Government as Liberty's Servant: The "Reasonable Time, Place, and Manner" Standard of Review for All Government Restrictions on Liberty Interests

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I. INTRODUCTION

To borrow a nicely turned phrase from the Supreme Court, "If there is any [other] fixed star in our constitutional constellation,"[1]

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1. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official,

it is the Court's dedicated use over the past seventy years of the presumption-of-constitutionality doctrine for judicial review. Under this standard of review, the great majority of government actions operate under a heavy presumption of validity and are almost always upheld, subject only to a challenger showing the action is unreasonable or arbitrary.[2] Only in the exceptional case, where the government action affects a previously Court-identified liberty interest or suspect classification, will the presumption be reversed to impose the initial burden on the government to justify its action.

There are persuasive arguments that this is the correct approach, as it reflects a proper deference to the elected branches of government in a democratic society. It is the very nature of democracy to allow the people who will be affected by particular policies to have a voice in the enactment of those policies; and of the republican form of democracy to allow representatives, accountable to the people, to enact those policies. It *is* a valid question why a court, composed of unelected officials not directly accountable to the people (in federal courts, at least), should be allowed to nullify the actions of a voting majority. As Michael McConnell says, "the people through their representative institutions—not the courts—have authority to decide which course of action 'does most credit to the nation.' . . . It is the right,

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high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

2. Another phrasing of the standard is: The action will be upheld so long as the government had a "rational basis" for the action. The presumption-of-constitutionality standard has been applied in an extremely deferential manner, where the government action is upheld as long as the government could *conceivably* have had, but did not *actually* have, a rational basis for the action. *See, e.g.*, Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 230 (1984) (stating that the statute will be upheld so long as it is "rationally related to a *conceivable* [government] purpose" (emphasis added)); Williamson v. Lee Optical, 348 U.S. 483, 487–88 (1955) ("[I]t is for the legislature, not the courts, to balance the advantages and disadvantages of a [policy] . . . . [So long as] the legislature *might* have concluded [the policy was necessary, it will be upheld] . . . . 'For protection against abuses by legislatures the people must resort to the polls, not to the courts.'" (quoting Munn v. Illinois, 94 U.S. 113, 134 (1876)).

privilege, and obligation of the people to deliberate about such questions through their elected representatives."[3]

Alexander Bickel describes the task of devising the proper scope of judicial review as a "search . . . for a [judicial] function which differs from the legislative and executive functions; . . . whose discharge by the courts will not lower the quality of the other departments' performance by denuding them of the dignity and burden of their own responsibility."[4] James Bradley Thayer's 1893 formula suggests courts generally should let stand the decisions of democratically elected legislatures and strike down only irrational laws:

> [The court] can only disregard the [challenged] Act when those who have the right to make laws have not merely made a mistake, but have made a very clear one,—so clear that it is not open to rational question. That is the standard of duty to which the courts bring legislative Acts; that is the test which they apply,—not merely their own judgment as to constitutionality, but their conclusion as to what judgment is permissible to another department which the constitution has charged with the duty of making it. This rule recognizes that, having regard to the great, complex, ever unfolding exigencies of government, much which will seem unconstitutional to one man, or body of men, may reasonably not seem so to another; that the constitution often admits of different interpretations; that there is often a range of choice and judgment; that in such cases the constitution does not impose upon the legislature any one

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3. Michael McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "*Moral Reading*" of the Constitution*, 65 FORDHAM L. REV. 1269, 1273–74 (1997).

4. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16–24 (2d ed., Yale Univ. Press 1986) (1962) (coining the phrase "counter-majoritarian difficulty" for the problem of unelected judges replacing the values of the elected legislature with those of their own). *See also generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 4–5, 72 (1980) (developing the "representation-reinforcing" theory that legislation should generally be presumed constitutional and upheld so long as the democratic process is open and fair, but may be struck down when it has resulted from a defective or malfunctioning democratic process).

> specific opinion, but leaves open this range of choice; and that whatever choice is rational is constitutional.[5]

Thayer's views on judicial review have been enormously influential,[6] providing foundations for the judicial philosophies of a number of prominent twentieth century jurists, including Justices Holmes, Brandeis, Frankfurter, and Judge Learned Hand.[7] Judge Hand famously said, "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not";[8] and that "[c]ourts 'should not have the last word in those basic conflicts of "right and wrong,"' even in cases involving Bill of Rights guarantees. Such

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5. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144–50 (1893).

6. *See generally* Symposium, *One Hundred Years of Judicial Review: The Thayer Centennial Symposium*, 88 NW. U. L. REV. 1 (1993) (discussing the influence of Thayer's 1893 article); Michael J. Perry, *Protecting Human Rights in a Democracy: What Role for the Courts?*, 38 WAKE FOREST L. REV. 635, 680–82, nn.110, 111 (2003).

7. Describing Thayer as "our great master of constitutional law" Justice Frankfurter commented,

> [Thayer] influenced Holmes, Brandeis, the Hands (Learned and Augustus) . . . and so forth. I am of the view that if I were to name one piece of writing on American Constitutional Law—a silly test maybe—I would pick an essay by James Bradley Thayer in the Harvard Law Review, consisting of 26 pages, published in October, 1893, called "The Origin and Scope of the American Doctrine of Constitutional Law" . . . . Why would I do that? Because from my point of view it's a great guide for judges and therefore, the great guide for understanding by non-judges of what the place of the judiciary is in relation to constitutional questions.

Leonard W. Levy, *Editorial Note to James Bradley Thayer, The Origin and Scope of the American Doctrine of Constitutional Law*, *in* JUDICIAL REVIEW AND THE SUPREME COURT: SELECTED ESSAYS 43 (Leonard W. Levy ed., 1967). Justice Holmes stated, "I agree with [Thayer's 1893 article] heartily and it makes explicit the point of view from which implicitly I have approached the constitutional questions upon which I have differed from some other judges." PAUL KAHN, LEGITIMACY AND HISTORY: SELF-GOVERNMENT IN AMERICAN CONSTITUTIONAL THEORY 84 (1992) (adding that, in addition to Thayer's professional and personal association with Holmes in private practice and at Harvard, "Louis Brandeis was a student of Thayer's, and Felix Frankfurter, who just missed Thayer at Harvard, acknowledged Thayer's substantial influence").

8. LEARNED HAND, THE BILL OF RIGHTS 73 (1958) (quoted also in Griswold v. Connecticut, 381 U.S. 479, 526–27 (1965) (Black, J., dissenting)).

constitutional rights must 'serve merely as counsels of moderation.'"[9] To Hand, then, the Bill of Rights "are [merely] precatory, and their specific implementation and effect must depend on the people and their elected representatives."[10]

Such Thayerian-style countermajoritarian difficulty arguments have largely prevailed throughout most of the twentieth century since 1937, such that for decades the Court's presumption-of-constitutionality doctrine was virtually unchallenged among jurists and constitutional theorists, who, regardless of the interpretive method(s) employed, largely ceded the analytical high ground to the "government-first" position. As Rebecca Brown notes, "[e]ven the most sympathetic theorists tended to assume the role of apologist for judicial review . . . ."[11]

In recent decades, however, increasing numbers of scholars have begun questioning whether such a sympathetic reading of Thayer and the resulting presumption-of-constitutionality doctrine might not throw the original Liberty baby out with the countermajoritarian-difficulty bathwater. Lawrence Gene Sager points out, for example, that we misread Thayer's rule-of-clear-mistake if we assume legislative action defines the "outer boundary" of a constitutional norm. The judiciary may properly defer to a particular legislative act and yet reserve judgment on the full scope of protection offered by a particular constitutional provision. As Sager says,

> [Thayer's] judicial restraint thesis has retained its vitality, and continues to be instrumental in the judicial enforcement of the Constitution, as the federal judicial enforcement of

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9. Stephen M. Feldman, *Unenumerated Rights in Different Democratic Regimes*, 9 U. PA. J. CONST. L. 47, 79–80 (2006) (quoting LEARNED HAND, THE CONTRIBUTION OF AN INDEPENDENT JUDICIARY TO CIVILIZATION (1942), *reprinted in* THE SPIRIT OF LIBERTY 181 (Irving Dilliard ed., 1952)).

10. *Id.* at 80.

11. Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531, 532–33 (1998) ("Judgment . . . was recast as the unforgivable 'value imposition.' These attacks on the legitimacy of judgment in a democracy have left their mark not only on the academy, but also on the public understanding of the judicial role and on the Supreme Court's understanding of its own role. These effects, in turn, have had palpable implications for the recognition and enforcement of individual rights." (footnotes omitted)).

> the equal protection clause so clearly indicates. But, under the influence of a vigorous tradition of Supreme Court enforcement of constitutional norms, we have come to lose sight of the fact that some judicial decisions reflect the tradition of judicial restraint and should not be understood to be exhaustive statements of the meaning of the implicated constitutional norms.[12]

Properly understood,

> The heart of Thayer's argument is [merely] that the legislature is charged with the responsibility of measuring its own conduct against the Constitution and that the judiciary should therefore not lightly reach a judgment on the constitutionality of a legislative act contrary to the prior constitutional judgment of the legislature . . . .[13]

Archibald Cox offers a modern-day counterpoint to Judge Hand's extreme view, pointing out there is in fact good reason the Constitution subjects majoritarian democracy to judicial review:

> [C]ourts will be a great deal firmer and wiser than legislatures in interpreting constitutional guarantees which protect essential liberty. First, judicial interpretation gives better protection to unpopular individuals and minorities shut out of or inadequately represented in the political process. It was the Supreme Court that spoke for the national conscience in *Brown v. Board of Education*, when Congress and the President remained silent. Similarly, judicial review provides better protection over time for enduring values which politicians too often neglect and of which the people too often lose sight in the emotional intensity and maneuvering of political conflict. Individual liberties such as freedom of speech and guarantees of privacy are often in this character.[14]

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12. Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1224 (1978).

13. *Id.* at 1223.

14. Archibald Cox, *The Independence of the Judiciary: History and Purposes*, 21 U. DAYTON L. REV. 565, 572–73 (1996) (footnotes omitted).

Rebecca Brown observes that majoritarian government exists, not for the sake of majoritarian government itself, but rather as a mechanism for protecting the people's Freedom:

> One of the genuinely unique aspects of the Constitution was its dependence on a principle of representation "'where all authority flows from and returns at stated periods to, the people.' . . . All parts of the government were equally responsible but limited spokesmen for the people, *who remained as the absolute and perpetual sovereign, distributing bits and pieces of power to their various agents*. . . . The powers of the people were thus never alienated or surrendered to a legislature. . . ."
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> This unique structure of American government, then, does not divide all power amongst the branches. It divides all *delegated* power amongst the branches, always retaining the role of the people as an overseer of the entire system.[15]

Once this relationship is understood, it becomes apparent that "John Hart Ely's theory . . . lead[ing] to the conclusion that the Bill of Rights exists to support majoritarian government . . . had it exactly backwards. A better understanding of the system we have is that *majoritarian government exists to support the Bill of Rights*."[16]

Indeed, the founders and framers themselves were well aware of the perils of leaving the People's liberties to the whims of direct and elected majorities. James Madison, for example, arguing in support of passage of the Bill of Rights before the First Congress, said, "[I]ndependent tribunals of justice will consider themselves

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15. Brown, *supra* note 11, at 573–74 (emphasis in original) (quoting GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 596, 599–600 (1969) (footnotes omitted) (quoting Charles Pinckney *in* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 331 (Jonathan Elliot ed., 1876))). *See also* Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 205, 197 (1952) ("The task of democracy is not to have the people vote directly on every issue, but to assure their ultimate responsibility for the acts of their representatives, elected or appointed [(including judges)]"; criticizing Hand's cramped view of judicial review as inappropriately based upon "dark shadows thrown upon the judiciary by the Court-packing fight of 1937").

16. Brown, *supra* note 11, at 574.

in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive . . . ."[17] In a letter to a French correspondent, Thomas Jefferson averred, "the laws of the land, administered by upright judges, . . . would protect you from any exercise of power unauthorized by the Constitution of the United States."[18] Alexander Hamilton also commented in *Federalist* No. 78 that, as paraphrased by Rebecca Brown, "the judiciary was entrusted with the primary responsibility for guarding the value that underlay the entire constitutional structure: The courts were expected to commit to 'inflexible and uniform adherence to the rights of the Constitution, and of individuals . . . .'"[19]

What the founders, framers, and many other Americans since have shared is a common understanding that the irreducible nucleus around which all else orbits in America is liberty. The Declaration of Independence stakes the claim, and the Constitution issues the guarantee. In America, government—and democracy itself—is Liberty's servant, designed for the ultimate purpose of protecting the people's freedom.

This essay argues that the Court's current presumption-of-constitutionality standard of judicial review gives too much deference to government at the expense of Liberty. Part II describes the heavy influence of *Lochner v. New York*[20] on the development of the presumption-of-constitutionality doctrine, discussing both the conventional wisdom and more sympathetic (revisionist) views on the case; concluding that the case, despite its long-held pariah status, offers useful guidance moving forward for future judicial decision-making. Part III suggests the presumption-of-constitutionality doctrine fails to do proper justice to the robust conception of Liberty under which the nation was founded, and offers a new Due Process Clause-based presumption-of-*liberty* standard of judicial review, modeled on the Court's existing First

17. 1 ANNALS OF CONG. 457 (Joseph Gales ed., 1834).

18. Cox, *supra* note 14, at 572.

19. Brown, *supra* note 11, at 571 (quoting THE FEDERALIST NO. 78, at 441 (Alexander Hamilton) (Isaac Kramnick ed., 1987)).

20. 198 U.S. 45 (1905).

Amendment "reasonable time, place, and manner" doctrine.[21] This approach, already championed on a narrow basis by the Third Circuit Court of Appeals in *Lutz v. York*[22] in 1990, more accurately honors the Constitution's core Liberty-first ideals, while also recognizing the proper constitutional role of government in maintaining law and order.

II. THE PRESUMPTION OF CONSTITUTIONALITY DOCTRINE: *LOCHNER*'S LONG REACH

Any discussion of the Court's presumption-of-constitutionality standard of judicial review must inevitably consider *Lochner v. New York*[23] and its progeny. This part discusses the singular position *Lochner* has occupied over most of the past century as a constitutional outcast, giving voice to the assertion, implicit (at least) in much of the more recent scholarship, that *Lochner* at a rudimentary level provides a more properly balanced approach to reconciling government power and individual liberty than does the current standard of review. The *Lochner* doctrine, as *applied* by the Court, was sometimes seriously flawed (especially when reviewing Acts of Congress during the New Deal era),[24] but its underlying premise was sound.

Generations of first-year constitutional law students have learned that *Lochner v. New York*[25] is the constitutional

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21. Ideally, the analysis of individual Liberty should be located in the Fourteenth Amendment Privileges and Immunities Clause, but absent the Court distinguishing the *Slaughter-House Cases* anytime soon, the analysis proceeds under the Due Process Clause. *See, e.g.*, Michael Anthony Lawrence, *Second Amendment Incorporation Through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 MO. L. REV. 1 (2007) (suggesting the Court should revisit the debates in the 39th Congress concerning the proposal and passage of Section One of the Fourteenth Amendment, in which event it would find compelling evidence for a much broader interpretation of the Privileges and Immunities Clause than allowed in *Slaughter-House*).

22. 899 F.2d 255 (3d Cir. 1990).

23. 198 U.S. 45.

24. *See infra* notes 103, 131 (briefly discussing Congress' elevated post-Reconstruction constitutional power).

25. 198 U.S. 45 (striking down a state law imposing maximum hours per week that bakers could work). "*Lochner*" is convenient shorthand for describing the Court's jurisprudence during the period spanning roughly 1897–1937,

Mephistopheles: an example of an anti-democratic Supreme Court usurping the authority of state- and federal-elected majorities with its too-close questioning of legislative power. The message, until recently, has been effective and complete. As David A. Strauss reports,

> *Lochner v. New York* would probably win the prize, if there were one, for the most widely reviled decision of the last hundred years. . . . [J]udged by some rough-and-ready indicators—Would you ever cite this case in a Supreme Court brief, except to identify it with your opponents' position? If a judicial nominee avowed support for this case in a Senate confirmation hearing, would that immediately put an end to her chances?—*Lochner* is one of the great anti-precedents of the twentieth century. You have to reject *Lochner* if you want to be in the mainstream of American constitutional law today.[26]

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beginning with *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897) (stating liberty includes the right "to enter into all contracts which may be proper, necessary, and essential" to engage in a trade or profession), and ending with *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding a state law imposing a mandatory minimum wage for female workers as within the state police power).

26. David A. Strauss, *Why Was* Lochner *Wrong?*, 70 U. CHI. L. REV. 373, 373 (2003) (footnotes omitted). *See also* Jack M. Balkin, *Wrong the Day It Was Decided:* Lochner *and Constitutional Historicism*, 85 B.U. L. REV. 677, 682–83 (2005) ("For many years, *Lochner v. New York* was an established element of the anti-canon, holding a position of infamy rivaled only by *Plessy v. Ferguson* and *Dred Scott v. Sandford*. A surefire way to attack someone's views about constitutional theory was to argue that they led to *Lochner*. When John Hart Ely sought to denounce *Roe v. Wade* in 1973, he coined a term—'*Lochner*ing'—to display his disagreement. *Roe* was *Lochner*, Ely proclaimed, and that was as damning an indictment as one could imagine. Ely threw down the gauntlet before an entire generation of legal scholars. They took up the challenge, attempting to show why Ely was wrong, and why you could love *Roe* and still hate *Lochner*. . . . Until recently, few thought to deny the premise and argue that *Lochner* was perhaps not so wrong and that therefore it was not so urgent to distinguish it." (citing John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973) (footnotes omitted)); Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293, 295 (1985) ("Nothing can so damn a decision as to compare it to *Lochner* and its

The demonization was useful for a time,[27] but with a century's passage, an increasing number of scholars (and Justices) are coming to realize *Lochner* is not the devil and are beginning to explain that the traditional *Lochner* story offers a problematic, and ultimately counterproductive, account. The *Lochner*-era Court, while it took ill-advised missteps along the way, offers "an otherwise sound path"[28] for reconciling the uneasy relationship of individual liberty and government power.[29]

A. The Conventional Story

For the past seventy years, *Lochner* has been constitutional law's favorite whipping-boy, with the lashes coming from all directions[30] including frequent self-flagellation by the Court

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ilk."); David E. Bernstein, Lochner *Era Revisionism, Revised:* Lochner *and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 5 n.12 (2003) ("*Lochner* was so reviled that, between the demise of *Lochner* in *West Coast Hotel v. Parrish* in 1937 and the publication of Bernard Siegan's *Economic Liberties and the Constitution* in 1980, it appears that only a single article that expressed even mild support for *Lochner* was published." (citing Guy Miller Struve, *The Less-Restrictive-Alternative Principle and Economic Due Process*, 80 HARV. L. REV. 1463 (1967))).

27. *See infra* text accompanying notes 43, 76 (discussing the political utility of *Lochner*-bashing).

28. Bernstein, *supra* note 26, at 57.

29. *See, e.g.*, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 222 (2004) ("[I]n *Lochner* and [subsequent] cases, the . . . Court began to require proof that both federal and state legislatures restricting the retained liberties of the people were actually pursuing a legitimate purpose rather than merely purporting to do so.").

30. *See, e.g.*, Balkin, *supra* note 26, at 689 ("By the 1970's and 1980's conservatives opposed to what they saw as liberal judicial activism used *Lochner*'s anti-canonical status to attack what they regarded as judicial overreaching by the Warren and early Burger Courts . . . , [and] John Hart Ely, a liberal, showed his bona fides by attacking *Roe* as 'Lochnering' . . . ." (citing ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 44 (1990) ("arguing that *Lochner* is 'the symbol, indeed the quintessence, of judicial usurpation of power'"); WILLIAM H. REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS 205 (1987) ("arguing that *Lochner* is 'one of the most ill-starred decisions that [the Court] ever rendered'"); Ely, *supra* note 26, at 943–44, 940 ("arguing that *Lochner* and *Roe* are twin cases")).

itself.[31] The actual source of the excitement, *Lochner v. New York*, struck down a New York statute limiting to sixty the number of hours bakers could work per week, with the Court reasoning,

> [T]here is a limit to the valid exercise of the police power by the state. . . . Otherwise the 14th Amendment would have no efficacy and the legislatures of the states would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext,—become another and delusive name for the supreme sovereignty of the state to be exercised free from constitutional restraint.[32]

Juxtaposing its view of a circumscribed police power against constitutionally protected individual liberty interests—in this case, liberty of contract—the *Lochner* Court asked, "Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty . . . ?"[33] The Court concluded, "the limit of the police power has been reached and passed in this case. . . . The act is not, within any fair meaning of the term, a health law, but is an illegal interference with the rights

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31. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 194–95 (1986) ("The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930s, which resulted in the repudiation of much of the substantive gloss that the Court placed on the Due Process Clause of the Fifth and Fourteenth Amendments."); Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) ("The doctrine that prevailed in *Lochner* [et al.] . . . has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws."). *See also* Dandridge v. Williams, 397 U.S. 471 (1970); Griswold v. Connecticut, 381 U.S. 479 (1965); Williamson v. Lee Optical, 348 U.S. 483 (1955).

32. Lochner v. New York, 198 U.S. 45, 56 (1905).

33. *Id.*

of individuals, both employers and employees, to make contracts regarding labor . . . ."[34]

In the several decades thereafter, the Court applied the three major themes developed in *Lochner*:

> Freedom of contract was a right protected by the due process clause[] . . . ; the government could interfere with freedom of contract only to serve a valid police purpose of protecting public health, public safety, or public morals; and the judiciary would carefully scrutinize [both the ends

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34. *Id.* at 58, 61. The four *Lochner* dissenting justices (Holmes, Harlan, White, and Day) "resolv[ed] the tension between rights and legislative power by adopting the Thayerian principle of legislative deference." Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of* Lochner, 76 N.Y.U. L. REV. 1383, 1432 (2001). Holmes stated that the Court should defer to the legislature "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 of our law." *Lochner*, 198 U.S. at 76 (Holmes, J., dissenting). Harlan, for his part, as commented upon by Barry Friedman, averred,

> "The responsibility . . . rests upon legislators, not upon the courts," as legislation has duly "received the sanction of the people's representatives. . . . [I]t is the solemn duty of the courts . . . to guard the constitutional rights of the citizen . . . , [but] legislative enactments should be recognized and enforced by the courts as embodying the will of the people."

Friedman, *supra* at 1431–32 (quoting *Lochner*, 198 U.S. at 74 (Harlan, J., dissenting)) (footnotes omitted). Harlan identifies the issue to be:

> "[W]hat are the conditions under which the judiciary may declare such regulations to be in excess of legislative authority and void?" [and] goes on at length on this point earlier in his opinion, sounding at times more like Thayer than Thayer himself. Thus, "a legislative enactment, Federal or state, is never to be disregarded or held invalid unless it be, beyond question, plainly and palpably in excess of legislative power." Rather, "[i]f there be doubt as to the validity of the statute, that doubt must therefore be resolved in favor of its validity, and the courts must keep their hands off, leaving the legislature to meet the responsibility for unwise legislation."

Id. at 1432 (quoting *Lochner*, 198 U.S. at 68 (Harlan, J., dissenting)) (footnotes omitted). Barnett points out the differences in tone of Holmes' and Harlan's dissents: "Harlan[] . . . more directly addressed the doctrine established by the Court. Unlike Holmes, Harlan did not disparage the nature of the fundamental liberty articulated by the majority." BARNETT, *supra* note 29, at 217.

> and means of] legislation to ensure that it truly served such a police purpose.[35]

The Court utilized these themes in striking down nearly 200 state laws[36] as inappropriately infringing upon individual liberty (sometimes expanded beyond freedom of contract to include other liberties). In the 1923 case *Meyer v. Nebraska*,[37] for example, the Court held,

> [under] established doctrine, . . . liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the Legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts.[38]

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35. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 590 (2d ed. 2002) ("[T]his [approach] is classic substantive due process: The due process clause was used not to ensure that the government followed proper procedures, but to ensure that laws served an adequate purpose.").

36. *Id.* at 592 (citing BENJAMIN WRIGHT, THE GROWTH OF AMERICAN CONSTITUTIONAL LAW 154 (1942); PAUL BREST & SANFORD LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 299 (3d ed. 1992)).

37. Meyer v. Nebraska, 262 U.S. 390 (1923) (striking down state law prohibiting the teaching of German in public schools). Ironically, *Meyer* is the case the modern Supreme Court often invokes for explaining the principles of liberty protected by the Due Process Clause. See *infra* text accompanying notes 86–93, demonstrating the hollowness of the Court's and others' continuing vilification of all-things-*Lochner*.

38. *Meyer*, 262 U.S. at 399–400 (1923) ("Without doubt, ['liberty'] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." (citations omitted)).

The Court repudiated *Lochner* in 1937 in *West Coast Hotel v. Parrish*,[39] replacing it with a doctrine substantially more deferential to government power:

> In prohibiting that deprivation [of liberty], the Constitution does not recognize an absolute and uncontrollable liberty. . . . [T]he liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.[40]

Conceptually aided a year later by *Carolene Products* Footnote Four,[41] the Court then built the highly deferential presumption-of-constitutionality edifice that survives to this day[42]—leaving *Lochner* to its ignominious fate as a constitutional pariah.

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39. 300 U.S. 379, 393 (1937) (upholding a Washington state law imposing a mandatory minimum wage for female workers, recognizing that regulations addressing the inequality of bargaining power in the employment context are a legitimate exercise of state authority: "In dealing with the relation of employer and employed, the Legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression." (citations omitted)).

40. *Id.* at 391.

41. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth."). Footnote Four has been commonly interpreted in one of two ways: (1) allowing heightened standard of review for enumerated Bill of Rights protections alone; and (2) allowing heightened standard of review for enumerated Bill of Rights protections plus select unenumerated "fundamental rights" as identified by the Court. *See, e.g.*, BARNETT, *supra* note 29, at 253–54 (describing the two approaches as "Footnote Four" and "Footnote Four Plus," respectively). A broader liberty-friendly reading of Footnote Four, as proposed herein, would go beyond both of these interpretations and allow heightened scrutiny for government restrictions on *all* liberty interests. *See infra* Part III.C.2.

42. *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 540–41 (2d ed. 2006) (stating the new doctrine "was a victory for legal realists, who

Jack M. Balkin suggests the case achieved its "anti-canonical" status for essentially political reasons:

> Following the struggle over the New Deal and the ascendancy of the Roosevelt Court, *Lochner* symbolized the constitutional regime that had just been overthrown. . . . [W]hat *Lochner* symbolized, had to be understood as deviant.
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> . . . .
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> [Accordingly,] [t]he *Lochner* narrative that we have inherited . . . projects on to the Supreme Court between 1897 to 1937 a series of undesirable traits—the very opposite of those characteristics that supporters of the New Deal settlement wanted to believe about themselves. . . . Thus, during the "*Lochner* Era" courts employed a rigid formalism that neglected social realities, while the New Deal engaged in a vigorous pragmatism that was keenly attuned to social and economic change. The *Lochner* Era Court imposed laissez-faire conservative values through its interpretations of national power and the Due Process Clause, while the New Deal brought flexible and pragmatic notions of national power that were necessary to protect the public interest. Finally, the Justices during the *Lochner* Era repeatedly overstepped their appropriate roles as judges by reading their own political values into the Constitution and second guessing the work of democratically elected legislatures and democratically accountable executive officials, while the New Deal revolution produced a new breed of Justices who believed in judicial restraint and

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undermined *Lochner*'s intellectual foundations with their arguments that because law reflects political choices, there is no reason for the Court to overturn decisions made through the political process") (citing, e.g., HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF *LOCHNER* ERA POLICE POWER JURISPRUDENCE (1993); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY (1992)).

> appropriate respect for democratic processes in ordinary social and economic regulation.[43]

Barry Cushman captures the extravagant flavor of some of the criticism: "One can hardly avoid coming away from these . . . decisions with the impression that these were men fanatically devoted to property rights and callously indifferent to the commonweal."[44] Contrary to conventional wisdom of the Four Horsemen[45] as "driven [solely] by 'their basic and bone-deep Hamiltonian empathy with the well-to-do,'"[46] Cushman attributes more calculated motives to them:

> [In fact] [t]he Four Horsemen were themselves closet liberals. It appears that they struck a reactionary pose in celebrated cases in order to retain the good graces of the

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43. Balkin, *supra* note 26, at 685–86 (citing, e.g., Friedman, *supra* note 34, at 1383, 1385 & n.5) (footnotes omitted). Balkin goes on to describe the systematic debunking of the *Lochner* myth. *Id.* at 687 (citing Friedman, *supra* note 34, at 1390–1402; Stephen A. Siegel, *The Revision Thickens*, 20 LAW & HIST. REV. 631 (2002); James A. Thomson, *Swimming in the Air: Melville W. Fuller and the Supreme Court 1888–1910*, 27 CUMB. L. REV. 139, 140–41 & n.6 (1996)).

44. Barry Cushman, *The Secret Lives of the Four Horsemen*, 83 VA. L. REV. 559, 559 (1997) (referring to the decisions in Carter v. Carter Coal Co., 298 U.S. 238 (1936); Morehead v. New York ex rel. Tipaldo, 298 U.S. 587 (1936); R.R. Ret. Bd. v. Alton R.R., 295 U.S. 330 (1935); Ribnik v. McBride, 277 U.S. 350 (1928); Adkins v. Children's Hospital, 261 U.S. 525 (1923); Hammer v. Dagenhart, 247 U.S. 251 (1918); referring to the dissents in Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 448 (1934) (Sutherland, J., dissenting); Nebbia v. New York, 291 U.S. 502, 539 (1934) (McReynolds, J., dissenting); the Gold Clause Cases—Norman v. Baltimore & O.R.R., 294 U.S. 240, 361 (1935) (McReynolds, J., dissenting), Nortz v. United States, 294 U.S. 317, 361 (1935) (McReynolds, J., dissenting), Perry v. United States, 294 U.S. 330, 361 (1935) (McReynolds, J., dissenting); the Wagner Act Cases—Assoc. Press v. NLRB, 301 U.S. 103, 133 (1937) (Sutherland, J., dissenting), NLRB v. Friedman-Harry Marks Clothing Co., 301 U.S. 58, 76 (1937) (McReynolds, J., dissenting), NLRB v. Fruehauf Trailer Co., 301 U.S. 49, 76 (1937) (McReynolds, J., dissenting), NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 76 (1937) (McReynolds, J., dissenting)).

45. "The Four Horsemen" was the nickname given the four *Lochner* Era Justices—McReynolds, Sutherland, Van Devanter, and Butler—who consistently voted to strike down legislation.

46. Cushman, *supra* note 44, at 560 (quoting FRED RODELL, NINE MEN: A POLITICAL HISTORY OF THE SUPREME COURT FROM 1790-1955, at 217 (1955)).

> conservative sponsors to whom they owed their positions and whose social amenities they continued to enjoy, while in legions of low-profile cases they quietly struck blows for their own left-liberal agendas. . . . Theirs, then, is not a simple story of handmaidens of the industrial and financial elite. It is instead a tale of luxury and deceit.[47]

Conspiracy theories aside, most conventional criticisms of *Lochner* have included one or more of the following: (1) its laissez-faire economic policy preferences perpetuated a pernicious form of Social Darwinism;[48] (2) it was infected with an elitist class bias favoring large corporations and disfavoring workers;[49] (3) once the doctrine was established, "even Justices not inclined to [the *Lochnerian*] ideology felt obligated to formalistically follow precedent, ignoring social conditions and the need for ameliorative

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47. *Id.* at 560–61. *See also* IRVING BRANT, STORM OVER THE CONSTITUTION 240 (1936) (describing Supreme Court opinions as aligned with the interests of the industrial oligarchy). What did the *Lochner* Court do to engender this sort of enmity? For some forty years around the turn of the twentieth century it required government to justify its actions, and on over 200 occasions, it found the government explanations wanting, and hence struck down the actions.

48. Bernstein, *supra* note 26, at 2 (citing, e.g., FRANK R. STRONG, SUBSTANTIVE DUE PROCESS OF LAW: A DICHOTOMY OF SENSE AND NONSENSE 95 (1986)). The charge originates with Justice Holmes' famous dissenting comment, "The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics." Lochner v. United States, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

49. *See, e.g.*, Friedman, *supra* note 34, at 1454 (stating typical criticisms during the *Lochner*-era itself were that "class bias and ideology were deciding cases, not law, . . . [and that] the judges [were] employing novel and unprecedented rules to resolve legal controversies"); Bernstein, *supra* note 26, at 2–3 (citing, e.g., DERRICK A BELL, JR., RACE, RACISM AND AMERICAN LAW (3d. ed. 1992) ("Called upon to decide pressing questions concerning the relations of labor and capital, the power of state legislatures, and the rights of big business, the courts foreswore impartiality and came down heavily on the side of economic interests."); LOREN P. BETH, THE DEVELOPMENT OF THE AMERICAN CONSTITUTION, 1877–1917, at 185 (1971) ("referring to the Court's 'familiar pattern of favoring employers at the expense of employees'"); ARCHIBALD COX, THE COURT AND THE CONSTITUTION 134–37 (1987) ("claiming that the Supreme Court engaged in a willful defense of wealth and power")).

legislation";[50] and (4) it was an illegitimate "countermajoritarian" judicial action by the Court "into a realm properly reserved to the political branches of government."[51]

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50. Bernstein, *supra* note 26, at 3–4 (citing, e.g., J.M. Balkin, *Ideology and Counter-Ideology from* Lochner *to* Garcia, 54 UMKC L. REV. 175, 180–82 (1986) ("describing *Lochner* as elevating formalist logic above empirical data"); Louis D. Brandeis, *The Living Law*, 10 ILL. L. REV. 461, 467 (1916) ("bemoaning the purported abstract reasoning and legal formalism that led judges to invalidate reform legislation"); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 616 (1908) ("attacking the Court for invalidating laws based on logical deduction rather than considering whether the law was needed to address a specific problem")).

51. Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 874 (1987) (citing, e.g., R. DWORKIN, TAKING RIGHTS SERIOUSLY (1979) (basing objections on "distinctions between matters of policy, to be resolved by the legislature, and matters of principle, to be resolved by the courts"); Robert Bork, *Neutral Principles and some First Amendment Problems*, 47 IND. L.J. 1 (1971) (basing objection on "conceptions of democracy")). Alexander Bickel called this final criticism "the influential and ultimately decisive criticism of the Court." Strauss, *supra* note 26, at 375–76 (quoting BICKEL, *supra* note 4, at 46). *See also* Keith E. Whittington, *Congress Before the* Lochner *Court*, 85 B.U. L. REV 821 (2005) ("It was also during the *Lochner* era that the now-ubiquitous 'countermajoritarian difficulty' was formulated"). Barry Friedman suggests the countermajoritarian complaint was at the core of the Populist and Progressive Movements in the early decades of the twentieth century: "[T]he dominant political movements of the time shared, at least at the level of rhetoric, a taste for popular democracy [and judicial] deference to majoritarian legislative will." Friedman, *supra* note 34, at 1432 (citing ROBERT H. WIEBE, SELF RULE: A CULTURAL HISTORY OF AMERICAN DEMOCRACY 124, 163 (1995) ("claiming that according to Populists, 'the People *were* the government'" . . . . 'One [Progressive] reform strategy . . . called for new means of direct democracy: popular initiative in legislation, a referendum on a significant law or issue, and ways to recall public officials, perhaps even judicial decisions.'")). Further, "the Progressive reaction to *Lochner* harped repeatedly on the theme of judicial deference to majoritarian judgments," *id.* at 1437 (citing L.B. Boudin, *Government By Judiciary*, 26 POL. SCI. Q. 238, 264 (1911), and "'Progressives wanted to make governments truly responsive and responsible by a package of democratic measures,'" *id.* at 1434 n.246 (quoting SEAN DENNIS CASHMAN, AMERICA IN THE AGE OF THE TITANS: THE PROGRESSIVE ERA AND WORLD WAR I, at 52 (1988)). Moreover, Friedman reports,

> The countermajoritarian problem was a hot issue in the 1912 election . . . . Theodore Roosevelt, campaigning for the presidency, published several articles on his stance on the judiciary in The Outlook, arguing that if the courts continue to strike down laws of public interest, "it will prove well-nigh impossible to prevent States from acting when they

B. The Story Revised

Notwithstanding the democratic-appeal of Thayerian-style deference, we must not forget that at the turn of the century the nation was only a few decades removed from the greatest stain ever on the American character: human slavery. Keith E. Whittington suggests that it is therefore understandable, "[i]n the face of a new activism on the part of American governments and in the wake of post-abolitionist sensibilities about the threat that legislatures and democratic majorities could pose to individual liberty, [that] the Court was not disposed to heeding the Thayerian call for deference."[52] Government—particularly state government—had been lauded at the founding and framing as being the great protector of freedom, but the many decades following demonstrated that assumption to be the miserable miscalculation that it was. If the states would not protect Liberty, the Constitution provided that the Court (and Congress, through Section Five of the Fourteenth Amendment)[53] *would*[54]—and so it did during the *Lochner* era.[55]

> have a furiously indignant public opinion behind them, and there will be a real popular loss of confidence in the courts . . . ." Roosevelt urged a recall of unpopular judicial decisions and condemned courts "steeped in some outworn political or social philosophy . . . [that] totally misapprehend their relations to the people and to the public needs." At the Progressive Convention, Roosevelt said: "The American people and not the courts are to determine their own fundamental policies."

Id. at 1443–44 (footnotes omitted) (quoting Theodore Roosevelt, *Nationalism and the Judiciary*, 97 OUTLOOK 532, 536 (1911); *Judges and Progress*, 100 OUTLOOK 40, 40 (1912); Purposes and Policies of the Progressive Party, Speech Before the Progressive Convention (Aug. 6, 1912), *in* S. Doc. No. 62-904, at 8 (1912)).

52. Whittington, *supra* note 51, at 822.

53. *See infra* notes 103, 131 and accompanying text.

54. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE UNITED STATES OF THE AMERICAN UNION iii (3d ed. 1874) ("[T]here are on all sides definite limitations which circumscribe the legislative authority, independent of the specific restrictions which the people impose by their State constitutions. . . . [Courts may set aside state law even absent] some specific inhibition which has

Assuming most Americans would agree the Court was justified in striking down at least the most egregious state laws, the mere fact that *Lochner* engendered such long-standing enmity from almost all quarters suggests *something* was wrong with the Court's performance. Discounting the earlier demonizing, bordering-on-irrational accounts, a number of recent commentaries offer more helpful explanations for what went wrong in *Lochner*.[56] Taken together, the accounts point to two fatal errors: (1) somewhere along the way the Court lost its sense of balance by disproportionately elevating the liberty of contract over valid countervailing concerns of basic fairness;[57] and (2) during the New

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been disregarded, or some express command which has been disobeyed."); Bernstein, *supra* note 26, at 31 ("When leading postbellum lawyers considered American constitutionalism, they thought of it not as being solely the powers and prohibitions contained within the four corners of a document. Rather, they took a cue from British constitutional theorists, who posited that England had a 'constitution' despite the absence of any such written document. American theorists argued that the United States, too, had an unwritten constitution, one that complemented and supplemented the written document. This idea was sufficiently widely accepted that the Supreme Court declared in 1875 that '[t]here are limitations on [government] power which grow out of the essential nature of all free governments.'") (quoting Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655, 663 (1874)); Whittington, *supra* note 51, at 822–23 (suggesting the Court's active approach to state legislation is appropriate: "While state laws may reflect local political majorities, it is not always clear that they represent the will of national majorities, and the judiciary is importantly charged with the task of insuring the supremacy of national constitutional and policy commitments over those of states and localities.").

55. Whittington, *supra* note 51, at 822–23 ("Historically speaking, the states did not fare well before the *Lochner* Court."). *See infra* text accompanying notes 102–13 for discussion of the *Lochner* Court's decidedly different treatment of Acts of Congress in other-than the New Deal years.

56. Why the change in tone? With passage of time, emotions from the Depression and New Deal have cooled, and with the benefit of the added distance, commentators can interpret the case with greater objectivity. *See e.g.*, Balkin, *supra* note 26, at 688, 691 ("We no longer live in the immediate wake of the struggles over the New Deal, as did the legal scholars of the 1940s, 1950s, and 1960s. Rather, the New Deal has receded to the background, giving way to later, more urgent struggles . . . . With the distance of a century, there is less need to caricature the past or view it in monolithic terms. The great battles have been fought long ago.").

57. *See infra* text accompanying notes 59–65.

Deal it failed to properly consider the constitutional role of the coequal federal branches in implementing national economic and social policy.[58]

Regarding the first, David A. Strauss suggests that the *Lochner*-era Court's error was its

> treat[ment of] freedom of contract as a cornerstone of the constitutional order and [its] systematic[] undervalu[ation of] reasons for limiting or overriding the right. It is one thing to enforce freedom of contract in a limited and qualified way; it is quite another to make freedom of contract a preeminent constitutional value that repeatedly prevails over legislation that, in the eyes of elected representatives, serves important social purposes.[59]

Further, the problem

> was not that the Court misconceived the judicial role or did not understand how to interpret the Constitution. The justices' failure was in a sense a lack of humility: an inability, or refusal, to understand that although they were vindicating an important value, matters were more complicated than they thought.[60]

Properly exercised,

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58. *See infra* text accompanying notes 97–99.

59. Strauss, *supra* note 26, at 373, 375 (continuing, "[T]he *Lochner*-era Court acted defensibly in recognizing freedom of contract but indefensibly in exalting it. Freedom of contract, judged by the standards that developed in the last half of the twentieth century, is a plausible constitutional right. It might merit careful, case-by-case enforcement, undertaken with sensitivity to the limitation of the right as well as its value. The *Lochner*-era Court went far beyond that."). *See also* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1371 (3d ed. 2000) (stating *Lochner's* error was not that it sought to protect unenumerated rights, but rather that its choice of the particular rights to protect "badly distorted the character and needs of the human condition, the reality of the economic situation, and the relationship between political choices and legal rules"). *See also infra* note 65 and accompanying text.

60. Strauss, *supra* note 26, at 386 ("There is a time for judicial crusades on behalf of principles of the highest importance; the Warren Court's campaign against racial discrimination is an example.").

> judicial review requires courts to recognize the complexity of the issues they confront and to develop doctrines that, while vindicating constitutional rights, also accommodate values that are in tension with those rights. *Lochner* presented the latter, but the Court treated it as the former, and that is why *Lochner* deserves the reputation it has today.[61]

In short, it was primarily the *Lochner* Court's tone-deafness to societal needs in pushing the freedom of contract (the first of the three major themes enunciated in *Lochner*)[62] beyond its natural boundaries—*not* the very fact that the Court was engaging in searching scrutiny (the second and third major enunciated themes)[63]—that earned it its dubious reputation.[64]

Cass R. Sunstein comments, "*Lochner* was wrongly decided, and one of the reasons that it was wrong is that it depended on baselines [i.e., "natural, immutable common law rules" regarding, for example, freedom of contract] and consequent understandings of action and neutrality that were inappropriate for constitutional analysis."[65] He further observes that the defining *Lochner* approach—(1) the "sharp limitation of the category of permissible government ends" and (2) a more searching "means-end scrutiny" to "'flush-out' impermissible ends"[66]—while scaled back, "has

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61. *Id.*

62. *See supra* text accompanying note 35.

63. *See supra* text accompanying note 35.

64. *See infra* text accompanying notes 97–99 for discussion of "social legitimacy" as a necessary criterion (together with "legal legitimacy") for judicial legitimacy.

65. Sunstein, *supra* note 51, at 903.

66. *Id.* at 877–78; *see also* CHEMERINSKY, *supra* note 35, at 477 (citing ARNOLD PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW 1–2, 5 (1960)).

hardly been overruled"[67] in such areas as campaign finance,[68] procedural and substantive due process,[69] and state action.[70]

While generally critical, Professors Strauss and Sunstein acknowledge the backlash against *Lochner* has itself gone too far. Sunstein suggests, "The Holmesian position [abandoning baseline constitutional principles in favor of majoritarianism], reflected in some traditional thinking about *Lochner*, would amount to an abandonment of constitutionalism altogether. Its crude and conclusory references to the primacy of electoral politics are insufficient to support that abandonment."[71] Strauss comments that the extreme deference granted state legislatures by the post-*Lochner* Court "seem[s] nearly indefensible. The laws involved in *Williamson v. Lee Optical Co.* and *Ferguson v. Skrupa*, for example, seem very hard to justify."[72]

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67. Sunstein, *supra* note 51, at 874–75 (characterizing the *Lochner* approach as "a mistake").

68. *Id.* at 884 ("*Buckley* [*v. Valeo*] is a direct heir to Lochner. In both cases, the existing distribution of wealth is seen as natural, and failure to act is treated as no decision at all. Neutrality is inaction, reflected in a refusal to intervene in markets or to alter the existing distribution of wealth.").

69. *Id.* at 885. ("*Lochner*-like premises powerfully influence [procedural and substantive due process] debate[s]. . . . [T]he Court's failure to put benefits said to be created by the government [statutes] on the same footing with benefits said to be 'natural' is a clear holdover from the *Lochner* period.").

70. *Id.* at 887, 889 (opining the Court's state action cases "confirm that the [Court's] state action inquiry is not a search for whether the state has 'acted,' but instead an examination of whether it has deviated from functions that are perceived as normal and desirable . . . [an] examination . . . powerfully influenced by the common law . . . [and] defined in terms that are reminiscent of that in *Lochner* . . . . [G]overnment ha[s] no duty to remove barriers 'not of its own creation.' The idea is that poverty is simply 'there'; it is not a product of government action. By now it should be easy to see that this idea depends on *Lochner*-like definitions of neutrality, inaction, and appropriate baselines." (quoting Harris v. McRae, 448 U.S. 297, 316 (1980)). The Court's approach in the administrative law realm, with its willingness to review agency "action" but not agency "inaction" (presumed unreviewable) bear this out as well: "This understanding is a direct modern analogue to *Lochner* . . . . Governmental 'inaction' is treated as neutral and legally unobjectionable; indeed, it does not furnish a predicate for judicial intervention." *Id.* at 892.

71. *Id.* at 906 (citation omitted).

72. Strauss, *supra* note 26, at 386 (citing Ferguson v. Skrupa, 372 U.S. 726 (1963); Williamson v. Lee Optical, 348 U.S. 483 (1955)).

Some critics find silver linings. Owen Fiss suggests, for example, "*Lochner* may be illegitimate and an error, but once we see clearly what it was trying to do, we may wish to criticize its substantive values and yet leave unimpeached its conception of [the judicial] role—which it shared in common with *Brown* [*v. Board of Education*]."[73] The Justices in the *Lochner* majority acted on principle, "believ[ing] that the Constitution embodies a set of values that exists apart from, and above, ordinary politics and that their duty was to give, through exercise of reason, concrete meaning and expression to these values."[74]

It is a mistake, moreover, to continue to assert that the *Lochner* Court strayed from the original understandings of the Fourteenth Amendment concerning the judicial role, only to return to its senses in 1937.[75] As Jack M. Balkin explains, the more accurate story is that

> the [*Lochner* Court] jurisprudence of the late nineteenth and early twentieth centuries reflected ideas quite familiar to the framers of the Fourteenth Amendment; namely, that the Amendment was designed to prevent so-called 'class legislation' that favored one group over another, an idea which developed out of Jacksonian and free labor ideology.[76]

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73. OWEN M. FISS, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910, at 19 (Cambridge Univ. Press 2006) (1993).

74. *Id.* at 20.

75. *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726, 730–31 (1963) (Black, J., concurring) ("The doctrine that prevailed in *Lochner*, *Coppage*, *Adkins*, *Burns*, 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.").

76. Balkin, *supra* note 26, at 687–88 (citing GILLMAN, *supra* note 42, at 10–13, 21, 33–60; Benedict, *supra* note 26, at 318). *See also* PAUL, *supra* note 66, at 72; Bernstein, *supra* note 26, at 35–38; Thomas B. McAffee, Overcoming *Lochner* in the Twenty-First Century: Taking Both Rights and Popular Sovereignty Seriously as We Seek to Secure Equal Citizenship and Promote the Public Good 31 n.108 (Sept. 21, 2007) (unpublished manuscript, on file with BePress) ("[T]here is not much question that some members of the Supreme Court—perhaps most starkly, Justice Field—wanted to read the Fourteenth Amendment as legally protecting the inalienable natural rights referred to in the

"Indeed," Professor Balkin suggests, "once we understand the underlying assumptions of the [Chief Justice] Fuller Court, Holmes' dissent in *Lochner* is the true outlier, because it rejects the premises of police power jurisprudence and asserts an almost total power in legislatures akin to that of the British Parliament."[77]

Professor Balkin's comments largely echo those in Howard Gillman's influential 1993 book, *The Constitution Besieged*,[78] which cogently explains that *Lochner* "represented a well-developed, albeit increasingly untenable, conception of the appropriate relationship between the state and society"[79] as understood in state and federal courts throughout much of the preceding century:

> [T]he standards used by these judges to evaluate exercises of legislative power were not illegitimate creations of unrestrained free-market ideologues, but rather had their roots in principles of political legitimacy that were forged at the time of the creation of the Constitution and were later elaborated by state court judges as they first addressed the nature and scope of legislative power in the era of Jacksonian democracy . . . .
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> . . . . Many of the familiar cases of this period [i.e., the postbellum era]—such as *Slaughterhouse*, *Munn*, *Butchers' Union*, *Barbier*, *Yick Wo*, and *Powell*,—take on a new meaning once we appreciate the extent to which they represent a *continuation* of a tradition whereby judges attempted to define the boundaries of state power by drawing distinctions between legislation that legitimately

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Declaration of Independence." (citing Munn v. Illinois, 94 U.S. 113, 141–42 (1876) (Field, J., dissenting)).

77. Balkin, *supra* note 26, at 692 (footnotes omitted) ("Because Holmes' dissent rejected the background assumptions of the late nineteenth and early twentieth centuries, it was celebrated by progressives and New Dealers. . . . Justice Harlan's dissent, by contrast, inhabits the same world of police power jurisprudence as Justice Peckham's majority opinion, and hence could not serve as a rallying cry for the New Deal.").

78. GILLMAN, *supra* note 42.

79. *Id.* at 18.

> promoted the general welfare and legislation that illegitimately promoted the special interests of particular groups and classes.[80]

Gillman concludes that "the judiciary's persistent attachment to traditional limits on legislative power" epitomized in *Lochner*—far from being an anomalous departure from principles firmly grounded upon the Constitution—instead "represented the final defense of a principle of political legitimacy that the framers sought to permanently enshrine in the fundamental law, . . . [and that had] helped shape state-society relations in the United States for a century and a half."[81] Accordingly, it was actually the post-*Lochnerian* "rise of a new American Republic organized around a different understanding of the proper use of legislative power" that represented the "collapse" of traditionally recognized constitutional principles.[82]

David E. Bernstein, on the basis of his exhaustive work on the *Lochner* project, suggests we should view *Lochner* "as a misstep on an otherwise sound path, not an irredeemable mistake."[83] While acknowledging the value of Professor Gillman's class-legislation thesis for describing circumstances at the turn of the

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80. *Id.* at 10, 14 (emphasis added).

81. *Id.* at 15.

82. *Id. See also* Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 716 (1975) ("Intellectually, the 18th-century philosophical framework supporting the concept of immutable natural rights was eroded with the growth of legal positivism, ethical relativism, pragmatism, and historicism.").

83. Bernstein, *supra* note 26, at 57. He notes, "This is the consistent position of Justice David Souter" in, for example, *Washington v. Glucksberg*, 521 U.S. 702, 760–61 (Souter, J., concurring) ("[T]he cases in the *Lochner* line routinely invoked a correct standard of constitutional arbitrariness review.") *Id.* at 57 n.319. Professor Bernstein's works on *Lochner* include: *Thoughts on* Hodges v. United States, 85 B.U. L. REV. 811 (2005); Bolling, *Equal Protection, Due Process, and* Lochner*phobia*, 93 GEO. L.J. 1253 (2005); Lochner v. New York*: A Centennial Retrospective*, 83 WASH. U. L.Q. 1469 (2005); Bernstein, *supra* note 26; Lochner's Legacy*'s Legacy*, 82 TEX. L. REV. 1 (2003); Book Review: Lochner*'s Feminist Legacy,* 101 MICH. L. REV. 1960 (2003); Lochner, *Parity, and the Chinese Laundry Cases*, 41 WM. & MARY L. REV. 211 (1999); *Roots of the "Underclass": The Decline of Laissez-Faire Jurisprudence and the Rise of Racist Labor Legislation*, 43 AM. U. L. REV. 85 (1993).

century,[84] Professor Bernstein claims that Gillman overstates the influence of aversion to class-legislation on the *Lochner* Court's decision-making,[85] suggesting instead that "the basic motivation for Lochnerian jurisprudence was the Justices' belief that Americans had fundamental unenumerated constitutional rights, and that the Fourteenth Amendment Due Process Clause protected those rights."[86] This perspective, he observes, is the very basis for

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84. Bernstein, *supra* note 26, at 12–13 (explaining that Gillman accurately shows the influence of hostility to special interest legislation in American political thought and the use of class legislation analysis in state and U.S. Supreme Court decision-making during the immediate pre-*Lochner* period). Comprehensively surveying the literature on *Lochner* over the past century, Bernstein observes,

> Among constitutional law professors, the most popular understanding of *Lochner* is Cass Sunstein's view that the Court believed that common law rules were natural and immutable and therefore formed the appropriate baseline from which to judge the constitutionality of regulatory legislation.
>
> Legal historians, meanwhile, pay little heed to Sunstein's rather impressionistic understanding of *Lochner* . . . [and] [i]nstead . . . have generally adopted Howard Gillman's thesis . . . that the Court was motivated by opposition to "class legislation." . . . Gillman's understanding of *Lochner* is gradually winning an increasing audience among mainstream constitutional scholars and threatens to eventually supplant Sunstein's interpretation as the conventional understanding of *Lochner* among law professors.

Id. at 11–12 (footnotes omitted). Bernstein suggests part of Gillman's theory's appeal is its normative value to academics seeking to distance themselves from *Lochner*. *See generally id.*

85. *Id.* at 12–15. "If Gillman is correct, some of the Supreme Court's most beloved and controversial liberal modern fundamental rights decisions—notably *Griswold v. Connecticut* and *Roe v. Wade*—would be immunized from the longstanding charge that they are *Lochner's* illegitimate offspring." *Id.* at 60. *Cf.* Feldman, *supra* note 9, at 49 n.11 ("[Professor] Bernstein . . . seems to misunderstand the proscription of class legislation. In particular, Bernstein does not give enough weight to the fact that legislatures could infringe on individual liberties to promote the common good." (citing WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA *passim* (1996) ("discussing at length nineteenth century cases contrasting the common good and partial or private interests"); G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 246–51 (2000) ("following Gillman's approach"))).

86. Bernstein, *supra* note 26, at 12. "[B]y the time *Lochner* was decided, there was a broad consensus that the Due Process Clause protected fundamental

modern substantive due process: "It turns out . . . that *Griswold*,[87] *Roe*,[88] and their progeny [including *Casey*[89] and *Lawrence*[90]] *can* be traced back to *Lochner*."[91] Indeed, it was a *Lochner*-era Court

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rights from state intrusion." *Id.* at 35. Bernstein locates the source of these fundamental rights in "the American natural rights tradition, tempered by a historicist perspective" and describes natural rights theory in this context as "the idea that individuals possess prepolitical rights that antedate positive law and that can be discovered through human reason." *Id.* Bernstein explains that by 1905

> a virtual consensus seems to have developed among the Justices that due process principles protected fundamental rights that were antecedent to government. . . . The main dispute in the Court was not over the existence of fundamental judicially-enforceable unenumerated rights, nor was the dispute primarily about the content of those rights. . . . [Rather,] the Justices disagreed about how vigorously fundamental rights should be enforced against the states, and more specifically, whether there should be a presumption of constitutionality and how strong such a presumption should be.

Id. at 37–38 (citing Stephen A. Siegel, Lochner *Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 2–22 (1991), *id.* at 37 n.197, and noting that the scope of the presumption "was the main dispute between the majority in *Lochner* and Justice Harlan's dissent," *id.* at 38 n.203).

87. Griswold v. Connecticut, 381 U.S. 479 (1965) (striking down, on equal protection privacy grounds, a state law banning the use and sale of contraceptive to married persons).

88. Roe v. Wade, 410 U.S. 113 (1973) (striking down, on due process privacy grounds, a state law prohibiting all abortions).

89. Planned Parenthood v. Casey, 505 U.S. 833 (1992) (reaffirming, on due process privacy grounds, *Roe v. Wade*).

90. Lawrence v. Texas, 539 U.S. 558 (2003) (striking down, on due process liberty grounds, a state law punishing sodomy).

91. Bernstein, *supra* note 26, at 60 (emphasis in original) ("When *Lochner* came to full fruition in the 1920s, it ushered in an era in which the Court largely ignored equal protection[-class legislation] concerns in favor of aggressive enforcement of unenumerated due process rights. . . . After a twenty-five year or so hiatus, *Lochner*ian fundamental rights analysis returned in mutated form in *Griswold*, minus the liberty of contract notion, with less overt historicism, and with a negligible concept of police powers. The recent *Lawrence* opinion asserting a Fourteenth Amendment right for adults to engage in homosexual sodomy is even more *Lochner*ian because the Court has fully shifted from protecting 'privacy,' which at least had the pretense on relying on penumbral rights, to protecting 'liberty.'").

(the Taft Court) that decided *Meyer v. Nebraska*[92] and *Pierce v. Society of the Sisters*,[93] the foundational darlings of modern substantive due process cases striking down state laws for depriving persons of unenumerated fundamental rights and liberty interests protected by the Fourteenth Amendment.[94]

C. The Story Moving Forward

If one agrees with Cass R. Sunstein that at least part of the goal in assessing the *Lochner* saga should be to use the lessons learned to develop new ways of advancing justice,[95] what does *Lochner* teach?

First, as discussed above,[96] it teaches that while the *Lochner* Court inappropriately elevated freedom of contract beyond its constitutional bounds, it established a sound doctrinal path for the judicial reconciliation of individual rights and government power. Second, it offers a cautionary tale that the Supreme Court repeatedly disregards the national will—as expressed through the policies of the co-equal democratically elected federal legislative and executive branches—only at its peril.

Regarding the latter, Barry Friedman posits,

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92. 262 U.S. 390 (1923) (striking down, on liberty grounds, state law prohibiting the teaching of German in public schools).

93. 268 U.S. 510 (1927) (striking down, on liberty grounds, a state law banning private schools).

94. *See also, e.g.*, Strauss, *supra* note 26, at 375 (observing "[t]hree widely-accepted developments" over the past fifty years: (1) the Court has enforced fundamental rights in a *Lochner*ian sort of way, sometimes in face of significant popular opposition; (2) the Court has recognized unenumerated constitutional rights; and (3) there is, among many, "an enhanced understanding of both the virtues and the limitations of freedom of contract and economic markets—an understanding that validates the *Lochner*-era Court's concern with freedom of contract but impugns many of the specific decisions that the Court made as it enforced the right").

95. Sunstein, *supra* note 51, at 918–19 ("[T]he task for the future is to develop theories of distributive justice, derived from constitutional text and purposes, that might serve as the basis for evaluating any particular practice. Whether and how to develop and implement such theories is a mixture of substantive and institutional problems.").

96. *See supra* text accompanying notes 59–65, 71–74, 83–94.

> the work of constitutional judges must have both "legal" and "social" legitimacy. . . . The proper lesson of *Lochner* instructs us that, even where it is possible to identify a jurisprudential [legal] basis for judicial decisions, if those familiar with the Court's decisions do not believe those decisions will be socially correct, the work of judges will be seen as illegitimate.[97]

Friedman explains:

> [L]egal legitimacy, at least under ordinary circumstances and with regard to constitutional litigation, is a relatively easy test to meet. Cases rarely are litigated through the hierarchy of trial and appellate courts with no plausible doctrinal and jurisprudential argument on the other side. Legal legitimacy demands no more.[98]
>
> Standing alone, however, legal legitimacy may not suffice in the eyes of the public to legitimate the work of constitutional judges. Judges rendering decisions that are legally legitimate but socially unacceptable will be attacked. Moreover, the attack may well take the form that judges are acting lawlessly.
>
> Stated differently, strong disagreement over social legitimacy puts pressure on perceptions of legal legitimacy. When decisions are seen as contrary to the needs of society, observers are unlikely to concede legal legitimacy, and rest

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97. Friedman, *supra* note 34, at 1387 (footnotes omitted) ("Social legitimacy looks beyond jurisprudential antecedents of constitutional decisions and asks whether those decisions are widely understood to be the correct ones given the social and economic milieu in which they are rendered.").

98. Based on this test, most reasonable observers would agree the *Lochner* decision was, at least, "lawful." *Id.* at 1453–54 ("[The] claim that *Lochner*-era judges were acting in a lawful fashion cannot be very big news. . . . Is it imaginable that numerous judges around the country simply began to decide cases in a lawless fashion? They were, after all, lawyers brought up in a common law system. It is difficult to picture them (all of them, some quite independently) deciding cases out of the blue, without reliance on existing doctrine and jurisprudential ideas. . . . Common law judges are unlikely, under relatively ordinary circumstances and across a range of many cases, to cast the law aside in a way that we would be willing to say the decisions were legally illegitimate.").

> entirely upon a claim about social propriety. Critics of the judicial decisions will attack the law as itself the problem. And, decisions that are understood as socially illegitimate may ultimately cause the law to change.[99]

It is important to distinguish the *Lochner* Court's relatively deferential treatment of Congress (during all but the New Deal years) with its consistently more critical review of state laws—a distinction the *Lochner*-era Justices understood very well. During their own and their parents' and grandparents' lifetimes, the states had amply demonstrated their unworthiness in protecting liberty.[100] The people responded with the Reconstruction amendments, dramatically altering the nation's federalist structure by shifting power away from the states, and to Congress, to act as the ultimate guarantor of the freedoms, liberties, privileges, and immunities encompassed in those amendments. It was only natural, therefore, that the *Lochner*-era Court would review state laws with an especially critical (if sometimes clouded)[101] eye, whereas it would be considerably more circumspect when reviewing acts of Congress.

As Keith E. Whittington explains, part of the conventional *Lochner* story—of a Supreme Court running roughshod for forty years over an unwilling Congress—is simply inaccurate:

> Perhaps the most striking feature of the Court's exercise of judicial review vis-à-vis Congress is how mundane it seems to have been. History remembers the highlights—the income tax cases, *E.C. Knight*, the child labor case—but this was but a small part of the Court's work and leaves a

99. *Id.* at 1455 ("The Progressives did not prevail overnight. It took many years on some issues. On a few it took the Depression and a threat to judicial independence. But it should come as little surprise that intense social disagreement with judicial decisions over a period of time increases the probability of seeing those judicial decisions changed. In that sense, intense social illegitimacy can lead to legal illegitimacy as well.").

100. *See supra* text accompanying notes 52–55.

101. *See, e.g.*, *supra* text accompanying notes 59–65.

misleading impression of how judicial review was exercised.[102]

To be sure, the Court likely exceeded its proper constitutional role during the New Deal years of 1934–1936, when it too obstinately butted heads with Congress and the Executive on major policy issues designed to pull the nation out of the Great Depression. When the Court "boldly str[ikes] down the preferred policies of a coordinate branch of the national government," and stands as "a countermajoritarian obstacle to progressive reform," then we certainly "want to know how and why it behaved as such an 'extremely anomalous institution from a democratic point of view.'"[103] Robert A. Dahl's comprehensive examination of the

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102. Whittington, *supra* note 51, at 856 ("The [phrase] '*Lochner* era' implies a concerted assault on government power by a determined, conservative majority. . . . The Court at the turn of the twentieth century does not match those images. Its actions were informed by a coherent constitutional vision, but few of its decisions were of great political moment and the overall pattern does little to suggest an orchestrated campaign against the government."). *See also id.* at 857–58 ("In toting up the gains and losses of judicial review, . . . [*Lochner*] had little significance, mostly amounting to adjustments around the margins of politics." (citing MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 153 (1999)).

103. Whittington, *supra* note 51, at 829 (quoting Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy Maker*, 6 J. PUB. L. 279, 291 (1957)). On this reasoning, in light of the People's decision to amend the Constitution in 1868 through Section Five of the Fourteenth Amendment to enable a democratically-accountable Congress to enforce Section One's citizenship, privileges or immunities, due process, and equal protection clauses, and to the extent the New Deal legislation was predicated in part on Section Five, the Court acted inappropriately in striking down the legislation. A discussion of the scope of Congress' Section Five power is beyond the scope of this article; suffice it to say, the criticisms of the *Lochner* Court during the years 1934–1936 apply at least equally today, with the Court's nullification of various Acts of Congress promulgated under its Section Five power with the goal of enforcing Section One freedoms. *See, e.g.*, Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (striking down Congress' abrogation of state sovereign immunity for federal age discrimination (equal protection) claims, on reasoning that Congress' Section Five authority to "enforce" does not extend to determining what constitutes a Section One violation); City of Boerne v. Flores, 521 U.S. 507 (1997) (striking down the Religious Freedom Restoration Act). The Court may also be criticized, on the other hand, for giving *too* much respect to Congress and its commerce power and not enough to state sovereignty. *See,*

Court's entire history of invalidating federal statutes confirms, however, that "the New Deal was a historic outlier, a rare instance of the Court immediately bucking the major policies of a legislative majority."[104] Criticisms of the *Lochner* Court's decision-making during the New Deal years—particularly its invalidation of major federal laws—are justified, but they are empirically mistaken to extend the same charges to the years outside those of the New Deal.

Dahl's research also suggests that throughout most of the nation's history, including during the remaining, non-New Deal years of the *Lochner*-era, "the Court addressed . . . policies of minor significance to lawmakers. . . . Far from exercising a power of absolute veto, the Court, like 'a powerful committee chairman in Congress,' could only 'determine important questions of timing, effectiveness, and subordinate policy.'"[105] Moreover, "[w]hile the Court occasionally struck down provisions of politically important [federal] statutes or limited their scope with constitutional rules, the Court's exercise of judicial review during this period was usually routine, uncontroversial, and normatively unobjectionable."[106] The Court's actions during these years arguably met the standard for social legitimacy enunciated by Professor Friedman,[107] since "the invalidation of federal action rarely, if ever, pitted the Court against a clear majority of elected officials. . . . The *Lochner* Court worked hand-in-hand with the conservative political leaders in both parties to realize a common constitutional vision of limited government within a decentralized federal system."[108]

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e.g., Gonzales v. Raich, 545 U.S. 1 (2005) (holding that the application of a federal statute criminalizing the manufacture, distribution, or possession of marijuana to *intra*state growers and users of marijuana for medical purposes did not violate the Commerce Clause). *See also infra* note 131.

104. Whittington, *supra* note 51, at 826 (citing Dahl, *supra* note 103, at 291). *See also id.* at 827 n.30 (citing Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 36 (1993) for the same proposition).

105. *Id.* at 826–27 (quoting Dahl, *supra* note 103, at 294).

106. *Id.* at 823.

107. *See supra* text accompanying notes 97–99.

108. Whittington, *supra* note 51, at 823. Whittington illustrates empirically: "Between 1890 and 1919, the Supreme Court seriously entertained

In this sense, during all but the few New Deal years, the *Lochner*-era Court engaged in what Mark A. Graber might characterize as "constitutional dialogue" with its partner governing institutions, Congress and the Executive, "on crosscutting issues that internally divide the existing lawmaking majority,"[109] instead of merely "sustaining or rejecting the policies of the lawmaking majority."[110] In so operating "within the interstices of national politics, [rather than] throwing itself against lawmaking majorities,"[111] the Court was able to assist the other branches in "resolv[ing] those political controversies that they cannot or would rather not address"[112] and, moreover, insulate judicial review from political challenge.[113] In short, from 1934–1936 the *Lochner* Court threw itself against lawmaking majorities, and its credibility long-suffered as a result.

III. THE PRESUMPTION OF LIBERTY: A NEW "REASONABLE TIME, PLACE, AND MANNER" STANDARD OF REVIEW FOR ALL RESTRICTIONS ON LIBERTY

"As a practical matter," explains Randy E. Barnett,

> we must choose between two fundamentally different constructions of the Constitution, each resting on a different presumption. We either accept the presumption [of liberty] that in pursuing happiness persons may do whatever is not justly prohibited or we are left with a presumption [of constitutionality] that the government may do whatever is not expressly prohibited.[114]

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constitutional challenges to federal statutes in at least 158 cases," striking down only twenty-three. *Id.* at 831.

109. Graber, *supra* note 104, at 36.

110. Whittington, *supra* note 51, at 827.

111. *Id.*

112. Graber, *supra* note 104, at 36.

113. Whittington, *supra* note 51, at 827.

114. BARNETT, *supra* note 29, at 268–69 ("The presence of the Ninth Amendment in the Constitution strongly supports the first of these two presumptions. The Constitution established what Steven Macedo has called islands of governmental powers 'surrounded by a sea of individual rights.' It

Which of these jurisprudential approaches—the presumption of constitutionality, or the presumption of liberty—is most faithful[115] to the constitutional design? To begin, we might rephrase the question to: What was the *single overarching purpose*—the one guiding principle that precedes and trumps all else—behind the founding of the nation, as expressed in the Declaration of Independence and guaranteed in the Constitution? Stated yet another way: Details aside, what was the single irreducible Big Idea that prompted the founding and framing? If it is possible to so reduce the founding and framing to one single transcendent principle of "America-as-Ideal," what would it be?

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did not establish 'islands [of rights] surrounded by a sea of governmental powers.'" (quoting STEPHEN MACEDO, THE NEW RIGHT V. THE CONSTITUTION 97 (1987))). *See also* Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365, 1417–18 (1997) ("The burden for those who would discriminate [or invade a right] is to demonstrate a sufficiently strong [justification] . . . . If the justification rests on what people think is undebtable, the justification is relatively strong. If the justification rests on what people think is debtable, or contested . . . , then the justification is relatively weak. . . . Contestation tilts to the default, and the default is active support of the right [and non-discrimination].").

115. As Thomas Paine explained, constitutional fidelity is important because it establishes the immutable rules by which the game is played:

> A Constitution is a thing *antecedent* to a Government, and a Government is only the creature of a Constitution . . . . [I]f experience should hereafter show that alterations, amendments, or additions are necessary, the Constitution will point out the mode by which such things shall be done, and not leave it to the discretionary power of the future Government . . . .
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> . . . .
>
> A Government . . . cannot have the right of altering itself. If it had, it would be arbitrary. It might make itself what it pleased; and wherever such a right is set up, it shows there is no Constitution.

THOMAS PAINE, RIGHTS OF MAN (1791) [hereinafter RIGHTS OF MAN], *reprinted in* COMMON SENSE, THE RIGHTS OF MAN, AND OTHER ESSENTIAL WRITINGS OF THOMAS PAINE 129, 175 (2003) [hereinafter ESSENTIAL WRITINGS OF PAINE]. *See also* BARNETT, *supra* note 29, at 103 ("The Constitution is a law designed to restrict the lawmakers. . . . In particular, it is put in writing so these [political] actors cannot themselves make the laws by which they make law.").

A. Foundations

Once we engage in the interpretive task[116] and carefully consider the possible answers to these questions, we are ultimately left with only one acceptable answer: the single irreducible value eclipsing all else under the American constitutional regime is Liberty/Freedom. Eric Foner explains:

> No idea is more fundamental to Americans' sense of themselves as individuals and as a nation than . . . "freedom"—or "liberty," with which it is almost always used interchangeably . . . . The Declaration of Independence lists liberty among mankind's inalienable rights; the Constitution announces as its purpose to secure liberty's blessings. . . . If asked to explain or justify their actions, public or private, Americans are likely to respond, "It's a free country." "Every man in the street, white, black, red or yellow," wrote the educator and statesman Ralph Bunche in 1940, "knows that this is 'the land of the free' . . . 'the cradle of liberty.'"[117]

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116. Historians and constitutional theorists make interesting careers debating how to interpret the Founding documents. *See, e.g.*, PHILIP BOBBITT, THE MODALITIES OF CONSTITUTIONAL ARGUMENT, CONSTITUTIONAL INTERPRETATION 12–22 (1991) (suggesting a judge's approach must incorporate either a historical, textual, doctrinal, structural, ethical, or prudential modalities, or some combination thereof: "There is no constitutional legal argument outside of these modalities. Outside these forms a proposition about the US Constitution can be a fact, or be elegant, or be amusing or even poetic, and although such assessments exist as legal statements in some possible legal world, they are not actualized in our legal world."). *See also* Lessig, *supra* note 114, at 1371, 1379 (analogizing interpretation as a sort of translation of text from one language (or era) to text in another: "If the translation succeeds—if it is a good translation—then there is an important relation between the two texts, in these two contexts: naively put, their 'meaning' is to be 'the same.' Different texts, different contexts; same meaning.").

117. ERIC FONER, THE STORY OF AMERICAN FREEDOM xiii (1998). *See also, e.g.*, GASPAR G. BACON, THE CONSTITUTION OF THE UNITED STATES 96 (2d ed. 1971) (1928) ("The recognition and preservation of the liberties of the individual citizen by specific limitations upon the power of government is one of the essential characteristics of the Constitution. . . . This ideal [of personal liberty] is today the birthright of every American. It is a fundamental part of our charter of government; it can be impaired only if the people themselves, of their

own free will choose to relinquish [through constitutional amendment] their inalienable rights. It is the protection of the humblest individual against his own government; it is our bulwark against autocratic power, and against the impulses of an irresponsible majority.").

A simple thought experiment illustrates the point: Imagine the ubiquitous multiple choice test where we must select the single *best* response to the question, "What is the single, irreducible ideal underlying America's Founding as embraced in the Declaration of Independence and Constitution?" from the following list of choices: "Democracy"; "Equality"; "Liberty/Freedom"' or "Property." The single *best* response is "Liberty/Freedom." The constitutional preamble gives the first clue, since "Liberty" is the only one of the choices explicitly named. U.S. CONST. PREAMBLE ("We the People of the United States, in Order to form a more perfect Union, establish justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the *Blessings of Liberty* to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America." (emphasis added)).

Regarding Property, although there is no question a major purpose of the Constitution was to protect economic interests (*see generally, e.g.*, CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913)), few would suggest Property should prevail over (at least) Democracy or Liberty/Freedom.

As between Liberty/Freedom and Equality, Liberty/Freedom would prevail. As protected through the Bill of Rights (selectively incorporated to the states through the Fourteenth Amendment Due Process "Liberty" Clause), and the Ninth and Fourteenth Amendments, Liberty/Freedom actually encompasses Equality within its broad scope, so in fact we need not sacrifice Equality at all; whereas the converse is not true: Equality, as protected within the Fifth (due process), Ninth and Fourteenth Amendments, does not incorporate Liberty/Freedom within its bounds even when broadly defined. See also Trevor W. Morrison, *Lamenting* Lochner*'s Loss: Randy Barnett's Case for a Libertarian Constitution*, 90 CORNELL L. REV. 839, 870–71 (2005), pointing out a "liberty-equality connection" in the Court's modern substantive due process doctrine:

> Indeed, certain of the Court's substantive due process decisions—*Roe*, for example—are probably best justified on both equality and liberty grounds. The freedom to make personal decisions about one's body and one's intimate associations helps secure one's status as an empowered, equal member of society. Put simply, equality is promoted by the protection of the liberties associated with procreative autonomy, bodily integrity, and intimate association.

(footnotes omitted). Distinguishing Randy Barnett's interpretation of *Lawrence v. Texas*, *see infra* note 137, Morrison continues,

> *Lawrence* is best understood as according special attention to liberty-based claims that also seek to promote equality. And in that respect,

Historian Bernard Bailyn reports that the most basic goals of the American Revolutionary Era were to "free the individual from the oppressive misuse of power, [and] from the tyranny of the state."[118] As Thomas Jefferson said in 1774, "[K]ings [are] 'the

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> *Lawrence* highlights a liberty-equality connection implicit in much of the Court's work. By focusing on that connection, we may be able to pursue a jurisprudence of liberty that, unlike Professor Barnett's libertarian account, is both grounded in existing constitutional doctrine and tailored to the freedoms that the modern Court seems most inclined to protect.

Id. at 571.

The choice between Liberty/Freedom and Democracy is tougher, since the question, as posed, is a zero-sum game, and both values are well-established in the Constitution. Democracy, though, is not so well established as Liberty/Freedom. *See generally, e.g.*, SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION (2007) (discussing numerous ways in which the Constitution mandates and maintains undemocratic processes); Brown, *supra* note 11, at 556 ("[The] presumption that majority rule is the starting point of inquiry . . . is not justified by the text of the Constitution, nor has it been justified by extrinsic theoretical arguments. Majority rule has a place under the Constitution, but that document does not purport to elevate the popular will to a position of even presumptive primacy. Indeed, popular political will is a force to be tempered at every turn." (footnotes omitted)). Even assuming *arguendo* the constitutional grounding of the two values are precisely "equal," certainly most Americans would elect to save Liberty/Freedom if forced to choose between the two (i.e., in a theoretical world, "would we forever sacrifice Liberty/Freedom if we could forever maintain Democracy?"; versus, "would we forever sacrifice Democracy if we could forever maintain Liberty/Freedom?")—it is almost inconceivable to imagine that many Americans, then or now, would elect to live in servitude *with* a vote, rather than to live free *without* a vote.

To metaphorically conceptualize this interpretive task squarely in the present day, imagine the "Google Earth®" feature of the popular internet search engine, where written answers to basic constitutional questions may be viewed in greater detail by zooming in closer to the document, and in broader, less-detailed form by zooming out. Zooming out to view the contours of our question, "What single value does the Constitution stand for?," from the widest possible angle, where all detail has been lost leaving *only one* answer to the question, the answer would read, "Liberty/Freedom." Zooming in, we could next read, "to free the individual from the oppressive misuse of power, [and] from the tyranny of the state," then "Equality," "Democracy," "Property," and so on. *See infra* text accompanying note 118.

118. BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION v–vi (enl. ed. 1992).

servants and not the proprietors of the people.'"[119] Thomas Paine captured this understanding of the superior natural relationship of the people to their government in two enormously influential pamphlets, *Common Sense* in 1776 and *Rights of Man* in 1791–1794,[120] stating, "Society in every state is a blessing, but government even in its best state is but a necessary evil; in its worst state an intolerable one . . . . Government, like dress, is the badge of lost innocence . . . ."[121]

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119. GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 168 (1993) ("Government was [in Revolutionary America] being widely pictured as merely a legal man-made contrivance having little if any natural relationship to the family or to society." *Id.* at 167).

120. Thomas Paine's philosophy "inspired two of the greatest revolutions in human history—the American Revolution and the French Revolution." Sidney Hook, *Introduction* to ESSENTIAL WRITINGS OF PAINE, *supra* note 115, at xix. *Common Sense* created a sensation. It was "the January heat of 1776 that balanced the July light of Thomas Jefferson's Declaration of Independence." Jack Fruchtman, Jr., *Foreword* to ESSENTIAL WRITINGS OF PAINE, *supra* note 115, at x. "George Washington, Thomas Jefferson, and many others praised it . . . . It might even be said that while Jefferson's abstract diction justified rebellion, Paine's explosive words got rebel men and muskets into the field." *Id.* "But not everyone agreed. *Common Sense* argued for American independence, just as Rush, Franklin, and Sam Adams desired. But it did so in such charged language that some American leaders thought went too far." *Id.* at ix–x. *Rights of Man*, which was actually addressed in withering response to Paine's former close friend and confidant Edmund Burke's (whom Paine had earlier labeled "a friend of mankind" for his support of the American revolution) condemnation of the French Revolution in *Reflections on the Revolution in France*, rebutted Burke's stodgy "defen[se] [of] tradition, church and aristocracy . . . with the weapons of innovation, free thought, and democracy." *Id.* at xi.

121. THOMAS PAINE, COMMON SENSE (1776), *in* ESSENTIAL WRITINGS OF PAINE, *supra* note 115, at 1. Paine continues,

> In order to gain a clear and just idea of the design and end of government, let us suppose a small number of persons settled in some sequestered part of the earth, unconnected with the rest, they well then represent the first peopling of any country, or of the world. In this state of natural liberty, society will be their first thought. A thousand motives will excite them thereto, the strength of one man is so unequal to his wants, and his mind so unfitted for perpetual solitude, that he is soon obliged to seek assistance and relief of another, who in his turn requires the same. . . .
>
> Thus necessity, like a gravitating power, would soon form our newly arrived emigrants into society, the reciprocal blessings of which, would supersede, and render the obligations of law and government

Paine adds, "Man did not enter into society to become *worse* than he was before, nor to have fewer rights than he had before, but to have those rights better secured."[122] Paine explains the circumstances under which man cedes some of his natural rights to the care of society and government as "civil" rights: "The natural rights which are not retained, are all those in which, though the right is perfect in the individual, the power to execute them is defective."[123] Indeed, he states:

> [N]atural rights are the foundation of all his civil rights . . . [and include] all the intellectual rights, or rights of the mind, and also all those rights of acting as an individual for his own comfort and happiness, which are not injurious to the natural rights of others. Civil rights are those which appertain to man in right of his being a member of society. Every civil right has for its foundation some natural right pre-existing in the individual, but to the enjoyment of which his individual power is not, in all cases, sufficiently competent. Of this kind are all those which relate to security and protection.
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> . . . .
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> . . . He therefore deposits this right in the common stock of society, and takes the arm of society, of which he is a part, in preference and in addition to his own. Society *grants* him nothing. Every man is a proprietor in society, and draws on the capital as a matter of right."[124]

> unnecessary while they remained perfectly just to each other; but as nothing but heaven is impregnable to vice, it will unavoidably happen, that . . . they will begin to relax in their duty and attachment to each other; and this remissness will point out the necessity of establishing some form of government to supply the defect of moral virtue.

Id. at 2, 5. "[O]n this [model]," Paine concludes, "depends the *strength of government, and the happiness of the governed.*" *Id.* at 5 (emphasis added).

122. RIGHTS OF MAN, *in* ESSENTIAL WRITINGS OF PAINE, *supra* note 115, at 168.

123. *Id.* at 170.

124. *Id.* at 168–70. For a modern perspective on these ideas, see, for example, CHARLES FRIED, MODERN LIBERTY: AND THE LIMITS OF GOVERNMENT 71–72, 76–77 (2007):

By contrast, Paine explains, "The natural rights which he retains are all those in which the *power* to execute it is as perfect in the individual as the right itself."[125]

These ideals are echoed throughout the official and unofficial writings of the key framers as well. To give just a few examples, James Madison says, in *The Federalist* No. 51, "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary."[126] In No. 15, Alexander Hamilton describes "[t]he great and radical vice" of the existing Articles of Confederation: "the principle of legislation for states . . . in their corporate or collective capacities, . . . as contradistinguished from *the individuals of which they consist.*"[127] And Madison again, discussing in No. 37 the reconciliation of liberty and government through the mechanism of representatives' electoral accountability to the people: "The genius of republican liberty seems to demand on one side not only that all power should be derived from the people,

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> It is generally thought that we must have the state for enforcement, legislation, and adjudication, and [therefore rights must be merely] creatures of the state. But . . . [i]t is entirely plausible to argue that we have the rights whether or not they are enforced, embodied in codes, or officially adjudicated. . . . Our rights— . . . in their broad outlines—are the entailments of what we are: free and reasoning persons, capable of a conception of what is good and right . . . . It is because our rights flow from who and what we are that we may form, re-form, or accept [government] in order to make our rights more certain and secure. So those who say that our rights depend on or are the creatures of states have it the wrong way around.
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> . . . .
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> . . . The state is rather nothing but a web of relations between individuals as individuals, whose choices are coordinated according to what they understand is possible for them and what they may or may not do. . . . [That is, i]f states are the greatest violators of liberty, they are also its greatest enablers and protectors. In any advanced condition of civilization there can be no effective degree of liberty without the state, because there can be no effective degree of liberty without law.

125. RIGHTS OF MAN, *in* ESSENTIAL WRITINGS OF PAINE, *supra* note 115, at 170.

126. THE FEDERALIST NO. 51.

127. THE FEDERALIST NO. 15 (emphasis added).

but that those intrusted with it should be kept in dependence on the people by a short duration of their appointments . . . ."[128]

Some nearly four-score years later, Abraham Lincoln expressed his understandings of these liberty/freedom-first principles as well:

> [The founders] meant to set up a standard maxim for free society, which should be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its

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128. THE FEDERALIST NO. 37 (emphasis added). For further examples of *The Federalist* characterizing liberty as an underlying American ideal, see *Contents* of THE FEDERALIST xix, xx–xxxi (Clinton Rossiter ed., 1961): In No. 14, answering objections regarding the extent of the Union, James Madison "gets in a few more stout blows for federalism and republicanism *as agencies of freedom* . . . ." *Id.* at xxi (emphasis added). In No. 16, Hamilton continues "with his argument for a government with 'the power of *extending its operations to individuals*,' and warns that failure to institute such a government will abandon America to anarchy, war, despotism, and death." *Id.* (emphasis added). In No. 20, Hamilton and Madison describe "the calamities that have befallen the Netherlands because of adherence to the false principle of 'a sovereignty over sovereigns, a government over governments, a legislation for communities, *as contradistinguished from individuals*.'" *Id.* at xxi–xxii (emphasis added). In No. 27, Hamilton makes "[f]urther observations on the necessity of a national government with authority to *legislate for individuals*." *Id.* at xxiii (emphasis added). In No. 47, Madison "instruct[s] his readers ['in favor of liberty'] in the true meaning of 'the political maxim that the legislative, executive, and judiciary departments ought to be separate and distinct.'" *Id.* at xxvi. In No. 48, Madison begins his "praise of checks and balances by insisting that 'parchment barriers' are not enough to prevent the 'tyrannical concentration of all the powers of government in the same hands,'" *to the detriment of individual liberty. Id.* In No. 51, Madison "finds '*security for civil rights*,' not in charters or in appeals to humanity, but in 'the multiplicity of interests' that characterizes *a free society*." *Id.* (emphasis added). In No. 62, Madison, making a strong case for the principle of legislative bicameralism, "[w]ith candor and eloquence . . . salutes the joys [specifically, *individual freedom*] of ordered society and stable government." *Id.* at xxviii. In No. 63, Madison continues on that theme, finding in bicameralism "'a defense to the people against their own temporary errors and delusions,' . . . [and] arguing 'the necessity of some institution that will blend stability *with liberty*.'" *Id.* (emphasis added). Finally, in No. 78, Hamilton comments, "Whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter['s *protections of individual rights*, among others] and disregard the former." *Id.* at xxx–xxxi.

> influence, and augmenting the happiness and value of life to all people of all colors everywhere. . . . They knew the proneness of prosperity to breed tyrants, and they meant when such should re-appear in this fair land and commence their vocation they should find left for them at least one hard nut to crack.[129]

In short, in America, government is Liberty's servant. Government—and democracy itself—exists only to protect Liberty,[130] with the Constitution serving as the bulwark against inevitable government attempts toward overreaching.[131] The framers understood full well that men are not angels[132] and that power has the overwhelming tendency to corrupt,[133] so they

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129. Abraham Lincoln, Speech on the Dred Scott Decision at Springfield, Illinois (June 26, 1857), *in* ABRAHAM LINCOLN: SPEECHES AND WRITINGS: 1832–1858, at 390, 398–99 (Don E. Fehrenbacher ed., 1989).

130. *See, e.g.*, BICKEL, *supra* note 4, at 18–19 ("Elections . . . 'are a crucial device for controlling leaders.'" (quoting Professor Robert A. Dahl)); Brown, *supra* note 11, at 571, 535 ("[Democratic] [a]ccountability is a structural notion of blame whose final cause is liberty"; "accountability is best understood . . . as a structural feature of the constitutional architecture, the goal of which is to protect liberty. In this respect it is much like the other structural constitutional features such as separation of powers, checks and balances, and federalism—all of which are more comfortably accepted as devices for protecting individual rights.").

131. The enforcement provisions of the Reconstruction amendments (primarily Section Five of the Fourteenth Amendment) provide ample constitutional authority for Congress to enact progressive legislation (though ironically this is an area in which the current Supreme Court fails to give proper deference to Congress, *see, e.g.*, City of Boerne v. Flores, 521 U.S. 507 (1997)).

132. *See supra* note 126 and accompanying text.

133. *See, e.g.*, BAILYN, *supra* note 118, at 60 ("[T]he point [writers of the Revolutionary era] hammered home time and again, and agreed on—freethinking Anglican literati no less than neo-Calvinist theologians—was the incapacity of the species, of mankind in general, to withstand the temptations of power. Such is 'the depravity of mankind,' Samuel Adams, speaking for the Boston Town Meeting, declared, 'that ambition and lust of power above the law are . . . predominant passions in the breasts of most men.' . . . Power . . . 'converts a good man in private life to a tyrant in office.' It acts upon men like drink: it 'is known to be intoxicating in its nature'—'too intoxicating and liable to abuse.' And nothing within man is sufficiently strong to guard against these effects of power—certainly not 'the united considerations of reason and

constructed a limited government of separated powers with the ultimate power reserved to the people[134] to operate within their own self-imposed constitutional constraints.[135]

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religion,' for they have never 'been sufficiently powerful to restrain these lusts of men.'" (citing Eliot, *sermon* (JHL 15), pp. 10–11, etc.)).

134. The Tenth Amendment provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, *or to the people*." U.S. CONST. amend. X (emphasis added). In other words, to the limited extent power exists in *government*, it is divided among the national and state governments; and the people have the great residual power. *See, e.g.*, ELIZABETH PRICE FOLEY, LIBERTY FOR ALL 14–15 (2006) ("Taking the Ninth and Tenth Amendments together, . . . [we see that] the principal idea of American law at both the state and federal level . . . is that the people are sovereign and that any powers not ceded to government (whether federal or state) remain in the possession of individual citizens. There is thus a strong presumption in favor of individual liberty that may be rebutted if the government can establish a clearly defined power to act. The default position, in other words, is that 'the claimant of governmental power must show title to it' and, if not, individual liberty prevails." (citing EDWARD INGERSOLL, PERSONAL LIBERTY & MARTIAL LAW: A REVIEW OF SOME PAMPHLETS OF THE DAY 24 (1862); JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 752 (1833))).

135. Jeremy Waldron identifies a "precommitment model" for "reconcil[ing] the ideal of democratic self-government with our system of constitutional constraint." Jeremy Waldron, *The 1999 Hartman Hotz Lecture Banking Constitutional Rights: Who Controls Withdrawals?*, 52 ARK. L. REV. 533, 538, 547 (1999). Just as a compulsive gambler may establish an ATM withdrawal limit with his bank to prevent him from withdrawing money against his better judgment once in the heat of the moment at the casino;

> a chronic over-sleeper with a weakness for the "snooze" button may place his alarm clock out of reach on the other side of the bedroom; a smoker may hide his cigarettes; and a heavy drinker may give his car keys to a friend at the beginning of a party with strict instructions not to return them when they are requested at midnight.

Id. at 539. Waldron continues,

> So, similarly, it may be said, a whole people may decide collectively to bind themselves in advance to resist the siren charms of rights-violations. Aware, as much as the gambler, of the temptations of wrong or irrational action, the people as a whole in a lucid moment may put themselves under certain constitutional disabilities—disabilities which serve the same function in relation to democratic values as are served by ATM withdrawal limits in relation to the gambler's autonomy . . . . The mechanisms [the gamblers and the

My point is simply this: The most important, influential writings and commentaries of the American founding and reconstruction eras extol the virtues of freedom, not of government power to limit freedom. By contrast, we do not find any serious argument in these writings for the sort of overly powerful government that we have today in America.[136] Nothing in the Constitution mandates such an extreme level of judicial deference to government as currently exists. The point is that presumption-of-constitutionality review is ill-advised in the sense that it offers government too much temptation and leeway to act in ways that infringe upon Liberty/Freedom, which, as we have seen, constitutes the very core ideal upon which the nation was founded and the Constitution is designed to protect. Accordingly, the U.S. Supreme Court should replace its current presumption-of-constitutionality standard of review with a presumption-of-liberty

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> others] adopt enable them to secure the good that they really want and avoid the evil which, occasionally despite themselves, they really want to avoid. Similarly, the people do not really want to restrict free speech, abridge press freedom, or set up an established church. They are aware, however, that on occasion they may be panicked into doing something like this. So they take precautions in advance, instituting legal constraints as safeguards to prevent them from doing in a moment of fever what in their cooler, more thoughtful moments they are sure they do not want to do . . . .
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> . . . .
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> . . . As in the case of our gambler, we acknowledge the existence of constraint at the moment when the decision in question is being made: the people or their legislative representatives *will* feel limited and frustrated when the courts strike down their enactments. It will seem to them at the moment as though they are not really their own masters. But when they reflect on how we came to have a constitution, they will understand these constraints as an aspect of their self-mastery, not as a derogation of it.

Id. at 540–43 (emphasis in original).

136. *See, e.g.*, FOLEY, *supra* note 134, at 32 ("[M]odern constitutional jurisprudence turns the original constitutional structure on its head, placing the burden on citizens to convince the courts that laws restricting liberty are 'irrational.' . . . The slow, steady, and silent subversion of the Constitution has been a revolution that Americans appear to have slept through unaware that the blessings of liberty bestowed upon them by the founding generation were being eroded.").

standard for all governmental restrictions on individual liberty interests.[137]

B. Existing Applications of the "Reasonable Time, Place, and Manner" Standard

If one accepts this essay's assertion that the Constitution requires a presumption-of-*liberty* standard of judicial review for all government restrictions on (broadly defined) liberty interests, the next question is how (absent a resurrection of the Fourteenth Amendment Privileges or Immunities Clause to its rightful status)[138] such a standard could be effectuated, in practical terms. Happily, a useful normative model for a more Liberty-friendly standard of review already exists. The one area where the Court currently *does* apply a liberty-first approach is in its First Amendment speech doctrine, where government restrictions on speech (as *per se* burdens on a protected liberty interest)[139] are presumed unconstitutional and subject either to strict scrutiny

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137. The Court occasionally recognizes the proper scope of Liberty/Freedom, notwithstanding the presumption-of-constitutionality doctrine. In *Lawrence v. Texas*, for example, the Court stated, "Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct." 539 U.S. 558 (2003) (repudiating the exceedingly cramped view of liberty earlier recognized in *Bowers v. Hardwick*, 478 U.S. 186 (1986)). *See also* BARNETT, *supra* note 29, at 334 ("Justice Kennedy's opinion in *Lawrence* is especially noteworthy because it protects *liberty*, rather than privacy, without any discussion of whether that liberty was 'fundamental.' Having identified the conduct as liberty (not license), it then placed the burden on the government to justify its restriction. In this way, *Lawrence* can be viewed as escaping the Footnote Four-Plus framework [*see supra* note 41] and employing in its place a Presumption of Liberty."); *supra* note 116 for assertion of *Lawrence's* "liberty-equality connection."

138. *See generally* Lawrence, *supra* note 21.

139. The First Amendment protects speech, a liberty interest incorporated to apply to states through the Fourteenth Amendment Due Process Clause. Gitlow v. New York, 268 U.S. 652 (1925). Twenty of the twenty-five distinct provisions contained within the Bill of Rights have been incorporated to apply to the states through the Due Process Clause in similar fashion. *See, e.g.*, Lawrence, *supra* note 21, at 44. Federal restrictions on speech are presumptively invalid under the First Amendment (by its terms) and the Fifth Amendment Due Process Clause.

review (if the restriction is content-based),[140] or intermediate scrutiny review (if the restriction is content-neutral).[141]

With the latter, the Court has held that the government may meet its burden if its particular speech-limiting action constitutes a "reasonable time, place, and manner restriction." As the Court states in *Clark v. Community for Creative Non-Violence*,[142] for example,

> We have often noted that [time, place, and manner] restrictions of this kind are valid provided they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.[143]

This last requirement is crucial: outright prohibitions on the speech liberty interest are *never* "reasonable"—the restriction must leave open alternative times or places for its exercise.[144]

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140. *See generally* Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'n, 512 U.S. 622, 641 (1994) ("Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion.").

141. *Id.* at 642 ("[R]egulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." (citation omitted)). As an initial matter, the Court asks if the conduct at issue is sufficiently "expressive" to merit even *any* form of First Amendment protection. *Id.* at 641–43.

142. 468 U.S. 288 (1984) (upholding, as a reasonable time, place, and manner restriction, Park Service's denial of a permit for protesters to sleep overnight in symbolic tent city).

143. *Id.* at 293–94. *See also, e.g.*, Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981) (upholding a regulation requiring a religious organization seeking to distribute literature at a state fair to do so only from an assigned location); City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789 (1984); Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37 (1983); United States v. Grace, 461 U.S. 171 (1983); Consol. Edison v. Pub. Serv. Comm'n, 447 U.S. 530, (1980); Va. Pharmacy Bd. v. Va. Citizens Consumer Council, 425 U.S. 748 (1976).

144. CHEMERINSKY, *supra* note 35, at 1090–92 (surveying Hill v. Colorado, 530 U.S. 703 (2000); Schenck v. Pro-Choice Network of W. N.Y., 519 U.S. 357

Looking beyond the First Amendment, it is conceptually possible to extend the reasonable time, place, and manner analysis to other liberty interests. In fact one federal court, the Third Circuit Court of Appeals, has already done so. In *Lutz v. City of York*,[145] the Third Circuit found a constitutional right of intrastate travel in the Fourteenth Amendment substantive due process doctrine and then applied a time, place, and manner analysis to determine whether a local ban on "cruising" violated that liberty interest. Noting that enumerated speech liberty interests protected by the First Amendment are sometimes subject to less-than-full strict scrutiny under the Court's time, place, and manner approach, the Third Circuit concluded, "if the freedom of speech itself can be so qualified, then surely the unenumerated right of localized travel can be as well."[146]

The Third Circuit reasoned:

> The concerns underlying York's cruising ordinance seem to us highly analogous to the concerns that drive the time, place and manner doctrine: just as the right to speak cannot conceivably imply the right to speak whenever, wherever and however one pleases—even in public fora specifically used for public speech—so too the right to travel cannot conceivably imply the right to travel whenever, wherever

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(1997); Madsen v. Women's Health Ctr., 512 U.S. 753 (1994); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984); United States v. Grace, 461 U.S. 171 (1983); *Heffron*, 452 U.S. at 648; Grayned v. Rockford, 408 U.S. 104 (1972); Brown v. Louisiana, 383 U.S. 131 (1966); Kovacs v. Cooper, 336 U.S. 77 (1949)). *But see* City of Erie v. PAP's AM, 529 U.S. 277, 317–18 (2000) (Stevens, J., dissenting) (stating, in response to the plurality upholding a ban on nude dancing, "For the first time, the Court has now held that such [secondary] effects may justify the total suppression of protected speech.").

145. 899 F.2d 255 (3d Cir. 1990).

146. *Id* at 269. The court noted the inapplicability of the "content-neutrality" criterion outside of the First Amendment context, commenting,

> The requirement of content-neutrality in the speech context has no obvious analog in the travel context . . . . Because we can discern no invidious distinctions among travelers in the cruising ordinance, we find its restrictions on travel more closely analogous to a content-neutral, not a content-specific, restriction on speech in a public forum.

Id. at 270 n.40.

> and however one pleases—even on roads specifically designed for public travel. Unlimited access to public fora or roadways would result not in maximizing individuals' opportunity to engage in protected activity, but chaos. To prevent that, state and local governments must enjoy some degree of flexibility to regulate access to, and use of, the publicly held instrumentalities of speech and travel. Therefore, in order to set out a workable jurisprudence for the newly recognized due process right of localized movement on the public roadways, we find it appropriate to borrow from the well-settled, highly analogous rules the Court has developed in the free speech context. The cruising ordinance will be subjected to intermediate scrutiny, and will be upheld if it is narrowly tailored to meet significant city objectives.[147]

In applying the well-recognized and -accepted time, place, and manner doctrine for the first time to liberty interests beyond the First Amendment, *Lutz* provides an excellent practical framework for extending a heightened scrutiny standard of review to governmental restrictions on *all* asserted liberty interests. As discussed below, this would be a positive development, as the time, place, and manner standard more accurately reflects the Constitution's core Liberty-first ideals, while also recognizing the proper constitutional governmental role in maintaining law and order.

C. Broadening the Scope of the Standard to Cover All Liberty Interests

This essay argues that the "reasonable time, place, and manner" approach of the sort employed by the Supreme Court to review restrictions on First Amendment speech liberty interests and by the Third Circuit in *Lutz* to review restrictions on Fourteenth Amendment intrastate travel liberty interests should be extended to apply to restrictions on *all* asserted liberty interests.[148]

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147. *Id.* at 269–70 (footnotes omitted).

148. *See also* BARNETT, *supra* note 29, at 325 ("Like the modern doctrine that views content-neutral 'time, place, and manner' regulations of speech to be

The approach is not a perfect fit and wrinkles need to be ironed out,[149] but it offers an excellent practical mechanism to move us well down the road toward judicial recognition of a more proper balance between individual liberty interests and government power.

1. Virtues

The virtues of adopting the reasonable time, place, and manner standard of review for *all* restrictions on asserted liberty interests are significant. Most obviously, it reestablishes the proper elevated posture of individual liberty, as broadly defined, *vis-à-vis* government power, whereby government must explain to the individual when it restricts the person's liberty rather than require the person to approach the government hat-in-hand to redeem the liberty that is rightly hers in the first place. While the new standard would be much more protective of liberty interests,[150] it should be emphasized that many restrictions regulating liberty interests will be upheld as reasonable time, place, and manner restrictions.[151] As with the Court's First Amendment doctrine,

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consistent with the First Amendment, the police power permits the states the authority 'to make extensive and varied regulations as to the time, place, and circumstances in and under which parties shall assert, enjoy, or exercise their rights, without coming into conflict with any of those constitutional principles which are established for the protection of private rights or private property.'" (quoting COOLEY, *supra* note 54, at 597)).

149. The current "fundamental rights" designation should be retained for those liberty interests (previously and as yet) recognized as deserving of the highest degree of protection from government interference (strict scrutiny). Absent retention of the existing fundamental rights regime in some form, the new "reasonable time, place, and manner" approach (essentially a form of intermediate scrutiny) would have the undesired effect of actually *lessening* the degree of protection for the liberty interests currently designated as "fundamental rights," which currently receive strict scrutiny protection.

150. *See infra* notes 163–66 and accompanying text.

151. *See* Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 14 (2006) (stating, in a related context, "This [individual natural rights] model [of the Ninth Amendment] does not exclude the regulation of natural rights, any more than an individual natural rights model of the First

outright *prohibitions* of the liberty interest will, however, *never* be acceptable.[152]

Moreover, from a jurisprudential standpoint, applying the reasonable time, place, and manner approach to all asserted liberty interests addresses the countermajoritarian difficulty created when unelected judges strike down some, but not other, acts of the democratically elected branches of government.[153] To illustrate, consider first Robert Bork's discussion of the proper exercise of judicial review:

> [T]he Court must not be merely a "naked power organ," which means that its decisions must be controlled by principle. . . .
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> . . . .
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> The requirement that the Court be principled arises from the resolution of the seeming anomaly of judicial supremacy in a democratic society. If the judiciary really is supreme, able to rule when and as it sees fit, the society is not democratic. . . .
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> . . . [Our Constitution] has also a counter-majoritarian premise, however, for it assumes there are some areas of life a majority should not control. There are some things a majority should not do to us no matter how democratically it decides to do them. These are areas properly left to individual freedom, and coercion by the majority in these aspects of life is tyranny. . . .
>
> . . . Society consents to be ruled undemocratically within defined areas by certain enduring principles believed to be stated in, and placed beyond the reach of majorities by, the Constitution.
>
> But this resolution of the dilemma imposes severe requirements upon the Court. For it follows that the Court's power is legitimate only if it has, and can demonstrate in reasoned opinions that it has, a valid theory,

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Amendment excludes all time, place, or manner regulations of speech, press, or assembly.").

152. *See supra* notes 140–41 and accompanying text.

153. *See supra* notes 3–10 and accompanying text.

> derived from the Constitution, of the respective spheres of majority and minority freedom. If it does not have such a theory but merely imposes its own value choices, or worse if it pretends to have a theory but actually follows its own predilections, the Court violates the postulates of the Madisonian model that alone justifies its power.
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> . . . .
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> This is, I think, the ultimate reason the Court must be principled. If it does not have and rigorously adhere to a valid and consistent theory of majority and minority freedoms based upon the Constitution, judicial supremacy, given the axioms of our system, is, precisely to that extent, illegitimate.[154]

By removing the Court's discretion under its current substantive due process doctrine to handpick which liberty interests are sufficiently "fundamental" to trigger heightened scrutiny,[155] this essay's proposal to subject restrictions on *all*

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154. Bork, *supra* note 51, at 2–4 ("A principled decision . . . is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved." (quoting HERBERT WECHSLER, *Toward Principles of Constitutional Law*, *in* PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW 3, 27 (1961))). *See also* McConnell, *supra* note 3, at 1273 ("[The] more modest view of constitutional judicial review is that the constitution is not designed to produce the one 'best answer' to all questions, but to establish a framework for representative government . . . . The job of the judge is to ensure that representative institutions conform to the commitments made by the people in the past, and embodied in text, history, tradition, and precedent.").

155. Robert Bork is arguably correct in describing the Court's current substantive due as technically unprincipled. *See generally* Bork, *supra* note 51. The Court's substantive due process jurisprudence, where the Court is forced to pick and choose from among particular "rights" according to its own value system (whether based on the Justices' own individual understandings of "original intent," "tradition," "neutrality," personal predilections, or other criteria), lacks adequate moorings. To some, liberty may be the freedom to make end-of-life decisions free of government interference, or to have sex with whomever they choose on whatever terms they may arrange (economic or otherwise), or to smoke marijuana free of threat of imprisonment by the government, *see infra* notes 176–77 and accompanying text; to others liberty may be the freedom to engage in certain economic transactions or to pursue a livelihood of one's choosing—and never the twain shall they meet. This

liberty interests to heightened time, place, and manner scrutiny[156] offers a principled approach of judicial restraint, though of a different sort than that championed by Holmes, Frankfurter, Hand, et al., who elevate majoritarian democracy above Liberty itself; or of Robert Bork himself, Antonin Scalia, and others with excessively cramped views of Liberty. The proposed approach is, rather, more in keeping with the principles of Paine, Hamilton, Madison, Jefferson, Lincoln, and others with expansive views of Liberty/Freedom, who understand the perils of leaving the People's liberties to the whims of elected majorities.

No longer may the Court be accused of acting as a "superlegislature";[157] rather, the new approach enforces constitutional Liberty-First dictates in a more even-handed, almost ministerial sense. The Constitution itself makes those value choices for the Court, and *requires* it to nullify those legislative and executive acts that excessively restrict the core constitutional value of individual Liberty/Freedom (as also encompassing Equality).[158] As Chief Justice Roberts said it in his confirmation hearings, "I don't think the Court should be a taskmaster of Congress. The Constitution is the Court's taskmaster, and it is Congress' as well."[159]

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approach is rightly criticized. Liberty should not be left to a regime that rewards special protection to those who are able to shout the loudest or to spend enough money to elect their candidates or place their judges in positions of prominence. It is important to note, though, that economic liberty interests, while protected to a degree under the new approach, are less protected than other individual liberty interests. *See, e.g.*, FRIED, *supra* note 124, at 154 ("[U]nlike liberty of the mind and sex, property is not a natural right . . . .").

156. *See infra* note 164 (stating that existing (and future) fundamental rights still receive strict scrutiny review).

157. *See, e.g.*, Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 384 (2001) (Breyer, J., dissenting) ("[C]ourts, do not "'sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations" (quoting Heller v. Doe, 509 U.S. 312, 319 (quoting New Orleans v. Dukes, 427 U.S. 297, 303 (1976))); Ferguson v. Skrupa, 372 U.S. 726, 731 (1963) ("We refuse to sit as a 'superlegislature to weigh the wisdom of legislation'" (quoting Day-Brite Lighting, Inc., v. Missouri, 342 U.S. 421, 423 (1952))).

158. *See supra* note 117 and accompanying text.

159. Linda Greenhouse, *In Roberts Hearing, Specter Assails Court*, N.Y. TIMES, September 15, 2005.

Once we accept this essay's proposition that the genuine Constitution was premised upon an expansive view of Freedom *vis-à-vis* government power, and mandates broad protections of individual Liberty, we see how the notion of "special" protections falls away. The fact that "[t]he Constitution has little to say about contract [and] less about abortion," as John Hart Ely put it, is simply irrelevant: *all* liberty interests—enumerated and unenumerated—are protected.[160]

2. Applying the Standard

How would the new "reasonable time, place, and manner" standard work in practice? Whenever a plaintiff asserts that the government is restricting a liberty interest,[161] the burden shifts automatically to the government to prove any one of the following: (1) the asserted interest is not a liberty interest (broadly defined);[162] (2) the restriction is not a substantial burdening of the liberty

160. Ely, *supra* note 26, at 939. Then, if the results are unacceptable—if, for example, the Court consistently strikes down governmental actions that the people popularly support—the people have recourse in Article V to amend the Constitution to curtail the constitutional protections of Liberty/Freedom. It would seem highly unlikely they would do so, however, since every amendment ever ratified (save one, the Eighteenth Amendment, which was undone by the Twenty-First Amendment a mere fourteen years later) has acted to *broaden* liberty. This trend is yet further proof that the core value for which the people believe the Constitution stands is Liberty/Freedom.

161. In cases not involving an asserted liberty interest, nothing would change —the presumption-of-constitutionality would still apply. *See e.g.*, BARNETT, *supra* note 29, at 265 ("The many laws that regulate the internal operation of government agencies or the dispensation of government funds, for example, would be unaffected by a Presumption of Liberty.").

162. *See infra* text accompanying notes 166–69 for discussion of the harm-principle in defining liberty. *See also* BARNETT, *supra* note 29, at 262 (suggesting that individual behavior causing sufficient harm is "wrongful" and thus regulatable as "license"; "Prohibiting such actions, though it restricts a person's freedom to do as he wills, does not violate the rights retained by the people. To the contrary, such prohibitions protect the liberty rights of others."). In meeting this stage one of the test, the government should be held to some kind of "proximate cause" standard, familiar from tort law. It is not simply enough for the government to assert some sort of broad, generalized harm. Specific harm to another must be shown.

interest;[163] *or* (3) it is a reasonable time, place, and manner restriction of the liberty interest.[164] Failing proof of any of these three items, the government restriction is struck down.[165]

In applying stage one of the test, "liberty interests" is expansively defined. Justice Brandeis enunciated Liberty's proper scope in *Olmstead v. United States*: "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness . . . . They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."[166] John Stuart Mill's "harm principle" captures the essence of Liberty as protected under the new standard:

> [T]he only purpose for which [government] power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. . . . The only part of the conduct of any one, for which he is amenable to [government],[167] is that which concerns others.

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163. This element resembles the similar inquiry under the Court's current substantive due process approach, where "[t]he Supreme Court has said that in evaluating whether there is a violation of a [fundamental] right, it considers '[t]he directness and substantiality of the interference.'" CHEMERINSKY, *supra* note 42, at 819 (quoting Lyng v. Castillo, 477 U.S. 635, 638 (1986); Zablocki v. Redhail, 434 U.S. 374, 387 n.12 (1978)).

164. Strict scrutiny—not the time, place, and manner test—would apply if the restriction either: (1) involves a previously recognized (or as yet recognized) "fundamental right," *see supra* note 149; or (2) distinguishes among different individuals' exercise of the liberty interest, *see supra* note 146. *See also* supra note 117 (discussing "liberty-equality connection" expressed in *Lawrence v. Texas*).

165. If the restriction consists of legislation, it can be struck down either as-applied or on its face. *See, e.g.*, Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 580 (1998).

166. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J. dissenting); *see also* FRIED, *supra* note 124, at 68–69 ("Imagine that each of us moves through life surrounded by a bubble . . . [(]what we might call moral or liberty space) . . . [and] [n]o one [including government] may trespass upon it without doing me wrong.").

167. "Government" is substituted here for Mill's "society." For the purposes of this essay, it is only official legal action (or perhaps government-sanctioned social action) that gives rise to a constitutional violation. *See also* JED RUBENFELD, FREEDOM AND TIME 230 (2001) (arguing that Mill goes too far in

> In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.[168]

In short, as Brandeis and Mill suggest, government simply has no business intruding into an individual's Liberty/Freedom of Autonomy.[169]

Assuming we have both a liberty interest and a direct and substantial restriction, thus satisfying stages one and two, we then

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adding freedom from *social* coercion to freedom from legal coercion to create the formula for determining the "limit to the legitimate interference of collective opinion with individual independence" (quoting JOHN STUART MILL, ON LIBERTY 4 (1859), *available at* http://www.netlibrary.com.libezp.lib.lsu.edu/Search/AdvancedSearch.aspx (search "Title" "On Liberty" and "Author" "John Stuart Mill"; then follow "On Liberty" hyperlink))).

168. MILL, *supra* note 167, at 52. Ian Shapiro writes,

> [T]hink of the harm principle as operating in two steps. When evaluating a particular action or policy, the first step involves deciding whether the action causes, or has the potential to cause, harm to others. If the answer is no, then the action is in the self-regarding realm and the government would be unjustified in interfering. Indeed, in that case the government has a duty to protect the individual's freedom of action against interference from others as well. If, however, the answer to the initial query is yes, then different considerations arise. We are then in a world in which harm is being committed willy-nilly, and the question is: What, if anything, should the government do about it? In this regard, a more accurate summation of the harm principle than the more famous formulation already quoted can be found at the start of chapter four: "As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it, and the question whether the general welfare will or will not be promoted by interfering with it becomes open to discussion. But there is no room for entertaining any such discussion when a person's conduct affects the interests of no persons besides himself."

IAN SHAPIRO, THE MORALITY OF POLITICS 60–61 (2003) (quoting MILL, *supra* note 167, at 60).

169. *See also generally* Michael Anthony Lawrence, *Reviving a Natural Right: The Freedom of Autonomy*, 42 WILLAMETTE L. REV. 123 (2006). If we stop and think about it, why should any person be allowed to impose his or her morality on others? For that matter, why do they want to? Anyone who wishes to impose his or her morality on others arguably is presumptively unfit to serve. As the old saying goes, the only people whom we should want to have the job of governing are those who do not want the job.

look to stage three and, assuming the restriction neither involves a previously recognized fundamental right nor distinguishes among persons seeking to exercise the liberty interest, in which case strict scrutiny would apply,[170] inquire whether the government's limiting action is a reasonable time, place, or manner restriction. Under this inquiry, as the Court has often noted in the analogous First Amendment context, the restriction will be upheld only if it is "narrowly tailored to serve a significant governmental interest, and that [it] leave[s] open ample alternative channels for" exercise of the liberty interest.[171]

The impact of the new standard of review would be most dramatically felt in the many cases involving genuine (though currently unrecognized) liberty interests where the government restriction is currently presumed constitutional and upheld so long as it is rationally related to a legitimate purpose.[172] For example, mere "conduct" that is presently excluded from protection under the Court's current First Amendment doctrine *would* now be entitled to protection so long as it constitutes a liberty interest as defined above; whereas, before, only conduct that is sufficiently communicative[173] would be entitled to protection.[174] And once

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170. *See supra* note 158.

171. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984); Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37, 45 (1983). *See supra* note 143 and accompanying text.

172. Under the current presumption-of-constitutionality standard the challenger has the heavy burden of showing the government action is arbitrary or unreasonable. This burden would disappear under the new approach.

173. *See* Spence v. Washington, 418 U.S. 405, 410–11 (1974) (emphasizing two factors in determining whether conduct is sufficiently expressive to qualify for First Amendment protection: (1) "An intent to convey a particularized message was present," and (2) "in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.").

174. Under current doctrine, once the activity is determined to be communicative conduct, the Court applies a form of intermediate scrutiny, where the government restriction is upheld only (1) "if it is within the constitutional power of the Government;" (2) "if it furthers an important or substantial governmental interest;" (3) "if the governmental interest is unrelated to the suppression of free expression;" and (4) "if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." United States v. O'Brien, 391 U.S. 367, 377 (1968) (upholding conviction of individual who burned his draft card in violation of

again, by requiring heightened scrutiny for restrictions on *all* asserted liberty interests, we remove a degree of discretion from the judiciary, thus lessening concerns regarding the countermajoritarian difficulty.[175]

A fair application of the new standard would accordingly invalidate many current laws across the board, including, for example, many involving sex and drugs. We see, in applying the new test, that the government's criminalization of such matters of personal choice as engaging in prostitution and using marijuana violates individual liberty. The government is unable to meet its burden of showing any of the three criteria for either of these activities. First, deciding what to do with and put into one's own body is a liberty interest[176]—neither prostituting oneself or using marijuana directly harms any other person.[177] Second, the government's criminalization of the activities of prostitution and marijuana use certainly impose *substantial* burdens on these liberty interests. Third, outright *prohibitions* on prostitution and marijuana use are not "reasonable time, place, and manner restrictions," for they do not allow *any* exercise of the right.

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federal law). Where the government restriction of the conduct *is* related to suppression of free expression (number 3 above), the more demanding strict scrutiny is applied. *See* Texas v. Johnson, 491 U.S. 397 (1989) (striking down conviction of individual who burned flag as a means of political protest, stating, "If the State's regulation is [related to expression], then we are outside *O'Brien's* test, and we must ask whether this interest justifies Johnson's conviction under a more demanding standard.").

175. *See supra* text accompanying notes 155–59.

176. The Court already recognizes elements of this liberty interest in its current substantive due process approach. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003) (finding liberty interest to engage in sexual activity of one's choosing in privacy of home); Cruzan v. Dir., Mo. Dep't. of Health, 497 U.S. 261 (1990) (finding fundamental right to deny unwanted medical treatment); Griswold v. Connecticut, 381 U.S. 479 (1965) (finding fundamental right of privacy to make personal sexuality-based decisions). All of these cases recognize the individual's most basic desire identified by Justice Brandeis—to be "let alone" from an overbearing government.

177. Arguments that prostitution and marijuana use "harm society" are unavailing as failing to meet the proximate cause requirement. Any harm caused to others by the individual action is simply too remote. *See supra* note 162 and text accompanying notes 166–69.

Accordingly, since the government is unable to meet its burden by demonstrating any one of the three criteria, the criminalization of prostitution and marijuana use are unconstitutional.

Regarding stage three of the new test, the "reasonable time, place, and manner" criterion, it is worth repeating that government *may* regulate prostitution and marijuana use, much like it regulates other professions like medicine and drugs like alcohol and cigarettes. The new proposed standard still gives adequate deference to the state to regulate for the health, safety, and welfare of the people under its police power. If the exercise of the asserted liberty interest truly directly harms another or others, it is not a protectable "liberty interest" under item one of the test because it violates the harm principle,[178] and it may therefore be proscribed. Under item three, moreover, the government may exercise its police power by imposing reasonable time, place, and manner regulations—but *not* prohibitions—on the liberty interests, even as newly broadly defined.[179]

Government would be forced to fundamentally change its way of doing business under this essay's proposal. As American law and culture is built upon the edifice of decades of legislative supremacy met with the people's mostly silent and passive acquiescence, this upheaval would no doubt encounter resistance from many quarters.[180] To the extent the new Liberty-First standard of review eliminates laws substantially burdening individual liberty interests and forces government to think more critically about the effects of its laws, serious progress will have been made in protecting Liberty and Freedom.

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178. *See supra* note 162 and text accompanying notes 166–69.

179. *See, e.g.*, BARNETT, *supra* note 29, at 262 ("[W]hen the rightful exercise of freedom involves more than one person, it can be 'regulated' or made regular to facilitate its exercise and, if necessary, to protect the rights of others. A regulation of liberty is not an improper infringement of liberty if a legal system merely says that, to obtain its protection, contracts or other transactions must take a certain form (if such a regulation is also found to be necessary).").

180. It goes without saying that the upheaval itself should be no reason to avoid the change. If a particular government practice unconstitutionally deprives a person of liberty, mere inconvenience or expense in abating the practice is an unacceptable excuse for failing to force the change.

IV. CONCLUSION

The approach proposed in this essay for a heightened scrutiny "reasonable time, place, and manner" judicial standard of review for all government restrictions burdening individual liberty interests may seem radical—and it probably *is* radical, when viewed in the context of current judicial practice. No doubt such a change would create an uproar among lawyers, academics, legislators, lobbyists, administrators, jurists, and others vested in the *status quo*. But that would be a good thing. If we take a deep breath, remove the blinders, raise our heads and see with fresh eyes the great vistas of possibility for furthering freedom, we may well surprise ourselves and conclude that a progressive liberty approach is more faithful to the core principles upon which America was founded as expressed in the Declaration of Independence and guaranteed in the Constitution.

Quixotic? Maybe. But then again, maybe not. As discussed, the suggestion does have the practical advantage of being "doable" within the Court's current analytical imagination. In any event, every movement starts with conversation,[181] and with every new exchange reminding us of our Liberty-based birthright, we make positive progress in our "own search for greater freedom."[182]

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181. *See, e.g.*, Balkin, *supra* note 26, at 720–21:

> Legal culture has an important place for . . . "off-the-wall" arguments. They are a form of prophecy. They dare others to think differently about settled questions in a constitutional regime. They try to unsettle what seems fixed and certain. Even if today a particular position seems extreme, the position asserts that it is the true meaning of the Constitution that will come to be recognized in time. . . . Members of social movements with "off-the-wall" arguments have an effect . . . . They make claims about the Constitution and start a conversation. Only the future knows whether the unconventional position, or parts of it, will become accepted. Much turns on whether social movements and political parties get behind a particular interpretation of the Constitution and use their power to push it into public acceptance.

182. Lawrence v. Texas, 539 U.S. 558, 579 (2003).