

THE MAINSTREAMING OF LIBERTARIAN CONSTITUTIONALISM

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I

INTRODUCTION

Libertarian constitutional thought is a distinctly minority position among scholars and jurists—one that, at first glance, has little in common with either modern Supreme Court jurisprudence or the liberalism that dominates the legal academy. However, libertarian ideas have had greater influence on constitutional law than first meets the eye.

This article explores the connections between mainstream and libertarian constitutional thought in recent decades. On a number of important issues, modern Supreme Court doctrine and liberal constitutional thought have been significantly influenced by pre–New Deal libertarian (or “classical liberal”) ideas, even if the influence is often overlooked by observers or unknown to those influenced. This is particularly true on issues of equal protection and modern “substantive” due process as it pertains to “noneconomic” rights. Here, both the Supreme Court and mainstream academics have repudiated early twentieth-century Progressivism’s advocacy of strict judicial deference to legislatures. They have also rejected efforts to eliminate common-law and market-oriented “baselines” for constitutional rights.

The gap between libertarian and mainstream constitutional thought is much greater on issues of federalism and property rights. Here too, however, recent decades have seen a degree of convergence. Over the last thirty years it has become intellectually respectable to support stronger judicial protection for property rights and federalism. The Supreme Court has become increasingly willing to protect property rights and to enforce limits on federal power.

Before proceeding, it is worth briefly defining what we mean by “libertarian” and “mainstream” constitutional thought. By “libertarian,” we mean the idea that there should be significant constitutional limits on government in order to protect both “economic” and “noneconomic” rights. Given that constitutional rights are most often vindicated in modern America

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through judicial review, most libertarian constitutionalists believe that the courts should enforce these rights. Libertarian jurists and legal scholars also often advocate strong judicial enforcement of federalism and separation of powers limits on government power, in part because they provide important indirect protection for individual freedom.

This relatively broad definition of libertarian constitutional thought is necessarily oversimplified. It abstracts away from some important internal disagreements among libertarians. For example, it overlooks the important distinction between libertarian constitutional theorists who embrace originalism and those who do not.¹ It also does not consider the distinction between utilitarian libertarians and those who emphasize natural rights. But, for our purposes, we believe it effectively captures the core of modern libertarian constitutional thought, as exemplified by leading scholars such as Richard Epstein and Randy Barnett.²

Defining the constitutional mainstream is perhaps even more difficult than defining libertarianism. Here, we use it to indicate the dominant strains in Supreme Court jurisprudence and academic constitutional thought since World War II. Obviously, mainstream jurists and legal scholars disagree among themselves on many issues. But they also share core assumptions, such as the need for strong judicial review to protect important noneconomic freedoms and to prevent invidious discrimination by government. Other ideas, such as advocacy of judicial intervention to enforce federalism and property rights, are part of mainstream discourse, although they are hotly contested. As we discuss below, libertarian constitutional thought has significantly influenced both consensus and disputed mainstream views.

II

THE PRE-NEW DEAL LIBERTARIAN ROOTS OF MODERN CONSTITUTIONALISM

Even during the heyday of modern liberal American constitutionalism, classical-liberal thought and doctrine significantly influenced American constitutional law. Indeed, there are substantial continuities between constitutional law in the pre-New Deal period and constitutional law as it developed after World War II.

Pre-New Deal constitutionalism is often referred to as conservative (or even reactionary).³ In general, however, it was based on classical liberal premises—

1. For an example of nonoriginalist libertarian constitutional theory, see Tom W. Bell, *The Constitution as if Consent Mattered*, 16 CHAPMAN L. REV. 269 (2013).

2. For the most comprehensive recent statements of their views, see RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (rev. ed. 2013); RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT* (2013).

3. See KERMIT L. HALL, *THE MAGIC MIRROR* 226 (1989) (explaining that this is how the jurisprudence of the so-called “*Lochner* era” is often viewed). We do not use the phrase “*Lochner* era,” because it is anachronistic, fails to reflect the nuances of the period, and wildly overstates the

limited government, individual rights, and the rule of law—that still dominate constitutional law today. Despite successive challenges to constitutional law’s liberalism from sociological jurisprudence, legal realism, critical legal studies, and other schools of thought, constitutional law still retains the same basic liberal contours it had in the 1910s. Some important examples of the liberal underpinnings of modern constitutional law include: (1) the federal judiciary’s continued crucial role in maintaining the constitutional order through judicial review; (2) government inaction is still the baseline by which government actions that may violate rights are judged; (3) property and liberty are still considered coherent, judicially protectable concepts; and (4) the state action doctrine still defines the scope of constitutional rights. Although Americans today generally accept these elements of modern constitutional law as simply the natural order of things, they all faced strong intellectual and political challenges starting in the Progressive era.

The first challenge to the pre–New Deal constitutional order came from the early twentieth-century Progressives. Many leading Progressives perceived American “individualism” to be the primary barrier to their success. Individualism was shorthand for a legal and political system focused on individual rights, especially property and contract rights.⁴ Progressives at that time tended to be “small d” democrats and favored lodging administrative power and discretion in expert government agencies. Not surprisingly, many Progressives were very skeptical of—even hostile to—review of constitutional rights claims by an appointed judiciary with little expertise on the underlying policy issues.

This skepticism meshed nicely with, and was in part inspired by, the views of Harvard Law School Professor James B. Thayer. He argued that courts should only invalidate legislation “when those who have the right to make laws have not merely made a mistake, but have made a very clear one,—so clear that it is not open to rational question.”⁵ Thayer influenced entire generations of Progressive lawyers, including Louis Brandeis and Felix Frankfurter.⁶ Brandeis grew so disgusted with what he considered to be “conservative” abuse of judicial review that he wanted to repeal the Due Process and Equal Protection Clauses of the Fourteenth Amendment, leaving no clear avenue for the protection of constitutional rights against the states.⁷ His protégé, Frankfurter, along with Learned Hand, would have been satisfied with abolishing only the

importance of *Lochner v. New York* at the time. See DAVID E. BERNSTEIN, *REHABILITATING LOCHNER* (2011).

4. See, e.g., GEORGE W. ALGER, *THE OLD LAW AND THE NEW ORDER* 241 (1913); Richard T. Ely, *Economic Theory and Labor Legislation*, 9 AM. ECON. ASS’N. Q. 124, 146 (1908).

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

6. See Wallace Mendelson, *The Influence of James B. Thayer upon the Work of Holmes, Brandeis, and Frankfurter*, 31 VAND. L. REV. 71, 73 (1978); Edward A. Purcell, Jr., *Learned Hand: The Jurisprudential Trajectory of an Old Progressive*, 43 BUFF. L. REV. 873, 874, 885 (1995).

7. Melvin I. Urofsky, *The Brandeis-Frankfurter Conversations*, 1985 SUP. CT. REV. 299, 318, 325.

Due Process Clause.⁸ Oliver Wendell Holmes, the great hero of Progressive legal intellectuals in the 1910s and 1920s (though not a Progressive himself), at times seemed to want to virtually abolish the judicial role in protecting constitutional rights.⁹ Beyond Progressive jurists, various Progressive writers,¹⁰ intellectuals, and politicians, including Theodore Roosevelt,¹¹ Senator William Borah,¹² and Senator Robert LaFollette,¹³ sought in the 1910s and early 1920s to severely limit judicial independence and the power of judicial review.

Robert Hale and other early legal realists continued the Progressives' assault on constitutional protections for individual rights by attacking the very notion of rights against government coercion in the early 1920s.¹⁴ According to this line of thinking, a fixed amount of coercion exists. If courts were to restrain the government from taking an action—say, segregating residential neighborhoods by law—the courts would be stopping the government from forcing those who prefer integration to segregate. At the same time, the courts would be “coercing” those who prefer segregation by preventing them from enforcing that preference through legislation.¹⁵

8. See Frankfurter, *The Red Terror of Judicial Reform*, unsigned editorial, 40 NEW REPUBLIC 110, 113 (1924); Hand, *An Unseen Reversal*, unsigned editorial, NEW REPUBLIC 7, 7–8 (1915).

9. E.g., *Noble State Bank v. Haskell*, 219 U.S. 104, 111 (1911) (stating the states' police power may be used “in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare.”); *Lochner v. New York*, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting) (“I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.”); KEN I. KERSCH, *CONSTRUCTING CIVIL LIBERTIES: DISCONTINUITIES IN THE DEVELOPMENT OF AMERICAN CONSTITUTIONAL LAW* 151 (2004) (quoting Holmes as arguing that “a law should be called good if it reflects the will of the dominant forces of the community, even if it takes us all to hell.”). For a humorous take, see H.L. Mencken, *Mr. Justice Holmes*, AM. MERCURY, May 1930, at 123 (suggesting that if Holmes's judicial opinions “were accepted literally, there would be scarcely any brake at all upon lawmaking, and the Bill of Rights would have no more significance than the Code of Manu”).

10. See, e.g., WILLIAM L. RANSOM, *MAJORITY RULE AND THE JUDICIARY* ch. VIII (1912) (supporting Theodore Roosevelt's proposal that judicial decisions be subject to “popular recall”); GILBERT E. ROE, *OUR JUDICIAL OLIGARCHY* 212–24 (1912) (calling for popular recall of judges to encourage them to act more reasonably).

11. In his 1912 campaign for president, Roosevelt advocated allowing state voters to “recall” state supreme court judicial decisions that they opposed. Theodore Roosevelt, *A Charter of Democracy: Address Before the Ohio Constitutional Convention*, THE OUTLOOK, Feb. 24, 1912, at 390. Obviously, this would have been a precedent for similar federal action.

12. Borah argued that it should take a 7-2 majority of the Supreme Court to invalidate legislation. 64 Cong. Rec. 3959 (1923).

13. LaFollette, while running a vigorous Progressive Party campaign in 1924, promised direct election of federal judges and enabling Congress to overturn Supreme Court decisions. KENNETH CAMPBELL MACKAY, *PROGRESSIVE MOVEMENT* 11, 144 (1947); WILLIAM G. ROSS, *A MUTED FURY: POPULISTS, PROGRESSIVES AND LABOR UNIONS CONFRONT THE COURTS, 1890–1937* 193–217 (1994). See also 62 Cong. Rec. 9076 (1922) (reprinting LaFollette speech calling for a ban on lower federal court's invalidating laws, and for Congress to have the authority to overturn Supreme Court decisions).

14. Robert L. Hale, *Coercion and Distribution in the Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923). See also NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 107–11.

15. See HOWARD LEE MCBAIN, *THE LIVING CONSTITUTION* 78 (1927) (criticizing the Supreme

Once Progressive and modern liberal Justices took control of the Supreme Court, the Court had the opportunity to enforce judicial restraint. The Court, however, rejected both the Progressives' devotion to strict judicial restraint and the realists' suggestion that rights are illusory. Moreover, despite several dalliances with the contrary perspective,¹⁶ the Court ultimately continued to require that Fourteenth Amendment claims be based only on government, and not private action. And despite one significant step in the direction of recognizing positive rights via the "new property,"¹⁷ the idea that the Constitution is a "charter of negative liberties"¹⁸ has survived.

Instead of adopting the Progressive and legal realist critique of rights-based liberalism, the Supreme Court gradually invented modern constitutional liberalism. Although the Court's constitutional priorities shifted away from defending federalism, property rights, and contractual rights in favor of the sort of jurisprudence defended in and advocated by John Hart Ely's *Democracy and Distrust*, the basic contours of liberal constitutionalism remained. Thus the Court, instead of abandoning jurisprudential liberalism, reshaped it to suit the sort of liberalism that dominated New Deal and post-New Deal thinking.

Eventually, the dominance of post-New Deal constitutional liberalism during the Warren Court era provoked two significant counter-reactions. From the right, conservatives, distressed by what they saw as the Court's "activist" invention of new rights, adopted the old Progressive mantra of judicial restraint. Robert Bork, for example, adopted the "neutral principles" argument (in)famously made by the Progressive scholar Herbert Wechsler in the context of school desegregation¹⁹ and applied it to First Amendment jurisprudence.²⁰ He concluded that the Warren Court had engaged in significant overreach in its First Amendment jurisprudence.²¹

From the left, critical legal studies theorists, commonly known as "crits," questioned the coherence and justness of a constitutional system built on liberal pillars. Mark Tushnet, one of the crits' brightest constitutional stars, argued that rights-based jurisprudence is unstable, indeterminate, and, ultimately,

Court for invalidating residential segregation ordinances, and thus violating whites' right to live in segregated neighborhoods). These ideas continued to have force in circles though at least the late 1950s. See, e.g., Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) (claiming that he could not distinguish, on a principled basis, between the right of blacks to attend an integrated public schools and the right of whites to attend segregated schools). Wechsler went to law school in Columbia in the 1920s, when it was a center of Progressive legal thought.

16. See, e.g., *Shelley v. Kraemer*, 334 U.S. 1 (1948) for the most significant example.

17. See *Goldberg v. Kelly*, 397 U.S. 254 (1970) (holding that a denial of government welfare benefits could be a violation of the Due Process Clause because such benefits should be deemed "property" protected by the Clause).

18. *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982).

19. See generally Wechsler, *supra* note 15.

20. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 22 (1971).

21. *Id.*

reactionary.²² He summed up the antagonistic relationship between constitutional liberalism and critical legal studies succinctly: “Critical legal studies . . . is not committed at any level to liberalism.”²³

Critical legal studies has also influenced some leading legal scholars associated with mainstream liberalism, such as Cass Sunstein. Sunstein famously argued that the Supreme Court should cease repeating what he deemed to be *Lochner’s* mistake: using common-law baselines to determine the existence and scope of constitutional rights.²⁴ By common-law baselines, Sunstein did not mean the actual common law, but rather a stylized common law that treats private-market decisionmaking as the appropriate baseline for legal decisionmaking.²⁵ Critical legal studies was also important in the development of critical race theory, whose advocates became leading voices favoring such illiberal²⁶ constitutional ideas as limiting the First Amendment so that the government may prohibit hate speech.²⁷ Critical race theory advocates also favored interpreting the Fourteenth Amendment’s guarantee of equal protection of the law as solely a guarantee of group “antisubordination” and not as a guarantee of an individual right to fair treatment by government.²⁸

Despite all of this intellectual tumult, constitutional liberalism has survived and thrived. Conservatives these days are less inclined to channel old Progressive views about judicial restraint, and they are more inclined to speak of the necessity of courts enforcing the original meaning of the Constitution. Critical legal studies mostly disintegrated in the early 1990s,²⁹ and a form of originalism has even taken hold in some intellectual precincts that might once have been attracted to critical legal studies.³⁰ Attempts to get the Supreme Court to abolish the state action doctrine, to go beyond token recognition of the “New Property,” to allow restrictions on hate speech, or even to reduce the

22. Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1363–64 (1984). See also Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, in LEFT LEGALISM/LEFT CRITIQUE 178 (Wendy Brown & Janet Halley eds., 2002).

23. Mark Tushnet, *Critical Legal Studies and Constitutional Law: An Essay in Deconstruction*, 36 STAN. L. REV. 623, 627 (1984).

24. See generally Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873 (1987).

25. See David E. Bernstein, *Lochner’s Legacy’s Legacy*, 82 TEX. L. REV. 1, 11 (2003).

26. CRITICAL RACE THEORY: THE CUTTING EDGE 1 (Richard Delgado & Jean Stefancic, eds., 1st ed. 1995) (noting critical race theory’s “discontent with liberalism”).

27. E.g., MARI J. MATSUDA, ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993).

28. See, e.g., CHARLES LAWRENCE & MARI J. MATSUDA, WE WON’T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION (1997); Charles R. Lawrence III, *Two Rivers of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 951 (2001) (arguing that the Equal Protection Clause mandates “ridding society of racial subordination” and not “mandating equal treatment as an individual right”); Athena D. Mutua, *The Rise, Development, and Future Directions of Critical Race Theory and Related Scholarship*, 84 DENV. U. L. REV. 329, 336 (2006) (stating “Critical Race Theory’s . . . stance is one of ‘antisubordination’”).

29. See Peter Goodrich, *Sleeping With the Enemy: An Essay on the Politics of Critical Legal Studies in America*, 68 N.Y.U. L. REV. 389, 390 (1993).

30. See generally JACK M. BALKIN, LIVING ORIGINALISM (2011).

level of review for government affirmative action preferences to something less than strict scrutiny all have failed.

Moreover, it is not just the general contours of modern constitutional jurisprudence, but some of the Supreme Court's specific doctrines that are direct descendants of the classical-liberal jurisprudence of the early twentieth century. Modern constitutional jurisprudence, shaped to a large extent by the liberal Warren and Burger Courts, is, to a great extent, a synthesis of early twentieth-century Progressivism and conservative classical liberalism of the same period. Modern doctrine reflects Progressive fondness for government economic regulation and expansion of federal responsibilities to set national standards. But it also retains classical-liberal support for individual rights and skepticism towards the arbitrary use of government power, reflected in the pre-New Deal equal protection and due process cases involving both economic and noneconomic rights claims.³¹

III

EQUAL PROTECTION

Despite signs of doctrinal instability,³² black-letter law still holds that, under the Fourteenth Amendment's Equal Protection Clause, three tiers of scrutiny exist. Laws challenged as discrimination based on race or alienage receive strict scrutiny, laws challenged as discrimination based on sex or legitimacy receive intermediate scrutiny, and all other claims of discrimination result in rational basis scrutiny.

Generations of law students have undoubtedly wondered where these tiers of scrutiny come from given that they are nowhere to be found in the text of the Constitution. And one might wonder whether they have any relationship to pre-New Deal equal protection jurisprudence, which, at least formally, treated all equal protection claims with the same level of scrutiny. In fact, there is a great deal of continuity between pre-New Deal doctrine and modern equal protection doctrine, and the existence of the tiers of scrutiny becomes more understandable once one studies the history of the Supreme Court's equal protection jurisprudence.

Opposition to "class legislation," that is, legislation that classifies on an arbitrary basis,³³ had deep roots in pre-Civil War American thought³⁴ and, after the Civil War, quickly became an interpretive focal point of the Fourteenth

31. See David E. Bernstein, *The Conservative Origins of Strict Scrutiny*, 19 GEO. MASON. L. REV. 861, 864 (2012); David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 11-12 (2003) [hereinafter Bernstein, *Lochner Era Revisionism, Revised*].

32. See *infra* notes 62-65.

33. Arbitrary legislation, as one contemporary scholar pointed out, meant "oppressive or unjust or not based upon a sufficient reason." Robert P. Reeder, *Is Unreasonable Legislation Unconstitutional?*, 62 U. PA. L. REV. 191, 192 (1913).

34. See generally HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* (1993).

Amendment.³⁵ For example, in his influential concurring opinion in *Butchers' Union v. Crescent City*,³⁶ Justice Stephen Field stated that the Fourteenth Amendment was “designed to prevent all discriminating legislation for the benefit of some to the disparagement of others” and that the Amendment “inhibit[ed] discriminating and partial enactments, favoring some to the impairment of the rights of others.”³⁷ The Supreme Court’s opinions were initially unclear on whether the ban on class legislation found its textual support in the Equal Protection Clause, the Due Process Clause, or both. The language of the Equal Protection Clause, however, seems better suited for class legislation analysis, and the Court eventually used that clause as the primary textual basis for class legislation cases.³⁸

The obvious problem with a ban on class legislation is that no law affects everyone exactly the same way, and differentiating between arbitrary and non-arbitrary classifications is difficult. Nor are courts, as nonparticipants in the legislative process, in a particularly good position to draw the relevant distinctions. As a result, in 1884, the Court strictly qualified the ban on class legislation, explaining that the unconstitutionality of class legislation did not preclude all special or partial legislation.³⁹ The Court added that “[s]pecial burdens are often necessary for general benefits,—for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects.”⁴⁰ Although “[r]egulations for these purposes may press with more or less weight upon one than upon another,” they are constitutional because they are “designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little inconvenience as possible, the general good.”⁴¹

In 1888, the Supreme Court again emphasized the narrow reach of the Fourteenth Amendment’s prohibition on class legislation.⁴² The Court unanimously rejected the argument “that legislation which is special in its character is necessarily within the constitutional inhibition.”⁴³ Justice Field explained, “nothing can be further from the fact. The greater part of all legislation is special, either in the object sought to be attained by it, or in the

35. See THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 459 (3d ed. 1874) (“[E]very one has a right to demand that he be governed by general rules.”); *id.* at 466 (“[T]he same securities which one citizen may demand, all others are entitled to.”).

36. *Butchers' Union Co. v. Crescent City Co.*, 111 U.S. 746, 758 (1884) (Field, J., concurring).

37. *Id.* at 759.

38. See RODNEY L. MOTT, DUE PROCESS OF LAW; A HISTORICAL AND ANALYTICAL TREATISE ON THE PRINCIPLES AND METHODS FOLLOWED BY THE COURTS IN THE APPLICATION OF THE CONCEPT OF THE “LAW OF THE LAND” 277–78 (1926); Victoria F. Nourse & Sarah A. Maguire, *The Lost History of Governance and Equal Protection*, 58 DUKE L.J. 955 (2009).

39. See MOTT, *supra* note 38, at 31–32.

40. *Id.*

41. *Id.*

42. See generally *Mo. Pac. Ry. Co. v. Mackey*, 127 U.S. 205 (1888).

43. *Id.* at 209.

extent of its application.”⁴⁴ Special legislation is not illicit class legislation “if all persons brought under its influence are treated alike under the same conditions.”⁴⁵

Although the Court occasionally overturned as illicit class legislation legislative classifications that seemed patently discriminatory and that lacked any valid justification,⁴⁶ such decisions were relatively rare. Meanwhile, the Court upheld several laws that seemed very plausible candidates for condemnation as class legislation,⁴⁷ including laws requiring racial segregation. Racial classifications were treated with no more skepticism than were other classifications, and given the racism of the time, the Court was not prepared to condemn racial classifications as inherently arbitrary.⁴⁸

In *Plessy v. Ferguson*,⁴⁹ for example, the Court infamously argued that the segregation law at issue was not arbitrary discriminatory class legislation because it followed the “established usages, customs, and traditions of the people,”⁵⁰ and was passed “with a view to the promotion of their comfort, and the preservation of the public peace and good order.”⁵¹ Given “racial instincts,” segregating whites and African Americans was a reasonable legislative classification, and not class legislation, because a “statute which implies merely a legal distinction . . . has no tendency to destroy the legal equality of the two

44. *Id.*

45. *Id.*

46. *See, e.g.,* *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540 (1902) (invalidating an antitrust law that exempted only farmers and ranchers); *Cotting v. Kansas City Stock Yards Co.*, 183 U.S. 79, 114–15 (1901) (Harlan, J., concurring for six Justices) (invalidating a state statute that regulated rates for some stockyard companies but not for others); *Gulf, Colo. & Santa Fe Ry. v. Ellis*, 165 U.S. 150 (1897) (invalidating a law that allowed plaintiffs with small claims against railroads to recover attorneys’ fees if the railroad initially refused to pay the claim and then lost at trial).

47. *See, e.g.,* *Am. Sugar Ref. Co. v. Louisiana*, 179 U.S. 89, 92, 95 (1900) (upholding an exemption for planters and farmers from a tax on the refining of sugar as a reasonable classification and finding that the law was “obviously intended as an encouragement to agriculture” but was not “pure favoritism”); *Atchison, Topeka & Santa Fe R.R. Co. v. Matthews*, 174 U.S. 96, 104 (1899).

48. CHARLES A. LOFGREN, *THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION* 80 (1987) (“[T]he approach that the Court took to state economic and social regulations paralleled and anticipated its treatment of restrictions on blacks”). *See* Richard S. Kay, *The Equal Protection Clause in the Supreme Court: 1873–1903*, 29 *BUFF. L. REV.* 667, 696 (1980) (concluding that during this period, “the objection to discrimination on grounds of race may be merely a special case of the objection to classifications not reasonably related to a police power objective”). The Court, however, did hold that the discriminatory enforcement of facially neutral legislation can constitute illicit arbitrary discrimination on the basis of race and alienage. *See* *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886).

The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which, in the eye of the law, is not justified. The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution.

Id. Unlike the modern Supreme Court, however, at the time, Supreme Court doctrine held that the Court would not inquire into legislative motive. *See* *Barbier v. Connolly*, 113 U.S. 27 (1885).

49. 163 U.S. 537 (1896).

50. *Id.* at 550.

51. *Id.*

racess.”⁵² The pre–New Deal Supreme Court also routinely upheld sex classifications against equal protection challenges.⁵³

The Court, meanwhile, rejected more aggressive state-court decisions, such as those holding that “truck acts”⁵⁴ and laws restricting women’s hours of labor⁵⁵ were illicit class legislation. By the time the so-called *Lochner* era was nearing its end in the 1930s, the Court limited its rulings holding legislation to be unconstitutional “class legislation” primarily to cases involving seemingly arbitrary differential tax burdens.⁵⁶

When liberals formed a new majority on the Supreme Court beginning in the late 1930s, they stopped using the Equal Protection Clause to protect economic interests⁵⁷ when there was no evidence of invidious discrimination against a minority group. Contrary to Justice Brandeis’s wishes, however, the Equal Protection Clause hardly faded into oblivion. The first hint of resilience came in *United States v. Carolene Products*.⁵⁸ There, the Supreme Court, signaling its eventual withdrawal from serious review of ordinary economic regulation, held that such regulations pass constitutional muster if they pass a “rational basis” test.⁵⁹ But in the famous footnote four, the Court also suggested that a “more searching judicial inquiry” might be needed when legislation is motivated by “prejudice against discrete and insular minorities.”⁶⁰

Eventually, concern for the rights of minorities led to the three-tier test we are familiar with today. This test is broadly consistent with the concern for class legislation that motivated pre–New Deal equal protection jurisprudence. It can

52. *Id.* at 543.

53. The key precedent was *Muller v. Oregon*, 208 U.S. 412 (1908). The one exception was *Adkins v. Children’s Hosp.*, 261 U.S. 525 (1923), in which the Court invalidated a D.C. minimum wage law for women because it violated a woman’s right to liberty of contract. The Court distinguished earlier cases involving maximum hours, night work, and other restrictions on women’s labor on the grounds that, although there are real physical differences between men and women, the latter are no less capable of bargaining for fair wages than are the former.

54. *Knoxville Iron Co. v. Harbison*, 183 U.S. 13, 22 (1901). For prior state court decisions invalidating truck acts, see *State v. Loomis*, 22 S.W. 350, 353 (Mo. 1893); *State v. Goodwill*, 10 S.E. 285, 288 (W. Va. 1889). See also *Godcharles v. Wigeman*, 6 A. 354 (Pa. 1886).

55. *Muller v. Oregon*, 208 U.S. 412, 422 (1908). State cases holding such laws unconstitutional included *People v. Williams*, 189 N.Y. 131, 136–37 (1907); *Burcher v. People*, 41 Colo. 495, 503–04 (1907); *Ritchie v. People*, 40 N.E. 454, 456 (1895).

56. See, e.g., *Hartford Co. v. Harrison*, 301 U.S. 459 (1937); *Valentine v. Great Atl. & Pac. Tea Co.*, 299 U.S. 32 (1936); *Stewart Dry Goods Co. v. Lewis*, 294 U.S. 550 (1935) (invalidating a graduated sales tax that applied a higher rate to larger merchants); *Liggett Co. v. Lee*, 288 U.S. 517 (1933) (overturning a graduated retail sales tax that rose with the number of stores a chain store company owned); *Smith v. Cahoon*, 283 U.S. 553 (1931); *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389 (1928) (holding that a statute taxing corporations that owned cabs, but not individual owners, violated the Equal Protection Clause); *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920).

57. E.g., *Ferguson v. Skrupa*, 372 U.S. 726, 732 (1963). *Ferguson* was unanimous. By contract, in 1947 some of the Justices were still willing to countenance Equal Protection challenges to economic regulation. See *Kotch v. Bd. of River Port Pilot Comm’rs*, 330 U.S. 552 (1947) (rejecting an equal protection claim to a nepotistic licensing law by a 5–4 vote).

58. *United States v. Carolene Products*, 304 U.S. 144 (1938).

59. *Id.* at 152.

60. *Id.* at 152 n.4.

be explained in these terms: the Equal Protection Clause bans arbitrary classifications. The judiciary has neither the mandate nor the expertise to determine whether each piece of legislation that might be challenged involves an arbitrary or non-arbitrary classification. Instead, the courts use heuristics. They utilize a strong presumption that classifications, in general, are legitimate. A classification by race or alienage, however, raises the suspicion that the classification is arbitrary. Being a resident alien or a member of a racial class seems like an inherently arbitrary reason for classification, and such classifications are especially likely to result from prejudice rather than a reasoned attempt to serve the public good. Therefore, such classifications are presumptively invalid and can survive only if they pass “strict scrutiny” review. Similarly, given the long history of unjust and arbitrary discrimination against women, the courts have reason to suspect the legitimacy of classifications by sex. But because men and women, unlike whites and blacks, *are* intrinsically different in some important ways, a midlevel standard of review, instead of strict scrutiny, has been deemed appropriate for sex classifications.

Thus, rather than seeing modern equal protection jurisprudence as a novel departure from pre–New Deal classical liberalism, it is better conceived as a modern liberal reinterpretation of the jurisprudence that the Supreme Court adopted in the late nineteenth and early twentieth century. If anything, this understanding is reinforced by such recent decisions as *Romer v. Evans*⁶¹ and *United States v. Windsor*,⁶² where the Supreme Court, taking Justice Kennedy’s lead, has in practice ignored the tiered-scrutiny approach that would have required extremely deferential rational basis review.⁶³ Instead, the Court has applied a standard akin to the Old Court’s class-legislation methodology:⁶⁴ If the government is classifying people for arbitrary reasons not clearly related to any legitimate government interest, then the law violates the Equal Protection Clause.

Moreover, as minority groups have gone from being “discrete and insular”⁶⁵ to wielding substantial political power, the Court has resisted attempts to weaken its standard of review for racial classifications that favor certain minority groups.⁶⁶ Liberal arguments can be made for racial and ethnic preferences in limited circumstances. Nevertheless, a race-neutral strict scrutiny standard of review for racial classifications seems broadly consistent with the classical-liberal principles of prohibiting government from drawing arbitrary

61. 517 U.S. 620 (1996).

62. See generally 133 S. Ct. 1512 (2013).

63. See Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PA. J. CONST. L. 945, 948 (2004) (discussing how the Court has deviated from its official tiers of scrutiny).

64. See Ernest A. Young & Erin C. Blondel, *Federalism, Liberty, and Equality in United States v. Windsor*, 2013 CATO SUP. CT. REV.117, 139–40; Jack Balkin, *Windsor and the Constitutional Prohibition on Class Legislation*, BALKINIZATION (June 26, 2013), <http://balkin.blogspot.com/2013/06/windsor-and-constitutional-prohibition.html>.

65. *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938).

66. See *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411, 2433 (2013).

distinctions between its citizens and avoiding dangerous concentrations of power in the hands of government.⁶⁷

IV

MODERN “SUBSTANTIVE” DUE PROCESS⁶⁸

The Supreme Court’s modern “substantive” due process decisions also have direct antecedents in pre–New Deal classical-liberal jurisprudence. Although some have argued that the pre–New Deal due process decisions were grounded in class legislation concerns,⁶⁹ after *Lochner*, these decisions primarily involved the Court trying to protect the fundamental rights of the American people from oppressive government regulations.⁷⁰ The terminology has changed over the decades—it is very unusual for modern judges to speak of natural rights, and “state interests” have replaced “police powers” as justifications for challenged legislation—but the basic idea is the same.

In the early post-Reconstruction period, the Supreme Court held that, to the extent the Fourteenth Amendment’s Due Process Clause provided any substantive protection against government overreach, it primarily, or perhaps exclusively, protected individuals from class legislation.⁷¹ The Supreme Court interpreted the due process prohibition on class legislation quite narrowly, allowing, for example, obvious special interest legislation banning the production of margarine at the behest of dairy farmers.⁷² A series of challenges to labor regulation based on class legislation arguments failed in the late 1890s and early 1900s.⁷³

The Court soon replaced class legislation analysis in due process cases with a focus on the liberty interest presented by the party challenging allegedly arbitrary legislation.⁷⁴ Indeed, by 1905, the Supreme Court explicitly questioned

67. See David E. Bernstein, *Schuette v. Coalition to Defend Affirmative Action and the Failed Attempt to Square a Circle*, 8 NYU J. L. & LIB. 210 (2014).

68. As applied to the pre–New Deal Court, the phrase “substantive due process” is anachronistic, as courts did not explicitly distinguish between the substantive and procedural aspects of due process. See JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 103–04 (2d ed. 1998); James W. Ely, Jr., *Reflections on Buchanan v. Warley, Property Rights, and Race*, 51 VAND. L. REV. 953, 956 (1998); Gary D. Rowe, *Lochner Revisionism Revisited*, 24 L. & SOC. INQUIRY 221, 244 (1999). See also G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* 245 (2000) (explaining that it was not until the 1950s that jurisprudence under the Due Process Clause was separated into by courts and legal scholars into “substantive” and “procedural” categories).

69. See, e.g., Gillman, *supra* note 34 (arguing this position at length).

70. See Bernstein, *Lochner Era Revisionism, Revised*, *supra* note 31, at 15.

71. In *Dent v. West Virginia*, 129 U.S. 114, 124 (1889), the Supreme Court even declared that the absence of arbitrary classification defeats not just successful equal protection claims against regulatory legislation, but due process claims as well.

72. *Powell v. Pennsylvania*, 127 U.S. 678, 679 (1888).

73. See generally *Atkin v. Kansas*, 191 U.S. 207 (1903); *St. Louis Cons. Coal Co. v. Illinois*, 185 U.S. 203, 207 (1902); *Knoxville Iron Co. v. Harbison*, 183 U.S. 13, 22 (1901); *Holden v. Hardy*, 169 U.S. 366 (1898).

74. See BERNSTEIN, *REHABILITATING LOCHNER*, *supra* note 3, at ch. 1.

whether the guarantee of due process of the law applied to class legislation at all.⁷⁵ The Court eventually concluded that it did, but that the Due Process Clause only provided a “mere minimum” of protection against unequal legislation.⁷⁶

A key doctrinal turning point was the 1898 case of *Allgeyer v. Louisiana*.⁷⁷ In *Allgeyer*, the Supreme Court stated that the Fourteenth Amendment’s protection of liberty from arbitrary deprivation included

the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.⁷⁸

In *Lochner v. New York*,⁷⁹ however, the majority almost entirely ignored the class legislation issue even though both the lower court rulings and *Lochner*’s brief had focused on it. Instead, the Court focused on the right to liberty of contract protected by the Due Process Clause.⁸⁰

Allgeyer and *Lochner* established the Due Process Clause as a fertile source for the protection of liberty rights against the states.⁸¹ However, the scope of these rights seemed limited. For almost two decades, the Supreme Court, as in *Allgeyer* and *Lochner*, only enforced protections for liberty of contract and property rights.⁸² These rights, moreover, could be overcome by the government upon showing that the challenged laws fell within its “police powers,” which were in turn somewhat amorphous and subject to idiosyncratic and, at times, inconsistent judicial definition.

Eventually, however, the Court expanded the scope of due process protections. In *Meyer v. Nebraska*⁸³ in 1923, the Court invalidated a Nebraska statute banning the teaching of foreign languages to children. The Court stated that the Due Process Clause protects not just economic rights, but the rights “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.”⁸⁴ The Court proceeded to use the Clause to invalidate laws banning private schools and restricting the teaching of the Japanese language.⁸⁵ The Court also held that the Clause protects freedom of

75. *E.g.*, *District of Columbia v. Brooke*, 214 U.S. 138, 142 (1909).

76. *Truax v. Corrigan*, 257 U.S. 312, 331–32 (1921).

77. 165 U.S. 578 (1897).

78. *Id.* at 589.

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

80. Bernstein, *Lochner Era Revisionism, Revised*, *supra* note 31, at 25–26.

81. *Id.* at 28.

82. More precisely, *Allgeyer* only enforced the right “to contract outside of the state.” *Allgeyer*, 165 U.S. at 587. *Lochner* enforced a broader right to liberty of contract. *Lochner*, 198 U.S. at 51.

83. *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923).

84. *Id.* at 399.

85. *Farrington v. Tokushige*, 273 U.S. 284, 298 (1927).

expression, and began to invalidate state laws restricting freedom of speech. These cases are often incorrectly described as “incorporation” cases; in fact, they do not mention the First Amendment, but instead rely solely on the Due Process Clause.

Meanwhile, the Court held in several cases that even valid police-power rationales could not save legislation that violated fundamental rights.⁸⁶ In *Buchanan v. Warley*,⁸⁷ the Court invalidated a Louisville, Kentucky residential segregation law as a violation of the Due Process Clause. The Court acknowledged that Kentucky had asserted at least two valid police-power rationales for the law, including limiting interracial violence. The Court held that the law was nevertheless “not a legitimate exercise of the police power of the State, and is in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing state interference with property rights except by due process of law.”⁸⁸

Six years later, in *Meyer v. Nebraska*, the Court acknowledged that Nebraska had a legitimate interest in ensuring that the children of the state become fluent in English.⁸⁹ The law banning the teaching of foreign languages was still held unconstitutional, however, “because a desirable end cannot be promoted by prohibited means.”⁹⁰ Similarly, in *Farrington v. Tokushige*, the Court acknowledged the government’s legitimate interest in encouraging Japanese assimilation in Hawaii, but still held that a law banning Japanese-language instruction violated due process rights.⁹¹

Given longstanding Progressive hostility to the use of the Due Process Clause to protect substantive rights, one could reasonably have expected the Court to overrule all of these precedents as soon as a majority could be cobbled together to overturn *Lochner* and its progeny. Instead, in *Palko v. Connecticut*, the Court’s new Progressive-liberal majority suggested that some of the rights in the Bill of Rights might be worthy of due process protection,⁹² and in *Carolene Products’* footnote four the Court suggested that government infringement on certain “fundamental rights” might require extra judicial scrutiny.⁹³

For the next twenty-five years or so, the Court rejected opportunities to protect substantive rights directly via the Due Process Clause. In particular, in *Skinner v. Oklahoma*,⁹⁴ it relied on an equal protection argument instead of a liberty argument to invalidate a law requiring sterilization of certain prisoners.

86. For additional discussion, see David E. Bernstein, *The Conservative Origins of Strict Scrutiny*, 19 GEO. MASON L. REV. 861 (2012).

87. 245 U.S. 60 (1917).

88. *Id.* at 82.

89. 262 U.S. at 396.

90. *Id.* at 401.

91. *Farrington v. Tokushige*, 273 U.S. 284, 298 (1927).

92. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

93. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

94. *See generally* 316 U.S. 535 (1942).

In *Bolling v. Sharpe*,⁹⁵ objections from Justice Hugo Black forced Chief Justice Earl Warren to edit a ruling holding public-school segregation in D.C. to violate “substantive” due process standards into a somewhat incoherent mush.⁹⁶

During the same post–World War II period, the Court gradually adopted the incorporation doctrine, holding that some of the rights protected by the Bill of Rights were “incorporated” in the Fourteenth Amendment’s Due Process Clause. Though the Court denied it, the incorporation cases were themselves a species of “substantive” due process because they protected substantive rights via the Due Process Clause. And although the origins of the incorporation doctrine are sometimes incorrectly attributed to Progressive Justice Louis Brandeis,⁹⁷ the first advocate of incorporation was actually Justice John Marshall Harlan.⁹⁸ Harlan’s overall jurisprudential philosophy is a bit obscure. He was, however, at least a classical-liberal fellow traveler, as he supported the right to liberty of contract⁹⁹ and believed in natural rights.¹⁰⁰

Some old-school Progressives, notably an elderly Learned Hand, objected to the Warren Court’s nascent use of the Due Process Clause to protect rights. Hand criticized the Court’s incorporation doctrine in general, and the incorporation of the First Amendment into the Fourteenth Amendment’s Due Process Clause in particular. He contended that there is “no constitutional basis” for the Court to exercise any more supervision over state and local regulation of freedom of expression than it did over liberty of contract.¹⁰¹

95. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

96. See generally David E. Bernstein, *Bolling, Equal Protection, Due Process, and Lochnerphobia*, 93 GEO. L.J. 1253 (2004).

97. See MELVIN I. UROFSKY, *LOUIS D. BRANDEIS* 641 (2009).

98. See, e.g., *Twining v. New Jersey*, 211 U.S. 78, 114–27 (1908) (Harlan, J., dissenting); *Hurtado v. California*, 110 U.S. 516, 540–41 (1884) (Harlan, J., dissenting); Bryan H. Wildenthal, *The Road to Twining: Reassessing the Disincorporation of the Bill of Rights*, 61 OHIO ST. L.J. 1457, 1459 (2000).

99. See generally *Adair v. United States*, 208 U.S. 161 (1908) (Harlan, J.) (invalidating a law in part because it violated the right to liberty of contract).

100. *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U.S. 239, 252 (1905) (stating that there are limitations on all organs of government which “grow[] out of the essential nature of all free governments”). See also *Monongahela Bridge Co. v. United States*, 216 U.S. 177, 195 (1910); *Berea College v. Kentucky*, 211 U.S. 45, 68 (1908) (Harlan, J., dissenting).

[T]he right to enjoy one’s religious belief, unmolested by any human power, is no more sacred nor more fully or distinctly recognized than is the right to impart and receive instruction not harmful to the public. The denial of either right would be an infringement of the liberty inherent in the freedom secured by the fundamental law.

Id.

See also *Jacobson v. Massachusetts*, 197 U.S. 11, 29 (1905) (Harlan, J.) (“There is, of course, a sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government—especially of any free government existing under a written constitution, to interfere with the exercise of that will.”); *Chi., B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 238 (1897) (Harlan, J.) (stating that compensation for the taking of property for public use is a “settled principle of universal law, reaching back of all constitutional provisions”). See generally MILTON R. KONVITZ, *FUNDAMENTAL RIGHTS: HISTORY OF A CONSTITUTIONAL DOCTRINE* 38–40 (2001) (noting Harlan’s influence on the development of natural rights jurisprudence on the Supreme Court in the years leading up to *Lochner*).

101. LEARNED HAND, *THE BILL OF RIGHTS* 50–51, 56 (1958).

Hand and other critics, however, failed to slow the embrace of a broad reading of the Due Process Clause. A speed bump arose in the form of a 1963 opinion upholding a ban on debt adjustment by nonlawyers.¹⁰² Justice Black, who believed that the “substantive” aspect of the Due Process Clause should be wholly limited to incorporating the Bill of Rights, wrote for the Court that “a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution.”¹⁰³

Just two years later, though, in *Griswold v. Connecticut*,¹⁰⁴ the Supreme Court (over a strong dissent from Justice Black) enforced an unenumerated right via the Due Process Clause for the first time since 1936. Four different Justices in the majority wrote opinions in *Griswold*, and all of them cited the pre–New Deal opinions of *Meyer v. Nebraska* and *Pierce v. Society of Sisters*¹⁰⁵ in support of finding a fundamental right to privacy under the Due Process Clause. The main opinion for the Court, written by Justice William O. Douglas, denied that the Court was utilizing “substantive” due process. Rather, Douglas argued, the opinion was akin to incorporation, because it relied on the “penumbras, formed by emanations” from rights protected by the Bill of Rights.¹⁰⁶ Fifty years later, it seems fair to say that Douglas fooled no one but (perhaps) himself.

Over the ensuing decades, the Court recognized other fundamental rights, including the right to terminate a pregnancy¹⁰⁷ and the right to marry.¹⁰⁸ At first, the Court enforced a strict dichotomy: A right was either “fundamental,” and infringements on it were subject to strict scrutiny, or a right was nonfundamental, and protected only by the rational basis test. The Court has eroded this dichotomy, however, by adopting a unique “undue burden” test for abortion regulations,¹⁰⁹ by refusing to articulate the standard of review that applies to laws infringing on the fundamental right to control the upbringing of one’s children,¹¹⁰ and by protecting the right to engage in homosexual sex without recognizing it as a fundamental right.¹¹¹ Modern substantive due process jurisprudence, then, has not only always had its antecedents in pre–New Deal classical-liberal jurisprudence, but has, over time, become more similar to how that jurisprudence operates in practice—judges weigh the importance of the right against the government’s purported interest in infringement. Two big chasms between substantive due process jurisprudence in 1913 and 2013 nevertheless remain. First, the Court no longer recognizes pure “moral”

102. *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

103. *Id.* at 729.

104. 381 U.S. 479 (1965).

105. 268 U.S. 510 (1925).

106. *Griswold*, 381 U.S. at 484–85.

107. *See generally* *Roe v. Wade*, 401 U.S. 113 (1973).

108. *See generally* *Loving v. Virginia*, 388 U.S. 1 (1967).

109. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 837 (1992).

110. *Troxel v. Granville*, 530 U.S. 57 (2000).

111. *See generally* *Lawrence v. Texas*, 539 U.S. 558 (2003).

concerns as valid rationales for infringement on rights. Second, the Court refuses to give economic rights any significant protection. But the point is not that modern substantive due process jurisprudence is the same as the pre–New Deal Court’s substantive due process jurisprudence. Rather, the point is that the modern doctrine is a direct descendant of, and is significantly influenced by, the old doctrine.

V

FEDERALISM

At first glance, the libertarian approach to issues of constitutional federalism has little in common with either modern liberal constitutional theory or with the position taken by the modern Supreme Court. Most modern liberal constitutional theorists generally advocate nearly unconstrained federal power, especially when it comes to making regulations that might affect the national economy in any significant way.¹¹² Others go even farther, and argue that federalism questions should be left entirely to the political process,¹¹³ or at least subject to very heavy judicial deference.

Over the last twenty years, the Rehnquist and Roberts Courts have enforced some modest limits on the scope of Congress’s power under the Commerce Clause¹¹⁴ and have interpreted the Tenth Amendment to constrain Congress’s power to commandeer the states.¹¹⁵ Most recently, in the Affordable Care Act case, a majority of Justices ruled that there are important constraints on Congress’s power to impose mandates under both the Commerce Clause and the Necessary and Proper Clause.¹¹⁶ The Court has also enforced limits on the scope of congressional enforcement power under Section Five of the Fourteenth Amendment and Section Two of the Fifteenth Amendment.¹¹⁷ But all of these decisions were closely contested 5-4 or 6-3 rulings, and most liberal scholars and jurists reject them. Moreover, they do not go nearly as far in constraining federal power as libertarian constitutional theorists would like.

Although the Court has not gone as far as libertarians have wanted it to, in recent years it has embraced several key ideas that have been championed by libertarian critics of the post–New Deal consensus on federalism. Similarly,

112. See, e.g., BALKIN, *supra* note 30, at ch. 9; ERWIN CHEMERINSKY, *ENHANCING GOVERNMENT: FEDERALISM FOR THE 21ST CENTURY* (2008).

113. For leading statements of this view, see generally JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* (1980); Herbert J. Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

114. See, e.g., *Morrison v. United States*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

115. See *Printz v. United States*, 521 U.S. 898, 923 (1997); *New York v. United States*, 505 U.S. 144, 166 (1992).

116. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2572 (2012).

117. See, e.g., *Shelby County v. Holder*, 133 S.Ct. 2612 (2013) (enforcing limits on congressional power under Section Two of the Fifteenth Amendment); *City of Boerne v. Flores*, 521 U.S. 507, 516 (1997) (enforcing limits on congressional power under Section Five of the Fourteenth Amendment).

there are important commonalities between the libertarian approach to federalism questions and the mainstream liberal approach to other issues of structural constitutional law—most notably, separation of powers.

A. Libertarianism and the Revival of Judicial Enforcement of Federalism

In the 1930s and 1940s, the New Deal Supreme Court issued a series of decisions severely reducing judicial enforcement of constitutional limits on the scope of congressional power, particularly the Commerce Clause and the Spending Clause. The Court ruled that Congress has the power to regulate almost any activity that affects interstate commerce,¹¹⁸ and also held that there are few judicially enforceable limits on its power to allocate federal funds under the General Welfare Clause.¹¹⁹ In the aftermath of the New Deal transformation of constitutional law, the conventional wisdom among most jurists and legal scholars was that the courts should defer to the political branches of government when it comes to federalism questions. That conventional wisdom was reinforced by the civil rights revolution of the 1960s, when the banner of “states’ rights” was used to defend Jim Crow segregation, and expansive federal power was needed to break the southern states’ resistance to the establishment of equal rights for African Americans.

From the New Deal period until well into the 1980s, libertarian constitutional theorists who argued that the judiciary should enforce tight limits on federal power, such as Richard Epstein,¹²⁰ were severely out of step with the legal mainstream. Over the last twenty-five years, however, the Rehnquist and Roberts Courts have revived the idea of judicial enforcement of limits on federal power and have helped make it intellectually respectable again.¹²¹ During the same period, libertarian legal scholars such as Randy Barnett, Gary Lawson, and Michael Greve have deepened and expanded the libertarian critique of the dominant post–New Deal approach to federalism.¹²²

The Court has not gone nearly as far as libertarian constitutional theorists would like in limiting federal power. Scholars such as Epstein and Barnett would prefer to reverse many of the core New Deal decisions and restore much of the pre-1930s’ understanding of the scope of federal power.¹²³ But the Court

118. See generally *Wickard v. Filburn*, 317 U.S. 111 (1942).

119. See, e.g., *Helvering v. Davis*, 301 U.S. 619, 640 (1937); *Steward Mach. Co. v. Davis*, 301 U.S. 548, 606 (1937).

120. See, e.g., Richard A. Epstein, *The Mistakes of 1937*, 11 GEO. MASON U. L. REV. 5, 6 (1988); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1388 (1987).

121. For an overview of that revival and its causes, see Ilya Somin, *The Impact of Judicial Review on American Federalism: Promoting Centralization More than State Autonomy*, in COURTS IN FEDERAL COUNTRIES: FEDERALISTS OR UNITARISTS? (Nicholas Aroney & John Kincaid, eds.) (forthcoming), available at <http://ssrn.com/abstract=2311400>.

122. See, generally BARNETT, *supra* note 2; MICHAEL S. GREVE, *THE UPSIDE-DOWN CONSTITUTION* (2012); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001); Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 290 (1993).

123. See generally BARNETT, *supra* note 2; RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL*

has endorsed several of the most important precepts long advocated by libertarian scholars.

At the most basic level, the Court has emphasized that there are meaningful limits to federal power, and the courts have a duty to enforce them. Chief Justice Rehnquist's 1995 opinion in *Lopez v. United States*—the first to strike down a statute as beyond the bounds of Congress's Commerce Clause authority in nearly sixty years—begins with the “first principle [that] [t]he Constitution creates a Federal Government of enumerated powers,” and that it is the task of the judiciary to enforce those limitations.¹²⁴ This is a direct repudiation of New Deal-inspired notions that structural limits on the scope of congressional power are left up to the discretion of the political process. Later decisions such as *Morrison v. United States* and *NFIB v. Sebelius* have reinforced that conclusion.

The Court's enforcement limits on federal power remain very limited. For example, the Court continues to apply the highly deferential rational basis test on the question of whether an “economic activity” that Congress seeks to regulate has a “substantial effect” on interstate commerce such that it can use the commerce power.¹²⁵

On the other hand, the Court has not been similarly deferential in addressing the question of whether a given object of regulation is an economic activity in the first place. Most notably, in *NFIB v. Sebelius*, five Justices concluded that failure to purchase health insurance is actually “inactivity” outside the scope of the Commerce Clause and thus not subject to congressional mandates, despite its significant impact on commerce.¹²⁶ If the Court need not defer to Congress in determining whether a regulated activity (or inactivity) qualifies as economic, this is a potentially significant limitation on the scope of congressional power. So far, it has not been so, in part because the Court has defined economic activity broadly, as anything involving “the production, distribution, and consumption of commodities.”¹²⁷ Nonetheless, the lack of judicial deference on this issue gives the Court the option of retreating from that definition in the future.

An additional theme of libertarian constitutionalism that has been embraced by the Supreme Court is the idea that the limitation of federal power is important to the preservation of individual liberty.¹²⁸ In *Bond v. United States*, Justice Anthony Kennedy wrote an opinion for a unanimous Court which held that “[s]tates are not the sole intended beneficiaries of federalism,” because

CONSTITUTION: THE UNCERTAIN QUESTION FOR LIMITED GOVERNMENT (2014).

124. *United States v. Lopez*, 514 U.S. 549, 552 (1995).

125. *Id.* at 561. *See also* *Gonzales v. Raich*, 545 U.S. 1, 22 (2005) (“[w]e need not determine whether [defendants'] activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a ‘rational basis’ exists for so concluding”).

126. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2580–94 (2012) (Roberts, C.J.).

127. *Raich*, 545 U.S. at 25–26 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 720 (1966)).

128. For libertarian assertions of this idea, see generally BARNETT, *supra* note 2; EPSTEIN, *supra* note 123.

“[f]ederalism secures the freedom of the individual” as well as the prerogatives of state governments.¹²⁹ The link between judicial enforcement of federalism and individual liberty is now a sufficiently mainstream idea that even liberal Supreme Court justices are willing to sign on to it, albeit only to a limited degree.

The link between federalism and liberty was also a recurring theme in the opinions of Justice Sandra Day O’Connor, a key swing-vote Justice on the Rehnquist Court. In the important 1992 case of *New York v. United States*, her majority opinion clearly emphasized that “[s]tate officials cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution” in part because constitutional federalism exists for the benefit of “the people,” not the states alone.¹³⁰ In *Gregory v. Ashcroft*, she wrote that “[i]n the tension between federal and state power lies the promise of liberty.”¹³¹ The Court drew these ideas from the classical-liberal thought of the Founding Fathers more than from modern libertarianism.¹³² But obviously the latter has its intellectual origins in the former, and both are at odds with the New Deal view that limitations on federal power have little—if any—value in protecting individual freedom.

Less recognized than the above two connections between libertarian constitutional thought on federalism and the Court’s jurisprudence is the latter’s endorsement of the idea that state consent does not justify the expansion of federal power into otherwise unconstitutional realms. This precept is a logical extension of the related precept that constitutional limits on federal power are supposed to benefit the people, not just state governments.

A majority of the Court endorsed the theory as early as 1992, in *New York v. United States*, where Justice O’Connor ruled that state consent was not enough to justify otherwise impermissible federal “commandeering” of state governments. O’Connor wrote for the majority that “powerful incentives might lead both federal and state officials to view departures from the federal structure to be in their personal interests.”¹³³ If limits on federal power are meant to protect individual liberty, not just the interests of state governments, it follows that judicial enforcement may often be needed, because the states cannot be trusted to defend federalism in the political process in cases where it does not serve their own purposes, but does protect individual freedom. This point is a central precept of modern libertarian theories of federalism jurisprudence.¹³⁴ More generally, if the states often have an interest in expanding federal power beyond its constitutional bounds, then their political

129. *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011).

130. *New York v. United States*, 505 U.S. 144, 182–83 (1992).

131. *Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991).

132. *See, e.g., id.* at 457–59 (discussing the Founders’ thinking on this point).

133. 505 U.S. at 182.

134. *See, e.g., Greve, supra* note 122; John O. McGinnis & Ilya Somin, *Federalism vs. States’ Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 89, 125 (2004).

power cannot be a justification for judicial deference to Congress.

Overall, there is a large gap between the Court's current federalism jurisprudence and where most libertarians would want it to be. So far, the revival of federalism under the Rehnquist and Roberts courts has had only very modest results. However, a majority of the Court has embraced three key precepts of libertarian constitutional thought: (1) that the judiciary must enforce structural limits on federal power, (2) that such limits promote individual liberty as well as the interests of state governments, and (3) that state consent cannot alone justify expansions of federal power because state governments often have interests that diverge from those of the general public.

B. The Libertarian View of Federalism and the Progressive View of Separation of Powers

Although the libertarian approach to constitutional federalism has arguably converged with that of the Supreme Court majority in some important respects, the same cannot be said with respect to most left-liberal academics' and jurists' views of federalism. With rare exceptions, progressive scholars and judges have rejected nearly all recent efforts to promote judicial enforcement of structural limits on congressional power.¹³⁵ It may be a long time, if ever, before there is any substantial convergence between left-liberal and libertarian constitutional thought on this issue.

There is, however, an important congruence between the way libertarians view federalism issues and the way progressives approach other structural questions in constitutional law. Although most of the latter are hostile to judicial enforcement of federalism, many of them support aggressive enforcement of separation of powers constraints on executive power.

The liberal justices on the Supreme Court and most left-of-center academics supported the Court's decisions to limit executive power to detain and interrogate suspected terrorists during the war on terror.¹³⁶ In the most recent of these cases, *Boumediene v. Bush*, in 2008,¹³⁷ the Court restricted the President's exercise of detention authority even though he had congressional authorization.

Modern liberal constitutional theorists have defended these decisions and have urged tighter judicial constraints on the exercise of executive power because they recognize that the political process—including Congress—is often unable or unwilling to curb presidential power grabs, especially in a time of crisis.¹³⁸ Bruce Ackerman has even argued for the creation of a new specialized

135. For example, the liberal justices on the court consistently voted against limitations on federal power in cases such as *Lopez*, *Morrison*, and *Printz*. It is notable, however, that Justices Stephen Breyer and Elena Kagan voted to invalidate part of the expansion of Medicaid grants to state governments in *NFIB v. Sebelius*.

136. See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507, 525, 536 (2004); *Rasul v. Bush*, 542 U.S. 466, 485 (2004).

137. *Boumediene v. Bush*, 553 U.S. 723, 729–30 (2008).

138. See generally BRUCE A. ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2010); DAVID COLE & JAMES X. DEMPSEY, *TERRORISM AND THE CONSTITUTION: SACRIFICING*

court intended to rein in executive power, for fear that the Supreme Court, as presently constituted, is unlikely to be forceful enough.¹³⁹

These liberal scholars and jurists offer a critique of unconstrained executive power similar to the libertarian critique of unconstrained congressional power. Both groups argue that the political process cannot be trusted to constrain abuses on its own because of perverse incentives.¹⁴⁰ Accordingly, both are also willing to support judicial intervention even though the political branches of government may have superior information and expertise. The disparity between the judiciary's and the political branches' knowledge may actually be greater in the realm of wartime issues than domestic policymaking, because the former often involves complex classified intelligence data that cannot be publicized. Furthermore, both libertarians and liberals argue that judicial enforcement of structural constraints on government power is essential to preserve not only the institutional prerogatives of different branches and levels of government, but individual liberty.¹⁴¹ If presidents can abuse an unconstrained power to detain and surveil, so too can Congress abuse an unconstrained power to regulate and mandate.

Finally, both the modern liberal approach to executive power and the modern conservative approach to federalism represent important breaks with New Deal-era orthodoxy. New Deal jurists and constitutional theorists were, for the most part, comfortable with a high degree of judicial deference to the executive, especially in wartime.¹⁴² For example, a Supreme Court dominated by Roosevelt-appointed New Dealers held, in one of the Japanese internment cases, that “[s]ince the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of the means for resisting it . . . Where, as they did here, the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of warring, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.”¹⁴³ Few liberal jurists or constitutional scholars would endorse these words today.

With a few exceptions, libertarian constitutional theorists have recognized

CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY (2006); JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH (1993); HAROLD KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR (1990).

139. ACKERMAN, *supra* note 138, at ch. 6.

140. *See, e.g., id.*; ELY, *supra* note 138.

141. *See* ACKERMAN, *supra* note 138; COLE & DEMPSEY, *supra* note 138.

142. For the classic account, *see generally* ARTHUR M. SCHLESINGER, THE IMPERIAL PRESIDENCY (1973).

143. *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943).

the important parallels between abuses of executive power and unconstitutional congressional overreach. For example, Randy Barnett has taken a leading role in challenging expansive National Security Agency surveillance that is purportedly justified by the exigencies of the war on terror.¹⁴⁴

This is not to suggest that it is impossible to draw meaningful distinctions between executive and congressional overreach. Obviously, many liberals believe there are differences that justify greater judicial intervention in the former area, whereas many conservatives believe the opposite. Our point is not that such distinctions are inherently invalid, but that there are also strong parallels between the two areas. These parallels could potentially lead to a measure of convergence between liberal and libertarian views on structural constitutional law.

For the moment, such convergence seems unlikely. But it is worth noting that, over the last twenty years, the Supreme Court majority has expanded both its efforts to enforce federalism constraints on Congress and its oversight of the use of wartime executive power. In both cases, some critics argue that it has not gone nearly far enough, while others contend that even the modest steps taken so far are excessive. The arguments offered for and against both of these moves are strikingly similar. That may be part of the reason why key swing-voter Justices Sandra Day O'Connor and Anthony Kennedy consistently voted with the majority in both cases limiting federal power and cases limiting wartime executive power. That similarity may, over time, be more widely appreciated.

VI

PROPERTY RIGHTS

In few areas is the difference between libertarian and liberal views of constitutional law more readily apparent than in the field of property rights. For many decades beginning in the late 1930s, property rights were the “poor relation” of constitutional law, as the Supreme Court famously put it in 1994.¹⁴⁵ That the judiciary should abjure protection of property rights was one of the central tenets of New Deal liberal jurisprudence, and a major focus of Progressive criticisms of the old, pre–New Deal era Court.¹⁴⁶

The post–New Deal conventional wisdom on property rights was epitomized by the Supreme Court’s 1954 decision in *Berman v. Parker*,¹⁴⁷ which interpreted the Fifth Amendment’s requirement that property can only be condemned for a “public use” nearly out of existence, holding that once the “legislature has

144. See Randy Barnett, *The NSA’s Surveillance is Unconstitutional*, WALL STREET JOURNAL, July 11, 2013, <http://online.wsj.com/news/articles/SB10001424127887323823004578593591276402574>.

145. *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

146. See BARBARA H. FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ-FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* (2001); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* chs. 2, 5 (1992); James W. Ely, Jr., *The Progressive Era Assault on Individualism and Property Rights*, 29 SOC. PHILOSOPHY AND POLICY 255, 255 (2012).

147. See generally *Berman v. Parker*, 348 U.S. 26 (1954).

spoken, the public interest has been declared in terms well-nigh conclusive.”¹⁴⁸ During this era, the Court also took a very narrow view of what kinds of government regulations qualify as takings requiring compensation under the Fifth Amendment’s Just Compensation Clause.¹⁴⁹

Since the mid-1980s, however, the Court has begun to revive judicial protection of property rights under the Fifth Amendment in a variety of ways. In a series of decisions, it has increased the range of government actions that qualify as takings.¹⁵⁰ Most recently, in a controversial ruling in *Koontz v. St. Johns River Water Management District*,¹⁵¹ it significantly broadened the application of takings analysis to land-use permit schemes.¹⁵²

These decisions have not gone nearly as far as libertarian advocates of property rights would like.¹⁵³ In many ways, the Court continues to treat property rights less favorably than other enumerated constitutional rights.¹⁵⁴ But recent decisions do represent a significant change from the immediate post-New Deal era, and a challenge to the Progressive and New Deal orthodoxy.

At least for the moment, the Court continues to endorse a very broad conception of what qualifies as a public use. In the highly controversial 2005 case of *Kelo v. City of New London*,¹⁵⁵ the Court ruled that “economic development” by a private firm is enough to legitimate a taking and reaffirmed the idea that virtually any public benefit qualifies as a public use—the government need not even prove that the supposed benefit will actually be achieved.¹⁵⁶ But it is significant that *Kelo* was a close 5-4 decision, with key swing-vote Justice Sandra Day O’Connor authoring a forceful dissent, joined by three other justices, arguing that the Public Use Clause authorizes strong judicial review and that private economic development is not a permissible

148. *Id.* at 32.

149. The leading case on this issue was *Penn Central Transp. Co. v. New York*, 438 U.S. 104 (1978). For an overview of this era in Supreme Court property rights jurisprudence, see ELY, *supra* note 68, at 125–53.

150. See, e.g., *Palazzolo v. Rhode Island*, 533 U.S. 606, 626, 630 (2001) (restrictions imposed before the current owner purchased property can sometimes be takings); *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994) (land-use permit restrictions that impose physical invasions without “rough proportionality” to a government interest); *Lucas v. S. C. Coastal Council*, 505 U.S. 1003, 1015 (1992) (regulations destroying one-hundred percent of the value of property); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987) (land-use permit restrictions that impose physical invasions without an “essential nexus” to a government interest).

151. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013).

152. For an analysis and defense of *Koontz*, see Ilya Somin, *Two Steps Forward for the “Poor Relation” of Constitutional Law: Koontz, Arkansas Game & Fish, and the Future of the Takings Clause*, 2013 CATO SUP. CT. REV. 215.

153. See, e.g., RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985); ELLEN FRANKEL PAUL, *PROPERTY RIGHTS AND EMINENT DOMAIN* (1987).

154. For an analysis of several such double standards, see Ilya Somin, *Taking Property Rights Seriously? The Supreme Court and the “Poor Relation” of Constitutional Law*, *George Mason Law & Econ. Research Paper No. 08-53* (2008), available at <http://ssrn.com/abstract=1247854>.

155. See generally *Kelo v. City of New London*, 545 U.S. 469 (2005).

156. *Id.* at 476–83.

public use.¹⁵⁷ In a solo dissent, Justice Clarence Thomas outlined an even more extensive challenge to the post–New Deal Court’s ultradeferral public use jurisprudence.¹⁵⁸ Justice Anthony Kennedy, the swing voter in the case, authored a concurring opinion that suggested that heightened scrutiny of condemnations that transfer property to private parties might be appropriate in some cases where there was sufficient evidence of “favoritism” towards private interests.¹⁵⁹ Even the majority opinion written by Justice John Paul Stevens was slightly less deferential to the government than previous precedent had been.¹⁶⁰

If nothing else, the close result in *Kelo* shattered the previous consensus among experts, who viewed the broad post–New Deal view of public use as nearly unchallengeable orthodoxy that was both clearly correct and firmly established.¹⁶¹ If any Justices epitomize the constitutional mainstream of the late twentieth and early twenty-first century, it is perennial Supreme Court swing-voters O’Connor and Kennedy. The fact that that one of them decisively repudiated the equation of public use and potential public benefit, while the other at least raised questions about its validity, is a powerful sign of the erosion of the New Deal consensus on constitutional property rights issues. In the aftermath of *Kelo*, that consensus was further weakened by the refusal of several state supreme courts to adopt *Kelo* as a guide to the public use clauses of their state constitutions, and, by extensive disagreement among state and lower federal courts over the question of what qualifies as a “pretextual” taking. Under *Kelo*, pretextual takings are considered violations of the Public Use Clause because the official rationale for the condemnation in such cases is a mere pretext “for the purpose of conferring a private benefit on a particular private party.”¹⁶²

Outside the judiciary, *Kelo* led to a nearly unprecedented political backlash, with public opinion polls showing some eighty percent of Americans opposed to the decision, and some forty-five states enacting eminent domain–reform laws in response to the ruling—a more extensive legislative reaction than that which resulted from any other Supreme Court decision.¹⁶³

The political reaction to *Kelo* indicates the potential for a degree of convergence between libertarians and liberals on constitutional property rights issues. While most property rights cases divide observers along ideological lines,

157. *Id.* at 493–506 (O’Connor, J., dissenting).

158. *Id.* at 507–26 (Thomas, J., dissenting).

159. *Id.* at 491 (Kennedy, J., concurring).

160. For a detailed discussion of this point, see ILYA SOMIN, *THE GRASPING HAND: KELO V. CITY OF NEW LONDON AND THE LIMITS OF EMINENT DOMAIN* ch. 4 (forthcoming 2015).

161. See *id.* at ch. 2 (providing citations to various experts who made such claims before *Kelo*); *id.* at ch. 4, Conclusion (explaining how the consensus was undermined by *Kelo*).

162. 545 U.S. at 477–78. For detailed overviews of the relevant lower court jurisprudence on these issues, see *id.* at ch. 7; Ilya Somin, *The Judicial Reaction to Kelo*, 4 ALB. GOV’T L. REV. 1, 24 (2011) (symposium on eminent domain) (documenting skeptical reaction by several state supreme courts).

163. For a detailed analysis of the survey data and legislative reaction, see SOMIN, *supra* note 160, at chs. 5–6. See also Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2109–13 (2009).

with libertarians and conservatives supporting property rights and liberals tending to support the government, numerous liberal commentators, activists, and organizations were among those condemning *Kelo* and filing amicus briefs urging the Court to strike down economic development takings. They included the NAACP, the Southern Christian Leadership Conference (a prominent mostly African-American civil rights group), and left-wing activist Ralph Nader.¹⁶⁴ One of the present authors, a libertarian law professor, filed an amicus brief on behalf of legendary left-of-center urban development theorist Jane Jacobs.¹⁶⁵

Opposition to *Kelo* from the left was driven by, among other things, a recognition that economic development and “blight condemnations” often target the poor, the politically weak, and racial minorities for the purpose of transferring their property to politically connected developers and other influential interest groups.¹⁶⁶ Other property rights issues do not necessarily have the same valence. But their distributional consequences are nonetheless often more complex than the traditional New Deal worldview might suggest. Often, they involve government regulations that benefit well-connected interest groups at the expense of the general public, even if they do not necessarily involve straightforward “reverse Robin Hood” transfers from the poor to the affluent.¹⁶⁷

It is unlikely that libertarian and liberal views on constitutional property rights will ever completely converge, or even that they will become as close as the two groups’ views on “noneconomic” rights. Libertarians support strong protection for property rights even in cases where government restrictions on them do not inflict harm on the poor and disadvantaged, while liberals are unlikely to go that far. But the interesting anti-*Kelo* coalition suggests the possibility that the differences between the two might narrow.

So far, liberal opposition to *Kelo* has not, for the most part, affected attitudes among left-of-center federal judges and prominent legal scholars, most of whom tend to support the result in *Kelo* and continue to endorse the extremely broad view of public use outlined in the Court’s pre-*Kelo* jurisprudence. But that may eventually change over time. The next generation of progressive federal judges and legal scholars might include a higher proportion whose views on public use resemble those of Jacobs, Nader, and the NAACP.

Finally, convergence between liberal and libertarian views of constitutional property rights might occur because the extremely deferential New Deal approach to property rights is at odds with the dominant liberal view of most

164. See SOMIN, *supra* note 160, at chs. 1, 5.

165. Brief for Jane Jacobs as Amica Curiae Supporting Petitioners, *Kelo v. City of New London*, 545 U.S. 469 (2005) (No. 04-108).

166. See SOMIN *supra* note 160, at ch. 1.

167. See, e.g., Ilya Somin, *Why Robbing Peter Won’t Help Poor Paul: Low-Income Neighborhoods and Uncompensated Regulatory Takings*, 117 YALE L.J. POCKET PART 72 (2007).

other constitutional rights. In contrast to many early twentieth-century Progressives,¹⁶⁸ modern liberals generally support strong judicial enforcement of a wide range of individual rights, including freedom of speech, privacy rights, rights against racial and gender discrimination, and the rights of criminal defendants. In this context, extensive deference on property rights issues seems an unusual anomaly. As James Ely points out with respect to the Public Use Clause, “among all the guarantees of the Bill of Rights, only the public use limitation is singled out for heavy [judicial] deference.”¹⁶⁹

If liberal scholars and jurists were to treat property rights protected by the Takings Clause the same way as they treat other constitutional rights, they would still not necessarily grant these rights as much protection as libertarians claim they should. After all, liberals, like conservatives, often prefer to give government greater scope relative to individual liberty in a wide range of areas where libertarians would prefer tighter constraints. But it would significantly diminish the gap between the two camps.

Obviously, such convergence is by no means inevitable. As memories of *Kelo* fade, liberals could potentially reunite in defense of New Deal-era orthodoxy. Alternatively, libertarian constitutionalism could gradually fade as a significant, distinct movement in constitutional thought and return to the fringe obscurity it was consigned to in the decades immediately following the Great Depression. It is also possible that the two sides' views of property rights will remain as deeply divided as they are today.

Be that as it may, it is clear that the Supreme Court, over the last several decades, has gradually brought some key libertarian ideas on property rights back into the mainstream, and there is some potential for convergence between libertarian and liberal approaches to these issues. That potential is highlighted by the reactions of many in both groups to the *Kelo* case and by the anomalous status of property rights in modern liberal constitutional thought.

While libertarian theories of constitutional property rights have gained ground in recent years, it is only fair to note that libertarian efforts to strengthen judicial protection for economic liberties such as freedom of contract have attracted far less support. *Lochner v. New York*,¹⁷⁰ the 1905 case that symbolizes judicial protection for such rights under the Fourteenth Amendment, continues to be one of the most reviled Supreme Court decisions of all time, in the eyes of mainstream jurists and liberal academics. The modern Court has so far not chosen to revisit the ultra-deferential approach to

168. See *supra* Part II.

169. James W. Ely, Jr., ‘Poor Relation’ Once More: *The Supreme Court and the Vanishing Rights of Property Owners*, 2005 CATO SUP. CT. REV. 39, 62. It might be thought that the Second Amendment right to bear arms was another such anomaly. But at the time Ely wrote, most liberals, as well as the Supreme Court, had not yet endorsed the idea that the Second Amendment protects an individual right at all, as opposed to a “collective” right of state militias. The Court did not interpret the Second Amendment as protecting an individual right until 2008. See *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008).

170. 198 U.S. 45 (1905).

restrictions on economic freedom adopted in *Williamson v. Lee Optical*.¹⁷¹

Libertarian scholars who seek to challenge the dominant view on judicial protection for economic liberties have achieved only very limited success.¹⁷² Still, several lower court decisions have recently struck down particularly egregious licensing restrictions as violating the Fourteenth Amendment, a development which suggests that the deferential “rational basis” test that currently applies to economic regulations may over time develop “bite.”¹⁷³ In addition, libertarian defenses of judicial protection for economic liberty are now taken seriously in academic and jurisprudential circles to a much greater extent than was the case twenty or thirty years ago. It is possible that libertarian legal thought in this area may follow the same gradual path towards mainstream influence as it already has in the field of property rights.

VII CONCLUSION

Libertarian constitutionalism is likely to remain a small minority movement among jurists and legal scholars for the foreseeable future. But libertarian ideas nonetheless have had significant influence on modern Supreme Court jurisprudence. With respect to noneconomic liberties and equal protection of the law, modern jurisprudence has adopted, albeit in modified form, a surprising number of doctrines that originated in the supposedly benighted pre-New Deal period. With regard to federalism and property rights, there is a much larger gap between libertarian ideas and dominant precedent, and an even bigger one between libertarian views and those of left-liberal constitutional theorists. Nonetheless, libertarian ideas have made some progress within the Court in recent years. And, as the *Kelo* case dramatically demonstrated, there are also important commonalities between libertarian and liberal legal thought in these fields—commonalities that create some potential for convergence.

171. 348 U.S. 483 (1955).

172. For examples of such works, see DAVID N. MAYER, *LIBERTY OF CONTRACT: REDISCOVERING A LOST CONSTITUTIONAL RIGHT* (2011); TIMOTHY SANDEFUR, *THE RIGHT TO EARN A LIVING: ECONOMIC FREEDOM AND THE LAW* (2010); BERNARD SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* (1980). One of the present authors has argued extensively that *Lochner v. New York* does not deserve most of the opprobrium heaped upon it by Progressives and their intellectual heirs. See generally BERNSTEIN, *REHABILITATING LOCHNER*, *supra* note 3.

173. For an overview and discussion of these decisions, see Douglas Ginsburg & Steven Menashi, *Rational Basis with Economic Bite*, 8 NYU J. L. & LIBERTY 1055 (2014).