

## Book Reviews

### BACK TO THE FUTURE

**REHABILITATING *LOCHNER*: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM.** By David Bernstein.<sup>1</sup> Chicago, University of Chicago Press. 2011. Pp. viii, 194. \$45.00 (Cloth).

*William D. Araiza*<sup>2</sup>

“If you think *Roe*<sup>3</sup> is right, why do you think *Lochner*<sup>4</sup> is wrong?”

Constitutional law professors love playing this card with students. We like to think it forces them to confront how their policy preferences influence their legal analysis. And it *is* a nice trick: *Roe v. Wade*<sup>5</sup> responds to many (though not all<sup>6</sup>) students’ policy intuitions about the desirability of a broad abortion right, while *Lochner v. New York*<sup>7</sup> is often taught as the paradigmatic anti-canonical case, a dark stain on the Supreme Court in the tradition of *Dred Scott v. Sanford*<sup>8</sup> and *Plessy v. Ferguson*<sup>9</sup> (the

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1. Foundation Professor of Law, George Mason University School of Law.

2. Professor of Law, Brooklyn Law School. The reviewer wishes to acknowledge the financial support provided by the Brooklyn Law School Dean’s Summer Research Stipend Program. Thanks also to Sara Bernstein and Kristie LaSalle for fine research assistance.

3. *Roe v. Wade*, 410 U.S. 113 (1973).

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

5. *Wade*, 410 U.S. at 115.

6. Some studies suggest that young people may be less committed to abortion rights, or at least to the morality of abortion, than suggested by the standard story that holds that younger groups are inevitably more liberal on social issues. See, e.g., ROBERT P. JONES ET AL., COMMITTED TO AVAILABILITY, CONFLICTED ABOUT MORALITY: WHAT THE MILLENNIAL GENERATION TELLS US ABOUT THE FUTURE OF THE ABORTION DEBATE AND THE CULTURE WARS, 8–10 (2011) available at <http://www.publicreligion.org/research/?id=615> (polling data suggesting a “decoupling” of young people’s attitudes toward same-sex marriage and abortion).

7. *Lochner*, 198 U.S. at 45.

8. 60 U.S. 393 (1857).

latter of which is sometimes paired with *Lochner* as the one-two punch of the evil Gilded Age Court).

But not so fast. David Bernstein has done admirable work in debunking the melodramatic aspects of *Lochner*, and of the *Lochner* era more generally. His recent book, *Rehabilitating Lochner: Defending Individual Rights Against Progressive Reform*, while breaking little new analytical ground beyond his voluminous scholarship on the issue,<sup>10</sup> recapitulates his impressive revisionist scholarship about *Lochner* and its eponymous era. His careful research makes clear that the *Lochner* era was not one in which a hopelessly reactionary Court in the service of the economic elite continually used woodenly formalistic reasoning to stymie needed social reform. Instead, he paints a much more balanced picture of the contending forces of the period.

To begin with, Bernstein views the Court's conservatives as sincerely concerned with individual liberty, both in terms of results and philosophy. For example, consider *Meyer v. Nebraska*, the 1923 case where the Court struck down a state law prohibiting the teaching of German.<sup>11</sup> Bernstein notes that *Meyer* relied heavily on economic due process precedents, including *Lochner* itself. Thus, to the extent that modern substantive due process cases rely on *Meyer*,<sup>12</sup> a fair case could be made that *Roe* was in fact the spawn of *Lochner*. He also observes that *Meyer* was authored by Justice McReynolds, whose notorious racism and anti-Semitism makes him, at least among the *cognoscenti*, probably the most unattractive villain of the pro-*Lochner* Four

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9. 163 U.S. 537 (1896).

10. See generally David E. Bernstein, *Lochner v. New York: A Centennial Retrospective*, 83 WASH. U. L.Q. 1469 (2005) [hereinafter, Bernstein, *Retrospective*]; David E. Bernstein, Bolling, *Equal Protection, Due Process, and Lochnerphobia*, 93 GEO. L.J. 1253 (2005) [hereinafter Bernstein, Bolling]; David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1 (2003) [hereinafter, Bernstein, *Revisionism*]; David E. Bernstein, *Lochner's Legacy's Legacy*, 82 TEX. L. REV. 1 (2003); David E. Bernstein, *Book Review: Lochner's Feminist Legacy*, 101 MICH. L. REV. 1960 (2001) [hereinafter Bernstein, *Feminist*]; David E. Bernstein, *Lochner, Parity, and the Chinese Laundry Cases*, 41 WM. & MARY L. REV. 211 (1999).

11. 262 U.S. 390 (1923); see also *Bartels v. Iowa*, 262 U.S. 404 (1923) (companion case to *Meyer*).

12. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 564 (2003) (citing *Meyer* but concluding that "the more pertinent beginning point" for the Court's substantive due process analysis is *Griswold*); *Roe v. Wade*, 410 U.S. 113, 153 (1973); see also *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (citing *Meyer* but explaining it as a First Amendment case).

Horsemen.<sup>13</sup> To gild the lily, one could add to Bernstein's analysis the observation that McReynolds' prose from the follow-on case to *Meyer, Pierce v. Society of Sisters*,<sup>14</sup> especially his rejection of the state's authority to "standardize" children,<sup>15</sup> bears for contemporary liberals an uncomfortable resemblance to Justice Brennan's language in *Michael H. v. Gerald D.* about the protection due process affords to the freedom "not to conform."<sup>16</sup>

Contrast this picture of the conservative wing of the Court with the picture Bernstein paints of their Progressive opponents, on and off the Court. Rather than viewing them as heroic defenders of the downtrodden, Bernstein sees them as statist who would allow government a free hand to protect white, male, unionized labor at the expense of less favored workers, outlaw private (*i.e.*, Catholic) education, and otherwise trample on individual liberties in the service of broader social goals. Indeed, Bernstein paints the Progressive cause in even darker terms: in Progressives' views, less-capable workers are deemed unworthy of protection if minimum wage laws lead to their exclusion from the job market (pp. 53–54), women are intentionally excluded from that market (pp. 58, 62, 65, 66), and most menacingly, mental "defectives" are susceptible to the state's power to sterilize them for the good of society (pp. 96–98). If Bernstein's description of the conservatives can be summed up by McReynolds's protection of parents' liberty to avoid state "standardization" of their children, his description of the Progressives can be summed up by Holmes' cruel aphorism in *Buck v. Bell*: "Three generations of imbeciles is enough."<sup>17</sup>

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13. He was also notoriously cruel to his law clerks. *See, e.g.*, Barry Cushman, *Clerking for Scrooge*, 70 U. CHI. L. REV. 721, 733–738 (2003); *see also* TODD PEPPERS, *COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK* 66–68 (2006).

14. 268 U.S. 510 (1925).

15. *Id.* at 535 ("The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only.").

16. 491 U.S. 110, 136, 141 (1989) (Brennan, J., dissenting).

17. *Buck v. Bell*, 274 U.S. 200, 207 (1926). Indeed, the earlier parallel between Justice McReynolds' language in *Meyer* and Justice Brennan's language in *Michael H.*, *see text accompanying supra* notes 14–16, finds a mirror image in the comparison between Justice Holmes and Justice Scalia: in *Lochner*, Holmes insisted that the Court not strike down laws as violating substantive due process unless the statute "would infringe fundamental principles as they have been understood by the traditions of our people and our law," *Lochner v. New York*, 198 U.S. 45, 55 (1905) (Holmes J, dissenting), language that would fit comfortably in a due process opinion written by Justice Scalia, *see, e.g.*,

But the standard *Lochner* story may be invalid for a second reason as well, one that Bernstein does not accept. A second question raised by *Lochner* is whether *Roe* necessarily follows from it, or, by contrast, whether *Roe* and modern due process cases can be understood as having a different parentage. Under an alternative view to Bernstein's, modern substantive due process owes (or should owe) at least as much to equality concerns as to liberty.<sup>18</sup> If this view is accepted, then the *Lochner-Roe* connection is broken, or at least mitigated. In that case, maybe there is an answer to the law professor's gotcha question. Maybe you *can* agree with *Roe* but disagree with *Lochner*.

This Review follows, approximately, the structure of Bernstein's book. Part I reviews the story of *Lochner v. New York*: its facts, the opinions and the question of its jurisprudential foundation. Part II considers *Lochner*'s implications, both for what are now called "civil rights" or "civil liberties" and for minorities. Part III considers the modern implications of the absorption of many *Lochner*-based precedents into equal protection or equal protection-like categories<sup>19</sup>—in particular, what that absorption means for *Lochner*'s status as the father that modern substantive due process jurisprudence refuses to acknowledge.<sup>20</sup>

## I. THE *LOCHNER* CASE

### A. THE FACTS

Bernstein's description of *Lochner* does much to dispel the notion that the New York Bakeshop Law reflected a simple story of oppressed workers seeking legislative aid against

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Lawrence v. Texas, 539 U.S. 586, 593 (2003) (Scalia, J., dissenting).

18. See *infra* Part III.

19. By "equal protection-like" I mean in particular the content-neutrality rule in free speech and the requirement of discrimination in free exercise claims. The former in particular is noteworthy, as the content-neutrality rule derived from a case that was decided as an equal protection case. See *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972); see also *Simon & Schuster v. Members of the N.Y. State Crime Victims Compensation Bd.*, 502 U.S. 105, 124, 125 (1991) (Kennedy, J., concurring) (noting this history, and tracing it to *Carey v. Brown*, 447 U.S. 455 (1980)).

20. E.g., *Roe v. Wade*, 410 U.S. 113, 117 (1973) ("We bear in mind, too, Mr. Justice Holmes' admonition in his now-vindicated dissent in *Lochner v. New York*"); *Griswold v. Connecticut*, 381 U.S. 479, 481–482 (1965) ("Overtones of some arguments suggest that *Lochner v. State of New York* should be our guide. But we decline that invitation . . ." (citation omitted)).

powerful capitalists. Bernstein argues that, as is sometimes the case with regulatory legislation, the powerful sectors of the relevant industry supported the law, with an eye to restricting the competition posed by newer, smaller entrants into the market. In this case, Bernstein argues that the large bakeries supporting the law already satisfied its sanitary rules and maximum working-hours provisions, and thus had little to fear from it (p. 27). Conversely, Bernstein argues that the forces opposed to the law were small bakeshops, in particular those owned by recent Jewish, Italian and French immigrants (p. 24).

In setting up the conflict this way, Bernstein returns to a theme that he has expressed before: that ostensibly pro-labor regulatory legislation, such as laws permitting or even requiring closed-shop arrangements, are often really attempts by entrenched groups to secure benefits for themselves by limiting the operation of the free market.<sup>21</sup> Bernstein has made this point when arguing that pro-union legislation harmed African-Americans who were shut out of those unions because of racism, and thus were shut out of economic opportunities when legislation benefitted union members at the expense of non-union workers. In *Rehabilitating Lochner* he suggests similar effects, if not similar malicious motivation, with regard to laws regulating the terms of work performed by women (pp. 58, 62, 65, 66).<sup>22</sup> The heroic picture of Progressive legislatures protecting oppressed workers from rapacious capitalists becomes instead an anti-heroic one where powerful interests groups (now including unions) band together to preserve their monopoly privileges against the striving of less powerful underclass groups.

But problems lurk within this story, even as Bernstein tells it. First, a single piece of legislation may have many different effects, some nefarious and others quite benign. For example, Bernstein cites bakery owners who supported the law in part

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21. See DAVID BERNSTEIN, ONLY ONE PLACE FOR REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL 111–18 (2001) [hereinafter, BERNSTEIN, ONLY ONE PLACE].

22. See also Bernstein, *Feminist*, *supra* note 10, at 1971 (describing the view of “some reformers” during the *Lochner* era that that “saw women workers as an obstacle to their goal of persuading society that employers should be required to pay male heads of households a wage sufficient to support their families” and writing that “[t]he National Consumers’ League opposed . . . any . . . reform that might tempt women to enter the workforce”); *id.* at 1985 (“[P]rotective [labor] legislation was often promoted by labor unions that excluded women to prevent them from competing for jobs held or sought by union members”).

because they hoped its sanitary provisions would improve the reputation of bakeries, thus leading consumers to patronize them rather than baking their own bread (p. 27). Presumably, government has a legitimate interest in increasing the public's confidence in an industry-based food distribution network, apart from either any discriminatory effects the law might have or any restrictions on liberty of contract it might impose. Concededly, this justification does not mitigate the law's impact on equality or liberty rights. But it does blur the previously-clear picture of the bakeshop law as purely special interest legislation, unless legislative encouragement of industrial growth is itself special interest legislation.<sup>23</sup>

Second, the underlying facts justifying legislation are often hard to discern conclusively. Bernstein's own research reveals this. He notes that, in the run-up to the bakeshop law, New York had been roiled by accounts of unsanitary conditions in bakeshops. In particular, he recounts the story of a "dying Jewish baker . . . carried from a cellar bakery on the Lower East Side" in 1894 (p. 25). Based on that event, the bakery union chief convinced a newspaper to run a series of muckraking articles investigating and exposing conditions in bakeshops. But Bernstein expresses some doubt about the accuracy of the reporting, based on the reporter's sympathies and the timing of the article. He also cites two government reports that came to contradictory conclusions about the veracity of the reporter's conclusions (p. 25).

How is a legislature to know which facts most closely approximate reality? More relevantly, how is a court to know? The difficulty courts have in discerning both legislative motivations and underlying policy facts has led, in the modern

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23. If such motivations are illegitimate, then presumably broad swaths of the common law designed to further entrepreneurship and risk-taking would be similarly problematic. *See, e.g.*, CORBIN ON CONTRACTS § 11-56 ("The decision [in *Hadley v. Baxendale*, 156 Eng. Rep. 145 (Ex.) 151 (1854) (limiting damages available for breach of contract to those that are foreseeable or avoidable)] was clearly based on the policy of protecting enterprises in the then-burgeoning industrial revolution); Joseph M. Perillo, *Misreading Oliver Wendell Holmes on Efficient Breach and Tortious Interference*, 68 FORDHAM L. REV. 1085, 1096 (2000) (writing, in the context of a discussion of *Hadley*, that "the rule of certainty, like the rule of foreseeability, encourages entrepreneurial risk taking"); Jan Gordon Laitos, *Continuities From the Past Affecting Resource Use and Conservation Patterns*, 28 OKLA. L. REV. 60, 83 (1975) ("The central concept of tort liability [in the nineteenth century] reflected society's favor for production . . . By reducing legal risks through the liability concept, tort law tended to encourage entrepreneurs to venture for productive ends.").

era, to the extreme deference courts exhibit when considering claims of infringements of non-fundamental rights and discrimination against non-suspect classes. Of course, Bernstein is an academic, not a legislator or a judge; based on his historical investigation he might be able to draw more confident conclusions about these issues. But even he is forced to introduce some ambiguity into his narrative. For example, as noted above he cites two different government studies that reached different conclusions about the health risks of bakeshops.

It is probably the case that both public health and anti-newcomer sentiment motivated the New York legislature, just as it is probably the case that the law both advanced public health and disparately impacted newcomers. How great were those effects and what was the legislature's predominant motivation (even assuming legislative motivation is relevant)?<sup>24</sup> The difficulty in answering those questions makes judicial review—like that in *Lochner*—difficult. In turn, this difficulty counsels in favor of either narrowing the set of situations where courts will perform careful review, or abandoning the careful review *Lochner* exhibited in favor of more deferential judicial scrutiny. But *Lochner*, by insisting on at least some degree of real judicial review every time a regulation impaired one's ability to act in

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24. Bernstein argues that the Court during this period did not inquire into underlying legislative purpose (p. 15). While there is language in the caselaw supporting this conclusion, commentators have sometimes described opinions during this period as turning on considerations of congressional motive. See, e.g., Rosiland Dixon, *Partial Constitutional Amendments*, 13 U. PA. J. CONST. L. 643, 663 (2011) (suggesting that the Court considered congressional motive in the child labor cases, *Hammer v. Dagenhart*, 247 U.S. 251 (1918), and *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922), where the Court rejected, respectively, federal bans on interstate shipment and taxation of child labor-manufactured goods as illegitimate attempts by Congress to regulate manufacturing). Ultimately, the distinction here may turn on whether the term “motive” implies some level of subjective motivation or a “purpose” abstracted out from the necessary effect of the law at issue. See, e.g., *Bailey*, 259 U.S. at 38 (“Although Congress [in the ostensible tax it levied on child labor-manufactured items] does not invalidate the contract of employment or expressly declare that the employment within the mentioned ages is illegal, it does exhibit its intent practically to achieve the latter result by adopting the criteria of wrongdoing and imposing its principal consequence on those who transgress its standard.”); see also *Lochner v. New York*, 198 U.S. 45, 64 (1905) (“It is impossible to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power . . . are, in reality, passed from other motives. We are justified in saying so when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law. The purpose of a statute must be determined from the natural and legal effect of the language employed . . .”).

the marketplace, opened up the specter of judicial review of every instance of what we now call “economic and social regulation.”<sup>25</sup>

#### B. A LACK OF DEFERENCE?

*Lochner*’s insistence on more than *pro forma* judicial review in every case of contractual liberty requires an examination of the deference with which the Court acted. Justice Peckham’s opinion for the Court has been roundly criticized for its failure to defer to the legislature’s determinations. Such deference could take one of two, or possibly three, forms. First, it could take the form of Justice Holmes’s presumption that such legislation was constitutional, given his understanding that the Due Process Clause simply did not protect substantive rights such as the right to contract. In a sense, the Holmes approach is not deference at all, as it reflects a bright-line rule that the Constitution simply does not speak to the claim at issue.

A second approach, one that is deferential in the true sense of the word, is reflected by the modern rational basis standard used to decide cases where non-fundamental rights are alleged to be unconstitutionally infringed. This approach, while similarly yielding predictable government wins, at least leaves open the theoretical possibility that a law could be so arbitrary that it violates the substantive guarantee of liberty found in the Due Process Clause. Finally, a third approach, the one associated with Justice Harlan’s *Lochner* dissent, defers to government determinations that the public interest requires an infringement on liberty, but does so only after something more than perfunctory judicial review.

Did Justice Peckham really refuse to defer? His opinion for the Court reads at times like a breezy rejection of the legislature’s findings: he relied on “the common understanding” that “the trade of a baker has never been understood as an unhealthy one,”<sup>26</sup> and then complained that upholding the New York law would render susceptible to state regulation every profession, since, “unfortunately . . . labor, even in any department [sic], may possibly carry with it the seeds of unhealthiness.”<sup>27</sup> On the other hand, he also wrote that he

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25. See, e.g., *Trimble v. Gordon*, 430 U.S. 762, 766 (1977) (using this term).

26. *Lochner*, 198 U.S. at 59.

27. *Id.*



reached his conclusion about the health risk of being a baker “in looking through statistics regarding all trades and occupations.”<sup>28</sup> Indeed, Bernstein elsewhere argues that Peckham “clearly relied on—but, to the detriment of his reputation, did not explicitly cite—the studies discussed in the appendix to *Lochner*’s brief showing bakers had similar mortality rates to many ordinary professions that the legislature did not regulate.”<sup>29</sup> But even had Peckham explicitly cited those studies he still would have been susceptible to the criticism that he was choosing for himself which studies to rely on and which to discredit. By contrast, Harlan explicitly cited studies that supported the view that baking was unhealthful work.<sup>30</sup> Based on that evidence, he concluded that the law was not “beyond all question a plain, palpable invasion of rights secured by” the Constitution.<sup>31</sup> The charge of failure to defer appears solid.

More generally, Bernstein’s careful analysis of the differing deference levels in the various *Lochner* opinions helpfully illuminates two distinct disagreements on the Court. One, between Holmes and the eight Justices comprising the Peckham majority and the Harlan dissent, centered on the existence of an unenumerated right to contract, and, indeed, on whether the Due Process Clause protected any substantive rights whatsoever. The other faultline exposed by *Lochner* concerned the amount of deference legislatures were due when they regulated in ways that impaired contractual liberty. Both of these divisions were moving targets: by 1925, Justice Holmes was willing to recognize, based on the Court’s interpretation of the Due Process Clause in other contexts, that the Clause provided at least some protection for the freedom of speech.<sup>32</sup> Similarly, Bernstein notes that in the second decade of the twentieth century the Court became significantly friendlier to government regulation, but then

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28. *Id.*

29. See Bernstein, *Retrospective*, *supra* note 10, at 1498.

30. See *Lochner*, 198 U.S. at 71 (Harlan, J., dissenting). Bernstein elsewhere notes that the studies Harlan cited did not appear in New York’s brief. Bernstein, *Retrospective*, *supra* note 10, at 1499.

31. *Lochner*, 198 U.S. at 68 (Harlan, J., dissenting).

32. See *Gitlow v. New York*, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting) (“The general principle of free speech, it seems to me, must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word ‘liberty’ as there used. . . .”); see also *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) (recognizing, based on precedent, that the Due Process Clause provided substantive guarantees that included the First Amendment right to freedom of speech).

increased its scrutiny again with the ascension of several Harding appointees (pp. 48–49).

Here again Bernstein performs a useful service by performing a more fine-grained analysis of the *Lochner* Court. In particular, by considering Harlan’s dissent he does much to dispel the black-and-white narrative that too often passes as the truth about *Lochner*. However, his carefulness in delineating the different phases of the *Lochner* era has the ironic effect of watering down the force of his argument about the Court’s mode of analysis during this period, and the implications of its approach. Simply put, it is harder to paint a coherent picture of how much the Court deferred to legislative judgments (and thus how strictly it protected the right to contract), and how its approach impacted minorities and other outsiders, given the Court’s evolution from its early-phase stringent review to its middle-phase (relatively) lenient review, and then back again.<sup>33</sup>

Obviously, it’s not Bernstein’s fault that the Court didn’t apply a consistent analytical approach during this period, even if that ambiguity does muddy his underlying narrative. More importantly for our purposes, the question of how much the *Lochner*-era Court really deferred to marketplace regulation becomes less important once the economic regulation cases provided the foundation for the Court’s non-economic liberty jurisprudence. To the extent the marketplace cases generated *Meyer* and its progeny, the impact of that generative process persisted, even if the stringency of the Court’s underlying economic due process analysis waxed and waned.

### C. LIBERTY OR EQUALITY?

In *Rehabilitating Lochner*, Bernstein makes a powerful argument that *Lochner* was based on liberty rather than equality concerns. To many ears this may sound obvious. However, Bernstein rightly chooses to spend time addressing the argument, most fully developed by Michael Les Benedict and Howard Gillman, that *Lochner*-era jurisprudence focused less on protecting individual liberty than on ensuring that government not enact so-called “class legislation.”<sup>34</sup> Anxiety about class

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33. Indeed, Bernstein speculates that *Lochner* itself included statements that not all members of the five-Justice majority agreed with (pp. 34–35). Thus, even the case itself arguably stands for less than what it appears to at face value.

34. See generally Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation*

legislation—that is, legislation that bestowed benefits and burdens unequally, and in particular legislation that granted monopoly privileges—was surely a major concern of the Fourteenth Amendment. Bernstein acknowledges that avoidance of class legislation was a major concern of the original framers (who expressed it as a concern about faction),<sup>35</sup> antebellum constitutional thinkers and the framers of the Fourteenth Amendment (pp. 14–15).<sup>36</sup> But in his other writing, Bernstein argues that the class legislation prohibition was never interpreted stringently by the Supreme Court.<sup>37</sup> Indeed, he contrasts the Supreme Court with some state high courts, which he argues enforced equality guarantees strictly.<sup>38</sup>

It is difficult in a short review to evaluate which side has the better of the debate, in large part because, as Bernstein himself notes, class legislation restrictions constituted part of the Court's understanding of due process. This should not be surprising: our current practice of rigidly separating substantive rights, protected under due process, from equality rights, protected under equal protection, was likely alien to the Fourteenth Amendment's drafters, or at least not their primary understanding.<sup>39</sup> For confirmation, one need only look to the Civil Rights Act of 1866, which protected not a particular level of contract and property rights, but the same level of protection as that a state granted white citizens.<sup>40</sup>

For our purposes, it is unnecessary to resolve this dispute. Regardless of *Lochner's* basis, the fact remains that the *Meyer* line of cases began to diverge from any explicit concern with

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*of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 L. & HIST. REV. 293 (1985); HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE LOCHNER ERA POLICE POWERS JURISPRUDENCE* (1993).

35. See, e.g., GILLMAN, *supra* note 34, at 22 (“[t]he distinctions *Lochner* era judges attempted to draw between valid public-purpose legislation . . . and invalid class legislation . . . had their origins in a similar set of distinctions elaborated by the framers of the Constitution”).

36. Mark G. Yudof, *Equal Protection, Class Legislation and Sex Discrimination: One Small Cheer for Mr. Herbert Spencer's Social Statics*, 88 MICH. L. REV. 1366, 1373–74 (1990); see also Melissa L. Saunders, *Equal Protection, Class Legislation and Colorblindness*, 96 MICH. L. REV. 245, 251–68 (1997).

37. See Bernstein, *Revisionism*, *supra* note 10, at 15–21; Bernstein, *Feminist*, *supra* note 10, at 1963.

38. See Bernstein, *Revisionism*, *supra* note 10, at 18–20.

39. A vestige of this understanding may remain today in the fundamental rights strand of equal protection. See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964).

40. See, e.g., Jacobus tenBroek, *Equal Under Law* 237 (1965) (concluding that the Equal Protection Clause required full—that is, substantive—protection for these rights).

class legislation or equality. Certainly these cases can be understood as dealing with unequal or discriminatory legislation. Indeed, that fact may allow their legitimate reconceptualization as cases about discrimination.<sup>41</sup> But language about class legislation is largely absent from the actual opinions. Thus, one can remain agnostic about the liberty vs. class legislation debate in *Lochner* while still recognizing that, somehow, *Lochner*'s progeny became based on substantive liberty rather than on the requirement that all legislation be general.

## II. *LOCHNER*'S IMPLICATIONS

The middle chapters of *Rehabilitating Lochner*—Chapters 4 and 5, and to a great degree Chapter 6—consider *Lochner*'s implications for, respectively, sex equality, racial equality, and what we now call “civil rights” or “civil liberties.” Bernstein makes important claims in these chapters, which are all the more significant because they challenge the standard view that *Lochner*-era jurisprudence inevitably favored powerful interests at the expense of the powerless. These claims deserve a closer look.

### A. CIVIL LIBERTIES AND *LOCHNER*

What did *Lochner* mean for the rights we today call “civil rights” or “civil liberties?” Bernstein is persuasive in arguing that *Lochner* was the doctrinal font for the Court's gradual embrace of such rights in the 1920's and 1930's. He notes that Justice McReynolds's opinion in *Meyer v. Nebraska*<sup>42</sup> relied heavily on economic due process cases as support for the proposition that the Due Process Clause protects a parent's right to direct his child's upbringing.<sup>43</sup> More generally, *Lochner*-era Justices favoring the right to contract also played important roles in expanding civil liberties. For example, Justice McReynolds, in

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41. See *infra* Part II(A).

42. 262 U.S. 390 (1923); see also *Bartels v. Iowa*, 262 U.S. 404 (1923) (companion case to *Meyer*).

43. Later opinions upholding constitutional rights claims did not rely as heavily on economic due process as the foundation. See, e.g., *Powell v. Alabama*, 287 U.S. 45, 60-67 (1932) (relying on history and general statements in early cases about the possibility that “due process” included specific Bill of Rights guarantees to incorporate the Sixth Amendment); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (assuming, without deciding or giving extended discussion, that due process liberty included the freedom of speech). But see 268 U.S. at 666 n.9 (citing, among other cases, the statement in *Coppage v. Kansas*, 236 U.S. 1, 17 (1915), that liberty and property are “human rights”).

writing *Meyer*, used expansive language about the scope of individual liberty,<sup>44</sup> while Justice Sutherland wrote important civil liberties opinions in the criminal procedure<sup>45</sup> and press freedom<sup>46</sup> areas. Conversely, Justices Holmes and Brandeis were, at best, reluctant converts to the cause of substantive due process liberty.<sup>47</sup>

So it seems like an open and shut case that *Lochner* is the font of the Court's first protections of civil liberties, and thus of the Court's modern individual rights jurisprudence. But the picture is at least slightly more complicated. As Bernstein himself has noted in his previous scholarship on the *Lochner* era, many of those early civil rights cases dealt with government action that had severe disparate impacts on minorities. The statute struck down in *Meyer* was the product of anti-German xenophobia during the World War I era,<sup>48</sup> while the law at issue in *Pierce v. Society of Sisters* clearly aimed at Catholic education,<sup>49</sup> the hangover from the bitter nineteenth century disputes between Protestants seeking to inculcate their religious values via public education and Catholics seeking to preserve

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44. See *Meyer*, 262 U.S. at 399 (“While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”).

45. See *Powell v. Alabama*, 287 U.S. 45 (1932). *Powell* was the case dealing with “the Scottsboro Boys,” African-American young men who were victimized by a racist criminal justice system in the South.

46. See *Am. Press v. Grosjean*, 297 U.S. 233 (1936); ARTHUR HELLMAN, WILLIAM ARAIZA AND THOMAS BAKER, *FIRST AMENDMENT LAW: FREEDOM OF SPEECH AND RELIGION* 820 (2nd ed. 2010) (noting Sutherland's position).

47. See, e.g., *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) (“Despite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure.”); *Gitlow*, 258 U.S. at 671 (Holmes, J., dissenting) (“The general principle of free speech, it seems to me, must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word ‘liberty’ as there used”); see also p. 101 (describing Holmes' recognition that due process protects the freedom of speech as “grudging”).

48. See Bernstein, *Bolling*, *supra* note 10, at 1273 (“The *Meyer* law had been motivated by nativist hysteria attendant to World War I.”).

49. See Bernstein, *Bolling*, *supra* note 10, at 1274 (describing the law struck down in *Pierce* as “inspired by anti-Catholic sentiment”). For an alternative view, see Steven J. Macias, *The Huck Finn Syndrome in History and Theory: The Origins of Family Privacy*, 12 J. L. & FAM. STUD. 87, 105–09 (2010) (arguing that the Oregon referendum leading to the law struck down in *Pierce* was not heavily motivated by anti-Catholic animus).

their values via parochial education.<sup>50</sup> The major speech cases of the era all dealt (as they usually do) with the speech of dissenters, usually unpopular ones at that.<sup>51</sup> For their part the criminal procedure cases dealt with criminal defendants, hardly the most popular group in any polity. This fact was especially true during this era, as the key cases that began using the Due Process Clause to incorporate the Bill of Rights' criminal procedure provisions dealt with racist southern criminal justice systems and African-American defendants.<sup>52</sup>

Indeed, as Bernstein briefly notes (p. 104), the Court in the famous footnote four of *United States v. Carolene Products*<sup>53</sup> transformed *Meyer*, *Pierce* and similar cases<sup>54</sup> into cases that stood for the proposition that “similar considerations [requiring more stringent judicial review than normal] enter into the review of statutes directed at particular religious or national or racial minorities.”<sup>55</sup> Bernstein is more than grudging here: referring to footnote four's treatment of the *Meyer* line of cases, he writes as follows: “The Court creatively reinterpreted—that is, intentionally misinterpreted—*Meyer* and *Pierce* as decisions invalidating laws because the laws discriminated against minorities” (p. 104).

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50. See, e.g., Meir Katz, *The Economics of Section 170: A Case for the Charitable Deduction of Parochial School Tuition*, 12 RUTGERS J.L. & RELIGION 224, 259 n.134 (2011) (noting this phenomenon in the late nineteenth and early twentieth centuries); Christopher C. Lund, *The New Victims of the Old-Anti-Catholicism* 4–7, 10–11 (Wayne State University Law School Working Paper No. 10-13), available at <http://ssrn.com/abstract=1943646> (same); see also *id.* at n.1 (citing sources); Bernstein, *Bolling*, *supra* note 10, at 1274 (discussing *Farrington v. Tokushige*, 273 U.S. 284 (1927), a case dealing with a Hawaii law restricting foreign-language education, which Bernstein describes as “designed to shut down Japanese-language schools in Hawaii”).

51. E.g., *Gilow*, 268 U.S. at 252 (considering a free speech challenge to a New York law aimed at agitation in favor of the overthrow of private property); *Herndon v. Lowery*, 301 U.S. 242 (1937) (finding First Amendment protection for Communist literature calling for a separate state for African Americans living in the South).

52. E.g., *Powell v. Alabama*, 287 U.S. 45 (1932) (“Scottsboro Boys” case). Note, however, that pro-*Lochner* Justices Butler and McReynolds dissented in *Powell*, albeit on a narrow ground. See Sanjay Chhablani, *Disentangling the Sixth Amendment*, 11 U. PA. J. CONST. L. 487, 492 n.18 (2009) (citing cases); Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 764 (1991) (“The vast majority of the Court's first constitutional interventions in state criminal procedure involved the Jim Crow ‘justice’ southern states meted out to black defendants.”).

53. 304 U.S. 144, 152 n.4 (1938).

54. See *id.* (citing *Meyer*, *Pierce*, and also *Bartels v. Iowa*, 262 U.S. 404 (1923), the companion case to *Meyer*, and *Farrington*, which dealt with a similar restriction on foreign-language schools in the very different context of Hawaii, where the Court, relying on *Meyer*, *Pierce* and *Bartels*, struck down the law).

55. *Id.*

The stridency of Bernstein's criticism seems a little unfair. Bernstein does not develop the argument in *Rehabilitating Lochner*, but in other scholarship he has argued that the *Meyer* line of cases and others (most notably *Adkins v. Children's Hospital*<sup>56</sup> and *Buchanan v. Warley*<sup>57</sup>) are based on an approach in which, once a court identifies a protected liberty interest that the law infringes, discriminatory motives or goals are insufficient to provide a police power justification for the infringement.<sup>58</sup> Thus, his argument with regard to footnote four's treatment of *Meyer* seems to be that footnote four focused on the fact of discrimination, rather than on the insufficiency of discriminatory motives as justification for an infringement on liberty rights.

In theory this is a real distinction. Under Bernstein's understanding of how the *Lochner*-era Court analyzed cases like *Meyer*, a crucial first step was the identification of a liberty right. If no liberty right was at stake, that was the end of the case—the government won. But if such a liberty right did exist, the government could not justify its infringement by claiming a discriminatory motive.<sup>59</sup> By contrast, under footnote four's formula, discrimination against a “discrete and insular” minority triggered closer judicial scrutiny. Not only was there not any preliminary inquiry into the existence of a liberty interest, but the entire focus of the analysis moved away from the government's police power-based reasons for infringing on a liberty interest and toward to the government's justifications for the discrimination itself. In sum, the focus shifts from liberty interests to anti-discrimination *simpliciter*.

But this distinction may be more theoretical than real, at least if due process is to do the work Bernstein thinks it should. Consider *Bolling v. Sharpe*,<sup>60</sup> the companion case to *Brown v.*

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56. 261 U.S. 525 (1923) (striking down a District of Columbia ordinance mandating a minimum wage for women).

57. 245 U.S. 60 (1917) (striking down a Louisville, Kentucky, ordinance prohibiting real estate sales that would lead to residential integration).

58. See Bernstein, *Bolling*, *supra* note 10, at 1270–73.

59. See, e.g., *Buchanan*, 245 U.S. at 80–82 (noting, and rejecting, the city's race-based reasons for the ordinance); *Adkins*, 261 U.S. at 552–53 (noting, and rejecting, the government's arguments about women's incapacity to contract as justifications for the law); see also Bernstein, *Bolling*, *supra* note 10, at 1272 (“In *Buchanan* the Court held that denial of property rights for African Americans could not be based on weak race-related police power rationales. In *Adkins*, the Court held that women could not be denied liberty of contract based solely on weak gender-related police power rationales.”).

60. 347 U.S. 497 (1954).

*Board of Education*,<sup>61</sup> in which the Court struck down school segregation in District of Columbia schools. As Bernstein has elsewhere argued,<sup>62</sup> *Bolling* is a confused opinion. The absence of an Equal Protection Clause binding the federal government required the Court to rely on the Fifth Amendment's Due Process Clause. While that Clause had long been understood as including some restriction on discrimination,<sup>63</sup> *Bolling*'s reliance on due process inevitably raised the specter of resurrecting *Lochner*-era jurisprudence, especially given how the *Lochner*-era Court had combined concepts of liberty and equality.

Bernstein has argued that *Bolling* would have been a more coherent opinion had the Court forthrightly relied on the *Meyer* line of cases to recognize a liberty to attend a non-segregated public school, and then, following *Lochner*-era analysis, had rejected racially discriminatory justifications for the law.<sup>64</sup> But this approach requires recognizing a liberty interest in attending a non-segregated *public* school. That move seems to be a stretch. As Bernstein himself notes, it is susceptible to the objection that "once a *Lochnerian* Court acknowledged that access to a government-provided service could be construed as a *liberty* right, the entire classical/libertarian edifice of *Lochner* would be lost."<sup>65</sup> His response—that "a libertarian might argue that to subsidize one group is the economic equivalent of taxing its competitors"—and thus that "[t]o subsidize whites' education more than blacks' education . . . is, by economists' lights, the equivalent of taxing blacks more than whites"<sup>66</sup> seems, at least at first glance, to erase any boundaries on what we call liberty rights. If discriminatory access to public education violates the victim's liberty, then presumably so does discriminatory access to a government contract<sup>67</sup> or broadcasting license,<sup>68</sup> or discriminatory access to any government service at all.<sup>69</sup> If

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61. 347 U.S. 483 (1954).

62. See generally Bernstein, *Bolling*, *supra* note 10.

63. See generally *id.*

64. See, e.g., *id.* at 1282.

65. *Id.* at 1283 (emphasis in original).

66. *Id.*

67. E.g., *Adarand Constructors v. Peña*, 515 U.S. 200 (1995).

68. E.g., *Metro Broad. v. FCC*, 497 U.S. 547 (1990).

69. E.g., *Kotch v. Bd. of Riverboat Pilot Comm'rs*, 330 U.S. 552 (1947) (government appointment as riverboat pilot); *Vill. of Willowbrook v. Olech*, 528 U.S. 562 (2000) (discriminatory access to a city water hookup).



anything becomes a liberty interest, then searching for a liberty interest becomes a purely formalistic exercise.<sup>70</sup>

The upshot is that if Bernstein is going to argue that the *Bolling* Court could have reached the same result via the standard *Lochner*-style approach to discriminatory deprivations of liberty, then presumably most, if not all, modern equal protection fact patterns can be understood in this way as well. Perhaps more to the point, if one is willing to expand the notion of liberty as Bernstein is in his discussion of *Bolling*, then the *Lochner* Court's own precedents—*Meyer*, *Pierce*, *Farrington*, *Buchanan* and *Adkins*—can be legitimately understood as cases focusing on the discrimination, not on the liberty interest.

Hence my suggestion that Bernstein is perhaps too harsh in his evaluation of *Carolene Products*'s reconceptualization of the *Lochner*-era civil rights cases. In addition to the analysis sketched out above, the rhetoric of those cases rests easily within a basic concern for equality, separate from the status of the regulated conduct as a liberty interest. For example, *Adkins*' concern for the equal dignity of women fits easily within modern equal protection doctrine's aspiration to eradicate stereotypes about women's capabilities while recognizing government's legitimate authority to compensate women for past discrimination and account for real differences between the sexes.<sup>71</sup> Similarly, Justice McReynolds' refusal in *Pierce* to allow the government to "standardize" its children<sup>72</sup> can be reasonably

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70. It is true enough that there remains a distinction between the *Lochner* Court's second step—considering the police power justifications for the law—and modern equal protection doctrine's approach of considering the government interests behind the challenged classification. See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976) (testing the state's gender-based classification against its highway-safety justifications). But this may be a distinction without a difference. The type of police power argument that government may have made, say, in *Adkins*—that women are incapable of contracting as effectively as men, and thus need the government's assistance—closely tracks the type of argument a modern government-defendant would make when defending a classification against an equal protection challenge. For example, a modern government-defendant defending a law classifying based on gender might well argue that women are truly different from men, and merit different treatment. See, e.g., *Nguyen v. INS*, 533 U.S. 53 (2001) (accepting this type of argument). Of course, there still has to be some positive justification for the law, rather than simply a claim that the two groups are similarly situated. This is simply a restatement of the fundamental rule that every law must have a justification. But if Bernstein is correct that the *Lochner*-era Court gave legislatures broad latitude to legislate for the public good, then the deference with which the modern Court applies this rule would not differ greatly from how the *Lochner* Court would apply the analogous rule that a law must be within the government's police power.

71. See, e.g., *United States v. Virginia*, 518 U.S. 515, 547 (1996).

72. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925).

read as reflecting a concern about dissenting or minority approaches to basic issues such as child-rearing and family structure.<sup>73</sup>

Such a reconceptualization would not make the *Pierce* line of cases incoherent or anomalous. For example, approximately sixty years after *Meyer*, Justice Brennan in *Michael H. v. Gerald D.*—another due process case—spoke of the freedom “not to conform.”<sup>74</sup> Tellingly, such freedoms have also been vindicated via the Equal Protection Clause.<sup>75</sup> And approximately sixty years before *Meyer*, the Civil Rights Act of 1866 guaranteed to all individuals the “same rights” to contractual and other liberties,<sup>76</sup> an equality right whose constitutionalization all agree was at least one of the major goals of the Fourteenth Amendment.<sup>77</sup> Indeed, even during the *Lochner* era the Court was already experimenting with this reconceptualization. For example, in *Nixon v. Herndon*,<sup>78</sup> seemingly an equal protection case,<sup>79</sup> the Court cited *Buchanan* as an example of invidious race discrimination, without any mention of the liberty interest *Buchanan* originally focused on.<sup>80</sup>

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73. This concern can work its way through the doctrine either via due process, as with *Pierce* and *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (considering a challenge to a California law conclusively presuming paternity to the husband of a woman bearing a child), or equal protection, as with *Department of Agriculture v. Moreno*, 413 U.S. 528 (1973) (striking down, as violating equal protection, a law that denied food stamp benefits to members of unrelated communal homes). See also *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 455 (1985) (Marshall, J., concurring in the judgment) (agreeing that a city’s denial of a zoning exemption to a group seeking to establish a group home for mentally retarded persons violated equal protection, but arguing that the level of scrutiny to be accorded the government action should depend in part on the fact that the action infringed on the right to establish a residence in a given area). See also *supra* note 39.

74. See *Michael H.*, 491 U.S. at 140 (Brennan, J., dissenting); see also text accompanying *supra* note 16 (repeating this parallel).

75. See *supra* note 73.

76. Civil Rights Act of 1866, ch. 31 § 1, 14 Stat. 27.

77. E.g., RAOUL BERGER, *GOVERNMENT BY JUDICIARY* 26–27 (2d ed. 1997); WILLIAM NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 104 (1988); TENBROEK, *supra* note 40 at 224–25.

78. 286 U.S. 73 (1932) (striking down a Texas law authorizing state political parties to exclude whoever they wished from primary voting, as violating the Fourteenth Amendment when applied by the state Democratic Party to exclude African-Americans).

79. See *id.* at 89 (“The Fourteenth Amendment, adopted as it was with special solicitude for the equal protection of members of the Negro race, lays a duty upon the court to level by its judgment these barriers of color.”).

80. See *id.* at 89 (“Delegates of the State’s power have discharged their official functions in such a way as to discriminate invidiously between white citizens and black. *Buchanan v. Warley*, 245 U. S. 60, 77 [(1917)]. The Fourteenth Amendment, adopted as

Thus, it is not self-evident that Justice Stone's "creative[] misinterpret[ation]" of the *Meyer* line of cases was illegitimate, as suggested by Bernstein's dismissal of that move. Creative, yes—even aggressive. Bernstein is right that the *Lochner*-era civil rights opinions were doctrinally focused on due process. But the fact that due process doctrine rejected discrimination as a legitimate police power objective means that equality considerations would enter into the Court's analysis, at least in cases that were ripe for recasting in footnote four as equal protection cases. This recasting is not necessarily illegitimate, if by 1938 the Court had come to realize that the *Meyer* line of cases, the Court's then-nascent protection for speech, association and voting rights, and indeed, the protection of all Bill of Rights provisions it decided to incorporate, were correct exactly because they presented appropriately-cabined situations where more intrusive judicial review was called for, while avoiding such review every time government regulated the marketplace.<sup>81</sup>

Bernstein is also correct when he states, immediately after the "intentionally misinterpreted" sentence above,<sup>82</sup> that footnote four "was the Court's first of several attempts to preserve [the *Meyer*] line of cases by disentangling them from their roots in the now-obsolete liberty of contract line of cases" (p. 104). But by itself that does not prove that the Court's action was illegitimate. It is not unknown for the Court to "disentangle" holdings it deems correct from an underlying context or foundation it finds problematic.<sup>83</sup> Concededly, such attempts are potentially problematic, exactly because they provoke the response that the Court is simply picking the results it wants to preserve and pruning away the context of surrounding undesirable results in an unprincipled way.<sup>84</sup> But given the

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it was with special solicitude for the equal protection of members of the Negro race, lays a duty upon the court to level by its judgment these barriers of color." (parallel and additional citations omitted).

81. As implied by *Carolene Products*, such careful review is justified in these situations because of either the likelihood of a political process breakdown or, in the case of specific Bill of Rights provisions, the greater legitimacy of judicial enforcement of specifically-worded constraints on government action. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

82. See *supra* text accompanying note 53.

83. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 853 (arguing that it is preserving the "central holding" of *Roe* while correcting other doctrinal mistakes *Roe* made).

84. See, e.g., *id.* at 979, 993 (Scalia, J., concurring in the judgment in part and dissenting in part) (making a similar objection to the joint opinion's treatment of *Roe*).

foundation of the Fourteenth Amendment's framers' concern with both liberty and equality, not to mention later justices' attempts to determine the scope of due process rights by recourse to equality concerns,<sup>85</sup> Stone's reconceptualization of these cases deserves at least more study than the quick dismissal Bernstein provides.

Regardless of one's views about this question, the point remains that *Lochner* did ultimately make footnote four possible, by paving the way for cases like *Meyer* and in turn their eventual reconceptualization as equality cases. This insight raises a further, more practical question about *Lochner* and minorities: how good was *Lochner* itself for the minorities that its progeny eventually were understood to protect?

### B. *LOCHNER* AND MINORITIES

Bernstein argues forcefully that *Lochner*, and the muscular protection of substantive due process rights it represents, was good for minorities. As explained above, he draws a clear line connecting *Lochner*, the *Meyer* line of cases and the Court's ultimate protection of free expression and criminal procedure rights. His argument is hard to refute: even if, as suggested above, the non-economic due process cases can legitimately be reconceptualized as cases about discrimination, the fact remains that the opinions themselves relied on *Lochner* and its progeny. In this way, Bernstein is right to conclude that *Lochner* eventually redounded to the significant benefit of minorities.

However, Bernstein pushes the argument further. First, he argues that economic due process itself helped minorities by providing a means for courts to strike down discriminatory government action that impeded the core *Lochner* right to contract. In *Rehabilitating Lochner*, Bernstein presses the point that *Lochner*, by leading to the striking down of the Louisville, Kentucky, residential segregation ordinance in *Buchanan v. Warley*,<sup>86</sup> provided an important tool for African-Americans to gain a residential and thus social foothold in major cities.

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85. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 140 (1989) (Brennan, J., dissenting) (arguing that due process protects the "freedom not to conform"); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (noting that a holding about the due process right of gays and lesbians to engage in consensual non-commercial sexual intimacy also furthers equal protection values).

86. 245 U.S. 60 (1917).

This is a provocative claim. To his credit, Bernstein does not over-argue it. Thus, he writes:

Giving *Buchanan* its due does not absolve the Supreme Court of its acquiescence to Jim Crow in other contexts. Nor does it remotely suggest that the pre-New Deal Court's civil rights jurisprudence was superior to that of later Supreme Courts which, like American society more generally, became increasingly egalitarian on race. But, given that advocates of racial equality were a distinct minority among Progressives, the practical alternative to the early twentieth century's liberty of contract jurisprudence was not the Warren Court's liberalism but the indifference or hostility to the rights of African Americans shown by most Progressive legal elites (p. 85).

Still, Bernstein insists that "*Buchanan*'s implicit protection of [African-American] migration to urban areas, north and south, proved a crucial turning point in African American history"<sup>87</sup> (p. 83).

This claim seems to me unproven, at least in *Rehabilitating Lochner*. Indeed, the structure of the sentence quoted above suggests that Bernstein himself may not consider the claim fully proven: the way he writes the sentence, what proved to be "a crucial turning point in African American history" was the *implicit* protection provided by *Buchanan*. It's not clear how an implicit effect can confidently be stated as providing "a crucial turning point" in history. More generally (if still technically), as a historical matter the great migration of African-Americans to the north was already under way by 1917.<sup>88</sup> If *Buchanan* had come out the other way would that phenomenon have reversed? Probably not, although it's certainly plausible that it might have been mitigated, or that the arriving African-American populations would have found themselves even more socially isolated than they ended up being.

But a larger problem confronts Bernstein's claim that *Lochner*, via *Buchanan*, hastened African-Americans' full geographic and social integration into American life. This larger

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87. See also Bernstein, *Retrospective*, *supra* note 10, at 1505–06 (*Buchanan* "allowed hundreds of thousands of African Americans to leave impoverished rural plantations for a better life in cities.").

88. See, e.g., Michael J. Klarman, *Race and the Court in the Progressive Era*, 51 VAND. L. REV. 881, 897–98 (1998) ("Black migration northwards, which had appreciably increased in the 1890's and 1900's, exploded in 1916 owing to World War I."); *id.* at 900.

problem in turn casts doubt on *Lochner's* more general benefits for minorities. If *Buchanan* prevented cities from enacting laws like the Louisville segregation ordinance, then it must also be recognized that residential segregation continued unabated throughout the *Lochner* period. Northern cities were not suddenly integrated because of *Buchanan*. If the response to this observation is that that segregation arose from private choices rather than government action, the reply is that such private choices themselves would likely have been constitutionally protected by the same *Lochner* doctrine. Indeed, a case of a white seller refusing to sell to a black buyer in defiance of a non-discrimination ordinance would feature the mirror image of the rights claim vindicated in *Buchanan*. More generally, restrictive covenants, famously struck down in *Shelley v. Kraemer*<sup>89</sup> and *Barrows v. Jackson*,<sup>90</sup> featured private party contracts that the *Lochner* Court presumably would have respected.<sup>91</sup>

Concededly, the key issue in *Shelley* and *Barrows* was the Court's conclusion that judicial enforcement of the covenant constituted state action—not, at least technically, a rejection of property owners' claims that they had the right to contract to dispose of their property as they wished.<sup>92</sup> Nevertheless, it is hard to believe that the *Lochner* Court, so committed to respecting a sphere of private freedom of action, would have adopted the same state action analysis as that of the very different, Roosevelt-dominated, Court in *Shelley* and *Barrows*. Indeed, *Plessy v. Ferguson's* stubborn insistence that any badge of inferiority connoted by the Louisiana train segregation statute

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89. 334 U.S. 1 (1948).

90. 346 U.S. 249 (1953).

91. See *Corrigan v. Buckley*, 271 U.S. 323, 331 (1926) (suggesting the meritlessness of a claim that judicial enforcement of a racially restrictive covenant by a District of Columbia court violated the Fifth or Fourteenth Amendment); see also Klarman, *supra* note 88, at 942 n.336 (noting state court decisions holding that such judicial enforcement did not constitute state action).

92. Of course, the Court's broad understanding of state action in *Shelley* had the potential effect of converting private contractual decisions into state action. In this sense, *Shelley's* state action analysis effectively restricted private parties' contractual freedom by rendering that freedom subject to the requirements of the Fourteenth Amendment, at least to the extent a contracting party sought a court's aid in vindicating the terms of the contract.

Commentators have noted the potentially broad effect of *Shelley's* analysis on private parties' freedom to contract as they wish. See, e.g., ALLAN IDES & CHRISTOPHER MAY, *CONSTITUTIONAL LAW: INDIVIDUAL RIGHTS* 20–21 (5th ed. 2010); Martin Dolan, Comment, *State Inaction and Section 1985(3)*: United Brotherhood of Carpenters and Joiners of America v. Scott, 71 IOWA L. REV. 1271, 1280–81 (1986).

flowed from African-Americans' own perceptions, and not the state itself,<sup>93</sup> suggests that the *Lochner*-era Court was not committed to a broad conception of state action.<sup>94</sup> Thus, instances of private discrimination with regard to real estate transactions not only continued to exist after *Buchanan*, but presumably enjoyed constitutional protection based on the same freedom of contract doctrine that underlay *Buchanan* itself.

If this analysis is correct, it follows that legislative action attacking such private discriminatory choices—not just in real estate, but more generally throughout the economy—would also be suspect under *Lochner*-style reasoning. In particular, employment non-discrimination and other similar laws likely would have been attacked during this era as inconsistent with *Lochner*'s presumptive protection for the rights of individuals to decide with whom they wished to deal.<sup>95</sup> If a law prohibiting employers from demanding that would-be employees not join a union unconstitutionally violated both groups' freedom of contract,<sup>96</sup> then presumably a law requiring employers, shop-

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93. See *Plessy v. Ferguson*, 163 U.S. 537, 548 (1896) (“We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.”).

94. It is true that the Court was willing to find state action in legislation that authorized political party action. See *Nixon v. Condon*, 286 U.S. 73 (1932) (striking down, as state action violating the Fourteenth Amendment, a Texas law authorizing state political committees to set their own membership qualifications, as implemented by the state Democratic Party in a racially discriminatory way); *Nixon v. Herndon*, 273 U.S. 536 (1927) (invalidating a predecessor statute to the one struck down in *Condon*, which explicitly barred African-Americans from participating in a Democratic Party primary, but not discussing the state action issue). The *Herndon* statute’s explicit government discrimination makes it understandable why the state action issue was not explicitly discussed. It is worth noting that where that issue mattered, in *Condon*, the Four Horsemen dissented. See *Condon*, 286 U.S. at 90 (McReynolds, J., dissenting).

95. See, e.g., David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373, 384 (2003) (“Anti-discrimination laws did not exist during the *Lochner* era but would certainly be challenged as abridgments of freedom of contract today if *Lochner* survived.”); Klarman, *supra* note 88, at 939 n.323 (“The same substantive due process notions that invalidate residential segregation ordinances can be invoked to invalidate civil rights statutes on the ground that the state should not interfere with the contractual freedom of employers or owners of places of public accommodation.”). With regard to places of public accommodation it is at least possible that their common law foundation might save their constitutionality, to the extent that foundation implied a legitimate police power justification for them. See generally Joseph Singer, *No Right To Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283 (1996).

96. *Coppage v. Kansas*, 236 U.S. 1 (1915) (striking down state law prohibiting discharge of an employee for joining a union); *Adair v. United States*, 208 U.S. 161 (1908) (striking down similar federal law).

keepers and real property owners not to discriminate would be similarly vulnerable, even in light of the fact that the *Lochner* Court upheld much social and economic regulation. It was only when the right to contract fell from favor that the due process argument against such laws became, if not frivolous, then at least a likely loser.<sup>97</sup>

Second, as a practical matter it's not clear what effect *Lochner* had on minorities. In *Rehabilitating Lochner* Bernstein cites only a state court case from Georgia, invalidating a law prohibiting black barbers from cutting white children's hair, as an example of "liberty of contract reasoning" that was used in a way to further the interests of African-Americans<sup>98</sup> (p. 85). To his credit, Bernstein recognizes that civil rights lawyers of the era did not have the resources to litigate such claims aggressively. He also suggests that groups such as the NAACP were not inclined to rely on liberty of contract reasoning, since "by the 1920's the NAACP's leadership had an economically 'Progressive' outlook, and was therefore hesitant to rely on 'conservative' constitutional doctrines like liberty of contract" (p. 85).

These observations betray more ambiguities with Bernstein's thesis that, for minorities, the liberty of contract was, if not perfect, at least the best thing they had going.<sup>99</sup> Most notably, if the lack of resources meant that civil rights groups were not able to enforce African-Americans' contractual liberty rights then one can at least argue that a better strategy would have been for them to enlist the aid of government, via anti-discrimination statutes. Of course, Bernstein is correct in his implicit suggestion that aggressive non-discrimination legislation was not forthcoming in the 1920's.<sup>100</sup> In that sense, there's merit

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97. See, e.g., *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 258–59 (1964) (rejecting a due process challenge to the public accommodations provisions of the Civil Rights Act of 1964 by applying a very deferential rational basis standard); *id.* at 275, 277 (Black, J., concurring) ("In the past this Court has consistently held that regulation of the use of property by the Federal Government or the States does not violate either the Fifth or the Fourteenth Amendment.").

98. Bernstein does cite one other case, dealing with ethnic Chinese merchants in the Philippines, where liberty of contract reasoning was used to assist an ethnic minority. (p. 85 n.93, citing *Yu Cong Eng v. Trinidad*, 271 U.S. 50 (1926) (invalidating a Philippines law requiring that business records be kept either in English or Spanish)).

99. Bernstein has developed this thesis in more detail elsewhere. See BERNSTEIN, *ONLY ONE PLACE*, *supra* note 21.

100. On the other hand, by the 1920's some states had enacted public accommodations laws. See, e.g., Singer, *supra* note 95, at 1374 (noting that states started



in his claim that *Lochner* might have been the best tool minorities had. But again, to the extent that such legislation would have been threatened by exactly that same liberty of contract doctrine, it may be the case that had *Lochner* survived into the civil rights era it would have impeded African-Americans' civil rights legislative agenda.<sup>101</sup>

This insight perhaps suggests why the NAACP leadership "was . . . hesitant to rely on 'conservative' constitutional doctrines like liberty of contract"<sup>102</sup> (p. 85). Alternatively, perhaps that hesitancy was based more on the needs of a tactical alliance with anti-*Lochner* northern Progressives. But if this latter speculate is accurate, it starts to blur the clarity of Bernstein's picture of a Progressive movement largely hostile to minorities.<sup>103</sup> In sum, either the NAACP leadership concluded that liberty of contract would ultimately redound to African-Americans' detriment, or they calculated that an alliance with northern, anti-*Lochner*, Progressives was more important than any marginal advantage they could win by relying on *Lochner*. Either possibility creates at least some tension with Bernstein's overall narrative.

These arguments by no means completely refute Bernstein's claim that, given the available options, *Lochner* was the strongest tool minorities (and particularly African-Americans) possessed. Still, the vulnerability of anti-discrimination legislation to liberty of contract reasoning makes it plausible to conclude that equality advocates were ultimately correct to downplay reliance on *Lochner*. At the very least, the fact that the NAACP leadership—hardly unsophisticated advocates—disdained that reasoning suggests that there must have been a good reason for them to believe that *Lochner* was not the right path to take. Indeed, the fact that *Carolene Products* ultimately

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enacting such laws in the immediate post-Civil War period).

101. In other writing Bernstein appears to agree with this assessment. See BERNSTEIN, ONLY ONE PLACE, *supra* note 21, at 113–14.

102. Similarly, at least some women's rights groups during this era favored protective legislation for all workers, a position inconsistent with support for an extension of *Lochner*'s contractual liberty right to women. See, e.g., JULIE NOVKOV, CONSTITUTING WORKERS, PROTECTING WOMEN: GENDER, LAW AND LABOR IN THE PROGRESSIVE ERA AND NEW DEAL YEARS 187, 198 (2001) (cited in Bernstein, *Feminist*, *supra* note 10, at 1975).

103. In a footnote Bernstein does acknowledge that some pro-civil rights Progressives favored unions despite the latter's racism, on the theory that unionization represented the best long-term hope for African-Americans' economic prospects (p. 52 n.108).

provided a formula for protecting African-Americans' equality rights while simultaneously preserving government's latitude to enact anti-discrimination laws that regulated marketplace choices ultimately confirms the correctness of their choice to reject *Lochner*.

### III. BACK TO THE FUTURE

The above critiques notwithstanding, there is much merit in Bernstein's suggestion that *Lochner* is the ultimate precursor to the modern substantive due process privacy cases. Indeed, *Lochner*, by opening the way for the *Meyer* line of cases, the cases protecting free speech, and the cases incorporating the criminal procedure provisions of the Bill of Rights, can be understood as (very) indirectly paving the way for footnote four's reconceptualization of these cases as, respectively, cases protecting minorities, protecting the political process, and recognizing the legitimacy of judicial protection of textually-based constitutional rights.

The progression from robust judicial protection of unenumerated rights to a more nuanced recognition that some groups require special judicial protection from the legislative free-for-all is being replayed in the modern era. The modern privacy cases—most notably the abortion cases and *Lawrence v. Texas*<sup>104</sup>—have been subject to criticism that has never really abated since *Roe*. That criticism has led commentators sympathetic to those cases' results to argue for a recasting of those rights as sounding in equality. This phenomenon has been most pronounced in the abortion context: ever since *Roe*, commentators sympathetic to the abortion right have argued that that right was better understood as flowing from the Constitution's commitment to women's equality.<sup>105</sup> In the context of sexuality, Justice O'Connor's concurrence in *Lawrence* argued that the Texas law banning same-sex sodomy was more

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104. 539 U.S. 558 (2003).

105. Most notably, before ascending to the Court Justice Ruth Bader Ginsburg argued forcefully for understanding the abortion right as a right based in women's equality. See, e.g., Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985). She has continued to express this view on the Court, albeit within the limits of the current doctrine's housing of the abortion right in substantive due process. See, e.g., *Gonzalez v. Carhart*, 550 U.S. 124, 168, 184–85 (2007) (Ginsburg, J., dissenting) (using equality language to describe the importance of the abortion right).

appropriately struck down as a violation of equal protection, rather than as a violation of the majority's loosely-defined right to private, consensual, non-commercial sexual conduct between adults.<sup>106</sup> The current fight over same-sex marriage rights is replaying this debate, with some courts and commentators sympathetic to the rights claim arguing that it should inhere in equality guarantees rather than in an alleged "fundamental right to marriage."<sup>107</sup>

Thus, just as in the *Lochner* era, a substantive right recognized by courts has come under attack, and has generated calls, not for reversing the results of all the cases decided under that doctrine, but instead for their reconceptualization as equality cases. The same arguments made in favor of this change in the 1930's are heard today. It is argued that judicial recognition of substantive rights is subjective, lacks a legitimate grounding in judicial competence, and amounts to judicial policymaking.<sup>108</sup> On the other side of the ledger, advocates for an equality approach claimed during the *Lochner* era and claim today that such an approach respects legislative value choices and simply requires the legislature to provide to the disfavored group what it provides for the favored group.<sup>109</sup>

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106. See *Lawrence*, 539 U.S. at 577–78 (O'Connor, J., concurring in the judgment).

107. E.g., *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); See also, e.g., Nelson Tebbe & Debra Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375 (2010) (arguing that the best doctrinal vehicle for same-sex marriage rights is the fundamental rights strand of equal protection).

108. But see Carlos Ball, *Why Liberty Judicial Review is as Legitimate as Equality Review: The Case of Gay Rights Jurisprudence*, 14 U. PA. J. CONST. L. 1 (2011) (arguing that equal protection review is no more cabined or objective than due process review); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747 (2011) (describing a new, dignity-based, approach to rights protection).

109. See, e.g., *Ry. Express Agency v. City of New York*, 336 U.S. 106, 111, 112–13 (Jackson, J., concurring) ("The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation."); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 292, 300 (Scalia, J., concurring) ("Are there, then, no reasonable and humane limits that ought not to be exceeded in requiring an individual to preserve his own life? There obviously are, but they are not set forth in the Due Process Clause. What assures us that those limits will not be exceeded is the same constitutional guarantee that is the source of most of our protection—what protects us, for example, from being assessed a tax of 100% of our income above the subsistence level, from being forbidden to drive cars, or from being required to send our children to

It remains to be seen how such calls for an equality approach will be resolved. We are a long way from 1938, when the Court could confidently presume that it had the competence to determine when “prejudice against discrete and insular minorities” really existed, and thus justified more searching judicial review.<sup>110</sup> But the larger point remains: what *Lochner* teaches us is that a judicial doctrine can generate progeny that morph into new doctrines, once the results under the original doctrine are better understood with the passage of time.

At least this is one way a student could answer the opening question.<sup>111</sup>

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school for 10 hours a day, none of which horrors are categorically prohibited by the Constitution. Our salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me.”).

110. See, e.g., William D. Araiza, *The Section 5 Power and the Rational Basis Standard of Equal Protection*, 79 TULANE L. REV. 519, 521–23 (2005) (noting the Court’s inconsistent and unsteady application of footnote four’s formula); see also Bruce Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985) (critiquing the usefulness of footnote four’s “prejudice against discrete and insular minorities” formula).

111. See text accompanying *supra* notes 3–4.