

NEOLIBERAL CONSTITUTIONALISM: LOCHNERISM FOR A NEW ECONOMY

JEDEDIAH PURDY*

I

INTRODUCTION

Neoliberalism has a constitutional face. It figures in judicial and popular interpretations of free speech, due process, equal protection, and federalism, as surely as it does in intellectual property, family law, health policy, and the other areas that our contributors address.¹ In this article, I make the case that there is something special about the *constitutional* expression of neoliberalism, which arises from three features of constitutional law: its basicness, its breadth, and its integrating tendency.

Constitutional neoliberalism is *basic* because it weaves neoliberal ideas into some of the country's most fundamental legal principles. Constitutional doctrines of rights and structure both set out the elemental boundaries of governance—what governments may and may not do—and tie these rudiments of public power and constraint to orienting moral ideas: what interests and capacities most matter in people, which collective purposes define the role of government, and which constraints on government are essential to respecting individuals. Constitutional neoliberalism is *broad* in that it touches many areas of legal regulation, from state controls on pharmaceutical marketing to the federal individual-insurance mandate to corporate campaign contributions. It is *integrating* because the burden of principled constitutional decisionmaking is to identify common stakes across these areas. Giving an account of liberty and equality that integrates a variety of areas of regulation tends to produce, however roughly and inconsistently, a moral image of the person as a constitutional citizen. An account of federalism tends to produce such an image of the levels and roles of government. And where a variety of constitutional doctrines set limits on the regulation of economic life, they tend to produce a moral image of the economy.

In particular, I argue that there is value in illuminating emerging constitutional neoliberalism by comparison with the much-debated *Lochner*

Copyright © 2014 by Jedediah Purdy.

This article is also available at <http://lcp.law.duke.edu/>.

* Robinson O. Everett Professor of Law, Duke University School of Law.

1. See Anne L. Alstott, *Neoliberalism in U.S. Family Law: Negative Liberty and Laissez-Faire Markets in the Minimal State*, 77 LAW & CONTEMP. PROBS., no. 4, 2014 at 25; Robert Hockett, *Preliberal Autonomy and Postliberal Finance*, 77 LAW & CONTEMP. PROBS., no. 4, 2014 at 105; Amy Kapczynski, *Intellectual Property's Leviathan*, 77 LAW & CONTEMP. PROBS., no. 4, 2014 at 131; Frank Pasquale, *The Hidden Costs of Health Care Cost-Cutting: Toward a Postneoliberal Health-Reform Agenda*, 77 LAW & CONTEMP. PROBS., no. 4, 2014 at 171.

era, the period when U.S. jurisprudence came closest to constitutionalizing classical liberalism in economic matters. The comparison focuses attention on a series of key issues, despite the obvious dangers of tendentious parallel-drawing and hasty generalization that inhere in aligning distinct eras. These dangers are worth specifying upfront, as they are sure to occur to thoughtful readers. One danger has to do with the characterization of “constitutional eras,” in the past or in one’s own time, which of course can obscure more than it reveals about the messiness, diversity, and contestation within any moment of constitutional law and politics, and about the continuity across “eras” of constitutional themes and concerns. In other words, talk of eras can make the Constitution seem both falsely whole at any moment and falsely fragmented across time.

The second danger lies in comparison, in which two interpretations, each necessarily simplified, are set alongside each other for mutual illumination; plainly, the effect could be to amplify distortion instead. That being said, however, it is also true that in constitutional law, the whole is sometimes more than the sum of its parts, and commentators need ways to acknowledge and work with this fact. Constitutional law has epochs: between the mid 1950s and the late 1960s, the Supreme Court of Chief Justice Earl Warren went to war against Southern segregation, implemented a strong new voting-rights jurisprudence, and revolutionized criminal law with a series of protections for the accused. The individual cases of that time are part of a larger picture of the Court’s role: to help create a certain kind of decent society by enforcing an image of the legal and political meaning of equal citizenship in a democratic polity. American society gathers this set of facts within the term “Warren Court,” which critics and celebrators alike understand despite the many necessary qualifications.

II

WHY CALL IT A NEW LOCHNERISM? WHAT THE COMPARISON SHOWS ABOUT NEOLIBERAL CONSTITUTIONALISM

The “Lochner era,” of course, refers to the Supreme Court’s desultory affair with economic libertarianism, beginning in the late nineteenth century and abruptly ending on or about March 29, 1937, with *West Coast Hotel Co. v. Parrish*.² In the namesake 1905 case, *Lochner v. New York*, the Supreme Court invalidated a state law setting maximum daily and weekly hours for bakers.³ The Court ruled that the law violated constitutionally protected “liberty of contract,” the freedom of both employees and employers to make whatever agreements they saw fit.⁴ Minimum-wage laws were another prime target of *Lochner* reasoning because they forbade the contractual choice to accept low

2. 300 U.S. 379 (1937).

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

4. *Id.* at 64.

pay.⁵ The Court also invalidated laws that voided anti-union contracts to advance organized labor,⁶ struck down price regulations,⁷ and, more sympathetically, overturned barriers to entry in some trades⁸ and invalidated a residential segregation law as a violation of the white seller's right to transfer his property as he liked.⁹ Between the 1880s and the 1930s, the Supreme Court struck down more than 200 pieces of state and federal legislation as violations of "economic liberty" and laissez-faire policy.

More specifically, the *Lochner* era provides a hindsight view—with the partly artificial neatness of a completed episode—of what constitutional jurisprudence can look like when it adopts a moralized view of economic life that protects individual autonomy in market transactions.

First, key cases in the era take certain economic transactions as paradigms of constitutional liberty and equality. *Lochner* itself embraces a picture of liberty that centers on the contractual transactions of the autonomous producer—the worker bargaining with a potential employer over the terms of the labor contract. The same is true of cases dealing with wages, anti-union contract terms, and other products of labor-market bargaining. The paradigmatic constitutional citizen of these cases exercises the economic autonomy of a buyer or seller of labor, of more traditional and literal real-estate property or of the services of the craftsman or small businessman.¹⁰ This is the substance of activity protected under both the liberty and equality clauses of the Fourteenth Amendment; as courts sometimes explain, equal freedom to participate in these transactions places a person, at least potentially, within a Horatio Alger-style life-course of acquisition and ownership.¹¹

There is a parallel in today's neoliberal constitutionalism, which concentrates on forms of autonomy that are more characteristic of twenty-first century capitalism than that of a century ago: selling data, making consumption decisions, and deciding how to spend money more generally to advance one's preferences.¹² Even as the older model of economic constitutional liberty

5. See, e.g., *Adkins v. Children's Hosp. of D.C.*, 261 U.S. 525 (1923), *overruled by West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

6. E.g., *Coppage v. Kansas*, 236 U.S. 1 (1915).

7. E.g., *Tyson & Bro. v. Banton*, 273 U.S. 418 (1927).

8. E.g., *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911).

9. *Buchanan v. Warley*, 245 U.S. 60 (1917).

10. See *id.*; *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932) (invalidating a state law prohibiting any person from manufacturing ice without first obtaining a certificate of convenience and necessity); *Holden v. Hardy*, 169 U.S. 366 (1898); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

11. See, e.g., Abraham Lincoln, Address to the Wis. State Agric. Soc'y (Sept. 30, 1859) (arguing that mobility and the openness of careers and property ownership made American economy uniquely free and equal).

12. For examples, see *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2584–91 (2012) (the *Sebelius* reasoning on the Commerce Clause); *Sorrell v. IMS Health Inc.*, 131 S.Ct. 2653 (2011); the campaign-finance cases: *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) and *SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686 (D.C. Cir. 2010); and the commercial-speech cases: *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), and *Ohralik v. Ohio State Bar Ass'n*, 436

remains largely exiled, as it has been since its rejection during the New Deal, a new set of activities has formed a new version of economic constitutional liberty, much of it anchored in the First Amendment.¹³

III

THE FIRST AMENDMENT

Today the principle that Congress “shall make no law . . . abridging the freedom of speech”¹⁴ is perhaps the most familiar phrase in the Constitution, and certainly one of the most iconic for liberals. Recently, though, it has become a linchpin in the Supreme Court’s antiregulatory cases. Constitutional protection of speech increasingly means protection of spending, advertising, and even markets for the data that advertisers use to craft their messages. The Court has overturned regulation in each of these areas in the name of free speech. Lurking behind these doctrinal changes is an image of the world in which politics and argument are practically the same as pursuing one’s preferences through spending and seeking profit by advertising. This image assimilates to a single constitutional status two kinds of activity that have traditionally received very different levels of protection: classic political speech on the one hand and market activities such as spending, marketing, and data-mining on the other. The result has been to accord spending, marketing, and data-mining a level of constitutional protection very near to that traditionally given to speech.

In the instantly infamous 2010 *Citizens United* decision, Justice Kennedy applied these principles in full-throated fashion to strike down a ban on certain corporate spending in elections.¹⁵ Justice Kennedy’s opinion embraced a pair of principles that epitomize the First Amendment’s neoliberal version. First, limits on spending count as limits on speech,¹⁶ so the power to write a million-dollar check for a wave of last-minute advertising has about the same constitutional status as the right to post a blog entry making the case for your candidate. This spending-equals-speech equation was not new, only amplified: It dated back to a 1976 case, *Buckley v. Valeo*, which overturned limits on individual spending as unconstitutional speech restrictions.¹⁷

Rather, the novelty of *Citizens United* lay in its announcement that corporations’ political speech (read: spending) enjoys the same constitutional protection as individuals’ speech.¹⁸ Taken together, the money-is-speech

U.S. 447 (1978).

13. See Timothy K. Kuhner, *Consumer Sovereignty Trumps Popular Sovereignty: The Economic Explanation for Arizona Free Enterprise v. Bennett*, 46 IND. L. REV. 603, 631–32 (2013).

14. U.S. CONST. amend. I.

15. *Citizens United*, 558 U.S. at 310.

16. *Id.* at 347–48, 354–55.

17. *Buckley v. Valeo*, 424 U.S. 1 (1976); see also Timothy K. Kuhner, *The Democracy to Which We Are Entitled: Human Rights and the Problem of Money in Politics*, 26 HARV. HUM. RTS. J. 39, 73 (2013) (explaining that in *Buckley* the Court also held that equality was, and thus still is, an unconstitutional goal).

18. See *Citizens United*, 558 U.S. at 340–43.

principle and the extension of First Amendment protection to corporations meant that for Congress to limit corporate campaign spending was just as unconstitutional as banning a flesh-and-blood person from arguing for or against health care reform. Justice Kennedy's language was dire: "The censorship we now confront is vast in its reach."¹⁹ He warned, quoting an earlier opinion by Justice Scalia, that "the Government has muffled the voices that best represent the most significant segments of the economy."²⁰ The decision's effect on campaigns was immediate and dramatic: The advocacy group Public Citizen reports that in the 2012 presidential election cycle, spending by newly constitutionally empowered outside groups rose by 243 percent over the 2008 cycle.²¹

Just a year later, Justice Kennedy wrote the Court's opinion in *Sorrell v. IMS Health*, the Vermont pharmaceutical decision.²² The backdrop of the case was the enormous amount that drug companies spend marketing their products to doctors and consumers—estimated at more than thirty billion dollars annually in a 2008 study, which put marketing ahead of research and development as a share of industry spending.²³ Pharmacies and data-miners serve drug marketers by selling them doctors' prescription records, which the marketers use to target their sales efforts.²⁴ Vermont had barred the sale (or giveaway) of prescription information and its use in marketing except where physicians gave permission for their records to be used.²⁵ The policy was meant to protect doctors' and patients' privacy, and also to offset some of the market power of the big drug companies, in the hope that more doctors would prescribe less-expensive generic medicines.²⁶

Justice Kennedy wrote that the law was unconstitutional because it burdened speech—marketing—based on the identity of the speaker (patent-holding drug companies) and the content of the message ("prescribe our drugs").²⁷ Kennedy described the issue as follows: "The State may not burden the speech of others in order to tilt public debate in a preferred direction. 'The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish.'"²⁸ There is something

19. *Id.* at 354.

20. *Id.*; see also Kuhner, *supra* note 13, at 4 (explaining that a year after *Citizens United* the Court continued on this trajectory in its decision in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, which has allowed money in politics to reach "sufficiently towering heights").

21. PUBLIC CITIZEN, FACT SHEET: *CITIZENS UNITED V. FEC* 210 (2013), available at <http://www.citizen.org/documents/students-citizens-united-guide-factsheet.pdf>.

22. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011).

23. See York University, *Big Pharma Spends More on Advertising than Research and Development, Study Finds*, SCIENCE DAILY (Jan. 7, 2008), <http://www.sciencedaily.com/releases/2008/01/080105140107.htm>.

24. *Sorrell*, 131 S. Ct. at 2660.

25. *Id.*

26. *Id.* at 2661.

27. *Id.* at 2663.

28. *Id.* at 2671 (quoting *Edenfield v. Fane*, 507 U.S. 761, 767 (1993)).

otherworldly about describing as “public debate” companies’ targeted pitches to physicians. This constitutional peculiarity has two sources: one very much in line with *Citizens United*, the other even stranger and more innovative.

The peculiarity that is in line with *Citizens United* is the Court’s growing protection for businesses’ commercial speech.²⁹ For more than three decades, the Supreme Court has moved toward treating advertising as strongly protected constitutional speech. Although the Court wrote in 1942 that “purely commercial advertising” does not enjoy the First Amendment’s shield,³⁰ in 1976 (the year of *Buckley v. Valeo*) the Justices reversed that doctrine in *Virginia State Pharmacy Board v. Virginia State Consumer Council*. The Court struck down a Virginia law that forbade pharmacists to advertise drug prices, which was supposed to protect professionalism and discourage race-to-the-bottom competition.³¹ The decision established that purely economic speech, such as announcing low prices to potential customers, enjoys the protection of the First Amendment.³² The Court reasoned that advertising conveys useful information to consumers, which makes their decisions more efficient, and observed that a listener’s interest in the price of medicine might be “as keen, if not keener by far, than his interest in the day’s most urgent political debate.”³³

There is something reasonable in this formulation: The plaintiffs were consumers, not marketers, and the Court observed that, with advertising forbidden, drug prices varied widely around the state.³⁴ At the same time, however, this passage hints at very basic developments taking constitutional law in a neoliberal direction. First, the passage imagines the subject of constitutional rights not as a citizen engaged in political debate, but as a consumer worried about prices. Of course people care about whether they can get medicine; but the meaning of the doctrinal development is not that access to medicine is a constitutional interest: it is that the consumer tracking prices, as much as the citizen following debates, is exercising the liberty that the Constitution enshrines.

Second, the doctrine addresses the human interest in getting essential resources—medicine—or, more generically, fulfilling consumer preferences, through a specific act of constitutional imagination: It treats the market as the assumed vehicle for satisfying this interest. The First Amendment interest in economic communication has an implied institutional context, the market, which gives the First Amendment the function of making markets more closely approximate the neoclassical ideal of perfect information. This development is

29. See Timothy K. Kuhner, *Citizens United as Neoliberal Jurisprudence: The Resurgence of Economic Theory*, 18 VA. J. SOC. POL’Y & L. 395, 398–401 (2011) (attributing this movement to changes in Court membership which “have redefined democracy on the basis of this free market approach to constitutional values”).

30. *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942).

31. *Va. State Pharmacy Bd. v. Va. State Consumer Council*, 425 U.S. 748 (1976).

32. *Id.* at 776.

33. *Id.* at 763.

34. *Id.* at 753–54.

currently naturalizing the market through constitutional interpretation, as surely as liberty-of-contract doctrine did during the *Lochner* era, but with a focus on the consumer economy rather than the industrial labor market.³⁵

In *Virginia State Pharmacy Board*, only Justice Rehnquist dissented, arguing that, although the Court's preferred policy might be sensible, there is no constitutional interest in shielding advertising from regulation.³⁶ In the decades since, although the Court has tenuously maintained the formula that commercial speech receives lesser protection than "core" political speech, it has struck down limits on advertising for legal services, liquor stores, and tobacco products.³⁷ A certain amount of the everything-for-sale quality of American public spaces owes directly to the Court's protection of commercial speech. The Justices have never said, though, that advertising deserves the same very strict protection as political debate. *Sorrell*, the Vermont case, came as close as any to dissolving any distinction between advertising and argument.

The stranger and more innovative aspect of *Sorrell* is that the case extended First Amendment protection beyond anything recognizable as speech. Most of what the decision protects is not verbal expression or even political spending but simply the sale of data. *Sorrell* moved toward constitutionalizing an open market in information, at least where the data informs marketing decisions and where the regulation has different effects on different market actors. Just as the right to speak first implied the right to spend and the right to argue implied a right to advertise, now the rights to spend and advertise imply a right to buy and sell the information that goes into marketing (which is itself robustly protected as speech), so there is now a constitutionally protected interest in exchanging information on the same terms as everyone else in the market. Any limit on information markets, Kennedy reasoned in *Sorrell*, tilts the playing field in favor of those who have more access to data—in Vermont's case, generic drug companies and public-health agencies.³⁸

As Justice Breyer pointed out in dissent, regulators control the form and content of information transfer all the time, for instance, in guidelines for public and shareholders' communications by energy and financial companies, restrictions on the uses pharmaceutical companies may recommend for their drugs, and various controls on disclosure of patient information by doctors and hospitals.³⁹ Many of these regulations are specific to the content of the speech and identity of the speaker, which was the constitutional problem with the Vermont law.⁴⁰ It would be simplistic to say that those regulations are on the

35. I thank David Grewal for helping me to appreciate this point.

36. *Va. State Bd. of Pharmacy*, 425 U.S. at 781.

37. *See* *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (striking down a law that forbade advertising tobacco near schools); *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (ban on advertising liquor prices violates First Amendment); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977) (law forbidding attorney advertising violates First Amendment).

38. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2670–72 (2011).

39. *Id.* at 2676.

40. *Id.* at 2677.

chopping block, but the reasoning of *Sorrell* puts their constitutionality in doubt. If nothing else, that reasoning creates a powerful and flexible tool for limiting regulation of information markets and further amplifies the Court's solicitude for marketing as a core constitutional concern. For instance, post-2008 financial regulations requiring disclosure of standard-form information for certain financial products and services, or limiting the kinds of claims hedge funds or mortgage providers can make to clients, could be subject to constitutional challenge.

These changes in the First Amendment's meaning put new intellectual premises to work in constitutional law, premises not themselves implied by the Constitution. For one, this neo-*Lochner*ism supposes that the distinction between politics and markets, or principles and interests, is spurious: A democratically adopted policy is just the aggregation of some people's interests, and a company's economic interests make as worthy a basis for political argument as any principle. For another, there is no publicly acceptable measure of value except what people say they want and are willing to pay for: preferences, that is, backed by cash. Any attempt to establish an independent standard, such as fairness or cultural excellence, is elitist, parochial, or a try at petty tyranny. For a third, markets are the best way by far of capturing and maximizing this uniquely valid type of value. Therefore, elections and other institutions should come to resemble markets as much as possible. The one incontrovertibly valuable kind of freedom, then, is the freedom that makes markets work. It is in this neoliberal, market-fixated climate that courts can declare that spending is speech, advertisement is argument, and the transfer of marketing data is a core concern of the First Amendment.

These ideas are to the present what classical *laissez-faire* and social Darwinism were to the age of *Lochner*. As the rise of industrial capitalism and a vast population of wage laborers made freedom of contract pervasively relevant at the turn of the last century, today an economy built on consumption and information makes the First Amendment a natural vehicle to constitutionalize transactions at the core of the market. Much of what happens in the American economy is some hybrid of marketing and information transfer. Products, images, information, ideas, and advertising are increasingly aspects of a single economic process. There was nothing comparable in 1905 to the perennial marketing campaigns that make up a quarter of the pharmaceutical industry's spending, or the First Amendment-protected video game industry, the most violent and interactive of a new kind of entertainment product that the First Amendment secures from regulation.

For all these reasons, the First Amendment has helped the Supreme Court to do for the consumer capitalism of the information age what freedom of contract did for the industrial age: constitutionally protect certain transactions that lie at the core of the economy. This makes unequal economic power much harder for democratic lawmaking to reach, because there are only a few ways to reduce the effect of economic inequality: redistribute wealth, guarantee certain

goods (such as education or health care) regardless of wealth, and limit what the wealthy can do with their money. Constitutional protection of marketing and spending takes the last option off the table at a time when the other two are politically embattled. Whether in elections or in marketing and the vast data economy behind it, the market itself, with all its inequality, is ever more thoroughly constitutionalized as a realm of freedom.

This development is a milestone in the Court's march away from a principle that it accepted with the New Deal: Buying and selling enjoy no special constitutional status, and legislatures can regulate markets and businesses to make life more equitable, safe, or healthful. Now, when these policy decisions are interpreted as implicating the First Amendment, the wealthy interests burdened by social and economic legislation can appeal from the political process to the Supreme Court, delaying regulation and raising its costs, and sometimes they win, sending lawmakers back to the start of an often-fractious process.⁴¹ Moreover, these cases give wealthy interests a rhetorical leg up: they can denounce regulation as "censorship" with the Supreme Court and the neoliberal Constitution behind them.⁴²

IV

RIGHTS AND STRUCTURE

The second contribution of the *Lochner*-era comparison is to cast light on the connection between the jurisprudence of constitutional rights and that of constitutional structure, particularly federalism. Although these are, formally speaking, distinct principles, it is not accidental that the same *Lochner*-era courts that invalidated state economic regulations on equal-protection and due-process grounds also overturned federal economic regulations as exceeding the Constitution's grant of power in the Commerce Clause.⁴³ Nor is the link as bare and inarticulate as the fact that both kinds of rulings had the concrete effect of enabling employers to pay lower wages, hire child workers, and so forth.⁴⁴

Rather, the areas of social life exempted from federal regulation were associated with specific values, the same that were protected by Fourteenth Amendment jurisprudence. So Justice Day wrote in 1918 that if Congress can

41. See Tim Wu, *The Right to Evade Regulation: How Corporations Hijacked the First Amendment*, NEW REPUBLIC (June 3, 2013) <http://www.newrepublic.com/article/113294/how-corporations-hijacked-first-amendment-evade-regulation> (giving examples of recent First Amendment challenges to securities laws, anti-corruption laws, and food-labeling regulations).

42. See also Kuhner, *supra* note 29, at 409 ("The Court's theoretical view is tenable, however, and, upon reflection, clear: speech occurs within a marketplace and that marketplace must remain as free as possible, limited only by the need to prevent *quid pro quo* corruption.").

43. See *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

44. See *Adkins v. Children's Hosp. of D.C.*, 43 U.S. 394 (1923) (holding federal minimum wage for women and children violates the Due Process Clause of the Fifth Amendment), *overruled by West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Hammer*, 247 U.S. 251 (holding federal child labor laws as outside Congress's Commerce Clause power).

forbid interstate shipment of goods produced in factories where children under fourteen were employed or children under sixteen worked more than eight hours a day, “all freedom of commerce will be at an end.”⁴⁵ The idealization of a certain version of laissez-faire economic relations as “freedom of commerce” lent charisma and agency to both lines of cases.

The parallel today is evident in the arguments against the 2010 Affordable Care Act’s (ACA’s) individual insurance–purchase mandate that persuaded five Justices that the mandate exceeded Congress’s power to regulate interstate commerce.⁴⁶ Formally speaking, the judgment made in *Sebelius* was purely structural, based in the extent of the Article I, Section 8 grant of legislative power to Congress.⁴⁷ However, near the heart of the Justices’ opinions rejecting the commerce power basis for the individual mandate is the idea that the Constitution protects, even indirectly, the autonomy of the consumer deciding how to spend her money.⁴⁸ The moral and political gravamen of the structural argument, that is, captured the present mood of laissez-faire for consumer capitalism, as Justice Day’s warning about the end of “freedom of commerce” did a century ago for the industrial economy.⁴⁹

The strangeness of the ACA ruling lies precisely in its use of a structural federalism argument to protect a substantive individual right. In legislating, Congress always faces two kinds of constitutional constraints: Some Congressional actions are forbidden by rights-protecting language such as the First Amendment while others, though not prohibited, lack authorization in the Constitution’s enumeration of Congress’s powers. The five Justices who found that the Commerce Clause cannot support the individual mandate relied, of course, on the latter kind of constraint.

The Court has given a famously broad interpretation of the power “to regulate commerce . . . among the several states”⁵⁰ since the New Deal cases overruled *Hammer v. Dagenhart* and turned decisively away from other cases striking down federal economic regulation, such as *Carter v. Carter Coal*.⁵¹ Upholding the federal ban on home production of medical marijuana for personal use in the 2005 case of *Gonzales v. Raich* is only one recent, touchstone instance.⁵² In *Gonzales*, the Justices reasoned that, although the medical marijuana in question was not intended to leave the state or enter any commercial flow, it might find its way into the market for illegal drugs, and so prohibiting it was an integral part of a broader federal scheme of regulating (by

45. *Hammer*, 247 U.S. at 276.

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

47. *Id.* at 2578–80, 2585–93.

48. *See* Bryan J. Leitch, *Where Law Meets Politics: Freedom of Contract, Federalism, and the Fight Over Health Care*, 27 J.L. & POL. 177 (making this argument with extensive supporting detail and interpretation).

49. *See Hammer*, 247 U.S. at 276.

50. U.S. CONST. art. I, § 8.

51. *See, e.g., United States v. Darby*, 312 U.S. 100 (1941).

52. *Gonzales v. Raich*, 545 U.S. 1 (2005).

prohibition) interstate traffic in marijuana.⁵³

But in *Sebelius*, five Justices held that the Commerce Clause does not authorize Congress to require individuals to make purchases in a field of economic life that they have not already voluntarily joined.⁵⁴ Decide to become a farmer, the argument goes, and one may be subject to all kinds of regulations, quotas, and so forth.⁵⁵ The initial choice to enter the field means taking on its regulatory burdens. But a passive citizen, just by *being*, has done nothing to subject herself to the insurance mandate.⁵⁶ Once she enters the field of health care consumption, the Justices conceded, she can be required to buy insurance; but as long as, like Winnie-the-Pooh, she just *is*, Congress cannot reach her.⁵⁷

This argument is strange because, although it formally addresses the limits of federal power, its rhetorical, moral, and political force comes from its appeal to the autonomy of the consumer and warnings that a runaway Congress might violate that autonomy. Lower federal courts overturning the individual mandate invariably invoked dark fantasies of a paternalistic government requiring citizens to buy American cars, health-club memberships, or vegetables.⁵⁸ The same dire warnings appeared in several of the Justices' *Sebelius* opinions. The odd thing about this parade of nanny-state horrors is that, because the Commerce Clause concerns the powers of Congress, not the rights of individuals, a ruling that invalidates the individual mandate under the Commerce Clause simply means that only state governments, not the federal government, can pass such a law. Massachusetts had done just that in a piece of legislation that served as a template for the ACA.⁵⁹

Under modern doctrine, there is no such thing as an important, constitutionally protected personal liberty that a state can violate but the federal government cannot, or vice-versa. The Constitution protects individual rights against all government action, regardless of the source (with a handful of minor exceptions that are not relevant here). By and large, any personal right protected under the Bill of Rights is applied against the states via incorporation in the Due Process Clause of the Fourteenth Amendment, and the limitations that the Equal Protection Clause imposes on the states are enforced against the federal government by judicial interpretation of the Fifth Amendment's Due Process clause as including an equal-protection component.⁶⁰ The Commerce Clause governs federal but not state power because it is not a rights-protecting

53. *Id.* at 17–22.

54. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2586–87 (2012).

55. *Id.* at 2587–88.

56. *Id.* at 2590.

57. See BENJAMIN HOFF, *THE TAO OF POOH* (1982) (using A.A. Milne characters to illustrate a version of Taoist thought and practice). The quote comes from the famous summary on the back cover: “While Eeyore frets and Piglet hesitates and Rabbit calculates and Owl pontificates, Pooh just is.”

58. See, e.g., *Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs.*, 780 F. Supp. 2d 1256, 1289 (2011).

59. 2006 Mass. Acts 77–158.

60. *Adarand v. Peña*, 515 U.S. 200 (1995); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

clause; yet *Sebelius* and lower-court rulings proceeded as if they were vindicating a constitutional right of consumer liberty.

The irony is particularly acute because the modern constitutional era is marked by rejection, since 1937, of the idea that the Constitution secures personal rights of negative economic liberty.⁶¹ Justice Day in *Hammer v. Dagenhart* at least referred to a then-recognized constitutional liberty when he moved to protect “freedom of commerce” through the Commerce Clause.⁶² Although structural doctrines and rights-protecting doctrines are formally distinct, the very fact that it seems anomalous to allow states to intrude on rights that the federal government may not, or vice-versa (the intuition driving the incorporation and reverse-incorporation doctrines merging the Fifth and Fourteenth Amendments) lends some plausibility to interpretation in the style of Justice Day, which can seem an early effort to merge rights against federal and state regulation into a coherent web. Because the decisive post-1937 rejection of the idea that the Constitution protects negative economic liberties remains in effect, there is no similar hope of doctrinal coherence in the Commerce Clause reasoning of *Sebelius*.

There is, however, an ideological coherence: the commitment to an idea of negative economic liberty as a touchstone personal freedom, an idea embedded in an idealized image of a market economy, lends impetus to the thought that the Constitution *should* protect the passive consumer in her Bartleby-like choice to decline health insurance. We can see in hindsight that the *Lochner* era’s antiregulatory cases constitutionalized a laissez-faire picture of the economy precisely because they reached beyond the liberty-of-contract doctrine that decided *Lochner* itself and shaped other areas, including structural issues not formally concerned with direct protection of personal rights. In so doing, the cases of the *Lochner* era enforced a constitutional line that in many instances protected unequal bargaining power in the private economy from interference by government regulation. Similarly, the limit on federal power that the *Sebelius* Court announced complements the First Amendment cases’ protection of buying, selling, and marketing in a single, nascent conception of economic liberty.

A second telling development in structural doctrine is the limitation on Congress’s spending power announced in *Sebelius*. On this issue, seven Justices ruled that the Affordable Care Act’s provision withdrawing existing Medicaid federal funding from states that declined to expand the program as the ACA directed amounted to unconstitutional coercion of state governments.⁶³ In a reminder that the appeal of neoliberal jurisprudence⁶⁴ is not restricted to the

61. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937) (“The Constitution does not speak of freedom of contract.”).

62. See *Hammer v. Dagenhart*, 247 U.S. 251, 276 (1918).

63. See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2603–05, 2660–62 (2012) (plurality and dissenting opinions).

64. Neoliberal jurisprudence is defined as “the use of neoclassical economic theory as judicial

right-hand side of a Court divided along partisan lines, Justice Roberts's plurality opinion attracted the votes of Justices Breyer and Kagan. The heart of the plurality opinion's reasoning was that the formally separate character of the earlier Medicaid statutes and the ACA, in addition to the amount of federal money at stake, marked the ACA's conditional Medicaid grants as "coercion" rather than as an offer that the states were free to accept or refuse.⁶⁵

Justice Scalia's discussion of the issue, joined by Justice Kennedy, Alito, and Thomas, reveals the concrete stakes of this rather formalistic claim. Justice Scalia argued that the ACA's conditional spending, if permitted, would greatly raise the cost to states of opting out of federal social programs because the states' residents would be required to pay the taxes that fund those programs, regardless of whether they were to accept the conditional grants that would return the same money to the states.⁶⁶ State residents would also need to pay taxes to support any alternative approach to the same social program—a state version of low-income medical support that does not fit the requirements of the ACA, for instance.⁶⁷ This double payment would sharply limit effective state autonomy in policymaking, bringing the ACA's conditional spending intolerably close to the Congressional commandeering of state legislatures that the Court has elsewhere rejected on federalism grounds.⁶⁸

The functional meaning of this decision is that Congress faces a major constitutional barrier to its long-preferred way of imposing national settlements on basic questions of social policy. In this functional sense, the Medicaid-expansion decision is aligned with pre-New Deal Commerce Clause cases, notably *Hammer v. Dagenhart*, that also found in state autonomy a limit on Congress's power to shape a national economy according to a unifying set of ethical imperatives: there, no child labor; here, significant public subsidy of health care for low-income individuals and families. In the area of social benefits, such settlements tend, of course, to have major distributive consequences.

The Court's interpretation of the spending power as limiting Congress's distributive power in the interest of state autonomy also produces another and arguably more peculiar alignment for *Sebelius*: one with *Pollock v. Farmers' Loan & Trust Co.*, the 1895 decision holding that a federal income tax violated a constitutional requirement that the burdens of "direct taxes" be apportioned according to state population.⁶⁹ The requirement blocks national majorities from ganging up on states composed of an electoral minority to impose unequal tax burdens. Although the Wilson-Gorman Tariff Act of 1894, invalidated by

reasoning." Kuhner, *supra* note 29, at 397.

65. *Sebelius*, 132 S. Ct. at 2604–05 (Roberts, J., plurality opinion).

66. *Id.* at 2661–62 (Scalia, J., dissenting).

67. *Id.*

68. *Id.* at 2661–64 (Scalia, J., dissenting). For a discussion on commandeering, see *New York v. United States*, 505 U.S. 144, 174–81 (1992).

69. *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895).

Pollock, imposed no disproportionate tax burden, that it did not formally allocate the tax burden according to state population gave a five-Justice majority a hook to rule for the plaintiffs who had argued, as Justice Harlan recounted in his dissent, that “this income tax was an assault by the poor upon the rich,” and that the Court must “stand in the breach for the protection of the just rights of property against the advancing hosts of socialism.”⁷⁰ In both *Sebelius* and *Pollock*, the Court used the specter of redistribution among the states to limit Congress’s authority to impose a national settlement on basic distributive questions concerning how the benefits and burdens of economic life are shared.

V

THE LIMITS OF THE SAYABLE: WHERE IS THE WALL?

In an effort to rehabilitate the doctrine and worldview of *Lochner*, a set of libertarian constitutional theorists have made a rhetorically convenient, if conceptually awkward, two-part case that (1) the doctrines of the era were more benign and defensible than they have been portrayed as being in the conventional hindsight story; and (2) in any case, those doctrines received inconsistent application that never hardened into a constitutional rule against redistribution.⁷¹ The second part of the defense, that the *Lochner* era never really generated a set of clear and consistently enforced rules, is a red herring, and understanding why reveals a third benefit of thinking about the present moment in light of the *Lochner* era.

During the *Lochner* era, the significance of liberty-of-contract and antiregulatory federalism doctrines was not that they became a hard-and-fast set of rules, but that they created, used, and, in so doing, expanded a set of available constitutional arguments. As Jack Balkin has argued, the era, like others, was marked not so much by hard lines and fixed points of doctrine as by what kinds of constitutional arguments were unsayable, or “off-the-wall,” and what kinds were available for use and innovation.⁷² The arguments offered by litigants challenging regulation in cases such as *Hammer v. Dagenhart* show that it was entirely possible to advance a consistent theory of a laissez-faire Constitution, based on case language and principles distilled from that language, and that members of the Supreme Court Bar regarded that strategy as their best gambit in many cases—including some that they won on variations of those principles.⁷³

To illuminate the importance of this possibility, it may be helpful to compare it to a pair of familiar positions in the constitutional jurisprudence of the early twenty-first century: the vision of the Equal Protection Clause as

70. *Id.* at 674 (Harlan, J., dissenting).

71. See DAVID E. BERNSTEIN, REHABILITATING *LOCHNER*: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM 1–22 (2011).

72. JACK M. BALKIN, CONSTITUTIONAL REDEMPTION 174–84 (2011).

73. See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251, 266–68 (1918).

enforcing a “color-blind Constitution,” which has at least four adherents based on the Court’s opinion in *Parents Involved in Community Schools v. Seattle School District*,⁷⁴ and the view that some combination of the Equal Protection and Due Process clauses supplies a right to same-sex marriage.⁷⁵ Neither is the law of the land. Both have made their way “onto the wall,” the marriage-equality position in the last decade, the color-blind view over several decades.

These arguments’ becoming “sayable” has three kinds of consequences: The availability of these arguments imposes (1) costs in litigation, (2) caution in drafting, and (3) general uncertainty on those who support, design, and implement the policies that the novel arguments call into question. These arguments also hold open the possibility of further constitutional development in the directions they mark out: as long as these doors are not closed, future Courts might go through them and keep walking. The post-1937 rejection of the *Lochner* era was a Carthaginian peace: the New Deal Justices ploughed salt into the fields of *Lochner* and made its name anathema for decades.⁷⁶

Without such unconditional defeat, a whole series of advances remains possible with just one or two Supreme Court appointments or a single watershed case. In their most diffuse effect, but with great consequence, these doctrines enable activists and innovators both inside and outside of litigation to make claims on the Constitution that put their preferred positions outside ordinary political debate.⁷⁷ They create, in other words, pathways for turning activism and movement commitment into constitutional law—one of the more potent and mysterious achievements possible in U.S. politics.

The same is true of the new set of antiregulatory doctrines. They entangle classically legislative action, such as the design and passage of the Affordable Care Act, in prolonged constitutional litigation and create uncertainty and drafting anxiety around advertising restrictions, disclosure requirements, and regulation of the digital economy. They make possible the alchemy of political disagreement into disputes over constitutive national principle that is the hallmark of constitutional politics. For one salient example, they have enabled the Tea Party’s mistrust of Barack Obama’s presidency and of federal regulation generally to flow into constitutional form in the Commerce Clause

74. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

75. *United States v. Windsor*, 133 S. Ct. 2675 (2013) (invalidating portions of the Defense of Marriage Act on equal protection grounds); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014) (invalidating Virginia’s ban on same-sex marriage under due-process strict scrutiny); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014) (invalidating Utah’s ban on same sex marriage).

76. *See West Coast Hotel v. Parrish*, 300 U.S. 379, 392 (1937) (“What is this freedom? The Constitution does not speak of freedom of contract.”). Thereafter, substantive due process was long an accusation—a self-evidently bad form of reasoning that Justices accused one another of falling into. *See, e.g., Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 675–76 (1966) (Black, J., dissenting) (accusing majority of “using the old ‘natural-law-due-process formula’ to justify striking down state laws”).

77. *See Robert Post & Reva Siegel, Originalism as a Political Practice: The Right’s Living Constitutionalism*, 75 *FORDHAM L. REV.* 545 (2006) (on popular constitutionalism).

argument against the individual mandate.⁷⁸

At first, that argument struck most serious constitutional commentators as a blend of perversely contrarian academic exercise and know-nothing populism.⁷⁹ What it had become by the time five Justices adopted it—a serious piece of constitutional argumentation—was as much a diagnostic symptom of a neoliberal moment as it was an achievement of anyone involved in the litigation. Even more markedly than ordinary women and men, constitutional jurists must make history under circumstances that they do not choose. Both the *Lochner* era and the present moment come into focus partly when considered in light of the history that they enable jurists to make.

Part of the reason that neoliberal doctrines enjoyed relatively quick ascendancy is that the post-1937 repudiation of the *Lochner* era was never as complete or as deep as it seemed in the scornful hindsight of mid-century Supreme Court opinions. This is true in at least two respects. First, although certain specific doctrines were set aside in 1937, there was no successful move to constitutionalize the New Deal settlement. A brief move in the direction of constitutional guarantees of minimum social benefits and equal protection scrutiny of policies that ill-served the poor, such as inequitable public-school funding tied to property taxes, collapsed between 1970 and 1973, leaving such policies almost entirely to legislative discretion.⁸⁰ Judicial language about the importance of education, food, and shelter to civic functioning and expressions of constitutional suspicion toward laws that burdened the poor were quickly set aside.

Second, the social base of laissez-faire politics never went away in the United States; as David Grewal and I have argued, a historically unusual level of prosperity allowed shared wealth and social peace for a time between business and labor.⁸¹ However, an enduring substrate of opposition to the New Deal and the Great Society persisted both in demotic political culture and among economic elites.⁸² The Carthaginian peace that buried *Lochner* was

78. See Rebecca E. Zietlow, *Popular Originalism? The Tea Party Movement and Constitutional Theory*, 64 FLA. L. REV. 483 (2012) (on the Tea Party's influence on constitutional interpretation); Zietlow, *Democratic Constitutionalism and the Affordable Care Act*, 72 OHIO ST. L.J. 1367 (2011) (setting out in greater detail the role of Tea Party movement in developing arguments against the constitutionality of the Affordable Care Act).

79. See, e.g., Jeffrey Rosen, *Radical Constitutionalism*, N.Y. TIMES MAGAZINE at MM34, Nov. 28, 2010 (observing that arguments against the Affordable Care Act seemed "far-fetched only a year ago" but were likely to gain traction from Tea Party political influence).

80. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (financing public school districts through property taxes is not unconstitutional discrimination against students living in poor neighborhoods); *Dandridge v. Williams*, 397 U.S. 471 (1970) (a cap on welfare grants regardless of family size and need is not a violation of the Equal Protection Clause); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (statutory prohibition of welfare assistance to residents of less than a year is unconstitutional discrimination); cf. *Plyler v. Doe*, 457 U.S. 202 (1982) (a statute preventing school districts from admitting undocumented students violates the Equal Protection Clause).

81. David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 LAW & CONTEMP. PROBS., no. 4, 2014 at 1.

82. See ANGUS BURGIN, *THE GREAT PERSUASION: REINVENTING FREE MARKETS SINCE THE*

rather more doctrinally specific, and more restricted to an elite professional culture, than several generations of law students, lawyers, and judges might have recognized.⁸³ For both reasons, neoliberal constitutionalism could develop once the long crisis of the post–World War II settlement set in and certain economic interests began to align with freedom to advertise, spend, sell, and so forth.

VI

FREEDOM IN THE NEOLIBERAL CONSTITUTION

Lochner-era judges did not simply ride to the aid of factory owners against workers and labor-friendly legislatures. They were idealistic in their own way. Their open-market principles developed from the democratic and antislavery legacy of the earlier nineteenth century: Jacksonian attacks on monopolies and other forms of legally enshrined economic privilege, the Republican and Abolitionist war on slavery, and the Fourteenth Amendment’s promise of equal citizenship for all Americans.⁸⁴ In effect, the Court, along with much of the country, sometimes reasoned as if the principle of equal freedom, the rejection of slavery, and economic special privilege amounted to an equal right to win or lose in the marketplace.⁸⁵ So, with decades of struggle for equal freedom and civic dignity at its back, the *Lochner*-era Court struck down minimum wages, maximum hours, income taxes, rate regulation, and laws protecting labor unions.

The early twenty-first century, too, follows an era of struggle for equal freedom that has fallen into uncertainty and conflict over the meaning of its emancipating achievement. In the modern instance, the backdrop is the Civil Rights era and expansion of individual liberty that earlier Supreme Courts did

DEPRESSION 12–54 (2012) (discussion of reception of Hayek in United States upon the publication of his book, *THE ROAD TO SERFDOM*); RICK PERLSTEIN, *BEFORE THE STORM: BARRY GOLDWATER AND THE UNMAKING OF THE AMERICAN CONSENSUS* (2001) 3–17, 43–60, 120–40 (on the social and ideological basis of the U.S. pro-market right in the twentieth century); Memorandum from Lewis F. Powell, Jr. to Eugene B. Sydnor, Jr., Chairman, Educ. Comm., U.S. Chamber of Commerce (Aug. 23, 1971), *available at* <http://law.wlu.edu/deptimages/Powell%20Archives/PowellMemorandumTypescript.pdf>.

83. This is, of course, the argument usefully made in this issue by David Bernstein and Ilya Somin, who propose both that the jurisprudence of the *Lochner* era is less remote from what followed than is often imagined and that its distinctive features are now experiencing a revival in what they call libertarian constitutionalism. David E. Bernstein & Ilya Somin, *The Mainstreaming of Libertarian Constitutionalism*, 77 *LAW & CONTEMP. PROBS.*, no. 4, 2014 at 43.

84. See JEDEDIAH PURDY, *THE MEANING OF PROPERTY* 87–109 (2010) (discussing origins, competing versions, and difficulties of free-labor thought).

85. Justice Brewer gave especially vivid expression to this idea in an 1893 address to the New York State Bar Association. See David J. Brewer, *The Nation’s Safeguard*, 16 *PROC. N.Y. ST. B. ASS’N* 37, 39 (“It is the unvarying law, that the wealth of a community will be in the hands of a few . . .”); *id.* at 46 (“Who does not hear the old demagogic cry . . . ‘the majority are always right’ . . . invoked to justify disregard of those guaranties . . . [of] protection to private property?”); *id.* at 47 (warning against “anarchism,” “barbarism,” “socialism,” and the prospect that “the State [will] take all property and direct all the life and work of individuals as if they were little children”).

much to articulate and enforce. The same Justices who are driving the new antiregulatory decisions also have a view about the meaning of that twentieth-century legacy, above all *Brown v. Board of Education*,⁸⁶ the touchstone of the Civil Rights revolution. In cases challenging affirmative action in higher education and race-conscious school-placement plans in public schools, the Justices have argued that *Brown* establishes a color-blind Constitution, and that when the government classifies students for the purposes of different treatment—where to admit them to school, for instance—it strikes at the dignity of citizenship.⁸⁷

This view is idealistic, in its way. It insists on the autonomy of self-defining individuals, whose identities and relationships are their own to form, and may not be dictated, let alone marked as more or less worthy, by the hand of a supervisory state. But idealistic or not, in a world where racial stratification remains pervasive and tracks economic and educational inequality, this form of constitutional individualism can also be terribly unrealistic, even intellectually dishonest.⁸⁸ As with differences in economic power, when the government closes its eyes to a real problem, it may only prevent itself from doing something about it. This position comes very close to “solving” the multifarious issue of race by leaving it up to millions of dispersed individuals to figure out. As Justice Kennedy wrote in *Parents Involved*, “Under our Constitution the individual, child or adult, can find his own identity, can define her own persona, without state intervention that classifies on the basis of his race or the color of her skin.”⁸⁹

If there is a neoliberal approach to race, this is it: respectful of a certain kind of individual choice, wary of government attempts to engineer the system, and mainly blind to the ways that inequality persists and makes race real in practice, even as the Supreme Court works to make it irrelevant in principle. Like the old *Lochnerism*, today’s new antiregulatory doctrines echo a sweeping view of the country’s situation and the meaning of its core ideals, a view that cuts across fields of social life and areas of constitutional doctrine.

This point highlights a pair of parallels between the *Lochner* era and this neoliberal time, with import for understanding the role of conceptions of personal autonomy in normative views of political economy. First, any strong conception of negative autonomy—a right to refuse mandatory economic relations such as slavery or indenture in the first *Lochner* era, and a right to be

86. 349 U.S. 294 (1955).

87. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 742–43, 746–48, 797 (2007) (Kennedy, J., concurring) (“To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society”); Pamela S. Karlan, *Lecture: What Can Brown Do for You?: Neutral Principles and the Struggle Over the Equal Protection Clause*, 58 DUKE L.J. 1049, 1063–66 (2009).

88. See DARIA ROITHMAYR, *REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGE* 108–20 (2014) (on how whites’ economic advantage has become “locked in[to]” the economy in such a way that it persists without any intentional racial discrimination).

89. *Parents Involved*, 551 U.S. at 797 (Kennedy, J., concurring).

free of mandatory gender and racial identities and roles in the current era of constitutional individualism—has certain consequences that, unless one is a defender of the substance of those hierarchies, are undeniably emancipating. The attractiveness and importance of rights enforcing such conceptions of autonomy lie in the fact that they break people out of mandatory, hierarchical roles.

The second point is that, with this emancipation achieved, the question becomes *what are people emancipated into?* What kind of political economy, what kinds of social relations, and what distribution of benefits and burdens follow emancipation? The danger of negative conceptions of autonomy is that it is tempting, and ideologically convenient for some positions, to pretend that they are not only necessary to achieve any worthwhile modern form of freedom, but sufficient to that goal. Then they become means to rationalize and insulate structurally produced inequality as being simply the product of fair relations among equally free individuals. That is the temptation and danger of neoliberal Lochnerism.

What will become of all of this depends, at the simplest level, on the outcome of the next presidential election and the next few Supreme Court appointments. In a more complex way, it depends on the quality of politics and public life. The Constitution is what Americans make it. Constitutional law is unlikely to produce a better version of its core principles, freedom and equality, than America's social movements and political leaders confidently voice and pursue. For a few decades in the twentieth century, regulating the economy to make personal freedom and security a reality was a goal shared between Democrats and Republicans, big business and labor. Earlier, however, it was a fraught idea, denounced as socialism or fascism, and it became consensual only after the crisis of the Depression and the decades-long efforts of the labor movement and progressive critics of *laissez-faire*. If Americans do not reestablish ideals of equality and personal liberty that take account of vast social and economic inequality and give government a strong role in addressing it, the United States will get the Constitution, and the country, it has earned.