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# The Return of Lochner

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## THE RETURN OF *LOCHNER*

Thomas B. Colby† & Peter J. Smith††

*For a very long time, it has been an article of faith among liberals and conservatives alike that Lochner v. New York was obviously and irredeemably wrong. Lochner is one of only a few cases that constitute our “anti-canon,” universally reviled by the legal community as the “worst of the worst.” Our first claim in this Article is that the orthodoxy in modern conservative legal thought about Lochner is on the verge of changing. We believe that conservatives are ready, once again, to embrace Lochner—although perhaps not in name—by recommitting to some form of robust judicial protection for economic rights. Our second claim is that this impending change has been greatly facilitated by important modifications to the theory of originalism, which has served for nearly a half century as the intellectual framework for conservative legal thought. That intellectual framework has been evolving for decades, and it has now evolved to the point where it can plausibly accommodate claims that the Constitution protects economic liberty.*

*These developments are revealing about how legal movements evolve generally. Sometimes the courts change the doctrine, and the theorists scramble to keep up. This is, roughly speaking, what happened with liberal legal thought in the second half of the twentieth century. Just when liberal legal theorists, reeling from the Lochner era, had settled on the view that the courts should exercise judicial review very sparingly—and perhaps never to enforce rights not specifically identified in the Constitution—the liberal Court began to exercise judicial review more frequently and aggressively, often to protect rights not clearly identified in the Constitution. Liberal theorists then struggled for years to develop an account of the appropriate judicial role that condemned Lochner but legitimized later cases protecting fundamental rights and vulnerable minorities. Modern conservative legal thought seems to be following the opposite progression: the theorists lead, the opinion leaders gradually sign on, and judges eventually follow. Whereas liberal judges created constitutional doctrine in the absence of a metatheory of constitutional interpretation—essentially building the house before the architectural blueprints were completed—conservatives have patiently waited for the theory to come together—for the blueprints to be drawn—before moving forward. But the plans are now largely ready, and we expect that it will not be long before the bulldozers break ground.*

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INTRODUCTION .....	528
I. <i>LOCHNER</i> : THE CASE, THE ERA, AND THE SYMBOL .....	533
II. THE EVOLUTION OF LIBERAL LEGAL THOUGHT	
ABOUT <i>LOCHNER</i> .....	541
III. THE EVOLUTION OF CONSERVATIVE LEGAL THOUGHT	
ABOUT <i>LOCHNER</i> .....	558
IV. ORIGINALISM AND <i>LOCHNER</i> .....	580
CONCLUSION .....	600

## INTRODUCTION

For a very long time, it has been an article of faith among those who pay attention to constitutional law that *Lochner v. New York*<sup>1</sup> was obviously and irredeemably wrong. *Lochner*, in which the Supreme Court identified and protected an unwritten right to liberty of contract, is a “pariah” that would “win the prize, if there were one, for the most widely reviled decision of the last hundred [and some] years.”<sup>2</sup> This has not just been the view of liberal elites in the legal academy. It has been the view of just about everyone. Even in this era of deep polarization—on matters of constitutional law and theory as much as on matters of politics and policy—the overwhelming majority of scholars and judges, liberal and conservative alike,<sup>3</sup> agree on *Lochner*’s disfavored status. It is one of only a few cases that constitute our “anticanon,”<sup>4</sup> universally reviled by the legal community as the “worst of the worst.”<sup>5</sup>

<sup>1</sup> 198 U.S. 45 (1905).

<sup>2</sup> David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373, 373–74 (2003).

<sup>3</sup> We recognize that the terms “conservative” and “liberal” are imprecise and cannot be measured by easily applied metrics, both because the popular meaning of those terms changes over time and because most individuals hold some views that might (at one time or another) be considered conservative and other views that might (at one time or another) be considered liberal. The categorizing schemes that political scientists have devised—see, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* XV (1993); Jeffrey A. Segal et al., *Ideological Values and the Votes of the U.S. Supreme Court Justices Revisited*, 57 J. POL. 812, 813 (1995)—are, by necessity, “obviously crude.” Richard H. Fallon, *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. CHI. L. REV. 429, 447–48 (2002); see also DAVID KAROL, *PARTY POSITION CHANGE IN AMERICAN POLITICS: COALITION MANAGEMENT* 182–85 (2009) (explaining how American political party positions evolved in the second half of the twentieth century). We use the terms here in their popular sense, with an acknowledgement that it is quite difficult to reduce to rigid categories the vast range of variation in ideology. Because we describe generally recognizable legal movements and schools of thought, we believe that this relatively crude use of the terms “conservative” and “liberal” is adequate for our purposes.

<sup>4</sup> See, e.g., Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380 (2011); Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 245 (1998).

<sup>5</sup> Greene, *supra* note 4, at 387. There is, however, substantial debate today about whether *Lochner* was *always* wrong. See Jack M. Balkin, “*Wrong the Day It Was Decided*”: *Lochner* and *Constitutional Historicism*, 85 B.U. L. REV. 677, 678 (2005) (“Until quite recently, most legal academics, not to mention most judges, would have viewed *Lochner* and *Plessy* in similar ways. Both were not only wrong, but wrong the day they were decided; they were

There is, to be sure, disagreement about just *why it is* that *Lochner* was wrong. To many conservatives today, *Lochner* was wrong because courts have no business protecting a “constitutional” right—in that case, the freedom of contract—that is not mentioned in the text of the Constitution.<sup>6</sup> Liberals today, by contrast, typically condemn *Lochner* not because it enforced an unenumerated right *simpliciter*, but instead because it enforced a particular right that is undeserving of constitutional protection.<sup>7</sup>

Nor has liberal or conservative legal thought about the reasons for the wrongness of *Lochner* (and the approach that it represents) been static over the years. For several decades after the *Lochner* decision, and others like it that frustrated Progressive reforms, liberals embraced the view that *Lochner* was wrong in large part because courts should invalidate the acts of legislative majorities only in very rare circumstances.<sup>8</sup> In the last sixty years or so, however, liberals have had to reconcile their repudiation of *Lochner* with their embrace of the modern judiciary’s more robust role, which, among other things, protects various unenumerated rights, such as the right to reproductive choice, from legislative interference.<sup>9</sup>

Conservative legal thought about *Lochner* has evolved as well. The Court that decided *Lochner*—and the Court that presided in the era that now bears its name—is generally viewed as quite conservative, and so at least for a time conservative legal thought embraced aggressive judicial protection of economic liberty.<sup>10</sup> But for many decades now, orthodoxy in mainstream conservative legal thought has held

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central examples of how courts should not decide constitutional cases. *Plessy* still remains in that category. But for an increasing number of legal thinkers, *Lochner* no longer does.”). Many scholars take the view that “*Lochner* was wrong when it was decided.” Victoria F. Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CALIF. L. REV. 751, 753 (2009). Others are of the view that the decision was in fact defensible given the legal norms and intellectual assumptions of its time and became obviously problematic only in light of legal norms that developed in the modern era. See, e.g., 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 280 (1998). Some scholars of the *Lochner* era, for example, have endeavored to demonstrate that the Court’s defense of economic rights was consistent with the jurisprudential understandings of the time, particularly with the understanding of the police power, see, e.g., Nourse, *supra*, at 761–63, or with a tradition of skepticism of “class” or special-interest legislation, see, e.g., HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 7 (1993); G. Edward White, *Revisiting Substantive Due Process and Holmes’s Lochner Dissent*, 63 BROOK. L. REV. 87, 97 (1997). For this reason, Jack Balkin argues, *Lochner* has “slowly lost its anti-canonical status for a significant number of legal scholars,” even if most of those scholars conclude that *Lochner* would be a misguided (or obviously incorrect) interpretation of the Constitution today. Balkin, *supra*, at 684.

<sup>6</sup> See *infra* note 245 and accompanying text.

<sup>7</sup> See Rebecca L. Brown, *The Art of Reading Lochner*, 1 N.Y.U. J. L. & LIBERTY 570, 572–73 (2005) (cataloging the various forms of critique of *Lochner*).

<sup>8</sup> See *infra* notes 99–104 and accompanying text.

<sup>9</sup> See *infra* Part II.

<sup>10</sup> See discussion *infra* notes 222–24 and accompanying text.

that *Lochner* exemplifies a discredited and unacceptable form of judicial activism.<sup>11</sup> This is not to say that conservatives are no longer sympathetic to claims of economic liberty; to the contrary, many strains of modern conservative *political* thought embrace the claim that the government generally should not interfere in private economic ordering.<sup>12</sup> But conservative *legal* thought is a different matter.<sup>13</sup>

The modern conservative legal movement arose in response to the Warren Court's unbridled exercises of judicial review, and in particular to the Warren and Burger Courts' willingness to identify and protect unenumerated rights.<sup>14</sup> The central thrust of conservative criticism of those Courts was that, in cases like *Griswold v. Connecticut*<sup>15</sup> and *Roe v. Wade*<sup>16</sup>—which identified and protected unenumerated constitutional rights to marital sexual privacy and abortion, respectively—the Justices had impermissibly substituted their personal values for the text and historical meaning of the Constitution.<sup>17</sup>

This criticism, of course, ostensibly applies with equal force to the Court's decision in *Lochner* and its efforts in the late-nineteenth and early-twentieth centuries to protect the unenumerated right of contract.<sup>18</sup> And, indeed, mainstream conservative legal thought has frequently analogized the modern Court's protection of privacy and sexual autonomy to the *Lochner* Court's protection of economic rights. As Robert Bork has explained, substantive due process (and more generally all judicial protection of unenumerated rights) "is and always has been an improper doctrine," which means that "*Griswold's* antecedents"—including *Lochner*—"were also wrongly decided."<sup>19</sup> Indeed, conservatives have often sought to discredit the Court's modern substantive due process cases by explicitly tying them to—and declar-

<sup>11</sup> See *infra* notes 245–64 and accompanying text.

<sup>12</sup> See *infra* notes 317–25 and accompanying text.

<sup>13</sup> See Sujit Choudhry, *The Lochner Era and Comparative Constitutionalism*, 2 INT'L J. CONST. L. 1, 13–14 (2004) (noting that many conservative opponents of *Lochner*, including Robert Bork, "reject[ ] its theory of constitutional adjudication but accept[ ] its political theory").

<sup>14</sup> See *infra* notes 407–09 and accompanying text.

<sup>15</sup> 381 U.S. 479, 486 (1965).

<sup>16</sup> 410 U.S. 113, 164–65 (1973).

<sup>17</sup> See, e.g., OFFICE OF LEGAL POLICY, ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK 1 (U.S. Dep't of Justice 1987); William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 695, 695 (1976) (arguing that judges should not substitute "some other set of values for those which may be derived from the language and intent of the framers"); RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 284–87 (1977) (arguing that the "Justices' value choices may not displace those of the Framers").

<sup>18</sup> See *infra* notes 427–35 and accompanying text.

<sup>19</sup> Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 11 (1971).

ing them to be jurisprudentially indistinguishable from—the universally reviled *Lochner* decision.<sup>20</sup>

The central thrust of modern conservative legal thought, in other words, has been that judges should exercise restraint<sup>21</sup> and humility<sup>22</sup> and that judicial protection of unenumerated rights is the hubristic antithesis of restraint.<sup>23</sup> Accordingly, it has been accepted wisdom in the conservative legal movement for the last several decades that “judicial activism in the service of property and free enterprise”<sup>24</sup>—that is, *Lochner*—and judicial activism in the service of privacy and reproductive autonomy—that is, *Griswold* and *Roe*—are equally pernicious.<sup>25</sup>

Our first claim in this Article is that the orthodoxy in modern conservative legal thought is on the verge of changing. There are increasing signs that the movement is ready, once again, to embrace *Lochner*—although perhaps not in name—by recommitting to some form of robust judicial protection for economic rights. The signs come from prominent judges, from legal scholars, and from opinion leaders in the conservative political movement.

Our second claim is that, although there likely are many factors contributing to this change, it has been greatly facilitated by important modifications to the theory of originalism,<sup>26</sup> which has served for nearly a half century as the intellectual framework for conservative legal thought. That intellectual framework has been evolving for decades,<sup>27</sup> and it has now evolved to the point where it can plausibly accommodate claims that the Constitution protects economic liberty.

<sup>20</sup> See *infra* notes 296–303 and accompanying text.

<sup>21</sup> See, e.g., Lillian R. BeVier, *The Integrity and Impersonality of Originalism*, 19 HARV. J.L. & PUB. POL’Y 283, 286 (1996); Lino A. Graglia, *Constitutional Interpretation*, 44 SYRACUSE L. REV. 631, 640 (1993).

<sup>22</sup> See, e.g., Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin’s “Moral Reading” of the Constitution*, 65 FORDHAM L. REV. 1269, 1292–93 (1997).

<sup>23</sup> See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863 (1989) (arguing that nonoriginalism, by seeking to enforce “fundamental values,” facilitates the “judicial personalization of the law”).

<sup>24</sup> ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 36 (1990).

<sup>25</sup> See, e.g., BERGER, *supra* note 17, at 266 (“The logic that bars the one equally bars the other.”); BORK, *supra* note 24, at 43 (“[S]ubstantive due process, wherever it appears, is never more than a pretense that the judge’s views are in the Constitution.”).

<sup>26</sup> As we have previously noted, there are, in fact, many distinct constitutional theories that claim the label of “originalism.” See Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 244–45 (2009). The unifying feature of all of those theories is that they generally treat “the discoverable meaning of the Constitution at the time of its initial adoption as authoritative for purposes of constitutional interpretation in the present.” Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 599 (2004).

<sup>27</sup> See Colby & Smith, *supra* note 26, at 247–62; Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 716–20 (2011).

Specifically, originalism has slowly changed from a theory of judging, concerned principally with judicial restraint and focused narrowly on the intent and expectations of the framers, to an interpretive methodology that seeks objective semantic textual meaning, sometimes at a high level of generality, and that is less concerned about restraint than it is about fidelity to original constitutional meaning.<sup>28</sup> Unlike its forerunner, this “new originalism”<sup>29</sup> can readily accommodate claims that the Fourteenth Amendment (and perhaps other provisions of the Constitution as well) protects an unenumerated right to freedom of contract. Originalists can now plausibly say that fidelity to the Constitution, as distinct from conservative instrumentalism, requires judicial protection of the right to contract.

The developments that we see (and foresee) in conservative legal thought are revealing about how legal movements evolve generally. Sometimes the courts change the doctrine, and the theorists scramble to keep up. This is, roughly speaking, what happened with liberal legal thought in the second half of the twentieth century. Just when liberal legal theorists, reeling from the *Lochner* era, had settled on the view that the courts should exercise judicial review very sparingly—and perhaps never to enforce rights not specifically identified in the Constitution—the liberal Court began to exercise judicial review more frequently and aggressively, often to protect rights not clearly identified in the Constitution.<sup>30</sup> Liberal theorists then struggled for years to develop an account of the appropriate judicial role that condemned *Lochner* but legitimized later cases protecting fundamental rights and vulnerable minorities.<sup>31</sup>

Modern conservative legal thought seems to be following the opposite progression: the theorists lead, the opinion leaders gradually sign on, and the courts eventually follow. Whereas liberal judges created constitutional doctrine in the absence of a metatheory of constitutional interpretation—essentially building the house before the architectural blueprints were completed—conservatives have patiently waited for the theory to come together—for the blueprints to be drawn—before moving forward. But the plans are now largely ready, and we expect that it will not be long before the bulldozers break ground.

In Part I of this Article, we briefly summarize the reasoning and holding of *Lochner*, situate that decision in historical context, and describe how it became a symbol of an era. In Part II, we recount the evolution of liberal legal thought about *Lochner*. In Part III, we outline

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<sup>28</sup> See *infra* notes 462–74 and accompanying text.

<sup>29</sup> Whittington, *supra* note 26, at 607–12.

<sup>30</sup> See *infra* notes 165–66, 181 and accompanying text.

<sup>31</sup> See *infra* notes 185–97 and accompanying text.

the evolution of conservative legal thought about *Lochner*, culminating in what we see as the nascent rebirth of mainstream conservative support for judicial protection for unenumerated economic rights. In Part IV, we delve deeper into originalist theory to situate and explain the impending reemergence of *Lochnerism* on the right.

## I

## LOCHNER: THE CASE, THE ERA, AND THE SYMBOL

In 1905, in its 5–4 decision in *Lochner v. New York*,<sup>32</sup> the Supreme Court invalidated a New York law prohibiting bakery employees from working more than ten hours per day or sixty hours per week. The Court held that the law impermissibly interfered with the liberty of contract protected by the Due Process Clause of the Fourteenth Amendment.<sup>33</sup> Justice Peckham, writing for the majority, reasoned that the law was not necessary to protect bakery employees from an imbalance in bargaining power,<sup>34</sup> to protect the public health,<sup>35</sup> or to protect the health of bakery employees.<sup>36</sup> Accordingly, the Court concluded that the law was not a “fair, reasonable and appropriate exercise” of the state’s police power, but rather was an “unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty.”<sup>37</sup>

Justice Harlan (joined by Justices White and Day) and Justice Holmes filed dissenting opinions. Harlan agreed that the Fourteenth Amendment protects a liberty of contract, but he advanced a much more capacious view of the states’ police power and a much more limited view of the Court’s role in protecting the liberty of contract (and, perhaps, constitutional rights generally).<sup>38</sup> In his view, the “liberty of contract is subject to such regulations as the State may reasonably prescribe for the common good and the well-being of society.”<sup>39</sup> In reviewing a statute that interfered with the liberty of contract, Harlan would simply have inquired whether the “means devised by the State are germane to an end which may be lawfully accomplished”; as long as there was a “real or substantial relation between the means employed by the State and the end sought to be accomplished by its legislation,” the law was an appropriate exercise of the police power.<sup>40</sup> In Harlan’s view, “a legislative enactment, Federal or state, is never to

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<sup>32</sup> 198 U.S. 45, 57 (1905).

<sup>33</sup> *See id.* at 64.

<sup>34</sup> *See id.* at 57.

<sup>35</sup> *See id.*

<sup>36</sup> *See id.* at 59.

<sup>37</sup> *Id.* at 56.

<sup>38</sup> *See* *Lochner v. New York*, 198 U.S. 45, 67–68 (1905) (Harlan, J., dissenting).

<sup>39</sup> *Id.* at 68.

<sup>40</sup> *Id.* at 69–70.



be disregarded or held invalid unless it be, beyond question, plainly and palpably in excess of legislative power.”<sup>41</sup> Because “as all know, the air constantly breathed by [bakery employees] is not as pure and healthful as that to be found in some other establishments or out of doors,” Harlan concluded that the Court had no basis for disturbing the New York legislature’s judgment that “labor in excess of sixty hours during a week in such establishments may endanger the health of those who thus labor.”<sup>42</sup>

Justice Holmes’s brief dissent rejected the Court’s (and Justice Harlan’s) premise that the Fourteenth Amendment protects a liberty of contract.<sup>43</sup> He declared that “a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*,” and he stressed in particular that the Fourteenth Amendment “does not enact Mr. Herbert Spencer’s Social Statics.”<sup>44</sup> Holmes suggested that the Justices in the majority had impermissibly confused their personal social and economic views for the content of the Constitution, and he insisted that “the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.”<sup>45</sup> Holmes did not categorically conclude that the term “liberty” in the Fourteenth Amendment has no substantive content, but he asserted that its meaning is “perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that 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.”<sup>46</sup> To Holmes, “no such sweeping condemnation” could be passed upon the New York statute, as a “reasonable man might think it a proper measure on the score of health” or “as a first instalment of a general regulation of the hours of work.”<sup>47</sup>

*Lochner* was not the first Supreme Court decision to conclude that the Fourteenth Amendment protects a liberty of contract; that distinction rests with *Allgeyer v. Louisiana*,<sup>48</sup> which the Court decided eight years earlier.<sup>49</sup> There is also substantial evidence that *Lochner* was not

<sup>41</sup> *Id.* at 68.

<sup>42</sup> *Id.* at 69–70.

<sup>43</sup> *Id.* at 75 (Holmes, J., dissenting).

<sup>44</sup> *See id.*

<sup>45</sup> *Id.* at 76.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> 165 U.S. 578 (1897).

<sup>49</sup> *See id.* at 589 (defining the term “liberty” in the Fourteenth Amendment to include the freedom of the citizen “to pursue any livelihood or avocation, and for that purpose to

viewed as a particularly significant case when it was decided.<sup>50</sup> Indeed, when the Court eventually departed from the general approach of which *Lochner* has become the exemplar, it never saw the need formally and explicitly to overrule the *Lochner* decision itself.<sup>51</sup>

*Lochner*, in other words, was not the lightning rod for criticizing the Court or the central focus of constitutional theory during the epoch that we now call the *Lochner* era. Still, the decision drew a great deal of criticism when it was decided.<sup>52</sup> As Barry Friedman has demonstrated, many Progressives—picking up on the dissenting opinions of Justices Harlan and Holmes—responded to the *Lochner* decision by disparaging the judges for importing their (upper) class biases into the law and for failing to defer to the (Progressive) majority will.<sup>53</sup> Theodore Roosevelt, for instance, singled out *Lochner* as inconsistent with democracy.<sup>54</sup> But during the three decades after the *Lochner* case was decided—that is, during the era that now bears the *Lochner* name—the Justices themselves did not cite *Lochner* very often, and the Court’s critics did not tend to focus their attention specifically on it.<sup>55</sup>

Indeed, *Lochner* had not yet become the symbol of judicial overreaching by 1937, when the Court made clear<sup>56</sup> that it would no longer protect unenumerated economic rights from majoritarian interference.<sup>57</sup> Instead, *Lochner* achieved its symbolic status only in

enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned”).

<sup>50</sup> See Howard Gillman, *De-Lochnerizing Lochner*, 85 B.U. L. REV. 859, 859–60 (2005); Nourse, *supra* note 5, at 778. *But cf.* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383, 1402–04 (2001) (arguing that many commentators at the time criticized the *Lochner* decision).

<sup>51</sup> Years later, however, the Court recognized that *Lochner*—the “case” and the “Court,” Morton J. Horwitz, *Foreword: The Constitution of Change—Legal Fundamentalism Without Fundamentalism*, 107 HARV. L. REV. 30, 75–76 (1993)—had been effectively overruled. *See* *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) (“The doctrine that prevailed in *Lochner* . . . and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded.”); *see also* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 861 (1992) (noting that *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), “signaled the demise of *Lochner*”).

<sup>52</sup> *See* Felix Frankfurter, *Hours of Labor and Realism in Constitutional Law*, 29 HARV. L. REV. 353, 371 (1916) (“If ever an opinion has been subjected to the weightiest professional criticism it is the opinion in the *Lochner* case.”).

<sup>53</sup> *See* Friedman, *supra* note 50, at 1420–28.

<sup>54</sup> *See* *Roosevelt Attacks the Supreme Court United States in Denver Speech*, MACON DAILY TELEGRAPH (Macon, Ga.), Aug. 30, 1910, at 2 (calling *Lochner* a decision “against popular rights, against the democratic principle of government by the people under the forms of law”); *see also* *Clean Bakeshops Can Be Had*, N.Y. TIMES, Nov. 11, 1910, at 8 (“[T]he men and women of this city who are anxious to remedy insanitary conditions in the bakeshops will not be discouraged by Theodore Roosevelt’s heated argument that they are estopped by the Supreme Court from applying a remedy.”).

<sup>55</sup> *See* Greene, *supra* note 4, at 447.

<sup>56</sup> *See* *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

<sup>57</sup> *See id.* at 392.

the late 1940s, when Justice Frankfurter began to cite the case, generally by calling attention to Holmes's "famous protest" against the Court's misguided view.<sup>58</sup> In other words, *Lochner's* journey to the anti-canon—that is, to the group of "cases that any theory worth its salt must show are wrongly decided"<sup>59</sup>—began with a focus on Justice Holmes's dissent as a canonical and prescient statement of what eventually became the prevailing vision of the proper judicial role.<sup>60</sup> By the 1960s, the Justices had begun to cite *Lochner* as a cautionary tale about the dangers of striking down "social legislation when a particular law did not fit the notions of a majority of Justices as to legislation appropriate for a free enterprise system."<sup>61</sup> As Howard Gillman has observed, "it was only *after* the triumph of New Deal constitutionalism that the historical *Lochner* was transformed into the normative *Lochner*—that is, into the symbol of judges usurping legislative authority by basing decisions on policy preferences rather than law."<sup>62</sup>

By the 1970s, *Lochner* was firmly part of the anti-canon. In 1973, John Hart Ely famously criticized the Court's decision in *Roe v. Wade* by noting that, although the "Court continues to disavow the philosophy of *Lochner*," it is "impossible candidly to regard *Roe* as the product of anything else," a fact that "alone should be enough to damn it."<sup>63</sup> In 1978, Laurence Tribe noted that "'*Lochnerizing*' has become so much an epithet that the very use of the label may obscure attempts at understanding."<sup>64</sup> And in the 1980s, Cass Sunstein called *Lochner* "the most important of all defining cases" for the preceding half-century of constitutional law, noting that the "spectre of *Lochner* has loomed over most important constitutional decisions, whether they uphold or invalidate governmental practices."<sup>65</sup>

Today, *Lochner* is the "*bête-noire* of modern constitutional scholarship."<sup>66</sup> It is "deemed essential fodder for all constitutional theories

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<sup>58</sup> *Am. Fed'n of Labor v. Am. Sash & Door Co.*, 335 U.S. 538, 543 (1949) (Frankfurter, J., concurring); see Gillman, *supra* note 50, at 860–61 (describing Frankfurter's role in bringing attention to Holmes's dissent). As Jamal Greene has explained, Frankfurter viewed Holmes's *Lochner* dissent as "a near-perfect distillation of . . . a perfect judicial philosophy," Greene, *supra* note 4, at 449, and he evangelized (first as a professor and then as a judge) about the dissent's importance, *id.* at 450–54.

<sup>59</sup> J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1018 (1998).

<sup>60</sup> See Greene, *supra* note 4, at 446; Primus, *supra* note 4, at 245.

<sup>61</sup> *Poe v. Ullman*, 367 U.S. 497, 517 (1961) (Douglas, J., dissenting).

<sup>62</sup> Gillman, *supra* note 50, at 861.

<sup>63</sup> John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 939–40 (1973).

<sup>64</sup> LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 435 (1st ed. 1978).

<sup>65</sup> Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 873 (1987).

<sup>66</sup> Trevor W. Morrison, *Lamenting Lochner's Loss: Randy Barnett's Case for a Libertarian Constitution*, 90 CORNELL L. REV. 839, 840 (2005) (reviewing RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* (2004)).

and theorists, not to mention theorists of economy and regulation, and perhaps law itself.”<sup>67</sup> As Thomas Grey observed, the “ultimate punchline in the criticism of a constitutional decision is to say that it is ‘like *Lochner*.’”<sup>68</sup> In Ronald Dworkin’s colorful words, *Lochner* is the “whipping boy” of constitutional law.<sup>69</sup>

To be sure, the narrative on which the orthodox contemporary view of *Lochner* is based is hotly contested. The conventional narrative builds on implications from Justice Holmes’s critique of the *Lochner* decision: judges committed to laissez-faire economics and to the protection of wealthy interests aggressively and lawlessly substituted their personal policy preferences for that of a more Progressive legislature that sought to protect workers from overreaching employers and unhealthy working conditions.<sup>70</sup> This narrative draws strength from the remarkably (to modern eyes) dubious reasoning behind the Court’s conclusions in the *Lochner* case that the maximum hours law was not permissible as a labor law (seeking to protect bakery employees from an imbalance in bargaining power), as a public health regulation (seeking to protect the public from unsanitary food), or as a workplace health regulation (seeking to protect bakers from excessive exposure to harmful substances).<sup>71</sup>

The Court based its conclusion that the law could not stand as a valid “labor law” on an assertion that there was “no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State, interfering with their independence of judgment and of action.”<sup>72</sup> Because bakers were “in no sense wards of the State,” they could not be protected through labor legislation.<sup>73</sup> To many observers, the Court was either unconscionably oblivious or viciously hostile to the realities of the sweatshop-era workplace and to the underlying premise of the entire labor movement: that inequalities in bargaining

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<sup>67</sup> Nourse, *supra* note 5, at 759; *see also* Horwitz, *supra* note 51, at 74 (“How one explains why *Lochner* was illegitimate has become the necessary first step in the development of a modern constitutional theory.”).

<sup>68</sup> Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 711 n.35 (1975); *see also* Ely, *supra* note 63, at 944 (using “Lochnering” as a verb to mean the Court’s “indulging in sheer acts of will, ramming its personal preferences down the country’s throat”).

<sup>69</sup> RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 82 (1996).

<sup>70</sup> *See, e.g.*, Gary D. Rowe, *Lochner Revisionism Revisited*, 24 LAW & SOC. INQUIRY 221, 222 (1999).

<sup>71</sup> *See* *Lochner v. New York*, 198 U.S. 45, 57, 59 (1905).

<sup>72</sup> *Id.* at 57.

<sup>73</sup> *Id.*

power between management and labor can, in the absence of regulation, lead to egregious exploitation of the working class.<sup>74</sup>

The Court based its conclusion that the law could not stand as a valid public health regulation on an assertion that “[c]lean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week.”<sup>75</sup> But according to bakers at the time, “[t]ired workers were not apt to be cleanly workers, and dirty bakers surely made unhygienic bread.”<sup>76</sup> Indeed, “the health consequences suffered by the consuming public owing to the unhygienic quality of the overworked bakers and their unsanitary shops” were well known to the New York legislature.<sup>77</sup> The legislature passed the law at issue in *Lochner* on the heels of a *New York Press* story, entitled “Bread and Filth Cooked Together,” that detailed the unsanitary conditions in many New York City bakeries.<sup>78</sup> As one late-nineteenth century bakers’ union spokesman put it, “consumers like clean, wholesome bread, yet if they could go into the shops at night and see the men at work they would lose their appetites altogether.”<sup>79</sup>

Finally, the Court based its conclusion that the law could not stand as a valid workplace health regulation on an assertion that

there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract on the part of the individual, either as employer or employé. . . . To the common understanding the trade of a baker has never been regarded as an unhealthy one.<sup>80</sup>

Here, too, critics charge that the Court substituted its own ignorant understanding for the New York legislature’s careful analysis of the health risks of baking as they were contemporaneously understood. As Paul Kens has explained, bakers at the turn of the century often worked one hundred hours per week in abysmal conditions, and there was evidence to support their claim that working long hours in such an environment caused what they referred to as “white lung disease.”<sup>81</sup>

In one fell swoop, then, the *Lochner* Court delivered a near-death blow to the entire Progressive legislative enterprise of enacting labor

<sup>74</sup> See Paul Kens, *Lochner v. New York: Tradition or Change in Constitutional Law?*, 1 N.Y.U. J.L. & LIBERTY 404, 408 (2005).

<sup>75</sup> *Lochner*, 198 U.S. at 57.

<sup>76</sup> Matthew S.R. Bewig, *Laboring in the “Poisonous Gases”: Consumption, Public Health, and the Lochner Court*, 1 N.Y.U. J.L. & LIBERTY 476, 482 (2005).

<sup>77</sup> *Id.*

<sup>78</sup> See *id.* at 483 (discussing *Bread and Filth Cooked Together*, N.Y. PRESS, Sept. 30, 1894, pt. 4, at 1).

<sup>79</sup> *Id.* at 482 (quoting bakers’ union spokesman Henry Weismann).

<sup>80</sup> *Lochner*, 198 U.S. at 59.

<sup>81</sup> Kens, *supra* note 74, at 407.

laws, public health laws, and workplace safety regulations. And it did so, according to the conventional narrative, solely on the basis of its own allegedly common-sense, but in fact woefully uninformed, opinions—opinions that were shaped by class biases and laissez-faire politics, and that flew in the face of actual data and informed legislative judgment.<sup>82</sup> For more than thirty years, the recalcitrant and activist *Lochner*-era Court stood in the way of overwhelmingly popular and economically necessary Progressive legislation, perhaps contributing to or worsening the Great Depression.<sup>83</sup> And when the Court stood on the brink of striking down the entire New Deal, an exasperated President Franklin Roosevelt threatened to pack the Court with Progressive judges, prompting a constitutional crisis that ended only when the Court backed down in the famous “switch in time that saved Nine” in 1937 and finally brought an end to the *Lochner* era.<sup>84</sup>

Revisionist scholars of *Lochner* and the *Lochner* era have called this account into question in various ways. First, there is substantial debate over whether the particular New York law at issue in *Lochner* was a genuinely Progressive regulation designed to protect vulnerable bakery employees from the excesses of big business<sup>85</sup> or instead was a xenophobic, rent-seeking statute enacted to benefit a racist union at the expense of immigrant laborers.<sup>86</sup> Second, revisionist scholars have noted that the Court during the *Lochner* era upheld many more regulations than it invalidated, and thus was considerably more

<sup>82</sup> See Rowe, *supra* note 70, at 222.

<sup>83</sup> See Frank R. Strong, *The Economic Philosophy of Lochner: Emergence, Embrace and Emasculation*, 15 ARIZ. L. REV. 419 (1973).

<sup>84</sup> See WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 213–20 (1995).

<sup>85</sup> See, e.g., PAUL KENS, *JUDICIAL POWER AND REFORM POLITICS: THE ANATOMY OF LOCHNER V. NEW YORK* 44–45 (1990) (arguing that the New York Bakeshop Act of 1895 should be viewed in the broader context of tenement and workplace reforms that characterized the Progressive era and was motivated by a reformist desire to clean up the baking industry by protecting the working conditions of bakery employees); Friedman, *supra* note 50, at 1417 (“The law at issue was enacted to help journeymen bakers (not commercial baking companies) as part of a political campaign waged by those workers and their unions.”).

<sup>86</sup> See DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* 24–27 (2011) (arguing that the New York law effectively served as a restraint on competition from immigrant bakers who sought entry into the market, but not on large bakeries, which supported the law because they already satisfied its sanitary rules and maximum-working-hours provisions); David E. Bernstein, *Roots of the “Underclass”: The Decline of Laissez-Faire Jurisprudence and the Rise of Racist Labor Legislation*, 43 AM. U. L. REV. 85, 90 (1993) (noting that “during the *Lochner* era labor unions generally excluded blacks—as well as women and immigrants—from their ranks”); Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 733–34 (1984) (arguing that regulations that interfere with the employment relationship often are examples of “rent-seeking” by unions, whose members are in competition with nonunion workers).

modest than the conventional account suggests.<sup>87</sup> Third, revisionists have argued that the Court's commitment to the notion of limited government power led to liberal results in many civil rights cases,<sup>88</sup> and thus that the judges were more likely motivated by a sincere desire to protect liberty and equality rather than by economic self-interest.<sup>89</sup> Fourth, revisionists have argued that the Court's approach to rights and the limits on government power was consistent with jurisprudential understandings of the era,<sup>90</sup> and that, if anything, it was Justice Holmes's approach that was outside of the contemporary legal mainstream.<sup>91</sup> Finally, revisionists have questioned whether President Roosevelt's Court-packing proposal really precipitated the end of the *Lochner* era.<sup>92</sup>

Many—though, as we explain below, not all—of the revisionist accounts of *Lochner* are designed merely to situate the decision in the legal universe of its time, not to answer the question whether *Lochner* would be defensible today. Indeed, even *Lochner*'s staunchest defenders recognize that *Lochner* today is “shorthand for all manner of constitutional evils” and “likely the most disreputable case in modern constitutional discourse.”<sup>93</sup> Fairly or unfairly, since the middle of the twentieth century, *Lochner* has represented a particular approach to the Constitution.<sup>94</sup> *Lochner* today represents, at a minimum, constitutionally improper searching judicial scrutiny of democratic action in the name of economic rights.<sup>95</sup> And the overwhelming weight of opinion—liberal and conservative alike—over the last half century has

<sup>87</sup> See, e.g., KENS, *supra* note 85, at 4; Melvin I. Urofsky, *Myth and Reality: The Supreme Court and Protective Legislation in the Progressive Era*, 1983 SUP. CT. HIST. SOC'Y Y.B. 53, 55 (1983).

<sup>88</sup> See, e.g., BERNSTEIN, *supra* note 86, at 5 (“The *Lochner* line of cases pioneered the protection of the right of women to compete with men for employment free from sex-based regulations, the right of African Americans to exercise liberty and property rights free from Jim Crow legislation, and civil liberties against the states ranging from freedom of expression to the right to choose a private school education for one's children.”).

<sup>89</sup> See, e.g., OWEN FISS, *TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910*, 18–19 (1993); GILLMAN, *supra* note 5, at 1–2; Charles W. McCurdy, *The Roots of “Liberty of Contract” Reconsidered: Major Premises in the Law of Employment, 1867–1937*, 1984 SUP. CT. HIST. SOC'Y Y.B. 20, 24 (1984); Stephen A. Siegel, *Let Us Now Praise Infamous Men*, 73 TEX. L. REV. 661, 686–87 (1995).

<sup>90</sup> See, e.g., GILLMAN, *supra* note 5, at 4–5 (noting that several scholars have suggested that most of the Fuller Court's decisions were consistent with mainstream legal thought).

<sup>91</sup> See, e.g., White, *supra* note 5, at 87.

<sup>92</sup> See, e.g., G. Edward White, *West Coast Hotel's Place in American Constitutional History*, 122 YALE L.J. ONLINE 69, 73–76 (2012).

<sup>93</sup> BERNSTEIN, *supra* note 86, at 1.

<sup>94</sup> See, e.g., Balkin, *supra* note 5, at 688 (“*Lochner*’ is not just the decision in *Lochner v. New York*, but an accompanying story about the place of that decision in the history of the Constitution, the Court, and the country.”).

<sup>95</sup> See *infra* notes 193–99 and accompanying text.

been that *Lochner*, viewed in this broad, symbolic sense, is a mistake that we must not make again.<sup>96</sup>

The disagreement lies in the question *why* *Lochner* was mistaken. Liberal legal thought and conservative legal thought about *Lochner* have taken somewhat different routes to their modern orthodoxies. We turn now to the paths that these competing schools of thought took in arriving at that conclusion.

## II

### THE EVOLUTION OF LIBERAL LEGAL THOUGHT ABOUT *LOCHNER*

Morton Horwitz has argued that, in a sense, the *Lochner* decision “brought Progressive Legal Thought into being.”<sup>97</sup> During the *Lochner* era, liberal legal thought was defined by its opposition to the *Lochner* line of cases.<sup>98</sup> Frustrated and infuriated by the Supreme Court’s stymieing their political agenda, liberals latched on to the arguments that Justice Holmes had offered in his *Lochner* dissent. “After Justice Holmes’ dissent,” Horwitz explains, “it became a standard point of argument among progressives to denounce the United States Supreme Court for enacting its own reactionary social and economic preferences into law” and to insist that the “only institution authorized under our constitutional system to make political choices . . . was the legislature.”<sup>99</sup>

The critique of the *Lochner* line of cases during the Progressive era was both relentless and multifaceted.<sup>100</sup> Progressive critics attacked *Lochner* and its kin for improperly intruding into the realm of the legislature;<sup>101</sup> for crafting a malleable jurisprudence that allowed judges to import their political values into the Constitution;<sup>102</sup> and for enforcing rights that were not enumerated in the constitutional

<sup>96</sup> See *infra* notes 209–17, 241–66 and accompanying text.

<sup>97</sup> MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 33 (1992).

<sup>98</sup> Indeed, modern liberalism itself largely came into being in the *Lochner* era. “For the great majority of Americans, the word ‘liberal’ was literally born in the early New Deal.” RONALD D. ROTUNDA, *THE POLITICS OF LANGUAGE: LIBERALISM AS WORD AND SYMBOL* 14 (1986).

<sup>99</sup> Morton J. Horwitz, *The Jurisprudence of Brown and the Dilemmas of Liberalism*, 14 HARV. C.R.-C.L. L. REV. 599, 600 (1979).

<sup>100</sup> For a thorough discussion of liberal opposition to activist courts in this era, see Friedman, *supra* note 50, at 1404–16.

<sup>101</sup> See, e.g., HERBERT CROLY, *PROGRESSIVE DEMOCRACY* 136–40 (1914) (arguing that *Lochner*-era courts had usurped the role of the legislatures).

<sup>102</sup> See, e.g., EDWARD S. CORWIN, *CONSTITUTIONAL REVOLUTION, LTD.* 30–38 (1908); Frankfurter, *supra* note 52, at 363–64; Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 456–57 (1909); Jackson Harvey Ralston, *Shall We Curb the Supreme Court?*, 71 FORUM 561, 564–65 (1924).



text.<sup>103</sup> Ultimately, however, the Progressive critique coalesced primarily around the assertion that the error of *Lochner* lay in its failure to defer to the judgment of the elected legislature.<sup>104</sup>

The intellectual foundation for this critique was the emerging legal realism movement.<sup>105</sup> Realists argued that, contrary to the perceived wisdom of earlier generations,<sup>106</sup> law is inherently ambiguous, such that, in the choice of legal rules or in their application, “judges may rely on their own preferences, while concealing this possibility from public view by creating the illusion of logical necessity and mechanical application.”<sup>107</sup> The *Lochner* line of cases were Exhibit A in the case for legal realism.<sup>108</sup> “The whole expansion of the due process clause,” wrote Karl Llewellyn, “has been an enforcement of the [Court’s] majority’s ideal of government-as-it-should-be.”<sup>109</sup> Indeed, in many ways, it was *Lochnerism* that gave birth to the realist movement.<sup>110</sup>

The realist assessment of *Lochner* was the impetus for the Progressive call for judicial deference to legislative majorities.<sup>111</sup> If constitutional doctrine is inherently ambiguous and open ended, such that judicial review invariably serves as a tool for unelected judges to impose their own values on the nation, then judges must generally refrain from striking down legislative enactments, lest they wrest political control of the nation from the people.<sup>112</sup> “For a half century until the decision in *Brown [v. Board of Education]*, the notion that

<sup>103</sup> See, e.g., Learned Hand, *Due Process of Law and the Eight-Hour Day*, 21 HARV. L. REV. 495, 495 (1908) (“There can be little doubt that so to construe the term ‘liberty’ is entirely to disregard the whole juristic history of the word.”).

<sup>104</sup> See, e.g., Frankfurter, *supra* note 52, at 370; Ernest Freund, *Limitation of Hours and Labor and the Federal Supreme Court*, 17 GREEN BAG 411, 416 (1905); see generally Friedman, *supra* note 50, at 1437 (“The Progressive reaction to *Lochner* harped repeatedly on the theme of judicial deference to majoritarian judgments.”).

<sup>105</sup> See LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 13–19 (1996); Choudhry, *supra* note 13, at 8. Of course, there is a great deal of disagreement about the proper definition of “realism” and the proper size of the realist tent. We use the term here broadly, to refer to all contemporary legal thinkers who contributed to the “effort to define and discredit classical legal theory and practice and to offer in their place a more philosophically and politically enlightened jurisprudence.” AMERICAN LEGAL REALISM xiii–xiv (William W. Fisher III, Morton J. Horwitz & Thomas A. Reed eds., 1993).

<sup>106</sup> But see BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING* 67–90 (2010) (arguing that legal realist observations about judging were widely expressed before the legal realism movement formed).

<sup>107</sup> Choudhry, *supra* note 13, at 8.

<sup>108</sup> See KALMAN, *supra* note 105, at 18 (noting that realists “believed Supreme Court members had gone out of their way to insist the rule of law ‘forced’ [the Court] to reject social welfare legislation”).

<sup>109</sup> Karl N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 40 (1934).

<sup>110</sup> See Friedman, *supra* note 50, at 1412.

<sup>111</sup> See Horwitz, *supra* note 99, at 602 (“Judicial restraint was an inevitable consequence of this loss of faith in law.”).

<sup>112</sup> See Choudhry, *supra* note 13, at 8–9.

courts should ordinarily defer to the policies of the legislature”—that is, the principle of “judicial restraint”—“became the princip[al] article of faith of liberal jurisprudence.”<sup>113</sup>

When liberals gained control of the Supreme Court with the “switch in time” of 1937, they initially practiced what they had preached. The liberal leaders of the Court of that era were New Dealers who had come of age as intellectual and political soldiers on the front line of the fight against *Lochner*.<sup>114</sup> Justice Frankfurter, during his tenure at Harvard Law School, had been one of the leading advocates of judicial restraint and one of the leading critics of *Lochner* in the academy.<sup>115</sup> Justice Douglas was a “New Deal loyalist” who had served as chairman of the SEC<sup>116</sup> and before that had been a realist scholar at both Columbia and Yale Law Schools.<sup>117</sup> Justice Black had been “by wide repute the most radical member of the U.S. Senate” during the New Deal and had supported President Roosevelt’s Court-packing plan to end the *Lochner* era.<sup>118</sup> And Justice Stone had been, if not a realist himself, at least an ardent supporter of some of the leading realists when he served as dean of the Columbia Law School.<sup>119</sup>

As soon as these liberal jurists gained control, the Court began to promulgate a jurisprudence of deference to legislative majorities. In *West Coast Hotel Co. v. Parrish*,<sup>120</sup> which ended the *Lochner* era, the Court announced a generous test for the constitutionality of regulation under the Due Process Clause,<sup>121</sup> and it declared that the “legislature is entitled to its judgment” even if “the wisdom of the policy be regarded as debatable and its effects uncertain.”<sup>122</sup>

For almost two decades after that decision, the Supreme Court was largely disengaged. Implementing the Progressive jurisprudence

<sup>113</sup> Horwitz, *supra* note 99, at 600.

<sup>114</sup> See John P. Frank, *Court and Constitution: The Passive Period*, 4 VAND. L. REV. 400, 425–26 (1951). See generally NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR’S GREAT SUPREME COURT JUSTICES 1–50, 60–68 (2010) (discussing the lives and careers of Justices Frankfurter, Jackson, and Douglas before their nominations to the Supreme Court).

<sup>115</sup> See FELDMAN, *supra* note 114, at 105–06, 110; KALMAN, *supra* note 105, at 19–20.

<sup>116</sup> FELDMAN, *supra* note 114, at 169.

<sup>117</sup> See A.C. Pritchard & Robert B. Thompson, *Securities Law and the New Deal Justices*, 95 VA. L. REV. 841, 869 (2009); WILLIAM O. DOUGLAS, GO EAST, YOUNG MAN: THE EARLY YEARS 148 (1974) (“At Columbia, revolt against the traditional approach to law was now under way. . . . I joined their ranks.”).

<sup>118</sup> FELDMAN, *supra* note 114, at 133–35.

<sup>119</sup> See George Rutherglen, *International Shoe and the Legacy of Legal Realism*, 2001 SUP. CT. REV. 347, 354–56 (2002).

<sup>120</sup> 300 U.S. 379 (1937).

<sup>121</sup> *Id.* at 391 (“[R]egulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.”).

<sup>122</sup> *Id.* at 399.

of restraint, the Court allowed Congress and the state legislatures tremendous leeway to govern without judicial interference.<sup>123</sup>

Still, beneath the surface of a largely restrained Court, a battle was brewing for the soul of liberal jurisprudence.<sup>124</sup> Even before they came into power, Progressives began to worry about whether the deference that they were demanding from the *Lochner* Court should really be applied across the board in all constitutional cases. “[T]he orthodox New Deal position rendered the protection of [all] individual rights a suspect judicial activity . . .”<sup>125</sup> But that prospect, when applied to First Amendment freedoms and other noneconomic rights, made some liberals queasy. Herbert Goodrich, for instance, wrote in 1921 that, although he wished for the Supreme Court to disavow the “majority opinion in *Lochner v. New York*, . . . will not the same kind of argument and the same line of thought which upholds a law which restricts a man in the contracts he may make . . . uphold a law limiting the exercise of his tongue when the majority so wills it?”<sup>126</sup> Other liberals, like Edward Corwin, chastised the hypocrisy of those who would treat noneconomic rights differently.<sup>127</sup>

In the famous footnote four of the *Carolene Products* case, decided just a year after the “switch in time” of 1937, the Court reserved the question whether, even after *Lochner* had been abandoned, it might be appropriate to subject to searching scrutiny legislation that interferes with specifically enumerated rights, restricts the political process, or imposes burdens on vulnerable minorities.<sup>128</sup> Following footnote four, there were a handful of occasions in the 1940s and early 1950s when the temptation to protect rights that, unlike liberty of contract, resonated politically with liberals became too tempting for the new

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<sup>123</sup> See Choudhry, *supra* note 13, at 9; Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 179 (2002).

<sup>124</sup> See Martin Shapiro, *Fathers and Sons: The Court, the Commentators, and the Search for Values*, in THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 218, 220 (Vincent Blasi ed., 1983) (explaining that liberals struggled to choose between two alternative courses of action: to “dismantle the fortifications”—that is, to exercise restraint and reduce the role of the Court in public life—and “to rebuild and shift to new targets,” “singling out certain claims relating to speech, voting, and the criminal process for special judicial solicitude”).

<sup>125</sup> Rowe, *supra* note 70, at 235.

<sup>126</sup> Herbert F. Goodrich, *Does the Constitution Protect Free Speech?*, 19 MICH. L. REV. 487, 500 (1921).

<sup>127</sup> See Edward S. Corwin, *Freedom of Speech and Press Under the First Amendment: A Resumé*, 30 YALE L.J. 48, 55 (1920) (“For the most part those who are endeavoring to-day to elaborate constitutional restrictions upon Congress’s power over the press have shown themselves in the past distinctly opposed to the curtailment of legislative discretion by definite, unbending constitutional limitations. Personally, I am disposed to agree with their earlier rather than their later position.”).

<sup>128</sup> See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

Court to resist.<sup>129</sup> Most significant were the compelled flag salute cases. Just three years after the end of the *Lochner* era, the Court held in *Minersville School District v. Gobitis*<sup>130</sup> that a state may compel school children to salute the American flag,<sup>131</sup> even when doing so contravenes the teachings of their religion. The *Gobitis* opinion—authored by Justice Frankfurter, one of the intellectual leaders of the Progressive attack on *Lochner*—was filled with forceful language championing judicial deference.<sup>132</sup>

But just three years later, in *West Virginia v. Barnette*,<sup>133</sup> the Court reversed course and held that the Free Speech Clause of the First Amendment (as incorporated against the states through the Due Process Clause of the Fourteenth Amendment) precludes the government from compelling public school children to salute the flag and to recite the Pledge of Allegiance.<sup>134</sup> In so holding, the Court suddenly offered a powerful *rejection* of universal judicial deference to legislative majorities: “The very purpose of a Bill of Rights was to withdraw certain subjects”—including the “right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights”—“from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.”<sup>135</sup> Justices Black and Douglas—New Dealers both—wrote separately in *Barnette* to explain why they had changed their minds. As they explained it, they had originally joined the *Gobitis* opinion out of a commitment to judicial deference, but although they still believed generally in judicial disengagement, they could no longer stomach the consequences of its universal application.<sup>136</sup>

This renewed assertion of judicial power prompted an angry dissent by Justice Frankfurter, who refused to give in to the temptation to sway from the Progressive creed. Notwithstanding his deep personal

<sup>129</sup> See Owen Fiss, *A Life Lived Twice*, 100 YALE L.J. 1117, 1117 (1991) (noting the importance to liberal jurisprudence of pre-Warren Court cases involving the freedom of speech and procedural fairness).

<sup>130</sup> 310 U.S. 586 (1940).

<sup>131</sup> *Id.* at 599–600.

<sup>132</sup> See, e.g., *id.* at 599 (“Except where the transgression of constitutional liberty is too plain for argument, personal freedom is best maintained—so long as the remedial channels of the democratic process remain open and unobstructed—when it is ingrained in a people’s habits and not enforced against popular policy by the coercion of adjudicated law.” (footnote omitted)).

<sup>133</sup> 319 U.S. 624 (1943).

<sup>134</sup> *Id.* at 642.

<sup>135</sup> *Id.* at 638.

<sup>136</sup> *Id.* at 643 (Black and Douglas, JJ., concurring) (“Long reflection convinced us that although the principle [of restraint] is sound, its application in the particular case was wrong.”).

affinity for the plight of the plaintiffs,<sup>137</sup> Frankfurter insisted that “[a]s a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard.”<sup>138</sup> Frankfurter stressed that “responsibility for legislation lies with legislatures,”<sup>139</sup> and he asserted that the “Constitution does not give us greater veto power when dealing with one phase of ‘liberty’ than with another.”<sup>140</sup>

Over the next dozen years, as the Court remained largely (though not entirely) timid, liberal theorists continued to struggle with the question that had divided the *Barnette* Court: whether a principled commitment to rejecting *Lochner* necessarily required a concomitant devotion to universal judicial deference.<sup>141</sup> Some Progressives, like Judge Learned Hand, could “not understand how the principle which [we have] all along supported, could mean that, when concerned with interests other than property, the courts should have a wider latitude for enforcing their own predilections, than when they were concerned with property itself.”<sup>142</sup> As Paul Freund put it, “Is there any ground in reason for treating differently experiments in social and economic legislation and experiments in the control of speech and assembly and religious observances?”<sup>143</sup> After all, it “would be but a short step from the *Social Statics* of Herbert Spencer to the social ecstasies of the judges.”<sup>144</sup>

But other liberals sought to articulate a principled distinction between *Lochner* and cases like *Barnette*. Footnote four had suggested that it might be permissible, even after the demise of *Lochner*, to afford

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<sup>137</sup> See *id.* at 646–47 (Frankfurter, J., dissenting) (“One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should wholeheartedly associate myself with the general libertarian views in the Court’s opinion, representing as they do the thought and action of a lifetime.”).

<sup>138</sup> *Id.* at 647.

<sup>139</sup> *Id.* at 649.

<sup>140</sup> *Id.* at 648.

<sup>141</sup> See Friedman, *supra* note 123, at 183 (noting “the problem of the ‘double standard’” and asking, “How could one countenance judicial activism in the area of civil liberties after the Court had abjured with regard to economic rights?”).

<sup>142</sup> Learned Hand, *Chief Justice Stone’s Conception of the Judicial Function*, 46 COLUM. L. REV. 696, 698 (1946); see also LEARNED HAND, *THE BILL OF RIGHTS: THE OLIVER WENDELL HOLMES LECTURES*, 1958, at 51 (1958) (“I can see no more persuasive reason for supposing that a legislature is *a priori* less qualified to choose between ‘personal’ than between economic values; and there have been strong protests, to me unanswerable, that there is no constitutional basis for asserting a larger measure of judicial supervision over the first than over the second.”); Elliot L. Richardson, *Freedom of Expression and the Function of Courts*, 65 HARV. L. REV. 1, 47–54 (1951) (rejecting Progressive arguments for preferencing First Amendment liberties).

<sup>143</sup> Paul A. Freund, *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 533, 546 (1951).

<sup>144</sup> *Id.* at 548.

heightened scrutiny to rights that—unlike the liberty of contract—are enumerated in the Constitution.<sup>145</sup> But that naked suggestion had been offered without any theory behind it; footnote 4 did not say *why*, exactly, enumerated rights such as the freedom of speech should be entitled to greater judicial protection, or how such judicial involvement would be any different from that in *Lochner*.

Over the next decade, liberals offered several possible answers. Justice Black, for instance, promoted a theory of “total incorporation”—that is, the theory that enumerated rights alone should receive heightened scrutiny because the Fourteenth Amendment was originally understood to incorporate against the states all of the rights in the Bill of Rights, but no other rights.<sup>146</sup> Black’s argument was more textual and historical than theoretical, though in retrospect it can be characterized as an originalist constitutional argument.<sup>147</sup> But the accuracy of Black’s historical analysis was immediately called into question,<sup>148</sup> and liberals, not surprisingly, were not drawn to his originalist (and thus backward-looking) approach.

In *Barnette*, Justice Jackson offered a different theoretical argument: because enumerated rights are more specific and defined than unenumerated rights, judicial enforcement of the former poses less of a danger of *Lochner*-style judicial lawmaking than does judicial enforcement of the latter.<sup>149</sup> In his view, “[m]uch of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard.”<sup>150</sup> But Justice Jackson offered that argument only tepidly, as he could not help but admit that “the task of translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century, is one to disturb self-confidence.”<sup>151</sup>

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<sup>145</sup> See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

<sup>146</sup> See *Adamson v. California*, 332 U.S. 46, 68–123 (1947) (Black, J., dissenting).

<sup>147</sup> Cf. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 677 (1966) (Black, J., dissenting) (lambasting the Court for “consulting its own notions rather than following the original meaning of the Constitution”).

<sup>148</sup> See, e.g., Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding*, 2 STAN. L. REV. 5, 139 (1949) (concluding that “[i]n [Justice Black’s] contention that Section I [of the Fourteenth Amendment] was intended and understood to impose Amendments I to VIII upon the states, the record of history is overwhelmingly against him”).

<sup>149</sup> See *West Virginia v. Barnette*, 319 U.S. 624, 639 (1943) (“[I]t is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake.”).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* As Elliot Richardson put it, “once it has been recognized that the language of the [First] Amendment cannot in any event be literally applied, its apparent lack of ambiguity is hardly helpful.” Richardson, *supra* note 142, at 49–50.

Other liberals began to craft more sophisticated arguments in favor of a judicial preference for First Amendment rights, building on the legendary earlier free speech dissents of Justices Holmes and Brandeis. During the *Lochner* era, while they had been railing against aggressive judicial protection of economic rights, Justices Holmes and Brandeis had simultaneously argued in *favor* of aggressive judicial protection of the freedom of speech. Relying primarily on the marketplace-of-ideas metaphor,<sup>152</sup> Holmes insisted that it is “the theory of our Constitution”<sup>153</sup> that free speech should be aggressively protected, whereas liberty of contract should not. Brandeis, by contrast, had relied on the unique centrality of free speech to a well-functioning political process. The Framers, he insisted, believed “that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.”<sup>154</sup>

In the years after the “switch in time,” liberals seized upon and developed these arguments as a means of justifying aggressive judicial protection of the freedom of speech and distinguishing it from aggressive judicial protection of economic rights.<sup>155</sup> Most famously, Alexander Meiklejohn in 1948 argued that judges do not repeat the error of *Lochner* when they enforce the First Amendment, because “[t]he principle of the freedom of speech springs from the necessities of the program of self-government,”<sup>156</sup> rather than from a *Lochner*-like appeal to natural law.<sup>157</sup>

In the free speech arena, then, liberal theory was keeping up with liberal jurisprudence. Indeed, for the most part, the theory behind First Amendment preferentialism was developing *faster* than the

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<sup>152</sup> See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . .”).

<sup>153</sup> *Id.*

<sup>154</sup> *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

<sup>155</sup> See Richardson, *supra* note 142, at 50 & n.209 (collecting authorities asserting that deference should not be extended to legislative judgments relating to freedom of speech because this freedom is “vital to the democratic process”).

<sup>156</sup> ALEXANDER MEIKLEJOHN, *FREE SPEECH: AND ITS RELATION TO SELF-GOVERNMENT* 26–27 (1948).

<sup>157</sup> See *id.* at 27. The Progressive critique of *Lochner* often focused on the Court’s misguided appeals to natural law. See, e.g., Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 41 (1918) (“The jurists who believe in natural law seem to me to be in that naïve state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere.”); BERNSTEIN, *supra* note 86, at 41 (noting that critics of *Lochner* “took issue with the prevailing natural rights/historicist perspective on constitutional law”); Diarmuid F. O’Scannlain, *The Natural Law in the American Tradition*, 79 FORDHAM L. REV. 1513, 1515 (2011) (“*Lochner*, and similar cases of that age, were seen as instances of ‘natural law reasoning.’ Thus, criticism of ‘the *Lochner* era’ became bound up with criticism of the natural law.”).

courts' jurisprudence. Holmes and Brandeis had crafted their arguments in dissent, and although the Court issued a handful of decisions like *Barnette* in the 1940s and 1950s,<sup>158</sup> it would be decades before the Supreme Court would begin to get serious about consistent protection for speech. By the time the Court became a reliable champion of free speech, there was a well-developed body of legal theory to support what it was doing.

But in other areas, the liberal Court soon got ahead of liberal legal theory. In the 1950s, the old guard New Deal-era Justices—the ones who had brought about the end of the *Lochner* era—began to leave the Court, to be replaced over the coming two decades by a new generation of (mostly) liberal jurists who, unlike their predecessors, did not carry scars from the *Lochner* fight.<sup>159</sup> These new Justices were a generation removed from the front lines of the New Deal. They had not been raised and steeped in Progressive-era liberal legal theory in the way that their predecessors had been; they did not come of age as legal thinkers with an abiding revulsion toward active judging.

And so was born the Warren Court. The Justices who served on the Warren Court were more politicians than legal theorists or doctrinal craftsmen.<sup>160</sup> On the Court that decided *Brown v. Board of Education*, there sat three former senators, two former attorneys general, and a former state legislator; their leader—the brand-new Chief Justice—was a former governor and presidential candidate.<sup>161</sup> Only one member of that Court had ever served as a lower court judge.<sup>162</sup>

When these experienced politicians looked out at the nation whose highest court they now occupied, they saw endemic racial discrimination, the censorship of dissent, an unchecked and oppressive criminal justice system, and sharp limits on the ability of the poor to participate in civic life.<sup>163</sup> In their view, America's increasingly conservative legislatures were unwilling or unable to remedy these

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<sup>158</sup> See, e.g., *Terminiello v. Chicago*, 337 U.S. 1, 3, 6 (1949) (holding that a conviction under a city ordinance defining “breach of peace” to include any “misbehavior which violates the public peace and decorum” violated the First Amendment).

<sup>159</sup> See Fiss, *supra* note 129, at 1117–21.

<sup>160</sup> See Mark Tushnet, *The Warren Court as History: An Interpretation*, in *THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE* 1, 17–18 (Mark Tushnet ed., 1993).

<sup>161</sup> See *Senate Committee Hearings on the Judicial Nomination Process, Statement by Professor Mark Tushnet*, 50 *DRAKE L. REV.* 561, 563 (2002).

<sup>162</sup> See *id.* at 563 (noting that Sherman Minton had served as a judge on the federal court of appeals); *Sherman Minton Biography*, *BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS*, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=m000800> (last visited November 7, 2014) (noting that Sherman Minton served on the United States Court of Appeals for the Seventh Circuit). Additionally, Justice Black had served very briefly as a police court judge early in his career. See FELDMAN, *supra* note 114, at 55.

<sup>163</sup> See Fiss, *supra* note 129, at 1118.



problems.<sup>164</sup> The Justices of the Warren Court refused to perpetuate these injustices by standing by deferentially.

So the Warren Court acted, and it acted boldly. Its decision to end segregation in *Brown v. Board of Education* was a turning point in constitutional law. *Brown* represented the reemergence of a Supreme Court willing to stand up against popularly enacted laws, and to do so on the center stage of American political life.<sup>165</sup> *Brown* opened the floodgates of judicial engagement. The Warren Court followed its decision in *Brown* with fifteen years of often revolutionary opinions seeking to rectify perceived injustices across a broad spectrum of constitutional law.<sup>166</sup> The challenge for liberals was how to reconcile all of this judicial activity with what had to that point been the cornerstone of liberal constitutional theory—that judicial deference is essential in order to avoid the unpalatable error of *Lochner*.

In seeking to meet this theoretical challenge, liberal thinkers were given little help from the Warren Court itself. “[T]he Warren Court’s members were not concerned with constitutional theory to any significant degree;”<sup>167</sup> they were instead concerned with justice.<sup>168</sup> And thus they wrote opinions that, while advancing the cause of justice in many respects, were often lacking in theoretical sophistication and self-reflection.<sup>169</sup> Not having grown up steeped in the rhetoric and culture of judicial restraint, they made little effort to reconcile at a theoretical level their judicial actions with the liberal orthodoxy about the proper judicial role that had prevailed for more than a generation.<sup>170</sup>

<sup>164</sup> See *id.*

<sup>165</sup> See Morton Horwitz, *The Warren Court and the Pursuit of Justice*, 50 WASH. & LEE L. REV. 5, 8 (1993).

<sup>166</sup> See John J. Farmer, Jr., *Mitigating “The Frailties of Human Judgment”*: Justice Robert Clifford and the Sources of Judicial Legitimacy, 25 SETON HALL L. REV. 1027, 1031 (1995). Actually, the Warren Court did not really get going full tilt until 1962, when Justice Frankfurter, the champion of restraint, was replaced by Justice Goldberg (and later by Justice Fortas). See Tushnet, *supra* note 160, at 16.

<sup>167</sup> Tushnet, *supra* note 160, at 18.

<sup>168</sup> See Horwitz, *supra* note 165, at 11 (“Warren . . . was an outsider to sophisticated legal culture. When I was in law school, it was common to mock Warren for often asking from the bench whether a particular legal position was ‘just.’ Sophisticated legal scholars did not speak that way.”); see generally MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE: A CRITICAL ISSUE* (1998) (describing Warren Court decisions that contributed to social justice).

<sup>169</sup> See Tushnet, *supra* note 160, at 17–18; KALMAN, *supra* note 105, at 46–47.

<sup>170</sup> See Archibald Cox, *The Supreme Court, 1979 Term—Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 30–31 (1980) (“The evolution of ‘strict review’ under the preferred rights approach to the first amendment, and later under the equal protection clause, appears to contemplate more searching judicial inquiry, but the Warren Court made no serious effort to address the question.” (footnote omitted)).

Many liberal thinkers—especially older veterans of the New Deal<sup>171</sup>—stuck to their Progressive guns and simply could not countenance the actions (or, at least, the unsophisticated opinions) of the Warren Court. Their frustrations led them to coalesce around the emerging legal process school, which focused on the importance of following consistent legal procedures and on allocating decision-making authority among governmental bodies according to their relative competence.<sup>172</sup> The legal process school endeavored to determine “how to have a dynamic, problem-solving government (the realist vision, shared by process theorists) that is also lawlike and legitimate, or ‘neutral’ (a big concern of [1950s] thinkers, recalling the bane of *Lochner*).”<sup>173</sup> Legal process thinkers “took the Warren Court to task for failing to provide reasons for its decisions or for relying on irrational justifications.”<sup>174</sup> Herbert Wechsler, most famously, condemned the *Brown* decision as grounded ultimately in policy considerations rather than neutral constitutional principles.<sup>175</sup> Taking a different tack, Alexander Bickel argued that the Warren Court would have been better served to employ the “passive virtues”—doctrinal techniques designed to keep the courts out of controversial areas in which unelected bodies should not be making policy decisions.<sup>176</sup> Today, these thinkers are often viewed as conservative because of their pointed criticism of the Warren Court and because modern conservative legal thought has drawn substantially upon their ideas.<sup>177</sup> But in fact, they were political liberals who simply had trouble reconciling the judicial role adopted by the Warren Court with the vision of the judicial role preached by liberals during the Progressive era.<sup>178</sup>

Most liberals, however, switched gears and sought to provide a theoretical justification for the actions of the Warren Court.<sup>179</sup> But

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<sup>171</sup> See Shapiro, *supra* note 124, at 218 (“Throughout the life of the Warren Court the commentary on that Court was produced almost exclusively by a generation of academic lawyers for whom the New Deal was a highly personal and often formative experience.”).

<sup>172</sup> See William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to The Legal Process*, in HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW*, at xci–xcvi (1994).

<sup>173</sup> *Id.* at ci.

<sup>174</sup> *Id.* at cix.

<sup>175</sup> See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 32–34 (1959).

<sup>176</sup> See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 169–75* (1962).

<sup>177</sup> See *infra* Part III.

<sup>178</sup> See Friedman, *supra* note 123, at 249 (noting that Bickel once wrote to one of Justice Brennan’s clerks, “Why is it you fellows don’t recognize that I am on your side?”); Wechsler, *supra* note 175, at 27 (noting his personal political belief that the Warren Court’s desegregation decisions “have the best chance of making an enduring contribution to the quality of our society of any that I know in recent years”).

<sup>179</sup> See KALMAN, *supra* note 105, at 48.

the “move from critic to apologist was a difficult one.”<sup>180</sup> Liberal theorists found it maddeningly challenging to come up with a principled justification for Warren Court activism while simultaneously assuring themselves and others that the Court had not simply reverted to *Lochnerism*, this time in the service of liberal political ends.<sup>181</sup> In Rebecca Brown’s words, liberal “constitutional theory was struggling to find itself, impaled on the horns of a dilemma resulting from a concern that, if *Lochner* was wrong, then *Brown v. Board of Education*, also activist, might also have to be considered wrong.”<sup>182</sup>

This dilemma has not gone away. In the half century since the Warren Court era, the central mission of liberal constitutional theory has been to articulate a coherent and convincing justification for modern judicial protection of liberty and equality that could not just as easily be used to justify the judicial activism of the *Lochner* era.<sup>183</sup>

The theoretical arguments that had been advanced in the first half of the twentieth century in favor of a preference for the First Amendment were not, on their own, adequate to the task. The Warren Court’s decisions went well beyond free speech protection. More promising was the other strand of footnote four from *Carolene Products*: the notion that greater judicial activism might be warranted when reviewing “legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation,” particularly when engaging in the “review of statutes directed at particular religious, or national, or racial minorities.”<sup>184</sup>

During and soon after the Warren Court era, a number of leading liberal theorists drew upon footnote four to promulgate increasingly sophisticated “process theories” of judicial review that, they believed, justified most of the work of the Warren Court, without simultaneously endorsing the work of the *Lochner* Court.<sup>185</sup> “Process theorists were taken with the notion that aggressive judicial review was appropriate if its goal was to further the very democratic principles

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<sup>180</sup> Friedman, *supra* note 123, at 240.

<sup>181</sup> See Fiss, *supra* note 89, at 21 (noting the challenge for liberals to explain how they could “remain attached to *Brown* and its robust use of the judicial power to further the ideal of equality, yet be happy that *Lochner* lies dead and buried”); KALMAN, *supra* note 105, at 5–6 (“While *Brown* became the seminal decision for a new generation of legal scholars coming to maturity, the task of their elders, who remembered 1937, became difficult during the Warren years.”).

<sup>182</sup> Brown, *supra* note 7, at 577 (footnotes omitted).

<sup>183</sup> See, e.g., Horwitz, *supra* note 99, at 600–02 (discussing *Brown*’s effect on liberal thought and noting that, “[i]n some sense, all of American constitutional law for the past twenty-five years has revolved around trying to justify the judicial role in *Brown* while trying simultaneously to show that such a course will not lead to another *Lochner* era”).

<sup>184</sup> *United States v. Carolene Products Co.*, 304 U.S. 144, 152–53 n.4 (1938) (internal citations omitted).

<sup>185</sup> See Friedman, *supra* note 123, at 226–27; see also Shapiro, *supra* note 124, at 222 (discussing Jesse Choper and John Hart Ely’s views).

with which judicial review interfered.”<sup>186</sup> John Hart Ely, the most prominent of the process theorists, dedicated his great work, *Democracy and Distrust*, to Chief Justice Warren, whom Ely described as a personal “hero.”<sup>187</sup> Ely spent much of his book arguing that, while the Warren Court was surely interventionist, “that is where its similarity to earlier interventionist Courts, in particular the early twentieth-century Court that decided *Lochner v. New York* and its progeny, ends.”<sup>188</sup> Whereas the *Lochner* Court had imposed its own values on the nation, the Warren Court was simply playing the role of “referee”—interfering only to ensure a well-functioning democratic process that would allow the people to establish laws that truly reflected their own values.<sup>189</sup>

Process theory garnered a good deal of criticism from some liberals, who argued that it could not deliver on its promise to be value neutral.<sup>190</sup> But its greatest weakness was that, even on its own terms, it could not account for some of the most notable liberal Supreme Court decisions of the second half of the twentieth century.

Even before the Warren Court, some liberals had worried about the limits of the theory advanced in footnote four. Its insistence that heightened judicial review is justified only when protecting either the political process or rights enumerated in the Constitution would, noted Paul Freund, “unduly restrict the development of fundamental rights by imprisoning them in the formulas of the late eighteenth century.”<sup>191</sup> “The concept of liberty in the Fourteenth Amendment,” he warned, “is hardly adequate if it is limited to the specific substantive

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<sup>186</sup> Friedman, *supra* note 123, at 228 (footnote omitted). Despite their similar names, “process theory” should not be confused with the Legal Process school. These were, in fact, competing approaches to constitutional theory. *See id.* at 228–29.

<sup>187</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW*, at vi (1980).

<sup>188</sup> *Id.* at 73.

<sup>189</sup> *See id.* at 73–75. A related strain in process-based liberal justifications for the Warren Court focused on an assertion that the Warren Court was vindicating the will of the people in circumstances in which the political branches were, as a result of process defects, failing to do so, whereas the *Lochner* Court had defied the will of the people despite the fact that the political process had been functioning well. *See, e.g.*, ARCHIBALD COX, *THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM* 5–12 (1968) (discussing the political context of Warren Court decisions); J. Skelly Wright, *The Role of the Supreme Court in a Democratic Society—Judicial Activism or Restraint?*, 54 CORNELL L. REV. 1, 9 (1968); *see also* Maurice J. Holland, *American Liberals and Judicial Activism: Alexander Bickel’s Appeal from the New to the Old*, 51 IND. L.J. 1025, 1027–28 (1976) (describing this view).

<sup>190</sup> *See, e.g.*, Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1070–71 (1980) (“[T]he process-perfecter must treat process as ultimately instrumental, as but a means to other ends, and thus must regard as secondary what he would at the same time celebrate as primary.”).

<sup>191</sup> Freund, *supra* note 143, at 548.

guarantees of the first eight Amendments and to procedural guarantees.”<sup>192</sup>

Indeed, the Warren Court pushed well beyond what process theory could ever hope to justify. Footnote four could explain judicial protection of enumerated rights, voting rights, and minorities from majoritarian oppression. But it could not explain judicial protection of *unenumerated* rights. Yet only a decade after *Brown*, the Court concluded in *Griswold v. Connecticut*<sup>193</sup> that the Constitution protects a right to use birth control as an aspect of a constitutional right to privacy, despite the fact that no such rights are expressly enumerated in the Constitution.<sup>194</sup> At this point, the Warren Court majority lost the vote of Justice Black—one of the last of the aging New Deal Justices and the leading proponent of the total incorporation doctrine as a means of reconciling opposition to *Lochner* with aggressive judicial protection of free speech and other personal rights.<sup>195</sup> Justice Black protested that what the majority had done in *Griswold*—declaring the existence of, and then aggressively protecting, a constitutional right that is not actually mentioned in the constitutional text—was no different from what the *Lochner* Court had done.<sup>196</sup> Black insisted that this “formula, based on subjective considerations of ‘natural justice,’ is no less dangerous when used to enforce this Court’s views about personal rights than those about economic rights.”<sup>197</sup>

Black’s criticisms hit close to home. In the *Griswold* majority opinion, one sees for the first time indications that the Warren Court majority was struggling with the uncomfortable parallels between its own actions and those of the *Lochner* Court. Writing for the majority, Justice Douglas—another aging New Deal veteran—was apparently so troubled by the concern that employing so-called “substantive due process” to protect unenumerated rights amounts to *Lochnerizing* that he insisted that the right to privacy is, in fact, an enumerated one, in the attenuated sense that it is contained within the nontextual “penumbras” that “emanat[e]” from the “specific guarantees in the Bill of Rights.”<sup>198</sup> Douglas was so opposed to protecting unenumerated rights—indeed, he and his fellow liberals had for more than a half century defined much of their constitutional theory in opposition to that practice—that he resorted to a convoluted reliance on penum-

<sup>192</sup> *Id.* at 547.

<sup>193</sup> 381 U.S. 479, 485–86 (1965).

<sup>194</sup> *Id.* at 484–86 (reasoning that “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance”).

<sup>195</sup> *See id.* at 508–10 (Black, J., dissenting).

<sup>196</sup> *See id.* at 514–15.

<sup>197</sup> *Id.* at 522.

<sup>198</sup> *Id.* at 484 (majority opinion).

bras and emanations to convince himself and others that he was not engaged in precisely such an effort.<sup>199</sup>

A decade later, the jig was up. The Court (then under the stewardship of Chief Justice Burger but still under the intellectual sway of the liberals) decided in *Roe v. Wade*<sup>200</sup> that the Constitution protects the right to abortion. “Rather than rely on penumbras and emanations from enumerated rights in the Bill of Rights, as the Court had done in *Griswold*, and without making any attempt to distinguish its reasoning from that in *Lochner*, the Court resuscitated the idea of substantive due process in all its uncabined glory.”<sup>201</sup> The Court’s decision in *Roe* substantially complicated the task of liberal scholars who were “struggling to rationalize the Warren Court while guarding against conservative judicial activism.”<sup>202</sup>

At this point, the process theorists could no longer defend the Court. *Roe* was neither about protecting the political process nor about protecting enumerated rights. Complaining that “*Lochner* and *Roe* are twins,”<sup>203</sup> John Hart Ely viciously chastised the Court for “indulging in sheer acts of will, ramming its personal preferences down the country’s throat.”<sup>204</sup>

The majority of liberal legal theorists did not jump ship, but they were left scrambling for a life raft. Most of the various extant theoretical efforts to distinguish liberal judicial engagement from *Lochnerism* could not distinguish *Roe v. Wade*.<sup>205</sup> And yet a commitment to *Roe* and to abortion rights quickly moved to the heart of liberal political orthodoxy and the platform of the Democratic Party, where it remains today.<sup>206</sup> In the forty years since the *Roe* decision, it has been a central

<sup>199</sup> See Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1283–84 (2007) (“For Douglas, the idea that the Due Process Clause protected substantive liberties remained tainted beyond redemption by the judicial practices of the *Lochner* era. Given a choice between *Lochner* and penumbras, Douglas chose penumbras.” (footnotes omitted)); KALMAN, *supra* note 105, at 44–45 (noting that “no one on the Court exemplified the realist-gone-amok more than [Justice Douglas]” and discussing how he “cobbed together a constitutionally protected right to marital privacy” in *Griswold*); Richard G. Wilkins, *The Structural Role of the Bill of Rights*, 6 BYU J. PUB. L. 525, 547 (1992) (noting that “Douglas adopted [his approach in *Griswold*] to avoid criticism that the Court was merely engaged in the type of free-wheeling, substantive due process analysis exemplified by *Lochner v. New York*”).

<sup>200</sup> 410 U.S. 113, 166 (1973).

<sup>201</sup> Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1797 (2012). Although the *Roe* majority cited Holmes’s *Lochner* dissent, seemingly as a way of distancing itself from *Lochner*, see *Roe*, 410 U.S. at 117, the Court made little effort to explain how its decision was jurisprudentially different from *Lochner*.

<sup>202</sup> KALMAN, *supra* note 105, at 7.

<sup>203</sup> Ely, *supra* note 63, at 940.

<sup>204</sup> *Id.* at 944.

<sup>205</sup> See KALMAN, *supra* note 105, at 5–7.

<sup>206</sup> See 2012 DEMOCRATIC NATIONAL PLATFORM, available at <http://www.democrats.org/democratic-national-platform> (“The Democratic Party strongly and unequivocally supports

mission of liberal legal thought to refine once again the understanding of *Lochner's* error, in a way that does not similarly condemn *Roe*.<sup>207</sup>

Today, liberal legal thought is, to understate the point, diverse. As Bill Marshall puts it, “[t]here are probably as many accounts of progressive constitutionalism as there are progressives.”<sup>208</sup> And there is certainly no consensus among modern liberal theorists about how exactly to reconcile opposition to *Lochner* with support for *Roe*.<sup>209</sup> We have neither the space nor the inclination here to attempt to catalogue each liberal constitutional theory and its approach to *Lochner* and *Roe*. Perhaps all that emerges clearly from the literature is that, in Paul Brest’s words, “*Lochner* remains an embarrassment for proponents of fundamental rights adjudication and cause for skepticism about the practice.”<sup>210</sup> Larry Tribe has confessed that “[n]one of the theories offered to date is wholly satisfying.”<sup>211</sup> Indeed, many liberals likely agree with Brest’s ultimate assessment that the controversy over the legitimacy of judicial review of unenumerated rights is “essentially incoherent and unresolvable.”<sup>212</sup>

For present purposes, it suffices to note that a general theme of many of the modern liberal theories is a belief that *Lochner* did not err simply by protecting rights, or even by protecting unenumerated rights; rather, it erred by protecting the *wrong* unenumerated rights.<sup>213</sup> Sometimes this assertion takes the soft form that, pursuant to our “living Constitution,” it is permissible (and indeed desirable) for courts to enforce collective societal values when certain legislative acts, for whatever reason, defy them.<sup>214</sup> On this theory, the problem with *Lochner* is that, unlike the modern Court’s major rights cases,

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*Roe v. Wade* and a woman’s right to make decisions regarding her pregnancy. . . . We oppose any and all efforts to weaken or undermine that right.”).

<sup>207</sup> See, e.g., BARBARA H. FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* 207 (1998) (“It has been a perennial problem for left liberal political theorists over the past forty years . . . to explain why the Court is not merely engaged in that most dread[ed] of all pursuits, ‘*Lochnerizing*.’”); Strauss, *supra* note 2, at 378–81 (noting that *Roe*, like *Lochner*, enforced unenumerated rights). More recently, liberals have also been tasked with deflecting comparisons between *Lochner* and the Court’s decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), protecting the unenumerated rights of gays and lesbians to sexual intimacy. See Brown, *supra* note 7, at 588–89.

<sup>208</sup> William P. Marshall, *Progressive Constitutionalism, Originalism, and the Significance of Landmark Decisions in Evaluating Constitutional Theory*, 72 OHIO ST. L.J. 1251, 1254 (2011).

<sup>209</sup> See Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1067–80 (1981) (reviewing the work of numerous liberal scholars of the 1970s whose various fundamental rights-based constitutional theories were promulgated to support *Griswold* and *Roe*).

<sup>210</sup> *Id.* at 1086.

<sup>211</sup> LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 778 (2d ed. 1988).

<sup>212</sup> Brest, *supra* note 209, at 1063.

<sup>213</sup> See TRIBE, *supra* note 211, at 769; Choudhry, *supra* note 13, at 12.

<sup>214</sup> See Wright, *supra* note 189, at 15.

it did not in fact reflect the prevailing societal values of the day.<sup>215</sup> Sometimes the assertion takes the modified form that *Lochner* may actually have been right for its time, but no longer reflects the values and needs of today's society, whereas the Court's modern rights cases do.<sup>216</sup> And sometimes the assertion takes the robust and heavily realist form that "substantive value choice by the judiciary is not only desirable, but, in fact, an inescapable feature of constitutional interpretation," and that *Lochner's* error was making objectively poor, and immoral, value choices.<sup>217</sup>

In summary, the story of the relationship between liberal legal theory about *Lochner* and the actions of the liberal Supreme Court is a story of initial caution and principle giving way to an overriding but undertheorized desire for justice. Liberals developed a theory when they did not control the Court (but did control the legislatures) about the necessity for a restrained judicial role, and they put that theory into effect when they gained power on the Court.<sup>218</sup> But once they had consolidated their control of the courts, it became clear that consistent application of their theory of judicial restraint would lead to substantively disquieting results, particularly as liberals lost control of the legislatures.<sup>219</sup> A period of tension followed, during which liberal judges generally held back, while simultaneously developing more sophisticated theories that would justify circumscribed future action.<sup>220</sup> But at midcentury, the Court shed its cautious instincts (and the concern with legal theory that had animated them) and leaped before it looked. The liberal Court's bold actions jumped ahead of the liberal

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<sup>215</sup> See, e.g., *id.* Cf. Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 280–85 (1973) (arguing that judges are uniquely able to, and therefore should, enforce society's shared moral values through judicial review and arguing that *Lochner* erred in misconceiving those shared values, whereas *Griswold* did not (but expressing concern that *Roe* may have)).

<sup>216</sup> See, e.g., I BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 63–67 (1991); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 861–62 (1992). Much of the impetus for the *Lochner* revisionism movement, see *supra* notes 85–94 and accompanying text, has actually come from liberals who seek to discredit the traditional narrative about *Lochner* as a means of undermining the notion (which arose from that narrative) that aggressive judicial protection of rights is inherently unacceptable. See, e.g., Rowe, *supra* note 70, at 224 (arguing that *Lochner* revisionism is a "way in which legal liberals . . . have sought to undermine the commonly asserted skepticism toward a strong judicial role . . . in the hope that the truth about the *Lochner* Court will set contemporary judges free"); Fiss, *supra* note 89, at 237 (explaining that he seeks to reexamine *Lochner* in order to prevent it from continuing to be used to impeach the activism of the Warren Court"); see generally Balkin, *supra* note 5 (discussing the range of views about the correctness of *Lochner*).

<sup>217</sup> Choudhry, *supra* note 13, at 12 (noting this argument); see, e.g., DWORKIN, *supra* note 69, at 82; LAURENCE H. TRIBE & MICHAEL C. DORF, *ON READING THE CONSTITUTION* 66 (1991); Horwitz, *supra* note 99, at 603.

<sup>218</sup> See *supra* notes 97–123 and accompanying text.

<sup>219</sup> See *supra* notes 124–40 and accompanying text.

<sup>220</sup> See *supra* notes 141–207 and accompanying text.



theorists' principled justifications for judicial intervention. And the theorists have been scrambling to catch up ever since.

As the next Part will demonstrate, the liberal Court's choice to act without a justificatory theoretical framework in place angered and gave fodder to conservative critics, much as the *Lochner* Court's under-theorized actions had infuriated liberal critics a generation earlier. When the tables turned once again, and conservatives regained control of the judiciary, the conservative movement faced the same crisis that liberals had faced in 1937:<sup>221</sup> Do we practice the restraint that we have been preaching, or do we pursue the conservative agenda with the vast new power that we have now obtained?

### III

#### THE EVOLUTION OF CONSERVATIVE LEGAL THOUGHT ABOUT *LOCHNER*

During the Progressive era, the conservative legal orthodoxy about *Lochner* was exemplified by the conservative Supreme Court majority that applied robust protection for the liberty of contract. To be sure, the Court's approach did not uniformly produce policy outcomes that today would be viewed as substantively conservative; as David Bernstein has noted, robust protection for the liberty of contract also had the potential, in an age characterized by substantial prejudice, to limit law's ability to discriminate on the basis of race and sex.<sup>222</sup> In addition, the conservative Court's application of the theory of substantive due process (though it did not yet have that name) in the Progressive era resulted in protection for other rights that, at least from today's vantage point, are more difficult to characterize along the left-right spectrum, such as the right of parents to direct the education of their children.<sup>223</sup> But for present purposes, it suffices to note that a commitment to robust judicial protection of economic rights was one of the hallmarks of conservative legal thought for the first few decades of the twentieth century.<sup>224</sup>

As noted above, liberals succeeded in the late 1930s in rejecting this conservative legal orthodoxy. By the early 1940s, it was no longer a contest; the dying whimper of the conservative legal approach, heard in the final dissents of the remaining conservative members of

<sup>221</sup> See *infra* note 436–39 and accompanying text.

<sup>222</sup> See BERNSTEIN, *supra* note 86, at 71–72, 85–89.

<sup>223</sup> See *Pierce v. Soc'y of the Sisters*, 268 U.S. 510, 518 (1925) (“It is not seriously debatable that the parental right to guide one’s child intellectually and religiously is a most substantial part of the liberty and freedom of the parent.”); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (“His right thus to teach [German] and the right of parents to engage him so to instruct their children, we think, are within the liberty of the Amendment.”).

<sup>224</sup> See Ronald K.L. Collins & David M. Skover, *The Future of Liberal Legal Scholarship*, 87 MICH. L. REV. 189, 206–08 (1988).

the Court,<sup>225</sup> was followed by silence from the right. President Roosevelt's appointees, and their commitment to judicial restraint, dominated the Court for the next decade. The legal professoriate largely signed on to this post–New Deal vision of a limited judicial role, and the Court's electoral salience diminished substantially.<sup>226</sup> From 1940 until the mid-1960s, there was, essentially, no distinctively conservative legal orthodoxy; indeed, as noted above, the judicial figures and legal theorists that we today think of as the “conservatives” of the era—Felix Frankfurter, Hugo Black, and John Marshall Harlan II on the Court, and Alexander Bickel, Herbert Wechsler, and others in the academy—were largely devoted to the Progressive cause of judicial restraint and are today viewed as conservatives primarily because of the shift in liberal legal thought that began at the end of this era.<sup>227</sup>

This is not to suggest that conservatives had nothing to say about legal developments in the 1940s and 1950s; to the contrary, conservatives in the South waged something bordering on open war against the Court in the wake of the school desegregation decisions.<sup>228</sup> Conservatives also objected to some of the Court's decisions in this era concerning the rights of communists.<sup>229</sup> But aside from an inchoate disdain for judicial activism, it is difficult to identify any distinctive conservative legal orthodoxy from 1940 until the late 1960s. Indeed, Steven Teles's canonical account of the rise of the conservative legal movement begins in the late 1960s,<sup>230</sup> as there were essentially no earlier antecedents on which to draw.

All of this changed in the early 1960s with the Warren Court's increasingly interventionist approach in constitutional cases and the attempts by liberal academics to develop justifying theories for the Court's decisions. Conservative reaction to these developments marked the beginning of a distinctive conservative legal orthodoxy that emphasized the same themes of restraint that liberals had once

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<sup>225</sup> See, e.g., *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 406 (1937) (Sutherland, J., dissenting) (“That the clause of the Fourteenth Amendment which forbids a state to deprive any person of life, liberty or property without due process of law includes freedom of contract is so well settled as to be no longer open to question.”).

<sup>226</sup> See *supra* notes 171–82 and accompanying text.

<sup>227</sup> See *supra* notes 114–19, 171–82 and accompanying text.

<sup>228</sup> See *Cooper v. Aaron*, 358 U.S. 1, 15 (1958) (noting that the difficulties of desegregation were “directly traceable to the actions of legislators and executive officials of the State of Arkansas, taken in their official capacities, which reflect their own determination to resist this Court's decision in the *Brown* case”); JACK BASS, *UNLIKELY HEROES* (1981); C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 154–59 (2d rev. ed. 1966) (chronicling the widespread defiance in the South in the form of rhetorical gestures, new regulations, and sanctions against compliance with the Court's desegregation orders).

<sup>229</sup> See Friedman, *supra* note 123, at 193–95.

<sup>230</sup> See STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* 58–62, 95–104 (2008).

offered to criticize the *Lochner*-era Court.<sup>231</sup> Indeed, whereas *Lochner* exemplified the conservatives' legal approach in the early twentieth century,<sup>232</sup> in the late twentieth century it was the rejection of *Lochner*—and of robust judicial protection of unenumerated rights—that became a central focus of conservative legal thought.<sup>233</sup> The conservative critique of *Lochner* was distinct from the evolving liberal critique: conservative legal thought held that *Lochner* was wrong because the Constitution does not protect unenumerated rights at all, and thus that the Court has no warrant for invalidating legislation absent a clear basis in the constitutional text.<sup>234</sup>

This view began to take shape in earnest as the orthodoxy in conservative legal thought in the late 1960s. In his campaign for the presidency, Richard Nixon criticized the decisions of the Warren Court and insisted that it was “the job of the courts to interpret the law, not to make the law.”<sup>235</sup> In appointing Justice Rehnquist to the bench, Nixon promised that his new Justice would “interpret the Constitution[,] . . . not twist or bend the Constitution in order to perpetuate his personal political and social views.”<sup>236</sup> Echoing the same theme around the time of Nixon's reelection, Robert Bork criticized the Court's decision in *Griswold v. Connecticut* by asserting that “substantive due process . . . is and always has been an improper doctrine”<sup>237</sup> because “the choice of ‘fundamental values’ by the Court cannot be justified” in any principled way.<sup>238</sup> Bork explained that “in *Lochner*, Justice Peckham, defending liberty from what he conceived as a mere meddlesome interference, asked, ‘[A]re we all . . . at the mercy of legislative majorities?’ The correct answer, where the Constitution does not speak, must be ‘yes.’”<sup>239</sup> *Lochner*, Bork later declared, was “lawlessness” and an “unjustifiable assumption[ ] of power.”<sup>240</sup>

For the next forty years, the central theme of conservative legal thought, as articulated by political figures, judges, scholars, and other opinion leaders, was that the activist decisionmaking of the Warren

<sup>231</sup> See, e.g., Tushnet, *supra* note 160, at 5–6 (discussing reactions to the Warren Court's limits on investigations of communist activities); Earl M. Maltz, *The Prospects for a Revival of Conservative Activism in Constitutional Jurisprudence*, 24 GA. L. REV. 629, 640 (1990) (discussing Nixon's emphasis of a “constitutional jurisprudence of restraint”).

<sup>232</sup> See Maltz, *supra* note 231, at 636.

<sup>233</sup> See Richard E. Levy, *Escaping Lochner's Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 N.C. L. REV. 329, 348–50 (1995) (discussing conservative criticism of liberal judicial activism creating the right of privacy).

<sup>234</sup> See Strauss, *supra* note 2, at 378–79; *infra* text accompanying note 259.

<sup>235</sup> JOHNATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY 96 (2005) (quoting President Nixon) (internal quotation marks omitted).

<sup>236</sup> RICHARD NIXON, THE PUBLIC PAPERS OF THE PRESIDENT: 1971, at 1054 (1973).

<sup>237</sup> Bork, *supra* note 19, at 11.

<sup>238</sup> *Id.* at 8.

<sup>239</sup> *Id.* at 11.

<sup>240</sup> BORK, *supra* note 24, at 44, 46.

Court (and, at times, the Burger Court) was *Lochner* all over again, and thus lawless and impermissible. For example, Edwin Meese, Attorney General during the Reagan Administration and a prominent critic of liberal legal activism, declared that, “[l]ike the Warren Court decades later, the Court in the *Lochner* era ignored the limitations of the Constitution and blatantly usurped legislative authority.”<sup>241</sup> He criticized the “fallacious assumption [ ] that Presidents Ronald Reagan and George Bush, by their Supreme Court appointments, were seeking to achieve a ‘conservative judicial revolution’ in substantive law,” explaining that to “both Chief Executives the activist Court of the *Lochner* era was as illegitimate as the Warren Court.”<sup>242</sup> A “sourcebook” issued by Meese’s Department of Justice in 1987 repeatedly cited *Lochner*, treating it as emblematic of impermissible judicial instrumentalism.<sup>243</sup>

Senator Orrin Hatch, who served alternately as the Chairman and ranking Republican member of the Senate Judiciary Committee during the nominations of Justices Ginsburg and Breyer and Chief Justice Roberts, similarly criticized both *Lochner* and the more recent substantive due process cases. *Lochner*, he declared, was a “ridiculous case” that was “conjured out of thin air by this role of substantive due process.” In his view, “it is impossible, as a matter of principle, to distinguish . . . the *Lochner* cases from the Court’s substantive due process/privacy cases like *Roe v. Wade*. The methodology is the same; the difference is only in the results, which hinge on the personal subjective values of the judge deciding the case.”<sup>244</sup>

Conservative judges similarly have criticized *Lochner* and its protection of unenumerated rights as unjustifiable judicial activism. Justice Rehnquist explained at his confirmation hearings that he would refuse “to disregard the intent of the framers of the Constitution and change it to achieve a result that [he] thought might be desirable for society,”<sup>245</sup> and he later made clear his view that this approach to judging requires the rejection of *Lochner*, “one of the

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<sup>241</sup> Edwin Meese III, *A Return to Constitutional Interpretation from Judicial Law-Making*, 40 N.Y.L. SCH. L. REV. 925, 927 (1996).

<sup>242</sup> *Id.* at 928. According to Meese, Presidents Reagan and Bush stressed judicial restraint, seeking “a federal judiciary that understood its proper role in a democracy, respected the authority of the legislative and executive branches, and limited their judgments according to the role of the judiciary prescribed in the Constitution.” *Id.*

<sup>243</sup> See, e.g., OFFICE OF LEGAL POLICY, *supra* note 17, at 1; *id.* at 1, 7.

<sup>244</sup> Nomination of Ruth Bader Ginsburg: Hearings Before the Comm. on the Judiciary, 103d Cong., 1st Sess., at 270–71, 273 (1993) (statement of Sen. Hatch); see also *id.* at 6 (noting that “[a]s a consequence of judicial activism, we witnessed in an earlier era the invalidation of State social welfare legislation, such as wage and hour laws”).

<sup>245</sup> Nominations of William H. Rehnquist and Lewis F. Powell, Jr.: Hearings Before the Comm. on the Judiciary, 92d Cong., 1st Sess., at 19 (1971) (quoting Sen. McClellan).

most ill-starred decisions that [the Supreme Court] ever rendered.”<sup>246</sup> In Rehnquist’s view, the *Lochner* Court “believed, erroneously, that ‘liberty’ under the Due Process Clause protected the ‘right to make a contract,’” just as the modern Court believed, erroneously, that that Clause protects a right to choose to have an abortion.<sup>247</sup> In his dissent in *Roe v. Wade*, Justice Rehnquist chided the majority for quoting from Justice Holmes’s *Lochner* dissent, asserting that “the result it reaches is more closely attuned to the majority opinion of Mr. Justice Peckham in that case.”<sup>248</sup>

Justice Scalia similarly has regularly invoked “the discredited substantive-due-process case of *Lochner*”<sup>249</sup> when criticizing (and often dissenting from) the Court’s fundamental rights cases. He has asserted that the Court erred in *Lochner* by seeking “to impose a particular economic philosophy upon the Constitution,”<sup>250</sup> and he has made clear his view that the Court makes a similar mistake when it seeks to protect other unenumerated rights. Accordingly, he has argued, although laws “prohibiting prostitution, recreational use of heroin, and, for that matter, working more than 60 hours per week in a bakery” (as in *Lochner*) impose “constraints on liberty,” there is “no right to ‘liberty’ under the Due Process Clause”<sup>251</sup>—and thus no constitutional right to same-sex intimacy<sup>252</sup> or abortion,<sup>253</sup> either.

Justice Thomas also has called *Lochner* “illegitimate” for locating a “‘right of free contract’ in a constitutional provision that says nothing of the sort.”<sup>254</sup> And Chief Justice Roberts criticized *Lochner* during his Senate confirmation hearings as an example of judicial “immodesty”<sup>255</sup> because “it’s quite clear that they’re not interpreting the law, they’re making the law.”<sup>256</sup>

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<sup>246</sup> WILLIAM H. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* 205 (1987); see also Rehnquist, *supra* note 17, at 702 (stating that the “dissenting opinion [in *Lochner*] has been overwhelmingly vindicated by the passage of time”).

<sup>247</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 961 (1992) (Rehnquist, C.J., dissenting).

<sup>248</sup> *Roe v. Wade*, 410 U.S. 113, 174 (1973) (Rehnquist, J., dissenting).

<sup>249</sup> *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 690–91 (1999).

<sup>250</sup> *Id.*

<sup>251</sup> *Lawrence v. Texas*, 539 U.S. 558, 592 (2003) (Scalia, J., dissenting).

<sup>252</sup> *Id.* at 590.

<sup>253</sup> *Casey*, 505 U.S. at 998 (Scalia, J., dissenting) (criticizing the Court’s conclusion that the Constitution protects a right to abortion and analogizing to “the Court’s erroneous (and widely opposed) constitutional opposition to the social measures of the New Deal” in the *Lochner* era).

<sup>254</sup> *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 355 (2007) (Thomas, J., concurring).

<sup>255</sup> Nomination of John Roberts: Hearing Before the Comm. on the Judiciary, 109th Cong., 1st Sess., at 408 (2005) (statement of John Roberts).

<sup>256</sup> *Id.* at 162.

Conservative scholars in the last half century also regularly criticized *Lochner*. To give just a few examples, in 1987 Lino Graglia declared that the “due process clause [ ] has absolutely nothing to do with . . . the power of New York State to limit the working hours of bakers or of Texas to restrict the availability of abortion.”<sup>257</sup> In his view, the “Supreme Court’s decisions to the contrary do not, in any intellectually respectable sense, represent interpretations of the clause.”<sup>258</sup> Instead, those decisions are “obviously examples of the Court’s usurpation and exercise of policy-making power, the effect of which is to deprive American citizens of their most important constitutional right, the right to decentralized self-government on fundamental issues of social policy.”<sup>259</sup> Charles Fried noted that “*Lochner*’s use of stricter scrutiny has been so discredited that its name stands as the apothegm for a whole basket of arguments against constitutional scrutiny of legislation”—rightly so, in his view, because the Court in *Lochner* was unable to offer “principled distinctions to be made between instances in which these invalidating strictures do and do not apply.”<sup>260</sup> And Steven Calabresi admonished his readers not to forget that *Lochner*, like the notorious decisions in *Dred Scott v. Sandford*<sup>261</sup> and *Korematsu v. United States*<sup>262</sup> (and *Roe*),<sup>263</sup> was a “substantive due process decision[ ] where the Court was guided by its own twisted ideas about what human dignity required.”<sup>264</sup>

Finally, conservative public intellectuals and opinion leaders also repeatedly condemned *Lochner* in the late twentieth and early twenty-first centuries. In 1996, for example, George Will criticized substantive due process, even when applied to regulate economic transactions, as “the tendentious doctrine that many government actions distasteful to judges can be baldly declared to be the results of consti-

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<sup>257</sup> Lino A. Graglia, “Constitutional Theory”: *The Attempted Justification for the Supreme Court’s Liberal Political Program*, 65 TEX. L. REV. 789, 795 (1987).

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> CHARLES FRIED, SAYING WHAT THE LAW IS: THE CONSTITUTION IN THE SUPREME COURT 183 (2004). Unlike many other conservatives of his era, Professor Fried did not reject all of modern substantive due process doctrine, see CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT 78 (1991) (“The Constitution has no language speaking directly to the right of privacy, yet I believe the proper use of judicial method allows the inference to such a right.”), but he agreed that *Roe* was indefensible, see *id.* at 75–82 (stating that *Roe* “gave legal reasoning a bad name”).

<sup>261</sup> 60 U.S. 393 (1856).

<sup>262</sup> 323 U.S. 214 (1944).

<sup>263</sup> See Steven G. Calabresi, *Text, Precedent, and the Constitution: Some Originalist and Normative Arguments for Overruling Planned Parenthood of Southeastern Pennsylvania v. Casey*, 22 CONST. COMMENT. 311, 345 (2005).

<sup>264</sup> Steven G. Calabresi, *A Critical Introduction to the Originalism Debate*, 31 HARV. J.L. & PUB. POL’Y 875, 884 (2008).

tutionally impermissible processes.”<sup>265</sup> He expressed relief that the Court had “tidied up after itself”—that is, effectively overruled *Lochner*—but warned that *Lochner*’s doctrine “has long since been smuggled into liberal jurisprudence to support a different social-policy agenda.”<sup>266</sup>

To be sure, conservative commentators have never been entirely unanimous in their opposition to *Lochner* and to aggressive judicial protection of economic rights. There has long been a libertarian minority within the conservative coalition, and some prominent libertarian scholars have for decades urged a revival of *Lochner*-like scrutiny for regulation of economic activity. For example, in 1980 Bernard Siegan characterized the Court’s rejection of the *Lochner* line of cases as a form of “judicial abdication” that led regulators who “wield enormous power” “frequently and frivolously” to disturb the “economic marketplace on which so many in this country rely for their welfare.”<sup>267</sup> He urged the courts to fulfill their “[o]bligation to [p]rotect [e]conomic [l]iberties,”<sup>268</sup> because “changes beneficial to both freedom and material welfare are not as likely to be realized if the legislature remains the final arbiter of economic liberties.”<sup>269</sup>

Perhaps more influentially, Richard Epstein has argued since the 1980s that courts should aggressively protect economic rights<sup>270</sup> and that *Lochner*’s “fault” was that it did not provide *enough* protection for the liberty of contract.<sup>271</sup> In his view, the government’s power to regulate private ordering is quite limited: “[t]he sole function of the police power is to protect individual liberty and private property against all manifestations of force and fraud.”<sup>272</sup> Epstein accordingly rejects conservative paeans to judicial restraint, arguing that “some movement in

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<sup>265</sup> George Will, *How Irsome that We Allow Judges to Make Our Laws*, SUN SENTINEL (June 2, 1996), [http://articles.sun-sentinel.com/1996-06-02/news/9606030105\\_1\\_punitive-awards-due-process-punitive-damages](http://articles.sun-sentinel.com/1996-06-02/news/9606030105_1_punitive-awards-due-process-punitive-damages).

<sup>266</sup> George Will, *High Court Ruling on Forfeiture Should Trouble Conservatives*, ORLANDO SENTINEL (Mar. 12, 1996), [http://articles.orlandosentinel.com/1996-03-12/news/9603110252\\_1\\_stephen-breyer-bennis-forfeiture](http://articles.orlandosentinel.com/1996-03-12/news/9603110252_1_stephen-breyer-bennis-forfeiture).

<sup>267</sup> BERNARD H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* 189, 203 (1980).

<sup>268</sup> *Id.* at 83–84, 96–108.

<sup>269</sup> *Id.* at 264.

<sup>270</sup> See generally RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 30–31 (1985).

<sup>271</sup> See Epstein, *supra* note 86, at 733–35 (“*Lochner* may well have given *too much* scope to the police power, for it can be argued that there is no reason to interfere with freedom of contract, even for reasons of health, where no third-party interests are at stake.”); see also EPSTEIN, *supra* note 270, at 108–09 (noting that “[t]he police power cannot be interpreted as an unrestricted grant of state power to act in the public interest, for then the exception will overwhelm the clause”).

<sup>272</sup> EPSTEIN, *supra* note 270, at 112.

the direction of judicial activism”—activism, that is, to protect economic rights from regulatory interference—“is clearly indicated.”<sup>273</sup>

Epstein’s and Siegan’s views on the Constitution’s protections for economic liberty, however, were clear outliers in the conservative movement when they advanced them. Epstein acknowledged that his view was outside of the “mainstream of American constitutional theory” and that his purpose was “to take issue with the conventional wisdom”;<sup>274</sup> Siegan lamented that, “[a]t the time of [his] writing, the idea of restoring a high legal priority to economic liberties is not acceptable to most judges.”<sup>275</sup> And, indeed, the leading lights of mainstream conservative legal thought sharply criticized Epstein’s and Siegan’s views about *Lochner* and judicial protection of economic liberties.

In 1985, for example, Robert Bork gave a speech at the University of San Diego Law School (where Bernard Siegan taught) on “The Constitution, Original Intent, and Economic Rights,” in which he criticized Siegan’s neo-*Lochnerian* view that courts should apply searching scrutiny to all economic regulations.<sup>276</sup> Bork argued that with such scrutiny, “when employed as a formula for the general review of all restrictions on human freedom without guidance from the historical Constitution, the court is cut loose from any external moorings and required to perform tasks that are not only beyond its competence, but beyond any conceivable judicial function.”<sup>277</sup> Because in applying rigorous scrutiny a court “will have no guidance other than its own sense of legislative prudence,”<sup>278</sup> Bork explained, Siegan’s approach inevitably would result in “a massive shift away from democracy and toward judicial rule.”<sup>279</sup> Bork later argued that Siegan’s view, which would place “the Court in a stance of across-the-board libertarianism,” required acceptance not only of *Lochner* but also of *Griswold* and *Roe*.<sup>280</sup> But “[t]here being nothing in the Constitution about maximum hours laws, minimum wage laws, contraception, or abortion,” the Court simply “had no business undertaking to give a substantive answer to the claim of right in any of those” cases.<sup>281</sup>

Similarly, in 1984, Antonin Scalia, then a judge on the United States Court of Appeals for the District of Columbia Circuit, took aim

<sup>273</sup> Richard A. Epstein, *Judicial Review: Reckoning on Two Kinds of Error*, in SCALIA V. EPSTEIN: TWO VIEWS ON JUDICIAL ACTIVISM 9, 16 (Cato Inst. 1985).

<sup>274</sup> *Id.* at 10.

<sup>275</sup> SIEGAN, *supra* note 267, at 23.

<sup>276</sup> Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 828–30 (1986).

<sup>277</sup> *Id.* at 829–30.

<sup>278</sup> *Id.* at 832.

<sup>279</sup> *Id.* at 829.

<sup>280</sup> BORK, *supra* note 24, at 225.

<sup>281</sup> *Id.*



at Epstein's call to revive *Lochner*. Scalia appeared with Epstein at a Cato Institute Conference on Economic Liberties and the Judiciary. In his address, Scalia criticized the view that the courts should aggressively protect economic rights, stressing the importance of judicial restraint and respect for democratic norms.<sup>282</sup> Implicitly linking Epstein's jurisprudence to *Griswold* and *Roe*, he lamented that "our system already suffers from relatively recent constitutionalizing, and thus judicializing, of social judgments that ought better be left to the democratic process."<sup>283</sup> He warned that a "reversal of a half-century of judicial restraint in the economic realm" represented a "threat to constitutional democracy."<sup>284</sup>

In rejecting these calls for a revival of aggressive judicial protection of economic liberty, Bork and Scalia stressed both the Progressive-era norm of judicial restraint—which requires a separation between the judge's personal views and the substantive content of the law—and an originalist interpretive methodology, which, they asserted, would ensure that separation.<sup>285</sup> This focus on judicial restraint and originalism was central to conservative legal thought in the late twentieth century.

First, mainstream conservative legal thought—and the conservative critique of Epstein and Siegan—held that courts should be sparing in the exercise of judicial review.<sup>286</sup> This is not to say that conservative legal orthodoxy was that courts should *never* (or virtually never) invalidate democratically enacted legislation; conservatives never seriously entertained such a Thayerian view (whereas some Progressive-era proponents of restraint and their successors came close to adopting, at least rhetorically, such a view).<sup>287</sup> Instead, the modern conservative view of the judicial role held that courts should intervene to invalidate democratically enacted legislation only when the Constitution itself—as opposed to the judge's values and personal policy preferences—plainly requires such a result.

As Bork explained, the Court's power of judicial review, which is countermajoritarian in nature, is "legitimate only if it has, and can

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<sup>282</sup> Antonin Scalia, *Economic Affairs as Human Affairs*, in SCALIA v. EPSTEIN: TWO VIEWS ON JUDICIAL ACTIVISM, *supra* note 273, at 3–4.

<sup>283</sup> *Id.* at 4.

<sup>284</sup> *Id.* at 1, 4.

<sup>285</sup> See BORK, *supra* note 24, at 351–52; Scalia, *supra* note 282, at 1, 5.

<sup>286</sup> See, e.g., BORK, *supra* note 24, at 259 (“[W]here the constitution does not apply, the judge, while in his robes, must adopt a posture of moral abstention.”); see *supra* notes 267–73.

<sup>287</sup> See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893) (arguing that a statute should be invalidated only if its unconstitutionality is “so clear that it is not open to rational question”); see generally Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519, 522–34 (2012) (discussing Thayerism and Thayer's successors).

demonstrate in reasoned opinions that it has, a valid theory, derived from the Constitution, of the respective spheres of majority and minority freedom.”<sup>288</sup> A “Court that makes rather than implements value choices,” in contrast, “cannot be squared with the presuppositions of a democratic society,” because a judge’s own values and personal preferences are an “inadequate basis for judicial supremacy.”<sup>289</sup> Accordingly, in Bork’s view, a “legitimate Court must be controlled by principles exterior to the will of the Justices.”<sup>290</sup>

Second (and closely related), modern conservative legal thinkers turned to originalism to provide, as Justice Scalia put it, a “historical criterion that is conceptually quite separate from the preferences of the judge himself.”<sup>291</sup> As Steven Smith explained, a “central concern of originalism is that judges be constrained by the law rather than be left free to act according to their own lights, a course that originalists regard as essentially lawless.”<sup>292</sup> On this view, nonoriginalist approaches to constitutional interpretation not only fail to constrain judges but also effectively invite judicial instrumentalism under the guise of constitutional interpretation.<sup>293</sup> Accordingly, when Bork advanced his critique of Siegan’s approach, he not only focused on the need for judicial restraint generally but also insisted on adherence to original intent as the proper mechanism of constraint.<sup>294</sup> Bork later similarly criticized Epstein’s approach, noting that although Epstein had advanced “a powerful work of political theory,” he had not “convincingly located that political theory in the Constitution.”<sup>295</sup>

Conservatives thus generally rejected calls to reinvigorate the judicial role in protecting economic liberty because such calls conflicted with conservative legal orthodoxy. According to that orthodoxy, *Lochner*, like the subsequent decisions in *Griswold* and *Roe*, was indefensible because it was not—and could not be—grounded in the original

<sup>288</sup> Bork, *supra* note 19, at 3.

<sup>289</sup> *Id.* at 6, 10.

<sup>290</sup> *Id.* at 6.

<sup>291</sup> Scalia, *supra* note 23, at 864; *see also* Whittington, *supra* note 26, at 602 (“By rooting judges in the firm ground of text, history, well-accepted historical traditions, and the like, originalists hoped to discipline them.”).

<sup>292</sup> Steven G. Smith, *Law Without Mind*, 88 MICH. L. REV. 104, 106 (1989) (emphasis omitted); *see also* BERGER, *supra* note 17, at 284–86 (“The Justices’ value choices may not displace those of the Framers . . .”).

<sup>293</sup> *See* OFFICE OF LEGAL POLICY, *supra* note 17, at 1 (“Because these alternative standards are so vague, [they] often lead[ ] to the imposition of the judge’s personal concept of prudent public policy.”); Scalia, *supra* note 23, at 863 (arguing that “[n]onoriginalism, which under one or another formulation invokes ‘fundamental values’ as the touchstone of constitutionality,” by definition increases the risk that judges will “mistake their own predilections for the law,” because “[i]t is very difficult for a person to discern a difference between those political values that he personally thinks most important, and those political values that are ‘fundamental to our society’”).

<sup>294</sup> *See* BORK, *supra* note 24, at 224–29.

<sup>295</sup> *Id.* at 230.

meaning of the constitutional text.<sup>296</sup> Accordingly, it represented nothing other than the Justices' naked policy preferences, and as such was lawless.<sup>297</sup>

To be sure, the substantive policy outcomes that the *Lochner* approach would likely produce—significant limits on the government's power to interfere in the marketplace—have long held great appeal for many conservatives, and the conservative *political* orthodoxy has long aligned quite closely with that decision's antiregulatory thrust. But modern conservative *legal* orthodoxy holds that constitutional interpretation must be independent from the judge's personal political preferences.<sup>298</sup> Accordingly, it is not surprising to find that many central figures in the conservative legal movement went to great lengths to stress that their opposition to *Lochner* was a matter of legal principle, as evidenced by the fact that they agreed in large part, as a matter of policy, with *Lochner's* antiregulatory impulse.

For example, when then-Judge Scalia criticized Epstein's call for a revival of aggressive judicial protection of economic liberties, he began by noting, "I know no society, today or in any era of history, in which high degrees of intellectual and political freedom have flourished side by side with a high degree of state control over the relevant citizen's economic life."<sup>299</sup> He was also careful to state that he did not "necessarily quarrel with the specific nature of the particular economic rights that the most sagacious of the proponents of substantive due process would bring within the protection of the Constitution; were I a legislator, I might well vote for them."<sup>300</sup> Similarly, Bork noted that he rejected the *Lochner* line of cases even though he was "in political agreement" with the outcomes in some of those cases.<sup>301</sup> In addition, in the course of criticizing Siegan's libertarian prescriptions, Bork allowed that, "[v]iewed from the standpoint of economic philosophy, and of individual freedom, the idea [of applying searching scru-

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<sup>296</sup> See, e.g., Steven Calabresi, *Text v. Precedent in Constitutional Law*, 31 HARV. J. L. & PUB. POL'Y 947, 952 (2008) ("The Supreme Court abandoned the *Lochner*-era doctrine of economic substantive due process in the face of a withering textualist and originalist critique . . ."); OFFICE OF LEGAL POLICY, *supra* note 17, at 59 ("To justify its promotion of a laissez-faire marketplace [in the *Lochner* era], the Court purported to rely on the due process clauses of the fifth and fourteenth amendments, but it never seriously attempted to justify its expansive interpretation of those clauses with their original meaning.")

<sup>297</sup> See Whittington, *supra* note 26, at 601 ("[A] core theme of originalist criticisms of the Court was the essential continuity between *Lochner v. New York* and *Griswold v. Connecticut*.").

<sup>298</sup> See, e.g., BORK, *supra* note 24, at 5 ("[J]udges must consider themselves bound by law that is independent of their own views of the desirable."); SCALIA, *supra* note 23, at 863 ("[T]he main danger in judicial interpretation of the Constitution . . . is that the judges will mistake their own predilections for the law.")

<sup>299</sup> Scalia, *supra* note 282, at 2.

<sup>300</sup> *Id.* at 4.

<sup>301</sup> Bork, *supra* note 19, at 11.

tiny to all economic regulations] has many attractions.”<sup>302</sup> And Attorney General Meese’s Sourcebook of Original Meaning Jurisprudence went out of its way to note that originalism is not a “[d]isguise for the [c]onservative [p]olitical [a]genda,” a point that it substantiated by noting that “original meaning analysis is antithetical to attempts by some scholars to promote conservative economic reforms by resurrecting *Lochner* and the doctrine of economic substantive due process.”<sup>303</sup>

And so it was for several decades: conservative legal orthodoxy held that *Griswold* and *Roe* (and their progeny) were simply *Lochner* under a different guise, and that all of those decisions—the freedom of contract cases from the early twentieth century and the fundamental rights cases from later in the century—were lawless and illegitimate.<sup>304</sup> But there are signs that the broad consensus in the conservative legal movement is unraveling and that many conservatives are willing to look afresh at arguments in favor of aggressive judicial protection for economic liberty.<sup>305</sup>

As noted above, in the early 1980s conservative support for *Lochner*-like judicial protection for the freedom of contract was limited to a relatively small number of libertarian scholars who for the most part operated on the fringe of the conservative legal universe.<sup>306</sup> In the last decade, however, a new wave of libertarian scholars—operating closer to the mainstream of conservative legal thought—has argued anew for a revival of *Lochner*’s aggressive scrutiny for regulations that interfere with economic liberty.<sup>307</sup> In 2004, Randy Barnett argued generally that the courts should interpret the Constitution to embody a “presumption of liberty,”<sup>308</sup> and specifically for a return to *Lochner*’s respect for the freedom of contract.<sup>309</sup> In 2011, David

<sup>302</sup> Bork, *supra* note 276, at 829.

<sup>303</sup> OFFICE OF LEGAL POLICY, *supra* note 17, at 39.

<sup>304</sup> See *supra* notes 244–64, 296–97 and accompanying text.

<sup>305</sup> See *infra* notes 312–25 and accompanying text.

<sup>306</sup> See *supra* notes 267–84 and accompanying text.

<sup>307</sup> This is perhaps unsurprising. Although we are not aware of any hard data, impressionistically it appears that—outside of the religiously affiliated law schools—modern “conservative” law professors are much more likely to be economic libertarians than traditional social conservatives. Cf. TELES, *supra* note 230, at 164–65 (noting that social conservatives have gained less traction in legal academia than have libertarians). There are also several influential think tanks and publications that are dedicated to advancing a libertarian vision, and they have echoed the call for a revival of *Lochner*’s approach. See, e.g., Damon Root, *Lochner and Liberty*, REASON.COM (Sept. 18, 2009), <http://reason.com/archives/2009/09/18/lochner-and-liberty> (arguing that conservatives and liberals who express hostility toward *Lochner* “don’t give economic liberty its constitutional due”).

<sup>308</sup> RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 260–69 (2004).

<sup>309</sup> See *id.* at 211–14, 319–33; Randy E. Barnett, *Does the Constitution Protect Economic Liberty?*, 35 HARV. J.L. & PUB. POL’Y 5, 5 (2012) (“The evidence that the Constitution protects rights of private property and contract is overwhelming.”).

Bernstein sought to “rehabilitat[e] *Lochner*” by offering a detailed revisionist historical account of the decision specifically and the liberty of contract doctrine more generally.<sup>310</sup> He sought to demonstrate that the *Lochner* Court’s conclusion that “the police power is not infinitely elastic” was eminently sensible.<sup>311</sup>

Barnett’s and Bernstein’s defenses of *Lochner* came just as libertarianism—at least with respect to economic liberties—was gaining salience in the conservative movement.<sup>312</sup> To be sure, economic libertarianism—and in particular the view that the government generally should not interfere in the marketplace—has been a part of conservative political belief for some time. The Republican Party’s platform, for example, has stressed the importance of “free, competitive enterprise” since at least 1964.<sup>313</sup> Charles Fried has reported that many of the young conservative lawyers in the Reagan Administration were “devotees of the extreme libertarian views” of Richard Epstein and sought to use the Takings Clause to limit the government’s ability to regulate.<sup>314</sup> And the Federalist Society, which has played an increasingly central role in the development of conservative legal

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<sup>310</sup> BERNSTEIN, *supra* note 86, at 128. Bernstein explained, however, that his book is “a work of history” that “draws no normative conclusions about current constitutional practice” and is agnostic about whether courts should again protect economic liberties. David E. Bernstein, *A Reply to Professor George W. Liebmann’s Review of REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM*, 21 L. & POL. BOOK REV., 424 (2011), available at <http://www.lawcourts.org/LPBR/reviews/bernstein0711r.htm>.

<sup>311</sup> BERNSTEIN, *supra* note 86, at 127; see also Timothy Sandefur, *In Defense of Substantive Due Process, or the Promise of Lawful Rule*, 35 HARV. J.L. & PUB. POL’Y 283, 349 (2012) (arguing that the Constitution “cannot be equally compatible with all political or economic perspectives. On the contrary, it incorporates a classical liberal political philosophy rooted in individual rights and the tradition of lawful, non-arbitrary rule.”).

<sup>312</sup> The conservative movement since 1945 has included a somewhat tenuous coalition of economic and social conservatives. See GEORGE H. NASH, *THE CONSERVATIVE INTELLECTUAL MOVEMENT IN AMERICA: SINCE 1945*, at 233–35 (1976) (discussing the shift in conservative ideologies that occurred in the 1940s). As Jamal Greene has observed, libertarianism that “takes the form of anti-regulatory zeal” is “harmonious with that fusion, whereas a purer form of anti-statist libertarianism is threatening to it.” Jamal Greene, *What the New Deal Settled*, 15 U. PA. J. CONST. L. 265, 282 (2012). As we recount below, the vanguard supporting a rehabilitation of *Lochner* tends to include those with antistatist leanings, but the reinvigoration of *Lochner* appears to hold increasing appeal to those motivated only by an antiregulatory zeal.

<sup>313</sup> See, e.g., REPUBLICAN PARTY PLATFORM OF 1964, <http://www.presidency.ucsb.edu/ws/index.php?pid=25840> (last visited Jan. 18, 2015) (pledging to “vigorously protect the dynamo of economic growth—free, competitive enterprise—that has made America the envy of the world,” and declaring that “[e]very person has the right to govern himself, to fix his own goals, and to make his own way with a minimum of governmental interference”); REPUBLICAN PARTY PLATFORM OF 1980, <http://www.presidency.ucsb.edu/ws/index.php?pid=25844> (last visited Jan. 18, 2015) (“It has long been a fundamental conviction of the Republican Party that government should foster in our society a climate of maximum individual liberty and freedom of choice.”).

<sup>314</sup> FRIED, *ORDER AND LAW*, *supra* note 260, at 183.

thought,<sup>315</sup> defines itself as “a group of conservatives and libertarians”; lists as one of its founding principles the idea that “the state exists to preserve freedom”; and seeks, among other things, to “reorder[ ] priorities within the legal system to place a premium on individual liberty.”<sup>316</sup>

But libertarian views on economic matters have gained even more salience in conservative politics in recent years, as evidenced by the rise of the Tea Party movement and the uniform conservative opposition to President Obama’s agenda (and in particular to the Affordable Care Act). In 2010, several dozen Republican candidates with close ties to the Tea Party movement—a political movement focused in large part on restoring constitutional protection to economic liberties<sup>317</sup>—were elected to Congress, with most vowing to dramatically reduce governmental interference in the marketplace.<sup>318</sup> As of 2014, thirteen successful Republican candidates for the Senate and over sixty successful Republican candidates for the House had signed the “Contract from America,” a libertarian manifesto that focused on economic liberties.<sup>319</sup> Ron Paul, a libertarian member of Congress from Texas,<sup>320</sup> received roughly 11 percent of the vote<sup>321</sup> and 8 percent of the delegates during the 2012 Republican presidential primaries.<sup>322</sup> The 2012 Republican Party Platform had a particularly strong

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<sup>315</sup> See TELES, *supra* note 230, at 135–37 (overviewing the influence of the Federalist Society in the conservative legal movement).

<sup>316</sup> *Our Purpose*, THE FEDERALIST SOC’Y, <http://www.fed-soc.org/aboutus/> (last visited Jan. 18, 2015).

<sup>317</sup> See, e.g., Ryan D. Murphy, Note, *Tea Party Constitutionalism: Does the “Astroturf” Have Roots in the History of the Constitution?*, 40 HASTINGS CONST. L.Q. 187, 191 (2012) (“A central quality of Tea Party constitutionalism is its prioritization of economic freedoms.” (citation omitted)); *id.* at 198–207 (demonstrating the Tea Party’s support for *Lochner*-style liberty of contract).

<sup>318</sup> See Vanessa Williamson, Theda Skocpol & John Coggin, *The Tea Party and the Remaking of Republican Conservatism*, 9 PERSP. POL. 25, 38 app. A (2011).

<sup>319</sup> *Current Governors and Members of Congress*, CONTRACT FROM AMERICA, <http://contractfromamerica.org/signers> (last visited Nov. 3, 2014). See *Contract from America*, <http://www.thecontract.org/the-contract-from-america/> (last visited Nov. 3, 2014) (“Our moral, political, and economic liberties are inherent, not granted by our government. . . . The market economy, driven by the accumulated expressions of individual economic choices, is the only economic system that preserves and enhances individual liberty.”).

<sup>320</sup> Ron Paul’s “statement of principles” provides: “We believe the free market is the most just and humane economic system and the greatest engine of prosperity the world has ever known. . . . We believe that freedom is an indivisible whole, including not only economic liberty, but civil liberties, privacy rights, and all the personal freedoms protected by the Bill of Rights.” *Statement of Principles*, CAMPAIGN FOR LIBERTY, <http://www.campaignforliberty.org/about/statement-of-principles/> (last visited Jan. 18, 2015).

<sup>321</sup> See *2012 Presidential Republican Primary Election Results*, USELECTIONATLAS.ORG, <http://uselectionatlas.org/RESULTS/national.php?year=2012&elect=2> (last visited Jan. 18, 2015).

<sup>322</sup> See *Republican Delegate Tally: ELECTION 2012*, N.Y. TIMES, <http://elections.nytimes.com/2012/primaries/delegates> (last visited Jan. 18, 2015).

focus on economic liberty,<sup>323</sup> and the 2016 nomination battle is likely to put economic libertarianism front and center.<sup>324</sup> And well-financed advocacy groups have played an increasingly important role during the last several election cycles, particularly in Republican primaries, in supporting candidates dedicated to minimalist government and economic liberty.<sup>325</sup>

We seek to demonstrate here that this renewed focus in conservative political thought on limiting government interference in the marketplace has begun to affect mainstream conservative legal thought. An important signal of these changes came in the legal challenges to the minimum-essential-coverage provision—otherwise known as the “individual mandate”—in the Affordable Care Act.<sup>326</sup> Although that provision, which requires that most Americans obtain health insurance or face a tax penalty, was originally proposed by conservative policy experts who sought an alternative to a single-payer system,<sup>327</sup> it became the central focus of conservatives seeking to invalidate the Act on constitutional grounds. Opponents of the Act formally framed their legal attack on the mandate principally in terms of federalism—they argued that Congress lacked authority to enact it under its commerce and taxing powers—but in substance the political and legal claims against the mandate sounded more in notions of personal liberty than state autonomy.<sup>328</sup>

For example, Randy Barnett, who played a key role in framing the legal challenges, argued that mandates to take action are much more serious infringements on liberty than are prohibitions on con-

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<sup>323</sup> See REPUBLICAN PARTY PLATFORM OF 2012, [http://www.gop.com/2012-republican-platform\\_Restoring/](http://www.gop.com/2012-republican-platform_Restoring/) (last visited Jan. 18, 2015) (“We are the party of maximum economic freedom and the prosperity freedom makes possible. . . . This year’s election is a chance to restore the proven values of the American free enterprise system.”).

<sup>324</sup> See Karen Tumulty, *Libertarians’ Rise Has the GOP Boiling*, WASH. POST, Aug. 1, 2013, at A1 (“Libertarianism once again appears to be on the rise . . . [b]ut its alliance with the Republican establishment is fraying . . .”).

<sup>325</sup> See, e.g., Jane Mayer, *Covert Operations*, NEW YORKER, Aug. 30, 2010, at 44, 48–52 (describing David and Charles Koch’s libertarianism and influence on conservative politics); Richard W. Stevenson, *Club for Growth Leads Conservative Charge, Sometimes at Republicans*, N.Y. TIMES (Mar. 13, 2013), <http://thecaucus.blogs.nytimes.com/2013/03/13/club-for-growth-leads-conservative-charge-sometimes-at-republicans/> (describing influence of Club for Growth, a “conservative group intent on electing candidates who adhere strictly to a small-government, low-tax philosophy”).

<sup>326</sup> See Ezra Klein, *The Unpopular Mandate*, NEW YORKER, June 25, 2012, at 30.

<sup>327</sup> See *id.* at 30–31.

<sup>328</sup> See Peter J. Smith, *Federalism, Lochner, and the Individual Mandate*, 91 B.U. L. REV. 1723, 1743 (2011); see also Greene, *supra* note 312, at 278–80 (describing substantive due process challenge to the Affordable Care Act); Bryan J. Leitch, *Where Law Meets Politics: Freedom of Contract, Federalism, and the Fight Over Health Care*, 27 J.L. & POL. 177, 180–81 (2011) (outlining how “the constitutional challenges to the [Affordable Care Act] are utilizing contemporary federalism doctrine to vindicate *Lochner*-era ‘freedom of contract theories’”).

duct.<sup>329</sup> When Charles Krauthammer, a conservative columnist for the *Washington Post*, described the “constitutional wreckage” left by the Affordable Care Act, he focused in large part on the “assault on free enterprise” and the “assault on individual autonomy,” expressing outrage that the “[P]resident presumes to order a private company to enter into a contract for the provision of certain services—all of which must be without charge.”<sup>330</sup> Hans Spakovsky, a former FEC commissioner and Justice Department official who is influential in conservative circles, declared, “The very idea that Congress has the power to force individual Americans into commercial activity goes against our most basic notions of freedom and liberty.”<sup>331</sup> And a senior fellow at the Heritage Foundation warned that the mandate was “an unconstitutional violation of personal liberty *and* strikes at the heart of American federalism.”<sup>332</sup>

The courts, of course, ultimately decided the cases on federalism grounds, but even then the published opinions include echoes of *Lochner*’s protection for economic rights. A federal district judge in Virginia, in concluding that the individual mandate exceeded Congress’s Article I powers, stated, “At its core, this dispute is not simply about regulating the business of insurance—or crafting a scheme of universal health insurance coverage—it’s about an individual’s right to choose to participate.”<sup>333</sup> And Chief Justice Roberts, in the portion of his opinion concluding that Congress lacked power under the Commerce Clause to enact the mandate, noted that “[p]eople, for reasons of their own, often fail to do things that would be good for them or good for society,” but that the “country the Framers of our Constitution envisioned” does not authorize Congress to “compel citizens to act as the Government would have them act.”<sup>334</sup> He noted that “Congress already enjoys vast power to regulate much of what we

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<sup>329</sup> See Randy E. Barnett, *Obamacare’s Individual Mandate Is a Dangerous New Federal Power*, WASH. EXAMINER (Feb. 15, 2011), <http://washingtonexaminer.com/obamacares-individual-mandate-is-a-dangerous-new-federal-power/article/39119> (stating that, “[w]hile your liberty would be restricted” if you were told things you were not permitted to do, mandates “could potentially occupy all your time and consume all your financial resources” and thus “are so much more onerous”).

<sup>330</sup> Charles Krauthammer, *Overreach: Obamacare vs. the Constitution*, WASH. POST (Feb. 16, 2012), [http://www.washingtonpost.com/opinions/charles-krauthammer-overreach-obamacare-vs-the-constitution/2012/02/16/gIQAmupcIR\\_story.html](http://www.washingtonpost.com/opinions/charles-krauthammer-overreach-obamacare-vs-the-constitution/2012/02/16/gIQAmupcIR_story.html).

<sup>331</sup> Hans A. Von Spakovsky, *Individual Mandate Goes Against Basic Freedom and Liberty*, U.S. NEWS & WORLD REP. (Mar. 25, 2012, 6:46 PM), <http://www.usnews.com/debate-club/should-the-supreme-court-overturn-obamas-healthcare-law/individual-mandate-goes-against-basic-freedom-and-liberty>.

<sup>332</sup> Robert E. Moffit, *Obamacare and the Individual Mandate: Violating Personal Liberty and Federalism*, THE HERITAGE FOUNDATION (Jan. 18, 2011) (emphasis added), <http://report.heritage.org/wm3103>.

<sup>333</sup> Virginia *ex rel.* Cuccinelli v. Sebelius, 728 F. Supp. 2d 768, 788 (E.D. Va. 2010).

<sup>334</sup> Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2589 (2012).



do,” and he warned that “[a]ccepting the Government’s theory would give Congress the same license to regulate what we do not do, fundamentally changing the relation between the citizen and the Federal Government.”<sup>335</sup>

At the same time that the debate over the constitutionality of the individual mandate was taking shape, *McDonald v. City of Chicago*<sup>336</sup> reached the Supreme Court. That case involved the incorporation against the states of the individual right to keep and bear arms, which the Court had recognized two years earlier.<sup>337</sup> The petitioners in *McDonald*, represented by a libertarian lawyer, had urged the Court to overrule the *Slaughter-House Cases*<sup>338</sup> and to conclude that the Privileges or Immunities Clause of the Fourteenth Amendment<sup>339</sup> protects all fundamental rights, including but not limited to those set out in the Bill of Rights.<sup>340</sup> The Court demurred, resolving the case under the Due Process Clause of the Fourteenth Amendment,<sup>341</sup> but Justice Thomas wrote separately to express his view that the Privileges or Immunities Clause protects the right to keep and bear arms, among other rights.<sup>342</sup> Without resolving the issue, Justice Thomas acknowledged the possibility that “the privileges and immunities of American citizenship include . . . rights besides those enumerated in the Constitution” and noted that the “mere fact that the Clause does not expressly list the rights it protects does not render it incapable of principled judicial application.”<sup>343</sup>

The lower courts have gone even further down the road back to *Lochner*. In April 2012, not long after the oral arguments in the Affordable Care Act cases, the United States Court of Appeals for the District of Columbia Circuit decided *Hettinga v. United States*,<sup>344</sup> which involved a constitutional challenge to a federal statute that regulates the price that milk processors and distributors pay to dairy farmers.<sup>345</sup> The court rejected the challenge, applying rational basis review.<sup>346</sup> But Judge Brown, joined by Chief Judge Sentelle, wrote separately to express the view that the Supreme Court, in insisting on rationality

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<sup>335</sup> *Id.*

<sup>336</sup> 561 U.S. 742 (2010).

<sup>337</sup> *See* District of Columbia v. Heller, 554 U.S. 570, 635 (2008) (holding that the Second Amendment protects a right to gun possession for purposes of self-defense).

<sup>338</sup> 83 U.S. (16 Wall.) 36 (1873).

<sup>339</sup> U.S. CONST. amend. XIV, § 1, cl. 2 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .”).

<sup>340</sup> *See* Brief for Petitioner at 42, *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (No. 08-1521), 2009 WL 4378912.

<sup>341</sup> *See McDonald*, 561 U.S. at 756–760.

<sup>342</sup> *See id.* at 3084–85 (Thomas, J., concurring in part).

<sup>343</sup> *Id.* at 854.

<sup>344</sup> 677 F.3d 471 (D.C. Cir. 2012).

<sup>345</sup> *Id.* at 474–76.

<sup>346</sup> *Id.* at 479.

review for regulations of economic activity, has “abdicated its constitutional duty to protect economic rights completely.”<sup>347</sup> Judge Brown lamented that “America’s cowboy capitalism was long ago disarmed by a democratic process increasingly dominated by powerful groups with economic interests antithetical to competitors and consumers,” and that “the courts, from which the victims of burdensome regulation sought protection, have been negotiating the terms of surrender since the 1930s.”<sup>348</sup> Citing Randy Barnett’s work, Judge Brown reasoned that “[t]he practical effect of rational basis review of economic regulation is the absence of any check on the group interests that all too often control the democratic process,” thereby allowing “the legislature free rein to subjugate the common good and individual liberty to the electoral calculus of politicians, the whim of majorities, or the self-interest of factions.”<sup>349</sup> She concluded ominously, “Rational basis review means property is at the mercy of the pillagers. The constitutional guarantee of liberty deserves more respect—a lot more.”<sup>350</sup>

Judge Brown, in other words, unabashedly argued for the revitalization of the *Lochner* era’s rigorous scrutiny for government regulation that interferes with economic liberty. It was perhaps not particularly surprising to hear Judge Brown make such a claim, as she had given a speech in 2000 (before her appointment to the court) warning about the “collectivist impulse,” criticizing Justice Holmes’s *Lochner* dissent, and criticizing the Supreme Court’s shift, beginning in 1937, to rationality review for claims of government interference with economic rights.<sup>351</sup> But it was striking to find that Judge Sentelle, a Reagan appointee (and Judge Scalia’s replacement on the D.C. Circuit), had joined Judge Brown’s opinion,<sup>352</sup> and to learn that Judge Griffith, the third member of the panel (and a recent Republican appointee), had written separately simply to announce that he was “reluctant to set forth [his] own views on the wisdom of such a broad area of the Supreme Court’s settled jurisprudence that was not challenged by the petitioner,” even though he was “by no means unsympathetic to their criticism.”<sup>353</sup> And it was striking that the decision was not met with a chorus of criticism from mainstream conservative legal thinkers; instead, a few libertarian commentators praised it,<sup>354</sup> and one conserva-

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<sup>347</sup> *Id.* at 481 (Brown, J., and Sentelle, C.J., concurring).

<sup>348</sup> *Id.* at 480.

<sup>349</sup> *Id.* at 482–83.

<sup>350</sup> *Id.* at 483.

<sup>351</sup> Janice Rogers Brown, “A Whiter Shade of Pale”: *Sense and Nonsense—The Pursuit of Perfection in Law and Politics* (Apr. 20, 2000), available at <http://www.communityrights.org/PDFs/4-20-00FedSoc.pdf>.

<sup>352</sup> *Hettinga*, 677 F.3d at 480.

<sup>353</sup> *Id.* at 483 (Griffith, J., concurring).

<sup>354</sup> See, e.g., Randy Barnett, *Strict Scrutiny for Every Law? Remembering the Real Carolene Products*, VOLOKH CONSPIRACY (Apr. 20, 2012, 10:34 AM), <http://www.volokh.com/2012/>

tive commentator simply reacted cautiously, arguing that it was the “very beginning of a long discussion.”<sup>355</sup>

Less than one year after the decision in *Hettinga*, the United States Court of Appeals for the Fifth Circuit decided *St. Joseph Abbey v. Castille*,<sup>356</sup> which invalidated a rule issued by the Louisiana Board of Funeral Directors granting funeral homes the exclusive right to sell caskets.<sup>357</sup> The court, in a unanimous opinion by Judge Higginbotham,<sup>358</sup> concluded that economic protection of a particular industry is not a legitimate government purpose.<sup>359</sup> The court reasoned that, without a rational relationship to some other legitimate government interest, economic favoritism is “aptly described as a naked transfer of wealth” and is thus unconstitutional.<sup>360</sup>

The court then concluded that the challenged rule was not rationally related to the protection of public health, safety, and consumer welfare.<sup>361</sup> In reaching that conclusion, the court acknowledged that *Williamson v. Lee Optical*<sup>362</sup>—the leading Supreme Court precedent on post-*Lochner* era substantive due process review of economic regulation—dictates extreme deference to state economic regulation, including a “willingness to accept post hoc hypotheses for economic regulation.”<sup>363</sup> But the court asserted that the Court in *Williamson* “insist[ed] upon a rational basis,” and declared that “a hypothetical rationale, even post hoc, cannot be fantasy.”<sup>364</sup> The court then reasoned that the challenged rule was not rationally related to the interest in consumer protection, because Louisiana law did not require funeral directors to receive any special instruction about caskets or grief counseling.<sup>365</sup> The court also found a “disconnect” between restricting casket sales to funeral homes and preventing consumer fraud and abuse, in light of the fact that Louisiana’s unfair trade practices law “already polices inappropriate sales tactics by

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04/20/remembering-the-real-carolene-products/ (“I was very pleased to see [the court’s] critique of ‘rational basis’ Due Process Clause scrutiny of economic legislation.”).

<sup>355</sup> Adam J. White, *The Constitutional Guarantee of Liberty Deserves More Respect*, THE WEEKLY STANDARD (Apr. 20, 2012, 12:00 AM), [http://www.weeklystandard.com/blogs/constitutional-guarantee-liberty-deserves-more-respect\\_640455.html](http://www.weeklystandard.com/blogs/constitutional-guarantee-liberty-deserves-more-respect_640455.html).

<sup>356</sup> 712 F.3d 215 (5th Cir. 2013).

<sup>357</sup> *Id.* at 226–27.

<sup>358</sup> Judge Higginbotham was appointed to the court by President Reagan. Judge Haynes was appointed by President George W. Bush, and Judge Higginson was appointed by President Obama. *Fifth Circuit*, JUDICIALNOMINATIONS.ORG, <http://judicialnominations.org/fifth-circuit> (last visited Jan. 18, 2015).

<sup>359</sup> *St. Joseph Abbey*, 712 F.3d at 222–23.

<sup>360</sup> *Id.*

<sup>361</sup> *See id.* at 223–27.

<sup>362</sup> 348 U.S. 483 (1955).

<sup>363</sup> *St. Joseph Abbey*, 712 F.3d at 221.

<sup>364</sup> *Id.* at 223.

<sup>365</sup> *Id.* at 224.

sellers of all caskets.”<sup>366</sup> Finally, the court reasoned that, because “Louisiana does not even require a casket for burial, does not impose requirements for their construction or design, does not require a casket to be sealed before burial, and does not require funeral directors to have any special expertise in caskets,” “no rational relationship exists between public health and safety and limiting intrastate sales of caskets to funeral establishments.”<sup>367</sup>

The court concluded by denying that the “ghost of *Lochner* [was] lurking about,” because the court “deploy[ed] no economic theory of social statics [nor drew] upon a judicial vision of free enterprise.”<sup>368</sup> But of course, the *Lochner* majority did not explicitly rely on Herbert Spencer’s *Social Statics* or openly admit that it was drawing upon a judicial vision of free enterprise either. It was Holmes who made the point explicit in his dissent;<sup>369</sup> the *Lochner* majority had merely purported to find no “fair, reasonable and appropriate” connection between the regulation and the state’s proffered interests.<sup>370</sup> Indeed, after acknowledging that the “deference we owe [to state economic regulation] expresses mighty principles of federalism and judicial roles,” the Fifth Circuit in *St. Joseph Abbey* insisted—in words that could have come straight from the *Lochner* era<sup>371</sup>—that the “principle we protect from the hand of the State today protects an equally vital core principle—the taking of wealth and handing it to others when it comes not as economic protectionism in service of the public good but as ‘economic’ protection of the rulemakers’ pockets.”<sup>372</sup> At the very least, the court’s approach was a marked departure from the approach in *Williamson*, which effectively sent the message—in a case that also involved a law that was likely the product of political favoritism and rent-seeking<sup>373</sup>—that, now that the *Lochner* era is over, judges

<sup>366</sup> *Id.* at 225.

<sup>367</sup> *Id.* at 226.

<sup>368</sup> *Id.* at 227.

<sup>369</sup> *Lochner v. New York*, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting).

<sup>370</sup> *Id.* at 56.

<sup>371</sup> See, e.g., *New State Ice Co. v. Liebmann*, 285 U.S. 262, 279 (1931) (striking down law prohibiting the manufacture, sale, or distribution of ice without a license and declaring that the aim of the law was “not to encourage competition, but to prevent it; not to regulate the business, but to preclude persons from engaging in it”); Paul M. Schwartz & William Michael Treanor, *Eldred and Lochner: Copyright Term Extension and Intellectual Property as Constitutional Property*, 112 *YALE L.J.* 2331, 2392 (2003) (“The [*Lochner*] Court was . . . both viewing the statute as a wealth transfer and concluding that a statute that produced a wealth transfer, without benefiting society as a whole, was unconstitutional, even if the legislature decided that legitimate reasons existed for aiding a particular group.”).

<sup>372</sup> *St. Joseph Abbey*, 712 F.3d at 226–27.

<sup>373</sup> See Mark Tushnet, *Public Choice Constitutionalism and Economic Rights*, in *LIBERTY, PROPERTY, AND THE FUTURE OF CONSTITUTIONAL DEVELOPMENT* 23, 37 (Ellen Frankel Paul & Howard Dickman eds., 1990) (“A classic rent seeking statute was presented to the Court in *Williamson v. Lee Optical Co.* Oklahoma prohibited opticians from fitting duplicate lenses without a prescription from an ophthalmologist or optometrist . . . Essentially all that this

should not invoke the Due Process Clauses to second-guess legislative judgments that interfere with economic liberty.<sup>374</sup>

There have been other recent signs that *Lochner's* status in conservative legal thought is evolving. Shortly after the D.C. Circuit's decision in *Hettinga*, Ed Whelan, a Justice Department official during the second Bush Administration and a prominent contributor to the *National Review's* website, declared that it is "quite plausible" that "the Privileges or Immunities Clause, properly construed, does protect some substantive economic rights."<sup>375</sup> Keith Whittington, a prominent scholar of originalist methodology, announced that he had "learned to stop worrying and love substantive due process—sort of."<sup>376</sup> And in 2011, George Will, who in 1996 had harshly criticized *Lochner* and accused liberals of attempting to revive it in cases involving other fundamental rights,<sup>377</sup> praised David Bernstein's revisionist account of *Lochner*.<sup>378</sup> Will concluded that "[t]he rehabilitation of *Lochner*" is an important step in the "disarmament" of liberals' "aspiration, which is to provide an emancipation proclamation for regulatory government."<sup>379</sup> Seven months later, Will lamented that in the 1930s the Court "formally declare[d] economic rights to be inferior to 'fundamental' rights," which regrettably "begot pernicious judicial restraint—tolerance of capricious government abridgements of economic liberty."<sup>380</sup> He urged conservatives to "wean themselves [from] excessive respect for judicial 'restraint' and condemnation of 'activism,'" in order to accomplish the Court's "principal purpose," the "protection of liberty."<sup>381</sup> Eighteen months later, Will completed

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statute did was to generate business for eye doctors, thereby raising the price of duplicate lenses.").

<sup>374</sup> See *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955) ("The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. . . . 'For protection against abuses by legislatures the people must resort to the polls, not to the courts.'" (citations omitted)).

<sup>375</sup> Ed Whelan, *Re: Does the Constitution Protect Unenumerated Rights*, NAT'L REV. ONLINE (Apr. 18, 2012, 5:19 PM), <http://www.nationalreview.com/bench-memos/296482/re-does-constitution-protect-unenumerated-rights-ed-whelan>; see also *Declaration of the Institute for Justice Center for Judicial Engagement*, INST. FOR JUSTICE, <http://ij.org/cje/declaration> (last visited Nov. 9, 2014) ("The Constitution promises an array of individual rights—both written and unwritten—that the government may neither deny nor disparage.").

<sup>376</sup> Keith Whittington, *How I Learned to Stop Worrying and Love Substantive Due Process—Sort of*, LIBRARY OF LAW AND LIBERTY (Apr. 4, 2014), <http://www.libertylawsite.org/2014/04/04/how-i-learned-to-stop-worrying-and-love-substantive-due-process-sort-of/>.

<sup>377</sup> See Will, *supra* note 265; see also *supra* notes 265–66 and accompanying text.

<sup>378</sup> George F. Will, *Why Liberals Fear the Lochner Decision*, WASH. POST (Sept. 7, 2011), [http://www.washingtonpost.com/opinions/why-liberals-fear-the-lochner-decision/2011/09/06/gIQAZapUAK\\_story.html](http://www.washingtonpost.com/opinions/why-liberals-fear-the-lochner-decision/2011/09/06/gIQAZapUAK_story.html).

<sup>379</sup> *Id.*

<sup>380</sup> George F. Will, *Unleash the Supreme Court*, WASH. POST, June 15, 2012, at A19.

<sup>381</sup> *Id.*

his evolution, insisting that “[j]udicial activism isn’t a bad thing.”<sup>382</sup> Will lamented that “[c]onservatives clamoring for judicial restraint, meaning deference to legislatures, are waving a banner unfurled a century ago by progressives eager to emancipate government, freeing it to pursue whatever collective endeavors it fancies, sacrificing individual rights to a spurious majoritarian ethic.”<sup>383</sup> Rather than urging deference (and thus emboldening government), Will advised conservatives to “urge courts to throw as many flags as there are infractions.”<sup>384</sup>

Finally, in 2013, Senator Rand Paul, a libertarian elected during the Tea Party wave in 2010 who reportedly is considering seeking the Republican nomination for President in 2016,<sup>385</sup> praised *Lochner* during a rare speaking filibuster on the Senate floor.<sup>386</sup> In the course of his comments, Paul noted that the “President doesn’t like *Lochner* at all,” but he urged the President to “rethink” it.<sup>387</sup> Paul called *Lochner* “a wonderful decision,” noting that it “expands the [Fourteenth] Amendment and says to the people that you have unenumerated rights,” rights that are “unlimited” because “[y]ou got them from your Creator. These are natural-born rights and no democracy should be able to take these away from you.”<sup>388</sup> Paul specifically cited David Bernstein’s and Randy Barnett’s work seeking to reinvigorate *Lochner*.<sup>389</sup>

Conservative legal orthodoxy regarding *Lochner*, in other words, is evolving. While it is still sporadic, it is no longer anathema on the right to claim that the courts should provide robust protection to unenumerated economic rights. An increasingly broad range of conservative thinkers are beginning to make these claims, and they are no longer being met with a wall of fierce condemnation. Indeed, we believe that, after a forthcoming period of hand-wringing and ideological and jurisprudential soul-searching, conservative legal orthodoxy will ultimately embrace judicial protection for unenumerated economic rights, including the right to contract. Conservative legal thought about the validity of *Lochner* is about to come full circle.

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<sup>382</sup> George F. Will, *Judicial Activism Isn’t a Bad Thing*, WASH. POST (Jan. 22, 2014), [http://www.washingtonpost.com/opinions/george-will-judicial-activism-isnt-a-bad-thing/2014/01/22/31b41a12-82c7-11e3-8099-9181471f7aaf\\_story.html](http://www.washingtonpost.com/opinions/george-will-judicial-activism-isnt-a-bad-thing/2014/01/22/31b41a12-82c7-11e3-8099-9181471f7aaf_story.html).

<sup>383</sup> *Id.*

<sup>384</sup> *Id.*

<sup>385</sup> See, e.g., Jeremy W. Peters, *G.O.P.’s Foreign Policy Hawks Wary of Paul’s Evolving Views*, N.Y. TIMES, May 24, 2014, at A1 (noting that Paul is “test[ing] the waters for a presidential run in 2016”).

<sup>386</sup> 113 CONG. REC. S1160–61 (Mar. 6, 2013) (statement of Sen. Rand Paul).

<sup>387</sup> *Id.*

<sup>388</sup> *Id.* at 1161.

<sup>389</sup> See *id.*

IV  
ORIGINALISM AND *LOCHNER*

What—aside from simply the growing influence of libertarianism in conservative politics—accounts for this impending dramatic change in conservative legal thought about *Lochner*? One possibility, which Mark Graber has offered, is that judges necessarily are political actors who can be expected to pursue their political parties' ideological aims from the bench, and thus the conservative ascendancy in the judiciary is likely to lead to judicial protection for economic rights, the preferred position of the conservative political movement.<sup>390</sup> Graber argues that the Roberts Court is “likely to make American public policy more libertarian,” both because of the “distinctive features of contemporary constitutional conservatism” and because the “affluent, well-educated citizens who tend to become Justices are more concerned with freedom from government regulation than government protection.”<sup>391</sup> Graber situates his argument in the extensive political science literature about how judges decide cases.<sup>392</sup>

Our colleague Jeffrey Rosen has painted a similar, if more colorful, picture, arguing that a small group of motivated ideologues, operating primarily in the shadows, has tirelessly been working for years to implement a carefully conceived plan to restore the “Constitution in Exile,” which embraces the “legal doctrines that established firm limitations on state and federal power before the New Deal.”<sup>393</sup> On Rosen’s account, this cabal is led not by traditional originalists concerned about “states’ rights or judicial deference to legislatures,” but instead by economic libertarians who seek to cripple the government’s ability to interfere with private economic ordering.<sup>394</sup>

Rosen thus implies that any forthcoming rebirth of *Lochner* will arise from a concerted (albeit mysterious) movement, carefully

<sup>390</sup> See Mark A. Graber, *Does It Really Matter? Conservative Courts in a Conservative Era*, 75 *FORDHAM L. REV.* 675, 688–91 (2006).

<sup>391</sup> *Id.* at 706–07.

<sup>392</sup> See, e.g., LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 143 (2005) (“Judges and justices always have been political beings. . . . Likewise, justices, and to a lesser extent judges, bring their politics into the courtroom—and always have.”); JEFFREY A. SEGAL & HAROLD SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 32 (1993) (discussing the legal and attitudinal models of constitutional decisionmaking); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 *J. PUB. L.* 279, 264–66 (1957), *reprinted in* 50 *EMORY L.J.* 563 (2001) (discussing how the Supreme Court functions as a legal and political institution).

<sup>393</sup> Jeffrey Rosen, *The Unregulated Offensive*, *N.Y. TIMES MAG.*, Apr. 17, 2005, at 42 [hereinafter Rosen, *Offensive*]; see also Jeffrey Rosen, *Economic Freedoms and the Constitution*, 35 *HARV. J.L. & PUB. POL’Y* 13, 16 (2012) (identifying legislative targets of the “Constitution in Exile” movement); Jeffrey Rosen, *Second Opinions*, *NEW REPUBLIC*, May 24, 2012, at 10 (discussing the “Constitution in Exile” movement and *Heltinga v. United States*).

<sup>394</sup> Rosen, *Offensive*, *supra* note 393, at 44.

thought out and planned, and Graber suggests that such an outcome is inevitable. We do not deny that there are committed libertarians who are dedicated to implementing a libertarian constitutional vision—though their existence is not a very well-kept secret<sup>395</sup>—or that judicial decisionmaking can be heavily influenced by political allegiances and judges' personal policy preferences.<sup>396</sup> Instead, we think that these explanations are incomplete. Even if a *Lochner* revival was inevitable once conservatives regained control of the courts, the question remains why now, and why not sooner? It has, after all, been decades since the conservative Justices gained a majority of the seats on the Supreme Court. Perhaps the answer is simply that it has taken this long for the "Constitution in Exile" movement to grow in strength and power and to emerge from the shadows. Indeed, a central thesis of Steven Teles's account of the rise of the modern conservative legal movement is that, due to the deep entrenchment of liberal legal ideas, figures, and institutions, conservatives needed decades to establish and grow a network of institutions capable of toppling the liberal legal order.<sup>397</sup>

But there is another important piece to the puzzle. In our view, these conventional accounts overlook the role played by a natural, organic evolution in conservative legal thought, driven by gradual changes in the theory of originalism that facilitate the justification of doctrinal outcomes that are politically appealing to conservatives.<sup>398</sup>

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<sup>395</sup> See, e.g., *Current Economic Liberty Cases*, INST. FOR JUSTICE, <http://ij.org/cases/economicliberty> (last visited Jan. 18, 2015) (listing economic liberty cases).

<sup>396</sup> See, e.g., Thomas B. Colby, *A Constitutional Hierarchy of Religions? Justice Scalia, The Ten Commandments, and the Future of the Establishment Clause*, 100 NW. U. L. REV. 1097, 1139 (2006) (arguing that Justice Scalia's "interpretation of the Establishment Clause aligns almost perfectly with the political preferences of the Republican Party"); Peter J. Smith, *Federalism, Instrumentalism, and the Legacy of the Rehnquist Court*, 74 GEO. WASH. L. REV. 906, 909 (2006) (arguing that "any ultimately satisfying account of the Rehnquist Court's federalism doctrine must acknowledge that the decisions have often appeared to be driven as much by the Justices' policy preferences about the underlying substantive matters at issue as they have by any neutral theory of federalism").

<sup>397</sup> See Ilya Somin, *Lessons from the Rise of Legal Conservatism*, 32 HARV. J.L. & PUB. POL'Y 415, 420–22 (2009) (discussing TELES, *supra* note 230).

<sup>398</sup> Jack Balkin has suggested that the conservative social movement will seek to graft its substantive principles (favoring laissez-faire economics and unregulated markets) onto existing constitutional norms. See Balkin, *supra* note 5, at 706. This view follows from Balkin's theory that constitutional understandings evolve as social and political movements make legal arguments that first seem "off-the-wall" become "on-the-wall" by virtue of the endorsement of mainstream or influential groups or thinkers. See JACK M. BALKIN, *LIVING ORIGINALISM* 17–18 (2011) ("Many of the proudest achievements of our constitutional tradition have come from constitutional interpretations that were at one point regarded as crackpot and off-the-wall."); Jack M. Balkin, *From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream*, ATLANTIC (June 4, 2012, 2:55 PM), <http://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040/> (noting the changing perception of mandating health insurance from "off the wall" to "on the wall"). We agree with much of Balkin's account, but we



We do, however, agree with Rosen in one other respect. The re-birth of *Lochner* will not be driven by the traditional originalist focus on judicial restraint.<sup>399</sup> It is only because originalism has evolved away from that focus that economic liberties can now come back, full circle, to the forefront of conservative legal thought.

During the Progressive era, and especially during the New Deal era, the liberal critique of *Lochner* focused in large part on an argument that the problem with *Lochner* was that it was, in fact, *too originalist*. Liberals “lambasted the Court for engaging in blind, inflexible originalism”<sup>400</sup>—for, in Frankfurter’s words, stubbornly employing “eighteenth-century conceptions of ‘liberty and equality.’”<sup>401</sup> New Deal liberals insisted that the Court update the “living Constitution” to account for twentieth-century economic realities.<sup>402</sup> As Senator Norris put it, “Our Constitution ought to be construed in the light of the present-day civilization instead of being put in a straightjacket made more than a century ago.”<sup>403</sup> When the Court finally did put an end to the *Lochner* era in the *West Coast Hotel* case, Justice Sutherland’s pro-*Lochner* dissent was a paean to originalism and a bitter attack on the newly liberal Court for abandoning it. In his view, the Court had ignored the simple truth that “the meaning of the Constitution does not change with the ebb and flow of economic events.”<sup>404</sup>

Accordingly, when conservatives rode back into power on the Supreme Court on a wave of originalist rhetoric a half century later, one might have expected them to re-embrace *Lochner*. But they did

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think it overlooks the ways in which originalism itself has evolved to facilitate the process of constitutional change.

<sup>399</sup> That conservatives would drift away from claims of judicial restraint should not be surprising, just as it will not be surprising when a *Lochner* renaissance prompts charges from liberals of judicial activism. As Bill Marshall has observed, the “subjects (and the originators) of the activism charge have continually shifted with changes in political and judicial power.” William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217, 1217 (2002).

<sup>400</sup> BERNSTEIN, *supra* note 86, at 43; *see also* Horwitz, *supra* note 51, at 51–52 (arguing that “progressive legal writers after *Lochner* . . . wished to explode the static picture of constitutional meaning that had been frozen into the *Lochner* Court’s jurisprudence” of “static originalism”).

<sup>401</sup> Felix Frankfurter, *Child Labor and the Court*, NEW REPUBLIC, July 26, 1922, at 48–49. *But see* BARNETT, *supra* note 308, at 222 (noting that some Progressives criticized *Lochner* for deviating from the original meaning of the Constitution).

<sup>402</sup> *See* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law’s Politics*, 148 U. PA. L. REV. 971, 1014, 1019–22 (2000).

<sup>403</sup> 81 CONG. REC. S2144 (1937) (statement of Sen. Norris).

<sup>404</sup> *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 402–03 (1937) (Sutherland, J., dissenting).

not, in large part because the particular brand of originalism that they had come to embrace would not allow it.<sup>405</sup>

As detailed above, the mid- to late-twentieth-century originalist movement arose in direct response to the broad rights-granting decisions of the Warren and Burger Courts.<sup>406</sup> Frustrated that the Court was invalidating government action in the name of vaguely defined and novel individual rights, conservative critics of the Court began to invoke the original intent of the Constitution's Framers to demonstrate how far afield the liberal Court had ventured from the historical Constitution.<sup>407</sup> This form of originalism was primarily a "reactive theory motivated by substantive disagreement" with the Court's decisions, and as such it focused principally on the perceived excesses of the Court's approach to decisionmaking.<sup>408</sup> Critics charged that the Justices had impermissibly substituted their own values for those embodied in the historic Constitution.<sup>409</sup>

If the disease was judges' imposing their own policy preferences under the guise of constitutional interpretation, then the cure was to constrain the judges. As Raoul Berger explained, if "the Court may substitute its own meaning for that of the Framers it may . . . rewrite the Constitution without limit."<sup>410</sup> Originalists posited a solution to this intolerable state of affairs: require judges to adhere to the original intent of the Framers—that is, to an objective historical criterion that is "exterior to the will of the Justices"—and thereby limit their ability to issue decisions based on their personal value preferences.<sup>411</sup>

This form of originalism—now often dubbed the "old originalism"—thus was concerned primarily with limiting judicial power, and "[o]riginalist methods of constitutional interpretation were understood as a means to that end."<sup>412</sup> Specifically, the old originalism was at its core deeply concerned with both judicial *constraint*—narrowing the discretion of judges—and judicial *restraint*—deferring to democratic majorities.<sup>413</sup>

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<sup>405</sup> See BERNSTEIN, *supra* note 86, at 118–19 (noting that the version of originalism employed by the *Lochner* Justices "differed in significant ways from modern conservative originalism" employed by, among others, Robert Bork).

<sup>406</sup> See *supra* notes 241–66 and accompanying text.

<sup>407</sup> See Colby, *supra* note 27, at 716 & n.7.

<sup>408</sup> Whittington, *supra* note 26, at 601; see also O'NEILL, *supra* note 235, at 101–10 (describing the rise of originalism).

<sup>409</sup> See Whittington, *supra* note 26, at 601.

<sup>410</sup> BERGER, *supra* note 17, at 370.

<sup>411</sup> Bork, *supra* note 19, at 6; see also BERGER, *supra* note 17, at 306–11 ("At the adoption of the Constitution the notion that judges . . . could make law as an instrument of social change was altogether alien . . .").

<sup>412</sup> Whittington, *supra* note 26, at 602.

<sup>413</sup> See Colby, *supra* note 27, at 750–51.

First, proponents offered originalism as a means of limiting the discretion of judges to rely on subjective value judgments in deciding constitutional questions. If the “political seduction of the law” was the threat, then the best response was “to lash judges to the solid mast of history.”<sup>414</sup> On this view, originalism’s historical criterion was a powerful form of *constraint* on judicial willfulness. As Robert Bork put it, “The only way in which the Constitution can constrain judges is if the judges interpret the document’s words according to the intentions of those who drafted, proposed, and ratified its provision and its various amendments.”<sup>415</sup>

Second, originalism promised judicial *restraint* in its implicit mandate of judicial deference to legislative majorities.<sup>416</sup> Originalists felt that, in aggressively protecting rights that were vaguely identified at best in the constitutional text, and unmentioned at worst, the Warren Court had improperly arrogated to itself the power to resolve countless questions “that determine the quality of life in a society and define the nature of civilization.”<sup>417</sup> As Lino Graglia argued, the “function of originalism is to minimize the conflict between judicial review and democracy,” which is best served “when judge-restraining originalism permits the results of the democratic political process to stand.”<sup>418</sup> If judges may invalidate democratic action only when required by the “principles actually laid down in the historic Constitution,” then there are fewer occasions for the exercise of judicial review and correspondingly more space for the operation of ordinary majoritarian decisionmaking.<sup>419</sup>

The old originalism accordingly was as much a normative theory of the proper judicial role as it was a semantic theory of textual interpretation.<sup>420</sup> As Keith Whittington has explained, the “primary commitment” of the old originalism “was to judicial restraint”;

<sup>414</sup> Whittington, *supra* note 26, at 602 (quoting BORK, *supra* note 24, at 11).

<sup>415</sup> Bork, *supra* note 276, at 826.

<sup>416</sup> See Whittington, *supra* note 26, at 602.

<sup>417</sup> Lino A. Graglia, “*Interpreting the Constitution: Posner on Bork*,” 44 STAN. L. REV. 1019, 1029 (1992).

<sup>418</sup> *Id.* at 1026; accord OFFICE OF LEGAL POLICY, *supra* note 17, at 4 (“[I]f the courts go beyond the original meaning of the Constitution, . . . they usurp powers not given to them by the people.”); Bork, *supra* note 19, at 10–11 (“Courts must accept any value choice the legislature makes unless it clearly runs contrary to a choice made in the framing of the Constitution.”).

<sup>419</sup> BORK, *supra* note 24, at 163.

<sup>420</sup> This is not to say that proponents of the old originalism did not also view it as an interpretive theory. To the contrary, they often argued that “interpreting a document *means* to attempt to discern the intent of the author; there is no other ‘interpretive methodology’ properly so called.” Graglia, *supra* note 417, at 1024. But even this conception of originalism was generally offered as a means to the ends of judicial constraint and restraint; fidelity to the original intent was important, early originalists argued, to ensure that judges see “their duty as interpreting law and not making law.” DONALD GRIER STEPHENSON JR., CAMPAIGNS AND THE COURT: THE U.S. SUPREME COURT IN PRESIDENTIAL ELECTIONS 181

“originalism was married to a requirement of judicial deference to legislative majorities.”<sup>421</sup> “Above all, originalism was a way of explaining what the [liberal] Court had done wrong, and what it had done wrong in this context was primarily to strike down government actions in the name of individual rights.”<sup>422</sup>

Not surprisingly, proponents of that theory were deeply hostile to the form of decisionmaking exemplified by *Lochner*. In *Lochner*, after all, the Court had invoked an amorphous right that was not specifically identified in the constitutional text—but that likely was appealing, as a matter of personal predilection, to many of the Justices—to invalidate a law duly enacted by the legislature. Indeed, the rhetoric of the old originalism was, in many respects, a carbon copy of the Progressive critique of *Lochner*: that the Justices “were essentially making it up and ‘legislating from the bench.’”<sup>423</sup>

This is not to say that there was no plausible claim, even under the old originalism, that *Lochner* was consistent with the original intent of the Framers. That had, after all, been the (largely unsubstantiated) assumption of many judges and critics, both liberal and conservative, during the *Lochner* era itself.<sup>424</sup> And in fact, Bernard Siegan wrote an article in 1985 canvassing the drafting history of the Fourteenth Amendment and arguing that the Framers of that amendment intended to protect from state infringement an array of unenumerated, natural law rights, including the freedom of contract and other economic rights.<sup>425</sup> Richard Epstein also sought to ground his support for a revitalization of *Lochner* in the original intent, understood at a much higher level of generality. Epstein argued that the Constitution’s “many broad and powerful clauses designed to limit the jurisdiction of both federal and state governments” were “designed to preserve definite boundaries between public and private ordering,”

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(1999) (quoting Richard Nixon in E.W. Kenworthy, *Nixon, in Texas, Sharpens His Attack: Nixon Scores ‘Indulgence’*, N.Y. TIMES, Nov 3, 1968, at 79).

<sup>421</sup> Whittington, *supra* note 26, at 602; accord Balkin, *supra* note 5, at 690 (explaining that originalism was initially “designed to promote judicial restraint”); Earl M. Maltz, *The Prospects for a Revival of Conservative Activism in Constitutional Jurisprudence*, 24 GA. L. REV. 629, 632 (1990) (arguing that “the appeal to democratic theory only makes sense if originalism is combined with a general preference for judicial restraint”).

<sup>422</sup> Whittington, *supra* note 26, at 601.

<sup>423</sup> *Id.*

<sup>424</sup> See BERNSTEIN, *supra* note 86, at 120 (arguing that “there was a broad consensus in the early twentieth century that the Supreme Court’s due process decisions were consistent with originalism”).

<sup>425</sup> See Bernard H. Siegan, *Rehabilitating Lochner*, 22 SAN DIEGO L. REV. 453, 454–55, 492–97 (1985); see also James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315, 315–19 (1999) (arguing that the Due Process Clause was intended to protect economic rights).

and thus that courts should searchingly review government action that interferes with private economic rights.<sup>426</sup>

But most early originalists rejected these claims out of hand, as they looked suspiciously like the types of arguments on which liberal apologists for the Warren Court had relied in justifying judicial protection for *noneconomic* rights, such as the right to privacy, that are not specified in the constitutional text.<sup>427</sup> As a theory concerned principally with limiting judicial power, the old originalism was deeply skeptical of claims that the Constitution protects unenumerated rights or that courts should find specific rights in vague constitutional language phrased at a very high level of generality. Whereas Epstein had cited the Privileges or Immunities Clause of the Fourteenth Amendment as one of the provisions that justified searching judicial review to protect economic liberty,<sup>428</sup> Bork argued that judges should decline to find any specific rights in that clause's capacious language. The clause is phrased so broadly, he argued, as to make its meaning a complete "mystery."<sup>429</sup> And a "provision whose meaning cannot be ascertained is precisely like a provision that is written in Sanskrit or is obliterated past deciphering by an ink blot. No judge is entitled to interpret an ink blot on the ground that there must be something under it."<sup>430</sup> To the old originalists, judicial reliance on vague constitutional language to produce specific results was simply a guise for judicial willfulness, the precise practice that gave rise to the need for originalism in the first place.<sup>431</sup>

In the view of the old originalists, in other words, vague clauses do not adequately constrain judges because they do not provide sufficient guidance about their meaning and proper application. The early originalists thus contended that it is simply implausible to believe that the Framers intended to permit unelected judges to rely on open-ended provisions to enforce rights not explicitly enumerated in the Constitution.<sup>432</sup>

<sup>426</sup> Epstein, *supra* note 273, at 12–14.

<sup>427</sup> BORK, *supra* note 24, at 167–70.

<sup>428</sup> Epstein, *supra* note 273, at 12–14.

<sup>429</sup> BORK, *supra* note 24, at 166.

<sup>430</sup> *Id.*

<sup>431</sup> See BERGER, *supra* note 17, at 1 (criticizing the Court's "continuing revision of the Constitution under the guise of interpretation").

<sup>432</sup> See BORK, *supra* note 24, at 180–85 (criticizing the view that the Constitution permits judicial protection of unenumerated rights, noting that "James Madison, who wrote the amendments, and who wrote with absolute clarity elsewhere, had he meant to put a freehand power concerning rights in the hands of judges, could easily have drafted an amendment" allowing for protection of unenumerated rights); BERGER, *supra* note 17, at 116–31 (rejecting the "'open-ended' phraseology theory" of constitutional interpretation).

Of course, Siegan offered specific historical evidence seeking to shed light on the ways in which the Framers intended a broad meaning for some of those clauses.<sup>433</sup> But the early originalists, true to their commitment to judicial restraint, dismissed that evidence not only because they doubted that those clauses were actually intended to protect unenumerated rights, but also because judicial reliance on those clauses risked upsetting the proper relationship between the courts and the political branches.<sup>434</sup> Accordingly, the old originalists counseled restraint, arguing that courts have no business invalidating regulation on the ground that it is inconsistent with an amorphous right not clearly identified in the constitutional text. “The absence of a clear constitutional basis for invalidation of a political choice should mean that the choice is not invalid . . . .”<sup>435</sup>

It was at this stage in the evolution of conservative legal thought that conservative judges regained control on the Supreme Court. Indeed, they did so as a result of the nominations made by Presidents Nixon, Reagan, and Bush, who had aggressively deployed the rhetoric of old originalist restraint on the campaign trail and had ridden the waves of popular support on the right for that agenda to electoral victory.<sup>436</sup>

Thus, the conservative Justices on the Burger and Rehnquist Courts, despite a likely strong political predilection in favor of economic rights, did not seek to revive *Lochner*, presumably because they believed that doing so would not be consistent with a commitment to originalism.<sup>437</sup> The conservative Justices had watched the Warren

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<sup>433</sup> See Siegan, *supra* note 425, at 478–92 (discussing congressional understanding of the Privileges or Immunities, Equal Protection, and Due Process Clauses).

<sup>434</sup> *Id.* at 454.

<sup>435</sup> Graglia, *supra* note 21, at 633.

<sup>436</sup> See DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 69 (5th ed. 2011) (noting that, on the campaign trail, Reagan had promised “to appoint only those opposed to abortion and the ‘judicial activism’ of the Warren and Burger Courts”); Whittington, *supra* note 26, at 601 (“In words that could have been lifted from Franklin Roosevelt, Nixon on the campaign trail insisted that the justices should be ‘servants of the people, not super-legislators with a free hand to impose their social and political viewpoints on the American people.’”)

<sup>437</sup> In an insightful 1995 law review article, Richard Levy argued that the Burger and Rehnquist Courts repeatedly tried to employ the Contract Clause, the Takings Clause, federalism and separation of powers doctrines, and even the Equal Protection Clause in halting efforts to give greater protection to economic rights, but then “quickly retreated from the full implications of those decisions.” Levy, *supra* note 233, at 333. Levy argued that it was only because of the fear of *Lochner* that the Court resorted to unconvincing appeals to inapt constitutional clauses and doctrines, rather than substantive due process, to support economic rights. *Id.* at 353. The specter of *Lochner* forced the Justices into a search for “an ‘originalist escape’—i.e., an economic rights doctrine whose textual or historical foundations reconcile judicial intervention” with “the high profile rhetoric of judicial restraint”—“and its theoretical corollary, originalism”—“that accompanied their appointments.” *Id.* at 332, 342. The problem was that “[n]one of the doctrines explored by the Court provide a solid originalist foundation for a broad reinvigoration of economic rights,” *id.* at 359, and

Court leap before it looked—protecting controversial, unenumerated constitutional rights in the absence of a strong theoretical foundation (and thus opening itself up to powerful critique and possibly backlash)—and they did not want to follow suit.<sup>438</sup> If they were going to reinvigorate *Lochner*-style economic rights, they would first need to develop a theoretical “approach that linked conservative activism to the originalist vision of constitutional adjudication.”<sup>439</sup> And for that to happen, originalism itself needed to evolve.

Originalism has now done just that. The evolution of originalism has had two key related components. The first is generational, and the second is theoretical.

It has now been more than forty years since *Roe v. Wade*, and twenty-five years since the end of the Reagan Administration. Those intervening years have seen the rise of a new generation of originalist thinkers who did not come of age steeped in palpable disgust with the Warren Court, and who were not themselves soldiers in the battle against the liberal Court of the 1960s. Rather, these younger originalists have developed their jurisprudential theories in an era in which not only has the Supreme Court been controlled by conservatives,<sup>440</sup> but also some of the work of the Warren Court—in particular *Brown v. Board of Education*—has become so universally cherished that it is now

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thus “the Court was forced to retreat,” *id.* at 353. Notwithstanding Levy’s argument, the Rehnquist Court subsequently employed the Due Process Clause to protect an essentially economic right—the right to be free from excessive punitive damages. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417–18 (2003). But the Court was careful to avoid explicit reliance on substantive due process or unenumerated rights, instead seeking opaquely to articulate its reasoning in procedural terms. “It would appear that the Court’s choice to couch its substantive decisions in *BMW* and *Campbell* in procedural terms was the product of a defensive and not particularly convincing effort to ward off comparisons to *Lochner*.” Thomas B. Colby, *Clearing the Smoke from Philip Morris v. Williams: The Past, Present, and Future of Punitive Damages*, 118 *YALE L.J.* 392, 404 (2008).

<sup>438</sup> We do not mean to suggest that conservatives stood down across the board when they regained power on the Court. In many respects, the Rehnquist and Roberts Courts have engaged in their own course of conservative judicial “activism” that, while perhaps a stealthier version than that of the Warren Court, has at times been aggressive nonetheless. See, e.g., Erwin Chemerinsky, *Supreme Court—October Term 2009 Foreword: Conservative Judicial Activism*, 44 *LOV. L.A. L. REV.* 863, 884–86 (2011) (discussing changing commitments of judicial conservatives on the Supreme Court); Jeffrey Toobin, *No More Mr. Nice Guy: The Supreme Court’s Stealth Hard-Liner*, *NEW YORKER*, May 25, 2009, at 42, 45–48 (discussing Chief Justice Roberts’s judicial philosophy). But these Courts have been deeply resistant to protecting unenumerated rights, as that strikes at the very heart of their critique of the Warren Court and *Roe*.

<sup>439</sup> Maltz, *supra* note 421, at 649.

<sup>440</sup> This is not to say, of course, that the Court does not continue sometimes to issue major constitutional decisions that please liberals and infuriate conservatives. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (invalidating a Texas law that criminalized consensual sexual activity between same-sex individuals). It is simply to say that the Court is, on the whole, far more conservative than it was a generation ago, and a majority of the Justices would likely describe themselves as political and judicial conservatives.

politically unacceptable to argue against it.<sup>441</sup> In this environment, broad judicial restraint is no longer the paramount goal of conservatives.

Just as liberal legal thought needed a generation of separation from the front lines of the New Deal before it could fully abandon its knee-jerk obsession with judicial restraint, conservative, originalist thought needed a similar separation from the Nixon and Reagan eras before it could begin to do the same.<sup>442</sup> Now that those years have passed, there has been, as Keith Whittington has explained, a significant “loosening of the connection between originalism and judicial deference to legislative majorities.”<sup>443</sup> Originalists have increasingly come to the view that the “job of the judge is to ensure that representative institutions conform to the commitments made by the people of the past, and embodied in text, history, tradition, and precedent.”<sup>444</sup> Thus, “a commitment to originalism is distinct from a commitment to judicial deference,” and originalism “may often require the active exercise of the power of judicial review in order to keep faith with the principled commitments of the founding.”<sup>445</sup> In other words, “[t]he new originalism does not require judges to get out of the way of legislatures. It requires judges to uphold the original Constitution—nothing more, but also nothing less.”<sup>446</sup> In contrast to the old originalism, the “primary virtue claimed by the new originalism is one of constitutional fidelity, not of judicial restraint or democratic majoritarianism.”<sup>447</sup>

Thus, for example, in its most avowedly new originalist decision—*District of Columbia v. Heller*<sup>448</sup>—the conservative Supreme Court used an appeal to history and original meaning to find a previously unrecognized (albeit arguably enumerated) constitutional right to own a handgun for self-defense in the home.<sup>449</sup> That decision, which has the potential to upset a large number of gun-control laws around the

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<sup>441</sup> See Mark Tushnet, *From Judicial Restraint to Judicial Engagement: A Short Intellectual History*, 19 GEO. MASON L. REV. 1043, 1045 (2012).

<sup>442</sup> Cf. Whittington, *supra* note 26, at 604 (“Just as liberal jurists did not turn on a dime once FDR had packed the Court and abandon deferential philosophies, many conservative jurists remain surprisingly attached to a certain rhetoric of restraint.”).

<sup>443</sup> *Id.* at 609.

<sup>444</sup> McConnell, *supra* note 22, at 1273.

<sup>445</sup> Whittington, *supra* note 26, at 609.

<sup>446</sup> *Id.*

<sup>447</sup> *Id.*; see also Gary Lawson, *No History, No Certainty, No Legitimacy . . . No Problem: Originalism and the Limits of Legal Theory*, 64 FLA. L. REV. 1551, 1562 (2012) (arguing that true originalism does “not worry about judicial restraint”); Tushnet, *supra* note 441, at 1047 (“Originalism is not a theory of judicial restraint; it is a theory that describes when courts should and should not be activist.”).

<sup>448</sup> 554 U.S. 570 (2008).

<sup>449</sup> *Id.* at 636.



country, was certainly not motivated by notions of judicial restraint.<sup>450</sup> Rather, the Court insisted that, even if the people of a particular jurisdiction believe strongly in banning handguns as the best solution to the blight of gun violence, and even if they are correct in that belief, “the enshrinement of constitutional rights necessarily takes certain policy choices off the table,” and “it is . . . the role of th[e] Court” to enforce those rights, as originally understood, against modern legislative interference.<sup>451</sup>

Although most of the ire aimed at the *Heller* decision came from liberals, one prominent critique came from the right. Judge J. Harvie Wilkinson III, a highly respected conservative judge and former constitutional law professor who came of age in the early years of the modern conservative legal movement, lambasted the Court’s “failure to adhere to a conservative judicial methodology.”<sup>452</sup> Expressly drawing support from Holmes’s *Lochner* dissent,<sup>453</sup> Wilkinson charged that, in rejecting “restraint and deference” in favor of “judicial aggrandizement,” “the *Roe* and *Heller* Courts are guilty of the same sins.”<sup>454</sup> In Wilkinson’s view, the “aggressive brand of originalism practiced in *Heller*”—utterly lacking in the traditional conservative value of judicial restraint—gives in to the “temptation to enshrine [the Justices’] own preferences in law.”<sup>455</sup> Most modern originalists, however, dismissed Wilkinson’s critique as hopelessly undertheorized and outdated, and celebrated *Heller* for vindicating the original meaning of a long-ignored constitutional provision. They insisted that the Court must enforce the original meaning of the Constitution, and that “the proper level of deference” that the Court should show to a legislature that enacts a law that contravenes that meaning is “none.”<sup>456</sup> On this view, a commitment to judicial restraint at the expense of enforcing the original meaning of the Constitution is not originalist at all.<sup>457</sup>

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<sup>450</sup> See J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 256–57 (2009) (“Whereas once legal conservatism demanded that judges justify decisions by reference to a number of restraining principles, *Heller* requires that they only make originalist arguments supporting their preferred view.”).

<sup>451</sup> *Heller*, 554 U.S. at 636.

<sup>452</sup> Wilkinson, *supra* note 450, at 254.

<sup>453</sup> See *id.* at 255.

<sup>454</sup> *Id.* at 254.

<sup>455</sup> *Id.* at 256.

<sup>456</sup> Alan Gura, *Heller and the Triumph of Originalist Judicial Engagement: A Response to Judge Harvie Wilkinson*, 56 UCLA L. REV. 1127, 1129 (2009); see also Nelson Lund & David B. Kopel, *Unraveling Judicial Restraint: Guns, Abortion, and the Faux Conservatism of J. Harvie Wilkinson III*, 25 J.L. & POL. 1, 1, 7 (2009) (rejecting the notion that “true conservatives are required to substitute principles of judicial restraint for an inquiry into the original meaning of the Constitution,” and concluding instead that it is “the courts’ duty to overturn democratically enacted legislation that violate[s] the Constitution[’s] original meaning”).

<sup>457</sup> See Randy E. Barnett, *Scalia’s Infidelity: A Critique of “Faint-Hearted” Originalism*, 75 U. CIN. L. REV. 7, 15 (2006) (arguing that Justice Scalia’s commitment to judicial restraint is, in many respects, not genuinely originalist).

The breaking of the bonds between originalism and judicial restraint was made possible not just by the passage of time but also by the theoretical maturation of originalism itself. Although the old originalism gained tremendous support in the conservative political movement,<sup>458</sup> it was subject to withering criticism in the legal academy.<sup>459</sup> In response to that criticism, originalism has evolved, matured, and become substantially more sophisticated over the last quarter century, to the point where it has morphed into a very different constitutional theory, often called the “new originalism.”<sup>460</sup> We have elsewhere described in great detail the nature of, and reasons for, that evolution, and the consequences thereof.<sup>461</sup> Rather than rehash that discussion here, we simply note several of the principal theoretical moves that new originalists have made and their impact on the constitutional status of unenumerated economic rights.

First, originalists have shifted the focus of their theory from a search for the original *intent* of the Framers to a search for the original *meaning* of the Constitution.<sup>462</sup> As Justice Scalia explains, originalists now seek “the original meaning of the text, not what the original draftsmen intended.”<sup>463</sup> Second, originalists have made clear that the original meaning of the constitutional text is its *objective* meaning, rather than the subjective meaning attached to it by any particular individual or group.<sup>464</sup> Thus, originalists have largely abandoned the (often fruitless) search for the particular understandings of actual historical figures or groups, and replaced it with “a hypothetical inquiry that asks how a fully informed public audience, knowing all that there is to know about the Constitution and the surrounding world, would understand a particular provision”<sup>465</sup>—a search, that is, for the

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<sup>458</sup> See Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 *FORDHAM L. REV.* 545, 548–49 (2006).

<sup>459</sup> See Colby, *supra* note 27, at 718.

<sup>460</sup> In saying this, we are keenly aware that “originalism”—in either its old form or its new one—is “not a single, coherent, unified theory of constitutional interpretation, but rather a smorgasbord of distinct constitutional theories that share little in common except a misleading reliance on a single label.” Colby & Smith, *supra* note 26, at 244. Still, “it is fair to say that there has been an unmistakable direction in the general flow of the mainstream of originalist thought.” Colby, *supra* note 27, at 718–19.

<sup>461</sup> See generally Colby, *supra* note 27 (detailing the demise of old originalism and the subsequent emergence of new originalism); Peter J. Smith, *How Different Are Originalism and Non-Originalism?*, 62 *HASTINGS L.J.* 707 (2011) (same).

<sup>462</sup> See Colby, *supra* note 27, at 720–21; Smith, *supra* note 461, at 712–13.

<sup>463</sup> Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 38 (Amy Gutmann ed., 1997).

<sup>464</sup> See Colby, *supra* note 27, at 722–24.

<sup>465</sup> Gary Lawson, *Delegation and Original Meaning*, 88 *VA. L. REV.* 327, 398 (2002).

hypothetical understandings of the “reasonable American person of 1788.”<sup>466</sup>

Third, originalists have recognized that the text of many constitutional provisions is *objectively* vague and abstract, and thus necessarily vests judges with a great deal of interpretive discretion.<sup>467</sup>

Fourth, originalists now take the view that the Framers’ narrow expectations about how the Constitution would apply to particular problems are not dispositive; what matters instead is the (often general) principle that the abstract text would objectively be understood to enact.<sup>468</sup>

Fifth, as a result of the recognition that the Constitution often enacts broad principles, rather than narrow rules of decision, the new originalism has developed a distinction between “constitutional interpretation” and “constitutional construction.”<sup>469</sup> Originalist constitutional *interpretation* consists of determining the original meaning of the constitutional provision at issue.<sup>470</sup> But that meaning often is too abstract and open-ended to be capable of resolving difficult cases, because there are “multiple rules of decision that are each consistent with the original meaning of the vague or ambiguous constitutional command.”<sup>471</sup> In order to decide those cases, the judge has no choice but to *construct* constitutional doctrine by choosing among the various decisional rules that could be derived from the abstract original meaning—a process that necessarily “requires an act of creativity beyond interpretation.”<sup>472</sup>

Sixth, many new originalists no longer view originalism as a normative theory of adjudication; instead, they treat it as solely an interpretive theory of textual meaning—a theory of how to determine the meaning of the words in an old legal text, rather than a normative theory of what role unelected judges should play in our legal system and our society.<sup>473</sup>

These moves were, for the most part, not strategic or instrumental. They represent, in our opinion, genuine efforts to respond to criticism and to improve and refine an increasingly serious constitutional

<sup>466</sup> Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 48 (2006).

<sup>467</sup> See Colby, *supra* note 27, at 724–26; Smith, *supra* note 461, at 716–17.

<sup>468</sup> See Colby, *supra* note 27, at 728–31.

<sup>469</sup> See *id.* at 731–34; Smith, *supra* note 461, at 716–18.

<sup>470</sup> Smith, *supra* note 461, at 712–13.

<sup>471</sup> Colby, *supra* note 27, at 732 (footnote omitted).

<sup>472</sup> KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 7 (1999).

<sup>473</sup> See Colby, *supra* note 27, at 735–36; Smith, *supra* note 461, at 714–15.

theory.<sup>474</sup> Whatever motivated its evolution, however, the new originalism illuminates a much clearer path to resuscitating *Lochner*.

First and foremost, the mere fact that protecting economic rights from legislative interference would be “activist” and would defy principles of judicial restraint is no longer a deal breaker for originalists. As noted above, judicial restraint is not originalism’s defining feature anymore, especially as originalism becomes more of a semantic theory of interpretation than a normative theory of adjudication.

Second, the fact that economic rights such as the liberty of contract are not expressly enumerated in the constitutional text is no longer dispositive for originalists. It was not only the normative commitment to judicial restraint but also the focus on the narrow intentions and expectations of the Framers that led old originalists to reject judicial protection for unenumerated rights.<sup>475</sup> Old originalists tended to answer constitutional questions by seeking to determine the intent of the Framers with regard to the particular question—that is, by asking whether the Framers actually intended the Constitution to prohibit the specific practice at issue.<sup>476</sup> And they dismissed as “ink blots” any constitutional provisions that could be interpreted to protect unspecified rights because they simply could not believe that the Framers *intended* to vest unelected judges with the power to determine and enforce unenumerated liberties.<sup>477</sup>

But if the proper interpretive quest is for the objective meaning that a hypothetical reasonable observer would find in the text, rather than the actual subjective intentions and expectations of the Framers, then the old originalists’ refusal to countenance judicial discretion in general, and unenumerated rights in particular, no longer makes sense.<sup>478</sup> The alleged fact that the Framers could not have intended for unelected judges to give content to open-ended constitutional rights provisions—itsself a contested twentieth-century projection rather than a supported and historically contextualized assertion—no longer matters. What matters instead is that the Constitution textually

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<sup>474</sup> See generally Colby, *supra* note 27, at 736–44, 749 (“If originalism was to be a genuine intellectual theory and not simply armchair political sloganeering camouflaged in the garb of constitutional interpretation, then it was inevitable that originalism would mature and refine itself as it faced both criticism from smart opponents and self-reflection from smart proponents.”).

<sup>475</sup> See BORK, *supra* note 24, at 183.

<sup>476</sup> See Colby, *supra* note 461, at 728.

<sup>477</sup> See *supra* notes 430–32 and accompanying text.

<sup>478</sup> See Colby, *supra* note 27, at 724–26; Barnett, *supra* note 457, at 11–13 (criticizing Justice Scalia’s defense of originalism because his “approach would seem to justify judicial enforcement of only those passages of the Constitution that are sufficiently rule-like to constitute a determinate command that a judge can simply follow”).

acknowledges the existence of unenumerated rights<sup>479</sup> and includes provisions such as the Privileges or Immunities Clause of the Fourteenth Amendment that, objectively speaking, are written at a level of generality so capacious as necessarily to include within their scope a variety of unspecified rights.<sup>480</sup> And, in fact, originalists have recently produced extensive historical research purporting to demonstrate that a reasonable observer at the time of the enactment of the Fourteenth Amendment would have understood that amendment to provide constitutional protection to unenumerated rights.<sup>481</sup>

To be sure, even assuming that the Fourteenth Amendment's original objective meaning embraces unenumerated rights, the amendment on its face provides virtually no guidance about *which* rights fall within the protected class. But whereas the old originalists' commitment to restraint required them to reject judicial authority to give meaning to open-ended provisions, the new originalists refuse to shy away from provisions that, objectively understood, necessarily vest judges with broad interpretive discretion.<sup>482</sup> The only question, accordingly, is whether economic rights such as the liberty of contract should be included within the list of unenumerated constitutional rights.

And that step, it turns out, comes naturally. Even if an originalist feels compelled to limit the universe of judicially enforceable unwritten rights to those with a long historical pedigree dating back to the framing of the original Constitution or the Fourteenth Amend-

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<sup>479</sup> See U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

<sup>480</sup> See BARNETT, *supra* note 308, at 256–57 (arguing that originalism requires judges to enforce the original meaning of the Ninth and Fourteenth Amendments, which in turn requires judges to protect unenumerated rights). Cf. Whittington, *supra* note 26, at 609 (noting that "features of the new originalism open up space for originalists to reconsider the meaning of such rights-oriented aspects of the Constitution as the Ninth Amendment or the Fourteenth Amendment's privileges or immunities and due process clauses").

<sup>481</sup> Much of this research is summarized in Brief of Constitutional Law Professors as Amici Curiae in Support of Petitioners at 8–21, *McDonald v. City of Chicago*, 561 U.S. 742 (2010), 2009 WL 4099504; see also AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 108–10 (2012) (arguing that "core 'privileges' and 'immunities' of 'citizens' safeguarded by the amendment encompass not merely pre-1868 rights recognized in canonical sources such as the federal Bill of Rights and the Declaration of Independence, but also post-1868 rights that Congress may identify . . .").

<sup>482</sup> See Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as it Sounds*, 22 CONST. COMMENT. 257, 264 (2005) ("That the Constitution includes more open-ended or abstract provisions, and thereby delegates discretion to judges, does not justify ignoring these portions of the text."); Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin's Originalism*, 103 NW. U. L. REV. 663, 673 (2009) ("It is not an adequate answer in these situations to say, as Justice Scalia sometimes does, that originalist judges ought not to enforce Clauses of this kind because they do not lend themselves to principled judicial application.").

ment,<sup>483</sup> the framing generation's deep affinity for property rights and economic liberties is well known.<sup>484</sup> In any event, the new originalism does not resolve constitutional issues by seeking to determine how the Framers would personally have answered the narrow question at issue; rather, it counsels that "we are bound to interpret the text at its original level of generality."<sup>485</sup> And there is evidence that the Framers of the Ninth and Fourteenth Amendments drafted them "at a higher level of abstraction or generality—that of natural liberty rights—than any specific list of liberties and deliberately so," precisely because the framers understood that it would be impossible and unwise to attempt to list all fundamental rights that the government might someday try to infringe.<sup>486</sup> Thus, *even if there were no* historical support for the view that economic liberties were originally included in the class of protected unenumerated rights, there is still a plausible argument that limiting the universe of fundamental rights to "particular historically situated liberties runs afoul of original meaning."<sup>487</sup>

Of course, interpreting the Fourteenth Amendment to protect unenumerated economic rights would be inconsistent with over three-quarters of a century of doctrine squarely rejecting that view.<sup>488</sup> But although, as Justice Scalia has asserted, many originalists would "adulterate" originalism "with the doctrine of *stare decisis*,"<sup>489</sup> most originalists are willing, in at least some cases, to depart from precedent when it is revealed to be inconsistent with the original meaning.<sup>490</sup> Indeed,

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<sup>483</sup> See, e.g., Steven G. Calabresi, Lawrence, *the Fourteenth Amendment, and the Supreme Court's Reliance on Foreign Constitutional Law: An Originalist Reappraisal*, 65 OHIO ST. L.J. 1097, 1109–11 (2004) (discussing an interpretation of the Privileges or Immunities Clause that would protect as fundamental a right that "has been enjoyed by the citizens of the United States since 1776 or at least since the Fourteenth Amendment was ratified in 1868").

<sup>484</sup> See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 622 (4th ed. 2011) (noting that "there is no doubt that the framers intended to protect economic rights"); James W. Ely, Jr., *The Constitution and Economic Liberty*, 35 HARV. J.L. & PUB. POL'Y 27, 31–32 (2012) (noting that the Framers "almost certainly approved" of steps taken to create a market economy, and that "protection of property ownership and contractual stability were seen as the keys to economic prosperity"); Renée Lettow Lerner, *Enlightenment Economics and the Framing of the U.S. Constitution*, 35 HARV. J.L. & PUB. POL'Y 37, 39–46 (2012) (arguing that Enlightenment economic theory permeates the Constitution); Siegan, *supra* note 425, at 492–95 (arguing that the Framers of the Fourteenth Amendment intended to protect economic freedoms).

<sup>485</sup> BARNETT, *supra* note 308, at 258.

<sup>486</sup> *Id.*

<sup>487</sup> *Id.*

<sup>488</sup> See *supra* notes 56–57 and accompanying text.

<sup>489</sup> Scalia, *supra* note 23, at 861.

<sup>490</sup> Justice Scalia, for example, has consistently argued that the Court should overrule *Roe v. Wade*, see *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 998 (1992) (Scalia, J., dissenting), even though the Court has protected a right to choose to have an abortion for several decades. In fact, Justice Scalia has stated that "*stare decisis* is not *part of* [his]

a growing number of new originalists have argued that doctrine *must* yield to the original meaning, going so far as to maintain that it is unconstitutional for the Supreme Court to follow a precedent—even a decades-old precedent—that deviates from the Constitution’s original meaning.<sup>491</sup> At a minimum, it is clear that, to originalists, *stare decisis* is not an “inexorable command.”<sup>492</sup>

Efforts to reinterpret the Fourteenth Amendment to protect the liberty of contract would also need to overcome the lingering taint of *Lochner*. After all, for many years, there has been an argument-stopping quality to the charge that a decision is “like *Lochner*,” a fact that (if true) “alone should be enough to damn it.”<sup>493</sup> But this obstacle too can be overcome—either by “[r]ehabilitating *Lochner*”<sup>494</sup> or, more likely, by maneuvering around it. Part of the modern conservative critique of *Lochner* (and of *Griswold*, *Roe*, and their progeny) has always been that it is oxymoronic—and thus self-evidently problematic as a matter of original meaning—to find substantive rights in a constitutional provision—the Due Process Clause—that on its face ostensibly is addressed only to matters of procedure.<sup>495</sup> But most of the recent research about the original meaning of the Fourteenth Amendment as a source for constitutional protection for unenumerated rights focuses on the Privileges or Immunities Clause, rather than the Due Process Clause.<sup>496</sup> By relying on the former—which many

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originalist philosophy” but rather is “a pragmatic *exception* to it.” Antonin Scalia, *Response, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW*, *supra* note 463, at 129, 140.

<sup>491</sup> See, e.g., Barnett, *supra* note 482, at 263 (arguing that a true “originalist simply could not accept that the Supreme Court could change the meaning of the text from what it meant as enacted and still remain an originalist”); Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL’Y 23, 27–28 (1994) (“If the Constitution says X and a prior judicial decision says Y, a court has not merely the power, but the obligation, to prefer the Constitution.”); Michael Stokes Paulsen, *The Intrinsicly Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 289 (2005) (arguing that “*stare decisis* . . . is completely irreconcilable with originalism”).

<sup>492</sup> See *Payne v. Tennessee*, 501 U.S. 808, 828 (1991); see also *id.* at 833–35 (Scalia, J., concurring).

<sup>493</sup> See Ely, *supra* note 63, at 939–40.

<sup>494</sup> See BERNSTEIN, *supra* note 86, at 125–29. This would seem to be the path favored by George Will and Rand Paul, among other influential conservatives. See *supra* Part III.

<sup>495</sup> See, e.g., *McDonald v. City of Chicago*, 561 U.S. 742, 811 (2010) (Thomas, J., concurring in part and concurring in the judgment) (“The notion that a constitutional provision that guarantees only ‘process’ before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words.”); Steven G. Calabresi, *Substantive Due Process After Gonzales v. Carhart*, 106 MICH. L. REV. 1517, 1531 (2008) (“For me as an originalist, the very notion of substantive due process is an oxymoron.”).

<sup>496</sup> Some scholars have, however, argued that the original meaning of one or both of the Due Process Clauses also supports unenumerated substantive rights. See, e.g., Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 640–45 (2009) (“[T]he Due Process Clause required that a congressional deprivation of life, liberty, or property be

conservatives and liberals alike believe the Court interpreted unduly narrowly in the *Slaughter-House Cases*<sup>497</sup>—originalists can plausibly recognize unenumerated rights without embracing the doctrine of substantive due process that conservatives have long mocked and despised. If nothing else, a focus on the capacious language of the Privileges or Immunities Clause, rather than the Due Process Clause, permits judicial protection of unenumerated economic rights without embracing the technical holding of *Lochner* itself.

Originalism therefore now supports a plausible argument, soundly grounded in sophisticated conservative legal theory, in favor of revitalizing *Lochner*. And importantly, it facilitates such an argument without purporting to abandon its commitment to objectivity, historical fidelity, and political neutrality. Robert Bork's early insistence that judges be faithful to "the text and the history, and their fair implications"—that is, the original intent—arose from the imperative that judges be controlled by "neutral principles."<sup>498</sup> Such claims to neutrality were central to academic and political defenses of the old originalism. Earl Maltz, for instance, contended that "unlike nonoriginalist theories, at its core originalism does not depend on extralegal, nonneutral justifications. Instead, it is premised on internal legal conventions developed without regard to some specific political agenda unrelated to the nature of judging itself."<sup>499</sup> Edwin Meese similarly argued that originalism is "not a jurisprudence of political results," but instead is "concerned with process" and thus "seeks to depoliticize the law."<sup>500</sup> On this account, originalism is an ideologically neutral and objective methodology, treating fidelity to textual meaning, rather than any particular substantive result, as the ultimate measure of proper interpretation. As Earl Maltz noted, it is "this potential for neutrality that accounts for the visceral appeal of originalism."<sup>501</sup>

Although the more recent versions of originalism focus less on limiting judicial authority than did their predecessors, new originalists have steadfastly maintained the old originalism's claim to neutrality

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accomplished by a 'law,' and to be a 'law,' a congressional act must not have exceeded the limits of legislative power marked by natural and customary rights."); Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 512 (2010) (arguing that the original meaning of the Fourteenth Amendment "encompassed a recognizable form of substantive due process").

<sup>497</sup> See 83 U.S. (16 Wall.) 36, 74 (1872); Williams, *supra* note 496, at 488–89.

<sup>498</sup> See Bork, *supra* note 19, at 2, 6, 8.

<sup>499</sup> Earl Maltz, *Foreword: The Appeal of Originalism*, 1987 UTAH L. REV. 773, 789 (1987).

<sup>500</sup> Edwin Meese III, *Construing the Constitution*, 19 U.C. DAVIS L. REV. 22, 29 (1985).

<sup>501</sup> Maltz, *supra* note 499, at 794.



and its rhetorical focus on fidelity over results.<sup>502</sup> For instance, Michael McConnell, an important figure in the evolution of originalist thought, contends that originalism “supplies an objective basis for judgment that does not merely reflect the judge’s own ideological stance,” whereas “constitutional interpretation based on the judge’s own assessment of worthy purposes and propitious consequences lacks that objectivity.”<sup>503</sup> Keith Whittington similarly argues that the new originalism “demands fidelity to the written Constitution as it was understood by those who adopted it, and nothing more.”<sup>504</sup> Originalist interpretation on this view is politically neutral, as it “does not make constitutional law any more attractive to conservatives (or liberals) than the underlying constitutional provisions in their historical context.”<sup>505</sup> And Larry Solum has similarly focused on the notion of fidelity, explaining that “originalists characteristically believe that the legal content of constitutional doctrine must be consistent with the communicative content of the constitutional text,” which is another way of saying that most new originalists believe that judges should be faithful to the semantic meaning of the constitutional text when they decide questions of constitutional law.<sup>506</sup>

By the same token, although originalism has abandoned its devotion to judicial *restraint*, it has largely maintained its professed commitment to judicial *constraint*.<sup>507</sup> “New Originalists believe that the courts should sometimes be quite active in preserving (or restoring) the original constitutional meaning, but they do not believe that the courts are unconstrained in that activism. They are constrained by their obligation to remain faithful to the original meaning.”<sup>508</sup>

When this continuing claim to constraint and neutrality is combined with the more capacious understanding of original meaning, it allows new originalists plausibly to claim that the Constitution protects unenumerated economic rights, and that this conclusion is required not by conservative political desires but rather by fidelity to the written Constitution and faithful application of a neutral interpretive ap-

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<sup>502</sup> See Whittington, *supra* note 26, at 609 (“The primary virtue claimed by the new originalism is one of constitutional fidelity, not of judicial restraint or democratic majoritarianism.”).

<sup>503</sup> Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2415 (2006) (reviewing STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005)).

<sup>504</sup> Keith E. Whittington, *Is Originalism Too Conservative?*, 34 HARV. J.L. & PUB. POL’Y 29, 37 (2011).

<sup>505</sup> *Id.*

<sup>506</sup> Lawrence B. Solum, *Faith and Fidelity: Originalism and the Possibility of Constitutional Redemption*, 91 TEX. L. REV. 147, 167 (2012) (reviewing JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* (2011), and JACK M. BALKIN, *LIVING ORIGINALISM* (2011)).

<sup>507</sup> See Colby, *supra* note 27, at 750–51 (collecting sources demonstrating this trend).

<sup>508</sup> *Id.* at 751.

proach. One prominent new originalist—Randy Barnett, who, as noted above, comes from the libertarian wing of the conservative movement, but whose role as “the intellectual godfather of the argument that [the Affordable Care Act] is unconstitutional”<sup>509</sup> has amplified his influence in conservative legal circles more generally—has already offered a detailed argument that *Lochner* is amply supported by the original meaning of the Ninth and Fourteenth Amendments.<sup>510</sup> We suspect that other originalists will soon follow suit.<sup>511</sup>

To be clear, we are not asserting that the new originalism *necessarily* dictates a return to *Lochner*—that is, that robust protection of economic liberties is, in fact, *compelled* by a commitment to original meaning. As we have both written elsewhere, our view is that the new originalism is so inherently open-ended that its continued promise of constraint is illusory; because the key rights-granting provisions of the Constitution are phrased in such objectively abstract language, one can use new originalist methodology to produce just about any (reasonable) intended outcome.<sup>512</sup> But, of course, that is an admission that originalists (with very few exceptions) simply will not make. They will, instead, insist that their particular conclusions are historically mandated—even if, in at least some cases, they are ultimately driven by the writer’s personal sense of justice, rather than any objectively definitive historical fact.<sup>513</sup>

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<sup>509</sup> Kate Zernike, *Proposed Amendment Would Enable States to Repeal Federal Law*, N.Y. TIMES, Dec. 20, 2010, at A14.

<sup>510</sup> See BARNETT, *supra* note 308, at 211–29.

<sup>511</sup> In this regard, it is perhaps important to note the Tea Party’s (not always highly sophisticated) support for both originalism and liberty of contract. See Christopher W. Schmidt, *The Tea Party and the Constitution*, 39 HASTINGS CONST. L.Q. 193, 207 (2011) (“One of the defining characteristics of Tea Party constitutionalism is the enthusiastic embrace of originalism as its preferred method[ ] of constitutional interpretation.”); Murphy, *supra* note 317, at 189 (“The Tea Party’s view of economic liberty translates into a theory of liberty of contract with clear parallels to the Supreme Court’s decisions of the *Lochner* era.”). The Tea Party’s originalism tends to be more crude than the refined versions now practiced in the legal academy, and in many ways resembles the old originalism more than the new. See Schmidt, *supra*, at 211–12. And its arguments in favor of economic liberty tend to rely more on soaring rhetoric than carefully supported assertions about history and original meaning. See Murphy, *supra* note 317, at 190–92. Still, the influence of the Tea Party in the modern conservative movement will likely encourage more sophisticated thinkers to craft better-refined originalist arguments to the same ends.

<sup>512</sup> See Colby, *supra* note 27, at 760–64; Smith, *supra* note 461, at 730–35; see also Wilkinson, *supra* note 450, at 257 (arguing that the new originalism “is not determinate enough to constrain judges’ discretion to decide cases based on outcomes they prefer”). Cf. Whittington, *supra* note 504, at 30, 36 (conceding that “originalists might be tempted to skew the results of their historical-interpretive inquiries and make the historical arguments produce answers that comport with their current political and policy preferences,” which would enable them to “claim to be engaging in the originalist enterprise and adhering to the dictates of the originalist Constitution”).

<sup>513</sup> See Colby, *supra* note 27, at 773–76 (providing examples of originalists who have contended that “constitutional interpretation is substantially more determinate . . . than

To be sure, if we are correct that conservative legal thought will soon gravitate to the view that the Constitution requires judicial protection for economic liberty, the *importance* of that change depends upon the particular form that such judicial protection takes. It does not necessarily follow from the view that the Constitution protects economic liberty that all regulation that interferes with such liberty is unconstitutional. A relatively modest approach might look like the one advanced in *St. Joseph Abbey*, the recent case in which the Fifth Circuit invalidated a rule prohibiting anyone other than a licensed funeral director from selling caskets.<sup>514</sup> In that case, the court applied what amounts to rational basis review with “bite,”<sup>515</sup> still leaving considerable room for legislation that does not merely effect naked wealth transfers to interfere with economic liberty. A more robust approach—and one that would have much more dramatic implications for the scope of regulatory power—would require application of strict scrutiny (or something like it) to a wide range of government regulations, similar to the approach of the *Lochner* Court. One can imagine approaches that fall somewhere between these points on the spectrum of deference as well. But whatever form it takes, the claim that regulations that interfere with economic liberty should trigger some form of heightened scrutiny would represent a significant departure from a longstanding consensus.

The ultimate point is that, for those who are inclined personally to favor economic liberties (and most conservatives are), originalism now provides an avenue to get where they want to go while purporting to follow the neutral method of constitutional interpretation long insisted upon by conservatives. The stage is now set for new originalist defenses of economic liberties.

#### CONCLUSION

In 1984, then-Judge Antonin Scalia noted that the question whether courts should aggressively review regulations interfering with economic liberty

presents the moment of truth for many conservatives who have been criticizing the courts in recent years. They must decide whether they really believe, as they have been saying, that the courts are doing too much, or whether they are actually nursing only the less

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one might think”); Smith, *supra* note 461, at 734–35 (explaining how originalism is “at a crossroads” because of this approach).

<sup>514</sup> See *supra* notes 356–74 and accompanying text.

<sup>515</sup> See Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 20–24 (1972) (discussing this more enhanced scrutiny and noting that “[p]utting consistent new bite into the old equal protection would mean that the Court would be less willing to supply justifying rationales by exercising its imagination”).

principled grievance that the courts have not been doing what *they* want.<sup>516</sup>

In response, conservative legal orthodoxy settled on Scalia's view that courts had indeed been doing too much, even if that view meant that the government would have more space to interfere with private economic ordering.<sup>517</sup>

Conservatives appear once again to be faced with such a moment of truth, and there is good reason to think that they will make a different choice this time around. Unlike in 1984, it is today entirely plausible, under the iteration of originalism that currently prevails in sophisticated conservative circles, to claim that the original meaning of the Constitution embraces unenumerated economic rights. Conservatives can now have their cake and eat it, too: they can support judicial intervention to invalidate government regulation of the marketplace while pledging interpretive fidelity to the Constitution's original meaning.

This is not to denigrate conservatives as unprincipled opportunists who *consciously* seek to subjugate the law to their political whims. To the contrary, we give credit to conservatives for abstaining from action in the absence of a strong theoretical foundation, rather than following the path of the Warren Court. When conservative legal theory did not support their politically favored outcomes, conservatives laudably chose mostly to respect their jurisprudential commitments, at least in the case of unenumerated economic rights. But as conservative legal theory has evolved, it has come to illuminate a truth that it does not want to admit: contrary to the prevailing conservative rhetoric, the Constitution is inherently indeterminate, and judges inevitably have considerable discretion in applying it.<sup>518</sup> In betraying this truth, the advances in originalist theory make it possible for conservatives to subconsciously align their jurisprudence with their politics. We suspect that, for conservatives every bit as much as for liberals, the draw of doing so will be too great to resist.

Thus, Lino Graglia, a founding father of the modern originalism movement and a strident critic of liberal legal thought, was perhaps mistaken twenty years ago when he declared, "We will almost surely never again see a *Lochner* era in which the Court takes from liberals, as

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<sup>516</sup> Scalia, *supra* note 282, at 5.

<sup>517</sup> See BARNETT, *supra* note 308, at 222–23; Colby, *supra* note 27, at 769–70.

<sup>518</sup> See Thomas B. Colby, *In Defense of Judicial Empathy*, 96 MINN. L. REV. 1944, 1949–51 (2012) (arguing that the common assertion "that good judges (which is to say, conservative judges) decide all cases by simply following the law, mechanically calling balls and strikes according to clear and determinative rules set down by the Framers and legislatures . . . bears virtually no resemblance to the actual process of judging" because "any even remotely sophisticated student of law recognizes that the formal sources of law often do not dictate clear and unequivocal answers to the questions posed to judges").

it now does from conservatives, what they win in the political process by, for example, striking down economic regulation . . . .”<sup>519</sup> To the contrary, we may well be on the brink of just such an era.

Of course, Justice Scalia is unlikely to lead the charge. A soldier of the Reagan Revolution, his pronounced commitment to judicial restraint when it comes to unenumerated rights is simply too ingrained to overcome.<sup>520</sup> Scalia has long insisted that, because the Constitution must have “a fixed meaning ascertainable through the usual devices familiar to those learned in the law,” unelected judges have no business protecting rights not clearly set out in the constitutional text.<sup>521</sup> As such, he believes that the unenumerated rights ostensibly protected by provisions such as the Ninth Amendment should not be enforced judicially,<sup>522</sup> and that *Lochner* was unequivocally mistaken.<sup>523</sup> But as two self-described new originalists have noted, “In some ways, [Justice Scalia] is a leader whose followers have bettered the leader’s own work. Scholars and judges a half-generation younger than Scalia, who are in some respects his heirs, often appear to be employing more thoroughly and carefully honed versions of originalist textualism.”<sup>524</sup> These next-generation originalists (along with originalists a half-generation younger still)—both removed in time from the Nixon and Reagan eras and more sophisticated in their constitutional theory—stand poised to move conservative legal thought about economic rights forward: by taking it back a hundred years.<sup>525</sup>

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<sup>519</sup> Graglia, *supra* note 417, at 1022–23 (citation omitted).

<sup>520</sup> In both his theoretical approach and his actual decisions, Scalia straddles the divide between the old and new originalisms. See Colby, *supra* note 27, at 719 n.27, 772–73.

<sup>521</sup> Scalia, *supra* note 23, at 854.

<sup>522</sup> See *Troxel v. Granville*, 530 U.S. 57, 91 (2000) (Scalia, J., dissenting).

<sup>523</sup> See *supra* notes 249–53 and accompanying text.

<sup>524</sup> Vasani Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1140 (2003); see also Barnett, *supra* note 457, at 11–13 (arguing that, in refusing to enforce unenumerated rights, Justice Scalia is not a true originalist).

<sup>525</sup> When conservatives recaptured the courts, many liberals found themselves circling back to theories of judicial restraint. See Josh Benson, *The Past Does Not Repeat Itself, but It Rhymes: The Second Coming of the Liberal Anti-Court Movement*, 33 LAW & SOC. INQUIRY 1071, 1078 (2008) (noting “the popular constitutionalism of Larry Kramer, the minimalism of Cass Sunstein, the bipartisan restraint of Jeffrey Rosen, and the call to abolish judicial review by Mark Tushnet”). If we are correct that conservatives are poised to take a major leap forward, now that they have developed a theoretical foundation for doing so, we might also suppose that even more liberals (having failed to coalesce around any particular theory of judicial engagement) will be drawn to these theories (assuming that conservatives retain their numbers in the judiciary).