

**LOCHNER, LIBERTY OF CONTRACT, AND PATERNALISM:
REVISING THE REVISIONISTS?**

REVIEW ESSAY:

**DAVID N. MAYER, LIBERTY OF CONTRACT:
REDISCOVERING A LOST CONSTITUTIONAL RIGHT¹**

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INTRODUCTION

“Given the principle of freedom, as active freedom of association, the notion of scientific control of society is a palpable contradiction. . . .”²

More than “[o]ne hundred years after the Supreme Court invalidated a law regulating bakers’ working hours as a violation of liberty of contract in *Lochner v. New York*,³ the case and its legacy are at the forefront” of constitutional debates.⁴ Liberals and conservatives continue to gain tenure by condemning controversial decisions that fail to reify their preferences as nothing more than a form of Lochnerian analysis.⁵ The demonization of *Lochner* and its corresponding substantive due process⁶ doctrine is built on the foundational claim

1. DAVID N. MAYER, LIBERTY OF CONTRACT: REDISCOVERING A LOST CONSTITUTIONAL RIGHT (2011).

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2. PETER J. BOETTKE, LIVING ECONOMICS: YESTERDAY, TODAY, AND TOMORROW 42 (2012) (quoting Frank H. Knight, *The Role of Principles in Economics and Politics*, SELECTED ESSAYS OF FRANK H. KNIGHT 361-91 (Ross Emmett ed., vol. 2, 1999)).

3. 198 U.S. 45 (1905).

4. David E. Bernstein, *Lochner v. New York: A Centennial Retrospective*, 83 WASH. U. L.Q., 1469, 1469 (2005) [hereinafter Bernstein, *Lochner: A Centennial Retrospective*]. See also Harry G. Hutchison, *Achieving Our Future in the Age of Obama?: Lochner, Progressive Constitutionalism, and African-American Progress*, 16 J. GENDER RACE & JUST. 483, 485 (2013) [hereinafter Hutchison, *Achieving Our Future in the Age of Obama*].

5. See, e.g., Robert P. George, *Judicial Usurpation and the Constitution: Historical and Contemporary Issues*, 871 HERITAGE FOUND. LECTURES, Apr. 11, 2005, at 5 (characterizing the Court’s decision in *Lawrence v. Texas*, 539 U. S. 558 (2003) as a form of ‘Lochnerizing’); Cass R. Sunstein, *What if Bush Wins? Hoover’s Court Rides Again*, WASH. MONTHLY, Sept. 2004, at 27, 35-36 (warning that a nascent conservative movement that aims to revive *Lochner* is on the horizon).

6. For a definition of substantive due process, see, e.g., Timothy Sandefur, *In Defense of Substantive Due Process, or the Promise of Lawful Rule*, 35 HARV. J.L. & PUB. POL’Y 283, 314 (2012) (defining substantive due process as follows: “In short, a lawful act is one the ruler is authorized to adopt or enforce. One must therefore inquire into the lawmaker’s authority and the

that the New York law at issue protects vulnerable people.⁷ Demonization is not new.⁸

According to the prevailing myth propagated by Progressives and New Dealers—and widely accepted today—Supreme Court Justices of the *Lochner* period, influenced by pernicious Social Darwinist ideology, sought to impose their laissez-faire views on the American polity through a tendentious interpretation of the Due Process Clause of the Fourteenth Amendment.⁹ Condemning what they perceived as an egregious instance of “judicial activism,” the doyens of the Progressive Movement asserted that judges, driven by their own policy preferences, made “new law rather than interpreting and applying existing rules of law.”¹⁰

In reality, a skeptical examination of the period from *Plessy v. Ferguson* to *New Deal Labor Law* shows that Social Darwinism originated within the domain of progressive thought itself.¹¹ Consistent with anti-creedal trends emerging during the latter half of the nineteenth century and surfacing during the twentieth century, “Progress,” on this view, was “not an accident, but a necessity. Surely must evil and immorality disappear; surely must men become perfect.”¹² Hence, the cultural conversion of a society that featured natural rights¹³ into one that fostered a new social and moral imperative grounded in science appeared both unstoppable and desirable.¹⁴ Consistent with legal theories emanating from the early part of the nineteenth century and later amplified by legal positivists such as Hans Kelsen, this “new” state would not be susceptible to any limitation not imposed by itself, and, hence, any restriction upon it could not be derived validly from an external source since this would imply a diminution of its authority.¹⁵

limits on that authority, both procedural and substantive, to determine whether an act satisfies the due process of law guarantee. When a government act exceeds the government’s authority—due to a procedural shortcoming, a substantive violation, a logical contradiction, or any other flaw—that act cannot qualify as law, and thus any attempt to enforce it constitutes arbitrary or lawless action.”).

7. See, e.g., Louise Weinberg, *Holmes’ Failure*, 96 MICH. L. REV. 691, 714 (1997) [hereinafter Weinberg, *Holmes’ Failure*].

8. Bernstein, *Lochner: A Centennial Retrospective*, *supra* note 4, at 1470.

9. *Id.* at 1470-71.

10. MAYER, *supra* note 1, at 2.

11. See, e.g., Harry G. Hutchison, *Waging War on the “Unfit”? From Plessy v. Ferguson to New Deal Labor Law*, 7 STAN. J. C.R. & C.L. 1, 5 (2011) [hereinafter Hutchison, *Waging War on the “Unfit”*].

12. PHILLIP RIEFF, *THE TRIUMPH OF THE THERAPEUTIC: USES OF FAITH AFTER FREUD*, 5 (40th Anniversary ed. 2006) (quoting Herbert Spencer in HERBERT SPENCER, *SOCIAL STATICS* 32 (London, 1892)).

13. See, e.g., Randy E. Barnett, *Does the Constitution Protect Economic Liberty?*, 35 HARV. J.L. & PUB. POL’Y 5, 6-7 (2012) (claiming that the original public meaning of the Constitution suggests that people have certain natural rights).

14. RIEFF, *supra* note 12, at 5-6.

15. Bruce P. Frohnen, *Is Constitutionalism Liberal?*, 33 CAMPBELL L. REV. 529, 539 (2011)

Signifying their commitment to quasi-science and its consequent mandate favoring the elimination of all forms of imperfection in society, Progressives of various stripes¹⁶ were at the forefront of a reform movement infected with biological determinism that gave rise to a variety of abhorrent developments, as richly illustrated by the life and times of Carrie Buck.¹⁷ On one hand, progressive believers in Social Darwinism foresaw the future as inevitably governed by the laws of evolution and heredity.¹⁸ “On the other, they worried whether the inevitable outcome of history that they foresaw could come about without their intervention.”¹⁹ Primed to facilitate this preordained outcome, members of the progressive vanguard denigrated the economic and social liberties of women, blacks, and immigrants as groups that were seen as unworthy of uplift.²⁰ Rightly appreciated, the demonization of *Lochner* has often supplied a convenient trope that has sheltered progressive paternalism and its consequences from critical review.

Bruiting below the surface of constitutional debates is the noticeable fact that we live in a “late modern, post-secular world.”²¹ Late modern post-secularity finds expression through an intensifying and unstable pluralism that signifies a dazed, confounding, and confused cultural milieu.²² “This pluralism is particularly challenging and unsettling because it not only raises the specter of difference, but deep ‘moral and metaphysical differences’ that implicate how communities understand the nature of humanity and indeed the cosmos.”²³ This claim signifies that radical differences within the community of scholars about the

(suggesting such currents are supported by Supreme Court decision-making during the early nineteenth century).

16. It is worth pointing out though that there was a significant difference between being someone whose political views were in line with at least the more conservative aspects of the Progressive movement, which after all dominated American politics in the early twentieth century, and being someone who wholeheartedly adopted the Progressive vision of constitutional law, which involved replacing the natural rights tradition of inherent limits on government power with the “Living Constitution.” I am indebted to David Bernstein for this clarification. See Email from David E. Bernstein, George Mason Univ. Found. Professor, to Harry G. Hutchinson, October 29, 2012 (on file with the author).

17. Hutchison, *Waging War on the “Unfit,”* *supra* note 11, at 3-6 (describing the state-sponsored effort to remove Carrie Buck’s reproductive capacity as an appropriate way to eliminate “unfit” people).

18. *Id.* at 5.

19. *Id.* at 5-6.

20. David E. Bernstein & Thomas C. Leonard, *Excluding Unfit Workers: Social Control Versus Social Justice in the Age of Economic Reform*, 72 *LAW & CONTEMP. PROBS.* 177, 177-80 (2009).

21. James Davison Hunter, *Law, Religion, and the Common Good*, 39 *PEPP. L. REV.* 1065, 1069 (2013).

22. *Id.* at 1068-69; see also Zachary R. Calo, *Faithful Presence and Theological Jurisprudence: A Response to James Davison Hunter*, 39 *PEPP. L. REV.* 1083, 1083-84 (2013).

23. Calo, *supra* note 22, at 1084.

meaning of *Lochner* and its progeny may be difficult to resolve, which gives rise to a quandary that “tests ‘the limits of tolerable diversity’” of opinion.²⁴ Correspondingly, attaining a consensus about the meaning of liberty of contract as an aspect of basic liberty and as a fundamental right derived from the Due Process Clauses of the Fifth and Fourteenth Amendments²⁵ that is restrained by a valid exercise of the police power may be impossible.²⁶ Indeed, even if one accepts the proposition that “the due process of law guarantee is an effort—one with deep roots in the history of western civilization—to reduce the power of the state to a comprehensible, rational, and principled order, and to ensure that citizens are not deprived of life, liberty, or property except for *good reason*[,]” it is probable, nonetheless, that this claim gives rise to all sorts of normative questions, not least being the contested possibility that courts and legal scholars are willing to take seriously the idea that there are real answers to such normative questions.²⁷ These various contentions reverberate within the legal academy, irrespective of whether or not the *Lochner* decision can be defended as a valid exercise of judicial discretion²⁸ that safeguarded a constitutional rule securing the rights of individuals to freely enter into contracts against attempts by government to arbitrarily exercise its power. The domain of government has ballooned as human selfishness and solipsism have waxed, and self-control, community, and self-reliance have waned.²⁹ This gives rise to a nation of narcissists who are unable to control their own impulses and desires, either individually or collectively.³⁰ “A nation of narcissists turns out to be a nation of gamblers and speculators . . . and Ponzi schemers, in which household debt rises alongside public debt, and bankers and pensioners and automakers and unions all compete to empty the public trough.”³¹ This formulation yields a nation wherein limitless appetites spur unlimited government.

Given the resilience of the opposition to liberty of contract, a doctrine that is epitomized by *Lochner*, and in light of a renaissance in revisionist scholarship that defends the *Lochner* Court, a development that coincides with a sharp rise in America’s public debt, it is an opportune time to review David Mayer’s contribution to the literature surrounding *Lochner*. In his new book, *Liberty of Contract: Rediscovering A Lost Constitutional Right*, Mayer maintains that the Court during the *Lochner* era was protecting liberty of contract as a fundamental right rather than enacting laissez-faire constitutionalism, as Justice Holmes and

24. *See id.* (quoting Hunter, *supra* note 21, at 1077).

25. MAYER, *supra* note 1, at 1.

26. *See* Calo, *supra* note 22, at 1087.

27. Sandefur, *supra* note 6, at 285.

28. *See* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1793-94 (2012) (showing that neither the *Lochner* majority nor the dissent “squares with anything resembling the original understanding of due process”).

29. ROSS DOUTHAT, *BAD RELIGION: HOW WE BECAME A NATION OF HERETICS* 235 (2012).

30. *Id.*

31. *Id.*

his intellectual heirs supposed.³² Coherent with David Bernstein's mettlesome scholarship, Mayer unravels the myth of "laissez-faire constitutionalism," a fable that has often contaminated critiques of *Lochner* era Supreme Court decisions that nullified various state and federal laws that abridged the liberty of contract.³³ The Court's respect for the jurisprudential doctrine of liberty of contract made possible the invalidation of laws that abridged individuals' "freedom to bargain over the terms of their own contracts—maximum-hours laws, minimum wage laws, business licensing laws, housing-segregation laws, and compulsory education laws."³⁴ At the same time, this form of jurisprudence could not be isolated from its cultural milieu, and, hence, it often proved thoroughly ineffective when it came to protecting women from state-ordered sterilization³⁵ or African Americans from New Deal innovation that expunged them from the workforce.³⁶ On this score, Mayer neglects to adequately explain the Court's failure to consistently apply liberty of contract jurisprudence. Regardless of how defensible liberty of contract may be, and no matter how under-theorized the opposition to substantive due process may seem, it is possible that decisions seen as part of the freedom of contract canon were actually not inconsistent, on close inspection, with more moderate forms of progressive thought that, nonetheless, cultivated paternalism.³⁷ Consequently, neither the demonization of *Lochner* nor its path-breaking defense by revisionist scholars prevents this decision and its offspring from being seen as part of a global progressive consensus that led to the expansion of the modern regulatory state at both the state and federal levels.³⁸

Part I of this Article sets forth Mayer's elucidation of the liberty of contract doctrine and his effort to distinguish *Lochner* from laissez-faire constitutionalism. This section also considers the efficacy of liberty of contract dogma in the context of progressive reform efforts. Part II examines the meaning and durability of this disputed doctrine, which protected individualism against its mortal enemy: majoritarian paternalism.³⁹ Building upon Professor Sawyer's exposition of *Hammer v. Dagenhart* and the Court's application of the harmless items doctrine,

32. MAYER, *supra* note 1, at 115.

33. *Id.* at 1.

34. *Id.*

35. *See, e.g.*, *Buck v. Bell*, 274 U. S. 200, 207 (1927) (agreeing that the state had the right to eviscerate the reproductive capacity of certain women that the state arbitrarily classified as defective).

36. *See generally* Hutchison, *Waging War on the "Unfit," supra* note 11, at 1-46.

37. *See, e.g.*, Logan E. Sawyer III, *Creating Hammer v. Dagenhart*, WM. & MARY BILL RTS. J. 67, 110-17 (2012).

38. *See id.* at 93-123 (elaborating on Knox's effort to create and defend the federal police power and the harmless items limit as the best way to allow the federal government to "solve problems created by the increasing integration of the national economy").

39. DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* 44 (2011) [hereinafter BERNSTEIN, *REHABILITATING LOCHNER*] (explicating the intense opposition to individualism expressed by leading progressives and explaining progressives equally intense support for majoritarian paternalism).

a guideline conceived by one of America's most influential lawyers, Philander Knox, Part III offers a non-orthodox conception of the *Lochner* Court. This contrasting viewpoint suggests that the Court's *Lochner* era decision-making correlates with the nation's and the Court's capitulation toward paternalism and progressive values rather than with a firm defense of liberty. Despite the *Hammer* Court's application of the harmless items doctrine to constrain Congress's police power, this decision, regardless of its critics' claims, was part of a shrewd calculus that ultimately subordinated individual liberty to the needs of an increasingly interconnected nation. Thus appreciated, *Hammer* implicates any principled understanding of *Lochner*. This Article shows that; notwithstanding the elegance of liberty of contract jurisprudence and quite apart from whether *Lochner* squares with anything resembling an originalist understanding of due process, a proposition that Chapman and McConnell deny;⁴⁰ the emergence of today's welfare state, which resembles a dystopian reality richly symbolized by the manifestation of legions of "one percenters" who insist on occupying America's capital city,⁴¹ was an unfortunate but predictable outcome.

I. LIBERTY OF CONTRACT: REDISCOVERING A LOST CONSTITUTIONAL RIGHT?

Mayer argues that

For a period of exactly 40 years, from 1897 until 1937, the Supreme Court protected liberty of contract as a fundamental right, one aspect of the basic right to liberty safeguarded under the Constitution's due process clauses, which prohibits government—the federal government, under the Fifth Amendment, and states, under the Fourteenth Amendment—from depriving persons of "life, liberty, or property without due process of

40. Chapman & McConnell, *supra* note 28, at 1793-94; *see also* Frohnen, *supra* note 15, at 531 (suggesting the contention that the Constitution necessarily protects natural rights to "life, liberty and the pursuit of happiness" as a Lockean formulation that is highly protective of property rights, constitutes an un-nuanced view of the origins and purpose of American constitutionalism). *But see* Barnett, *supra* note 13, at 5-12 (defending *Lochner* through an application of the Privileges or Immunities Clause); and Barry Cushman, *Ambiguities of Free Labor Revisited: The Convict-Labor Question in Progressive-Era New York*, in MAKING LEGAL HISTORY: ESSAYS ON THE INTERPRETATION OF LEGAL HISTORY IN HONOR OF WILLIAM E. NELSON 117 (R. B. Bernstein & Daniel J. Hulsebosch eds., 2013) [hereinafter Cushman, *Ambiguities of Free Labor*] (indicating that "late-nineteenth century jurists viewed the inherent right of freedom of contract as embracing 'the right to use and dispose of property'"). More generally, questions arise as to whether the original public meaning of the Constitution can be defended as a sufficient for human flourishing. *See, e.g.*, Patrick McKinley Brennan, *Two Cheers for the Constitution of the United States: A Response to Professor Lee J. Strang*, 80 FORDHAM L. REV. RES GESTAE 104, 104-05 (2012) (expressing only qualified support for the focus on original intent, original meaning).

41. John H. Fund, *The One Percenters' Fortress City*, THE AMERICAN SPECTATOR, June 2012, available at <http://spectator.org/articles/35535/one-percenters-fortress-city>, archived at <http://perma.cc/A33B-WJDW> (the top one-half of one percent of counties in the United States, two-thirds of the total, is dominated by counties surrounding Washington, D.C.).

law.”⁴²

Professor Mayer considers a number of important questions. Is a bakery employee free to work as many hours as he and his employer agree to in order to earn more money to support his family?⁴³ Does a homeowner have the right to sell her home to whomever she wishes despite a city ordinance precluding the sale to someone of a different race?⁴⁴ Can an owner of a new business enter a market in order to compete with established companies?⁴⁵ Are parents free to send their children to private schools, and are private schools free to compete with government-funded schools?⁴⁶ Mayer demonstrates that, “[a]t one time in American history, the Supreme Court answered yes to each of the above questions” premised on an individual’s “liberty of contract” interest.⁴⁷ In addition, Mayer examines the philosophical underpinnings of liberty of contract and the conflict between economic substantive due process and the goals of progressive reformers, particularly in the economic arena, in order to dispute the dominant narrative regarding the “lost constitutional right.”⁴⁸

A. *Historical Foundations of Liberty of Contract*

It is possible that economic substantive due process can be “grounded in such antebellum ideological concerns [such] as the aversion to factional politics” and “class legislation” or the free labor ideology that is traceable to both the anti-slavery movement, and the notion of “self-ownership, and particularly ownership of one’s own labor.”⁴⁹ In any case, this doctrine and its corresponding liberty of contract rule have sparked a blizzard of claims and counter-claims regarding the identification of this principle as a legitimate right that deserves judicial protection. Among the many contentions are claims suggesting that the framers of the Fourteenth Amendment anticipated that economic liberties should be protected under the Privileges or Immunities Clause of the Fourteenth Amendment rather than the Due Process Clause,⁵⁰ that post-Reconstruction cases

42. MAYER, *supra* note 1, at 1.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 1-2.

49. See, e.g., Barry Cushman, *Ambiguities of Free Labor*, *supra* note 40 (quoting *Revisited: The Convict-Labor Question in Progressive-Era New York* (abstract)), *forthcoming in* MAKING LEGAL HISTORY: ESSAYS ON THE INTERPRETATION OF LEGAL HISTORY IN HONOR OF WILLIAM E. NELSON (R. B. Bernstein & Daniel J. Hulsebosch eds., 2012), *available at* <http://ssrn.com/abstract=1807114> [hereinafter Cushman, *Ambiguities of Free Labor*]. Evidently, factional politics and class legislation generate unjustified special benefits for favored groups and individuals. See *id.*

50. See, e.g., Kurt Lash, *The Constitutional Convention of 1937: The Original Meaning of the New Jurisprudential Deal*, 70 *FORDHAM L. REV.* 459, 464 (2001).

may exonerate *Lochner* of the charge of being unprecedented,⁵¹ or that New Deal Justices appointed to end liberty of contract jurisprudence did so by emphasizing the constitutional text, and an interpretive method based upon the original meaning of the Constitution.⁵² Nevertheless, the prevailing narrative emphasizes more orthodox claims. Although it is true that some members of the Progressive vanguard, such as Roscoe Pound, disagreed with the orthodox position that liberty of contract analysis arose from the desire of individual judges to project “their ‘personal, social and economic views into the law,’”⁵³ they nonetheless presumed the correctness of the equally orthodox view that liberty of contract analysis was simply a new doctrine that appeared suddenly in late-nineteenth century jurisprudence.⁵⁴ Mayer shows that these claims were mistaken.⁵⁵

First, Mayer densely examines the history of liberty of contract in order to illustrate that the application of this doctrine to state and federal legislation was not a newfangled effort. He demonstrates that substantive due process originated in two well-established precedents in American constitutional law: “the protection of economic liberty and property rights through . . . the U.S. Constitution’s due process clauses or equivalent provisions in state constitutions” and “the limitation of state police powers through the enforcement of certain Constitutional rules”⁵⁶ What was novel during the latter part of the nineteenth century was the judicial identification of these doctrines as the right of “liberty of contract” and the protection of this right through the Due Process Clauses of either the Fourteenth⁵⁷ or the Fifth Amendment.⁵⁸

Fourteenth Amendment due process cases raised three primary issues: whether the party challenging government regulatory authority had identified a legitimate right deserving of judicial protection; the extent to which the court should or should not presume that the government was acting within its inherent “police power”; and, finally, taking the decided-upon presumption into account, whether any infringement on a recognized right protected by the Due Process Clause was within the scope of the states’ police power, or whether instead it was an arbitrary, and therefore unconstitutional, infringement on individual rights.⁵⁹

Evidently, “[t]he concept of liberty thus was central to Anglo-American constitutional thought during the era of the American Revolution; indeed, it was

51. Chapman & McConnell, *supra* note 28, at 1794 (noting that the existence of post-Reconstruction cases is irrelevant to any argument that *Lochner* was consistent with the original public understanding of the Constitution, whether in 1791 or in 1868).

52. Lash, *supra* note 50, at 478-80.

53. MAYER, *supra* note 1, at 11.

54. *Id.* at 11-12.

55. *Id.*

56. *Id.* at 11.

57. *Id.*

58. *Id.* at 3.

59. BERNSTEIN, REHABILITATING *LOCHNER*, *supra* note 39, at 3-4.

central to early American law.”⁶⁰ Hence, constitutional protection of individual liberty, including economic liberty and the protection of private property rights, drew on cultural and legal currents percolating through the nation that predated the Constitution itself.⁶¹ Congruent with these insights, and contrary to modern scholars who assert that substantive due process did not originate until the middle of the 19th century with the *Dred Scott* case,⁶² the record suggests that American courts began to apply substantive due process shortly after the adoption of the Constitution itself.⁶³

Second, featuring far-reaching limits on public or state power, and putatively rejecting paternalism,⁶⁴ the implementation of doctrines that favored the interests and pursuits of happiness by individuals became the paramount goal of the nation.⁶⁵ Largely influenced by English radical Whig opposition during the Revolution, liberty was theorized as something more than mere freedom to do what the law allows.⁶⁶ Rather, Patriot leaders perceived that liberty is a natural right of individuals to do what they will, provided they do not violate the equal right of others.⁶⁷ This intuition signifies that “what was truly radical about the American Revolution was that it made the protection of individual rights (including liberty in this broader sense as well as property rights) the test for government’s legitimacy.”⁶⁸ Unquestionably, early American law diverged from the ideals envisioned by late nineteenth century classical liberals or modern libertarians.⁶⁹ Nonetheless, advanced by the idea that allowing an individual to live upon one’s own terms (as opposed to the state of “[s]lavery”, which is ‘to live at the mere [m]ercy of another’),⁷⁰ and consistent with Thomas Paine’s freedom agenda,⁷¹ it appears that early American law “deviated radically from the British paternalistic system by the degree to which it . . . promoted individual freedom.”⁷² Rather than reflecting the preferences of a compliant judiciary that

60. MAYER, *supra* note 1, at 12.

61. *Id.*

62. *Id.* at 22 (disputing this view).

63. *Id.* at 20.

64. *Id.* at 13 (“The rejection of paternalism was manifest in many developments in Revolutionary-era society, among them the rise of contract law and even the ever-growing popularity of laissez-faire economics, perhaps best illustrated by the Philadelphia merchants’ opposition to price controls in 1777-78.”).

65. *Id.*

66. *Id.* at 12.

67. *Id.* (Apparently, the framers of early American constitutions “understood two critically important foundational principles: first, that the essential function of government was to protect the rights of individuals (including their right of liberty); and second, that the essential function of a constitution was to limit or control government power”).

68. *Id.*

69. *Id.* at 13.

70. *Id.* at 15.

71. *Id.* at 14.

72. *Id.* at 13.

avored entrenched interests, this deviation from paternalism and the accompanying preference for liberty were deeply conceptualized so as to encompass the right to property consistent with the notion that, for eighteenth-century Americans, property and liberty were inseparable companions.⁷³ Without security for one's property, one could only live on the basis of another's sufferance.⁷⁴ When liberty of contract was applied, courts were prepared to dismiss deceptive attempts to shelter legislation under the guise of promoting public health or some other aspect of a jurisdiction's police power,⁷⁵ and this is so despite an apparent lack of explicit evidence that *Lochner* and its correlative substantive due process doctrine were consistent with the original public understanding of the Constitution, both in 1791 or when amended by the Fourteenth Amendment in 1868.⁷⁶

B. Economic Substantive Due Process in the Mirror of Progressive Reform

Modern scholars repeatedly return to the contention that *Lochner* represents the promulgation of judicial policy preferences as part of the commitment of judges to "laissez-faire" constitutionalism and to the advancement of the interests of rich capitalists.⁷⁷ This perspective, "originat[ing] in the legal scholarship . . . [of] the Progressive Era", led to the emergence of Progressivism, a moderate-to-radical reform movement involving a diverse collection of Americans who shared the conviction that government at all levels should play a more active role in regulating the economic and social life of the nation.⁷⁸ Although Progressives saw themselves as leaders of a novel movement, Mayer verifies that "Progressivism was itself based on the paternalistic and collectivist threads that ran deeply through the Anglo-American common-law tradition."⁷⁹

Like the Fabian socialists, their counterparts in Britain, who harkened back to the "Tory paternalism" of the 18th century, American Progressives championed various "protective" labor laws (particularly regarding women, children, and other supposedly vulnerable classes of workers), liquor prohibition and other forms of morals legislation, and in general a category of laws called 'social legislation' by modern scholars.⁸⁰

Social progress legislation posed a challenge to individuals who asserted that government regulation infringed upon their legitimate liberty rights.

Since liberty of contract was largely attached to the concept of economic

73. *Id.* at 16.

74. *Id.* at 16-17.

75. *Id.* at 22-23.

76. Chapman & McConnell, *supra* note 28, at 1794.

77. MAYER, *supra* note 1, at 2-3.

78. *Id.* at 3.

79. *Id.* at 55.

80. *Id.*

liberty, conflict between this right and the tenets of both the Progressive Movement and the New Deal was inevitable. Mayer shows that economic liberty could be broken down into the following categories:

[F]irst, freedom of labor (including the freedom of both employers and employees to bargain over hours, wages, and other terms of their labor contracts); second, freedom to compete (including the freedom to pursue a lawful trade or occupation and to compete with others already in the market); and third, freedom of dealing (including the right of refusal to deal . . .).⁸¹

Identification of one or more these rights might be sufficient to limit government police power. Although Mayer neglects to sufficiently emphasize the highly paradoxical effects of Progressive reform efforts, it is important to establish such effects for the purposes of this Article. Notably, some Progressive scholars, taking their cues from prominent Fabians such as Sidney and Beatrice Webb, were provoked by the claim that “workers who received less than the ‘living wage’ and employers who paid less, were parasites.”⁸² Progressive leaders surrendering to the enticing deduction that “social progress is ‘a higher law than equality,’” “proposed the ‘eradication of the vicious and inefficient’”⁸³ in order to further society’s advance. In concert with the paternalistic and social progress inclinations that prompted them to act, many Progressives followed the exclusionary direction supplied by eugenics, race science, and the pursuit of perfection.⁸⁴ Congruent with the observation that “the scientific path led not only to a false picture of man and society, but also gave the impressions that social science could be an effective tool for social control,”⁸⁵ Progressive experts sought ways to regulate immigrant groups that they perceived to be hereditarily predisposed to low standards of living, as well as schemes to mitigate the possibility that Anglo-Saxon males, who they saw as more productive, would otherwise be displaced by “less productive” Chinese, African-American, and Jewish workers who they saw as racially inferior.⁸⁶ Embracing this tempting illogical position, as well as the interpenetration of scientism and paternalism, Progressives were goaded by the presumption that large numbers of inferior people might outbreed superior races.⁸⁷

Social progress reformers sought to expand the size and scope of government by coupling blithe self-confidence in their own capacity to design effective

81. *Id.* at 70.

82. Harry G. Hutchison, *Waging War on “Unemployables”? Race Low-Wage Work, and Minimum Wages: The New Evidence*, 29 HOFSTRA LAB. & EMP. L.J. 25, 41 (2011) [hereinafter Hutchison, *Waging War on “Unemployables”*].

83. Bernstein & Leonard, *supra* note 20, at 183-84 (quoting Simon N. Patten).

84. Hutchison, *Waging War on the “Unfit,” supra* note 11, at 21.

85. BOETTKE, *supra* note 2, at 177 (discussing F. A. Hayek’s criticism of scientism Hayek).

86. Hutchison, *Waging War on the “Unemployables,” supra* note 82, at 41.

87. *Id.* at 41-42.

programs with a “dangerous faith in the benevolence of the state and its agents.”⁸⁸ Straying from concepts such as the invisible hand or the insight that voluntary human exchange leads to a spontaneous, durable, and defensible social order,⁸⁹ the reformers’ faith in the benevolence of the state was reinforced by a rising hostility toward “the individualist philosophy that [Progressives] perceived in the courts’ protection of liberty of contract.”⁹⁰ Learned Hand, a true believer in the Progressive Movement, was so distressed by judicial decisions that invalidated maximum-hours and minimum-wage legislation that he advocated the total repeal of the due process provisions of the Fifth and Fourteenth Amendments in order to deny courts the power to protect liberty of contract.⁹¹

Contempt for *Lochner* era jurisprudence was catalyzed by Justice Holmes’s dissent in *Lochner*.⁹² According to Holmes, the *Lochner* majority’s decision was driven simply by their prior surrender to laissez-faire ideology, quite apart from the Constitution itself.⁹³ Per Holmes’s account,

[t]he word ‘liberty,’ in the 14th Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and the law.⁹⁴

A principled reading of Holmes’s claim indicates that even he agreed with the proposition that there must be some limitation on majoritarian paternalism embedded in the contested maximum-hours legislation at issue in *Lochner*.⁹⁵ Still, in Holmes’s defense, it can be argued that “[t]he liberty of contract on which the [*Lochner*] majority relies is not set forth anywhere in the Constitution and contradicts the uniform understanding from the Founding era through Reconstruction that legislatures have the authority to pass prospective and general legislation affecting contracts.”⁹⁶ If this claim is correct, few constitutional limits on paternalism exist. Similarly, a principled reading of the majority’s reasoning in *Lochner* supports elements of the paternalist agenda.⁹⁷

Nevertheless, it is essential to isolate Holmes’s *Lochner* dissent as a critical element in the perpetuation of the fable that laissez-faire constitutionalism and

88. Andrew Scull, *Progressive Dreams, Progressive Nightmares: Social Control in 20th Century America*, 33 STAN. L. REV. 575, 577 (1981) (reviewing DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA (1980)).

89. BOETTKE, *supra* note 2, at 43-45.

90. MAYER, *supra* note 1, at 3.

91. *Id.*

92. *Id.* at 3-4.

93. *Id.* at 4.

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

95. MAYER *supra* note 1, at 4.

96. Chapman & McConnell, *supra* note 28, at 1793.

97. Nelson Lund, & John O. McGinnis, Lawrence v. Texas and Judicial Hubris, 102 MICH. L. REV. 1555, 1565 (2004); see also *infra* Part IV B.

liberty of contract are associated with legal formalism⁹⁸ and, as such, mandated judicial intervention grounded on the observation that “law [was] frozen, with its principles and values set and its rules determined for all time.”⁹⁹ Legal formalism, so the story goes, operated in stark contrast with sociological jurisprudence, which Progressives saw as a more “realistic, democratic, and humane” theory of law.¹⁰⁰ Law, according to this viewpoint, was “not a body of immutable principles and rules” but rather a constantly changing and perpetually evolving “institution shaped by social pressures.”¹⁰¹ This scientific view of law—as constantly changing and evolving—reified presumptions enunciated by Woodrow Wilson, who believed that “[g]overnment was not a machine but a living thing . . . [that] falls not under the Newtonian theory of the universe, but under the Darwinian theory of organic life.”¹⁰² Presumptively, the “ever-expanding power of the state was entirely natural”; correspondingly, constitutional limits on governmental power were a mere momentary phase in an irresistible evolutionary movement that would see individual citizens exchange their own sense of personal achievement for the greater good, as divined by Progressive experts who strove to submerge individuated human identity into an ever-growing collectivity.¹⁰³ Quaint principles, such as hostility to “class” legislation, “free labor” ideology in the antislavery movement, or liberty of contract (whether or not tied to the original meaning of the Fifth and Fourteenth Amendment’s Due Process Clauses),¹⁰⁴ could not stand in the way of sociological jurisprudence or the intelligentsia’s pseudo-scientific commitment to the evolutionary process. In contrast, building on a foundation provided by revisionist scholarship challenging the dominant, neo-Holmesian view of the *Lochner* era,¹⁰⁵ Mayer argues that the “orthodox view is wrong in virtually all of its assumptions, which were based on myths originally propounded by Progressive-Era scholars that have been perpetuated by modern scholars who similarly defend the policies of the modern regulatory state.”¹⁰⁶

The most important of these myths concerns the conflation of liberty of contract, as a possible defense against arbitrary government action, with laissez-faire constitutionalism.¹⁰⁷ Reacting furiously to a few successful legal challenges

98. MAYER, *supra* note 1, at 4.

99. *Id.* at 4-5.

100. *Id.* at 5.

101. *Id.*

102. JONAH GOLDBERG, LIBERAL FASCISM: THE SECRET HISTORY OF THE AMERICAN LEFT FROM MUSSOLINI TO THE POLITICS OF MEANING 86 (2007).

103. *See id.* at 83-93.

104. MAYER, *supra* note 1, at 5; *see also* Barnett, *supra* note 13, at 9 (defending the passage of the Civil Rights Act of 1866 on grounds that by abolishing the economic system of slavery, the Thirteenth Amendment empowered Congress to protect the system of free labor and the underlying rights of property and contract that defined that system).

105. MAYER, *supra* note 1, at 5.

106. *Id.* at 6.

107. *Id.*

to federal and state police power, Progressives engaged in a sustained and sedulous effort to confuse liberty of contract with laissez-faire.¹⁰⁸ On the other hand, building on the historical¹⁰⁹ and philosophical foundations¹¹⁰ of substantive due process, Mayer contends that “the Court was not engaged in judicial activism when it protected liberty of contract as a fundamental right during the 40-year period prior to 1937.”¹¹¹ He avers instead that “the Court was simply enforcing the law of the Constitution, specifically the right to liberty as protected substantively under the Fifth Amendment’s or the Fourteenth Amendment’s due Process clause.”¹¹² Although this claim is contestable as a matter of adjudication grounded in the original public meaning of the text of the Constitution,¹¹³ per Mayer’s account, the rights associated with liberty of contract were moderate if not modest, and they could not stand in the way of “laws that legitimately fit within one of the traditional exercises of the police power, for the protection of public health, safety, order, or morals.”¹¹⁴ While there are obvious dangers to this rather constrained construal of contract rights,¹¹⁵ a construal that limits liberty rather than expanding it, Bernstein verifies “that the liberty of contract doctrine was grounded in precedent and the venerable natural rights tradition.”¹¹⁶ Taken as a whole, revisionist scholarship supports the impression that the Supreme Court viewed liberty of contract as a form of jurisprudence, which differs substantially from mythic accounts that suggest this doctrine: (1) was merely a convenient cover for judicial preferences favoring the rich and (2) appeared suddenly.¹¹⁷

108. See, e.g., Sawyer, *supra* note 37, at 1-3; see also EDWARD S. CORWIN, *THE COMMERCE POWER VERSUS STATES RIGHTS: “BACK TO THE CONSTITUTION”* 18, 253 (1936) (asserting that decisions such as *Hammer v. Dagenhart* are “as lacking in precedential antecedents” while placing the case in the “era of laissez-faire-ism on the Bench”); Kent Greenfield, *Law, Politics, and the Erosion of Legitimacy in the Delaware Courts*, 55 N.Y.L. SCH. L. REV. 481, 487 (asserting that the reasoning in *Hammer* was “incoherent, unworkable, and transparently political”).

109. MAYER, *supra* note 1, at 11-42.

110. *Id.* at 43-67.

111. *Id.* at 66.

112. *Id.* at 66-67.

113. Chapman & McConnell, *supra* note 28, at 1794 (suggesting that revisionists who contend that the *Lochner* decision rested on sound principles of economics and liberty, that concepts of natural rights and liberty of contract had deep roots in political theory, and that the bakers’ hours legislation struck down in the case was a disguised scheme to favor entrenched and well-heeled special interests, which may mean that conventional attacks on the underlying ideology of the decision may well be unfounded but any claim that the decision rested on sound legal principles is unpersuasive, at least as an originalist matter since the “liberty of contract idea” did not come to contract law until the 1870s, and was adopted by the Supreme Court as a constitutional right only in the 1890s).

114. MAYER, *supra* note 1, at 67.

115. See *infra* Part IV.

116. BERNSTEIN, *REHABILITATING LOCHNER*, *supra* note 39, at 3.

117. See, e.g., *id.* at 8-23 (dispelling myths); see also RICHARD A. EPSTEIN, *HOW*

II. THE MEANING AND DURABILITY OF LIBERTY OF CONTRACT JURISPRUDENCE

Determining that liberty of contract analysis differs in substantial respects from the realm of myth gives rise to questions and confusion regarding the actual content and meaning of economic due process and liberty of contract as practiced by courts during the *Lochner* era. Confusion arises first because substantive due process and liberty of contract have been deployed to sort out the limits of both the state and federal police power,¹¹⁸ as well as limits on the power of state governments to interfere with voluntary agreements negotiated by individuals and firms. Second, even if the liberty of contract doctrine was not issued by judges projecting their own personal preferences into law, and even if it was grounded in widely accessible precedent,¹¹⁹ questions arise regarding the standards used by courts in applying this disputed doctrine. The following subsections address such questions.

A. *The Police Power and Liberty of Contract?*

To be clear, the police power is virtually undefinable, but “had its origins in the English common-law concept that one ought to use one’s property in such a way as not to injure that of another.”¹²⁰ Today, the police power encompasses the authority of state and federal legislatures to protect public health, safety, and morals¹²¹ against contrary claims by individuals asserting that such regulation infringes upon legitimate rights. The deployment of the federal police power has the added complication that its use has often been intertwined with questions about the reach and content of the Commerce Clause, which raises questions regarding the extent of Congress’s power to regulate interstate commerce and limit freedom of contract.¹²² During the nineteenth century, courts, particularly

PROGRESSIVES REWROTE THE CONSTITUTION 14-51 (2006) (suggesting that courts during the period before the New Deal and long before *Lochner*, evinced a deep respect for classical liberal values including competition and individual choice).

118. Barry Cushman, *Doctrinal Synergies and Liberal Dilemmas: The Case of the Yellow-Dog Contract*, 1992 SUP. CT. REV. 235, 241 [hereinafter Cushman, *Doctrinal Synergies*] (arguing that since the federal government, as a government of enumerated powers, did not have residuary police powers, but that Congress did possess a power analogous to the police powers of the state legislatures enabling it to protect the free flow of interstate commerce).

119. MAYER, *supra* note 1, at 11 (describing two lines of precedents that were well established in early American constitutional law).

120. *Id.* at 25.

121. *Id.*

122. See Cushman, *Doctrinal Synergies*, *supra* note 118, at 238-43 (examining the idea of liberty of contract in the context of Congress’ power to regulate interstate commerce and suggesting judicial support for the notion that the Fifth Amendment may constitute an independent limitation on the federal power to regulate commerce but also admitting that a legitimate basis for regulating contractual relations of businesses affected with the public interest may exist).

state courts, recognized several limits on the police power.¹²³

One limit of particular note regarding state legislative power was the prohibition against the enactment of any law that impaired the obligations of contract.¹²⁴ In addition, the police power was subject to unwritten limits that required equal treatment under the law, meaning that a law could not single out specific groups or classes for special treatment.¹²⁵ On the other hand, Mayer argues that *Lochner* and other liberty of contract decisions were based on substantive due process protection of liberty and property considerations that are independent of police power questions.¹²⁶ Whether or not this claim is correct exceeds the scope of this Article. In any case, what emerges from this confusion is the possible argument that

a false dichotomy has been created by those modern revisionist scholars who debate *Lochner* era jurisprudence as an either-or alternative between the prohibition on class legislation [often used to limit the boundaries of a state's police power] and substantive due process protection of liberty [often deployed to protect what came to be known as liberty of contract].¹²⁷

In reality, limits on either the police power or on liberty of contract became a tangled web that may be difficult to unravel.

In practice, state courts were principally focused on limiting police powers by enforcing prohibitions on class legislation (i.e., legislation granting particular benefits to some or imposing peculiar burdens on others).¹²⁸ Assertions of state police powers were met with skepticism, leading one court to invalidate a statute offered under the guise of advancing the public health, because the legislature had arbitrarily interfered with personal liberty and private property.¹²⁹ On the other hand, when and if the Supreme Court deployed liberty of contract and substantive due process analysis, it did so to prohibit a wide range of behavior, including English-only laws passed by the legislature of Nebraska¹³⁰ and the enforcement of a Louisville, Kentucky ordinance designed to interfere with the freedom of African-Americans to purchase homes in Caucasian neighborhoods.¹³¹

In considering the distinction between, if not the intersection of, police power limits and the prophylactic effects of liberty of contract, it is useful to note that Mayer refrains from defending a more robust conception of liberty, one that is

123. MAYER, *supra* note 1, at 26 (“Ordinarily, courts were willing to declare invalid statutes that directly conflicted with positive constitutional prohibitions, including general protections of liberty and property rights under due process of ‘law and the land’ provisions.”).

124. *Id.*

125. *Id.*

126. *Id.* at 30.

127. *Id.* at 32.

128. *Id.* at 28-29.

129. *Id.* at 23.

130. *Id.* at 89 (discussing *Meyers v. Nebraska*, 262 U. S. 390 (1923)).

131. *Id.* at 92 (discussing *Buchanan v. Warley*, 245 U. S. 60 (1917)).

conclusively grounded in the notion of higher law principles and, if applied, would prevent the exercise of the police power, except in cases that invoke the *sic utere* doctrine, which supports laissez-faire constitutionalism.¹³² The *sic utere* approach would preclude all police power regulation unless the actor used her freedom to inflict harm on the person or property of another.¹³³ As advanced by Christopher G. Tiedeman's police power analysis, enforcement of the *sic utere* doctrine would condemn as unconstitutional laws that regulate hours and wages of workers, usury laws, anti-miscegenation laws, and gambling laws.¹³⁴ It is relatively easy to deduce that such laws might be precluded by liberty of contract jurisprudence as well. One needs to look no further than *Lochner* itself, where the Supreme Court used liberty of contract analysis to invalidate New York's maximum hour law. Contrary to Tiedeman's view, "neither in *Lochner* nor in any of its other liberty-of-contract decisions did the Court follow any sort of laissez-faire ideology."¹³⁵ However, if the goal is liberty *per se*, then Mayer's analysis begs the question: what is wrong with the doctrine of laissez-faire? Rather than answer that question or make the normative case for laissez-faire and a more robust conception of liberty, Mayer shows that courts refused to honor the limits of the *sic utere* approach. Instead, the Supreme Court was prepared to rupture this doctrine premised on the reasonableness of police power that the legislative body asserted. This profoundly-weakened conception of liberty was consistent with the view that an individual's freedom was not unlimited.¹³⁶

Nevertheless, in a police power context, when protecting an individual's liberty through a general rule that forbade legislative interference with freedom of contract, the Court, in effect, applied a general presumption in favor of liberty.¹³⁷ Of course, this presumption could be overcome rather easily by a judicial finding that the law in question was a legitimate exercise of one of the many recognized functions of the police power.¹³⁸ Parenthetically, this approach was also consistent with the philosophical underpinnings of *Hammer v. Dagenhart*, which enabled courts to constrain liberty premised on a reasonably broad conception of the federal police power so long as Congress did not breach the harmless items limit on its authority.¹³⁹ Still, legislative attempts to overcome the general presumption in favor of liberty were made more difficult by virtue of the fact that courts during the *Lochner* era did not always accept at face value the

132. *Id.* at 60-61.

133. *Id.* As formulated by leading legal scholar Christopher G. Tiedeman, not only would the *sic utere* doctrine preclude the radical experimentation of social reformers, it would prevent virtually all forms of legal paternalism. *See id.* at 60. As used by Tiedeman, the doctrine of *sic utere* obliged everyone to use his own property to exercise his own liberty so as not to harm the property or liberty of another; the police power was limited to enforcing this principle. *Id.* at 61.

134. *Id.*

135. *Id.* at 67.

136. *Id.* at 64.

137. *Id.* at 65.

138. *Id.*

139. *See infra* Part IV.

government's rationale for a challenged law.¹⁴⁰ Mayer maintains that courts followed Justice Harlan's injunction to look at the substance of things: "that is, to critically examine whether 'a statute purporting to have been enacted to protect the public health, the public morals, or the public safety' had 'a real or substantial relation to those objects' or instead was 'a palpable invasion of rights secured by the fundamental law.'"¹⁴¹ In protecting liberty of contract against the state's intersecting claim of police power legitimacy, Justice Peckham in his opinion for the Court in *Lochner*,¹⁴² articulated the following test of statutory validity:

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, or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family?¹⁴³

The Court answered this question by determining that courts must apply a means-ends test.¹⁴⁴ The mere assertion that the subject relates to the public health or to some other legitimate exercise of the police power does not render the enactment valid; rather, the statute must have a more direct relation as a means to an end, and the end itself must be appropriate and legitimate before an act can be held valid, particularly when it interferes with the general right of an individual to be free in his person and in his power to contract with relation to his own labor.¹⁴⁵

B. The Doctrine and Its Scope

As advanced by Professor Mayer, liberty of contract jurisprudence was simply a moderate paradigm centered on a presumption in favor of liberty.¹⁴⁶ The precise boundaries of this approach meant that courts protected liberty in a limited context—freedom to make contracts—rather than protecting, in all its aspects, a general and absolute right to liberty limited only by the definitional constraints imposed on liberty itself (i.e., doing no harm to others).¹⁴⁷ Second, the courts protected this freedom under a standard that permitted the government to restrict its application through various exercises of the police power by creating a rebuttable presumption that the challenged law exceeded the government's legitimate police power.¹⁴⁸ As an illustration of the scope of liberty protected by the Fourteenth Amendment's Due Process Clause, Mayer cites with approval the

140. See MAYER, *supra* note 1, at 65.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

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

146. MAYER, *supra* note 1, at 63.

147. *Id.* at 63-64.

148. *Id.*

Supreme Court's opinion in *Allgeyer v. Louisiana*¹⁴⁹:

The liberty mentioned in that Amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all of his faculties, to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.¹⁵⁰

“[R]egarded as the Supreme Court's first unequivocal ‘substantive due process’ case,”¹⁵¹ *Allgeyer* held “for the first time held that the Due Process Clause invalidated a prospective statute that prohibited entering into certain contracts.”¹⁵²

Although *Allgeyer* has been criticized as a novelty and a break from the original meaning of the Fourteenth Amendment, the case offers, by its own terms, a strained conception of liberty that protects an individual's freedom to use her own faculties in all lawful ways to earn a livelihood by any lawful calling.¹⁵³ This formulation is coupled with one's right to realize one's freedom through legally enforceable contracts that were proper and necessary for one's purpose.¹⁵⁴ Mayer intuits that *Allgeyer*'s emphasis on freedom of contract meant that this liberty right was necessarily subject to certain legal constraints.¹⁵⁵ Yet what precise limits actually pertain to the liberty of contract doctrine? Evidently the constraints that emerge from duties owed by the individual to society, to the public, or to the government supply the appropriate boundary.¹⁵⁶ The internal logic of this claim implies that liberty is meaningless unless a principled conception of duties owed is on offer. Similarly, in *Adkins v. Children's Hospital*,¹⁵⁷ Justice Sutherland, while agreeing that freedom of contract is the general rule, added that freedom could be abridged by exceptional circumstances.¹⁵⁸ American history is rich in allegedly exceptional circumstances. Taken together, this analysis shows that only a minimal commitment to flexible language signals that doctrinal limitations—premised on the duties owed by an individual or, alternatively, the meaning of exceptional circumstances—in the hands of elites committed to regulatory encroachment

149. *Allgeyer v. Louisiana*, 165 U.S. 578 (1887).

150. MAYER, *supra* note 1, at 64 (quoting *Allgeyer*, 165 U.S. 578).

151. Chapman & McConnell, *supra* note 28, at 1733.

152. *Id.*

153. MAYER, *supra* note 1, at 64.

154. *Id.*

155. *Id.*

156. *Id.*

157. 261 U.S. 525 (1923) (invalidating a Washington, D.C. minimum wage for women as a violation of liberty of contract).

158. *Id.* at 546.

gives rise to the probability that liberty of contract will be the subject of ruthless restrictions. In the hands of judges and legislators committed to expanding the perimeters of paternalism and postmodern language, these supposed limitations on freedom of contract are more accurately understood as an invitation to expand the size and scope of government.

C. Shrinking the Liberty of Contract Doctrine During the Lochner Era

Ample case law indicates just how fragile the liberty of contract doctrine was in protecting the rights of flesh and blood individuals against state legislatures. An excellent place to begin is “with the well-known decision of *Muller v. Oregon*, which sustained the constitutionality of a statute that limited female laundry workers to a maximum of 10 hours per day.”¹⁵⁹ Evidently, assaults on the Oregon statute at issue rested on one simple proposition: that women are persons and citizens and, as such, are as competent to contract as men.¹⁶⁰ Despite its undeniable appeal, this claim was no match for the state’s argument in favor of paternalism and the need to compensate for women’s “obvious” inferiority by including additional protection for them. Writing securely within the Progressive tradition, and seduced by presumptive force of sociological jurisprudence, Louis Brandeis deployed detailed sociological studies to justify this differential legislation.¹⁶¹ *Muller* was later reinforced by the Court’s opinion in *West Coast v. Parrish*, overruling *Adkins v. Children’s Hospital*’s liberty of contract holding. In upholding the State of Washington’s enactment of a minimum wage for female workers in *West Coast*, Justice Hughes agreed that the Constitution does not speak of freedom of contract; rather, it speaks of liberty.¹⁶² Liberty, as viewed by Hughes is necessarily subject to the restraints of due process and regulation; a statutory enactment, which is reasonable in relation to its subject and adopted in the interest of the community, is indeed due process.¹⁶³ In answering the question of whether it is reasonable to provide a minimum wage for women, Justice Hughes deliberated over whether the wage regime serves the community’s interests as opposed to the interests of individual women before determining that nothing could be closer to the public interest than protecting the health of women from unscrupulous and overreaching employers.¹⁶⁴ Contrary to the paternalism residing at the heart of Justice Hughes’s opinion, at the core of prior minimum wage decisions was a commitment to freedom of contract, long held to reside in the Due Process Clause of the Fourteenth Amendment.¹⁶⁵ Nonetheless, no matter how defensible freedom of contract may have been, it could not stand in the way

159. EPSTEIN, *supra* note 117, at 90.

160. *Id.*

161. *Id.*

162. *West Coast v. Parrish*, 300 U. S. 379, 391 (1937).

163. *Id.*

164. JEFF SHESOL, *SUPREME POWER: FRANKLIN ROOSEVELT V. THE SUPREME COURT* 406 (2010).

165. *Id.*

of protecting the “weaker sex” from exploitation.¹⁶⁶

This outcome exploits the vulnerability of an already disadvantaged class and indicates that liberty of contract could be constrained, regardless of whether the Court is dealing with state police power pleadings or adjudicating the federal police power within the parameters of the Commerce Clause. Evidently, the Court was persuaded that liberty of contract could be restricted without a substantive investigation of the merits of the legislation at issue so long as the unit of government proffers the claim that it acts in “public interest.” Hinting at the Court’s increasing dependence on flexible language, such reasoning anticipates the Court’s complete withdrawal of substantive scrutiny from legislative enactments within the domain of economics and labor, and its comprehensive surrender to state and federal legislatures, which it announced one year later in *Carolene Products*.¹⁶⁷ Still, it is remarkable that the *West Coast* Court’s ostensible solicitude for the position of women, even if allowable based on an originalist reading of the text of the Constitution, is subject to the same objection that may be lodged against the statute in *Muller*: it diminishes the contractual rights of women by excluding them from jobs that they would most prefer over any other available.¹⁶⁸ Hence, neither *Lochner* nor liberty of contract dogma was available to prevent paternalism from proceeding apace as the Court failed to notice that the laws designed to protect women served as a central means of oppressing them.¹⁶⁹

Similarly, Epstein indicates that when President Woodrow Wilson resegregated the U.S. Civil Service, premised on a capacious conception of the federal government’s police power and a restricted view of the contract rights of African Americans, the National Association for the Advancement of Colored People chose not to make a constitutional challenge to the government’s decision.¹⁷⁰ Evidently, a deadly combination of a narrow conception of individual liberty and a broad conception of government police power ensured that attacks on this policy would have proved hopeless under *Plessy*.¹⁷¹

Coherent with the ideals that infected the Progressive Era, an argument was made that “if blacks lived close to whites, they would eventually cause the downfall of white civilization through race mixing.”¹⁷² The preferred solution required that African Americans be kept in a subservient role and denied political

166. *Id.*

167. Louise Weinberg, *Unlikely Beginnings of Modern Constitutional Thought*, 15 U. PA. J. CONST. L. 291, 292 (2012) [hereinafter, Weinberg, *Unlikely Beginnings*] (stating that *Carolene Products* formalized that Supreme Court’s acquiescence in the will of Congress and by extension, the will of state legislatures) (copy on file with the author).

168. EPSTEIN, *supra* note 117, at 93.

169. *Id.* at 90.

170. *Id.*

171. *Id.* at 102-03.

172. CAMERON MCWHIRTER, *RED SUMMER: THE SUMMER OF 1919 AND THE AWAKENING OF BLACK AMERICA* 63 (2011).

rights.¹⁷³ Fearing that African Americans carried contagious diseases and, secondarily, moved by the opinion that blacks had become disrespectful to their white superiors, President Wilson made an appeal to the broad police power that Progressives championed as a basis for this new policy.¹⁷⁴ Substantive due process review was rarely applied leaving the nation safe for President Wilson's subordinating maneuvers; therefore, it is no surprise that, between Reconstruction and the New Deal, African American workers viewed Lochnerism as "much too timid and ineffectual [as] courts gave far too much leeway to the regulatory powers of government, allowing powerful interest groups to profit from labor regulations at the expense of African Americans."¹⁷⁵ Although Court decisions that vindicated the right to freedom of contract often had ambiguous or even clear "pro-poor" distributive consequences, the Court nonetheless "upheld the vast majority of the laws that had been challenged as infringements on liberty of contract."¹⁷⁶ As a result, it is impossible to claim that liberty of contract consistently protected anyone, least of all those most in need of such protection.

It is true that before issuing its *Carolene Products* decision¹⁷⁷ and accompanying principles,¹⁷⁸ the Court, at times, protected liberty of contract by assessing whether the substance of challenged legislation limited a person's liberty in contradistinction to the procedures by which the law was enacted or enforced.¹⁷⁹ In addition, the Court placed some limits on the power of Congress and state legislatures in the realm of economic regulation.¹⁸⁰ Still, it is clear that substantive due process and the embedded doctrine of liberty of contract, even

173. *Id.*

174. EPSTEIN, *supra* note 117, at 102.

175. DAVID E. BERNSTEIN, ONLY ONE PLACE OF REDRESS: AFRICAN AMERICAN, LABOR REGULATIONS, & THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL 7 (2001).

176. BERNSTEIN, REHABILITATING *LOCHNER*, *supra* note 39, at 3.

177. *United States v. Carolene Prods.*, 304 U. S. 144 (1938).

178. The opinion contains two well-known principles: (1) the presumption of constitutionality accorded legislation regulating economic activity when challenged under the Due Process Clauses and (2) the creation of Footnote Four, which indicated that deferential review would be inappropriate "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." Nor should such a robust presumption of constitutionality be warranted with regard to "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" nor with respect to "statutes directed at particular religious," "national," "racial" or other "discrete and insular minorities." *Id.* at 152 & n.4 (citations omitted); *see also* Barry Cushman, *Carolene Products and Constitutional Structure*, SSRN, at 1 (Mar. 2012) [hereinafter Cushman, *Carolene Products*], available at <http://ssrn.com/abstract=2030439> (explaining the two above-referenced principles associated with *Carolene Products*).

179. MAYER, *supra* note 1, at 2.

180. State and federal regulatory power within the realm of health, safety, morality, and general welfare was limited largely to the question whether the product in question was intrinsically harmful or not. *See Sawyer, supra* note 37, at 1 (discussing the *Hammer* case).

during the *Lochner* era, often proved to be an unreliable defense against regulatory encroachment.

Regardless of how constrained and unreliable liberty of contract was in practice, this doctrine was also diminished by the fact that it was a short-lived constitutional right.¹⁸¹ Mayer offers three factors to explain this development: first, as leading libertarian justices left the bench, the Court transitioned away from dominance by moderate *Lochner*ians;¹⁸² second, despite the doctrine's general presumption in favor of liberty, the standard of review used by the justices to protect liberty of contract was riddled with exceptions;¹⁸³ and third, significant changes in the law, both in constitutional law principles and in theories of jurisprudence, as illustrated by the development of legal realism and the justifications for expanding the scope of the police power, took hold during the first few decades of the twentieth century.¹⁸⁴ Although this explanation may be apt, it seems unduly epigrammatic.

Since many explanations abound regarding the demise of freedom of contract, in addition to Mayer's elucidation, one ought to first reconsider David Bernstein's analysis. Bernstein shows that, in theory, sociological jurisprudence constituted a coherent philosophy of law that was independent of political considerations.¹⁸⁵ In practice, of course, it justified Progressive advocates' political and ideological commitments.¹⁸⁶ Bernstein confirms that "[m]ost advocates of sociological jurisprudence were primarily motivated by their desire that reformist legislation, especially legislation regulating the labor market, have a near-absolute presumption of constitutionality."¹⁸⁷ Secondly, Bernstein demonstrates the importance of Holmes's reasoning in *Lochner* as a spark toward the fulfillment of the dreams of the progressive vanguard, dreams that substituted

181. MAYER, *supra* note 1, at 97.

182. *Id.* at 98.

183. *Id.* at 99-103 (conceding that a majority of the justices during the period between the two world wars were unwilling to question (a) any exercises of the police power that seemed to protect workers' health, even if the legislation at issue effectively barred certain classes of person from particular occupations; (b) statutes relating to the performance of public work and statutes prescribing the character, methods, and time for payment of wages; (c) statutes regulating a business affected with the "public interest"; (d) statutes fixing the hours of work; and lastly (e) statutes involving matters within the traditional exercises of the police power including the protection of public morality).

184. *Id.* at 103-05 (describing (a) a fundamental shift in the way the American legal culture defined the police power from the well-defined categories of protecting the public health, safety and morality toward a looser, less well-delineated approach that include the notion of the promotion of the public welfare; and (b) a movement within the American legal culture from legal formalism to legal realism that was made possible by the acceptance of sociological theories of jurisprudence that extolled the notion that law should be seen as pragmatic and based on subjective principles as opposed to being based in natural law and natural rights and on objective principles).

185. BERNSTEIN, *REHABILITATING LOCHNER*, *supra* note 39, at 44.

186. *Id.*

187. *Id.*

evolutionary flux for natural law¹⁸⁸ and exchanged the notion of the common law based on natural rights and some form of higher law for an identifiable sovereign as an instrument for the institution of society's pragmatic will.¹⁸⁹ These dreams materialized in the form of Holmes's much belauded dissent in *Lochner*, which made him the intellectual leader of Progressive reformers regarding constitutional law¹⁹⁰ and an important legal theorist in the strategy to remove barriers to the elevation of dominant opinion.¹⁹¹ Charles Beard, Benjamin Cardozo, and the *New Republic* chimed in to proclaim that Holmes's opinion was a "flash of lighting [in] the dark heavens" enabling Holmes to become the voice of a new dispensation in the realm of law.¹⁹² Although it has been argued that Holmes's dissent did not really separate him from his fellow justices' methods, values, and jurisprudence,¹⁹³ widespread approval of Holmes's views by members of the social progress movement was grounded in distinct devotion to majoritarian paternalism.¹⁹⁴ Such devotion was fortified by escalating contempt for the natural law tradition, which was already in remission, and, as such, was seen as nothing less than a brooding omnipresence in the sky.¹⁹⁵ Approbation and contempt combined to reach their apotheosis in Justice Holmes's lecture in *Buck v. Bell*, which endorsed the advantages of majoritarianism, scientism, and human exclusion.¹⁹⁶

"Operating in stark contrast to *Lochnerian* liberty-of-contract jurisprudence, which was [occasionally] invoked to justify expanding constitutional protection of African Americans and women,"¹⁹⁷ the combination of the social progress movement, Holmes's dissent in *Lochner*, and his crushing rhetoric in *Buck* conforms to the jurisprudential path inaugurated by the Supreme Court in *Plessy*.¹⁹⁸ Established on a foundation fashioned by the observation that the

188. See, e.g., Bradley C. S. Watson, *Oliver Wendell Holmes, Jr. and the Natural Law*, THE WITHERSPOON INSTITUTE, available at <http://www.nlnrac.org/critics/oliver-wendell-holmes>, archived at <http://perma.cc/8AZ8-4WGN> ("Among [Holmes'] many accomplishments as a member of the Court was to help eradicate judicial reasoning based on principles of natural law or natural right. . . . For Holmes, law and society are always in flux, and courts adjudicate with an eye to law's practical effects. Morality has nothing to do with law; it amounts to little more than a state of mind. There are no objective standards for determining right and wrong and therefore no simply just answers to legal questions.").

189. See, e.g., *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J. dissenting) ("The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified.").

190. BERNSTEIN, REHABILITATING *LOCHNER*, *supra* note 39, at 45.

191. Hutchison, *Waging War on the "Unfit," supra* note 11, at 29.

192. BERNSTEIN, REHABILITATING *LOCHNER*, *supra* note 39, at 45.

193. Gerald Leonard, *Holmes on the Lochner Court*, B.U. L. REV. 1001, 1003 (2005).

194. See BERNSTEIN, REHABILITATING *LOCHNER*, *supra* note 39, at 44.

195. *Jensen*, 244 U.S. at 222 (Holmes, J. dissenting).

196. Hutchison, *Waging War on the "Unemployables," supra* note 82, at 42-43.

197. *Id.* at 42.

198. Hutchison, *Waging War on the "Unfit," supra* note 11, at 21-26, 28 (demonstrating the

Framers offered a mechanical, natural law theory in contradistinction to the recognition by members of the intelligentsia that society was a living organism that must obey the law of life and not mechanics, Progressives believed that the Constitution ought to be interpreted according to evolving Darwinian principles and standards.¹⁹⁹ Yet in order to effectuate Progressive policies as a vehicle to achieve societal transformation, Progressives sought judicial and legislative compliance with their highly paternalistic goals.²⁰⁰ The bold effort to achieve a paternalistic future sparked the development of an intriguing scheme. Before being deployed, this scheme—a broad conception of the state or federal government’s police power coupled with an equally broad conception of Congress’s commerce power—required a constitutional champion, one who was willing to eviscerate the retrograde forces that continued to ascribe to the natural law and natural rights tradition. This is where Justice Holmes’s audacious inclinations favoring deference to majoritarian pragmatism and paternalism took center stage.²⁰¹ The next section of this Article indicates that Holmes was not alone in defending paternalism. Instead, his inclinations, if not his language, accurately anticipated the subordination of liberty of contract and individualism to the forces of progress.

III. SHRINKING THE FORCE OF *LOCHNER* BY RECONSIDERING *HAMMER* AND PHILANDER KNOX?

Professor Sawyer’s recent scholarship²⁰² reconsiders the limits placed on Congress’s power to regulate interstate commerce in order to promote the health, safety, morality, and general welfare of the nation.²⁰³ His work offers a valuable perspective on Professor Mayer’s spirited efforts. First, Sawyer points out that the federal police power was seen as a vehicle to diminish the power of individual actors by turn-of-the-century Progressives who were increasingly looking to the national government to address social welfare problems, particularly those created by degenerative competition among the states.²⁰⁴ After celebrating a number of early triumphs, progressive hierarchs found that Congress’s authority to exercise its federal police power was significantly limited by the Supreme Court in *Hammer v. Dagenhart*.²⁰⁵ Although the Court “disclaimed any inquiry into the purpose or intent of Congress, in enacting the statute,”²⁰⁶ *Hammer* would only allow Congress to prohibit the interstate shipment of intrinsically harmful goods, like immoral lottery tickets, or impure food, but not items that were in and

biological connection between *Plessy v. Ferguson* and progressive thought).

199. *Id.* at 26-27.

200. *Id.* at 27.

201. *Id.*

202. See generally Sawyer, *supra* note 37, at 1-63.

203. *Id.* at 1.

204. *Id.*

205. *Id.*

206. Cushman, *Caroline Products*, *supra* note 178, at 9 (citing Justice Day).

of themselves harmless, like the products of child labor.²⁰⁷ This meant that the liberty of contract doctrine would not apply to protect the free movement of goods or otherwise constrain federal police power if the item at issue was inherently harmful. *Hammer* limited the exercise of Congress's police power to the regulation or prohibition of harmful, as opposed to harmless, items. This limit, adopted for purposes of Commerce Clause adjudication, has been subject to withering criticism, as inconsistent with precedent, incoherent as policy and the product of a backward-looking commitment to a laissez-faire economy.²⁰⁸

It is possible that the critics are wrong. Yet why might *Hammer* be relevant for purposes of grasping the parameters of liberty of contract as a constitutional right? A principled understanding of *Hammer* is crucial not only because of its prominent place in the canon of constitutional law but, more importantly, due to the central role it plays in (a) supporting a contested understanding of the *Lochner* Court, (b) appreciating the increasing inability of the liberty of contract doctrine to preclude the exercise of arbitrary government power,²⁰⁹ and (c) defining the parameters of the police power itself. *Hammer* and its social welfare antecedents²¹⁰ indicate that the intentional effort made to diminish liberty of contract was part of a lengthy and culturally-conspicuous process that preceded *Lochner*, which implies that the *Lochner* opinion may well have been the end rather than the beginning of the Court's commitment to liberty of contract.

The following subsections demonstrate that *Hammer* and its harmless items limit represented the culmination of a remarkable doctrinal evolution that helped to shape the federal police power,²¹¹ influenced future interpretations of the states' police power, and helped to delineate liberty of contract jurisprudence. In all likelihood, an expansion of the domain of police power, either at the state or federal level, correlates with a consequent reduction in the scope of the liberty of contract doctrine as a bulwark against paternalism and accretions in government power. Sawyer's analysis provides a foundation to substantiate this probability.²¹² In erecting this foundation, Sawyer concentrates his scholarship on the public career and rich private papers of the lawyer primarily responsible for establishing, propagating, and defending both the federal police power and the harmless items limit: Philander Knox.²¹³

207. Sawyer, *supra* note 37, at 1.

208. *Id.* at 1-2.

209. *Id.* at 2-3.

210. *Id.* at 1 (describing decisions that recognized the federal police power and included *Hoke v. United States*, 227 U.S. 308 (1913); *Hipolite Egg Co. v. United States*, 220 U.S. 45 (1911); and *Champion v. Ames*, 188 U.S. 321 (1903)); see also Cushman, *Carolene Products*, *supra* note 178, at 9 (adverting to Justice Holmes' dissent in *Hammer* pointing out that Congress had been expressly granted the power to regulate interstate commerce and, as such, "the exercise of its otherwise constitutional power by Congress" could not be "unconstitutional because of its possible reaction upon the conduct of the States in a matter upon which . . . they are free from direct control.").

211. Sawyer, *supra* note 37, at 3.

212. *Id.*

213. *Id.* (reconsidering the life's work of Philander Chase Knox). Mr. Knox was the leading

A. The Harmless Items Limit as a Vehicle to Adjust Constitutional Doctrine?

Sawyer shows that the harmless items limit was not invented in *Hammer* by a Supreme Court dedicated to promoting a laissez-faire economy; rather, the limit was invented by political moderates to reform the Commerce Clause doctrine well before *Hammer* and other *Lochner* era cases were decided.²¹⁴ Acting as a gap-filler within the realm of the Dormant Commerce Clause that prevented states from acting to preclude social evils,²¹⁵ the invention was designed to address the challenges of a new century while preserving what political moderates viewed as a valuable existing doctrine.²¹⁶ Inherent in any effort to address new challenges is the risk that such challenges will overwhelm any pre-existing doctrinal limits that might otherwise constrain the application of government power to individual citizens. Equally true, is the fact that the ongoing effort to address new challenges, a maneuver led largely by Progressives, may expose substantive due process as a rather impotent doctrine, in light of the nation's growing dependence on expertise.

Adverting to the nation's focus on collective action problems created by an increasingly integrated national economy,²¹⁷ and elevating human experience and the belief that government needed to play a dynamic role in ensuring that monopolies did not destroy functioning markets,²¹⁸ the record, per Sawyer's account, shows that the doctrine adopted in *Hammer* was not an ideological "attempt to return America to an imagined laissez-faire past, but was a half-way house on the road to the modern Commerce Clause doctrine"²¹⁹ and its corollary, the modern bureaucratic state. Sawyer's contribution to the literature simultaneously accomplishes two things: (1) it undermines the dominant contention that *Lochner* era judges who favored liberty of contract jurisprudence were engaged in a retrograde abuse of judicial power, and (2) it destabilizes the contention of revisionist scholars who maintain that *Lochnerian* jurisprudence can be separated from the legal and cultural currents of the day that favored progressivism, the regulatory state, and paternalism itself.²²⁰ Consistent with the

lawyer of his day; he was asked three times to join the Court by the same two Presidents who appointed all five members of the *Hammer* majority. *Id.* "As Attorney General, he shaped the establishment of the federal police power when he oversaw the litigation in *Champion v. Ames*; as a United States Senator, he helped define the limits of the doctrine in debates over the legislation that led to the decision in *Hipolite Egg*; and as a Presidential candidate and a nationally respected lawyer he defended the doctrine's limits in the legal literature." *Id.*

214. *Id.* (discussing the litigation in *Champion*, 188 U.S. 321, and opining that the harmless items limit was invented well before *Hammer* was decided).

215. *Id.* at 39 (citing Justice Harlan's majority opinion in *Champion*).

216. *Id.* at 3.

217. *Id.*

218. *Id.* at 23 (primarily discussing the views of Philander Knox).

219. *Id.* at 3.

220. *See, e.g., id.* at 5-8 (discussing the advent of case law establishing a federal police power).

latter claim, Sawyer demonstrates that, in a number of decisions, the Court fortified the progressive agenda and the tenets of paternalism by expressly and substantially, weakening its commitment to substantive due process.²²¹ He demonstrates that in *Champion v. Ames*, a 1903 decision, the Court upheld a federal prohibition on the interstate movement of lottery tickets because it threatened the nation's morality.²²² In *Hipolite Egg Co. v. United States*, a 1911 decision, the Court upheld the prohibition of impure or adulterated food and drugs in order to achieve federal police power ends,²²³ and in 1913, in *Hoke v. United States*, the Court stated that Congress could prohibit the movement of anything in interstate commerce if the prohibition ultimately promoted the health, safety, morality, or general welfare of the nation.²²⁴ On a doctrinal level, these decisions, which vindicated the police power and shredded freedom to contract, were coherent with the views of moderate Progressives, who advocated a comprehensive rejection of laissez-faire economics.²²⁵ Notably, this rejection of laissez-faire economics by members of the progressive or moderately progressive vanguard including Philander Knox, among others, began as early as 1902,²²⁶ three years before *Lochner* was decided.²²⁷ By adopting and affirming moderate progressive teleology that was fashioned by larger structural forces beyond the justices' private preferences,²²⁸ the Supreme Court's capitulation to this approach, in a number of *Lochner* era decisions, signals that if *Lochner* was a great victory for liberty, then it was an inevitably impermanent one.

Sawyer's intuition operates contrary to the dominant narrative, which stipulates that the *Hammer* majority simply ignored precedent and established a nonsensical rule that enabled Congress to prohibit the interstate shipment of harmful, but not harmless, goods.²²⁹ The conventional view of *Hammer* is regularly joined with the conventional view of *Lochner* as grounds for indicting the early twentieth-century Supreme Court for the crime of "manipulating meaningless legal forms to protect a laissez-faire economy that privileged powerful business at the expense of workers, the people, and children."²³⁰ This indictment has supported a particular view of judicial process as nothing more than the instantiation of judicial policy preferences, which leads to the corresponding conclusion that constitutional law is nothing more than preferences

221. *Id.*

222. *Id.* at 5-6.

223. *Hipolite Egg Co. v. United States*, 220 U.S. 45 (1911).

224. *Hoke v. United States*, 227 U.S. 308 (1913); Sawyer, *supra* note 37, at 6-7.

225. Sawyer, *supra* note 37, at 23-29 (describing Knox's private and public rejection of laissez-faire economics including his rejection of the notion that the market is "natural" and existed prior to the creation of government).

226. *Id.* at 23.

227. *See Lochner v. New York*, 198 U.S. 45 (1905).

228. Sawyer, *supra* note 37, at 63.

229. *Id.* at 9.

230. *Id.* at 9-10.

writ large.²³¹ As we have previously seen,²³² reality is quite different from this highly reductionist view of constitutional law.²³³ Although Sawyer confirms the revisionist contention that *Lochner* has been increasingly understood as having its “roots in an abolitionist concern with free labor and a long-standing judicial concern with the influence of factions in politics,”²³⁴ he also states that the *Lochner* era Court justices stirred by the evolving *zeitgeist*, routinely upheld significant regulations of the economy that impaired the promotion of a principled conception of a free market economy.²³⁵ *Hammer* heralds the Court’s acceptance of moderate progressivism and, as such, was not inconsistent with the Court’s evolving approach to state and federal regulation. In order to understand this, it is necessary to consider Philander Knox’s ideological contributions to this development.

Focusing on the life and career of Philander Knox, Sawyer shows that moderate progressive views, as encapsulated by the harmless items limit on federal police power, were not idiosyncratic,²³⁶ nor did they appear suddenly.²³⁷ In 1908, as an active government participant and nationally respected lawyer who held the trust and admiration of President Taft and President Theodore Roosevelt,²³⁸ Knox argued for a moderate position on the reach of Congress’s commerce power.²³⁹ In essence, Knox maintained that Congress should be able to use its power to regulate commerce by prohibiting the interstate movement of goods, regardless of whether or not the goods were harmful, if Congress did so in order to protect or promote interstate commerce.²⁴⁰ Additionally, Congress should be able to “prevent the channels of interstate commerce from being used as a conduit for harmful goods, which meant that it could prohibit goods recognized as harmful.”²⁴¹ On the other hand, Congress could not prohibit “the interstate shipment of intrinsically harmless goods,” thus anticipating the rule that the Supreme Court adopted in *Hammer* a decade before the decision was issued.²⁴² The Knox doctrine provides, “the commerce clause was a judicially enforceable limit on the *ends* Congress could pursue, rather than the grant of a *means* Congress could use to pursue other ends.”²⁴³ More precisely, Knox asserted that,

231. *Id.* at 10.

232. *See supra* Parts II & III.

233. Sawyer, *supra* note 37, at 10.

234. *Id.* at 11.

235. *Id.* at 10.

236. *Id.* at 13-14.

237. *Id.* at 15-16 (discussing Philander Knox’s position in 1907 and 1908).

238. *Id.* at 15.

239. *Id.* at 16.

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

Congress may employ such means as it chooses to accomplish that which is within in [sic] power. But the end to be accomplished must be within the scope of its constitutional powers. The legislature's discretion extends to the means and not the ends to be accomplished by use of the means.²⁴⁴

If an item inflicted harm in the state of destination,²⁴⁵ then prohibition of harmful interstate commerce was within the realm of Congress's authority; however, Congress could not, under the guise of a commercial regulation, deny a person the right to engage in interstate commerce for doing that which it could not prohibit him from doing.²⁴⁶ Congress, accordingly, did not have a general police power to prohibit the interstate shipment of any goods whenever that prohibition would advance police power ends.²⁴⁷

Contesting this view, Justice Holmes rejected virtually all limits on Congress's power to regulate interstate commerce.²⁴⁸ While Holmes's modern defenders doggedly insist that any opposition to Congress's power to regulate interstate commerce amounts to a commitment to a laissez-faire economy,²⁴⁹ in reality, Holmes's virtually unconstrained deference to legislative authority was so broad that it allowed Congress to prohibit the interstate transportation of all goods from states in which divorce is allowed, or in which a husband was allowed to abuse his wife.²⁵⁰ Responding to the implications of this distasteful syllogism, Professor Thomas Reed Powell rejected the suggestion of Holmes's dissent in *Hammer* that any prohibition of movement in interstate commerce qualified as a "regulation of interstate commerce."²⁵¹ The pivotal point in Powell's analysis was the claim that in any activity involving the interstate commerce of intrinsically harmful goods, Congress could still regulate harmless products if a sufficient *nexus* could be demonstrated between the harm to be prevented and the interstate movement itself.²⁵² This reasoning clarifies Knox's somewhat narrower view, which would permit Congress to use the federal police power to prohibit the interstate shipment of harmful goods only.²⁵³ Knox offered "a formal doctrinal rule of the kind then common throughout the Court's constitutional jurisprudence that required a tight, rather than loose, connection between the means of prohibition and the end of regulating interstate

244. *Id.*

245. Cushman, *Carolene Products*, *supra* note 178, at 10.

246. Sawyer, *supra* note 37, at 17.

247. *Id.*

248. *Id.* at 18.

249. *Id.*

250. *Id.* at 19 (citing Professor Thomas Reed Powell).

251. *Id.* Equally clear, Professor Powell also rejected the majority's approach in *Hammer*.
Id.

252. *Id.*

253. *Id.* at 19-20.

commerce.”²⁵⁴

What does this all mean in the context of intersection of the police power, liberty of contract, and *Lochner*? Among other things, Knox and his enthusiasts would allow legislative regulatory reform consistent with the harmless items limit only when the reform efforts resembled something similar but not identical to an intermediate level of judicial scrutiny rather than a rational basis review.²⁵⁵ Although the Court eventually migrated from intermediate scrutiny to rational basis review of economic legislation,²⁵⁶ the harmless item approach signified that prohibition was allowable “[i]f an article was itself immoral, unhealthy, or unsafe, [or if] its shipment in interstate commerce would cause real harm in the receiving state.”²⁵⁷ Hence, prohibition would prevent a harm that was causally related to the item’s movement in interstate commerce,²⁵⁸ but disguised and deceptive legislation of the kind later favored by FDR²⁵⁹ could not pass muster.²⁶⁰ Within this framework, if the means chosen by Congress fit tightly with the end of regulating interstate commerce, then the law should be upheld.²⁶¹ On the other hand, if the article was intrinsically harmless, then the fit was loose, and this looseness suggested that the law was simply an, “attempt to use the commerce power to regulate a subject reserved for state authority and should therefore be struck down.”²⁶² Whether or not the harmless items limit is a doctrinal line that requires too tight of a connection between interstate commerce and the harm that Congress sought to prevent is a question beyond the scope of this Article. What Sawyer’s analysis demonstrates is that Knox, the Court, and a raft of Progressives on both sides of the political aisle²⁶³ adopted an analytic approach that was calculated to advance rather than impede a paternalistic agenda. Although speed limits were placed on the advance of the progressive reform agenda, Knox, the Court, and many politicians embraced the harmless items limit, which

254. *Id.* at 20.

255. *Id.* (showing that Knox’s harmless items limit was, in some ways, “similar to the same kind of means-end analysis now common in equal protection jurisprudence requiring a kind of strict or intermediate level scrutiny rather than rational basis review”).

256. *See, e.g.*, Cushman, *Carolene Products*, *supra* note 178, at 1 (explicating Justice Stone’s rational basis test for regulatory initiatives affecting economic activity); *see also* Weinberg, *Unlikely Beginnings*, *supra* note 167, at 1-2 (stating that *Carolene Products* formalized that Supreme Court’s acquiescence in the will of Congress and, by extension, the will of state legislatures).

257. Sawyer, *supra* note 37, at 20.

258. *Id.*

259. Ilya Somin, *Voter Knowledge and Constitutional Change: Assessing the New Deal Experience*, 45 WM. & MARY L. REV. 595, 652 (2003) (discussing FDR’s deceptive strategy for eliciting public support for the National Industrial Recovery Act).

260. *See* MAYER, *supra* note 1, at 22-23 (discussing the Jacobs case involving a federal law and the *People v. Marx* involving a New York state law).

261. Sawyer, *supra* note 37, at 20.

262. *Id.*

263. *Id.* at 21.

successfully married liberty to the regulatory spirit of the age.²⁶⁴ This marriage implicates our contested understanding of *Lochner* while simultaneously suggesting that the liberty of contract doctrine, much like the federal police power, could be the subject of endless adjustments necessitated by an evolving economy.

It bears repeating that in *Hammer*, the Justices did not concoct the distinction between harmful and harmless items in order to protect a laissez-faire economy, putatively threatened by the federal police power.²⁶⁵ Rather, this distinction was designed as a moderately progressive lubricant that would legitimize the increasingly frequent application of federal regulatory power to the complexities of a progressively interconnected economy. Although the formal pedigree of this approach could be traced back more than a decade to Knox's 1908 article in the *Yale Law Journal*,²⁶⁶ the most disquieting implication is that the effort to advance paternalism and adjust constitutional doctrine to accommodate the needs of an increasingly complex society might be traceable back to *Lochner* itself.

B. Analysis: Revising the Revisionists?

After the Supreme Court withdrew even mild constitutional protection for liberty of contract in the 1930s, a hostile perspective inherited from the Progressives has virtually monopolized scholarly discussion of the Court's liberty of contract decisions.²⁶⁷ Although *Lochner* languished in obscurity for some time,²⁶⁸ it was rescued from oblivion as its notoriety increased, "when both the majority and dissent in *Griswold v. Connecticut*—a high profile, controversial case decided in 1965—used it as a foil."²⁶⁹ Ever since, *Lochner* has been part of a highly fossilized substrate of the anti-canon in American constitutional debates.²⁷⁰ Historians have had a rather easy time discrediting some of the elements of the dominant narrative pursued by the contemporary inheritors of the progressive movement.²⁷¹ Revisionist scholarship shows that "the Supreme Court justices who adopted the liberty of contract doctrine did not have the cartoonish reactionary motives attributed to them by Progressive and New Deal critics."²⁷² Today the Court continues to use substantive due process to protect certain aspects of liberty, including most of the rights enumerated in the Bill of Rights as well as other "personal" rights,²⁷³ such as the right to privacy implicated by *Griswold*. However, following the "New Deal Revolution" of 1937, an

264. *Id.* at 22.

265. *Id.* at 22-23.

266. *Id.* at 23.

267. BERNSTEIN, REHABILITATING *LOCHNER*, *supra* note 39, at 2.

268. *Id.* (*Lochner*'s obscurity commenced during the late 1930s).

269. *Id.*

270. *Id.*

271. *Id.* at 3.

272. *Id.*

273. MAYER, *supra* note 1, at 2.

intellectual transformation occurred in relatively obscure cases prefiguring the advent of tiered scrutiny characteristic of modern rights-based constitutional litigation;²⁷⁴ the Court “ceased protecting liberty of contract, a right it had first explicitly recognized merely [forty] 40 years before.”²⁷⁵ This decision led to a new judicial acquiescence to the will of the legislative branches of both the federal and state governments²⁷⁶ and a further acceleration in the growth of both size and scope of government.²⁷⁷

Whether or not Mayer’s contention that the dominant critique of *Lochner* era adjudication was primarily the result of a sustained misreading of liberty of contract/substantive due process review,²⁷⁸ and whether this misreading foreshadowed reform efforts of the 1930’s, it must be stressed that his analysis neglects to satisfactorily explain why the Court’s putative commitment to liberty of contract during the *Lochner* era was merely sporadic at best. As scholars Lund and McGinnis show, substantive due process led to only occasional decisions to invalidate statutes and, accordingly, it was less like a hegemonic tool of constitutional interpretation and more like a “random strike of lightning.”²⁷⁹ Liberty of contract jurisprudence, regardless of its ostensible appeal as a bulwark against state or federal interference in the quotidian affairs of citizens, could not reliably preclude the instantiation of Progressive reforms since it did not provide a principled basis for doing so.²⁸⁰ More worryingly, it is likely that the liberty of contract doctrine, when honestly examined, is little more than an intriguing doctrine that decelerated, albeit while swiftly paving the way forward toward Progressive paternalism. This proposition seems particularly true when one ponders the deliberate attempt by political moderates during the *Lochner* era to reform the Commerce Clause doctrine so as to empower Congress to take a more active role in addressing the problems created by an increasingly integrated national economy.²⁸¹ Sawyer’s analysis, which concentrates on *Hammer*, the harmless items limit, and the views of one of America’s leading lawyers and

274. Weinberg, *Unlikely Beginnings*, *supra* note 167, at 291.

275. MAYER, *supra* note 1, at 2.

276. *See, e.g.*, Weinberg, *Unlikely Beginnings*, *supra* note 167, at 291-92 (suggesting that Footnote Four of the *Carolene Products*’s decision “is surely one of the great revolutionary achievements of the New Deal Court” that marked “a new judicial acquiescence in the will of Congress”).

277. This move leads inevitably to a contest to capture government-controlled resources. *See, e.g.*, JOHN GRAY, *POST-LIBERALISM: STUDIES IN POLITICAL THOUGHT* 4 (1996).

278. *See generally* MAYER, *supra* note 1, at 95.

279. Lund & McGinnis, *supra* note 97, at 1565.

280. *See, e.g., id.*

281. Sawyer, *supra* note 37, at 69; *see also* Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 *UCLA L. REV.* 1353, 1354-60 (2006) (suggesting that the Court has increasingly become a willing partner of Congress in providing federal oversight to state interference with the national market, and describing the greatly expanded power of Congress in recognition of the fact that we live in a world with an increasingly interconnected national commercial market).

statesmen, Philander Knox, indicates that Court decisions characterized in the popular imagination as standing for one proposition may be accurately understood as standing for the opposite.

It bears emphasizing that Knox, perhaps the most influential lawyer of his era, advanced his commitment to the “pre-historicist and teleological assumptions of Social Darwinism not to support laissez-faire economic theory, but to undermine it.”²⁸² Once laissez-faire and its philosophical underpinnings were vanquished by Social Darwinism, little stood in the way of a determined effort to destabilize society’s modest commitment to economic liberty; including a similarly moderate conception of liberty of contract. In keeping with the early views of Progressives²⁸³ and the contention that “evolutionary pressures driving social development would ensure that the ‘social tendencies’ that survived would be those that would be most helpful for future generations,”²⁸⁴ Knox, like many of his contemporaries, “accepted that the law of the survival of the fittest was ‘as valid and inexorable among social phenomena and forces as in any other field of biology.’”²⁸⁵ Competition, in this view, “produced progress in nature and in society and that iron law of development was largely beyond the control of mankind.”²⁸⁶ Mankind could resist its consequences; however, society and the nation’s Constitution ultimately had to accommodate this “iron law.”²⁸⁷ Such views led to others, including the contention that “uncontrolled competition like unregulated liberty is not really free.”²⁸⁸

The plausible implication of such Knoxian contentions for democratic governance, and economic policy is that freedom must be secured through quasi-scientific control and regulation.²⁸⁹ Although the notion that quasi-science managed by bureaucrats should control society contradicts the principle of freedom based on freedom of association,²⁹⁰ it is nevertheless true that Knox’s views reflecting his explicit commitment to the iron law of evolutionary development, while moderate in tone, were not dissimilar to the more radical views of Justice Holmes, whose thinking reflected the notion that legal systems,

282. Sawyer, *supra* note 37, at 90.

283. Hutchison, *Waging War on the “Unfit,” supra* note 11, at 22-23 (describing Progressives as those who subscribed to the notion that government was a living thing freighted by irresistible impulses requiring ever-expanding power as part of the natural evolutionary process).

284. Sawyer, *supra* note 37, at 90.

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.* at 91 (quoting Memorandum of Philander C. Knox, U.S. Att’y Gen., Comment on “underlying laws” (in all social and industrial movements) as suggested by Kidd’s *Principles of Western Civilisation* (1902)).

289. *Id.* (quoting Memorandum of Philander C. Knox, U.S. Att’y Gen., Comment on “underlying laws” (in all social and industrial movements) as suggested by Kidd’s *Principles of Western Civilisation* (1902)).

290. BOETTKE, *supra* note 2, at 42 (quoting Frank H. Knight, *The Role of Principles in Economics and Politics*, 1-29 AM. ECON. REV. 42 (1951)).

language, and the cosmos gradually evolve to bring order out of chaos.²⁹¹ The convergence of Knox and Holmes's views was part of a widespread and infectious consensus compatible with both paternalism and the tendency toward authoritarianism that is embedded in modern democracies.²⁹² Individual freedom must surely suffer in the process. Consequently, and in keeping with arguments that I have offered elsewhere,²⁹³ women, whose reproductive capacity the state of Virginia saw as an intrinsically harmful attribute, were placed at risk both by Justice Holmes's pulverizing rhetoric in *Buck* and by the Knoxian logic of *Hammer*. All that was necessary for this risk to be realized was for society to see human reproductive capacity in the same light (i.e., as a harmful attribute) and then to couple it with the ideology of societal advancement and the willingness to follow Nietzsche's example, which is signaled by the will to use power without moral restraint.²⁹⁴ Consistent with Knox's perspective, which suggests that law must learn from biology,²⁹⁵ this capitulation to Social Darwinism unleashed Progressive reformers to "pursue standards to identify individuals and groups who were unfit," as part of an . . . effort to transform society."²⁹⁶ Whether moderately or immoderately Progressive, adherents to this view were unwilling to allow the text of documents such as the Constitution or antique conceptions of liberty to stand in the way of a mounting effort to root out harmful products and, by extension, harmful people.²⁹⁷ Surprisingly, a rigorous examination of the *Lochner* opinion suggests potential sympathy with such global views. Specifically, while examining the police power and its application to the state of New York's legislation, the *Lochner* majority wrote:

There are, however, certain powers existing in the sovereignty of each state in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated, and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals, and general welfare of the public.²⁹⁸

One need not surrender to the language and grammar of postmodernism nor lapse into a solipsistic spasm in order to understand that relatively minor shifts in factual assumptions regarding the limits of the state or federal police power can

291. Susan Haack, *Pragmatism, Law and Morality: The Lessons of Buck v. Bell*, 3 EUROPEAN J. OF PRAGMATISM AND PHILOSOPHY, 65, 69-70 (2011), available at <http://ssrn.com/abstract=21116371> (describing Holmes' views).

292. See, e.g., Richard H. Pildes, *The Inherent Authoritarianism in Democratic Regimes*, in OUT OF AND INTO AUTHORITARIAN LAW 125-151 (Andras Sajo ed., 2003) (showing that authoritarianism is "an inherent structural tendency of democratic regimes").

293. See generally Hutchison, *Waging War on the "Unfit," supra* note 11, at 1-46.

294. See generally *id.* at 21.

295. See generally *id.* at 22.

296. See generally *id.*

297. See generally *id.*

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

produce seismic shifts in adjudicatory doctrine.²⁹⁹ And if the Constitution is living, then neither living originalism³⁰⁰ nor the text of the Constitution itself could save Carrie Buck, *Buck v. Bell*'s tragic victim, or anyone else from perdition driven by Mankind's quest to attain perfection. Perfection, on this view, is achievable by an ever-expanding regulatory state that operates under a banner declaring that resistance to progress is pointless.³⁰¹

Neither modern critics nor revisionist defenders of Lochnerian jurisprudence have adequately explained why state and federal police power³⁰² occurred simultaneously with the *Lochner* epoch. Correlatively, the Supreme Court, both before and during the *Lochner* era, recognized the "federal police power," analogous to the powers of state legislatures,³⁰³ to promote the health, safety, morality and general welfare of the nation,³⁰⁴ as well as the states' police power to limit the hours worked by female employees³⁰⁵ on grounds that women were inferior and, therefore, in need of protection.³⁰⁶ Lund and McGinnis confirm that the law invalidated by the *Lochner* majority was no more paternalistic than the public health measures approved both before and after the *Lochner* decision.³⁰⁷ Indeed, it is possible that neither the *Lochner* majority nor the dissent squares with anything resembling the original understanding of due process, an outcome that Chapman and McConnell explain in some depth.³⁰⁸ First, they show that the New York enactment failed because it was not a "necessary or appropriate" way to affect the state's interest in protecting the health of its citizens, and, therefore, was not a valid exercise of its police powers,³⁰⁹ which implies that a more modest interference with liberty would have been acceptable to the Court. Second,

299. See Suzanna Sherry, *Foundational Facts and Doctrinal Change*, 2011 U. ILL. L. REV. 145, 145 (focusing largely on doctrinal shifts within the judiciary).

300. JACK M. BALKIN, *LIVING ORIGINALISM* 154-55 (2011) (discussing commerce as intercourse, which enables the Supreme Court to work around older cases without overruling them explicitly as part of the federal courts' evolutionary form of common law decision-making that enables human progress).

301. See EDWIN BLACK, *WAR AGAINST THE WEAK: EUGENICS AND AMERICA'S CAMPAIGN TO CREATE A MASTER RACE* 9 (2003) (describing mankind's quest for perfection).

302. See, e.g., Sawyer, *supra* note 37, at 67 (citing *Hoke v. United States*, 227 U.S. 308 (1913); *Hipolite Egg Co., v. United States*, 220 U.S. 45 (1911); *Champion v. Ames*, 188 U.S. 32 (1903)).

303. Cushman, *Doctrinal Synergies*, *supra* note 118, at 241.

304. See *id.* (*Hammer* allowed Congress to exercise its federal police power by prohibiting the interstate shipment of harmful goods, but not items that were in themselves harmless, like the products of child labor).

305. See, e.g., *Muller v. Oregon*, 208 U. S. 412 (1908).

306. EPSTEIN, *supra* note 117, at 90-93.

307. Lund & McGinnis, *supra* note 97, at 1564 (showing that all of the Justices who participated in the *Lochner* decision appeared to agree that the legislature was "perfectly free to regulate the hours of bakers in order to protect their health").

308. Chapman & McConnell, *supra* note 28, at 1792-94.

309. *Id.* at 1793.

Chapman and McConnell show that “[t]hree of the Justices would have watered down this means-ends analysis, making it easier for the state to comply, and one Justice would have invalidated the statute only if it interfered with what a ‘rational and fair man’ would have recognized as a ‘fundamental’ right,”³¹⁰ and accordingly, “[n]one of these opinions squares with anything resembling the original understanding of due process, whether in 1791 or in 1868.”³¹¹ Third, the liberty of contract doctrine “on which the majority relies is not set forth anywhere in the Constitution and contradicts the uniform understanding from the Founding era through Reconstruction that legislatures have the authority to pass prospective and general legislation affecting contracts.”³¹² Fourth, Chapman and McConnell assert that “[t]he idea that individuals possess a freedom to contract with other persons to do anything they would be permitted to do individually may be attractive in the abstract (or not), but it does not appear anywhere in the Constitution.”³¹³ Fifth, they maintain that liberty of contract “has no basis in the Due Process Clause, which allows deprivations of natural liberty so long as they are achieved with due process of law, meaning proper enactment by the legislature and proper enforcement by the courts.”³¹⁴ Finally, they show that “the Court’s limitation of legitimate state legislative authority to ‘police powers’ has no textual basis.”³¹⁵ If Chapman and McConnell’s bracing analysis is accurate, it is doubtful that *Lochner* provides a secure plinth to advance liberty. Rather, it provides a rather limp instrument that is unable to reliably deny states the power to enact and enforce paternalism borne of Progressive presumptions or any other forms of majoritarianism.³¹⁶ Equally ominous, *Hammer’s* harmless items limitation on the federal police power and the Commerce Clause can be seen not as part of an effort to advance liberty, but rather as part of a deliberate strategy to advance paternalism within Knoxian limits. This conclusion operates consistently with the views of “living originalist” scholars who see commerce as intercourse, and enables the Supreme Court to work around older cases without necessarily overruling them explicitly as part of the federal courts’ evolutionary form of common law decision-making that facilitates human progress.³¹⁷

Given this record, Professor Mayer’s defense of the inherent value of *Lochner*, which incorporates his careful explication of the difference between liberty of contract jurisprudence and laissez-faire ideology, fails to consider the probability that the doctrine developed by *Lochner* and its progeny has always

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.* at 1793-94.

315. *Id.* at 1794.

316. *Id.* (arguing that the Federal Constitution does not purport to limit the powers of state government except in specific ways and concluding that the Tenth Amendment guarantees that all powers not denied to the states by the Constitution are reserved to them, an understanding that contradicts the *Lochner* majority opinion).

317. BALKIN, *supra* note 300, at 154-55.

been incapable of securing the constitutional right of liberty. Contrary to Mayer's claims, skeptical analysis shows that *Lochner* cannot be separated from a movement that created statutes consistent with the paternalistic and collectivist threads that ran deeply through the Anglo-American common law tradition during the middle of the nineteenth century in Great Britain.³¹⁸ However contested our understanding of *Lochner* may be,³¹⁹ the *Lochner* Court's moderate commitment to paternalism can be seen as part of process that diminished³²⁰ Americans' liberty interests and culminated in the contemporary contention that no limits exist on the federal government's power to impose its will on individuals who engage in "harmful" inactivity within the nation's healthcare market.³²¹ Notwithstanding its revisionist defenders, the *Lochner* decision, which evinced a moderate commitment to liberty and a rather spacious commitment to paternalism,³²² can be convincingly separated from classical Liberalism and the natural rights tradition; which necessitated limited government in order to protect individual rights and liberties.³²³

Equally plausible is the idea that *Lochner*, as the life and times of Philander Knox demonstrate, cannot be fully distinguished from the normative views of Progressives who justified an expansion in the size and scope of government as the inevitable consequence of evolution. Premised on the proposition that society was one indivisible whole that left no room for individuals or firms who declined to comply or otherwise consistently evolve with the needs of a modern and interconnected nation.³²⁴ Positing the regulatory state as an ontology of necessity and the prerogative of scientism, this embryonic cycle gave birth to a predatory process that repudiated classical liberalism and liberty of contract as static relics. Thus understood, it appears that *Lochner* and *Hammer* were less concerned with advancing liberty and more concerned with placing speed limits on an already advancing paternalism.

Whether swift or slow, paternalism's advance has been richly described by John Gray, who indicates that the modern state now acts as an instrument of

318. MAYER, *supra* note 1, at 55 (critiquing this approach).

319. For a discussion of contrasting explanations of the *Lochner* Court, see, e.g., Sawyer, *supra* note 37, at 68-70.

320. *Id.* (suggesting that the *Lochner* Court was part of a process that suggested few limits on government power).

321. See, e.g., Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) (noting that the federal government asserts that there is no temporal limit in the Commerce Clause for its power to dictate the conduct of an individual today because of a "prophesied future activity").

322. See, e.g., Lund & McGinnis, *supra* note 97, at 1564 (showing that all of the Justices who participated in the *Lochner* decision appeared to agree that the legislature was perfectly free to regulate the hours of bakers in order to protect their health).

323. Harry G. Hutchison, *Employee Free Choice or Employee Forged Choice? Race in the Mirror of Exclusionary Hierarchy*, 15 MICH. J. RACE & L. 369, 381 (2010) [hereinafter Hutchison, *Employee Free Choice*].

324. *Id.*

oppression rather than as an umpire enforcing the rules of civil association.³²⁵ Reflecting the cultural forces that were set in motion during the latter part of the nineteenth century, forces that ignited the Progressive Era as a tendentious effort to rid the nation of harmful products and people, as well as “destructive” competition, the evolution of this highly symbiotic process is explainable: government power expands in part because of the vast assets it already controls or owns, but also because no private or corporate asset is safe from invasion or confiscation by the state.³²⁶ This symbiosis correlates with state and federal legislative behavior, which can be best understood as the quest for the maximization of individual utilities by politicians rather than the search for phantom public interest.³²⁷ Far from favoring a Madisonian conception of equality as the basis for every law,³²⁸ the promulgation of legal and regulatory innovation has now become an all-encompassing activity that diminishes liberty and enables highly organized groups to hijack the political process for their own benefit.³²⁹

History shows that this move (i.e., the initiation of paternal process that aims to eliminate all sorts of harms) appears to be the central moral and cultural tendency of modern democratic societies.³³⁰ Reflecting a corset of cultural and social constraints that diminished previously dominant notions associated with an atomistic classical political economy³³¹ attached to the natural rights tradition, the liberty of contract doctrine, as transmuted and vitiated by moderate or immoderate Progressives during the period from 1902 to 1920, was incapable of stopping this evolving progression.

Skeptically considered, *Lochner*, *Hammer*, and other similar cases signaled the inevitability of “Progress,” as well as the contention that government has a duty to protect both the nation and individuals from the risks associated with harmful products and people, and from the threats posed by collective action problems arising in an increasingly integrated economy. Taken together, *Lochner* era cases accommodated the nation’s response to such fears while conforming to Philander Knox’s belief that in a “survival of the fittest” world, resistance to the forces of progress was futile.³³² Despite Mayer’s capable research, it is likely that his comprehensive defense of liberty of contract jurisprudence is diminished by analytical gaps that fail to satisfactorily account for the history and potency of the social, cultural, and quasi-scientific currents permeating the nation before, during,

325. GRAY, *supra* note 277, at 12.

326. *Id.*

327. DANIEL T. RODGERS, AGE OF FRACTURE 64 (2011).

328. MAYER, *supra* note 1, at 28.

329. GRAY, *supra* note 277, at 12.

330. *Id.* at 11-12.

331. *See, e.g.*, RODGERS, *supra* note 327, at 45 (cultural and social developments conspired to constrain previously dominant notions associated with an atomistic and individualist classical political economy).

332. Sawyer, *supra* note 37, at 26.

and after the onset of the *Lochner* era.³³³ Naturally, these currents destabilized the influence of laissez-faire economics, advanced Social Darwinism, moderated and then robbed the effectiveness of liberty of contract, and shrunk individual liberty. This remains true despite David Bernstein's contention that, in the 1920s, the Court became more aggressive about reviewing government regulations in the economic sphere, as the Justices "began to acknowledge the broader libertarian implications of *Lochner* and other liberty of contracts cases" as an enforceable limit on government authority.³³⁴

While proof of cause and effect remains complex, Mayer's shortcomings regarding the potency of the social and cultural currents saturating the nation lead to other shortcomings. Toward the end of his book, Mayer appears to confirm public choice theory's key insight that people and groups act to further their own private interest rather than the public interest, whether they do so publicly or privately.³³⁵ Ratifying John Gray's incisive analysis, and implicating Warren Samuels's emphasis on the irreducible embeddedness of all economic processes in the political and legal nexus,³³⁶ Mayer inspects *United States v. Carolene Products Co.*,³³⁷ a decision that has occupied scholars for decades. This decision upheld the federal Filled Milk Act of 1923, a statute that prohibited the interstate shipment of all skimmed milk compounded with any fat or oil aside from milk fat.³³⁸ Mayer shows that this decision "was 'an utterly unprincipled example of special interest legislation' that mainly targeted skimmed milk laced with coconut oil, which was cheaper than canned milk containing milk fat."³³⁹ Since the major force behind the act was a privileged segment of the dairy industry that sought an economic advantage over its less privileged competitors, the legacy of *Carolene Products* is deepened by noting its reification of the primacy of special interest group politics.³⁴⁰ Mayer reacts to this development by stating that *Carolene Products*, along with its Footnote Four dictum protecting certain rights and minorities from discrimination, establishes a double standard.³⁴¹ Per Mayer's account, the double standard signifies that "the Court . . . gives less constitutional

333. See, e.g., RODGERS, *supra* note 327, at 4 ("In contrast to mid-nineteenth-century notions of the self as a free-standing, autonomous production of its own will and ambition, twentieth-century social thinkers had encircled the self with wider and wider rings of relations, structures, contexts, and institutions.").

334. BERNSTEIN, *REHABILITATING LOCHNER*, *supra* note 39, at 5.

335. MAYER, *supra* note 1, at 110-11 (inspecting *United States v. Carolene Prods.*, 304 U.S. 144 (1938)). *Carolene Products* upheld the Federal Filled Milk Act of 1923, a law mainly targeting skimmed milk laced with coconut oil, which was cheaper than canned milk containing milk and hence the law can be seen as favoring special interest in a process that verifies public choice theory's insights.

336. BOETTKE, *supra* note 2, at 109 (quoting Samuels).

337. 304 U.S. 144 (1938).

338. MAYER, *supra* note 1, at 110.

339. *Id.*

340. *Id.*

341. *Id.* at 111.

protection to economic liberty and property rights—the rights formerly protected by its *Lochner*-era liberty-of-contract jurisprudence—than it gives to other rights.”³⁴² Given the special interest group legacy of *Carolene Products*, and in light of the fact that disadvantaged groups have less access to power and influence,³⁴³ it is possible to dispute this contention on grounds that what the decision grants in Footnote Four, it takes away within the framework and legacy of the decision itself. Rather than truthfully creating a double standard within the domain of substantive due process jurisprudence,³⁴⁴ which blocks any legislation disfavoring members of minority groups, *Carolene Products*, in practice, favors entrenched groups at the expense of African Americans and other outsiders³⁴⁵ “[s]o long as the government’s action bears some connection to a minimally rational economic policy”³⁴⁶

A rich harvest of toxic fruit has been produced in the pursuit of “Progress” and the Public Good. Eschewing the “harmful” and surrendering to a salvific belief in expertise and social science as instruments of social control, this harvest signifies paternalism’s deification. The police power, which is amply armed with language from *Lochner*, *Hammer*, or other cases from the liberty of contract canon, provides the Supreme Court with a ready justification for minimal scrutiny: the protection of the safety, morals, health and general welfare of the public.³⁴⁷ Although it may be doubtful that the federal government, as a regime of enumerated powers, ever had residuary police powers,³⁴⁸ Sawyer shows that a consensus emerged in 1906 regarding freedom of contract and the Commerce Clause, implying that if a regulation was a legitimate adjustment of interstate commerce, then, by definition, it was not a violation of freedom of contract.³⁴⁹ Equally true, state regulations that advanced police power purposes—health, safety, morality, or general welfare—were legitimate,³⁵⁰ which suggests, but does not necessarily prove, that substantive due process and liberty of contract were

342. *Id.*

343. Harry G. Hutchison, *Racial Exclusion in the Mirror of New Deal Responses to the Great Crash*, NEXUS: 15 CHAPMAN’S J. L. & POL’Y 5, 13 (2009-2010) [hereinafter Hutchison, *Racial Exclusion*] (observing that government intervention disfavors the individuals and groups that lack political and economic clout).

344. See MAYER, *supra* note 1, at 111 (arguing that *Carolene Products* created a double standard in the Supreme Court’s modern substantive due process jurisprudence).

345. See Hutchison, *Employee Free Choice*, *supra* note 323, at 396-405 (cataloguing statutes and their consequences on African Americans during the New Deal, a process ultimately approved by the Supreme Court).

346. MAYER, *supra* note 1, at 110 (citing Timothy Sandefur).

347. *Lochner v. New York*, 198 U.S. 45, 54 (1905).

348. Cushman, *Doctrinal Synergies*, *supra* note 118, at 241 (showing that Congress did possess a power analogous to the police powers of the state legislatures, enabling it to protect the free flow of interstate commerce, which may provide a basis for interfering with the contractual relations of businesses that are affected with the public interest).

349. Sawyer, *supra* note 37, at 47-48.

350. *Id.* at 48.

conceptualized as moderate in theory but rather feckless in practice. This is so despite the efforts of *Lochner*'s ablest defender, David Bernstein, who suggested "that the decision rested on sound principles of economics and liberty, that concepts of natural rights and liberty of contract had deep roots in political theory, and that the bakers' hours legislation struck down in the case was a disguised scheme to favor entrenched and well-heeled special interests."³⁵¹ Although conventional attacks on the underlying ideology of the *Lochner* decision may well be unfounded,³⁵² and while the outcome of the Court's adjudication of economic liberty might well have been changed by the discovery of a robust conception of liberty in the text of the Constitution, today, the mere assertion that the subject relates even remotely to any of the categories of the police power pantheon, or alternatively implicates the Commerce Clause, appears to legitimate a statutory enactment, no matter how noxious the enactment.³⁵³ Although it cannot be argued that any one case alone ensured Progressivism's questionable achievements, and while history is inherently agnostic about the soundness of *Lochner*³⁵⁴ and *Hammer*, it is doubtful that either case offers a moral principle that would necessarily inhibit the advance of majoritarian paternalism. Taken together, this tidy paradigm confirms Ralph Inge's remarkable intuition that when defenders of liberty marry the regulatory spirit of the age, they unavoidably become widowers.³⁵⁵ Properly considered, to enshrine the harmless item limit within the doctrine of liberty of contract is to advance the culturally potent goals of the regulatory state rather than the rediscovery of a lost constitutional right. The widespread acceptance of this Knoxian approach signals that to the extent that liberty of contract is traceable to *Lochner* and *Lochner*-era cases, this doctrine spent its force *ab initio*.

Because Americans live in a late modern, post-secular world characterized by collective and individuated narcissism reinforced by solipsism,³⁵⁶ it would be naïve to believe that any single book could bridge the differences in tolerable opinion about deeply contestable matters such as the meaning, scope, and duration of liberty of contract jurisprudence. It is doubtful that substantive due process jurisprudence can be resuscitated by its subversive defense on the part of revisionist and originalist scholars; and this is true regardless of whether or not substantive due process is seen as legitimate or if originalism is seen as

351. Chapman & McConnell, *supra* note 28, at 1794.

352. *Id.*

353. *See, e.g.,* Brazier Constr. Co. v. Chao, 2002 U.S. Dist. LEXIS 28523 (D.D.C. Apr. 26, 2002) (upholding the Davis-Bacon Act, an act designed to protect white males against a claim that it was passed with discriminatory intent or purpose in violation of the Equal Protection guarantees of the Constitution. In reality, the Davis-Bacon Act and its progeny honor the legacy of Robert Bacon, co-author of the Act, who denied anti-African American animus but made clear his discomfort with "defective" workers taking jobs that rightfully belong to white union men); *see also* Hutchison, *Employee Free Choice*, *supra* note 323, at 412-13.

354. BERNSTEIN, REHABILITATING *LOCHNER*, *supra* note 39, at 6.

355. DOUTHAT, *supra* note 29, at 106.

356. *Id.* at 234-35, 240.

wrongheaded.³⁵⁷ Consistent with this deduction, this Article maintains that Professor Mayer's endeavor to rediscover a "lost constitutional right" is not fully tenable. Although it is true that disadvantaged individuals and groups would have benefited marginally had the *Lochner*ian liberty of contract doctrine been practiced consistently, at the end of the day it is probable that the size and scope of government would have approached its current apex predicated on the need to control and regulate an increasingly interconnected country. The liberty of contract doctrine, either in the hands of the *Lochner* Court majority or guided by the "moderate progressive" preferences of Philander Knox, appears to be inherently insufficient to preclude the instantiation of the regulatory state and its consequent subordination of human liberty to the paternal, if not the maternal, impulse.

The need to protect vulnerable people and markets along with the desire to ensure the health, safety, morals, and general welfare of society generates a culturally persuasive approach that glorifies Leviathan and shelters the search for economic and ideological rents from thorough scrutiny. Ably assisted by flexible, if not living language regarding both the notion of harm and the text of the Constitution, the Supreme Court has had little difficulty in legitimating the regulatory state. This maneuver is richly represented by the New Deal and its dubious achievements.³⁵⁸ Any sustained inspection of the New Deal and its progeny reveals a paradox: the attempt to attain social justice through government planning and regulation has often produced the opposite result.³⁵⁹ This irony appears to be the result of modern humans' quest for organizational predictability, predicated on the presumptive viability of social science³⁶⁰ and its correlative conceit, sociological jurisprudence. The search for order and certainty as a cure for human insecurity³⁶¹ creates a demand not only for law, but a demand for more precise law.³⁶² Since organizational success and predictability exclude one another, the project of creating a predictable society through endless quasi-scientific efforts by government bureaucrats is doomed by the very facts of social life.³⁶³ This is so because humans respond in unexpected ways to new regulatory thrusts, thus rendering organizational success based on bureaucratic managerialism and Progressivism as exemplary elements of a totalizing ideology that describes modern democratic states as nothing less than a factual and moral fiction.³⁶⁴

While it is true that after the death camps, the Gulag, and the New Deal slave

357. Chapman & McConnell, *supra* note 28, at 1675.

358. *See, e.g.*, Hutchison, *Racial Exclusion*, *supra* note 343, at 5-13.

359. *Id.* at 8 (discussing Goldberg's analysis).

360. ALASDAIR MACINTYRE, *AFTER VIRTUE* 88-108 (2007) (discussing the human search for predictability through social science generalizations).

361. Frohnen, *supra* note 15, at 536.

362. *Id.* at 537.

363. MACINTYRE, *supra* note 360, at 106.

364. *Id.* at 106-07.

camps,³⁶⁵ it was harder to credit the naïve Progressive belief that the modern scientific age, with its deadening focus on technique,³⁶⁶ represented a long march toward enlightenment and peace;³⁶⁷ and, while the consistent enforcement of the substantive due process doctrine had, and perhaps still has the potential to curb the expansion of the regulatory state, the pregnant capacity of this construct has gone unrealized. Because the *Lochner* Court, along with moderate Progressives of the day, was prepared to embrace as virtuous of a version of paternalism that differs only in degree from the state of New York's capitulation to special interest groups' pleadings in the form of legislation designed to favor large bakeries at the expense of small ones,³⁶⁸ it is inconceivable that the rediscovery of a lost constitutional right purportedly embedded in this case could reliably thwart clear and present dangers to liberty. These risks have materialized in a sharp expansion of the regulatory state, a process that demonstrates that the belief in social control, as advanced by Philander Knox and embodied in the notion of expertise, is a masquerade.³⁶⁹

CONCLUSION

Professor Mayer offers elegant arguments for rehabilitating liberty of contract that deserve admiration rather than obloquy. However, a conscientious assessment of the language and grammar of *Lochner*, *Champion*, *Hipolite*, *Hammer*, and *Hoke*, as well as a portfolio of cases decided during the period from 1897 to 1937, in combination with an assessment of the life and times of Attorney General-turned-Senator Philander Knox, raise doubts regarding the success of this project. This Article's examination of Mayer's project suggests that neither the Court nor the nation, at least since the latter part of the nineteenth-century, was prepared to reliably accept a modest conception of liberty of contract jurisprudence as a constraint on the government's reach. Instead, both the Court and the nation were primed to embrace majoritarian paternalism all the way down. Paternalism and the ever-growing modern state were grounded on legal positivism and succeeding forms of jurisprudence, which combined to favor the idea "that we cannot have law without an underived authority. Law, on this view, must come from somewhere and is in its nature a command, so a commander

365. See RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS 1-2* (2007) (richly documenting the attempts by African American workers to escape the virtual slaves camps that were established with the approval of the federal government during the early 1940s).

366. BOETTKE, *supra* note 2, at 176-77.

367. DOUTHAT, *supra* note 29, at 23.

368. See MAXWELL L. STEARNS & TODD J. ZYWICKI, *PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW 80* (2009) (suggesting that the disputed regulation at issue was designed for bakers who worked at the larger industrial bakeries that already complied with the various state safety and hours regulations, as reflected in the New York law, at the expense of small, often immigrant-owned bakeries that did not).

369. MACINTYRE, *supra* note 360, at 107.

must issue the laws and to do so must be in a position subservient to no one,³⁷⁰ or, by extension, no principle. Representing an immense concentration of power in the state, this move toward positivism has fatally undermined notions of liberty and natural law that might otherwise limit the power of government.³⁷¹

This trend has been hastened by the increasing inability of Americans to restrain their appetite for government-supplied goods and services, a development reflected in the nation's bloated public debt. This trend creates an immodest if not degenerate domestic government at both the state and federal levels "that tries to be all things to all people no matter which political party is in power . . ."³⁷² This progression has been encouraged by partisans who oscillate between circulating apocalyptic fears regarding harmful people and products and offering messianic delusions to save us from ourselves without the need for either self-control or personal sacrifice.³⁷³ Rightly deconstructed, the nation's political and juridical enterprise, mirroring the moderately Progressive architecture of Knox and the immoderate ideology of Holmes, shields society from the conclusion that no human institution can protect us from the unpredictability or the inescapable disappointments of life lived in the shadow of hope and injustice.

Consequentially, this process evokes Orwell's admonition that saints should be judged guilty until they are proven innocent,³⁷⁴ which supplies a suitable metaphor for measuring judges, politicians, citizens, and claims of constitutional rights in our current epoch, an era that unfurls under a banner offering new threats to human contingency, mortality, and the possibility of eternity. Until citizens, politicians, and judges display modesty regarding the nation's capacity to solve the human problem and immodesty regarding an individual's right and responsibility to solve her own difficulties in voluntary communion with others, it remains doubtful that the rediscovery of liberty of contract, as a lost constitutional right, can become anything but an attractive anachronism.

370. Frohnen, *supra* note 15, at 538.

371. *Id.* at 529.

372. DOUTHAT, *supra* note 29, at 5.

373. *Id.*

374. *Id.* at 229 (citing Orwell).