

The Presumptions of Classical Liberal Constitutionalism

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Richard A. Epstein’s *The Classical Liberal Constitution* is an imposing addition to the burgeoning body of legal scholarship that seeks to “restore” a robust conception of economic liberty and limited government to its rightful place at the center of American constitutionalism.¹ Legislators and judges operating within a “classical liberal conception of government,” Epstein explains, would approach skeptically “[a]ll [regulatory] proposals that deviate from the basic common law protections of life, liberty, and property.”² Classical liberal constitutional courts would thus renounce the

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1. See, e.g., RANDY E. BARNETT, *OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE* 23 (2016) (arguing that the Framers created a “republican” constitution that “views the natural and inalienable rights of . . . joint and sovereign individuals [as] preceding the formation of governments, so first comes rights and then comes government”); DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* 3 (2011) (seeking to “rehabilitate” the “liberty of contract doctrine” associated with *Lochner v. New York*, and arguing that that doctrine “was grounded in precedent and the venerable natural rights tradition”); David E. Bernstein & Ilya Somin, *The Mainstreaming of Libertarian Constitutionalism*, 77 *LAW & CONTEMP. PROBS.* 43, 43 (2014) (describing approvingly a convergence in recent decades between “mainstream” and “libertarian,” or “classical liberal,” constitutional thought).

2. RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT* 98 (2014).

toothless rational basis review of the post-New Deal “progressive mindset,” and instead subject to exacting scrutiny the government’s “purported justifications both as to the ends [it] chooses and the means [it] uses to achieve them.”³ Such a recalibration of constitutional scrutiny, Epstein predicts, would “exert[] a profound,” and highly salutary, “effect on the size of government.”⁴

Readers who share Epstein’s normative commitments naturally will find his constitutional vision compelling. But *The Classical Liberal Constitution* is not merely preaching to the choir; it is also addressed to those of us—constitutional progressives and conservatives alike—who do not necessarily share the author’s definition of individual liberty, faith in unregulated markets, or enthusiasm for limited government. And this large and politically heterogeneous segment of Epstein’s audience will just as naturally greet his constitutional vision with suspicion that Epstein is, to paraphrase Justice Holmes, attempting to engraft upon the Constitution a political and economic theory to which a majority of the country does not subscribe.⁵

Epstein anticipates the charge and comes ready with an answer: The argument for classical liberal constitutionalism does not proceed from liberal political and economic theory (key premises of which, Epstein understands, many readers do not embrace); nor does it depend on the Constitution’s text or the original meaning of specific provisions (both of which, Epstein acknowledges, are often ambiguous or indeterminate).⁶ Rather, Epstein stakes the cogency of his vision to the authority of history. Indeed, the great ambition of *The Classical Liberal Constitution* lies, in large part, in Epstein’s argument that the Constitution not only *can* be read as a classical liberal document, but that it “was *intended* to embody the theory of classical liberal thought.”⁷ The men who convened in Philadelphia in the summer of 1787 were steeped in social contract and natural law theory, Epstein contends, and designed a constitutional framework that reflected their worldview, jealously protecting liberty and property against governmental encroachment.⁸ This “classical view of American constitutionalism,” moreover, went on to enjoy “a long historical run of about 150 years,” right up until the progressive “rewriting” of the

3. *Id.* at 310.

4. *Id.* at 311.

5. *See* *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (accusing the majority of deciding the case “upon an economic theory which a large part of the country does not entertain”).

6. *See* EPSTEIN, *supra* note 2, at 47 (noting that “many jurisdictional commands, such as those under the Commerce Clause, and many substantive protections, such as those in the Bill of Rights, offer what can only be termed open invitations to courts, and indeed everyone else, to flesh out the meaning of the key terms”).

7. *Id.* at 582 (emphasis added).

8. *Id.* at 4–5, 18.

Constitution during the New Deal “revolution” of 1937.⁹ Fidelity to that worldview and framework, in turn, requires courts to “examine[] all legal interventions under a presumption of error.”¹⁰

Legal historians will find much to critique in Epstein’s appeal to history. Herbert Hovenkamp, among other contributors to this forum, convincingly demonstrates that Epstein vastly overstates the influence of classical liberal thought on early American constitutional law. As Hovenkamp observes, while constitutional Framers such as James Madison read and admired Adam Smith and other leading lights of 18th-century liberalism, “[t]he economic views that dominated in late 18th-century America favored active government involvement in managing the economy,” and reflected a view of statecraft best described as “pre-classical.”¹¹ There was indeed a “classical constitutional revolution,” Hovenkamp argues, but the “*laissez faire* doctrines that characterized 19th-century legal classicism actually came into existence 40 or more years after the Constitution was ratified,” in the Jacksonian campaign against special legislative privileges.¹²

My object in this Response is both to extend Professor Hovenkamp’s critique of *The Classical Liberal Constitution*, and to add a significant caveat. In brief, while I heartily agree with Hovenkamp’s contention “that the Constitution was not classical in its inception,” and that classical liberal tropes of economic liberty and limited government gained a serious hearing only decades later,¹³ I believe that Hovenkamp in fact concedes too much. It is undoubtedly true that Jacksonian hostility toward certain forms of government involvement in economic development—for example, state-sanctioned monopolies, special tax exemptions, and direct public subsidies financed through municipal bonds¹⁴—helped to propel the constellation of 19th-century doctrinal developments¹⁵ that both Epstein and Hovenkamp

9. *Id.* at 34; see RICHARD A. EPSTEIN, *HOW PROGRESSIVES REWROTE THE CONSTITUTION* 76, 135 (2006).

10. EPSTEIN, *supra* note 2, at 5.

11. Herbert Hovenkamp, *Inventing the Classical Constitution*, 101 IOWA L. REV. 1, 4, 10 (2015). Professor Edward Purcell’s contribution to this exchange, which was published while the present Response was in the late stages of the editing process, is devastating on this count, concluding after an exhaustive analysis of the history and historiography of the Founding era that the “classical liberal Constitution” that Epstein describes comes not from the worldview of the Founders, but from the distinctly modern “libertarian, free market views and values that he projects [onto] them.” Edward A. Purcell, Jr., *What Changes in American Constitutional Law and What Does Not?*, 102 IOWA L. REV. ONLINE 64, 114 (2017); see *id.* at 89–128 (stating that Epstein approaches history in an effort to support his own “preconceived paradigms”); see also generally Samuel R. Olken, *The Refracted Constitution: Classical Liberalism and the Lessons of History*, 101 IOWA L. REV. ONLINE 74 (2016) (disputing Epstein’s historical claims that the Founders embedded a classical liberal worldview into the Constitution).

12. Hovenkamp, *supra* note 11, at 4.

13. *Id.*

14. *Id.* at 19–20.

15. These include the narrowing of the federal commerce power; the expanded application of the Contract Clause; the extension beyond traditional eminent domain of

identify with classical liberal constitutionalism.¹⁶ In my judgment, however, both accounts overstate the extent to which the antebellum Supreme Court's heightened vigilance represents an approach to constitutionalism that we can accurately term "classically liberal." First, some of those developments—most notably the Court's curtailment of certain monopolies under the Contracts Clause and its later adoption of "substantive due process"—were more discrete and ambivalent with respect to state economic regulation than the term implies.¹⁷ Second, and more significantly, the narrative of classical liberal ascendancy—of a judiciary vigilantly defending liberty and property against unwarranted governmental interference—is belied by the vast and dense web of state economic regulation left untouched by the handful of high-profile decisions on which constitutional scholars tend to focus.¹⁸ Under their traditional common law police powers,

compensation requirements for private property damaged by state-sponsored economic development, and the development of "substantive due process." See *id.* at 19–40.

16. Stark differences remain, of course. Epstein presumably views such developments as the logical extension of the classical liberal worldview of the framers, see EPSTEIN, *supra* note 2, at 147–57 (addressing the Court's early 19th century Commerce Clause jurisprudence). Hovenkamp, on the other hand, argues that they reflected the belated "invention" of classical liberal constitutionalism decades later. See Hovenkamp, *supra* note 11, at 52.

17. "Substantive due process" is discussed at length in Part II. See *infra* Part II. With respect to the Contracts Clause, Professor Hovenkamp may put too much stock in the Taney Court's relative suspicion toward state grants of monopoly and other special privileges. See Hovenkamp, *supra* note 11, at 14–19. Consider, for example, the *Charles River Bridge* case, in which the new Chief Justice famously held that a state charter issued to the proprietors of the Charles River Bridge fifty years earlier had not implied a perpetual monopoly. See *generally* Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge, 36 U.S. (11 Pet.) 420 (1837). On the one hand, that holding expressed a strong presumption against monopoly and in favor of economic competition; accordingly, Hovenkamp views the *Charles River Bridge* case as a quintessential symbol of classical liberal constitutionalism. Hovenkamp, *supra* note 11, at 21 ("No decision symbolizes the rise of classical constitutionalism better than the *Charles River Bridge* case . . ."). On the other hand, Taney's opinion for the five-justice majority reads less like a manifesto for *laissez faire* constitutionalism than a forceful defense of precisely the kind of active, robust state regulatory authority discussed below in Part I. Because "[t]he object and end of all government, is to promote the happiness and prosperity of the community by which it is established," Taney reasoned:

[I]t can never be assumed, that the government intended to diminish its power of accomplishing the end for which it was created A state ought never to be presumed to surrender this power; because . . . the whole community have an interest in preserving it undiminished While the rights of private property are sacredly guarded, we must not forget, that the community also have rights; and that the happiness and well-being of every citizen depends on their faithful preservation.

Charles River Bridge, 26 U.S. at 422. In this reading, Taney's purpose in *Charles River Bridge* was less to vindicate the economic liberty of the competing proprietors than to ensure that the state retained its broad authority to induce new economic development projects deemed to serve the public interest.

18. See, e.g., *supra* note 17 (discussing Hovenkamp's reading of the *Charles River Bridge* case); see also *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819) (invalidating the state's revocation of the college's corporate charter on the ground that the college had a vested contractual right in the charter); *Wynehamer v. People*, 13 N.Y. 378

states and municipalities throughout the 19th century encroached on individual liberty and property in myriad ways, setting rates for the transportation of people and goods; enforcing licensing requirements for a host of occupations; curbing private profit by prohibiting the resale of consumer products; and prescribing the times and places for buying and selling.¹⁹ Although such encroachments should be anathema to the classical liberal constitutionalist, 19th-century courts consistently and emphatically upheld them against legal challenge.

Nor was the persistence—indeed, flourishing—of a robust police power a mere exception, or counterpoint, to a dominant classical liberal view of statecraft. Rather, Epstein's neglect of the police power underscores his more fundamental misunderstanding of the "basic common law protections of life, liberty and property."²⁰ The police power was itself a common law doctrine, and comprised the heart of a common law vision of governance in which individual rights, including the rights to liberty and property, were conceived not as natural, inviolable bulwarks against governmental intrusion, but as relative and relational, defined in equipoise with the authority of the state to regulate in the interest of the general welfare.²¹ In short, when we consider the common law vision of public authority and private rights as it was understood and practiced by 19th-century lawmakers and courts, the economic rights at the center of modern classical liberal revivalism bear little resemblance to Epstein's citadels of negative liberty. A Constitution that actually embodied "the basic common law protections of life, liberty, and property" would look nothing like the grand charter of classical liberalism that Epstein describes.

This Response proceeds in two Parts. Part I describes the extraordinary breadth of state police regulations throughout the 19th-century United States, the virtually unanimous endorsement of robust regulatory authority by courts, and the implications of this history for classical liberal constitutionalism's historical pedigree. Part II then analyzes the rise of "substantive due process" and "liberty of contract," from the *Slaughterhouse Cases* in 1873 up through the New Deal constitutional "revolution" of 1937. It argues that even during the so-called *Lochner* era—the high-water mark of classical liberal constitutionalism if there ever was one—the Court's defense of economic liberty against state interference was both more equivocal and more discrete than modern classical liberal constitutionalists might wish. Moreover, to the extent that *Lochner*-era police powers jurisprudence did instantiate something resembling Epstein's classical liberal ideal, that triumph was remarkably short-lived.

(1856) (striking down a state law prohibiting the sale of intoxicating liquors because the law interfered with the vested property rights of sellers).

19. See WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* 90–96 (1996).

20. EPSTEIN, *supra* note 2, at 98.

21. See *infra* notes 24–73 and the accompanying text; see generally NOVAK, *supra* note 19.

I. THE POLICE POWER AND THE “BASIC COMMON LAW PROTECTIONS OF LIFE, LIBERTY, AND PROPERTY”

The Classical Liberal Constitution remains curiously aloof from the actual history of economic regulation before the ascendancy of the “progressive mindset” in the 1930s. In fact, generations of historians have chronicled the remarkable extent to which public power was thoroughly enmeshed in American economic life during the 19th century.²² Even as Jacksonian lawmakers and judges decried the scourge of special legislative privileges granted to favored enterprises,²³ states remained deeply involved in economic development and regulation through the funding of public works, subsidizing of “private” development projects, issuing of corporate charters, the liberal exercise of eminent domain, and, as we shall see, the routine exertion of a robust and far-reaching police power.²⁴ As Michael Les Benedict explained in a now-classic article, state and local governments actively and consistently violated the fundamental tenets of *laissez-faire* by “promot[ing] transportation development with tax abatements, debt guarantees, and public subscription to stock issues,” and adopting “law after law promoting and subsidizing economic development, regulating business practices, employment conditions, and labor relations.”²⁵

22. See, e.g., OSCAR HANDLIN & MARY FLUG HANDLIN, *COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY: MASSACHUSETTS 1774–1861* (Belknap Press of Harvard Univ. Press rev. ed. 1969) (describing extensive governmental involvement in the development and direction of productive enterprise); LEONARD W. LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* (1957) (describing an antebellum police power that was broadly accommodative of economic regulation and reform); HARRY N. SCHEIBER, *OHIO CANAL ERA: A CASE STUDY OF GOVERNMENT AND THE ECONOMY, 1820–1861* (2012) (describing the critical role of state policy in supporting and directing antebellum economic development). For helpful discussions of the “commonwealth” histories, see William J. Novak, *The Legal Origins of the Modern American State*, in *LOOKING BACK AT LAW’S CENTURY* 249 (Austin Sarat, Bryant Garth, & Robert A. Kagan eds., 2002); and Harry N. Scheiber, *Government and the Economy: Studies of the “Commonwealth” Policy in Nineteenth-Century America*, 3 J. INTERDISC. HIST. 135 (1972). On the 19th-century state’s active involvement in economic regulation and development, see JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* (1956), which one leading scholar characterizes as “from beginning to end an implicit repudiation of the notion that Americans adhered to laissez-faire doctrines in the 1800s.” Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 L. & HIST. REV. 293, 297 n.15 (1985).

23. See *infra* notes 68–72 and accompanying text.

24. Matthew J. Lindsay, *In Search of “Laissez-Faire Constitutionalism,”* 123 HARV. L. REV. F. 55, 60–61 (2010).

25. Benedict, *supra* note 22, at 302. Federal authority, as well, penetrated social life and shaped economic development in myriad (if sometimes inconspicuous) ways throughout the 19th century. See generally BRIAN BALOGH, *A GOVERNMENT OUT OF SIGHT: THE MYSTERY OF NATIONAL AUTHORITY IN NINETEENTH-CENTURY AMERICA* 13, 20 (2009) (demonstrating that “a national legal structure laid the foundation for integrated markets, transportation systems, and . . . the modern business corporation” in 19th-century America, but that modern-day “classical liberal ideology [has] effaced the crucial role played by government in the national development). As William Novak explains, the reality of federal governance through the nation’s history “bears not the slightest resemblance to ideas about American laissez-faire,

Although the police power has never lent itself to easy definition, the 1851 case of *Commonwealth v. Alger* serves as an important touchstone.²⁶ The case pitted the rights of riparian landowner Curtis Alger to construct a wharf on his Boston Harbor property against “the just powers of the legislature to limit, control, or regulate the exercise . . . of [those] rights.”²⁷ The court’s opinion upholding the challenged regulation was written by Massachusetts Chief Justice Lemuel Shaw, the leading common law jurist of the era.²⁸ Chief Justice Shaw’s description of the state police power is particularly illuminating with respect to the “common law protections of life, liberty and property” that, in Epstein’s view, served as the fundamental measure of individual rights during the 150-year heyday of classical liberal constitutionalism.²⁹ “All property in this commonwealth,” Shaw explained, “is derived directly or indirectly from the government, and held subject to those general regulations, which are necessary to the common good and general welfare.”³⁰ By virtue of the state’s “dominion and sovereignty” over its lands, he continued, “[r]ights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment . . . as the legislature . . . may think necessary and expedient.”³¹ These are not the property rights of classical liberal lore—natural, pre-social rights protected against all but the most essential governmental encroachment by a strong judicial “presumption of error.” To the contrary, Alger’s “vested interest in the soil”—a fee simple absolute, in the language of the common law—was a “social and conventional right[,]” the meaning and scope of which were necessarily fluid and relative, subject to evolving

voluntarism, or anti-statism.” William J. Novak, *The Myth of the “Weak” American State*, 113 AM. HIST. REV. 752, 760 (2008). He writes:

From the founding of the first national governing institutions to the conquest of western lands; from the creation of a vast public infrastructure for the promotion of commerce to the construction of a powerful defense and military establishment; from the expansion of governmental powers of police, regulation, administration, and redistribution to the invention of new ways of policing citizens, aliens, races, morals, and gender relations in the production of national culture, the infrastructural power of the American state seems at times boundless, even borderless, as American legal, corporate, economic, and cultural forms spread across the globe. It is this power—infrastructural power—that renders commentary about American state weakness or statelessness unintelligible.

Id. at 763.

26. *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53 (1851).

27. *Alger*, 61 Mass. (7 Cush.) at 65.

28. *Id.* On Shaw’s extraordinary stature and influence, see Leonard Levy, *Lemuel Shaw: America’s “Greatest Magistrate,”* 7 VILL. L. REV. 389 (arguing that “no other state judge through his opinions had so great an influence on the course of American law”).

29. See EPSTEIN, *supra* note 2, at 98.

30. *Alger*, 61 Mass. (7 Cush.) at 85.

31. *Id.* at 84–85.

legislative conceptions of the “common good” and of regulatory expediency.³²

Nor was the relative nature of individual rights confined to the maintenance of public waterways and other public resources. The “police power,” Shaw explained, was “vested in the legislature . . . [to] establish all manner of wholesome and reasonable laws . . . as they shall judge to be for the good and welfare of the commonwealth.”³³ Indeed, neither the result in *Algernon* nor the terms in which Shaw addressed “the relative rights of the public and of individual proprietors” were unusual.³⁴ Chief Justice Shaw was merely giving expression to a broadly shared legal worldview that, as historian William Novak writes, “fostered and legitimated the pervasive role of police and regulation in early American economy and society: the common law vision of a well-regulated society.”³⁵ Within that vision, Novak explains, rights operated not as “absolute shields . . . protecting individuals from society and government,”³⁶ but rather were “guaranteed actively and relatively in an ongoing calculation of the reciprocal rights and duties of others and the good of the whole in a constantly changing society.”³⁷

Although the police power restricted economic liberty and private property in myriad and profound ways, it was not boundless. Contrary to Epstein’s assertion, however, the limits of that power generally were *not* enforced by state courts’ “solicitude for the rights of life, liberty, and property that lay at the core of the natural rights tradition.”³⁸ Rather, they were defined by the constitutive terms of the police power itself—specifically, the requirement that regulation serve the *common* good and *general* welfare of the commonwealth. In this way, the “public health, morals and welfare” constituted a finite universe of the police power’s legitimate ends. When evaluating the legal permissibility of a particular regulation, writes political scientist Howard Gillman, “[t]he issue in contention . . . was not the *importance of the liberty* but the *character of the legislation*: did it actually promote the good of the public or was it designed to promote the special interests of some favored groups?”³⁹

Within those broad limits, economic regulation routinely extended far beyond the discrete, targeted interventions that might be compatible with the classical liberal night-watchman state, such as controlling monopoly, regulating noxious trades, abating fire hazards and other public nuisances, and preventing the spread of infectious disease. As Professor Hovenkamp

32. *Id.* at 71, 85.

33. *Id.* at 85.

34. *Id.* at 64.

35. NOVAK, *supra* note 19, at 26.

36. *Id.* at 34.

37. *Id.* at 36.

38. See EPSTEIN, *supra* note 2, at 13.

39. Howard Gillman, *Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties Jurisprudence*, 47 POL. RES. Q. 623, 633–34 (1994) (emphasis in original).

observes, states and municipalities enacted hundreds of statutes and ordinances policing public morals, commonly targeting such evils as drunkenness, prostitution, gambling, vagrancy, profanity, adultery, fornication, obscenity, and the like.⁴⁰ Perhaps more importantly for our purposes, however, they also aggressively and conspicuously limited precisely the kinds of “private” economic enterprise for which some *Lochner*-era jurists and modern classical liberals would later seek constitutional protection. States and municipalities established strict licensing requirements for a broad range of commercial activities, including the mere trading or selling of otherwise lawful goods. Under Maryland law, for example, it was unlawful to “expose for sale, or sell, any goods, wares or merchandise, with a view to profit in the way of trade” without first obtaining a “license to trade.”⁴¹ State legislatures also controlled the prices of consumer goods, and reigned in what they considered excessive profits by proscribing the resale of various goods for gain.⁴² And municipalities extensively regulated the times and places in which ordinary commodities could be sold.⁴³ Such examples not only testify to the pervasive regulation of market exchange throughout the supposed heyday of classical liberal constitutionalism; they belie the basic classical liberal separation of private economy and public authority into distinct spheres.

Moreover, state courts upheld the vast majority of such regulations on the basis of municipal corporations’ far-reaching authority to circumscribe private economic transactions in the service of the public good. Consider the leading case of *Village of Buffalo v. Webster*, decided by the New York Supreme Court of Judicature in 1833.⁴⁴ The defendant, a farmer, had been convicted of violating a municipal ordinance prohibiting “the *hawking* of meats about the streets of the village.”⁴⁵ Webster’s crime consisted of exchanging a leg of lamb with a local grocer for a pound of tea, outside of the market district defined in the ordinance.⁴⁶ Webster argued on appeal that “[to] require [a] farmer and [a] grocer [to] march off to the prescribed bounds, and there make their contract for the exchange of the meat for the tea, and then formally return to the shop of the grocer and perfect the contract by the delivery of the articles,” amounted to an “unreasonable and improper[] restrain[t] [of] trade.”⁴⁷

40. Hovenkamp, *supra* note 11, at 5. Some regulations were more far-reaching. Connecticut’s criminal code, for example, included proscriptions on “any games, tricks, plays, shows, tumbling, rope dancing, puppet shows, or feats of uncommon dexterity or agility of body.” 1830 Conn. Pub. Acts 275 (quoted in NOVAK, *supra* note 19, at 155).

41. 1827 Md. Laws 1085 (quoted in NOVAK, *supra* note 19, at 91).

42. NOVAK, *supra* note 19, at 94.

43. *Id.* at 95–99.

44. *See generally* Vill. of Buffalo v. Webster, 10 Wend. 99 (N.Y. Sup. Ct. 1833).

45. *Id.* at 100.

46. *Id.*

47. *Id.*

The court's brief opinion upholding Webster's conviction captures the breadth of public authority in Jacksonian New York. "At common law," the court began, municipal corporations such as Buffalo had the power to "make by-laws, for the general good" so long as they "be reasonable and for the common benefit," and do not "restrain[] . . . trade, nor impose a burden without an apparent benefit."⁴⁸ The challenged ordinance easily satisfied those modest conditions.⁴⁹ The court drew a sharp distinction between the restraint of trade, which was prohibited at common law, and its mere regulation, which was permitted.⁵⁰ "[A] by-law that no meat should be sold in the village would be bad, being a general restraint," the court explained; however, a law "imposing particular restraints as to [the] time and place" that meat may be sold was not "a restraint of the *right to sell* meat, but a *regulation* of that right."⁵¹ A mere regulation of trade, even a particularly inconvenient regulation that encumbered commerce, did not constitute an impermissible restraint. The court likewise affirmed without comment that the burden imposed by the regulation carried a "correspondent benefit," and that the regulation was "reasonable in itself, and promotive of the public good."⁵²

Consider also *In re Nightingale*, decided by the Supreme Judicial Court of Massachusetts in 1831.⁵³ The defendant, a farmer, had been convicted of violating a Boston ordinance forbidding an inhabitant of Boston or any town "in the vicinity thereof" from "vending commodities" that were not "the produce of his own farm, or of some farm in his neighbourhood," at Faneuil Hall market or on two adjacent streets, without first obtaining permission from the official market clerk.⁵⁴ Such prohibitions on the resale of consumer goods at public markets were common during the antebellum era,⁵⁵ and were modeled after English statutes and traditional common law offenses intended to prevent the unjust inflation of consumer prices by various forms of profiteering.⁵⁶ Nightingale's crime consisted of selling, in

48. *Id.* at 101.

49. *Id.* at 102.

50. *Vill. of Buffalo v. Webster*, 10 Wend. 99, 101–02 (N.Y. Sup. Ct. 1833).

51. *Id.* at 101 (emphasis in original).

52. *Id.* at 102.

53. *In re Nightingale*, 28 Mass. (11 Pick.) 168 (1831).

54. *Id.* at 171.

55. See NOVAK, *supra* note 19, at 94–95.

56. Such "offenses against public trade" included "forestalling," "regrating," and "engrossing." According to William Blackstone's widely cited definitions, forestalling was "the buying or contracting for any merchandize or victual coming in the way to market; or dissuading [sic] persons from bringing their goods or provisions there; or persuading them to enhance the price, when there: any of which practices make the market dearer to the fair trader." WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 160 (10th ed. 1787). Regrating was "the buying of corn, or other dead victual, in any market, and selling them again in the same market, or within four miles of the place. For this also enhances the price of the provisions, as every successive seller must have a successive profit." *Id.* Engrossing was "the getting into one's possession, or buying up, large quantities of corn or other dead victuals, with intent to sell them

addition to the “produce of his own farm,” lambs that he had bought the previous week and “carcasses of sheep . . . bought some months before.”⁵⁷ On appeal, Nightingale argued that the ordinance was invalid on two distinct grounds: First, it was “*partial* and did not operate on all the citizens of the commonwealth equally” because it distinguished between “the inhabitants of Boston and its vicinity, and the inhabitants of distant towns in the commonwealth.”⁵⁸ Second, the ordinance was void for “uncertainty” because it failed to identify the specific towns contemplated to be within “‘the vicinity’ of Boston,” and thus lodged excessive discretion in the market clerk to order the removal of unauthorized sellers from the market.⁵⁹

The court soundly rejected each of these arguments: “[T]he partial operation of the ordinance can be no objection to its validity,” the court explained, “provided it does not infringe private rights; and it is very clear that it does not.”⁶⁰ Because “[t]he city government had an undoubted right to prohibit the occupation of a stand in the streets by any one,” it reasoned, there was “certainly nothing contained in the ordinance . . . which can be pretended to operate as a violation of private rights; nor does it operate as an improper restraint on trade, but is a wholesome regulation of it, to prevent the market from being unnecessarily thronged and incumbered [sic].”⁶¹ Neither was the ordinance “void for uncertainty.” Although the term “vicinity” was “somewhat indefinite,” the court acknowledged, the question of whether the defendant lived “in the vicinity” of Boston was “properly left [for] the jury.”⁶² If Nightingale had been fined for the “mere occupation” of the stand in question, the court acknowledged, the objection might carry more weight.⁶³ But he incurred a penalty only after refusing to vacate the stand when he was ordered to do so.⁶⁴ In these cases and many others, state courts upheld the authority of municipalities at common law and under their charters to interject public power into the most mundane of private commercial transactions—in *Webster*, the exchange of meat and tea at a location that was mutually convenient to the parties; in *Nightingale*, the resale of consumer goods for profit.

To be sure, Jacksonian courts and legislatures did limit the police power in meaningful ways. Judges were prepared to void legislation that violated

again. This must of course be injurious to the public, by putting it in the power of one or two rich men to raise the price of provisions at their own discretion.” *Id.*

57. *Nightingale*, 28 Mass. (11 Pick.) at 171.

58. *Id.* at 171 (emphasis added).

59. *In re Nightingale*, 28 Mass. (11 Pick.) 168, 171–72 (1831).

60. *Id.* at 173–74.

61. *Id.* at 174.

62. *Id.*

63. *Id.*

64. *Id.* at 174–75.

vested property rights;⁶⁵ and legislators adopted myriad statutes and constitutional provisions prohibiting the granting of special privileges.⁶⁶ Because such official hostility toward legislative overreaching was often couched in an idiom of *laissez faire*, later-day libertarians are sometimes inclined to read into pre-Civil War jurisprudence constitutional economic rights that appeared only decades later. The cases discussed above illustrate two critical counterpoints to that inclination: First, both regulators and reviewing courts understood and applied the police power as a fundamental, far-reaching, and uncontroversial form of public authority—a conception of governance that is difficult to reconcile with the classical liberal worldview that Epstein ascribes to the period. Second, and perhaps even more importantly, even during the supposed acme of *laissez faire* constitutionalism before the Civil War, an individual “right” was not, as Epstein imagines it, an autonomous sphere of liberty and property into which the state could not intrude. Rather, a “right” served as a guarantee that the state could only interfere with one’s liberty or property through general laws that were reasonably adapted to serve a public purpose. Consider, again, *Nightingale*. It was precisely *because* the City of Boston had the “undoubted right” to prohibit the reselling of consumer goods at the public market that there was “certainly nothing contained in the ordinance . . . which can be pretended to operate as a violation of private rights.”⁶⁷ Here, the Massachusetts court’s basic understanding of an individual “right” stands in sharp contrast to the modern conception of individual “rights” as inviolable, or at least “fundamental.” From the nation’s Founding until the beginning of the 20th century, explains Gillman, judges protected liberty primarily by asking “whether a law actually promoted a valid public purpose rather than whether a law violated an important liberty.”⁶⁸ In other words, “the nature of the legislative power prohibited legislatures from interfering with people’s liberty or property unless such interference was necessary to advance the general welfare of the community as a whole.”⁶⁹

This meant that judges were on the lookout not for intrusions of public power into a sphere of private liberty, but for “laws that appeared to advance only the narrow interests of certain classes, or that had no discernible impact on public health, safety, or morality.”⁷⁰ Such partial laws, or “class legislation,” as they were later termed, “could be struck down as corrupt,

65. See Benedict, *supra* note 22, at 324–25 (describing judicial disapproval of “retrospective legislation” that disturbed vested rights in property).

66. See *id.* at 322 (discussing the adoption of various state constitutional prohibitions on the granting of special legislative privileges, including the commitment of public funds, loans, or credit pledges in support of private enterprise).

67. *In re Nightingale*, 28 Mass. (11 Pick.) 168, 174 (1831).

68. Gillman, *supra* note 39, at 624.

69. *Id.* at 629.

70. *Id.*

arbitrary, and outside the scope of the police powers.”⁷¹ Some antebellum courts did begin to import “substantive” protection of liberty and property into their state due process (or “law of the land”) provisions. Critically, however, that substance consisted not in a freedom to exercise one’s private commercial prerogatives, but in protection against “special legislation [that] transferred property from one person to another without due process of law.”⁷² This is precisely why the *Webster* court emphasized that the challenged market regulation was a “general” one that was “reasonable and for the common benefit.”⁷³ In a “regime of limited government powers” like the antebellum United States, Gillman pointedly notes, “the rights and liberties of the citizens are protected residually: on this view, freedom is what is left over after government has reached the limits of its authorized power.”⁷⁴ It was only much later, in the 20th century, that state and federal courts developed a jurisprudence of “fundamental” rights, or “preferred freedoms,” the interference with which triggered heightened judicial scrutiny.⁷⁵

This was the common-law vision of statecraft that prevailed in the United States throughout the antebellum era, and it does not at all reflect “the classical liberal position that all state action should be examined under a presumption of error.”⁷⁶ Indeed, the municipal officials, state legislators, and common law judges who executed that vision would not have recognized the modern “fundamental rights” framework that Epstein anachronistically projects onto them. Accordingly, the defendants in *Webster* and *Nightingale*—men whose freedom to engage in remarkably ordinary commercial transactions was significantly encumbered—did not even challenge the ordinances under the due process clauses (or other liberty-protecting provisions) of their state constitutions.⁷⁷ Why would sophisticated

71. *Id.* at 629–30.

72. Benedict, *supra* note 22, at 325. “[A]ntebellum American law was suffused with the principle that special legislation was illegitimate,” Benedict explains, and as early as 1819 attorneys and courts had begun to link that conviction “to the fundamental maxim that no person could be deprived of property but by due process or law or by the laws of the land.” *Id.* at 326. As Ryan Williams explains, by the time the Fourteenth Amendment was ratified in 1868, the phrase “due process of law” already “had developed . . . well-established substantive connotations as both a prohibition of legislative interference with vested rights and as a guarantee of general and impartial laws.” Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 416 (2010).

73. *Vill. of Buffalo v. Webster*, 10 Wend. 100, 101 (N.Y. Sup. Ct. 1833).

74. Gillman, *supra* note 39, at 625.

75. *Id.* at 624–25.

76. See EPSTEIN, *supra* note 2, at 304.

77. Rather, their facial challenges to the ordinances centered on the allegation that the laws were “partial” (and therefore invalid) because they benefited some narrow class of persons rather than the general public. They also raised “as applied” challenges. For example, Webster argued that the time-and-place regulation was intended to prevent only the “hawking of meats about the streets of the village,” and not to apply to in-kind trades of the sort for which Webster had been prosecuted. See *Webster*, 10 Wend. at 100. *Nightingale* argued that he had not violated

and resourceful attorneys arguing before judges who supposedly were steeped in classical liberal constitutionalism and thus primed to approach every interference with individual liberty and property under a presumption of error, neglect to argue that the enforcement of the ordinances had violated their clients' constitutional rights? The answer is that they wouldn't.

II. CLASSICAL LIBERAL CONSTITUTIONALISM AND "LIBERTY OF CONTRACT"

Part I argued that the historical pedigree for classical liberal constitutionalism is remarkably weak, and that the "long historical run of about 150 years" that Epstein claims for the classical view was nothing of the sort.⁷⁸ But what about the *Lochner* era⁷⁹—the decades preceding the New Deal "revolution" in constitutional law, when, as every law student learns, courts imposed a host of new, or at least newly robust, constraints on the authority of both the state and federal governments to regulate private commercial transactions? Although the *Lochner* era and its conceptual centerpiece, "liberty of contract," have long been derided by legal liberals and conservatives alike as ideologically motivated judicial activism,⁸⁰ a host of recent works by libertarian-leaning legal scholars—with such titles as *Rehabilitating Lochner* and *Liberty of Contract: Rediscovering a Lost Constitutional Right*—have sought to rescue constitutional economic liberty from disrepute.⁸¹ Even if Epstein misattributes a classical liberal worldview to the Constitution's Framers and seriously exaggerates the influence of classical liberalism in the pre-Civil War period, one might nevertheless argue that the

the prohibition of reselling because "a large portion, perhaps half in value, of the articles in his wagon were the produce of his own farm." *In re Nightingale*, 28 Mass. (11 Pick.) 168, 172 (1831).

78. See EPSTEIN, *supra* note 2, at 34.

79. The term comes from the Supreme Court's famous decision in *Lochner v. New York*, 198 U.S. 45 (1905), striking down a maximum hours law for bakers as a violation of the Due Process Clause of the Fourteenth Amendment.

80. *Lochner*, in particular, continues to occupy a central place in the debate over the proper scope of judicial review. During the litigation over the Affordable Care Act, for example, both President Obama and Solicitor General Donald Verilli invoked *Lochner* as a caution to the Court against abandoning judicial restraint. See Matthew J. Lindsay, *Federalism and Phantom Economic Rights in NFIB v. Sebelius*, 82 U. CINCINNATI L. REV. 687, 691 n.12 (2014). Prominent conservatives, including Robert Bork and Chief Justice John Roberts, have also publicly denounced *Lochner* as a "judicial usurpation" of legislative power. See *id.* On the use and abuse of *Lochner* in modern constitutional discourse, see Gary D. Rowe, *Lochner Revisionism Revisited*, 24 LAW & SOC. INQUIRY 221, 223 (1999) (describing the "ghost of *Lochner*" in post-New Deal constitutional litigation). The origin of this rhetorical tradition lies in Justice Holmes' celebrated dissent in *Lochner* itself, chiding the majority for deciding the case based on its preferred "economic theory" rather than constitutional principle, and thereby perverting the Fourteenth Amendment to "prevent the natural outcome of dominant opinion." *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting). On the "progressive" interpretation of *Lochner* inaugurated by Holmes' dissent, and the body of subsequent revisionist scholarship complicating that interpretation, see Lindsay, *supra* at 704–05 and accompanying text.

81. See generally BERNSTEIN, *supra* note 1 (characterizing *Lochner* as a principled defense of individual liberty); DAVID N. MAYER, *LIBERTY OF CONTRACT: REDISCOVERING A LOST CONSTITUTIONAL RIGHT* (2011) (same).

decades preceding the New Deal constitutional “revolution” provide a sound, if substantially narrower, historical foundation for Epstein’s theory of constitutional interpretation.

This Part has three primary goals: First, it explains that the species of constitutional economic liberty that Epstein mistakenly ascribes to the period between the nation’s founding and the Civil War—a liberty against governmental meddling, the interference with which triggers exacting scrutiny—was instead developed in the decades following the adoption of the Fourteenth Amendment. Second, it demonstrates that even during the *Lochner* era—the supposed high-water mark of *laissez faire* constitutionalism—“liberty of contract” constrained economic regulation in much more discrete ways than is commonly supposed. Finally, it argues that if we take the long view, the brief ascendancy of constitutional economic liberty during the first three decades of the 20th century is most usefully understood not as the belated fulfillment of a classical liberal worldview woven into the constitutional fabric a century earlier, but rather as a contentious, uncertain, and somewhat muddled process of regulatory and constitutional adaptation, in which the Court worked out how to apply the long-standing common law prohibition against special legislative privileges in a modern industrial setting.⁸²

A. THE (BELATED AND EQUIVOCAL) CONSTITUTIONALIZATION OF ECONOMIC LIBERTY

The jurisprudential foundations of “liberty of contract” were laid in the decades following the adoption of the Fourteenth Amendment.⁸³ In separate dissenting opinions in the landmark 1873 *Slaughter-House Cases*,⁸⁴ Justices Stephen Field and Joseph Bradley famously argued that, in granting the Crescent City Company a twenty-five year butchering monopoly, the Louisiana legislature had deprived the butchers excluded from the

82. The remainder of this Part draws extensively from Lindsay, *supra* note 80, at 704–730; and Lindsay, *supra* note 24, at 70–77.

83. My focus here is the development of an expansive, constitutionally novel understanding of “liberty” and “property” in post-Civil War period. The origins of “substantive due process,” which would later become the primary doctrinal vehicle for constitutional economic liberty, in fact precedes the Civil War. See generally Williams, *supra* note 72 (demonstrating that when the Fourteenth Amendment was ratified in 1868, the phrase “due process of law” already “had developed . . . well-established substantive connotations as both a prohibition of legislative interference with vested rights and as a guarantee of general and impartial laws”). That said, the phrase “substantive due process” is itself a much later invention. Although today we routinely refer to the “substantive due process” right to “liberty of contract” (as well as a host of other modern “fundamental” rights), the term first appeared in a federal court opinion only in the 1940s, and was not applied to *Lochner*-style “liberty of contract” jurisprudence until the 1960s. See G. Edward White, *Revisiting Substantive Due Process and Holmes’s Lochner Dissent*, 63 BROOKLYN L. REV. 87, 108–10 (1997). For this reason, this Response generally (though not entirely) avoids applying the phrase to *Lochner*-era police powers jurisprudence, and instead refers to the “due process right to liberty of contract,” or “economic due process.”

84. *Slaughter-House Cases*, 83 U.S. 36 (1872).

monopoly of their privileges and immunities as citizens of the United States, in violation of the Fourteenth Amendment.⁸⁵ In these and subsequent opinions,⁸⁶ Justices Field and Bradley planted the seeds of a constitutional “right of free labor” that would, decades later, blossom into “liberty of contract.” Their opinions are worth considering at some length because they illustrate both the novelty of this particular constitutional economic right, and its kinship with the common-law limits on the state police power discussed in Part I. In brief, I want to suggest that Field and Bradley’s constitutionalization of the “right of free labor” was less a defense of economic liberty per se than a jurisdictional hook that enabled the federal courts to enforce conditions on state legislative authority that were intrinsic to the police power itself—specifically, that regulations of liberty and property serve the *general* welfare, rather than the narrower interests of a favored group.

In the *Slaughter-House Cases*, a five-justice majority denied that the Fourteenth Amendment had made the Court “a perpetual censor upon all legislation of the States [touching] on the civil rights of their own citizens.”⁸⁷ Justices Field and Bradley argued strenuously in dissent that Section I of the Amendment had in fact upended the nation’s federal structure of “double citizenship” in order “to provide National security against violation by the States of the fundamental rights of the citizen.”⁸⁸ What exactly were the fundamental rights of American citizenship? Field and Bradley agreed that when the Declaration of Independence proclaimed that “life, liberty, and the pursuit of happiness” were among the “inalienable rights” endowed in all men by “their Creator,” it identified “the fundamental rights which can only be taken away by due process of law, and which can only be interfered with . . . by lawful regulations necessary or proper for the mutual good of all.”⁸⁹ Here are Richard Epstein’s “common law protections of life, liberty, and property.”⁹⁰

85. *Id.* at 83–111 (Field, J., dissenting); *id.* at 111–24 (Bradley, J., dissenting).

86. After the Louisiana legislature subsequently revoked the butchering monopoly, the Crescent City Company brought suit, claiming that because it had expended great sums on a vast slaughterhouse and stockyard in reliance on its exclusive right, the legislative charter had taken on the character of an “irrepealable contract.” *Butchers’ Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 111 U.S. 746, 749 (1884). The Court unanimously upheld the repeal, but Justices Field and Bradley wrote separate concurring opinions in order to further theorize the Fourteenth Amendment right to individual economic liberty. *Id.* at 754–60 (Field, J., concurring); *id.* at 760–66 (Bradley, J., dissenting).

87. *Slaughter-House Cases*, 83 U.S. at 78.

88. *Id.* at 121–22 (Bradley, J., dissenting). Field agreed that as a result of Section 1, the “fundamental rights, privileges, and immunities which belong to him as a free man and a free citizen, now belong to him as a citizen of the United States, and are not dependent upon his citizenship of any State.” *Id.* at 95 (Field, J., dissenting).

89. *Id.* at 122 (Field, J., dissenting); *id.* at 116 (Bradley, J., dissenting).

90. EPSTEIN, *supra* note 2, at 98.

The contention that the Privileges and Immunities Clause authorized the federal courts to vindicate the fundamental rights of national citizenship against hostile state legislatures was not, by itself, especially remarkable. Most members of Congress who drafted, debated, and adopted the Fourteenth Amendment would have agreed, at least in principle, that Section 1 unsettled the nation's traditional federalism.⁹¹ Justices Field and Bradley's innovation lies, instead, in the breadth of meaning they ascribed to the phrase "life, liberty, and the pursuit of happiness." The right "to adopt such calling, profession, or trade" was "an essential part of that liberty which it is the object of government to protect," Bradley urged, "and a calling, when chosen, is a man's property and right. Liberty and property are not protected where these rights are arbitrarily assailed."⁹² Justice Field agreed, in a passage that would become an indispensable touchstone for late 19th-century state high courts:

The equality of right . . . in the lawful pursuits of life . . . is the distinguishing privilege of citizens of the United States. To them, everywhere, all pursuits, all professions, all avocations are open without other restrictions than such as are imposed equally upon all others This is the fundamental idea upon which our institutions rest, and unless adhered to in the legislation of the country our government will be a republic only in name. The fourteenth amendment . . . makes it essential . . . that this equality of right should be respected. . . . [B]y . . . the [butchering monopoly] the right of free labor, one of the most sacred and imprescriptible rights of man, is violated.⁹³

Of what, exactly, did the "sacred and imprescriptible" right of "free labor" consist? Field quoted at length one of the seminal texts of classical liberal political economy, Adam Smith's *The Wealth of Nations*:

'The property which every man has in his own labor,' says Adam Smith, 'as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands; and to hinder him from employing this strength and dexterity in what manner he thinks proper, without injury to his neighbor, is a plain violation of this most sacred property. It is a manifest encroachment upon the

91. See e.g. GARRETT EPPS, *DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND THE FIGHT FOR EQUAL RIGHTS IN POST-CIVIL WAR AMERICA* 226–28 (2006) (quoting leading congressional advocates of the Amendment, including Thaddeus Stevens and John Bingham, to that effect); WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 72–80 (1988) (same).

92. *Slaughter-House Cases*, 83 U.S. 36, 110 (1872) (Bradley, J., dissenting).

93. *Id.* at 109–10 (Field, J., dissenting).

just liberty both of the workman and of those who might be disposed to employ him.’⁹⁴

The most important jurisprudential legacy of Field’s opinion lies in this radical redefinition of constitutional “liberty” and “property.” For Field, “property” encompassed not only land and tangible goods, but anything with market value, including one’s labor; “liberty” referred not only to physical freedom, but freedom to act in the marketplace. This was a vision of individual economic liberty adapted not to a republic of independent artisans and craftsmen, but to the propertyless hirelings who increasingly populated the swelling industrial labor force—men whose economic personhood consisted entirely in their capacity to alienate their labor for a price.⁹⁵ It was also a vision that resonated deeply with the great moral and political cause of the previous generation—the abolition of slavery. Abolitionists had celebrated the voluntary sale of labor as the antithesis of slavery; and the right to dispose of one’s labor at market price had taken on the moral and emotional weight of opposing human bondage. Slave emancipation and the Civil Rights Act of 1866, securing the right to contract for the sale of one’s labor as an essential right of citizenship, enshrined this vision into law.⁹⁶ It was this notion of a constitutional right of

94. *Id.* at 110 n.39 (Field, J., dissenting) (quoting ADAM SMITH, *THE WEALTH OF NATIONS* (1776)); see *Butchers’ Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 111 U.S. 746, 757 (1884) (Field, J., concurring) (quoting the same passage).

95. In the 1870s, a time of rapid industrialization in the northern states, the meaning of “free labor” was an ideologically freighted subject of social and political debate. As the traditional centerpiece of republican political theory, the “free labor” ideal had long been embodied in the figure of the self-employed farmer or artisan, whose ownership of productive property served as a guarantee of economic self-sufficiency, and thus personal “independence”—the essential requisite for virtuous citizenship. To labor for a wage, by contrast, was to subject one’s personal autonomy, including one’s economic livelihood and even political will, to the authority of an employer. See LAWRENCE B. GLICKMAN, *A LIVING WAGE: AMERICAN WORKERS AND THE MAKING OF CONSUMER SOCIETY* 22–24 (1997); DAVID MONTGOMERY, *BEYOND EQUALITY: LABOR AND THE RADICAL REPUBLICANS, 1862–1872*, at 30–33 (1967); AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION* 9–10 (1998). For Field, the New Orleans butchers, who were struggling against a legislative monopoly that threatened to deprive them of their independence and reduce them to the condition of mere wage laborers, were exemplars of this free labor ideal. By championing the butchers’ “equality of right . . . in the ordinary avocations of life,” *Slaughterhouse Cases*, 83 U.S. (16 Wall.) at 109, Field was attempting to vindicate their republican independence. See Lindsay, *supra* note 24, at 70–71.

96. The Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended in scattered sections of 42 U.S.C.); see also STANLEY, *supra* note 95, at 17–18 (discussing the role of abolitionism in the moral and legal construction of “free labor”); William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767, 782–86 (1985) (same). In defining the privileges and immunities that the Fourteenth Amendment protected from state abridgement, Justice Field drew explicitly from the Civil Rights Act. Although passed before the adoption of the Fourteenth Amendment, Field explained, the Act expressed Congress’ understanding of the term “privileges and immunities” as it was used in Section I. *Slaughterhouse Cases*, 83 U.S. (16 Wall.) at 96 (Field, J., dissenting). That understanding included, Field wrote, quoting directly from the Act, the right “to make and

property in, and liberty to dispose of, one's labor that would later ripen into "liberty of contract."

Surely this is music to classical liberal ears. Yet even as Justices Field and Bradley characterized the "right to free labor" as a "sacred and imprescriptible" privilege of U.S. citizenship, the constitutional limitation they actually applied bears a closer affinity with the common law proscription of special privileges, or "class legislation," than with the protection of individual economic liberty per se. The right to free labor, Field explained, protected the citizen only against "discriminating and partial enactments, favoring some to the impairment of the rights of others."⁹⁷ It thus served as a constitutional bulwark against the "arbitrary invasion by State authority of . . . the right to pursue . . . happiness unrestrained, except by just, equal, and impartial laws."⁹⁸ It was not the regulation of butchering per se that troubled Field and Bradley, or even the legislature's interference with the economic prerogatives of individual butchers; but rather its unjust, "partial," "arbitrary" discrimination against a disfavored class of butchers.⁹⁹ A few years later, in *upholding* a different legislative restraint on the pursuit of one's chosen vocation against an economic due process challenge, Field explained that the "great purpose of the requirement [of due process] is to exclude everything that is arbitrary

enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property." *Id.* (quoting Civil Rights Act of 1866, ch. 31 § 1, 14 Stat. 27, 27 (codified as amended at 42 U.S.C. § 1981)). Among such rights, Field continued, "must be placed the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally effects all persons." *Id.* at 97.

97. *Butchers' Union*, 111 U.S. at 758 (Field, J., concurring). Leading scholars of *Lochner*-era police powers jurisprudence have interpreted Field and Bradley's opinions in this light, tracing *Lochner*-era judicial scrutiny of economic regulations to Jacksonian opposition to special legislative privileges. See HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 64–76 (1993). Intellectual-biographical studies of leading late 19th-century figures in the constitutionalization of individual economic liberty persuasively present jurists such as Stephen Field and the judge and treatise author Thomas Cooley not as *laissez-faire* ideologues, but rather as principled neo-Jacksonians, committed to the defense of the general good against the corrupting influence of powerful economic interests. See generally Alan Jones, *Thomas M. Cooley and "Laissez-Faire Constitutionalism": A Reconsideration*, 53 J. AM. HIST. 751 (1967); Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863–1897*, 61 J. AM. HIST. 970 (1975).

98. *Butchers' Union*, 111 U.S. at 759 (Field, J., concurring).

99. *Id.* at 758. Justice Field continued:

[T]he ordinary pursuits of life, forming the large mass of industrial avocations, are and ought to be free and open to all, subject only to such general regulations, applying equally to all, as the general good may demand; and the grant to the favored few of a monopoly in any of these common callings is necessarily an outrage upon the liberty of the citizen . . .

Id. at 763.

and capricious in legislation affecting the rights of the citizen.”¹⁰⁰ But “legislation is not open to the charge of depriving one of his rights without due process of law, if it be general in its operation upon the subjects to which it relates”¹⁰¹ And in fact, the New Orleans butchering monopoly was widely viewed at the time as an act of naked legislative favoritism.¹⁰² Understood as a demand for legislative impartiality, the Fourteenth Amendment right to economic liberty appears not as constitutional trump against state economic regulation, but rather as a convenient jurisdictional hook through which the federal courts might enforce constraints on legislative authority that were intrinsic to the police power itself.

B. “LIBERTY OF CONTRACT” AND THE (SORT OF) CLASSICAL LIBERAL MOMENT

The seed of constitutional economic liberty planted by Justices Field and Bradley bore fruit almost immediately.¹⁰³ Several state high court opinions from the 1880s striking down labor regulations read like tributes to the *Slaughterhouse* dissents. As the New York Court of Appeals declared in 1885, “[l]iberty, in its broad sense as understood in this country, means the right, not only of freedom from actual servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation.”¹⁰⁴ Then in 1897, the U.S. Supreme Court, in dicta, attached the New York court’s precise formulation to the Due Process Clause of the Fourteenth Amendment, adding that a person must also be free “to enter into all contracts which may be proper, necessary, and

100. *Dent v. West Virginia*, 129 U.S. 114, 124 (1889) (upholding a medical licensing requirement against constitutional challenge).

101. *Id.*

102. On the political background of the legislation, see generally RONALD M. LABBÉ & JONATHAN LURIE, *THE SLAUGHTERHOUSE CASES: REGULATION, RECONSTRUCTION AND THE FOURTEENTH AMENDMENT* (2003).

103. Field and Bradley were joined in this project by the jurist and treatise writer Thomas Cooley, whose influential *Treatise on Constitutional Limitations*, first published shortly before the ratification of the Fourteenth Amendment, argued that state due process clauses substantively limited the authority of legislatures to regulate common law property rights. THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* 351–61 (1868). After *Slaughterhouse*, writes legal historian William Forbath, those who felt unjustly burdened by a particular economic regulation “could proceed to court with Field’s sacred banner of Free Labor in one hand and Cooley’s *Treatise* in the other.” Forbath, *supra* note 96, at 794.

104. *In re Jacobs*, 98 N.Y. 98, 106 (N.Y. 1885) (invalidating a state law prohibiting the manufacture of cigars in certain tenement houses). *See also* *Godcharles v. Wigeman*, 6 A. 354, 356 (Pa. 1886) (striking down a state law requiring that iron workers be paid in cash at regular intervals as an unconstitutional attempt to “prevent persons who are *sui juris* from making their own contracts” that was “not only degrading to his manhood, but subversive of his rights as a citizen of the United States”); *State v. Goodwill*, 10 S.E. 285, 286 (W. Va. 1889) (striking down a state law forbidding payment in company script on the ground that it interfered with the “liberty” of every man “to pursue any lawful trade or avocation” (quoting *People v. Gillson*, 109 N.Y. 389, 399 (N.Y. 1888))). *See generally* Lindsay, *supra* 24, at 73 & nn. 95–100.

essential” to securing such liberties.¹⁰⁵ The doctrinal stage for constitutional “liberty of contract” was set.

Opening night, of course, came a decade later, in *Lochner v. New York*, when the Supreme Court struck down a maximum hours law for bakers on the ground that it violated one’s “right to make a contract in relation to his business,” including his “right to purchase and sell labor.”¹⁰⁶ Justice Rufus Peckham’s majority opinion incorporates elements of the familiar common law injunction against special legislative privileges alongside a recognizably modern fundamental rights analysis. This hybrid quality has made the opinion famously resistant to simple characterization, and has provided generations of historians and legal scholars with a fertile subject of interpretation and debate.

Before turning to Peckham’s opinion itself, it is helpful to situate *Lochner* in its historical context. In the half-century following the end of the Civil War, Americans experienced a remarkable revolution in their social and economic order, as their traditional (if highly idealized) republic of independent farmers and artisans was transformed into an industrial society characterized by large corporate employers, the proliferation of low-skill occupations, and an intensely competitive wage system. To many contemporaries, this industrial reorganization of American life and labor subverted prevailing ideals of economic freedom and independence—hotly contested concepts in the post-Civil War era, but ones that required, at the very least, a meaningful measure of autonomy in individual decision-making. In response, wage workers and their allies in progressive reform movements prevailed on state legislatures to ensure certain basic guarantees and protections for workers, such as requiring payment of wages in cash and at regular intervals, and establishing minimum wages and maximum hours.¹⁰⁷ Such demands for “special protection from the coercive effects of a corporate industrial economy,” Gillman writes, “constituted a direct challenge to an established tenet of political legitimacy”—the principal of state neutrality.¹⁰⁸ As I discussed in Part I, that neutrality principle was embodied in the constitutive terms of the police power—specifically, the requirement that regulatory interference with individual liberty or property serve the public good and general welfare, rather than the “partial” interests of a favored class.

Justice Peckham’s majority opinion reflects this tension. Peckham wasted little time in announcing that a man’s “right to make a contract in relation to his business” included “[t]he right to purchase or to sell labor.”¹⁰⁹ Although the challenged hours regulation “necessarily interfere[d] with”

105. *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897).

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

107. See GILLMAN, *supra* note 97, at 14; Lindsay, *supra* note 80, at 715.

108. GILLMAN, *supra* note 97, at 14.

109. *Lochner*, 198 U.S. at 53.

that right, that was not the end of the matter.¹¹⁰ There existed “certain powers . . . somewhat vaguely termed police powers,” Peckham explained, that inhered “in the sovereignty of each State,” and with which “the 14th Amendment was not designed to interfere.”¹¹¹ “Both [the] property and liberty” protected were thus “held on such reasonable conditions as may be imposed by the . . . State in the exercise of those powers.”¹¹² Foremost among those conditions was the requirement that police regulations serve “the safety, health, morals, and general welfare of the public,” rather than the partial interests of a particular class.¹¹³

Up to this point, Peckham’s analysis carries distinct echoes of the common-law (and Jacksonian) prohibition against special legislative privileges that Justices Field and Bradley read into the Fourteenth Amendment’s Privileges and Immunities Clause. In this respect, the new due process right to “liberty of contract” delimited state authority not by establishing a bastion of private economic prerogative that the legislature could not breach, but rather by enabling the federal courts, for the first time, to enforce conditions on the exercise of state regulatory authority that were intrinsic to the police power itself. As Peckham put it, if the federal courts could not enforce limits on state regulation, the “14th Amendment would have no efficacy and the legislatures of the States would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health or the safety of the people.”¹¹⁴ If courts deferred to every legislative assertion of public purpose, “no matter how absolutely without foundation . . . [t]he claim of the police power would be a mere pretext,—[and] become another and [a] delusive name for the supreme sovereignty of the state to be exercised free from constitutional constraint.”¹¹⁵ Rather, the Fourteenth Amendment had made it the business of the federal courts to scrutinize the police rationale proffered by a state legislature, and ensure that the claims of public purpose were more than “mere pretext.”¹¹⁶ “In every case that comes before this court . . . where legislation of this character is concerned and where the protection of the Federal Constitution is sought,” Peckham continued, “the question necessarily arises: 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 . . . ?”¹¹⁷

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

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

115. *Id.*

116. *Id.*

117. *Id.*

Yet the due process right to liberty of contract did more than authorize the federal courts to enforce familiar common law limits on state police authority. Because the state's effort to intercede in the terms of employment now registered constitutionally, it triggered a much more exacting review of the legislative rationale than pre-Civil War state common law courts would have recognized. "[B]efore an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor," Peckham explained, the regulation "must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate."¹¹⁸ This approach comports with Epstein's classical liberal position. That position, Epstein explains, endorses "a broad reading of liberty under the Due Process Clause of the Fourteenth Amendment,"¹¹⁹ covering a host of "economic, expressive, or intimate"¹²⁰ interests, and "gives narrow weight to purported justifications both as to the ends the state chooses and the means it uses to achieve them."¹²¹

In *Lochner*, Justice Peckham considered two possible legislative ends. The first, whether the act was "valid as a labor law, pure and simple," could "be dismissed in a few words," Peckham declared.¹²² Because "bakers as a class are . . . equal in intelligence and capacity to men in other trades or manual occupations, [and thus] . . . able to assert their rights and care for themselves without the protecting arm of the state," he reasoned, "the interest of the public is not in the slightest degree affected" by a law "interfering with their independence of judgment and of action."¹²³ Viewed as a "labor law," the regulation was naked class legislation. Peckham then turned to the second proffered legislative end—that the law protected "the health of the individual engaged in the occupation of a baker."¹²⁴ Peckham acknowledged that, in light of the voluminous "statistics regarding all trades and occupations" introduced in the case, "the trade of a baker does not appear to be as healthy as some other trades."¹²⁵ In the pre-*Lochner* era marked by judicial deference toward a state's regulatory rationale, such a finding would have supplied an ample factual basis to uphold the law as a valid health regulation. Indeed, earlier in his opinion Peckham noted that judicial scrutiny of state police regulations traditionally had "been guided by

118. *Id.* at 57–58.

119. EPSTEIN, *supra* note 2, at 338.

120. *Id.* at 305.

121. *Id.* at 310.

122. *Lochner*, 198 U.S. at 57.

123. *Id.*

124. *Id.* at 57. The hours regulation "does not affect any other portion of the public than those who are engaged in that occupation," Peckham explained, for "[c]lean and wholesome bread does not depend upon whether the baker works but ten hours per day or sixty hours a week." *Id.*

125. *Id.* at 59.

rules of a very liberal nature.”¹²⁶ But because the challenged hours regulation implicated “the right of free contract on the part of the individual,” the Court required greater congruence between legislative ends and means.¹²⁷ As Peckham explained, “[t]here must be more than the . . . possible existence of some small amount of unhealthiness to warrant legislative interference with liberty.”¹²⁸ Because baking was not distinctly more dangerous than many other common trades, Peckham concluded, it was not “unhealthy . . . to that degree which would authorize the legislature to interfere with the right to labor.”¹²⁹

Peckham, like Epstein, also understood heightened judicial scrutiny of economic regulations as a bulwark against the ominous expansion of the state police power generally. Peckham noted the recent increase in legislative “interference . . . with the ordinary trades and occupations of the people,” and approvingly cited a series of state court decisions striking down such regulations as unconstitutional deprivations of individual liberty and property.¹³⁰ If the State of New York could abridge “the right of an individual, *sui juris*,” to contract for the sale of his labor, “there would seem to be no length to which legislation of this nature might not go.”¹³¹ “No trade, no occupation, no mode of earning one’s living, could escape this all-pervading power,”¹³² he cautioned. As a result, the state “would assume the position of a supervisor, or *pater familias*, over every act of the individual, and its right of governmental interference with his hours of labor, his hours of exercise, the character thereof, and the extent to which it shall be carried would be recognized and upheld.”¹³³ At stake for the majority was not only the principle of governmental neutrality, or even freedom of contract, but the sovereignty of the individual in relation to the authority of the state.

126. *Id.* at 54.

127. *Id.* at 59.

128. *Id.*

129. *Id.*

130. *Id.* at 63.

131. *Id.* at 58.

132. *Id.* at 59. “A printer, a tinsmith, a locksmith, a carpenter, a cabinetmaker, a dry goods clerk, a bank’s, a lawyer’s or a physician’s clerk, or a clerk in almost any kind of business, would all come under the power of the legislature,” Peckham continued. *Id.* If the Court were to endorse “the interest of the state that its population should be strong and robust,” and thereby sanction as a valid health law “any legislation which may be said to tend to make people healthy,” all manner of human conduct “would come under the restrictive sway of the legislature.” *Id.* at 60. By way of illustration, Peckham described a parade of horrors running more than a page in length. Under the government’s theory, he declared:

Not only the hours of employees, but the hours of employers, could be regulated, and doctors, lawyers, scientists, all professional men, as well as athletes and artisans, could be forbidden to fatigue their brains and bodies by prolonged hours of exercise, lest the fighting strength of the state be impaired.

Id. at 60–61. “We mention these extreme cases,” Peckham explained, “because the contention is extreme.” *Id.* at 61.

133. *Id.* at 62.

In short, we might identify two distinct but interrelated principles at play in *Lochner*: the traditional common law requirement that police regulations serve the general interest (i.e., the “state neutrality” principle) and the defense of individual prerogative, economic or otherwise, against state interference (i.e., the “individual sovereignty” principle).¹³⁴ In *Lochner*, these two principles operate hand-in-hand: The state’s abridgement of Joseph Lochner’s liberty triggered heightened scrutiny of the legislative rationale, which was found wanting precisely because the legislature had improperly favored “bakers as a class.”¹³⁵ In the majority’s view, one highly salutary effect of that decision (though not its formal stated basis) was to limit the scope of state authority at a time of significant regulatory expansion. The two principles are nevertheless conceptually distinct, and need not travel in tandem. For example, one who neither sanctifies individual economic prerogatives per se, nor worries about the size of government generally, can still believe that courts should guard vigilantly against legislative favoritism—a position that is theoretically compatible with big, active government. Conversely, one can believe, as Epstein does, that courts should maximize individual economic prerogative by subjecting every state encroachment, “partial” and “general” alike, to exacting scrutiny. Under this view, a breach of the state neutrality principle is sufficient but not necessary to trigger heightened scrutiny.

Scholars disagree about which of these two principles—state neutrality or individual sovereignty—predominates in *Lochner*.¹³⁶ And as we have seen,

134. Legal historian G. Edward White similarly describes two distinct but often intermingled strains of American political economy and legal/constitutional thought that came to bear on the Court’s *Lochner*-era police powers jurisprudence, which he labels, respectively, the “anti-class principle” and the “public/private distinction.” White concludes, as do I, that the “analytical lynchpin” of *Lochner* for all of the Justices except Holmes was not “liberty of contract” per se, but “the anticlass principle informed by the heritage of ‘free labor’ theory.” White, *supra* note 83, at 101.

135. *Lochner v. New York*, 198 U.S. 45, 57 (1905).

136. For example, Professor David E. Bernstein argues that the Court’s analysis in *Lochner* turns “on individual liberty rights rather than hostility to class legislation.” BERNSTEIN, *supra* note 1, at 33–34. He acknowledges that the “class legislation” theme informed the Court’s review of labor legislation, but concludes that some *Lochner* revisionists have overstated the importance of the “state neutrality” principle, which, he maintains, was “barely evident in Peckham’s majority opinion.” *Id.* at 33. Rather, Bernstein asserts that Peckham’s opinion focused primarily “on the right to liberty of contract, and relegated the more equalitarian concerns” rooted in the principle of state neutrality “to an oblique aside.” *Id.* at 16. In my view, the balance of evidence runs against Bernstein’s reading. First, Peckham framed the basic question before the Court in terms of traditional police power categories: “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 . . . ?” *Lochner v. New York*, 198 U.S. 45, 56 (1905). Moreover, contemporary commentary on *Lochner* was dominated by discussion of the anti-class principle. The fact is that the New York bakery law *was* a labor law, “pure and simple,” as everyone understood. The question that preoccupied contemporaries was precisely whether a labor law intended by the legislature to mitigate laborers’ disadvantage in the bargaining process might nevertheless serve the *general* welfare. See White, *supra* note 83, at 104–05.

Peckham's opinion does indeed offer support for both readings. At the very least, Peckham melded a neo-Jacksonian objection to class legislation with "[t]he laissez-faire concept of liberty [that was then] the common currency among the elite in the United States."¹³⁷ Yet the difficulty of pointing to *Lochner's* "true" meaning is due also to the decision's pivotal position in the Court's highly contested, decades-long transition between two historical modes of protecting individual liberty. As I discussed in Part I, for most of the 19th century, individual rights were viewed as "specific immunities" from state authority—in Gillman's helpful formulation, the sphere of individual prerogative that was "left over after [the] government ha[d] reached the limits of its authorized power."¹³⁸ During the late-19th and early 20th centuries, in response to the era's broad expansion of state economic regulation, the Court gradually relinquished the traditional "limited powers-residual freedoms" model in favor of a "general powers-preferred freedoms" model that essentially conceded the plenary nature of much state and federal regulatory authority while "extend[ing] special protections to particularly important rights and liberties."¹³⁹

Consider *Lochner* in this light. For many legislators, labor spokesmen, and reformers, laws such as New York's maximum hours provision merely provided wage workers with modest protection against the depredations of the industrial economy. For such advocates of regulation, prohibiting bakers from working more than ten hours per day or 60 hours per week was surely no more an encroachment on individual economic prerogatives than, for example, prohibiting a farmer from selling produce outside of a specific location defined by ordinance. Yet for other contemporaries, state interference in the terms of employment posed a novel challenge to the principle of state neutrality as they understood it. As heirs to the long-standing common law prohibition on special legislative privileges, *Lochner*-era judges perceived their critical duty to be that of distinguishing between the vast majority of state police regulations that were legitimately directed toward the public health and welfare, and the illegitimate minority that were intended to serve the interests of a narrow class. Judges reared on a pre-industrial understanding of state neutrality—and perhaps influenced, as well, by *laissez-faire* ideas then in circulation—presumed that contractual exchange functioned as a neutral arbiter of the parties' economic preferences; accordingly, they viewed some efforts to curb exploitative labor practices as legislative favoritism. As a result, even courts that routinely upheld all variety of economic regulations could condemn as illegitimate "class legislation" reform initiatives directed toward mitigating the inequality of bargaining power between employers and employees. Limiting state regulatory authority to matters of the public health and general welfare was

137. Benedict, *supra* note 22, at 313.

138. Gillman, *supra* note 39, at 625.

139. *Id.* at 640, 643.

not new in principle; in practice, however, direct legislative interference with the specific terms of employment tested those limits in a new way.¹⁴⁰

Viewed in this context, the *Lochner* Court struck down New York's maximum hours law because five justices were not persuaded that limiting the number of hours worked by bakers meaningfully served the general welfare or public health. Because the statute thus transgressed the constitutive terms of the police power, the legislature had exceeded its authority. In this respect, however, the handful of labor-regulation cases headlined by *Lochner* were distinct outliers.¹⁴¹ Throughout this period, federal and state courts upheld the vast majority of police regulations against constitutional challenge. Two empirical studies published at the height of the *Lochner* era by the legal historian Charles Warren provide striking evidence.¹⁴² Warren set out to test the common "progressive" complaint that the Supreme Court had fallen out of step "with modern conditions," frustrating the ability of state legislatures to exercise their police authority "in the interest of the general public welfare."¹⁴³ To do so, he reviewed all 560 U.S. Supreme Court cases decided between 1887 and 1911 in which petitioners challenged the constitutionality of a "social or economic" regulation. Warren reported that of those 560, the Court struck down only three (including the New York law challenged in *Lochner*).¹⁴⁴ "The actual record of the Court," he concluded, "thus shows how little chance a litigant has of inducing the Court to restrict the police power of a State, or to overthrow State laws under the 'due process' clause; in other words, it shows the Court to be a bulwark to the State police power, not a destroyer."¹⁴⁵ Modern scholars confirm Warren's assessment.¹⁴⁶ Indeed, contrary to the

140. For an insightful discussion of the now-sizeable body of revisionist historical scholarship characterizing *Lochner*-era police powers jurisprudence as a clash between traditional police powers categories and "[t]he development of class conflict in an increasingly industrial society." See Rowe, *supra* note 80, at 232.

141. In addition to the Court's later decisions striking down minimum wage statutes, see *infra* notes 146–158 and accompanying text, *Lochner*'s "progeny" includes two decisions striking down on "liberty of contract" grounds state and federal laws protecting collective bargaining. See *Coppage v. Kansas*, 236 U.S. 1, 26 (1915) (striking down Kansas statute prohibiting employers from requiring employees, as a condition of employment, to agree not to join a labor union); *Adair v. United States*, 208 U.S. 161, 171, 180 (1908) (striking down the federal Erdman Act of 1898, making it a criminal offense to refuse to hire or to discharge a worker because of membership in a labor union).

142. Charles Warren, *A Bulwark to the State Police Power—The United States Supreme Court*, 13 COLUM. L. REV. 667 (1913) [hereinafter Warren, *Bulwark*]; Charles Warren, *The Progressiveness of the United States Supreme Court*, 13 COLUM. L. REV. 294 (1913) [hereinafter Warren, *Progressiveness*].

143. Warren, *Bulwark*, *supra* note 142, at 667.

144. Warren, *Progressiveness*, *supra* note 142, at 295.

145. *Id.* at 310.

146. See, e.g., Benedict, *supra* note 22, at 297; William E. Forbath, *Politics, State-Building, and the Courts, 1870–1920*, in 2 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 643, 645 (Michael Grossberg & Christopher Tomlins eds., 2008); Gillman, *supra* note 39, at 634; Novak, *supra* note 22, at 273. As the political scientist Karen Orren writes, "many reform landmarks of Progressive lawmaking—railroad regulation, antitrust statutes,

modern denomination of the period between 1905 and 1937 as the “*Lochner* era,” social and economic regulation exploded in the early 20th century, as a “new forcefulness and resourcefulness crept into discussions of the police power.”¹⁴⁷ In short, the select cast of iconic *Lochner*-era cases that Epstein holds up as emblems of classical liberal constitutionalism were the exception rather than the rule.

Although courts were most suspicious of governmental intermeddling in labor relations, the justices nevertheless were prepared to uphold regulations that directly abridged the contractual freedom of employers and employees when they were persuaded that the interference with liberty served the public health or welfare.¹⁴⁸ In *Holden v. Hardy*, for example, decided barely a year after the Court first recognized a man’s due process right “to earn his livelihood by any lawful calling[, and] to pursue any livelihood or avocation,”¹⁴⁹ seven justices agreed that in industries where employers “and their operatives do not stand upon an equality,” the legislature “may properly interpose its authority.” In such circumstances, the Court explained, “the proprietors lay down the rules, and the laborers are practically constrained to obey them.”¹⁵⁰ Even when “both parties are of full age, and competent to contract,” the public retains an interest in the welfare of the employee, who, the legislature may reasonably judge, needs to “be protected against himself.”¹⁵¹ The Court then concluded, in language that both recalls the public welfare rationale of antebellum police power cases and anticipates the “public right” to regulate of the New Deal cases, “[t]he whole is no greater than the sum of all the parts, and when the individual health, safety, and welfare are sacrificed or neglected, the state must suffer.”¹⁵²

protective food and drug statutes, industrial accident statutes, and others—survived judicial scrutiny at state and federal levels . . . Neither repudiated nor significantly weakened, these programs carried on as bulwarks of the American welfare state for the next half-century.” Karen Orren, *The Laws of Industrial Organization, 1870–1920*, in 2 *THE CAMBRIDGE HISTORY OF LAW IN AMERICA* 531, 532 (Michael Grossberg & Christopher Tomlins eds., 2008).

147. Novak, *supra* note 22, at 269.

148. On the court’s relative assertiveness with respect to labor regulations, Orren writes:

[D]uring the period from 1870 to 1920, American judges administered one set of rules . . . when the subject matter of the dispute before them was . . . production and trade of goods and money [,] and another set when the subject matter . . . was . . . relations between master and servant and employees’ collective action.

Orren, *supra* note 146, at 533.

149. *Allgeyer v. Louisiana*, 165 U.S. 578, 598 (1897).

150. *Holden v. Hardy*, 169 U.S. 366, 397 (1898) (upholding a Utah law limiting the hours of labor for miners and smelters).

151. *Id.*

152. *Id.*; see also *Bunting v. Oregon*, 243 U.S. 426 (1917) (upholding an Oregon law limiting the hours of labor for women and men to ten hours per day, and requiring employers to pay time-and-a-half wages for up to three overtime hours per day); *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding an Oregon law limiting the hours of labor for women to ten hours per day).

This is not to deny that the Court's *Lochner*-era police powers jurisprudence endorsed classical liberal themes. Some of it certainly did. Indeed, the apogee of constitutional economic liberty came not in *Lochner* itself, but two decades later in *Adkins v. Children's Hospital*, when a five-justice majority struck down a federal statute establishing a minimum wage for women in Washington, D.C.¹⁵³ In *Adkins*, the constitutional right to "liberty of contract" ripened into a more pointed injunction against governmental interference in the private labor market. The majority opinion omits *Lochner*'s broad reflection on the scope of the police power; instead, the constitutional right itself takes center stage, and does most of the analytical work. "[F]reedom of contract is . . . the general rule," Justice Sutherland explained, "and restraint the exception, and the exercise of legislative authority to abridge it can be justified only by . . . exceptional circumstances."¹⁵⁴ With regard to the challenged minimum wage law, such circumstances were wholly lacking. The law was "simply and exclusively a price-fixing law," Sutherland declared, because it prevented individuals from "freely contract[ing] with one another in respect to the price for which one shall render service to the other in a purely private employment where both are willing, perhaps anxious, to agree."¹⁵⁵ When the government fixes a wage according to the minimum needs of the employee rather than the market value of the services provided, "it amounts to a compulsory exaction from the employer" of "an arbitrary payment . . . having no causal connection with his business, or the contract of the work the employee engages to do."¹⁵⁶ This compelled disbursement, divorced from a market-driven notion of value, rendered the statute "a naked, arbitrary exercise of power,"¹⁵⁷ and thus "put[] upon it the stamp of invalidity."¹⁵⁸

Sutherland's insistence that governmental interference with individual prerogatives, economic or otherwise, was appropriately subject to exacting scrutiny well serves the "universal ideal" at the center of Epstein's classical liberal vision—that outside of a few exceptional and very narrow

153. *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923).

154. *Id.* at 546.

155. *Id.* at 555.

156. *Id.* at 557–58.

157. *Id.* at 559.

158. *Id.* at 558. Twelve years later, in *Morehead v. New York*, 298 U.S. 587 (1936), *overruled in part* by *Olsen v. Nebraska ex rel. W. Reference & Bond Ass'n*, 313 U.S. 236 (1941), the Court relied entirely on *Adkins* to strike down a New York law prohibiting the payment of "oppressive and unreasonable" wages. The Act's fatal flaw, according to the Court—the feature that rendered it an unconstitutional deprivation of economic liberty—was the legislature's definition of "oppressive and unreasonable" to include wages that were "less than sufficient to meet the minimum cost of living necessary to health." *Id.* at 605 (quoting N.Y. Labor Law § 551(7) (1933)). As in *Adkins*, to fix a wage through any means but private bargaining rendered the wage an "arbitrary" "exaction," and thus a form of economic compulsion in conflict with constitutional economic liberty.

circumstances, “the terms of [a] contract [be] left to the parties to devise.”¹⁵⁹ Yet a mere 14 years later, in *West Coast Hotel v. Parrish*, the Court overturned *Adkins* and brought the *Lochner* era to a decisive end.¹⁶⁰ Henceforth, legislative interference with the terms of contract would be upheld so long as the regulation was “reasonable in relation to its subject and [was] adopted in the interests of the community.”¹⁶¹ In Epstein’s telling, *Parrish* and its federal power counterpart, *NLRB v. Jones & Laughlin Steel*, inaugurated a “progressive counterrevolution” that “vanquished” a century-and-a-half of limited government and constitutional economic liberty, setting American constitutionalism along an epochal, deeply misguided detour from its original classical liberal course.¹⁶² Epstein is correct, of course, to view the

159. EPSTEIN, *supra* note 2, at 338.

160. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

161. *Id.* at 391. The only thing the Court had to decide, Hughes explained, was that a challenged economic regulation—in *Parrish*, a statutory minimum wage for women—was not an “arbitrary and capricious” means of protecting workers from “the most injurious competition” in the labor market. *Id.* at 399. “[I]f the protection of women is a legitimate end of the exercise of state power,” the Court queried, “how can it be said that the requirement of the payment of a minimum wage fairly fixed in order to meet the very necessities of existence is not an admissible means to that end?” *Id.* at 398. Thenceforth, the Court explained the following year, “regulatory legislation affecting ordinary commercial transactions” would be upheld unless the available facts “preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.” *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938).

162. EPSTEIN, *supra* note 2, at 34. With regard to rights of liberty and property, Epstein writes:

Historically, the magnitude of the shift in political and constitutional orientation between the (largely) classical liberal and the (largely) progressive view is captured in one critical flip-flop. Roughly speaking, economic liberties, and to a lesser extent property rights, received strong protection in the pre-1937 era and far weaker protection thereafter.

Id. at 337.

Although it does not bear directly on either Epstein’s thesis or my critique, it is worth noting for the sake of precision that the Court arguably disavowed the “absolute and uncontrollable liberty” of *Adkins* three years before the constitutional “revolution” of 1937. In *Nebbia v. New York*, the Court rejected a substantive due process challenge to a New York State statute fixing the price of milk. *Nebbia v. New York*, 291 U.S. 502, 525 (1934). The Due Process Clauses of the Fifth and Fourteenth Amendments, the Court explained, “do not prohibit governmental regulation for the public welfare,” but merely require “that the end shall be accomplished by methods consistent with due process.” *Id.* “And the guaranty of due process . . . demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.” *Id.* Accordingly, revisionist scholars have challenged the dating of the New Deal “revolution.” Professor Barry Cushman persuasively argues that the watershed moment in the New Deal constitutional revolution came not in 1937, but three years earlier, in *Nebbia*, when the Court abandoned the long-standing distinction between businesses “affected with a public interest,” over which the states and Congress traditionally enjoyed broad regulatory authority under their police and commerce powers, respectively, and “private” businesses, which were buffered against governmental intervention. BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* 154–55 (1998). By the time the Court decided *Parrish*, Cushman argues, it thus had already discarded an essential premise of economic

New Deal as an important turning point for the constitutional review of economic regulation, both state and federal. Yet as Part I demonstrated, *Parrish* and its lineage of “rational basis” decisions did not invent the presumption of validity for economic regulations.¹⁶³

Rather, the *Parrish* Court *revived* the presumption of validity with which common law courts approached police regulations throughout the 19th century, and which the *Lochner*-era Court had (equivocally and discretely) unsettled three decades earlier. Chief Justice Hughes’ majority opinion bears close attention. Elsie Parrish, a chambermaid at the West Coast Hotel, had sued her employer to recover \$216.19—the difference between the wages paid to her and the minimum wage fixed by Washington State.¹⁶⁴ The Hotel challenged the statutory minimum wage on the basis of *Adkins*, arguing that it unconstitutionally deprived employers and employees alike of “freedom of contract.”¹⁶⁵ Hughes retorted:

What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrollable liberty. . . . [T]he liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people.¹⁶⁶

Parrish not only spurned constitutional liberty of contract, however. Hughes’ opinion also took “judicial notice” of what had become “common knowledge through the length and breadth of the land”—that the economic well-being of individuals was integral to the “public interest.”¹⁶⁷ “What can be closer to the public interest,” Hughes queried, “than the health of women and their protection from unscrupulous and overreaching employers?”¹⁶⁸ Indeed, “recent economic experience” had brought the very public implications of putatively “private” economic hardship “into a strong light”:

The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage is not only detrimental to their health and well being, but casts a direct burden for their support upon the community. What these workers

substantive due process—the notion that only a discrete class of public and quasi-public enterprises were susceptible to wage and price regulations. *Id.*

^{163.} See generally *Williamson v. Lee Optical*, 348 U.S. 483 (1955); *Caroline Prods. Co.*, 304 U.S. 144.

^{164.} *Parrish*, 300 U.S. at 388.

^{165.} *Id.*

^{166.} *Id.* at 391.

^{167.} *Id.* at 399.

^{168.} *Id.* at 398.

lose in wages the taxpayers are called upon to pay. The bare cost of living must be met The community is not bound to provide what is in effect a subsidy for unconscionable employers.¹⁶⁹

Although reformers, organized laborers, and progressive politicians had long expounded the connection between individual and public welfare, the sustained economic crisis of the 1930s had made manifest that interdependence in stark and undeniable fashion.

Indeed, the Great Depression had exposed as a farce the two classical liberal presumptions that undergirded *Lochner*-era constitutional liberty of contract: first, that the parties to a labor contract “have an equal right to obtain from each other the best terms they can as the result of private bargaining;”¹⁷⁰ and second, “that the interest of the public is not in the slightest degree affected by”¹⁷¹ the economic hardship of individual workers. As long as those presumptions remained intact, legislative intermeddling in workers’ “independence of judgment and of action”¹⁷² could appear “unreasonable, unnecessary, and arbitrary,”¹⁷³ and thus a clear violation of the long-standing state neutrality principle. But in the face of mass poverty, homelessness, and epidemic levels of unemployment (25% nationally at the height of the Depression; much higher in some cities and regions)¹⁷⁴ that left throngs of able-bodied men pleading for virtually any paid labor, judicial assertions of workers’ “equal bargaining power” rang hollow, and statutory labor standards and/or collective bargaining rights came to look like necessary safeguards rather than special privileges.

To the extent that the *Lochner* era does represent a classical liberal moment—and, as I have argued, that interpretation is equivocal at best—it was not the belated fulfillment of a worldview woven into the nation’s constitutional fabric more than a century earlier, but rather a contentious, uncertain, and somewhat muddled process of regulatory and constitutional

169. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 399 (1937).

170. *Adkins v. Children’s Hosp.*, 261 U.S. 525, 545 (1923). Epstein’s vision shares that guiding faith. “[I]n all regimes of private property and freedom of contract,” he writes, “the contract is made to the very end that each may gain something that he needs or desires more urgently than that which he proposes to give in exchange.” EPSTEIN, *supra* note 2, at 339–40 (quoting *Coppage v. Kansas*, 236 U.S. 1, 17 (1915)). Constitutional review of all economic interventions should thus be guided by “the simple point that mutual benefits arise from voluntary exchanges no matter how great the initial wealth differentials may be.” *Id.* at 340. Accordingly, Epstein dismisses the “progressive” contention that industrialization altered this timeless truth, which, he asserts, rests on both the misguided equation of “large firm size with market power,” and the uniquely compulsory quality of state (as compared to corporate) power. *Id.* at 41–42, 340.

171. *Lochner v. New York*, 198 U.S. 45, 57 (1905).

172. *Id.* at 57. See *supra* note 117 and accompanying text. Recall that in *Lochner*, the majority failed to discern any connection between the challenged hours regulation and “the morals, the health or the safety of the people.” *Lochner*, 198 U.S. at 56.

173. *Id.* at 56–57.

174. See MICHAEL B. KATZ, IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA 207 (1986).

adaptation. When Chief Justice Hughes referred in *Parrish* to the “liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people,”¹⁷⁵ he was neither “rewriting” the Constitution nor “vanquishing” 150 (or even thirty) years of classical liberal hegemony, as classical liberal critics of the progressive constitutional turn suppose.¹⁷⁶ Rather, *Parrish* ushered the police power into the industrial era by rehabilitating the broad authority to regulate in the public interest that state and local lawmakers had exercised throughout the 19th century. That rehabilitation, however, required a renovated understanding of state neutrality, in which public power is not only an agent of coercion, but also a bulwark *against* the coercion of economic necessity.

III. CONCLUSION

Although Richard Epstein disclaims doctrinaire originalism, he nevertheless stakes his vision of classical liberal constitutionalism to the authority of history—in particular, to the classical liberal worldview of the late-18th century that the Founders wove into the constitutional fabric, and that channeled the “historical arc of legal evolution” right up until the progressive “revolution” of 1937.¹⁷⁷ Indeed, *The Classical Liberal Constitution’s* central argument is that the Constitution is not merely *open to* classical liberal interpretations, but that it “most emphatically [is] a classical liberal document”;¹⁷⁸ and that fidelity to its true, correct meaning requires that we read it as such. The obverse of this position, however, is that if the historical foundations that Epstein claims for classical liberal constitutionalism turn out to be unstable or worse, his normative argument collapses, particularly for readers who do not share his political-philosophical commitments to unregulated markets and limited government. The other contributors to this forum have very ably demonstrated that the Constitution was decidedly *not* classically liberal in its inception. As Professor Purcell pointedly concludes, to the extent that *The Classical Liberal Constitution* purports to be a history of legal and political thought during the Founding period, it is a history “designed . . . to confer ‘originalist’ legitimacy and authority on Epstein’s contemporary version of libertarian politics and free market economics.”¹⁷⁹

This Response has argued that Epstein’s narrative of subsequent classical liberal ascendancy—the “long historical run of about 150 years”¹⁸⁰—is likewise contradicted by the common law vision of public

175. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392 (1937).

176. EPSTEIN, *supra* note 2, at 34; EPSTEIN, *supra* note 9, at 135.

177. Richard A. Epstein, *Rediscovering the Classical Liberal Constitution: A Reply to Professor Hovenkamp*, 101 IOWA L. REV. 55, 65 (2015).

178. EPSTEIN, *supra* note 2, at 53.

179. Purcell, *supra* note 11, at 121; *see also* Hovenkamp, *supra* note 12, at 40–47; Olken, *supra* note 12, at 102–104.

180. *See supra* note 9 and accompanying text.

authority and private rights as it was understood and practiced by lawmakers and courts. Not only did antebellum states and municipalities routinely regulate a wide variety of economic activity, intermeddling in myriad ways with ordinary private commercial transaction; to the extent that courts did enforced limits on the police power, those limits simply were not drawn, as Epstein claims, according to “the rights of life, liberty, and property . . . at the core of the natural rights tradition.”¹⁸¹ The municipal officials, state legislators, and common law judges who executed the common-law vision of statecraft during the pre-Civil War decades would not have recognized the proto “fundamental rights” framework that Epstein anachronistically ascribes to that period. Further, even the economic liberties jurisprudence of the *Lochner* era, which Epstein celebrates as the culmination of the “classical liberal synthesis,”¹⁸² was remarkably limited in scope, equivocal in principle, and fleeting in time. In short, the actual history of economic regulation in the nineteenth and early twentieth centuries, and the relatively modest limits that courts placed on such regulation, offer meager evidence of a classical liberal constitutional tradition.

181. EPSTEIN, *supra* note 2, at 13.

182. *Id.* at 339.