over private property—to proper objectives. Indeed, courts had occasionally done so before the Civil War.[316]

In other words, long before the rise of *Lochner* era jurisprudence, conceptualism was a basic part of the American constitutional tradition. Moreover, the concepts that underlie the *Lochner* era approach to governmental regulation of private property were long-term members of that tradition. In the first half of the nineteenth century, courts established the tradition of thinking about governmental powers as concepts with known boundaries. Before the Civil War, courts had held, even without express constitutional text, that the concept of public use cabins the power of eminent domain and that the concept of public purpose cabins the power of taxation. In the decade prior to the Civil War, courts had just begun to discuss the boundaries of the police power.[317] It was left to the postbellum courts to continue these discussions and, even in the absence of constitutional text, to trace out the boundaries of the police power, the most difficult of the three great sovereign powers to define.

The notion that "due process" is violated when the legislature enacts substantive law infringing vested property rights was also well recognized before the Civil War. The general dearth of antebellum precedents grounded in due process resulted from the superfluity of a state court resting on that clause when it determined that a legislative act went beyond the legislature's grant of power.[318] Because of the English tradition of finding in the Magna Charta a textual proscription of arbitrary and despotic government, the Due Process Clause was readily associable with the tradition worked out under the state constitutions' granting clauses.[319] The migration of the issues addressed by the concept of "leg-

316. *See, e.g., Ex parte* Newman, 9 Cal. 502, 507-08 (1858).

317. *See, e.g., id.*; Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 84-88 (1851); Thorpe v. Rutland & B. R.R., 27 Vt. 140, 149-52 (1854).

318. *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, 44 (1913) (observing that the development of Fourteenth Amendment due process usurped the field that this doctrine occupied).

319. As further support for the migration of issues from the Granting Clause to the Due Process Clause, *Lochner* era jurists noted that to some extent medieval English courts used the Magna Charta to void royal and Parliamentary lawmaking outside the scope of their power. Brinton Coxe argued that in the Middle Ages the King's prerogative included some limited area of lawmaking power. The Magna Charta voided royal decrees outside the scope of this area, since the law of the land did not countenance them. Similarly, Parliament's legitimate area of lawmaking authority was limited in scope. Until the Reformation, the church, not Parliament, had jurisdiction over ecclesiastical matters. Consequently, the Magna Charta

islative power" from the state constitutions' granting clauses to their due process clauses began before the Civil War. Enactment of the Fourteenth Amendment Due Process Clause and the emasculation of the Privileges and Immunities Clause in *The Slaughter-House Cases*[320] only accelerated and highlighted that migration.

D. Conclusion

In the early nineteenth century, the tension between judicial review based on natural law and judicial review based on textual positivism resulted in a jurisprudence premised upon abstract concepts whose deductive application to controversies was thought to cabin judicial creativity while effectuating the intent of the Constitution's framers and ratifiers. John Marshall's early constitutional opinions evidence this development, as does the nineteenth-century concept of "legislative power." Yet the notion of "legislative power" does more than evidence conceptualism in pre-*Lochner* era constitutional law. The antebellum judges' concept of "legislative power" limited the legislature's power to transfer property from *A* to *B*, and controlled the legislature's exercise of the powers of eminent domain and taxation. That concept was the origin of the notion of substantive due process, which grew to prominence when it was extended, in the last quarter of the nineteenth century, to delimit the legislature's power to regulate private property. A total continuity exists between the jurisprudence that courts used before the Civil War to cabin the textually unlimited powers of eminent domain and taxation by the concepts of public use and public purpose, and the jurisprudence that courts used after the Civil War to bound the textually unlimited power of regulation by the concepts of public health, safety, morals, and the prevention of fraud.

From the early nineteenth century through the *Lochner* era, constitutional conceptualism was a hallmark of American constitutional jurisprudence. Indeed, until the revolution of 1937, conceptualism was

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voided any Parliamentary act trenching on ecclesiastical matters as not the law of the land, because the act was outside the scope of Parliament's limited lawmaking authority. BRINTON COXE, AN ESSAY ON JUDICIAL POWER AND UNCONSTITUTIONAL LEGISLATION 160-64, 178-80 (n.p. 1893). In any event, the association of the Magna Charta with a ban on arbitrary and despotic government may have been behind the appeals to the Magna Charta in the 1780s when legislation was first discussed as void because it allegedly violated natural law. Once it was established that American legislatures were delegated limited lawmaking powers, the thought returned to the place where it had started. *See also* Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941, 943-47 (arguing that Due Process Clause was intended to have substantive content).

320. 83 U.S. (16 Wall.) 36 (1873), discussed *infra* text accompanying notes 453-72; *see also* Bird, *supra* note 318, at 44 (stating that after adoption of Fourteenth Amendment, reliance on the doctrine of "fundamental law" faded).

considered a necessary condition of legitimate judicial review. In addition, the *Lochner* era's substantive due process doctrine, regarded as the product of a conceptualistic jurisprudence, was itself consonant with the course of nineteenth-century constitutional law. The *Lochner* era's substantive due process doctrine was so wholly a part of the American constitutional tradition that the doctrine, in large measure, should be regarded as a continuation, indeed as a fruition, of tradition. It was the 1937 Court's overturning of substantive due process precedents that marked a break with established methodological norms.

IV. THE SOURCE OF *LOCHNER* ERA CONCEPTS AND THE AMERICAN CONSTITUTIONAL TRADITION

Prior to the Civil War, natural law and framer intent were the two most important sources of American constitutional law.[321] Though natural law and framer intent may, on many occasions, protect the same substantive values,[322] they are ultimately separate and conflicting sources

321. On natural law (which encompasses drawing from natural reason and natural equity), see WHITE, *supra* note 149, at 595-740 (discussing Contract Clause and minority rights); Christopher Eisgruber, *Justice Story, Slavery, and the Natural Law Foundations of American Constitutionalism*, 55 U. CHI. L. REV. 273 (1988) (generally discussing natural-law basis for Justice Story's opinion in *Prigg v. Pennsylvania* and modern criticisms of approach); *supra* text accompanying notes 187-88, 205-11 (discussing *Marbury*); *supra* text accompanying notes 239-45 (discussing Marshall's concept of "contract" in *Fletcher*); *supra* text accompanying note 296 (explaining proscription of special legislation premised upon posited definition of law); *supra* note 297 and accompanying text (basing proscription of retrospective laws on "universally" received concept of law); *supra* note 299 and accompanying text (discussing sources of the "legislative power" theory).

On framer intent, see Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 403-27 (1857) (discussing whether blacks were "citizens" and whether Congress could naturalize them); The License Cases, 46 U.S. (5 How.) 504, 575-76 (1847) (dealing with the original package doctrine); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 137-38 (1810) (analyzing contract issues), discussed *supra* text accompanying notes 242-49. Also, the entire "legislative power" theory that led to the substantive due process doctrine was premised on the presumed intent of the people in vesting legislative power in the legislature. *See supra* notes 284-85, 300 and accompanying text; *see also* WHITE, *supra* note 149, at 674-740 (discussing displacement of natural law by framer intent in constitutional construction); Paul Kahn, *Reason and Will in the Origins of American Constitutionalism*, 98 YALE L.J. 449, 490-506 (1989) (discussing rise of "framer intent" in constitutional construction); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 923-35, 944-48 (1985) (same); Sherry, *supra* note 114 (generally discussing simultaneous appeal to framer intent and natural law).

322. The discussion of Marshall's analysis in *Fletcher* on the meaning of "contract," *see supra* text accompanying notes 242-49, illustrates his beliefs that natural reason and framer intent frequently coincided and that natural reason was a source of argument concerning framer intent. The framers, after all, were aware of natural law; one may assume they reasoned according to the demands of natural reason. Natural law and framer intent may also be reconciled by viewing them as theories used in separate types of cases. *See* Sherry, *supra* note 114, at 1167-68 (arguing that jurists drew from natural law in civil liberty cases and from framer intent in structure-of-government cases).

of law. Scholars have long noted that antebellum constitutionalism reflected a constant interplay and competition between the two sources.[323] Nevertheless, despite the conflict, antebellum jurists usually claimed to draw their constitutional concepts from one or the other or both.[324] These jurists established natural law and framer intent as the traditional sources of constitutional norms.

Natural law and framer intent emerged from the Civil War and moved into the early *Lochner* era with diminished ability to perform their traditional functions. Despite its link to democratic theory, framer intent was discredited as the constitutionalism of the advocates of state sovereignty, nullification, secession, and slavery.[325] Despite its appeal to God's eternal verities, the allure of natural law was tarnished by the nineteenth century's increasingly secular, positive, and scientific outlook. Because of this outlook, some *Lochner* era jurists spurned natural law, regarding it as a superannuated myth.[326] Others, who maintained a personal belief in natural law, nonetheless ceased to credit it with sufficient power to resolve disputes.[327] This latter group thought natural law supported general norms and social institutions, such as a right of property, the sanctity of the monogamous family, and the equality of all persons

323. *See, e.g.*, CORWIN, *supra* note 143, at 59-64; WHITE, *supra* note 149, at 674-740; Kahn, *supra* note 321, at 490-506. Professors White and Kahn maintain that under the stress of the slavery controversy, American judges tempered, if not abandoned, their use of natural law as an ultimate source of constitutional concepts and norms. The triumph of antislavery sentiment in the Civil War, however, brought to the bench many jurists who based their moral and political beliefs upon natural law, and set the stage for a reversion to natural law constitutionalism. The reversion was muted. *Cf.* William Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513, 558-66 (1974) (noting shift to legal formalism in private law). This Article implies that historism's ability to appeal to natural law and framer intent is an explanation for this outcome.

324. *See supra* note 321.

325. *See* Kahn, *supra* note 321, at 490-506; Powell, *supra* note 321, at 935; *cf.* Nelson, *supra* note 323, at 538-47 (discussing competition in private law between instrumentalism and natural law).

326. *See* LOWELL, *supra* note 30, at 9, 182-88 (quoted *infra* text accompanying note 408); CHRISTOPHER G. TIEDEMAN, THE UNWRITTEN CONSTITUTION OF THE UNITED STATES: A PHILOSOPHICAL INQUIRY INTO THE FUNDAMENTALS OF AMERICAN CONSTITUTIONAL LAW 70-71, 73-77, 153 (repr. ed. 1974) (1st ed. 1890) (asserting, among other things, that the "doctrine reaches the extreme limits of absurdity in the social contract"; that "[t]here is no such thing, even in ethics, as an absolute, inalienable, natural right. The so-called natural rights depend upon, and vary with, the legal and ethical conceptions of the people"; and describing the doctrine as "groundless"). Of course, the opponents of *Lochner* era constitutionalism, who openly mocked the notion of natural law, also contributed to diminishing natural law's ability to ground constitutional doctrine. *See, e.g.*, OLIVER W. HOLMES, *Natural Law*, *in* COLLECTED LEGAL PAPERS 310-16 (1920); William Lewis, *Civil Liberty as Written in the Constitution*, 41 AM. L. REG. 971, 972-73 (1893); Pound, *supra* note 10, at 467-68. But the salient point here is that some proponents of *Lochner* era jurisprudence agreed with these opponents.

327. *See* Siegel, *supra* note 107, at 1488-91.

before the law.[328] In contrast to jurists at the beginning of the nineteenth century,[329] however, this group no longer believed natural reason was powerful enough to dictate results in legal controversies.[330] Thus, even *Lochner* era jurists who maintained a personal belief in natural law admitted that their version of the tradition disabled it from providing an ultimate grounding for constitutional doctrine.

In addition, the appeal of framer intent and natural law was blunted because the doctrines entailed essentially static models of constitutional law.[331] Fidelity to framer intent required adhering to the law set down in 1787; fidelity to natural law required adhering to the law set down at the Creation. Yet, postbellum and *Lochner* era jurists were aware of the novelty of the task they were undertaking in substantive due process litigation—transforming the constitutional guarantee of private property from the protection of vested rights to the protection of substantive rights.[332] They knew the task of fashioning a substantive right of property, and the concomitant delimitation of government's "police power," had been thrust upon them by the late nineteenth century's momentous shift in the social and economic bases of American life.[333] Postbellum and *Lochner* era jurists were embarking on an elaboration of new constitutional law for a new era of social and economic relations. Immersed in the late nineteenth century's post-Darwin world view,[334] they saw their world as evolving, and they thought constitutional law needed an evolutionary, not static, foundation.

Lochner era jurists, in short, recognized the tremendous physical[335]

328. 1 BLACKSTONE, *supra* note 170, at *122 n.4 (annot. by Thomas M. Cooley).

329. *See, e.g., supra* text accompanying notes 187-241, 286-300 (discussing Chief Justice Marshall and the jurists who developed the "legislative power" doctrine).

330. The ability to decide concrete controversies was a demand of their conceptualism. *See supra* text accompanying notes 103-05.

331. John Marshall's famous statement in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), that the Constitution "is . . . intended . . . to be adapted to the various crises of human affairs," *see id.* at 415 (emphasis omitted), does not imply that framer intent and natural law, the primary sources of Marshall's constitutional conceptualism, were anything other than essentially static constitutional models. The term "adapted" may mean "suitable" as well as "[m]odified so as to suit new conditions." 1 OXFORD ENGLISH DICTIONARY 101 (1933). Indeed, the Oxford English Dictionary traces the former sense of "adapted" to 1610 and the latter sense only to 1816. *Id.* Also, Marshall made this argument to support construing the Constitution in a manner allowing Congress power to meet the unforeseeable future. He advocated selecting rules and modelling a static Constitution, informed by the unimaginable variety of circumstances in which the rules would have to function. *See* Epstein, *supra* note 109, at 1400, 1406-08.

332. *See supra* text accompanying notes 27-47 (discussing early *Lochner* era jurists).

333. *See supra* text accompanying notes 20-28.

334. *See infra* text accompanying notes 347-48, 418-20.

335. The term "physical" in this context means the economic and material bases of their

and metaphysical[336] gulf between their world and that of the founding generation.[337] They attempted to bridge this gulf by turning to a new source for their constitutional principles: the common law.[338] The common law is, of course, a curious and seemingly inappropriate source of ultimate constitutional norms. The common law traditionally was subject to legislative control.[339] In addition, drawing constitutional concepts from the common law, rather than from natural law or framer intent, was a departure from constitutional tradition. The *Lochner* era jurists' turn to the common law, however, was consistent with, and predicated upon, the core of the late ninteenth century's legal and social thought: use of "historism" as the method of legal analysis and social science.[340]

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lives. It refers to the shift from a country typified by rural communities and small-scale agricultural and commercial undertakings to urban communities and large-scale industrial enterprise.

336. The term "metaphysical" in this context refers to the abstract belief systems by which *Lochner* era jurists lived. America's founding generation believed, for example, in the ability of natural law to resolve legal disputes, while late nineteenth-century jurists, by and large, did not. America's founding generation also was less aware that societies change over time than were late nineteenth-century jurists. *See* Siegel, *supra* note 107, at 1437-40; *infra* text accompanying notes 343-45.

337. Antebellum jurists had attempted to grapple with the growing gulf between their world and the world of the founders through theories of constitutional interpretation such as Francis Lieber's theory of "construed intent." Lieber conceived "interpretation" as discovering the meanings that documentary draftsmen actually intended. He contrasted this with "construction," by which he meant determining the appropriate rule "in cases which have not been foreseen, by the framers of those rules, by which we are nevertheless obliged . . . faithfully to regulate . . . our actions respecting the unforseen case." FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS 17, 23, 56 (1839 & photo. reprint 1970). His widely noted theory attempted to allow jurists to respond within a jurisprudence of framer intent to issues that did not occur, and could not have occurred, to the framers. By the late nineteenth century, the gulf between the world in which the jurists lived and the world of the framers had grown so large that even Lieber's theory of construed intent could not bridge it.

338. Modern scholars correctly claim that *Lochner* era jurists read the concepts they wished to see into, rather than out of, the common law. On occasion, contemporary opponents of *Lochner* era jurisprudence also made this observation. *See* Charles Shattuck, *The True Meaning of the Term "Liberty" in Those Clauses in the Federal and State Constitutions Which Protect "Life, Liberty, and Property,"* 4 HARV. L. REV. 365, 381-82, 391-92 (1891); Charles Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431, 440-41, 460-61, 464 (1925). In general, contemporary opponents of the decisions conceded that the *Lochner* era justices drew from the common law, but criticized them for it. What was important, however, is that *Lochner* era jurists truly saw themselves as drawing from the common law, and believed that the common law was the ultimate source of their constitutional principles in civil liberty cases. *See infra* text accompanying notes 426-35; *infra* note 504.

339. A fundamental assumption of Anglo-American law is that legislatures may alter common-law rules. *See, e.g.*, Commonwealth v. Perry, 155 Mass. 117, 124-25, 28 N.E. 1126, 1127-28 (1891) (Holmes, J., dissenting); Stowell v. Flagg, 11 Mass. 364, 365-66 (1814) (finding some antebellum limits on legislative power over the common law, but upholding extensive control); 1 BLACKSTONE, *supra* note 170, at *160-62 (discussing omnipotence of Parliament).

340. For a discussion of historism, see Siegel, *supra* note 107 (discussing historism and its influence on three leading late nineteenth century constitutional commentators); *infra* notes

Historism enabled *Lochner* era jurists to perceive the common law as divided into two parts—one that was subject to legislative control and one that controlled legislatures. Historism also provided *Lochner* era jurists with a substitute source of constitutional concepts without departing dramatically from previously relied upon concepts of natural law and framer intent.[341] Finally, historism allowed *Lochner* era jurists to perceive the common law as founded upon permanent principles that entailed changing but sufficiently determinate results in legal controversies. Historism reconciled the *Lochner* era jurists' contradictory commitments to natural law, framer intent, and the tenets of constitutional conceptualism and, at the same time, allowed new law to evolve in response to a new era of social relations.[342]

A. Historism as the Basis of Nineteenth Century Legal and Social Thought

What is meant by describing late nineteenth-century legal and social thought as grounded in "historism" may be conveyed by contrasting it with the rationalist method, which provided the foundation for eighteenth-century legal and social thought. The rationalist approach, which originated in the work of Descartes, Hobbes, Locke, and Leibniz, holds

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343-91 and accompanying text. This Article traces historism in judicial, as well as scholarly, thought.

Historism must not be confused with a related but distinct term—"historicism." Historicism is the doctrine that societies change over time through secular causes and that social values are relative to time and place. Historicism holds that scholars may not induce "correct" moral and legal principles from studying social history. Historism, in contrast, recognizes that societies evolve but holds that social evolution is determined by intrinsic principles of social order. Historism, therefore, teaches that scholars may induce "correct" moral and legal principles from studying social history. Historism was the first step away from static philosophies of history, which dominated western social thought until the late eighteenth century. It was a transitional doctrine that eased the development of the twentieth century view that societies continually change in random ways. *See* Siegel, *supra* note 107, at 1435-36 nn.11-12, 1451-52 n.84, 1545 n.719.

341. Historism allowed the common law to replace framer intent and natural law without denigrating their fundamental qualities by enabling *Lochner* era jurists to see the common law as infused with natural-law principles and as the context within which the founding generation wrote and understood the Constitution. *See* Siegel, *supra* note 107, at 1505-06, 1534-35, 1543-44; *infra* notes 410-18, 427-35 and accompanying text.

342. In other words, although historism joined a variety of jurisprudential influences on laissez-faire constitutionalism, it was the *Lochner* era's pivotal jurisprudential influence. *Lochner* era jurists believed that the founding generation and the post-Civil War generation embedded "traditional principles" in the Constitution. They believed many of the permanent principles of the common law tracked natural law. Happily, the common law contained additional "true" principles of social order, such as the proscription of monopolies and the allowance of jury trial, protections not directly deducible from right reason. Happily also, the common law gave principles with sufficient content to direct specific decisions in close cases and to guide evolving application of its permanent principles to America's evolving society.

that fundamental postulates of human nature can be derived from casual observation of oneself or others.[343] In turn, these postulates and their deductive elaboration in the manner of Euclidian geometry[344] can establish a general body of knowledge concerning individuals and society. Because the postulates reflect humanity's essential, unchanging nature, the rationalist method claims that the conclusions derived from the postulates are eternal truths. It teaches that social laws, just like physical laws, are determinable in such fields as economics and politics and that eternally true codes of conduct are determinable in such fields as ethics and law. In short, the eighteenth-century rationalist method maintains that eternal truths of social order, the application of which has no limit in time or space, are knowable.[345]

According to the originators of the nineteenth century's approach to understanding society, the rationalist method is flawed because it considers individuals divorced from the environment in which they exist and philosophizes about abstract humanity, not actual individuals. Historist theorists note that humans, not humanity, exist, and that humans are embedded in time and space, in a physical and cultural environment. In consequence, historist theorists maintain that even if individuals have a common nature, it interacts with the environment in which it exists. Truth, therefore, can be determined only from a study of individuals in society. In addition, truth can be determined only about individuals in society. Because every society is affected by its context, which includes the history of that society,[346] historist theorists further claim that social and moral truths are determinable not through rationalistic introspection but through the study of history. They believe that economic principles,

343. *See* JOHN RANDALL, JR., THE MAKING OF THE MODERN MIND 308-86 (50th anniversary ed. 1976); 1 PAUL VINOGRADOFF, OUTLINES OF HISTORICAL JURISPRUDENCE 103-23 (1920); Hoeflich, *supra* note 106, at 98-102; Siegel, *supra* note 135, at 45-58.

344. Eighteenth-century rationalists took Euclidian geometry as a model body of scientific knowledge. Rationalists thought that Euclidian geometry deductively elaborated a small set of certain and immutable facts into a myriad of necessarily true conclusions about the world. *See* Hoeflich, *supra* note 106, at 96-108.

345. The rationalist view holds that the postulates of each social science are derived from empirical observation, yet are capable of determining other truths. Rationalist social science easily crosses the boundary between "is" and "ought."

346. *See* ERNST CASSIRER, THE PROBLEM OF KNOWLEDGE: PHILOSOPHY, SCIENCE, AND HISTORY SINCE HEGEL 212 (1950) (commenting on shift from considering phenomena in isolation to focusing on their interdependence); R.G. COLLINGWOOD, THE IDEA OF HISTORY 90-93 (1st ed. 1946); RANDALL, *supra* note 343, at 421-25, 501-07; PETER STEIN, LEGAL EVOLUTION: THE STORY OF AN IDEA 57 (1980). Unlike scholars in prior eras, those in the Enlightenment attempted to work out complete bodies of ethics and law from speculation about humankind's universal nature. *See* HEINRICH ROMMEN, THE NATURAL LAW 75-76 (4th prtg. 1955) (1st ed. 1947). The rise of historism represented a retreat from unusually broad claims about the power of abstract speculation.

for example, may be discovered through studying the history of economic phenomena; they assert that legal principles may be discovered through studying the history of law.

Historism was so much a part of nineteenth-century thought that it pervaded some physical sciences, particularly geology and biology.[347] From these two sciences, especially from the discipline of evolution, historism in social thought received tremendous reenforcement. As Sir Frederick Pollock wrote at the end of the century:

> [H]istorical method is not the peculiar property . . . of . . . any . . . branch of learning. It is the newest and most powerful instrument, not only of the moral and political sciences, but of a great part of the natural sciences, and its range is daily increasing. The doctrine of evolution is nothing else than the historical method applied to the facts of nature; the historical method is nothing else than the doctrine of evolution applied to human societies and institutions.[348]

Whatever the role of historical method in the nineteenth-century physical sciences, it dominated the social sciences and social thought. Sociology was founded upon it; studies as diverse as philology[349] and politics[350] were remodeled in its image.[351] Historism even challenged the

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347. *See* JEROME BUCKLEY, THE TRIUMPH OF TIME: A STUDY OF VICTORIAN CONCEPTS OF TIME, HISTORY, PROGRESS AND DECADENCE 6 (1966); ERICH KAHLER, THE MEANING OF HISTORY 161-66 (1964); Edward Saveth, *Scientific History in America: Eclipse of an Idea*, *in* ESSAYS IN AMERICAN HISTORIOGRAPHY 3 (1960).

348. FREDERICK POLLOCK, OXFORD LECTURES AND OTHER DISCOURSES 41 (1890); *see also* BUCKLEY, *supra* note 347, at 6; *id.* at 158 n.7 (quoting HANS MEYERHOFF, TIME IN LITERATURE 97 (1955)) (in the "nineteenth century all the sciences of man . . . became 'historical' sciences in the sense that they recognized and employed a historical, genetic, or evolutionary method"); STEFAN COLLINI ET AL., THAT NOBLE SCIENCE OF POLITICS: A STUDY IN NINETEENTH-CENTURY INTELLECTUAL HISTORY 247 (1983) (quoting T.E. CLIFFE LESLIE, ESSAYS IN POLITICAL AND MORAL PHILOSOPHY (n.p. 1879) that "[e]very branch of the philosophy of society, morals and political economy not excepted, needs investigation and development by historical induction.").

349. Philology is the study of language—a predecessor of contemporary linguistics. *See* HANS AARSLEFF, THE STUDY OF LANGUAGE IN ENGLAND, 1780-1860, at 125-36 (1967); JOHN B. CARROLL, THE STUDY OF LANGUAGE 18-19 (1953); JOHN FORRESTER, LANGUAGE AND THE ORIGINS OF PSYCHOANALYSIS 168-71 (1980); LEON POLIAKOV, THE ARYAN MYTH: A HISTORY OF RACIST AND NATIONALIST IDEAS IN EUROPE 189-92 (1971).

350. *See, e.g.*, 1 JOHN W. BURGESS, POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW 3, 37-39 (Boston 1890) [hereinafter BURGESS, COMPARATIVE CONSTITUTIONAL LAW]; COLLINI ET AL., *supra* note 348, at 183-246; RAYMOND G. GETTELL, HISTORY OF POLITICAL THOUGHT 389-412 (1924); FRANCIS LIEBER, ESSAYS ON PROPERTY AND LABOR AS CONNECTED WITH NATURAL LAW AND THE CONSTITUTION OF SOCIETY 25-32 (New York, Harper & Bros. 1841); 1 FRANCIS LIEBER, MANUAL OF POLITICAL ETHICS 101-20 (1838); FRANCIS LIEBER, ON CIVIL LIBERTY AND SELF-GOVERNMENT 21-50, 205 (3d ed. Philadelphia, J.B. Lippincott & Co. 1874) (1st ed. 1853); FREDERICK POLLOCK, AN INTRODUCTION TO THE HISTORY OF THE SCIENCE OF POLITICS 126-29 (rev. ed. 1911) (1st ed. 1890);

rationalistic method in economics.[352] In the early twentieth century, Karl Mannheim, reflecting on the social thought of the preceding century, described it as embodying a "Weltanschauung"[353] of historism.[354] By this he meant a dominating mode of thought and understanding that "experience[s] every segment of the spiritual-intellectual world as in a state of flux and growth[,] . . . [yet] realize[s] that something more than a mere chameleon-like variation in the elements of life takes place in history."[355] Historism, he wrote, "fulfils its own essence only by managing to derive an ordering principle from this seeming anarchy of change—only by managing to penetrate the innermost structure of this all-pervading change."[356]

In the late nineteenth century, not only did historism dominate legal

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John W. Burgess, *Political Science and History, in* ANN. REP. AM. HIST. ASS'N 203, 204, 206, 210 (1896) [hereinafter Burgess, *History*]. Pollock comments that John Stuart Mill was the "last considerable English writer on politics who ignored [the historical school's] importance." POLLOCK, *supra*, at 126. Collini finds Mill more ambivalent. COLLINI ET AL., *supra* note 348, at 144-48.

351. Other social studies that historism remodeled include ethics, *e.g.*, HENRY SIDGWICK, OUTLINES OF THE HISTORY OF ETHICS 304-05 (6th ed. 1931) (1st ed. 1886); sociology, *e.g.*, AMERICAN MASTERS OF SOCIAL SCIENCE 177-79 (Howard Odum ed. 1927) (discussing Albian W. Small's view of the history of sociology); JOHN W. BURROW, EVOLUTION AND SOCIETY: A STUDY IN VICTORIAN SOCIAL THEORY (1966); 2 JOHN H. RANDALL, JR., THE CAREER OF PHILOSOPHY: FROM THE GERMAN ENLIGHTENMENT TO THE AGE OF DARWIN 479-80 (1965) (discussing Auguste Comte); ALBIAN W. SMALL, ORIGINS OF SOCIOLOGY (1924); history, *e.g.*, CASSIRER, *supra* note 346, at 217-42; Dorothy Ross, *Historical Consciousness in Nineteenth Century America*, 89 AM. HIST. REV. 909 (1984); and philosophy, *e.g.*, GEORGE W.F. HEGEL, HEGEL'S PHILOSOPHY OF RIGHT 4-5, 16-18 (1972) (1st Ger. ed. 1821); GEORGE W.F. HEGEL, THE PHILOSOPHY OF HISTORY 8-11 (1900) (1st Ger. ed. 1837); HERBERT W. SCHNEIDER, A HISTORY OF AMERICAN PHILOSOPHY 336-71 (2d ed. 1963) (discussing "genetic social philosophy" and "desperate naturalism"). On economics and law, see *infra* text accompanying notes 352, 357-91. John Stuart Mill's elaboration of method in the social sciences in his treatise on logic was something of an exception to the dominance of historism in the social sciences. JOHN S. MILL, A SYSTEM OF LOGIC 594-616 (8th ed., London, Longmans, Green & Co. 1884) (1st ed. 1848).

352. COLLINI ET AL., *supra* note 348, at 247-75; 3 JOSEPH DORFMAN, THE ECONOMIC MIND IN AMERICAN CIVILIZATION 87-98 (1949); T.W. HUTCHISON, A REVIEW OF ECONOMIC DOCTRINES 1870-1929, at 18-22, 69-74 (1953); SMALL, *supra* note 351, at 154-66; Theo Surnyi-Unger, *Economic Thought: The Historical School, in* 4 INT'L ENCYCLOPEDIA SOC. SCI. 454-58 (1968). English and American economics remained rooted in ahistorical, rationalistic speculation. Historism challenged rationalism even in this stronghold, however, and Collini recounts a rather strong challenge. COLLINI ET AL., *supra* note 348, at 247-75.

353. "Weltanschauung" translates to "world-view." For the importance of world views in shaping scientific thought, see THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 111-36 (2d ed. 1970).

354. The translators used the word "historicism" rather than "historism." On the relation between historism and historicism, see *supra* note 340.

355. KARL MANNHEIM, *Historicism, in* ESSAYS ON THE SOCIOLOGY OF KNOWLEDGE 84, 86 (1952). The essay was originally published in 1924.

356. *Id.* (emphasis omitted).

thought,[357] but also through the work of Savigny in Germany and Maine in England, legal thought was at the forefront of the nineteenth century's turn to the historical method.[358] In law, historism initiated a number of important shifts in legal consciousness. First, historist jurists began to view law as contingent on culture. In the eighteenth century, rationalistic jurists had sought to ascertain laws that were true for all people.[359] Some historist jurists, especially after the development of comparative historical method, thought their methodology capable of reaching this

357. *See, e.g.*, POUND, INTERPRETATIONS, *supra* note 37, *passim* (illustrating that most major nineteenth-century schools of jurisprudence were interpretations of legal history); STEIN, *supra* note 346, at 69-78; E. Donald Elliott, *The Evolutionary Tradition in Jurisprudence*, 85 COLUM. L. REV. 38, 40-46 (1985); Susan G. Gale, *A Very German Science: Savigny and the Historical School*, 18 STAN. J. INT'L L. 123, 128-37 (1982); Stephen G. Utz, *Maine's* Ancient Law *and Legal Theory*, 16 CONN. L. REV. 821, 822 (1984). Historism decisively influenced legal philosophies not usually thought of as historist, including nineteenth-century analytic jurisprudence. *See, e.g.*, THOMAS E. HOLLAND, THE ELEMENTS OF JURISPRUDENCE 2-13 (13th ed. 1924) (1st ed. 1880) (era's leading treatment of analytic jurisprudence discussing importance of history); Siegel, *supra* note 107, at 1446 n.64. John Salmond, a leading analytic jurist, in an early work, ESSAYS IN JURISPRUDENCE AND LEGAL HISTORY (Littleton, Colo., F.B. Rothman 1891), said in the preface: "I have . . . endeavored to . . . deal with legal history . . . for the . . . assistance afforded by it to the scientific study of the first principles of law." *Id.* at iii. Jeremy Bentham's utilitarianism was the only major nineteenth-century legal philosophy that was rationalistic.

358. BARON CHARLES L. MONTESQUIEU, THE SPIRIT OF LAWS (1989) (1st French ed. 1748) (1st English ed. 1750), and HENRY S. MAINE, ANCIENT LAW (1906) (1st ed. 1861), are celebrated historist studies of legal systems that inspired legal and nonlegal scholars. Savigny's historist writings on German and Roman law were renowned throughout the West. They not only established him as the "greatest" European jurist of his time, but they also helped crystallize the entire shift from rationalism to historism as the basic approach to Western social theory. *See, e.g.*, BURROW, *supra* note 351, at 137-78; G.P. GOOCH, HISTORY AND HISTORIANS IN THE NINETEENTH CENTURY 47-53 (3d ed. 1920) (1st ed. 1913); STEIN, *supra* note 346, at 15-19, 56-65, 87-101; Elliott, *supra* note 357, at 40-46; Utz, *supra* note 357, at 822-24, 838-52; Paul Vinogradoff, *The Teachings of Sir Henry Maine*, 20 LAW Q. REV. 119 (1904), *reprinted in* 2 THE COLLECTED PAPERS OF PAUL VINOGRADOFF 173-89 (1928). In Professor Beale's view,

> [t]he impulse given to legal study by the work of Savigny and his school has in the last generation spread over the civilized world and profoundly influenced its legal thought. . . . In England a small but important school of legal thinkers have [sic] followed the historical method, and in the United States it has obtained a powerful hold. . . . We have abandoned the subjective and deductive philosophy of the middle ages, and we learn from scientific observation and from historical discovery.

Joseph H. Beale, Jr., *The Development of Jurisprudence During the Past Century*, 18 HARV. L. REV. 271, 283 (1905).

In referring to the work of Savigny and Maine, one must bear in mind that historism is something broader than the particular jurisprudential school founded by Savigny and Maine. Savigny and Maine founded a mode of thought that is known as "historical jurisprudence." Savigny's and Maine's school of historical jurisprudence was only the original impulse toward the approach to law this Article describes as founded upon historism. The historical school was a particular variant of a more general phenomenon.

359. *See supra* text accompanying notes 343-45.

"holy grail" of social science.[360] Other historist jurists contented themselves with determining the law that was appropriate for their particular culture. Certainly, their work implicitly expressed the belief that Western law was the most highly evolved and, therefore, the most correct law.[361] Nonetheless, most historist jurists conceded in theory—and in practice when distinguishing among Western nations—that law was a culturally bound phenomenon: a set of norms appropriate for the nation whose history shaped it and whose history it shaped.[362]

Second, historist jurists viewed law as contingent on time. Rationalist jurists had claimed to determine laws that were true for all time.[363] Some historist jurists also thought their methodology capable of reaching this "holy grail," if only for a particular society.[364] Yet other historist

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360. COLLINI ET AL., *supra* note 348, at 209-46; GUY C. LEE, HISTORICAL JURISPRUDENCE 1-11 (1900); *see generally* HANNIS TAYLOR, THE SCIENCE OF JURISPRUDENCE (1908) (contrasting various historic developments in the law with a focus on searching for the ideal law).

361. *See* STEIN, *supra* note 346, at 59, 63, 90, 93-94 (discussing Savigny's focus on "nobler" societies, Maine's focus on "progressive" society, and relation of historical jurisprudence to nationalism). Professor McCurdy likened Field's egalitarian approach to "equal protection" to a "white man's burden" ideology, and traced Field's thought to Theodore Sedgwick. Charles W. McCurdy, *Stephen J. Field and the American Judicial Tradition*, *in* THE FIELDS AND THE LAW 5, 17 (1986). McCurdy quotes Sedgwick's view:

> "It is enough for us to know, that the supreme Being has seen fit to separate his people on this earth into various families, and that the white man stands at the head of all these families.
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> . . . .
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> . . . As the white people, then, are at the head of the human families, they are bound to advance, to go forward in the race of civilization, and never backward by amalgamation, intermarriage, or any kind of corruption of their pure blood. The interests of humanity [and] of free government . . . depend upon the white man's retaining his superiority."

Id. (emphasis omitted) (quoting THEODORE SEDGWICK, PART FIRST, PUBLIC AND PRIVATE ECONOMY 257-58 (1974) (1st ed. 1836)). Field's historism is discussed *infra* notes 441-94 and accompanying text.

362. *See* EDGAR BODENHEIMER, JURISPRUDENCE 70-79 (rev. ed. 1974); OLIVER W. HOLMES, JR., THE COMMON LAW 164-70, 213 (Boston, Little, Brown 1881) (tracing "native origin" of common law of bailment and possession to primitive conditions of Germanic society); VINOGRADOFF, *supra* note 343, at 124-35; Herman Kantorowicz, *Savigny and the Historical School of Law*, 53 LAW Q. REV. 326, 332-33, 336-37 (1937); *see also* James C. Carter, *The Ideal and the Actual in the Law*, 13 REP. A.B.A. 217, 234-35 (1890) ("Neither law nor practical morality can ever transcend a universal custom. Polygamy may be wrong in New York, but is . . . right among the Turks.").

363. *See supra* text accompanying notes 343-45.

364. Sometimes this claim was based on the view that national legal growth is governed by permanent principles embedded in the nation's racial inheritance—for example, individualism and local self-government among the Teutonic and Anglo-Saxon peoples. *See* CARLETON K. ALLEN, LAW IN THE MAKING 93-95 (6th ed. 1958) (1st ed. 1927) (discussing Puchta and Gierke); FRIEDRICH C. SAVIGNY, OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE 24 (Abraham Hayward trans., London, Littlewood & Co. 1831) (1st ed.

jurists proposed that societies evolve through substantially different stages. Laws that are appropriate for one stage of a nation's development are not necessarily appropriate for another stage. The "felt necessities"[365] of each era in a nation's history determine its law, and "felt necessities" vary with the nation's surrounding material and ideational environment. Thus, for some historist jurists, law became a contingent, time-bound phenomenon.[366] To be sure, these historist jurists were not fully modern. They did not perceive law as entirely temporally contingent. Embedded in each culture, many of them said, are permanent principles that govern social and legal evolution and that distinguish culturally correct law and legal change from culturally incorrect change.[367] Thus, in law, historism initiated a step away from the static jurisprudence of eighteenth-century rationalism and a step towards the fully dynamic jurisprudence of the twentieth century.

The third shift in legal consciousness initiated by historism involved both a reconception of the nature of custom and a conflation of law with custom. Historist jurists varied greatly in their descriptions of the ultimate source of national laws. Some, like Savigny, said law develops from each nation's "volksgeist," its common spirit.[368] This spirit had been part of the nation from its origin; it was what made the people a nation; it

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1814); STEIN, *supra* note 346, at 59-60 (discussing Savigny's "volksgeist" or "common spirit" as existing from the origin of a people); Siegel, *supra* note 107, at 1479 n.267, 1500. Usually the claim was implicit: many historist jurists implied (and sometimes said) that the law of contemporary Western nations had achieved its ultimate or penultimate state. *See, e.g., id.* at 1462, 1464-67 (discussing Pomeroy). These jurists did not deny that law had evolved to this stage. *See id.* Instead, they confined their attention entirely to elaborating the principles now perceived as permanently true and therefore, presumably, not subject to further evolution. *See id.*

365. This phrase is from HOLMES, *supra* note 362, at 1 ("felt necessities" more than "syllogisms" guide legal development). Holmes's view is consistent with historism. The chapters on torts in Holmes's book contain a lengthy explication of the way law evolves unconsciously from the people, without the willful intervention of judges, except to crystallize the people's sentiment. *See id.* at 120-27, 150-52. Holmes later shifted from historism to modern positivist jurisprudence. *See* Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 464-77 (1897); Siegel, *supra* note 107, at 1546-47.

366. BURGESS, COMPARATIVE CONSTITUTIONAL LAW, *supra* note 350, at 1-40; LEE, *supra* note 360, at 1-2 (Historical jurisprudence "is essentially a progressive science, inasmuch as the law which it endeavors to comprehend and systematize is progressive and aims with ever-closer approximation to approach the ideals of the race in which it obtains."); STEIN, *supra* note 346, at 115-21 (discussing Vinogradoff's theory of stages of legal development); VINOGRADOFF, *supra* note 343, at 157-60; Burgess, *History*, *supra* note 350, at 204. Indeed, some historist jurists thought legal evolution had not ended with the development of laissez-faire constitutionalism but had entered a more socialist stage. *See* VINOGRADOFF, *supra* note 343, at 157-59.

367. *See* Siegel, *supra* note 107, at 1455-64, 1467-69, 1492-97, 1500-02.

368. STEIN, *supra* note 346, at 59-60 (discussing Savigny's theory of the "volksgeist").

was their racial inheritance.[369] Others said a nation's laws stem from less mystical and more variable sources, such as the customs and interests of its ruling class,[370] the common people's response to the practical necessities of life in their environment,[371] the decisions of judges and jurists,[372] or an amalgam of all of these elements.[373] The contentiousness and attention lavished on the question of the ultimate source of a nation's laws created an internecine conflict masking (and, indeed, caused by) an important commonality centered on the idea that law is embedded in national tradition.[374] Law, historist jurists maintained, is a social product;

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369. ALLEN, *supra* note 364, at 93-95 (discussing Puchta and Gierke); SAVIGNY, *supra* note 364, at 24; STEIN, *supra* note 346, at 59-60 (discussing Savigny's volksgeist as existing from the origin of a people).

370. ALLEN, *supra* note 364, at 89-92. Professor Gray said that only the rules judges enforce are law, but also observed that judges are subject to "the will of the real rulers of the State"; the identity of the "real rulers" is "a question of fact and not of form," and may vary from "court favorites . . . [to] priests . . . [,] demagogue[s] or political boss[es]"; in rare instances in "a very primitive community" it may even be the judges. JOHN C. GRAY, THE NATURE AND SOURCES OF THE LAW 121-23 (2d ed. 1921) (1st ed. 1909).

371. *See* ALLEN, *supra* note 364, at 95-101; Carter, *supra* note 362, at 231-33, 235-36, 239.

372. GRAY, *supra* note 370, at 93-105, 124-25, 308-09; Joseph H. Beale, Book Review, 20 HARV. L. REV. 164 (1906) (reviewing THOMAS E. HOLLAND, THE ELEMENTS OF JURISPRUDENCE (1906)) (arguing that common law is principles, not custom). Professor Beale writes:

> The law of a given time must be taken to be the body of principles which is accepted by the legal profession, whatever that profession may be; and it will be agreed that the judges have a preponderating share in fixing the opinion of the profession. They are, however, not the sole element in forming this opinion. Legal thinkers who are not judges have at all times played a considerable part. The teachers of law today have an increasing influence. . . .

1 JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS 40 (1935) [hereinafter BEALE, TREATISE]. Gray is usually regarded as a protorealist. *See, e.g.*, EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY 76, 159 (1973); Robert S. Summers, *Pragmatic Instrumentalism in Twentieth Century American Legal Thought*, 66 CORNELL L. REV. 861, 865, 876-77 (1981). Gray's work in property shows that he had many formalist and historist characteristics. *See* Stephen A. Siegel, *John Chipman Gray, Legal Formalism, and the Transformation of Perpetuities Law*, 36 U. MIAMI L. REV. 439, 446-55 (1982); *infra* note 374. All of Gray's doctrinal work and much of his theoretical work fit within a historist mold. His work sits on the historist-positivist border. *See* Siegel, *supra* note 107, at 1525-26, 1538-39 (discussing Christopher Tiedeman, a different jurist whose work occupied this terrain); *infra* note 374.

373. *See, e.g.*, ALLEN, *supra* note 364, at 112-29 (discussing interaction of juristic and popular influence on the law); *infra* text accompanying note 377 (quoting James Bryce); *see also* ALLEN, *supra* note 364, at 101-11 (discussing Tarde's analysis of the psychological force of imitation).

374. In many ways, it was a typical internecine dispute. Historist jurists were debating the role of the practices of the people in determining the law. In their struggle to elucidate a source of law other than reason or will, historist jurists debated endlessly among themselves over the correct depiction of what accounted for the existence of authoritative national customs. They did not doubt, however, the existence of such customs. *See* ALLEN, *supra* note 364, at 79, 87-107, 112-29 (discussing views on the origin and nature of custom and its place in legal systems).

An example of the internecine conflict is that Gray disparaged both Savigny's "volk-

it is neither the product of philosophical reason, as rationalist jurists contended, nor the product of sovereign will, as positivist jurists argued.[375] As James Bryce told the 1907 American Bar Association convention,[376]

> [L]aws are the work of the nation as a whole, framed indeed by the ruling class, and shaped in their details by a professional class, but to a large extent created by other classes also, because . . . the rules which govern the relations of the ordinary citizen must be such as fit and express the wishes of the ordinary citizen, being in harmony with his feelings and fitted to meet the needs of his daily life. They are the offspring of custom, and custom is the child of the people. Thus not only the constructive intellect of the educated and professional class but the half-conscious thought and sentiment of the average man go to the making and moulding of the law. It is the outcome of what German philosophers call the legal mind ("Rechts Bewusst-

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sgeist" theory and Carter's practices-of-the-people theory, and he seemed to reject entirely the notion, which was the bedrock claim of the school of historical jurisprudence, that custom is the ultimate source of law. GRAY, *supra* note 370, at 89-93, 150-01, 233-40, 282-94, 299-300. Yet Gray's doctrinal work is a marvelous illustration of historist jurisprudence. *See* JOHN C. GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY iii-xiv (2d ed., Boston, Boston Book Co. 1895) (1st ed. 1885) (criticizing a significant recent case in terms of its departure from traditional principles); JOHN C. GRAY, THE RULE AGAINST PERPETUITIES §§ 5-201 (Boston, Little, Brown 1886) (tracing slow development of "true" rule, which he induces from the record); John C. Gray, *Remoteness of Charitable Gifts*, 7 HARV. L. REV. 406, 407-08 (1894) (defending the jurisprudence of his treatises).

Gray is famous for advocating the modern, positivist theory that law is the set of rules of conduct that the judiciary enforces, and everything judges consider in determining the rules they enforce, such as statutes and customs, are merely sources of law. GRAY, *supra* note 370, at 121-23, 287-90, 302-09. Gray also said, however, that the judiciary is limited in what it does by the sentiments of the "rulers of society." *Id.* at 121-23. Most of the time, the "rulers" are indifferent to what the judges do, and judges, by and large, are guided by their own morality. Gray explicitly claimed that judicial treatment of all the law's sources—statutes, precedents, expert opinion, and custom—is greatly influenced by morality. *Id.* at 302-09. Gray insisted that judges are free to and should follow their own, not society's, morality. *Id.* at 287-90, 302-09. Thus, Gray's historism comes out of his view that law emerges from the slow interaction between experience and judicial morality. To the extent that judicial morality reflects common morality, his theory blends into mainstream historism. *Cf. supra* note 372 (indicating a similar position that John Henry Beale held: law is not custom but the principles, which develop over time, adhered to by the legal profession).

375. For this reason, historist jurists maintained that natural-law jurists erred in elaborating an imaginary law—a law for a mythical state of nature, rather than an actual law for real societies. They also contended that positivists erred by confusing the principle that nothing can be law that the sovereign does not enforce with the actual source of what the sovereign enforces. *See* GRAY, *supra* note 370, at 88-89; M.J. Aronson, *The Juridical Evolutionism of James Coolidge Carter*, 10 U. TORONTO L.J. 1, 11-12 (1953); Carter, *supra* note 362, at 222-23, 231-35.

376. Interestingly, this was the same convention that heard Roscoe Pound's call for a new sociological jurisprudence. *See* Pound, *The Need*, *supra* note 37.

sein," or legal consciousness) of a nation.[377]

For historist jurists, customary law was not customary law as understood by pre-nineteenth-century jurists. Prior to the nineteenth century, jurists regarded customary law as an unsystematic and unsystematizable mass of rules generated by usage.[378] Jurists, it is true, were divided on the inherent worth of these rules. Rationalist jurists dismissed them as unworthy of philosophical attention;[379] traditionalist jurists, such as Edmund Burke, thought them imbued with a wisdom and justice transcending human understanding.[380]

In contrast to both these views, nineteenth-century historist jurists saw customary law as possessing a wisdom that was accessible to human understanding and capable of systematic exegesis and development. Customary law was a spontaneous and evolutionary expression of the nation. As with all natural and social phenomena, however, discoverable ordering principles governed its development.[381] Thus, in one of the many ironies of intellectual history, historist jurists seem to have discovered in the disorderly mass of customary law not only the same structure of abstract principle and concept that rationalist jurists discovered in their inquiries into human nature, but at times even the same principles and concepts.[382] Accordingly, historist jurists found no contradiction between claiming custom and usage as the determinants of law and elaborating highly conceptualistic legal constructs.[383] As Savigny wrote at the

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377. James Bryce, *The Influence of National Character and Historical Environment on the Development of the Common Law*, 31 REP. A.B.A. 444, 449 (1907); *see also* JAMES C. CARTER, LAW: ITS ORIGIN, GROWTH AND FUNCTION (1907) (discussing the role custom and social progress play in shaping the law); HOLMES, *supra* note 362, at 1-2, 120-27, 164-70, 210-13 (discussing the "native origin" of the common law of bailment and possession and the way law evolves unconsciously from the people); LEE, *supra* note 360, at 1-2 (Jurisprudence "is essentially a progressive science, inasmuch as the law which it endeavors to comprehend and systematize is progressive and aims with ever-closer approximation to approach the ideals of the race in which it obtains."); Carter, *supra* note 362, at 225 ("[t]he social standard of justice exists in the habits, customs and thoughts of the people").

378. *See* Siegel, *supra* note 135, at 20-39, 50-53, 56-57.

379. STEIN, *supra* note 346, at 69-72 (discussing Bentham's argument that the common law was simply an arbitrary accumulation of rules).

380. JOHN POCOCK, *Burke and the Ancient Constitution: A Problem in the History of Ideas*, *in* POLITICS, LANGUAGE AND TIME 202, 205-12, 222-28 (1960) (discussing Burke's argument that the rules exemplified the most basic human rights); Siegel, *supra* note 135, at 49-55 (discussing Hobbes, Hale, and Locke).

381. *See* Siegel, *supra* note 107, at 1460-61, 1497-1500; *supra* text accompanying note 356.

382. Hoeflich, *supra* note 106, at 106-08 (commenting on Savigny's integration of the geometric method of rationalist jurists into historical jurisprudence); Pound, *The Scope and Purpose*, *supra* note 37, at 598-604; Siegel, *supra* note 107, at 1467-69, 1502, 1540-42 (discussing Pomeroy, Cooley, and Tiedeman).

383. Indeed, in the history of legal thought, no scholar's doctrinal work is more conceptualistic and rigorously logical than the work of Savigny, the founder of the historical school.

beginning of the rise of the historical school:

> With the progress of civilization, national tendencies become more and more distinct, and what otherwise would have remained common, becomes appropriated to particular classes; the jurists now become more and more a distinct class of the kind; law perfects its language, takes a scientific direction, and, as formerly it existed in the consciousness of the community, it now devolves upon the jurists, who thus, in this department, represent the community. Law is henceforth more artificial and complex, since it has a twofold life; first, as part of the aggregate existence of the community, which it does not cease to be; and secondly, as a distinct branch of knowledge in the hands of the jurists . . . .[384]

Finally, drawing from their new concept of custom and its role in establishing legal norms, historist jurists relegitimated and re-emphasized the role of judges and jurists as the central figures in legal development and lawmaking. By the end of the eighteenth century, rationalist jurists were proposing the abolition of customary law and the enactment of codes drawn from reason (on the continent) or utility (in England). This development, which portended much liberal reform, led to the articulation of the historist method by politically conservative jurists.[385] In their argument against both rationalism and positivism, historist jurists observed that legal development had always taken place, and should always take place, through juristic activity. Lawmaking through juristic activity, they said, was better than lawmaking through legislation because it drew from the wisdom of the ages, not the speculations of just the present generation; it was more flexible and responsive to social needs than lawmaking through legislative activity because courts are always in session and are more accessible to the common person; and it was administered

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That is true with the possible exception of his followers, the German Pandectists of the nineteenth century. *See infra* note 384.

384. SAVIGNY, *supra* note 364, at 28; *see also* ALLEN, *supra* note 364, at 16-17 (quoting FRIEDRICH C. SAVIGNY, SYSTEM OF THE MODERN ROMAN LAW *passim* (Westport, Conn., Hyperion Press 1867)) (discussing criticisms of Savigny's ideals and presenting selected refutals by Savigny); *id.* at 113-29 (discussing juristic development of custom). As Savigny later said, "The sum . . . of this theory is, that all law is . . . first developed by custom and popular faith, next by jurisprudence . . . ." SAVIGNY, *supra* note 364, at 30. Savigny's doctrinal treatises, and the treatises of his closest followers, were remarkably conceptualistic. *See* JULIUS STONE, LEGAL SYSTEM AND LAWYERS' REASONINGS 224-27 (1964); Hoeflich, *supra* note 106, at 106-08; Pound, *The Scope and Purpose*, *supra* note 37, at 598-604; *see also* BEALE, TREATISE, *supra* note 372, at 164 (conceptualistic presentation of conflicts of law by a historist); Siegel, *supra* note 107, at 1455-69 (discussing Pomeroy); Siegel, *supra* note 372, at 445-47 (discussing Gray).

385. STEIN, *supra* note 346, at 59, 63, 72, 75-76, 89; Pound, *The Scope and Purpose*, *supra* note 37, at 600-02 (commenting on the same phenomenon at the end of the century).

by a body of individuals whose long training made them uniquely qualified to focus the learning of the past on the needs of the present. In general, juristic activity imitates the mechanism of change in nature: large changes are accomplished by the slow accumulation of small variations.[386] This evolution avoids destabilizing shocks to the body politic. For these and many other reasons, historist jurists considered jurisprudence—the art of lawmaking through molding inherited legal principles and concepts to the needs of the present[387]—a far better engine of legal development than legislation—the willful imposition of self-interest upon the body politic.[388]

In the first half of the nineteenth century, American jurists had battled codification of the common law with these same arguments.[389] These jurists' ultimate view of law, however, was rationalistic; they saw the common law as bottomed on "principles of equity, natural justice, and . . . good public policy."[390] Natural justice, equity, and good public policy were as accessible to legislators as to judges. Therefore, the preference for common law over code law was only a matter of degree rather

386. *See, e.g.*, STEIN, *supra* note 346, at 88, 100 (discussing Maine); Siegel, *supra* note 107, at 1453-64, 1488-97 (discussing Pomeroy and Cooley).

387. As James Bryce said,

> The solid and essential value of legal science begins in the manipulation of the material presented by an actual system of law, in the moulding of the old customs so as to reconcile them with the always changing needs of the people. . . . For legal science is not merely either expository on the one hand or on the other . . . corrective . . . but is also Constructive and Ameliorative, framing rules under which society may advance steadily and smoothly, may get rid of obsolete doctrines, may find new facts adequately dealt with under new rules . . . .

JAMES BRYCE, *The Methods of Legal Science, in* STUDIES IN HISTORY AND JURISPRUDENCE 607, 633-35 (1901). John Chipman Gray argued that jurisprudence considers the rules courts have in fact adopted and the rules that "ought to be adopted in those cases which do not come within the established rules." GRAY, *supra* note 370, at 140-41. Gray assigned consideration of rules that "ought to be [adopted] in all cases" to the science of legislation, not the science of law. *Id.* (In the second edition either Gray or his editor added a footnote that the new sociological school of jurists included the science of legislation in jurisprudence. *Id.* at 141 n.1.); *see also* Aronson, *supra* note 375, at 27-35 (explaining the judge's function as a conduit for interpreting historical and current social standards and dispensing justice that meets those standards).

388. *See, e.g.*, SAVIGNY, *supra* note 364, at 30, 32; Carter, *supra* note 362, at 227, 242-45; Christopher G. Tiedeman, *The Doctrine of Stare Decisis*, 3 U.L. REV. 11, 25 (1896).

389. MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860, at 257-59 (1977).

390. Norway Plains Co. v. Boston & M. R.R., 67 Mass. (6 Gray) 263, 267 (1854) (discussing the derivation of common law from equitable principles and natural law); *see also, e.g.*, HORWITZ, *supra* note 389, at 16-30 (discussing and illustrating "instrumentalist" concept of common law in the first half of the nineteenth century); WILLIAM D. LEWIS, THE LAW OF PERPETUITY 48-49, 118, 138-39, 289, 357 (Am. ed. n.p., 1846), *discussed in* Siegel, *supra* note 372, at 448.

than a matter of kind. With the emergence of historist jurisprudence, the separation of legislative and common-law lawmaking became one of kind, not degree, because sufficient knowledge of the abstract legal concepts embedded in the traditions of the people was inaccessible except to the highly educated and trained minds of judges and jurists. Thus, in the nineteenth-century historism reinvigorated the view that legislatively made law can only be political while juridically made law can be "true." Historism allowed nineteenth-century American jurists to ascribe all legitimate lawmaking to the people, while denigrating democratically made law in favor of law discovered by a specially trained elite.[391]

B. The Impact of Historism on the American Constitutional Tradition

In the second half of the nineteenth century, the assumptions of historism enveloped Anglo-American law,[392] transforming constitutional tradition in three interrelated ways.[393] First, imbued with historism, *Lochner* era jurists turned to the common law for their constitutional norms. Second, they dislodged natural law and framer intent from their traditional places as the source of constitutional concepts. Third, they replaced the notion of a static Constitution with the notion of an evolutionary Constitution.

Under the aegis of historism, *Lochner* era jurists did not constitutionalize the common law per se; they found no constitutional right to particular common-law rules. In their view, legislatures had general power to amend the law "to remedy defects in the common law . . . and to adapt it to the changes of time and circumstances."[394] But, consistent with historism, *Lochner* era jurists thought of the mass of common-law rules as expressions of more abstract concepts and principles. They thought of these concepts and principles as the " 'established principles

391. *See* HORWITZ, *supra* note 389, at 252-66 (describing shift in common-law thought from instrumentalism to formalism after the mid-nineteenth century); Nelson, *supra* note 323, at 513, 558-66 (same). The shift from perceiving the common law as expressing current policy and justice to expressing historical truths is illustrated in the development of perpetuity law. *See* Siegel, *supra* note 372, at 446-55.

392. Implicit in the broad impact of historism on nineteenth-century jurists, *see supra* notes 357-91, is that historism decisively influenced private law, such as the law of torts and contracts, as well as public law, such as constitutional law, in the late nineteenth century. Legal formalism, the jurisprudence that dominated private-law discussions between 1870 and 1930, was the expression of historism in private law. Legal formalism is insightfully discussed in Kennedy, *supra* note 33. Private law is not the focus of this Article, which describes early *Lochner* era jurisprudence as historism's public-law expression.

393. In turn, these changes in constitutional tradition undergirded the *Lochner* era's transformation of substantive constitutional law.

394. Munn v. Illinois, 94 U.S. 113, 134 (1876).

of private rights and distributive justice' "[395] of the Anglo-American people.[396] Secure in the belief that common-law concepts and principles also reflect natural law and framer intent, *Lochner* era jurists ensconced them as the fundamental principles of substantive justice of the American polity,[397] principles that were the inviolate "law of the land."[398]

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395. COOLEY, *supra* note 9, at 355 (quoting Bank of Columbia v. Okeley, 17 U.S. (4 Wheat.) 235, 244 (1819)).

396. James Bryce described the common law as "the in-dwelling qualities of the race of men who built it up," as perfect expressions of the "mind and character of [the] people," and as "the work of the nation as a whole." Bryce, *supra* note 377, at 449; *see also* Siegel, *supra* note 107, at 1460-64, 1497-1500, 1527-29 (discussing Pomeroy, Cooley, and Tiedeman). Although he was English, James Bryce was a respected commentator on American law. *See* 1-2 JAMES BRYCE, THE AMERICAN COMMONWEALTH (3d ed. 1914) (1st ed. 1888); RICHARD A. COSGROVE, OUR LADY THE COMMON LAW: AN ANGLO-AMERICAN LEGAL COMMUNITY, 1870-1930, at 2-3, 7, 40-43, 59-88 (1987). Of course, *Lochner* era praise of the common law also noted its concordance with natural law and common sense, but this concordance was an outgrowth of the Anglo-American people's innate "ethnic" principles.

397. A review of *Lochner* era procedural due process cases shows that the Court sought to constitutionalize not the common law's fundamental concepts and principles, but the fundamental traditions and principles of all free and civilized nations. *E.g.*, Twining v. New Jersey, 211 U.S. 78, 106 (1908); Maxwell v. Dow, 176 U.S. 581, 588 (1900); Hurtado v. California, 110 U.S. 516, 531 (1884). Reflecting on a string of cases holding that due process constitutionalizes neither grand or petit juries of the common law nor the common-law privilege against self-incrimination, the Court concluded that as "salutary," *Twining*, 211 U.S. at 113, as the requirements of grand juries, petit juries, and the privilege against self-incrimination "may seem . . . to the great majority, [they] cannot be ranked with the right to hearing before condemnation, the immunity from arbitrary power not acting by general laws, and the inviolability of private property." *Id.*

The *Lochner* era jurists' refusal to incorporate the Anglo-Saxon people's traditional procedural institutions into the Due Process Clause is compatible with the claims of this Article. In *Hurtado*, the first of a string of procedural due process cases, the Court pointed out that although due process rights

> [a]pplied in England only as guards against executive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation; but, in that application, as it would be incongruous to measure and restrict them by the ancient customary English law, they must be held to guarantee not particular forms of procedure, but the very substance of individual rights to life, liberty, and property.

Hurtado, 110 U.S. at 532. In other words, deference to the "just and necessary discretion of legislative power," *id.*, meant that the Due Process Clause guarantees only those procedural requirements needed to protect the norms of substantive due process. No traditional procedural institution of the Anglo-Saxon people was ever found indisputably necessary to protect fundamental substantive rights. Only the abstract concepts of jurisdiction and appropriate notice and hearing, "two fundamental conditions, which seem to be universally prescribed in all systems of law," *Twining*, 211 U.S. at 111, were incorporated as procedural aspects of due process.

In short, *Lochner* era jurists saw due process as a guarantee of substantive justice. Procedural norms were constitutionalized only to the extent they were required to guarantee substantive justice. This approach paralleled the nineteenth century's treatment of the relationship of rights and remedies. For example, the Contract Clause protected contract rights absolutely, but protected contract remedies only when infringement of the remedy threatened impairment of the protected rights. In addition, the Court never acknowledged the

Accordingly, in constitutional disputes pitting legislative power against the right of private property, *Lochner* era jurists discovered, in the mass of common-law rules, traditional "principles upon which [the] power of regulation rests."[399] From time immemorial, either by common law or under statute, English courts had supervised the exercise of common callings, abated nuisances, imposed liability for uses of property that injured others, adjusted conflicting rights among concurrent owners, and proscribed fraud.[400] The principles, concepts, and doctrines underlying

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claim that the right to grand and petit juries and the privilege against self-incrimination were universally accepted norms of due process at the time of the Constitution's adoption. *See id.* at 91-92, 106-11; *Hurtado*, 110 U.S. at 524-28. Thus, in another irony of intellectual history, *Lochner* era jurists found that the Due Process Clause incorporated more substantive than procedural law. This position might be easier to understand if the clause had been rendered under its alternative wording, which proscribed deprivations not countenanced by the law of the land.

398. Since these principles were the "law" of the land, "due process of law" required their observance. *See supra* note 306 and accompanying text. Thus, a historically conceived common law provided principles that defined the concept of "law"; anything not countenanced by these principles was not "law" and, necessarily, not "due process of law."

Once again, the argument is not that *Lochner* era jurists introduced into American law the notion of the common law as founded upon abstract principles rather than concrete usage. The "mass of concrete usage" concept of the common law (the concept of common-law lawyers from Fortescue to Coke to Burke to Fearne) had been supplanted by the "abstract principles" concept in the first half of the nineteenth century. American jurists in the first half of the nineteenth century, however, were imbued with the rationalist method. Accordingly, they conceived the common law upon principles of natural justice, equity, and good public policy. *See supra* text accompanying note 390. Rather, the argument is that in the second half of the nineteenth century, *Lochner* era jurists shifted their concept of the common law's underlying abstract principles from natural justice, equity and good public policy to the traditions of the Anglo-American people. *See* Siegel, *supra* note 135, at 20-30, 56-58; *see also supra* text accompanying notes 389-90 (explaining the principles used by jurists in the first half of the nineteenth century). For an example of the shift from concepts of the common law based on rationalistic principles to concepts in private law based on historical principles, see Siegel, *supra* note 372, at 446-55. One *Lochner* era commentator suggested that constitutionalization of the principles, rather than the rules, of the common law was a break with pre-Civil War precedent, at least in the procedural due process cases. *See* MOTT, *supra* note 61, at 244-49 (commenting on Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856), and contrasting it with *Hurtado*, 110 U.S. 516). But Mott overstated the case. It is unclear which concept of the common law—the principles concept or the mass-of-rules concept—directed pre-Civil War constitutional adjudication.

399. Munn v. Illinois, 94 U.S. 113, 125 (1876), discussed *infra* text accompanying notes 473-94.

400. *See generally* McLean v. Arkansas, 211 U.S. 539, 550 (1908) (deriving police power from requirements of fraud prevention); Head v. Amoskeag Mfg. Co., 113 U.S. 9, 20-26 (1885) (deriving police power from regulation of conflicting rights to things held in common); *Munn*, 94 U.S. at 129, 131-32 (deriving police power from law of common callings); Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 84-88 (1851) (deriving police power from *sic utere* maxim of nuisance law); Baker v. Boston, 29 Mass. (12 Pick.) 183, 193 (1831) (deriving police power from abatement of nuisance at common law); Thorpe v. Rutland & B. R.R., 27 Vt. 140, 149-51 (1854) (deriving police power from *sic utere* maxim of nuisance law); *supra* text accompanying notes 29-34, 39-47 (describing strict and moderate laissez-faire constitutionalists).

these precedents delimited the right of property as understood by the common-law tradition and established the correlative sphere of government's "police power." New legislation compatible with the principles embodied in common-law doctrines regulating property was valid; new law incompatible with those principles was proscribed. As Thomas McIntyre Cooley concluded in his landmark treatise published in 1868:

> When the government . . . interferes with the title to one's property, or with [one's] independent enjoyment of it, and its act is called into question as not in accordance with the law of the land, we are to test its validity by those principles of civil liberty and constitutional defence which have become established in our system of law, and not by any rules that pertain to forms of procedure merely.[401]

Thus, for example, when the question of regulating railroad and utility rates arose, *Lochner* era jurists determined that common-law precedent countenanced regulation of the prices and charges of businesses "affected with a public interest."[402] Having made that determination, all that mattered was whether the business at bar was "within . . . [or] without" that abstract concept.[403] If the business was within that concept, its rates were regulable. It did not matter that the specific business was unknown to the common law or that its charges had not previously been regulated.[404] Similarly, when the question of liquor prohibition arose, *Lochner* era jurists determined that the common law always had regulated liquor closely because of its effect on public health and morals.[405] Therefore, all that mattered was whether prohibition was a reasonable means to control the deleterious effects of liquor or a "mere pretext" to accomplish an objective not properly within the sphere of governmental power. If prohibition was a reasonable means to accomplish the permitted objective, it did not matter that prohibition had never before been the common law's regulatory technique.[406] In sum, in turning to the com-

401. COOLEY, *supra* note 9, at 356.

402. *See, e.g.*, *Munn*, 94 U.S. at 126 (supporting regulation of "property . . . 'affected with a publick [sic] interest' " (quoting Lord Chief Justice Hale, *De Portibus Maris*, *in* 1 A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND 45, 77-78 (Francis Hargrave ed., London, T. Wright 1787))); Finkelstein, *From* Munn v. Illinois *to* Tyson v. Banton: *A Study in the Judicial Process*, 27 COLUM. L. REV. 769 (1927) (reviewing the history of the concept without using this phrase); W. Frederic Foster, *The Doctrine of the United States Supreme Court of Property Affected by a Public Interest and Its Tendencies*, 5 YALE L.J. 49 (1895) (discussing the implications of *Munn*).

403. *Munn*, 94 U.S. at 125.

404. *Id.* at 125, 133.

405. Mugler v. Kansas, 123 U.S. 623, 662 (1887); FREUND, *supra* note 21, at 192-93, 201-02.

406. *See Mugler*, 123 U.S. 623. *But see* TIEDEMAN, *supra* note 22, at 305-07 (arguing that

mon law as the source of their notions of substantive due process, *Lochner* era jurists conceived that mass of doctrines and rules as an expression of abstract principles and concepts that formed the traditional norms of the Anglo-American people. Because the common law's principles and concepts were the traditional norms of the Anglo-American people, they were the "law of the land"—the norms the founding generation intended the Constitution's Due Process Clause to protect.

Concomitant with their drawing constitutional concepts from the common law, *Lochner* era jurists dislodged natural law and framer intent from their traditional place as the sources of constitutional concepts. Certainly, *Lochner* era treatises and opinions contain many references to natural rights and framer intent.[407] Some of these references came from laissez-faire constitutionalists who regarded the theory of natural rights as an "exploded doctrine."[408] These jurists believed that through the exploded theory, certain rights had passed into the Anglo-American tradition.[409] For these jurists, common-law acceptation, not illusory natural-law origin, determined a right's constitutional status.

Most *Lochner* era references to natural law came, however, from *Lochner* era jurists who maintained a belief in that jurisprudence. Natural rights were a fundamental aspect of many *Lochner* era jurists' concepts of political science and morality.[410] But even for them, what constitutionalized the right of private property, the right to pursue all lawful callings, the right to equal laws, and the right to liberty of contract was not their status as natural rights. Rather, as Justice Bradley, a natural-rights enthusiast, wrote in his path-breaking dissent in *The Slaughter-House Cases*,[411] it was their status as "traditionary rights and privileges . . . which had been wrested from English sovereigns at various periods of the nation's history [and] established and secured by long usage and by various acts of Parliament."[412] Thus, although many *Lochner* era jurists

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because sale of liquor does not necessarily trespass on the rights of others or damage health, the legislature may regulate it but not prohibit it).

407. *See, e.g.*, Bradwell v. State, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring); The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 105 (1872) (Field, J., dissenting); WILLIAM S. PATTEE, THE ESSENTIAL NATURE OF LAW *passim* (1909); TIEDEMAN, *supra* note 22, at 1; *see also* 1 BLACKSTONE, *supra* note 170, at *122 n.4 (annotation by Thomas M. Cooley).

408. LOWELL, *supra* note 30, at 9; *see also supra* note 326 and accompanying text (discussing decline of natural-law theory in late nineteenth century).

409. *See* LOWELL, *supra* note 30, at 9, 182-88; TIEDEMAN, *supra* note 326, at 73, 76-78; *see also* Lewis, *supra* note 326, at 972-73 (opponent of *Lochner* era constitutionalism expressing same theory).

410. Nelson, *supra* note 323, at 551-52, 565.

411. 83 U.S. (16 Wall.) 36 (1872).

412. *Id.* at 114-15 (Bradley, J., dissenting); *see also* Head v. Amoskeag Mfg. Co., 113 U.S.

believed in natural law, they nevertheless drew from it not as a source of constitutional norms but as confirmation of rights they thought were embedded in common-law tradition.[413] For these jurists too, a right's constitutional status followed from common-law acceptation, not natural-law descent.

Lochner era references to framer intent served a similar function. In general, references to framer intent were fairly rare in *Lochner* era opinions. *Lochner* era jurists never claimed fidelity to the founding generation's specific intent. The claims made are only leitmotifs resonating as claims of fidelity to some original abstract societal intent.[414] Indeed, in a book elaborating America's "unwritten constitution," which is wholly an application of the insights of historist jurisprudence, Professor Christopher Tiedeman, the leading strict laissez-faire constitutionalist, concluded that the framers' Constitution endured solely because they had divined the "legal consciousness"[415] of the people for whom they wrote:

9, 20-21 (1884) (using the common-law principle of legislative regulation of conflicting rights to commons to deny that the Mills Acts are exercises of eminent domain); Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655, 663-65 (1874) (Miller, J.) (mentioning natural rights and the social compact but deciding the case on "the course and usage of the government"); *Slaughter-House*, 83 U.S. at 86-87, 104-08, 109-10 (Field, J., dissenting) (mentioning natural rights but resting on common-law tradition); Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 177-79 (1871) (Miller J.) (employing historical arguments to define a "taking" of property); COOLEY, *supra* note 9, at 533 ("[T]he settled practice of free governments must be our guides [sic] in determining what is . . . a public use."). In Bradwell v. State, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring), Justice Bradley's appeal to the "law of the Creator" functioned as collateral support for the claim that, as a matter of tradition, the right to pursue all lawful callings had not been regarded as a fundamental right of the female sex. Professor Nelson has noticed this use of "higher law" in late nineteenth-century private law. *See* Nelson, *supra* note 323, at 565-66. Professor McCurdy has noted that higher law complemented tradition in the public law of that era. Charles W. McCurdy, *The Roots of "Liberty of Contract" Reconsidered: Major Premises in the Law of Employment, 1867-1937, in* 1984 SUP. CT. HIST. SOC'Y Y.B. 20, 26-30.

413. An explanation for natural law's reduction to a secondary role in the thoughts of *Lochner* era jurists who believed in these rights perhaps lies in their view that natural law cannot resolve disputes, *see supra* text accompanying notes 327-30, and that common law incorporated and supplemented natural-law norms. *See infra* text accompanying notes 441-94 (discussing Justice Field); *supra* text accompanying note 382 (commenting on tendency of historical jurists to rediscover in tradition the concepts that rationalist jurists fashioned); *supra* note 342 (discussing view that the common law supplemented the shortcomings of natural law).

414. *See* Munn v. Illinois, 94 U.S. 113, 125 (1876) (holding that the right of property that the Constitution protects comes from the common law); Ives v. Southern B. Ry., 201 N.Y. 271, 293, 94 N.E. 431, 439 (1911) (fault principle was the law of the land when the Constitution was adopted); LOWELL, *supra* note 30, at 125-26, 129 (saying the framers did not specify clearly the principles they set above legislative powers); TIEDEMAN, *supra* note 326, at 77-78. For further discussion, see *infra* text accompanying notes 416-21.

415. Tiedeman did not use the term "legal consciousness." He used an equivalent expression earlier in discussing his general jurisprudence. In that discussion he described the basis of

> The . . . American constitution[] work[s] well, and challenges[s] the admiration of political students not because of [its] inherent and abstract excellences—for it would be no arduous or insuperable task to point out several glaring defects, but because [it is] in complete correspondence with the political sentiment of the . . . nation[], and . . . [is] the natural product[] of Anglo-American civilization. . . .
>
> . . . It is the complete harmony of its principles with the political evolution of the nation, which justly challenges our admiration, and not the political acumen of the convention which promulgated it.[416]

Moreover, in a clear break with the previous treatment of the framers, Abbott Lawrence Lowell—laissez-faire constitutionalist, political scientist, and future president of Harvard University—observed that the framers "ha[d] no distinct idea" of the meaning of due process as a limit on legislative discretion.[417] "[R]egarding [due process] very much as the Italian does the talisman which keeps off the evil eye, the American statesmen of a hundred years ago put it into the Bill of Rights, and left it as a puzzle for posterity to solve."[418] Specifying its meaning through a consideration of Anglo-Saxon traditions regarding government and the individual seemed the closest approximation to an intent that was all too indeterminate. *Lochner* era jurists, in other words, were positivists who believed that only "sovereign will" ordains constitutional norms. Historism, however, taught them to look to the common law to discover the intent of the generation that wrote and ratified the Constitution.

Finally, consonant with historism, *Lochner* era jurists replaced the image of the static constitution, premised upon natural law and framer intent, with the image of an evolutionary constitution premised upon na-

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law as "the prevalent sense of right. The Germans call it *Rechtsgefuehl.*" TIEDEMAN, *supra* note 326, at 7.

416. *Id.* at 20-21 (footnote omitted); *see also* LOWELL, *supra* note 30, at 126-28 (discussing Constitution as the "symbol . . . of our national existence" together with the doctrines embodied in the document).

417. LOWELL, *supra* note 30, at 86.

418. *Id.* Although *Lochner* era jurists generally did not ground themselves in framer intent, they never claimed that what they were doing was contrary to it. Tiedeman, in his book on the unwritten constitution, does give instances of departure from framer intent, and, during the pressure of the Civil War, even from the letter of the Constitution. TIEDEMAN, *supra* note 326, at 44, 46-50, 83-90. At one point he even says that framer intent is not the ultimate consideration of constitutional interpretation. *Id.* at 151. Nonetheless, he saw *Lochner* era substantive due process decisions as instances of continuity with framer intent because the framers made natural rights part of the American tradition. *Id.* at 77-78; *see also* Christopher G. Tiedeman, *The Income Tax Decisions as an Object Lesson in Constitutional Construction*, 6 ANNALS 268 (1895) (analyzing *The Income Tax Cases* as a return to original intent, which earlier precedents had ignored).

tional or racial[419] tradition. The federal Constitution's Fourteenth Amendment "will hereafter be regarded as the American complement of the Great Charter," Judge Dillon predicted in his 1891 Storrs Lectures at Yale.[420] He went on to quote Sir James Mackintosh:

> "It was . . . a peculiar advantage that the consequences of [the Magna Charta's] principles were, if we may so speak, only discovered gradually and slowly. It gave out on each occasion only so much of the spirit of liberty and reformation as the circumstances of succeeding generations required, and as their character would safely bear. For almost five centuries it was appealed to as the decisive authority on behalf of the people, though commonly so far only as the necessities of each case demanded."[421]

Lochner era jurists conceded, of course, that legislatures occupy a vital role in the progress of the law. Legislatures have the power, along with the courts, to specify what common-law principles remain vague. Legislatures have power, even greater than that of the courts, to change the law by applying the system's principles in light of an understanding of current conditions. Legislatures alone have power to anticipate and

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419. For claims of racial tradition, see for example COSGROVE, *supra* note 396, at 76-84; LEE, *supra* note 360, at 1-2; Bryce, *supra* note 377, at 449-51; *see also* 1 WILLIAM STUBBS, THE CONSTITUTIONAL HISTORY OF ENGLAND 1-11 (Oxford, Clarendon Press 1880) (commenting on English constitutional development).

420. JOHN F. DILLON, THE LAWS AND JURISPRUDENCE OF ENGLAND AND AMERICA 212 (Boston, Little, Brown 1894).

421. *Id.* at 212 n.1. (citation omitted). Of course, *Lochner* era jurists differed on the content of tradition and the direction of its evolution. For moderate laissez-faire constitutionalists, constitutional evolution tended to justify expansion of the proper subjects of legislative concern. For example, Justice Harlan wrote:

> [The police power] has doubtlessly been greatly expanded in its application[s] during the past century, owing to an enormous increase in the number of occupations which are dangerous, or so far detrimental to the health of the employés as to demand special precautions for their well-being and protection, or the safety of adjacent property.

Lochner v. New York, 198 U.S. 45, 66 (1905) (Harlan, J., dissenting); *see* Holden v. Hardy, 169 U.S. 366, 385-98 (1898). For more conservative laissez-faire constitutionalists, constitutional evolution tended to justify contraction of the subjects of legislative concern:

> [Jurists must] take notice of the steady growth of the free principles which have come from common-law rules and usages, and of their gradual expansion with the general advance in intelligence and independent thought and action among the people. The gradual transition from despotism to freedom has been mainly accomplished by the dropping out one by one of obnoxious and despotic powers, and by the recognition of the changes effected as permanent modifications of the constitutional system.

Cooley, *supra* note 108, at 269; *see In re* Morgan, 26 Colo. 415, 431, 58 P. 1071, 1077 (1899); People v. Budd, 117 N.Y. 1, 45-48, 22 N.E. 670, 680-82 (1889) (Peckham, J., dissenting), *aff'd*, 143 U.S. 517 (1892); LOWELL, *supra* note 30, at 13-15 (reaching the conclusion that society has progressed from basing obligations on status to basing them on contract).

interdict what the principles hold wrongful.[422] Legislatures even have power to proscribe what merely tends to be wrongful.[423] With regard to legislative activity, *Lochner* era jurists held that the role of the courts is to enforce all legislative declarations that are reasonably faithful specifications, anticipations, applications, or reapplications of common-law principles to reasonably believable understandings of current conditions. To allow legislatures more would be to allow them to act upon "mere pretexts" of fidelity to common-law principles, and effectively to allow legislatures to refashion those principles.[424] Legislative alteration of the principles, however, was impermissible. As Justice Brown, the *Lochner* era moderate, wrote in *Holden v. Hardy*, "the methods by which justice is administered are subject to constant fluctuation," but "the cardinal principles of justice are immutable."[425]

In sum, *Lochner* era jurists envisioned constitutional evolution, but limited its scope.[426] They thought reapplication of common-law princi-

422. For example, nuisance law was limited to abating nuisances after they occurred. Courts allowed legislatures to anticipate nuisance conditions and prohibit activities that might bring them about. Zoning laws are an example.

423. *See, e.g.*, McLean v. Arkansas, 211 U.S. 539, 550 (1908); Head v. Amoskeag Mfg. Co., 113 U.S. 9, 20-25 (1884); Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 84-88 (1851).

424. The requirement that judges engage in "rationality" review follows from this requirement. Rationality review determines that the legislative exercise of a certain power is not a pretext for the exercise of another, impermissible power. *See* Powell v. Pennsylvania, 127 U.S. 678, 695-98 (1888) (Field, J., dissenting); Mugler v. Kansas, 123 U.S. 623, 661 (1887); The Legal Tender Cases, 79 U.S. (12 Wall.) 457, 538-39 (1870); Hepburn v. Griswold, 75 U.S. (8 Wall.) 603, 611-12, 615 (1869); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819); *Ex parte* Newman, 9 Cal. 502, 508-09 (1858); Toledo, W. & W. Ry. v. City of Jacksonville, 67 Ill. 37, 40 (1873); Austin v. Murray, 33 Mass. (16 Pick.) 121, 125 (1831).

425. *Holden*, 169 U.S. at 387 (context makes it clear that by "methods" Justice Brown meant substantive laws as well as procedural rules). For other expressions of evolution and immutability, see Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926) ("while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation"); Twining v. New Jersey, 211 U.S. 78, 113 (1908) (in procedural due process context); Thomas M. Cooley, *Comparative Merits of Written and Prescriptive Constitutions*, 2 HARV. L. REV. 341, 354-55 (1889).

426. *See* LOWELL, *supra* note 30, at 125, 129; Cooley, *supra* note 425, at 353. *But see* JOHN N. POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 97 (10th ed., Boston, Houghton Mifflin 1888) (1st ed. 1868); TIEDEMAN, *supra* note 326, at 150-54, 164. For examples of the opponents of *Lochner* era constitutionalism who agree with Tiedeman's and Pomeroy's view that post-founding evolution is desirable, see Hand, *supra* note 35, at 498-500, 509; Lewis, *Social Sciences*, *supra* note 37, at 533, 535-37; Lewis, *Civil Liberty*, *supra* note 37, at 1070-71. Professor Chafee, the early twentieth century's leading First Amendment scholar and a liberal constitutionalist, wrote:

> [T]he meaning of the First Amendment did not crystallize in 1791. . . . "[L]iberty of speech" is no more confined to the speech [the framers] thought permissible than "commerce" in another clause is limited to the sailing vessels and horse-drawn vehicles of 1787. Into the making of the constitutional conception of free speech have

ples was permissible (even necessary), but variation was proscribed.[427] Central to an understanding of *Lochner* era constitutionalism, and its historistic blend of positivism and natural law, is acknowledgment that *Lochner* era jurists believed, on the one hand, that Anglo-American recognition of the specific fundamental principles they enforced through substantive due process[428] had evolved over centuries,[429] but, on the other hand, that the principles either became part of the common-law tradition before the nation's founding or were crystallized by it.[430] *Loch-*

> gone, not only men's bitter experience . . . before 1791, but also the subsequent development of the law of fair comment in civil defamation, and the philosophical speculations of John Stuart Mill. Justice Holmes phrases the thought with even more than his habitual felicity. "The provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil."

Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 954-55 (1919) (quoting Gompers v. United States, 233 U.S. 604, 610 (1916)); *see also id.* at 958 n.84 (noting that not everything old is good; therefore, the Bill of Rights should not be interpreted to crystalize antiquity).

427. For an extreme illustration of this claim, see Thomas M. Cooley, *Correspondence*, 2 MICH. L.J. 334, 334 (1893) [hereinafter Cooley, *Correspondence*] and Thomas M. Cooley, *Power to Amend the Federal Constitution*, 2 MICH. L.J. 109, 118-20 (1893) [hereinafter Cooley, *Power*]. These articles argue that although the people have ultimate power to rebel and impose revolutionary changes, Article V amendments departing from the original Constitution's principles are invalid because the word "amendment" connotes change consistent with an original plan.

428. Examples of these principles include proscription of wage and price control, *see* Cooley, *supra* note 108, at 269; *infra* text accompanying notes 473-94; the right to pursue all ordinary employments subject to reasonable and equal restraints, *see infra* text accompanying notes 453-72; and the fault principle in tort law, *see* Ives v. Southern B. Ry., 201 N.Y. 271, 293, 94 N.E. 431, 439 (1911).

429. *See* The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 114-51 (1873) (Bradley, J., dissenting); THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 234-35 (Boston, Little, Brown 1880); Cooley, *supra* note 425, at 346-49; *supra* text accompanying note 421; *see also* Hurtado v. California, 110 U.S. 516, 528-32 (1884) (discussing evolution in the procedural due process context).

430. *See Slaughter-House*, 83 U.S. (16 Wall.) at 114-15, 119-21 (Bradley, J., dissenting); *Ives*, 201 N.Y. at 293, 94 N.E. at 439 (stating that fault principle was the law of the land when the Constitution was adopted); People v. Budd, 117 N.Y. 1, 45-48, 22 N.E. 670, 686-87 (1889) (Peckham, J., dissenting), *aff'd sub nom.* Budd v. New York, 143 U.S. 517 (1892); COOLEY, *supra* note 429, at 234-35; Cooley, *supra* note 108, at 269; *see also* Twining v. New Jersey, 211 U.S. 78, 117, 121, 123 (1908) (Harlan, J., dissenting) (noting that at the time of the adoption of the Fourteenth Amendment, immunity from self-incrimination was one of the privileges belonging to citizens); *Hurtado*, 110 U.S. at 556-58 (Harlan, J., dissenting) (arguing that one should look to 1868, the time of the adoption of the Fourteenth Amendment, to determine the accepted principles of procedural due process). The result of Harlan's insight, of course, would have been to restrict the states further, substantively and procedurally.

Under this principle, some *Lochner* era jurists excepted paternalistic legislation from constitutional proscription if it was a traditional type still accepted at the time of the founding. Usury laws were the most frequent example. *See Budd*, 117 N.Y. at 45-48, 22 N.E. at 686-87; COOLEY, *supra* note 429, at 234-35; Cooley, *supra* note 108, at 269; Frederick N. Judson, *Liberty of Contract Under the Police Power*, 25 AM. L. REV. 871, 894 (1891) ("*Usury laws*,

ner era jurists depicted themselves as evolving only the application of principles extant at the founding, principles they took as the intended definitions of such ambiguous constitutional terms as "legislative power,"[431] "property,"[432] "cruel and unusual punishment,"[433] "freedom of speech,"[434] and "due process of law."[435]

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however objectionable in principle, are admitted in the judicial discussions of the general subject to rest upon such a traditional policy of the race, antedating the constitutions, as to make any question useless in the present state of public opinion."); *infra* text accompanying notes 491-94 (discussing Justice Field's approach to usury laws). Yet as Judge, later Justice, Peckham said in *Budd*,

> The fact that certain rules of the common law have come down to us unimpaired, although based upon a view of the relations of government to the people which obtained in the seventeenth century, should certainly furnish no reason for extending those rules to cases which, but for such extension, would be regarded as clearly within the protection of the constitutional limitations contained in our bill of rights.

Budd, 117 N.Y. at 45-48, 22 N.E. at 686-87; *see also* State v. Goodwill, 33 W. Va. 179, 185, 10 S.E. 285, 287-88 (1889) (Usury laws "existed at the time the Constitution was adopted. . . . The power to pass usury laws exists by immemorial usage; but such is not the case with such acts as we are now considering."), *overruled by* White v. Raleigh Mining Co., 113 W. Va. 522, 168 S.E. 285 (1933). Opponents of laissez-faire constitutionalism were always arguing that the existence of proscriptions accepted at the time of the founding established principles that should be recognized. The most important debate centered on the use of usury laws to establish a principle that legislation may protect individuals from "oppression," or economic coercion. See, for example, the use of usury laws in FREUND, *supra* note 21, at 308 ("it is difficult to see the difference between truck and usury legislation"); Pound, *supra* note 10, at 473, 483-84.

431. *See, e.g.*, COOLEY, *supra* note 9, at 87-88, 175-76 (discussed in Siegel, *supra* note 107, at 1508-09).

432. *See, e.g.*, *infra* text accompanying notes 477-79, 486-87.

433. *See, e.g.*, COOLEY, *supra* note 9, at 329-30.

434. *See, e.g.*, *id.* at 416-17.

435. *See, e.g.*, *supra* text accompanying notes 399-406. Modern revisionist scholarship suggests that *Lochner* era jurists enforced principles crystallized not at the founding but in Jacksonian America. *See, e.g.*, HORWITZ, *supra* note 389, at 85-99 (discussing fault principle); McCurdy, *supra* note 412, at 26-30 (tracing free labor ideology to Jacksonian and abolitionist principles); Treanor, *supra* note 169 (tracing protection of property to post-founding shift from republicanism to liberalism). An implication of this scholarship, however, is that the *Lochner* era's principles were gestating in antebellum America and had crystallized by mid-century. Thus, even if *Lochner* era jurists were not true to the norms of the founding generation, they were true to views that were traditional among the judiciary by the late nineteenth century. This judicial tradition, if not historic fact, gives great plausibility to the *Lochner* era jurists' claim that they were faithful to constitutional norms. *See also* Riggs, *supra* note 319 (arguing that the Fifth Amendment Due Process Clause was intended to have substantive content).

Consider, in this regard, the force of Justice Harlan's insight, discussed *supra* note 430, that the Due Process Clause constitutionalized common-law principles as developed at the time of the adoption of the Fourteenth Amendment. Current scholarship indicates that the opinions of *Lochner* era jurists were normally consistent with the common law of that time. Also, proponents of laissez-faire constitutionalism generally did not claim that *Lochner* era jurists' substantive views were not faithful to framer intent or to traditional Anglo-American values. Professor Pound, in criticizing *Lochner* era decisions, found one basis for the judicial espousal of liberty of contract in the fact that natural law was "the theory of our bill of rights."

Thus imbued with the historist method, which conceived the flux of human events as founded on "ordering principles," *Lochner* era jurists embarked on their task of articulating the crystallized fundamental rights of Anglo-American liberty and developing the application of such rights to newly emerging social conditions.[436] From the perspective of future development, *Lochner* era jurists' transformation of constitutional law from a static framework based on natural law and framer intent to an evolutionary model based on the common law was momentous because it was a decisive step toward the more evolutionary, social consensus-based constitutionalism of the post-New Deal Court.[437] From the perspective of contemporary thought, however, the *Lochner* era transformation of constitutional jurisprudence was easily blended into extant tradition. *Lochner* era jurists, after all, kept "original intent" as the touchstone of constitutional law. Seeking original intent, not in the intent of the Philadelphia convention, but in the traditions of the people as evidenced by their common law, seemed a sensible shift within tradition.[438] Natural law, too, remained a significant part of constitutional discourse. Although the relevance of natural law changed from ideas directly shaping framer intent to ideas shaping the common law (and only then shaping framer intent), this seemed a subtle shift with little revolutionary import. Indeed, seen through the prism of nineteenth-century historist thought, the shift to constitutional law based on common law only served to *better* realize the traditions of framer intent and natural-law constitutionalism.

Lochner era encomia to constitutional evolution, of course, were too

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Pound, *supra* note 10, at 457. Another basis for the doctrine, he admitted, was that individualism and liberty of contract were theories of the common law. Pound, *Philosophy of Law*, *supra* note 37, at 345-47; *see also* Lewis, *Social Sciences*, *supra* note 37, at 537 (describing pre-*Lochner* era legal principles as centered on "the liberty of the individual" and "free contract"). *But see* Shattuck, *supra* note 338 (arguing *Lochner* era expanded common-law concepts). Pound did argue that traditional equitable principles supported governmental interference with capital's oppressive economic power over labor. Pound, *supra* note 10, at 457, 482-83.

436. Opponents of *Lochner* era constitutionalism implicitly argued for evolution of the Constitution's principles. *See infra* notes 504-08.

437. *See infra* text accompanying notes 509-48.

438. Given that the common law was more generally known than the convention's secret proceedings, the common law seemed a better place to seek the people's understanding of constitutional terms. It seemed better to consult the people's, not the convention delegates', understanding because the people, not the delegates, are the national sovereign that ordained the Constitution. Finally, many terms, such as "property" and "due process," that were important in the *Lochner* era, simply were not discussed in Congress or the state legislatures when the Fifth Amendment was added to the Constitution in 1791. *See* Riggs, *supra* note 319, at 987, 995-99. The common law was arguably the only place to turn for a historical understanding of such terms' content.

distinct to be missed.[439] Their modernity, however, was masked by the belief that permanent principles of social order governed constitutional evolution.[440] To be sure, these governing principles were not principles of traditional natural law; they were principles of a historistically conceived common law. Nonetheless, the historistically conceived common law was itself perceived as a product of nature, not arbitrary social consensus. Discovering nature in history, not reason, seemed an improvement upon, not a departure from, tradition. The same may be said of the belief that constitutional doctrine evolves according to the constant operation of static principles. The notion of change according to permanent principles allowed *Lochner* era jurists to envision a Constitution that was static, as tradition required, yet evolutionary, as the times demanded.

C. *Historism Illustrated in Justice Stephen Field's Seminal Dissents in* The Slaughter-House Cases *and* Munn v. Illinois

Justice Stephen Field, who sat on the United States Supreme Court from 1863 to 1897, was the nation's leading early judicial proponent of laissez-faire constitutionalism.[441] Even though the Court did not embrace fully that jurisprudence until shortly after his resignation,[442] scholars have documented amply Field's central role in the Court's movement into the *Lochner* era.[443] While Field's constitutional philosophy may not represent the philosophies of all *Lochner* era jurists, it is the philosophy of a major figure—a justice who featured prominently in the Court's decisionmaking, influencing his colleagues and inspiring the following generation of justices.[444] Focusing on Field's thought complements the

439. *See* Holden v. Hardy, 169 U.S. 366, 385-89 (1898); Hurtado v. California, 110 U.S. 516, 528-32 (1884); *supra* notes 395-96, 399, 421 and accompanying text.

440. *But see infra* text accompanying notes 509-48 (discussing latent radical implications of *Lochner* era evolutionism).

441. For prior discussions of Field's jurisprudence and his role in the rise of laissez-faire constitutionalism, see CARL B. SWISHER, STEPHEN J. FIELD: CRAFTSMAN OF THE LAW 362-434 (paperback ed. 1969) (1st ed. 1930); Howard J. Graham, *Justice Field and the Fourteenth Amendment*, 52 YALE L.J. 851, 874-88 (1943); Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897*, *in* AMERICAN LAW AND THE CONSTITUTIONAL ORDER 246 (Lawrence M. Friedman & Harry N. Scheiber eds. 1988). *See generally* MCCURDY, *supra* note 361 (discussing Field's jurisprudence and his role in the rise of laissez-faire constitutionalism).

442. Field left the Court in 1897. Lochner v. New York, 198 U.S. 45 (1905), marks the Court's clear adoption of "liberty of contract" principles.

443. *See, e.g.*, McCurdy, *supra* note 361, at 8-12, 17-18.

444. *Id.* Professor Fiss, for example, reports that "Felix Frankfurter . . . saw Brewer [, who was Field's nephew,] and his colleagues, particularly Rufus Peckham, Brewer's constant ally and the author of *Lochner v. New York*, as doing little more than writing into law Field's *Slaughter-House* dissent." Owen M. Fiss, *David J. Brewer: The Judge as Missionary*, *in* THE FIELDS AND THE LAW 53, 54-55 (paperback ed. 1986).

general study of *Lochner* era jurists undertaken in the prior parts of this Article by tracing its conclusions into the opinions of a prominent justice.

Substantively, Field advanced moderate laissez-faire principles.[445] Unlike strict laissez-faire constitutionalists, who argued that "liberty of contract" proscribes all paternalistic legislation, Field consistently upheld legislation preventing individuals from harming their own health, safety, or morals.[446] Jurisprudentially, Field believed in a Christian God and natural law; he thought, however, that the Court was empowered to protect only those norms that the Revolutionary and Civil War generations had positively enshrined in the Constitution. He sought the intent of those generations through a study of the Anglo-American tradition, encapsulated in the common law. Historism not only underlay his concept of the common law, but also mediated his diverse commitments to natural law and framer intent. Illustrative of Field's historism are his

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445. *See supra* text accompanying notes 39-47 (describing moderate laissez-faire principles).

446. While on the Supreme Court of California, Field supported the validity of a general Sunday closing law, writing:

> The legislature possesses the undoubted right to pass laws for the preservation of health and the promotion of good morals. It is no answer . . . to say that mankind will seek cessation from labor by the natural inclination of self-preservation. The position assumes that all men are independent, and at liberty to work whenever they choose. . . . The relations of superior and subordinate, master and servant, principal and clerk, always have and always will exist. Labor is in a great degree dependent upon capital, and unless the exercise of the power which capital affords is restrained, those who are obliged to labor will not possess the freedom for rest which they would otherwise exercise. The necessities for food and raiment are imperious, and the exactions of avarice are not easily satisfied. It is idle to talk of a man's freedom to rest when his wife and children are looking to his daily labor for their daily support. The law steps in to restrain the power of capital. Its object is not to protect those who can rest at their pleasure, but to afford rest to those who need it, and who, from the conditions of society, could not otherwise obtain it. . . . It gives one day to the poor and dependent; from the enjoyment of which no capital or power is permitted to deprive them. . . . Authority for the enactment I find in the great object of all government, which is protection. Labor is a necessity imposed by the considerations of our race, and to protect labor is the highest office of the laws.

Ex parte Newman, 9 Cal. 502, 520-21 (1858) (Field, J., dissenting). His continued adherence to this position after his elevation to the Supreme Court is illustrated in Soon Hing v. Crowley, 113 U.S. 703 (1885), in which he wrote:

> Laws setting aside Sunday as a day of rest are upheld, not from any right of the government to legislate for the promotion of religious observances, but from its right to protect all persons from the physical and moral debasement which comes from uninterrupted labor. Such laws have always been deemed beneficent and merciful laws, especially to the poor and dependent, to the laborers in our factories and workshops and in the heated rooms of our cities.

Id. at 710. On Field's general balance of public power and private property, see McCurdy, *supra* note 441, at 264-65.

dissents in *The Slaughter-House Cases*[447] and *Munn v. Illinois*.[448] Although Field dissented in these two cases, his opinions are founding texts of *Lochner* era constitutionalism.[449] They are, in this regard, like Justice Holmes's classic dissents in *Lochner v. New York*[450] and *United States v. Adair*[451]—seminal statements of the philosophical basis of the coming era of constitutional law. Just as Holmes's famous dissents show the role of judicial deference in the founding of New Deal constitutionalism, Field's seminal dissents place historism at the inception of *Lochner* era jurisprudence.[452]

1. Justice Field's Dissent in *The Slaughter-House Cases*

In 1869, the reconstructed Louisiana legislature incorporated the Crescent City Live-Stock Landing and Slaughter-House Company, and granted it the exclusive right to establish facilities for landing and butchering animals for New Orleans and its environs, an area encompassing 1154 square miles and over 200,000 people.[453] In *The Slaughter-House Cases*, an association of butchers[454] challenged this grant of monopoly privilege, claiming it interfered with their liberty "to pursue . . . any of the known established trades and occupations of the country, subject only to such restraints as equally affect[] all others."[455] The Court re-

447. 83 U.S. (16 Wall.) 36, 83-111 (1873) (Field, J., dissenting).

448. 94 U.S. 113, 136-54 (1877) (Field, J., dissenting).

449. Field's *Slaughter-House* and *Munn* dissents are so important that Professor Fiss says that "Field's fame was largely due to [them]." Fiss, *supra* note 444, at 54.

450. 198 U.S. 45, 74-76 (1905) (Holmes, J., dissenting).

451. 208 U.S. 161, 190-92 (1908) (Holmes, J., dissenting).

452. Tracing historism in the opinions of Justice Field tends to confirm the results of the study of late nineteenth-century constitutional commentators presented in Siegel, *supra* note 107 (discussing John Pomeroy, Thomas Cooley, and Christopher Tiedeman).

453. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 38, 43 (1872); *id.* at 85 (Field, J., dissenting).

454. *The Slaughter-House Cases* combined three lawsuits, one by the butchers' association challenging the statute, one by the state attorney general seeking to enforce the act against stock dealers and butchers, and one by the corporation attempting to prevent competitors from infringing on its privileges. *Id.* at 36; *id.* at 85 (Field, J., dissenting). Only 17 men held shares in the corporation, and their grant affected about 1000 people engaged in the butchering trade in New Orleans. *Id.* at 39, 43. The statement of the case says that hundreds of suits were brought by butchers as individuals and in various combinations. *Id.* at 43. Perhaps the simplest account of the background is the statement by the Court that the cases "arise out of the efforts of the butchers of New Orleans to resist the Crescent City Livestock Landing and Slaughter-House Company in the exercise of certain powers conferred by [its] charter." *Id.* at 57.

455. *Id.* at 105 (Field, J., dissenting); *see also id.* at 88 (Field, J., dissenting) (quoted *infra* text accompanying note 460) (furthering Justice Field's argument); *id.* at 106 (Field, J., dissenting) (same). Much of the butchers' and Field's argument focused on whether constitutional law proscribes the grant of monopoly privileges over the common trades. *See id.* at 49-

jected the association's claim largely on the ground that pre-Civil War precedent firmly allocated the definition and protection of civil liberties to state law.[456] According to the majority, the Civil War amendments altered this fundamental aspect of American constitutional law only to the extent of guaranteeing the newly freed slaves equal treatment with whites. The substance of civil liberties remained a matter of state law; the newly amended Constitution forbade only racially motivated distinctions in their provision and protection.[457]

Justice Field and three other justices dissented.[458] Field argued that the Fourteenth Amendment's first section was intended to nationalize the definition and protection of fundamental civil liberties.[459] He also argued that the right to "pursue . . . the ordinary trades or callings of life"[460] equally with other citizens was among the liberties guaranteed by the Fourteenth Amendment's Privileges and Immunities Clause.[461] The

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57; *id.* at 88, 101-05 (Field, J., dissenting). Field conceded that monopolies can be established over trades that require governmental sanction for entry. *Id.* at 88 (Field, J., dissenting) (describing these enterprises, such as ferries and turnpikes, as occupations "of a public character appertaining to the government . . . [and] usually requir[ing] the exercise of the sovereign right of eminent domain"). Thus, the claim was that civil liberty encompasses the right to be free of governmentally established monopolies over the ordinary and common trades. This claim is the obverse of the statement that civil liberty encompasses the right to pursue those callings, subject to reasonable and equal regulations. I have chosen to phrase the claim this way, even though it was less frequently described in this manner in the case, because it shows the connection between the argument here and the claim that evolved into the *Lochner* era doctrine of "liberty of contract." Liberty of contract stemmed from the right to pursue ordinary callings.

The butchers also claimed the law violated the Thirteenth Amendment's proscription of "involuntary servitude." *Id.* at 49-51. Justice Field toyed with this claim but did not rest his dissent on it. *Id.* at 91-93 (Field, J., dissenting).

456. *Id.* at 77; *id.* at 94-95 (Field, J., dissenting); *see generally* Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 250-51 (1833) (holding Bill of Rights not applicable to the states); NELSON, *supra* note 9, at 104-09. There were, of course, exceptions to this statement, such as protection against bills of attainder and impairments of contract contained in the Constitution. *See* U.S. CONST. art. I, § 10.

457. *Slaughter-House*, 83 U.S. (16 Wall.) at 78-83.

458. All the dissenters joined in Field's opinion, *id.* at 111 (Field, J., dissenting), even though two of them filed separate opinions also. *Id.* at 111-30 (Bradley, Swayne, JJ., dissenting).

459. *Id.* at 95-96 (Field, J., dissenting). Field's assertion was that "[t]he fundamental rights, privileges and immunities" that Americans possess as "free m[e]n" and "free citizen[s]" no longer "derive their existence from [state] legislation, and cannot be destroyed by [their] power." *Id.* (Field, J., dissenting).

460. *Id.* at 88 (Field, J., dissenting).

461. U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."). Field's opinion discussed a variety of topics. He first dismissed the idea that the exclusive privileges that the Louisiana law granted were valid police-power measures designed to promote the public health. *Slaughter-House*, 83 U.S. (16 Wall.) at 86-89 (Field, J., dissenting). He then focused on the argument that the law violated the Thirteenth Amendment's prohibition of slavery and

state-created monopoly on slaughtering, Field concluded, violated these liberties. In his argument, Field recognized that the Fourteenth Amendment's text forbids the states from abridging the "privileges and immunities" of national citizenship but does not "enumerate or define" those rights.[462] Yet Field was certain that the right to engage in ordinary employments, subject to reasonable and equal police-power regulations,[463] was among the fundamental civil liberties for which the clause granted federal protection. No doubt Field's view was buttressed by his belief that the right to pursue ordinary occupations was a natural right; he suggested as much at the outset and at the conclusion of his discussion.[464] But natural-law reasoning is wholly absent from the core of his analysis. Rather, Field fleshed his answer from Anglo-American history, from the fact that "[a]ll monopolies in any known trade or manufacture . . . encroach upon the liberty of citizens to acquire property and pursue happiness, and were held void at common law in the great *Case of Monopolies*, decided during the reign of Queen Elizabeth."[465]

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involuntary servitude. *Id.* at 89-93 (Field, J., dissenting). Only after these discussions did Field focus on the core topics of whether the Fourteenth Amendment generally places civil liberties under national protection, *id.* at 93-96 (Field, J., dissenting), and whether the law at bar infringed those liberties, *id.* at 96-111 (Field, J., dissenting).

462. *Slaughter-House*, 83 U.S. (16 Wall.) at 96 (Field, J., dissenting) ("The amendment does not attempt to confer any new privileges or immunities upon citizens, or to enumerate or define those already existing. It assumes that there are such privileges and immunities which belong of right to citizens as such, and ordains that they shall not be abridged by State legislation.").

463. "Police-power regulations" were laws restraining liberty to promote the public health, safety, morals, or welfare. Field took an expansive view of the state's police power, *see supra* notes 445-46 and accompanying text, but he thought the monopoly grant at bar had no credible police-power justification. *Slaughter-House*, 83 U.S. (16 Wall.) at 86-89 (Field, J., dissenting).

464. *Slaughter-House*, 83 U.S. (16 Wall.) at 86, 96, 105 (Field, J., dissenting) (unselfconsciously shifting from discussion of the right to engage in common employments to discussion of natural rights).

465. *Id.* at 101-02 (Field, J., dissenting). Field also noted that both the King and Parliament subsequently ratified the judiciary's decision in a famous statute. *Id.* at 104 (Field, J., dissenting). *See* An Act Concerning Monopolies and Dispensations with Penal Laws, and the Forfeitures Thereof, 1623, 21 Jac., ch. 3. Field continued:

> The common law of England, as is thus seen, condemned all monopolies in any known trade or manufacture, and declared void all grants of special privileges whereby others could be deprived of any liberty which they previously had, or be hindered in their lawful trade. The statute of James I . . . only embodied the law as it had been previously declared by the courts of England, although frequently disregarded by the sovereigns of that country.

Slaughter-House, 83 U.S. (16 Wall.) at 104 (Field, J., dissenting).

Former Justice Campbell, counsel for the butchers, said in regard to the importance of common-law (rather than natural-law) principles in the definition of civil liberties: "Now, what are '[p]rivileges and immunities' in the sense of the Constitution? They are undoubtedly the personal and civil rights which usage, tradition, the habits of society, written law, and the

In short, Field viewed the "common law of England [as] the basis of the jurisprudence of the United States,"[466] and thought that jurists should look to that tradition in defining the "indubitable rights and liberties" that Americans claimed as fundamental at the time of the Revolution.[467] Thus, despite Field's belief that "the Creator ha[s] endowed all men 'with certain inalienable rights,' "[468] he turned to common-law tradition to determine the specific rights the Constitution's framers and ratifiers deemed fundamental and intended to be encompassed by the ambiguous clauses of the Fourteenth Amendment. Field was so devoted to history as the source of constitutional principles that, after establishing that the common law proscribes monopolies, he turned to discuss whether this finding was relevant to the case at bar because Louisiana traces its jurisprudence to the civil law.[469] His answer is historical. The civil law, he argued, adopted the antimonopoly principle in a decree by Louis XVI in 1776 before Louisiana became a part of the American commonwealth.[470] Moreover, the Fourteenth Amendment was intended to impose on the citizens of Louisiana the traditional rights of the citizens of the other states.[471]

In his *Slaughter-House* dissent, Field clearly and presciently as-

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common sentiments of people have recognized as forming the basis of the institutions of the country." *Id.* at 55.

466. *Slaughter-House*, 83 U.S. (16 Wall.) at 104 (Field, J., dissenting).

467. *Id.* at 104-05 (Field, J., dissenting). Again, Field's ultimate point is that the common-law tradition clearly proscribes governmental grants of monopoly over common employments. He drove the point home in his conclusion that

> when the Colonies separated from the mother country no privilege was more fully recognized or more completely incorporated into the fundamental law of the country than that every free subject in the British empire was entitled to pursue his happiness by following any of the known and established trades and occupations . . . subject only to such restraints as equally affected all others.

Id. at 105 (Field, J., dissenting). Field argued that because this proscription was part of the common-law tradition, it was part of the American law of civil liberty.

468. *Id.* (Field, J., dissenting) (quoting The Declaration of Independence para. 2 (U.S. 1776)); *see also id.* (Field, J., dissenting) (referring to "inalienable rights, rights which are the gift of the Creator, which the law does not confer, but only recognizes").

469. *Id.* (Field, J., dissenting).

470. *Id.* (Field, J., dissenting).

471. *Id.* (Field, J., dissenting). Note the easy shift from natural-law to common-law rights in Field's remark that

> [the Fourteenth] Amendment was intended to give practical effect to the declaration of 1776 of inalienable rights, rights which are the gift of the Creator, which the law does not confer, but only recognizes. If the trader in London could plead that he was a free citizen of that city against the enforcement to his injury of monopolies, surely under the fourteenth amendment every citizen of the United States should be able to plead his citizenship of the republic as a protection against any similar invasion of his privileges and immunities.

Id. at 105-06 (Field, J., dissenting).

serted that the Civil War amendments made the substance of American civil liberties a matter of federal constitutional law. Having taken that position, Field just as clearly and presciently turned to common-law principle, not natural law, to discern the rights newly placed under federal protection. Happily, in Field's view, the common law is consonant with natural law. Nonetheless, for Field, it was the common law that defines and supplements the specific rights the framers intended to enshrine in the nation's Constitution.[472]

2. Justice Field's Dissent in *Munn v. Illinois*

Field's historism is illustrated also in his famous dissent in *Munn v. Illinois*,[473] the Court's first rate-regulation case. Rate regulation was among the most controversial forms of late-nineteenth-century industrial regulation.[474] The Supreme Court adjudicated its constitutionality in *Munn*,[475] which considered the validity of a schedule of maximum charges that the Illinois Legislature had imposed on the fourteen grain elevators bordering the Chicago River in Chicago.[476] The Court upheld the schedule. Chief Justice Waite, writing for the majority, noted that although the Fourteenth Amendment ordains that no state shall " 'deprive any person of . . . property without due process of law,' " it nowhere defines the phrase's pivotal word "deprive."[477] He turned, therefore, to "usage"[478] and proposed to determine "the principles upon which [the] power of [rate] regulation rests" by "[l]ooking . . . to the common law, from whence came the right which the Constitution pro-

472. Field returned to the subject of his *Slaughter-House* dissent in a subsequent case when the company that prevailed in *Slaughter-House* sought to invoke the Contract Clause to enjoin the legislature's revocation of its monopoly privilege. Butchers' Union Co. v. Crescent City Co., 111 U.S. 746, 754-60 (1884) (Field, J., concurring) (arguing that legislative revocation of law that granted exclusive rights and created monopoly, upheld in *Slaughter-House*, is valid despite clause that it should last for 25 years). The opinion sounds in natural law rather than history. Field's discussion in *Butchers' Union*, however, is more conclusory than his discussion in *Slaughter-House*; it does not derive constitutional rights so much as assert them and their accordance with natural rights. Perhaps this difference reflects Field's assumption that common and natural law accord, rather than the theory that natural law is the source of constitutional principle. *See supra* note 471. Unlike in *Slaughter-House*, no other justice joined in Field's concurrence in *Butchers' Union*, although Harlan and Woods did join in Bradley's concurrence, drawing exclusively from common-law precedent and history. *Butchers' Union*, 111 U.S. at 760-66 (Bradley, J., concurring).

473. 94 U.S. 113, 136-54 (1876) (Field, J., dissenting).

474. Late nineteenth-century rate regulation is discussed in Siegel, *supra* note 9, at 187-232.

475. *Munn* is discussed in the context of rate regulation in Siegel, *supra* note 9, at 194-215.

476. The elevators were owned by approximately 30 people and controlled by nine business firms. *Munn*, 94 U.S. at 131.

477. *Id.* at 123 (quoting U.S. CONST. amend. XIV).

478. *Id.*

tects."[479] Surveying common-law history, Waite not only discovered a principle allowing government to regulate the rates of any business " 'affected with a publick [sic] interest,' "[480] but also found that the granaries along the Chicago River were within the principle because of their " 'virtual' monopoly" of the grain trade between the Midwestern States and the Eastern Seaboard.[481]

Justice Field and two other justices dissented.[482] Field opened his opinion with an extended analysis arguing that the majority's principles imposed a disastrous policy denying property any viable constitutional protection.[483] Field did not, however, use these opening remarks, or any other remarks drawn from policy, affirmatively to establish his own approach.[484] Neither did he draw from natural law.[485] Instead, to establish the correct principle delimiting the power of rate control, Field—like Waite—turned solely to the common law.[486] Indeed, he turned to largely the same sources from which Waite drew.[487] Field, however, dis-

479. *Id.* at 125-26.

480. *Id.* at 125-30 (quoting Lord Chief Justice Hale, *De Portibus Maris*, *in* 1 A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND 45, 77-78 (Francis Hargrave ed., London, T. Wright 1787)).

481. *Id.* at 130-35; *see supra* note 476 and accompanying text (detailing facts on concentration of ownership). *But see* Edmund W. Kitch & Clara A. Bowler, *The Facts of* Munn v. Illinois, 1978 SUP. CT. REV. 313, 316 (saying "whether or not this collusive pricing reflected a monopoly is doubtful," since competition did exist at the level of railroads with which each elevator was affiliated).

482. *Munn*, 94 U.S. at 154 (Story, J., dissenting). Justice Strong wrote a one-paragraph dissent saying he concurred in all Justice Field said. *Id.* (Strong, J., dissenting).

483. *Id.* at 139-45 (Field, J., dissenting).

484. The function of Field's opening remarks is to convince the reader that a wise constitutional system would not contain Waite's principle. Field wanted to prepare the reader for his claim that the common law wisely contains a different principle. *See id.* at 136 (Field, J., dissenting).

485. Field neither attacked Waite's principle nor defended his own in terms of natural law. Indeed, it is hard to imagine any nineteenth-century jurist claiming that natural law credibly addresses rate regulation beyond suggesting that private property be protected. *Id.* (Field, J., dissenting).

486. *Id.* at 144 (Field, J., dissenting). Field quoted approvingly Justice Miller's view that another key constitutional clause protecting property, the Takings Clause, U.S. CONST. amend. V, " 'has received the commendation of jurists, statesmen, and commentators, as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them.' " *Munn*, 94 U.S. at 144 (Field, J., dissenting) (quoting Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 177 (1871)). This argument surely evidences a notion that constitutional provisions enshrine common-law principles. In the main, the claim that Field turned to the common law is premised not upon any comment by Field saying he was doing so, but on what he did. *See id.* (Field, J., dissenting). Note that Justice Miller, who penned the quotation from *Pumpelly*, wrote for the majority in *The Slaughter-House Cases*. *See* The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 57 (1872).

487. *Compare Munn*, 94 U.S. at 126-29 (citing Lord Hale as authority) *with id.* at 139-40, 149-52 (Field, J., dissenting) (same). The similarity of Waite's and Field's approaches in

tilled a common-law principle different from Waite's. Field reviewed the precedents at length to show that Waite misread them and that the common-law concept of business "affected by a public interest" encompassed only enterprises upon which government had conferred special rights or privileges.[488] Rate regulation, Field said, is an "implied condition" of the grant of special privilege; in regulating rates, the state "only determines the conditions upon which its concession shall be enjoyed."[489] At common law, Field insisted, enterprises exercising only common rights were not subject to the uncommon power of rate control.[490]

Munn shows that historism was a widely shared jurisprudence that allowed its adherents to differ substantially on important issues. *See, e.g.*, 1 PAUL VINOGRADOFF, OUTLINES OF HISTORICAL JURISPRUDENCE 157-58 (1920) (historist jurist suggesting the further evolution of law from "individualistic jurisprudence" to "socialistic jurisprudence"); *infra* text accompanying notes 514-29 (discussing interpretive amendments). Thus, although most historist jurists were laissez-faire constitutionalists, the point of this Article is not that historism required that stance. Jurisprudence, like any ideology, influences and constrains policy choices but does not determine them. Although a particular jurisprudence may imply some policy choices more readily than others, ultimately a jurisprudence's practical implications are a matter of social construction, not logical deduction. *See* J.M. Balkin, *Ideology as Constraint*, 43 STAN. L. REV. 1133, 1137-38, 1141-45 (1991) (reviewing ANDREW ALTMAN, CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE (1990)). From the perspective of *Lochner* era jurisprudence, Field's dissent in *Munn*, not Waite's majority opinion, is important for pioneering, indeed constituting, the association between historism and laissez-faire constitutionalism. *See Munn*, 94 U.S. at 136 (Field, J., dissenting).

488. *See Munn*, 94 U.S. at 139 (Field, J., dissenting). Instances of special privileges included entrance into occupations that were public functions (such as turnpikes and railroads), grants of special assistance (such as eminent domain and tax exemptions), and use of public property (such as streets). *Id.* (Field, J., dissenting). Field's theory exemplified the property/privilege distinction. *See* Siegel, *supra* note 24, at 57-66; *see also* Siegel, *supra* note 9, at 189-94, 202-06 (discussing specific application of the property/privilege distinction to the controversy over rate regulation by Field and others).

489. *Munn*, 94 U.S. at 146-47 (Field, J., dissenting) (concluding that "[w]hen the privilege ends, the power of regulation ceases"). Field also wrote:

> [N]o one, I suppose, has ever contended that the State had not a right to prescribe the conditions upon which [its] privilege[s] should be enjoyed. The State in such cases exercises no greater right than an individual may exercise over the use of his own property when leased or loaned to others. . . . The recipient of the privilege, in effect, stipulates to comply with the conditions. It matters not how limited the privilege conferred, its acceptance implies an assent to the regulation of its use and the compensation for it.

Id. at 149 (Field, J., dissenting).

490. *Id.* (Field, J., dissenting). Had Chicago's grain elevators been legal monopolies, they would have been subject to rate regulation. *See id.* at 151 (Field, J., dissenting) (recognizing that English common law required that monopolies subject themselves to regulation). In Field's view, even assuming they were "virtual monopolies," they had established their position through exercise of common rights. *Id.* (Field, J., dissenting). They were exempt from rate control although they were subject to common-law antitrust principles for abuse of their position. Charles W. McCurdy, *The* Knight Sugar *Decision of 1895 and the Modernization of American Corporation Law, 1869-1903*, 53 BUS. HIST. REV. 304, 314-23 (1979) (discussing state antitrust law in the late nineteenth century).

Field's exclusive reliance on the common law to delimit the power of rate control tellingly evidences his historist approach to the issue. So too does his analysis of the one facet of common-law precedent he did not think clearly evidenced his theory: usury laws.[491] Usury laws regulate the prices charged by money lenders even though money lenders seem to exercise no governmentally granted rights or privileges. Yet a knowledge of history, Field said, teaches that money lenders do have a governmentally granted right. Field observed that

> [b]y the ancient common law it was unlawful to take any money for the use of money: all who did so were . . . exposed to the censure of the church; and if, after the death of a person, it was discovered that he had been a usurer whilst living, his chattels were forfeited to the king, and his lands escheated to the lord of the fee. No action could be maintained on any promise to pay for the use of money, because of the unlawfulness of the contract. Whilst the common law thus condemned all usury, Parliament interfered, and made it lawful to take a limited amount of interest.[492]

Consequently, Field asserted, "[t]he practice of regulating by legislation the interest receivable for the use of money, when considered with reference to its origin, is only the assertion of a right of the government to control the extent to which a privilege granted by it may be exercised and enjoyed."[493]

To modern eyes, this is a curious way to argue matters of constitutional law. Field's focus on serendipitous history, not rational principle, seems to show him grasping at straws. Certainly it flies in the face of Holmes's aphorism that "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV."[494] Nonetheless, its curiosity only highlights Justice Field's historist derivation and defense of constitutional principle.

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491. *Munn*, 94 U.S. at 148-49 (Field, J., dissenting). Field indicated that only usury laws troubled him. *Id.* (Field, J., dissenting).

492. *Id.* at 153 (Field, J., dissenting).

493. *Id.* (Field, J., dissenting); *see also id.* at 153-54 (Field, J., dissenting) (discussing regulation of grist mills). Usury laws troubled many laissez-faire constitutionalists. *See supra* note 430.

494. Holmes, *supra* note 365, at 469. Holmes continues with these remarks: "It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." *Id.* For an example of a laissez-faire constitutionalist who took this injunction to heart and therefore argued that usury laws were unconstitutional, see TIEDEMAN, *supra* note 22, at 240-41.

V. THE TRANSITIONAL NATURE OF *LOCHNER* ERA JURISPRUDENCE

The analysis thus far is but a prologue to establishing the transitional nature of *Lochner* era constitutionalism. The *Lochner* era's strong links to the past have been demonstrated,[495] but only the groundwork for its anticipation of the future has been laid. If the *Lochner* era's modernity was merely that it developed a substantive right of property and evolved constitutional doctrine according to permanent principles of social order, the era would have to be pronounced hardly emerged from tradition. Yet the *Lochner* era's belief in constitutional evolution and substantive property rights was more innovative and allied with the future than has appeared, as a review of the debate between the proponents and opponents of laissez-faire constitutionalism will show.

Almost as soon as *Lochner* era jurisprudence moved from the treatise literature[496] and Justices Field's and Bradley's seminal dissents[497] to state court precedents,[498] it was criticized as a substantive and methodological break with constitutional tradition. Charles Shattuck, for example, attacked the substance of *Lochner* era decisions by arguing that *Lochner* era notions of "liberty" expanded the traditional common-law concept.[499] James Thayer issued a famous condemnation of the method of *Lochner* era decisions, claiming they departed from the traditional norm of judicial restraint.[500] These attacks were easily answered, how-

495. The links to the past include conceptualism, the protection of property through limitations implied by constitutional terms (particularly the term "legislative power" in antebellum America and the term "due process of law" in the *Lochner* era), the conviction that the common law was suffused with natural law norms, the use of the common law as a means to divine original intent, and the belief that permanent principles of social order govern doctrinal evolution.

496. *See* COOLEY, *supra* note 9, at 351-413; TIEDEMAN, *supra* note 22, at 137-93.

497. *See supra* text accompanying notes 447-94 (discussing Field); *supra* text accompanying notes 411-12 (discussing Bradley).

498. *See, e.g.*, State v. Loomis, 115 Mo. 307, 320, 22 S.W. 350, 353 (1893); *In re* Jacobs, 98 N.Y. 98, 115 (1885); Godcharles v. Wigeman, 113 Pa. 431, 437, 6 A. 354, 356 (1886).

499. Shattuck, *supra* note 338, at 366-67, 369-70, 380; *id.* at 382 (tracing the common-law concept of liberty from its Teutonic origins to conclude that as known to the founding generation it "mean[t] nothing more or less than freedom of the person from restraint"). Shattuck did not disagree with the Court's jurisprudence, for his paper was also a work of historism, in which he noted that "the law is not a manufacture, but a growth, and that it is, therefore, impossible thoroughly to comprehend its true scope and meaning, without at least some knowledge of its history and development," *id.* at 365, and that "it is reasonable to suppose that the makers of our constitutions used [the terms 'life,' 'liberty,' and 'property'] with [their clear common-law meaning]," *id.* at 379-80. Shattuck's opening remarks are a precis of his historist approach to legal studies. *Id.* at 365-66. Interestingly, his thoughts were awarded the Harvard Law School Association prize for 1890. *Id.* at 365. The following year another historist essay won the Association's prize. *See* Ezra R. Thayer, *Judicial Legislation: Its Legitimate Function in the Development of the Common Law*, 5 HARV. L. REV. 172 (1892).

500. Thayer, *supra* note 1, at 156. Thayer's article is perhaps the most famous and influen-

ever, by both proponents and opponents of *Lochner* era constitutionalism.[501] The *American Law Register and Review* responded to Thayer with an editorial faulting judicial restraint for its inability to preserve "the rights of individuals as it was intended they should be preserved by the constitution."[502] Dean Pound criticized Shattuck for not distinguishing between the common law's narrow precedents and its broader principles, chiding that "the term 'liberty' is broader than Coke's use of it."[503]

In general, opponents of *Lochner* era constitutionalism felt they could not criticize the departure of *Lochner* era decisions from constitutional tradition because they supported even greater departure.[504] In at-

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tial essay ever written on American constitutional law. Richard McMurtrie also wrote an early series of articles attacking *Lochner* era precedents, in which he claimed there had been a shift from strict textual positivism to natural-law jurisprudence. *See* Richard McMurtrie, *A New Canon of Constitutional Interpretation*, 41 AM. L. REG. & REV. 1 (1893); Richard McMurtrie, *Comments on Recent Decisions: Constitutional Law*, 41 AM. L. REG. & REV. 594 (1893); Richard McMurtrie, *The Jurisdiction to Declare Void Acts of Legislation—When Is It Legitimate and When Mere Usurpation of Sovereignty*, 41 AM. L. REG. & REV. 1093 (1893).

501. *See infra* text accompanying notes 502-08; *see also* William D. Lewis, *Civil Liberty and a Written Constitution* (pts. 1-3), 41 AM. L. REG. & REV. 782, 971, 1064 (1893) (an opponent of *Lochner* era constitutionalism refuting the first two articles in McMurtrie's 1893 tripartite analysis, *supra* note 500, on grounds that courts should enforce contemporary consensus values).

502. *Editorial Notes and Comments*, 42 AM. L. REG. & REV. 73, 75 (1894). The editorial, which distinguishes between government structure cases and civil liberties cases, accepts judicial restraint for the former but not the latter. The editorial does not discuss whether restrained review is traditional or not. Considering Marshall's treatment of state legislation in Contract Clause and Commerce Clause litigation, there are good grounds for viewing restrained review as untraditional. In any event, Thayer grounded his argument for judicial restraint in the political principle that courts and legislatures are equal branches of government. Thayer, *supra* note 1, at 150. He admitted his argument did not apply to federal review of state laws. *Id.* at 154-55. William Draper Lewis, an opposition jurist, *see supra* note 37, was one of the review's three editors. He wrote a number of signed pieces for the review on constitutional law at this time, all consistent with the remarks in this editorial. *See, e.g.*, Lewis, *supra* note 501, at 782-85, 1064-71. It is plausible that an opposition jurist wrote the editorial rebuking Thayer.

503. Pound, *supra* note 10, at 467-68. In Pound's view the framers

> laid down principles, not rules, and rules can only be illustrations of those principles so long as facts and opinions remain what they were when the rules were announced. For instance: The cases agree that the term "liberty" is broader than Coke's use of it; that the fact that Coke confined it to freedom of physical motion and locomotion does not exclude a broader interpretation to-day.

Id. Frequently Pound admitted that *Lochner* era constitutionalism reflected tradition. *Id.* at 457, 465. When he denied it, his claim was that common-law precedents contained conflicting principles and choosing between them was a discretionary/political, not a scientific/neutral, act.

504. *See infra* text accompanying notes 505-08. As Dean Pound wrote,

> the same courts that recognize that 'liberty' must include more to-day that [sic] it did as used in Coke's *Second Institute*, lay it down that incapacities are to remain what they were at common law; that new incapacities of fact, arising out of present indus-

tacking *Lochner* era substantive due process decisions, liberal constitutionalists argued for a shift from a judicial method premised upon conceptualism to a method premised upon functionalism.[505] They espoused a change from a method premised upon fidelity to the traditional values of the race (which at least encompassed the founding generation) to a method premised upon fidelity to the values of the present generation.[506] Opposition jurists also argued for a shift in substantive premises from individualism to a moderate collectivism.[507] Opposition

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trial situations, may not be recognized by legislation. This is, in truth, but another illustration of the purely personal character of all natural law theories.

Pound, *supra* note 10, at 468. Opposition jurists frequently conceded that *Lochner* era constitutionalism was faithful to framer intent, traditional Anglo-American values, and jurisprudential norms. For Professor Pound's views, see *supra* note 435. When Pound and other opposition jurists argued that *Lochner* era decisions were departures from tradition, their typical argument was not that the opposition wanted to restore tradition but that there was no tradition. *See, e.g.*, Pound, *supra* note 10, at 482-83 (arguing that traditional equitable principles support governmental interference with capital's oppressive economic power over labor, and thus provide a fund of analogies in opposition to common-law precedents).

Thus, opposition jurists argued not for a restoration of pre-*Lochner* constitutionalism but for a more complete abandonment of it. It is ironic that opponents of laissez-faire constitutionalism eventually came to identify their position as protesting the substantive and methodological innovations of *Lochner* era jurists, and as arguing for a restoration of pre-*Lochner* era norms. *See* Horwitz, *Republicanism*, *supra* note 1, at 61-63 (arguing that the shift to the innovation/restoration argument was a tragedy).

505. *See, e.g.*, Chafee, *supra* note 426, at 957-60 (drawing First Amendment doctrine from balancing of interests, not rights); Pound, *supra* note 9, at 610-11, 615-16, 622-23 (arguing for "jurisprudence of ends"); Pound, *supra* note 10, at 462-64, 467 (claiming, in part, that the founders did not "intend[] to impose the [then current common-law] theory upon us for all time. . . . What they did intend was the *practical* securing of each individual against arbitrary and capricious governmental acts."). Functionalism appraises rules of law based not on their analytical symmetry, but on the way they work in practice.

506. *See* Chafee, *supra* note 426, at 954-55, 958-60; Hand, *supra* note 35, at 498-500, 509; Lewis, *Civil Liberty*, *supra* note 37, at 1070-71; Lewis, *Social Sciences*, *supra* note 37, at 531-39. Pound was the first to argue that the framers did not intend to "dictate philosophical or juristic beliefs and opinions to those who were to come after them." Pound, *supra* note 10, at 467; *see also* Chafee, *supra* note 426, at 954-55 (considering postfounding development in determining content of First Amendment). Professors Levy and Powell recently have returned to this theme. *See* LEONARD LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 1-29 (1988); Powell, *supra* note 321, at 885-923. The most that proponents of *Lochner* era constitutionalism argued was the impossibility of the framers dictating their opinions to the future. *See* TIEDEMAN, *supra* note 326, at 43-45, 150-51, 161-65; *infra* text accompanying notes 515-21.

507. Dean Pound, for example, called for a shift to "a sane individualism." Pound, *supra* note 10, at 482; *see also* COMMONS, *supra* note 36, at 11-64, 71-73, 288-93 (developing the economic and ethical justification for more social control of private property); Lewis, *Social Sciences*, *supra* note 37, at 531-32, 537-38 (emphasizing groups, not individuals); Richard Olney, *Discrimination Against Union Labor—Legal?*, 42 AM. L. REV. 161, 164 (1908) (arguing that it was archaic for labor to deal with employers individually); Pound, *supra* note 10, at 454-58, 466-68, 482-83, 500 (arguing that an individual's concept of justice exaggerates private rights at the expense of public rights). The point is that opposition jurists saw the importance of group organization and activity; they thought the law should not treat people as equal

jurists, in short, argued that *Lochner* era constitutionalism was not sufficiently evolutionary. They grounded their protest in the claim that social evolution had not ceased at the nation's founding or at the middle of the nineteenth century with the rise of Jacksonian democracy and the perfection of classical liberal society.[508]

Lochner era jurists, in turn, felt the vitality of this claim, and it put an edge of urgency in their writings.[509] *Lochner* era jurists agreed with their opponents that public opinion is the basis and touchstone of law.[510] Indeed, their historism implied the ultimate sovereignty of public opinion, even in societies that are not formal democracies. But whatever the situation under despotic governments, *Lochner* era jurists were certain that in a democracy the people's de facto power over law is also their de jure right.[511] Thomas McIntyre Cooley, the doyen of the late nineteenth-century bar and an advocate of moderate laissez-faire principles, exulted in speaking of "our law-makers, the people."[512] Christopher Tiedeman, the leading strict laissez-faire constitutionalist, concluded his study of constitutional theory by saying:

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individuals but as members of unequal groups, or as unequal individuals until represented by a group. *See generally* JOHN LUSTIG, CORPORATE LIBERALISM: THE ORIGINS OF MODERN AMERICAN POLITICAL THEORY, 1890-1920 (1982) (discussing impact of development of large-scale enterprise on classical liberalism).

By "moderate collectivism," this Article means a policy of allowing state power to promote the interests of society at some expense to individual property rights.

508. *See, e.g.*, Lewis, *Social Sciences*, *supra* note 37, at 537-38; Pound, *Philosophy of Law*, *supra* note 37, at 345-46; Pound, *The Need*, *supra* note 37, at 920-26.

509. *See, e.g.*, LOWELL, *supra* note 30, at 8-19; ARNOLD PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895, at 19-82 (paperback ed. 1969) (describing judges' and lawyers' speeches, particularly before bar associations); TIEDEMAN, *supra* note 22, at vi-viii; TIEDEMAN, *supra* note 326, at 80-81.

510. *See* LOWELL, *supra* note 30, at 127-28 (discussing constitutional law and saying "no court can hinder a people that is determined to have its way"); POMEROY, *supra* note 426, at 97 (discussing constitutional law); JOHN N. POMEROY, AN INTRODUCTION TO MUNICIPAL LAW 7-11, 174, 176 (New York, D. Appleton & Co. 1864) (discussing private law); TIEDEMAN, *supra* note 326, at 150, 161-62, 164 (discussing constitutional law); Carter, *supra* note 362, at 231-37 (discussing private law); Cooley, *supra* note 425, at 352 (discussing constitutional law); Thomas M. Cooley, *Labor and Capital Before the Law*, 139 N. AM. REV. 503, 503-08, 516 (1884) (discussing public and private law); Judson, *supra* note 430, at 898 (discussing constitutional law). Arguably, the importance of public opinion to *Lochner* era jurists accounts for Lowell's pioneering interest, as a political scientist, in studying public opinion. *See* A. LAWRENCE LOWELL, PUBLIC OPINION AND POPULAR GOVERNMENT (1913). Opposition jurists are, of course, noted for their devotion to this view. *See, e.g.*, Tyson & Bro. v. Banton, 273 U.S. 418, 446 (1927) (Holmes, J., dissenting) (law is anything that "has a sufficient force of public opinion behind it"); Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) ("Every opinion tends to become a law."); Lewis, *Social Sciences*, *supra* note 37, at 532-34; Pound, *The Need*, *supra* note 37, at 925-26.

511. *See* POMEROY, *supra* note 426, at 4-6; Cooley, *supra* note 425, at 352.

512. Cooley, *supra* note 510, at 516. For Cooley's general analysis of the relation of public sentiment and law, see *id.* at 503-08; Siegel, *supra* note 107, at 1492-97.

> If one professes any faith at all in popular government, [one] must confess to a desire that the popular will shall prevail . . . . And even if . . . [one] does not have any faith in popular government, [one] must admit that, with an enlightened and spirited people, who know their strength, and who know that the living power in all municipal law proceeds from them, it is an absolute impossibility to suppress the popular will.[513]

Recognizing the suzerainty of public opinion, some *Lochner* era jurists, typically those who held judicial appointment, limited the legitimate means by which public pressure changes constitutional law to formal amendment.[514] Scholarly commentators, however, went further. *Lochner* era commentators pointed out that the political branches of government possess the power of judicial appointment; they said judges are themselves subject to imbibing the opinions around them; they suggested that judicial views endure only if they harmonize with public sentiment.[515] *Lochner* era commentators concluded, therefore, that public opinion transforms itself into constitutional law through judicial interpretation. John Pomeroy, for example, defended the institution of judicial review from the charge that it renders the Constitution "fixed, unchangeable, unyielding to the demands of the people's progressive development" by saying that "[t]he courts do yield to the pressure of the popular will, do move with the popular progress, slower perhaps than legislatures and Presidents, but as certainly and as efficiently."[516] Christopher Tiedeman went further and argued that the Court rapidly accom-

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513. TIEDEMAN, *supra* note 326, at 164.

514. *See, e.g.*, COOLEY, *supra* note 429, at 55; Cooley, *supra* note 425, at 351, 353; Thomas M. Cooley, *The Federal Supreme Court—Its Place in the American Constitutional Scheme*, *in* CONSTITUTIONAL HISTORY OF THE UNITED STATES AS SEEN IN THE DEVELOPMENT OF AMERICAN LAW: A COURSE OF LECTURES BEFORE THE POLITICAL SCIENCE ASSOCIATION OF THE UNIVERSITY OF MICHIGAN 29, 31 (New York, G.P. Putnam's Sons 1890). Cooley went further and limited the amendment power to changes consistent with the original Constitution's principles; but by this he did not mean to deny the ultimate power of the public, because he recognized the concept of revolutionary change. *See* Cooley, *Correspondence*, *supra* note 427; Cooley, *Power*, *supra* note 427. Cooley was a judge on the Michigan Supreme Court. Most judges spoke of the Constitution as imposing unchangeable principles with a changing application. *See supra* text accompanying note 425. It seems appropriate to interpret these remarks as expressing the belief that constitutional change is possible through formal amendment but not judicial exegesis. *See also* Ives v. Southern B. Ry., 201 N.Y. 271, 294-95, 94 N.E. 431, 440 (1911) (holding that people, not legislatures, may change constitutions).

515. *See* LOWELL, *supra* note 30, at 128; POMEROY, *supra* note 426, at 97; TIEDEMAN, *supra* note 326, at 161-62, 164; Judson, *supra* note 430, at 898; *see also* Lewis, *Social Sciences*, *supra* note 37, at 536 (an opposition jurist expressing this view). Lowell also stressed the importance of public self-restraint in constitutional development, which implies the ultimate power of public opinion. LOWELL, *supra* note 30, at 89, 106.

516. POMEROY, *supra* note 426, at 97. Significantly, Pomeroy never gives a clear example of interpretive change. This illustrates the stunted modernism of the historist constitutionalists. *See infra* note 518; *infra* text accompanying notes 522-29.

modates itself to public sentiment. Analyzing judicial treatment of the Constitution's indeterminate Contract, Due Process, and Citizenship Clauses; its very specific habeas corpus and direct taxation provisions; and its Tenth Amendment,[517] he asserted that through judicial interpretation "American constitutional law follows and registers all material changes in public opinion, as unerringly as the needle follows the magnetic meridian."[518] He commended the Court's course of decision on the grounds that

> [n]o people are ruled by dead men, or by the utterances of dead men. . . .
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> . . . .
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> . . . [A]s soon as we recognize the present will of the people as the living source of law, we are obliged, in construing the [Constitution], to follow, and give effect to, the present intentions and meaning of the people.[519]

Lochner era commentators may not have been the first to note the power

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517. *See* TIEDEMAN, *supra* note 326, at 51-110, 129-45; Tiedeman, *supra* note 418, at 268.

518. TIEDEMAN, *supra* note 326, at 41. Frederick Judson, a practitioner from St. Louis, concluded his enthusiastic review of the initial substantive due process precedents with the warning that "whatever our written constitutions may provide, it is inevitable that our juristic conception must harmonize with the subtle yet all-powerful influences of public opinion, and with the conception of individual liberty which that public opinion sustains." Judson, *supra* note 430, at 898; *see also* Cooley, *supra* note 510, at 503-09 (jurist denying the propriety of interpretive changes yet noting one with approval); *infra* text accompanying notes 522-29 (outlining the view of A. Lawrence Lowell, who also denied the propriety of interpretive changes, yet ambiguously asserted the power of public sentiment to control the Court).

Tiedeman and Pomeroy also disagreed on whether the Court's interpretive shifts were conscious. Drawing from Pomeroy's private-law jurisprudence, it is proper to assume he thought the process unconscious. *See* POMEROY, *supra* note 510, at 177 (describing judicial change of private law as unconscious). Tiedeman described judicial interpretation of the Constitution as "unconscious[ly]" tracking public opinion. Tiedeman, *supra* note 418, at 271. Yet he all but shows that there was conscious control. *See* TIEDEMAN, *supra* note 326, at 102-03, 106-09 (discussing *The Slaughter-House Cases*); Tiedeman, *supra* note 418, at 275-78 (discussing *The Income Tax Cases*). Yet, like Pomeroy, Tiedeman was not fully modern. When discussing matters of current controversy, Tiedeman always concluded that the Court was adhering to the framers' original principles. *See* TIEDEMAN, *supra* note 326, at 77-78 (discussing due process and natural rights); Tiedeman, *supra* note 418, at 274 (discussing voiding income tax law).

519. TIEDEMAN, *supra* note 326, at 150-54; *see also* Tiedeman, *supra* note 418, at 278 ("The American people are not, and should not be, ruled by the commands of dead men, however distinguished they may be, and however much they and their political wisdom challenge and deserve our veneration."). Tiedeman did find that interpretive changes usually were limited to choices between permissible shades of meaning of the letter of the text. TIEDEMAN, *supra* note 326, at 141, 151. He did give at least one example in which public pressure forced the Court to disregard even the literal meaning of the text. *Id.* at 83-90 (discussing the Constitution during the Civil War); *see generally* Siegel, *supra* note 107, at 1527-39 (discussing Tiedeman's constitutional jurisprudence).

of the Court to amend the Constitution through interpretation,[520] but some of them were the first to assert its inevitability and legitimacy.[521]

Thus, *Lochner* era jurists agreed that constitutional law evolves through formal amendment and through application of traditional principles to new conditions, but they divided on the issue of interpretive amendments. Perhaps no one better represented the intellectual tensions and emergent modernism of his generation than Abbott Lawrence Lowell, who maintained the Court "attempt[s] to carry out the popular will only so far as it has found its expression in the instrument [it] interpret[s,]"[522] and that constitutional change is limited to formal amendment.[523] Yet at the same time, he thought that the framers had no clear notion of the "effect" of the Due Process Clause or any other Bill of Rights provision other than "prevent[ing] . . . legislature[s] from becoming despotic and tyrannous";[524] that the Court necessarily "shaped" the meaning of the Bill of Rights;[525] and that its rulings could survive only with public support.[526] One hears the voice of Holmes,[527] as well as Coo-

520. *See, e.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 400-25 (1819); *see also* JOHN TAYLOR, CONSTRUCTION CONSTRUED, AND CONSTITUTIONS VINDICATED i, 79-202 (repr. ed. 1970) (1st ed. 1820) (states' rights advocate responding to John Marshall's interpretation of the Necessary and Proper Clause); JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND 52-77, 106-54 (Gerald Gunther ed. 1969) (same). Tiedeman referred to Jefferson's view that "John Marshall and the Supreme Court were engaged in making a constitution for the government." TIEDEMAN, *supra* note 326, at 44.

521. Professors Ackerman and Levinson have returned to this theme. *See* Ackerman, *supra* note 1, at 546-47; Sanford Levinson, *"Veneration" and Constitutional Change: James Madison Confronts the Possibility of Constitutional Amendment*, 21 TEX. TECH. L. REV. 2443, 2455-60 (1990).

522. LOWELL, *supra* note 30, at 96; *see also id.* at 125-26 (legal profession has duty of "developing, explaining, and defending" principles founders embedded in Constitution).

523. *Id.* at 104, 124-25 (referring only to formal amendment as "safety-valve" and saying that when the Court voids legislation it "declares, in effect, that the present wishes of the people cannot be carried out, because opposed to their previous intention, or to the views of their remote ancestors").

524. *Id.* at 87; *see supra* text accompanying note 418.

525. LOWELL, *supra* note 30, at 86-87 ("[W]ithout precedent in the history of the world, a body of constitutional law has been formed which is not yet completely crystallized, but is being daily shaped by the decisions of the courts.").

526. *See infra* text accompanying note 529.

527. Holmes, the great opponent of *Lochner* era jurisprudence, is famous for saying that "[w]e do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind." Holmes, *supra* note 365, at 466. This sounds like Lowell. *Cf. infra* text accompanying note 529 (Lowell arguing that the power of the judiciary and the existence of the Constitution are dependent on public opinion). Yet Holmes, unlike Lowell, prefaced his remark with the observation that the principles that ground legal decisions "really are battle grounds where the means do not exist for determinations that shall be good for all time, and where the decision can do no more than embody the preference of a given body in a given time and place." Holmes, *supra* note 365, at 466. Lowell seemed to point toward more permanent and intrinsically correct principles. *See infra* text accompanying note 529.

ley,[528] in Lowell's ultimate claim:

> [I]f at any time the people conclude that constitutional law, as interpreted by lawyers, is absurd or irrational, the power of the judiciary will inevitably vanish, and a great part of the Constitution will be irretrievably swept away. Our constitutional law depends for its force upon the fact that it approves itself to the good sense of the people; and the power of the courts is held upon condition that the precedents established by them are wise, statesmanlike, and founded upon enduring principles of justice which are worthy of the respect of the community.[529]

Despite disparate views on the fact and propriety of interpretive amendment, from their analysis of the relation of public opinion to constitutional evolution the proponents of *Lochner* era jurisprudence drew the same theory of the Court's institutional role. The written Constitution and judicial review, they said, empower the Court to act as a drag on fundamental social change.[530] Judicial adherence to traditional principles steadies the course of reform, but cannot (and should not) thwart it.[531] It assures that constitutional change will reflect "the thought of the

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528. Cooley, the leading proponent of *Lochner* era jurisprudence, opposed the theory of interpretive amendment, thought the Constitution was based upon proper principles, and said the masses could (and must) be taught them if the Constitution was to survive. *See* Cooley, *supra* note 510, at 512-16; *supra* text accompanying note 512.

529. LOWELL, *supra* note 30, at 128; *see also supra* notes 516, 518 (discussing Pomeroy on interpretive amendment and Tiedeman on controversial issues as other examples of *Lochner* era jurists' blunted modernism on the issue of interpretive amendment).

530. POMEROY, *supra* note 426, at 97; TIEDEMAN, *supra* note 326, at 163-64; Cooley, *supra* note 425, at 353-54.

531. In discussing the Court's response to shifts in public opinion, Pomeroy remarks:

> [I]t is true that the movement of the Judiciary will be generally more slow and uniform than that of legislatures and executives. This fact, instead of being an objection, is a consideration of great weight in favor of giving to the national Supreme Court the function of interpreting the Constitution. That instrument, as the organic law of the whole people, is the source of all other legislation. Its meaning should be measurably fixed and certain. Congress may readily and frequently change its policy; its work may be done under the influence of a momentary pressure; it may commit mistakes which require speedy amendment; and the consequences, though evil, are transitory; they do not reach to the very foundation of the political structure. But rapid and sudden alterations in the construction of the organic law, assumptions of powers one day which are denied the next, affect the entire body-politic; they place every citizen in a state of constant uncertainty as to his rights and duties; they produce a condition of partial anarchy. England has its traditions, its social classes, its reverence for the past, to give steadiness to political progress. We have rejected these as inconsistent with our republican institutions. If we also reject the Judiciary as a controlling element in our civil polity, we shall be left without any thing to give stability to the administration of affairs, to render the growth which all desire, healthy and permanent, the progress continuous and sure.

POMEROY, *supra* note 426, at 97-98; *see also* Cooley, *supra* note 425, at 353-54 ("no maxim of statesmanship can be wiser than to make haste slowly").

people; not . . . the thought evolved in excitement or hot blood, but the sober second thought;"[532] that constitutional evolution realizes "the people's will, . . . [not] their whim."[533]

Clearly, *Lochner* era jurists realized the importance of public opinion in the evolution of constitutional law. In propounding laissez-faire constitutionalism, they believed public opinion was on their side.[534] They saw the courts and the legal profession as defenders of the nation's traditions and as educators of public opinon.[535] They saw the written Constitution and the power of judicial review as the ultimate bulwark of their views,[536] a bulwark that was vincible through formal and interpretive amendment.

From this perspective, *Lochner* era jurisprudence may be seen as having much in common with the jurisprudence of its opponents and as being a transitional concept, forming a bridge from early to modern American constitutional theory.[537] On the one hand, the *Lochner* era

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532. Cooley, *supra* note 425, at 350.

533. JAMES R. LOWELL, DEMOCRACY AND OTHER PAPERS 24 (Boston, Houghton Mifflin 1898), *cited and paraphrased in* TIEDEMAN, *supra* note 326, at 164, *and quoted in* Judson, *supra* note 430, at 398. Cooley referred to the need to avoid "yield[ing] . . . to the whim of the people." Cooley, *supra* note 425, at 350. For similar sentiments expressed in other phrases, see GRAY, *supra* note 370, at 290 (in Carter's private-law jurisprudence "the judge is appealing from Philip drunk to Philip sober"); LOWELL, *supra* note 30, at 22 ("to make it clear that the popular feeling is not caused by temporary excitement, but is the result of a mature and lasting opinion"); *id.* at 127 ("sober good sense of the people themselves").

534. *See* LOWELL, *supra* note 30, at 76-77, 126, 132; TIEDEMAN, *supra* note 326, at 70-71, 78-81 (recognizing both popular approval for traditional principles and spreading protest); TIEDEMAN, *supra* note 22, at vii (same); Cooley, *supra* note 510, at 503-09, 516. Pound agreed that the early *Lochner* era cases overruled statutes for which public opinion was not prepared. *See* Pound, *supra* note 10, at 457-58, 487. Thus, *Lochner* era jurists believed not only that their understanding of Anglo-American tradition had been crystallized by the time of the nation's founding, but that it was still adhered to by the people. Certainly some jurists thought this was so because it had to be so. Laissez-faire constitutionalism was the fruit of the germs of the Anglo-Saxon race; it was the present application of principles of social organization that traced back to the Teutonic tribes in the German forests.

535. *See* LOWELL, *supra* note 30, at 126, 134-35; TIEDEMAN, *supra* note 22, at vii-viii; Thomas M. Cooley, *Sources of Inspiration in Legal Pursuits*, 9 W. JURIST 515, 527, 529-34 (1875). Hence the bench and bar began an outpouring of speeches to bar and civic organizations. *See* PAUL, *supra* note 509, at 19-103.

536. *See, e.g.*, LOWELL, *supra* note 30, at 125 (attributing written Constitution to "[t]he truth . . . that our fathers . . . believed that there were principles more important than the execution of every popular wish, and rights which ought not to be violated by the impulse and excitement of a majority"); POMEROY, *supra* note 426, at 97-98; TIEDEMAN, *supra* note 326, at 81, 163-64 (asserting that Constitution legalizes resistance to popular will).

537. Dean Pound and Professor Stone believed that the historical school of jurisprudence was a bridge concept in private law from rationalistic jurisprudence to sociological jurisprudence. The contribution of the historical school in private law is that it initiated the notion of law as a product of social development rather than reason (natural law) or will (positivism, analytic jurisprudence). *See* ROSCOE POUND, INTERPRETATIONS OF LEGAL HISTORY 141-51

jurists' historism and their notion of substantive due process protection of property—which was imbued with individualism and refused to allow the state to address directly the relations between labor and capital—constitutionalized a past that was fading beyond retrieval, and created a doctrine that eventually was overthrown.[538] On the other hand, the same method and doctrine eventually articulated other supposedly traditional values, such as family autonomy[539] and freedom of speech,[540] which were the substantive beginning of the next constitutional order.[541] Opposition jurists joined in[542] and, in the time of their dominance, developed these

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(1923); STONE, *supra* note 19, at 446-84; Pound, *The Scope and Purpose*, *supra* note 37, at 604-09; *see also* Siegel, *supra* note 107 (discussing three late nineteenth century constitutional commentators).

538. In Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), in an opinion written by Justice Holmes, the Court granted property a type of substantive due process protection that is still respected today. *Id.* at 416. Under the regime of New Deal constitutionalism, however, the protections of *Pennsylvania Coal* have been minimal to nonexistent. *See, e.g.*, Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 122-28 (1978). Thus, substantive due process protection of property lives to some degree, and some have argued for its revival. *See, e.g.*, EPSTEIN, *supra* note 4, at 331-50. Perhaps a revival is occurring. *See, e.g.*, Nollan v. California Coastal Comm'n, 483 U.S. 825, 839 (1987); *see also* Margaret J. Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1671-84 (1988) (discussing increasing tendency to find takings in acts isolating physical or conceptual parts of the property); Terry Rice, *What Property Interests Merit Takings Protection?*, 43 LAND USE L. & ZONING DIG. 3 (Feb. 1991) (same).

539. *See* Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925); Meyer v. Nebraska, 262 U.S. 390, 400-01 (1923); Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655, 663 (1875) (discussing choice of marital partner as nontextual constitutional right); People v. Turner, 55 Ill. 280, 287-88 (1870) (voiding reform school act on grounds of natural right of parents to custody of children); TIEDEMAN, *supra* note 22, at 554-56 (plenary state power over parent and child relationship "as long as the limitations upon the parental control are confined to the ordinary ones, with which long usage has made us familiar").

540. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925) (first case in which the Court's majority discussed First Amendment as a due process limitation applicable to the states); COOLEY, *supra* note 9, at 414-66 (arguing for substantial press and speech protections).

541. The *Lochner* era origins of significant constitutional protection of these rights is more than simply temporal. For example, "liberty of contract" reasoning is mixed into the family autonomy precedents. *See Pierce*, 268 U.S. at 533, 535-36; *Meyer*, 262 U.S. at 399-400; *see also* Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) (although opposing the notion of substantive due process, stating that as long as the doctrine exists it should protect speech as well as property), *overruled by* Brandenburg v. Ohio, 395 U.S. 444, 449 (1969); *Meyer*, 262 U.S. at 403 (Holmes, J., dissenting) (Holmes's dissenting opinion accompanies the following case, Bartels v. Iowa, 262 U.S. 404, 412 (1923)); *cf.* MARK A. GRABER, TRANSFORMING FREE SPEECH 17-50 (1991) (describing conservative *Lochner* era jurists' defense of free speech).

542. On opposition jurists' participation in the development of substantive rights, even in substantive protection of property, see *Pennsylvania Coal*, 260 U.S. at 415-16 (Holmes, J.) (voiding safety regulation of property for going "too far"); Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) (offering to void laws that "a rational and fair man necessarily would admit . . . infringe fundamental principles as they have been understood by the traditions of our people and our law"); Chafee, *supra* note 426, at 960 (arguing for enlarged

and other doctrines[543] because of something proponents and opponents of the *Lochner* era shared: a view of constitutional law as ultimately the expression of the culture that shapes it and that it shapes. *Lochner* era jurists bequeathed to their victorious opponents the notion that constitutional law must evolve because society evolves. *Lochner* era jurists, therefore, also bequeathed to their successors the conundrums inherent in the notion—not of a judicially elaborated constitution in a democratic state; that conundrum has always been with us[544]—of a judicially elaborated constitution that of necessity can have little or no true mooring in the timeless verities of moral truth or framer intent.

The break with the static constitution of natural law and framer intent, and the elaboration of an evolutionary constitution, were commitments shared by the proponents and opponents of *Lochner* era constitutionalism. Their shared commitments arose from their common ground: they were the first generation of jurists to live in the modern world, a world whose economic, social, and philosophical bases differed markedly from the world of the founders. Their responses to the challenges of their times diverged. Substantively, the proponents and opponents of *Lochner* era constitutionalism differed over the extent to which government should redistribute wealth to redress the inequities of the new order.[545] Substantive dispute gave fire to their jurisprudential debate over the correct approach to constitutional evolution. Methodologically, what separated the proponents and opponents of *Lochner* era jurisprudence was the conceptualism of the former and the functionalism of the latter, and the former's search for fundamental values in the traditions of the past as compared to the latter's search in the values of the present.[546]

In sum, the *Lochner* era's defense of property, conceptualism, and

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protection of speech). *But see* Bartels v. Iowa, 262 U.S. 404, 412 (1923) (Holmes, J., dissenting) (saying he dissented in *Bartels* and *Meyer* because "it appears to me to present a question upon which men reasonably might differ and therefore I am unable to say that the Constitution of the United States prevents the experiment being tried"); *Meyer*, 262 U.S. at 403 (Holmes J., dissenting).

543. *See, e.g.*, West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (protecting symbolic speech); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (recognizing right to procreate). The importance of protecting substantive, rather than vested, rights in the modern era is tellingly illustrated by the role "expectations" play in the law of warrantless searches. *See* Katz v. United States, 389 U.S. 347, 352 (1967). I thank Professor Levinson for bringing this view of *Katz* to my attention.

544. *See* COVER, *supra* note 136, at 134-35.

545. Horwitz, *Republicanism*, *supra* note 1, at 58-63; Horwitz, *History and Theory*, *supra* note 1, at 1827-30; Lewis, *Social Sciences*, *supra* note 37, at 533 ("law must change with changes in social ideas").

546. This difference involved a metaphysical dispute: is social evolution governed by immanent principles of social order or by shifting power relations?

belief in permanent principles of constitutional law link it to the antebellum past. Its development of substantive rights, its evolutionary consciousness,[547] and its view that public opinion ultimately determines the content and growth of constitutional law, link it to the post-Depression future. Indeed, the *Lochner* era commentators' view of the governing force of public opinion was so advanced that modern constitutionalism has yet to assimilate it.[548]

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547. One thinks of Richard Hofstadter's comment on social Darwinism: "We may wonder whether, in the entire history of thought, there was ever a conservatism so utterly progressive as this." RICHARD HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT 8 (1944).

548. Witness the continued and growing commitment to a jurisprudence of moral truth and framer intent. *See* RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN (1987) (framer intent); RAOUL BERGER, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1989) (framer intent); EPSTEIN, *supra* note 4, at 3-31 (moral truth and implication of framer intent); RICHARD POSNER, THE PROBLEMS OF JURISPRUDENCE 313-92 (1990) (qualified support for corrective justice and wealth maximization as ends of law); Richard Epstein, *The Static Conception of the Common Law*, 9 J. LEGAL STUD. 253, 254 (1980) (moral truth); Douglas Kmiec, *The Original Understanding of the Taking Clause Is Neither Weak nor Obtuse*, 88 COLUM. L. REV. 1630, 1655 (1988) (original intent); Edwin Meese III, *Toward a Jurisprudence of Original Intent*, 11 HARV. J.L. & PUB. POL'Y 5, 10 (1988) (original intent); Michael Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 STAN. L. REV. 871, 903 (1989) (criticizing antifoundationalist theories); Michael Moore, *Moral Reality*, 1982 WIS. L. REV. 1061, 1153-55 (moral truth); *see also* William Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 696-99, 706 (1976) (framer-intent constitutionalism advocated by the present Chief Justice). Although the Court disclaims both the ability to discern moral truth and the power to impose it through constitutional interpretation, its recent interest in the nation's "specific historical tradition" reflects the commentators' renewed interest in framer intent. It also suggests the survival of the *Lochner* era technique of using the traditions of the Anglo-American people (as encapsulated in the common law) to define the Constitution's vague protections of civil liberty. See also Justice Harlan's remark, in Poe v. Ullman, 367 U.S. 497 (1961), that in adjudicating substantive due process cases the Court should reflect

> the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound.

Id. at 542 (Harlan, J., dissenting).