
IN SEARCH OF “LAISSEZ-FAIRE CONSTITUTIONALISM”

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I. INTRODUCTION

For nearly a century, legal scholars have been engaged in an ongoing investigation into the origins and nature of “laissez-faire constitutionalism.” In its most general terms, “laissez-faire constitutionalism” refers to the notion that, beginning some time in the second half of the nineteenth century and culminating in the U.S. Supreme Court’s 1905 decision in *Lochner v. New York*,¹ state and federal courts hemmed in governmental intervention into the economy by imposing a host of new, or at least newly robust, constitutional conditions on the authority of the states to exercise their police powers. Scholars generally agree that this so-called “*Lochner* era” continued until 1937, when the New Deal Court finally relaxed constitutional scrutiny of police regulations, thus setting the state legislatures free.²

Two distinct, successive, and in some respects conflicting historical interpretations have dominated our understanding of *Lochner*-era police powers jurisprudence. The first, which is typically labeled the “progressive”³ view, first emerged as a contemporaneous critique of “laissez-faire constitutionalism” and became ascendant in the decades following the New Deal. According to progressive scholars, American judges steeped in laissez-faire economic theory, who identified with the nation’s capitalist class and harbored contempt for any effort to redistribute wealth or otherwise meddle with the private marketplace,

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¹ 198 U.S. 45 (1905) (striking down New York State law limiting the number of hours worked by bakers under the Due Process Clause of the Fourteenth Amendment). See also *Morehead v. New York ex rel. Tiplido*, 298 U.S. 587 (1936) (striking down New York State minimum wage law, under the Due Process Clause of the Fourteenth Amendment); *Adkins v. Children’s Hosp.*, 261 U.S. 525 (1923) (striking down federal law establishing minimum wages for women and children in the District of Columbia under the Due Process Clause of the Fifth Amendment).

² See, e.g., *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding the constitutionality of a Washington State minimum wage law). See generally 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 279–344 (1998); BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT* (1998); Forum, *The Debate Over the Constitutional Revolution of 1937*, 110 AM. HIST. REV. 1046 (2005); James A. Henretta, *Charles Evans Hughes and the Strange Death of Liberal America*, 24 LAW & HIST. REV. 115 (2006).

³ The term “progressive” in this context refers to the legal dimension of the early twentieth-century Progressive movement, rather than contemporary left-leaning political “progressives.”

acted on their own economic and political biases to strike down legislation that threatened to burden corporations or disturb the existing economic hierarchy. In order to mask this fit of legally unjustified, intellectually dishonest judicial activism, the progressive interpretation runs, judges invented novel economic “rights” — most notably “substantive due process” and “liberty of contract” — that they engrafted upon the Due Process Clause of the Fourteenth Amendment.⁴

While the progressive interpretation continues to influence many commentators and judges,⁵ a subsequent generation of scholarship has undermined some of its key premises and conclusions. Since the 1970s, legal historians and constitutional scholars have traced the main strands of *Lochner*-era police powers jurisprudence back to the Jacksonian aversion to “class” legislation,⁶ to the anti-slavery movement’s adulation of individual economic liberty as a constitutive element of human freedom,⁷ and to the nation’s traditional social contract vision of political membership.⁸ Taken together, these studies comprise a comprehensive historical revision of the progressive narrative that

⁴ See, e.g., ARNOLD M. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW (1960); CARL BRENT SWISHER, AMERICAN CONSTITUTIONAL DEVELOPMENT 393, 520–21 (1943); BENJAMIN R. TWISS, LAWYERS AND THE CONSTITUTION (1942); Max Lerner, *The Supreme Court and American Capitalism*, 42 YALE L.J. 668 (1933). The progressive interpretation drew heavily on contemporaneous criticism of *Lochner*-era jurisprudence, most notably Justice Holmes’s famous dissent in *Lochner* itself, which accused the majority of striking down the challenged maximum hours law based on “an economic theory which a large part of the country does not entertain.” *Lochner*, 198 U.S. at 75 (Holmes, J. dissenting).

⁵ As Professor Gary Rowe writes, even today, decades after *Lochner* itself has been dead and buried, the progressive narrative

haunts every judge’s chambers and every constitutional law classroom. It gives force to the never-ending debate between judicial activism and judicial restraint. It generates the famed tension between judicial review and democracy. To *Lochner* is to sin, egregiously. Indeed, avoiding ‘*Lochner*’s error’ remains the central obsession, the (oftentimes articulate) major premise, of contemporary constitutional law.

Gary D. Rowe, *Lochner Revisionism Revisited*, 24 LAW & SOC. INQUIRY 221, 223 (1999) (footnote omitted). Professor Cass Sunstein has similarly noted the “received wisdom . . . that *Lochner* was wrong because it involved ‘judicial activism.’” Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 874 (1987). This view of *Lochner* as an emblem of the “illegitimate intrusion by the courts into a realm properly reserved to the political branches of government,” Sunstein observes, has been endorsed by the Supreme Court in a host of cases encouraging the virtues of “judicial deference to legislative enactments.” *Id.*

⁶ See, e.g., HOWARD GILLMAN, THE CONSTITUTION BESIEGED 19–60 (1993); Michael Les Benedict, *Laissez Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293 (1985); Lewis A. Grossman, *James Coolidge Carter and Mugwump Jurisprudence*, 20 LAW & HIST. REV. 577 (2002); Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863–1897*, 61 J. AM. HIST. 970 (1975).

⁷ See, e.g., William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767, 783.

⁸ See, e.g., OWEN M. FISS, 8 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910, at 157–59, 164 (Stanley N. Katz ed., 1993).

demonstrates — generally persuasively, in my view — that the *Lochner* era is best understood not as a politically motivated binge of judicial activism, but rather as a sincere and principled, if sometimes anachronistic, “effort to maintain one of the central distinctions in nineteenth-century constitutional law — the distinction between valid economic regulation” calculated to serve the general good and invalid “class” legislation designed to extend special privileges to a favored class of beneficiaries.⁹

Professor Jed Shugerman’s impressive recent article, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*,¹⁰ stakes out new interpretive territory within this revisionist project. Shugerman reveals how, in the 1850s, the first generation of elected state judges transformed the Jacksonian antagonism toward “class” legislation into a countermajoritarian rationale for robust judicial review.¹¹ Because judicial review had long been defended as a means of protecting “the people” against legislative overreaching, one might expect that elected judges who were dependent on “the people” for their continued tenure would embrace majoritarian rationales for voiding statutes passed by democratically elected legislatures. Yet they did exactly the opposite, driving what Shugerman pointedly calls a “counterintuitive turn to countermajoritarianism,”¹² marked by increased protection of individual rights and an anti-populist conception of majority rule as a “threat to higher law.”¹³ By uncovering this fascinating story, Shugerman provides a rare fresh perspective from which to reflect on what is perhaps the most venerable problematic in American constitutional theory — the supposed tension between democratic lawmaking and judicial review, also known as the “countermajoritarian difficulty.”¹⁴ Shugerman’s article thus not only revises our understanding of the origins of judicial elections; it makes an important contribution to the vast literature on the history and politics of judicial review.

⁹ GILLMAN, *supra* note 6, at 10.

¹⁰ Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV L. REV. 1061 (2010).

¹¹ *Id.* at 1124–1125.

¹² *Id.* at 1125.

¹³ *Id.* at 1124.

¹⁴ The phrase is generally attributed to ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16–18 (2d. ed. 1986). For an overview of the vast body of scholarly and judicial writing on the subject, see a series of articles by Barry Friedman: Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333 (1998); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction’s Political Court*, 91 GEO. L.J. 1 (2002); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383 (2001); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law’s Politics*, 148 U. PA. L. REV. 971 (2000); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002).

I find less compelling, however, Shugerman's further conclusion that the adoption of judicial elections in the 1850s, and the increasing exercise of judicial review by the first generation of elected judges, helped to effect a "transition from the early republic's active industry-building state to the laissez-faire constitutionalism that dominated the late nineteenth century and early twentieth century."¹⁵ This Response argues that Shugerman overstates both the extent to which the adoption of judicial elections in the mid-nineteenth century was animated by an "an overall laissez-faire, anti-regulation, anti-legislation ideology"¹⁶ and the extent to which the first generation of elected judges laid the doctrinal foundation for the so-called *Lochner* era several decades later. Jacksonian themes did indeed permeate *Lochner*-era police powers jurisprudence, but not as a countenance for laissez-faire.

Part II takes issue with Shugerman's claim that the adoption of judicial elections in the 1840s and 1850s was driven by laissez-faire ideological commitments. Section II.A briefly surveys a substantial and growing body of historical scholarship demonstrating that laissez-faire ideology never, in fact, characterized the actual practice of state governance at any time during the nineteenth century, and that during the period Shugerman labels laissez-faire states actually extended their regulatory reach into the economic marketplace as never before. Section II.B raises some interpretive questions about Shugerman's contention that the state constitutional convention delegates who adopted judicial elections "embraced laissez-faire and the limited state."¹⁷ It proposes that much of the evidence on which Shugerman relies to demonstrate the connection between judicial elections and laissez-faire constitutionalism suggests that delegates were motivated not by a general opposition to state interference in the economy, but rather by a Jacksonian aversion to the corruption, patronage, and special privilege that had plagued state legislatures in recent decades. Section II.C challenges Shugerman's argument that the decisions rendered by the first generation of elected judges in the 1850s developed "substantive due process" — the "core weapon and doctrine of the *Lochner* era"¹⁸ and a "pillar[] of laissez-faire constitutionalism for almost a century thereafter."¹⁹ It suggests that Shugerman misreads the mid-century uptick in judicial review in the service of "vested" property rights as both an expression of laissez-faire ideology and the doctrinal foundation of the *Lochner* era.

¹⁵ Shugerman, *supra* note 11, at 1068.

¹⁶ *Id.* at 1087.

¹⁷ *Id.* at 1082.

¹⁸ *Id.* at 1123.

¹⁹ *Id.* at 1121.

Part III argues that by overstating the doctrinal continuities between the mid-century “vested rights” decisions and the police powers jurisprudence of the *Lochner* era, Shugerman’s account obscures the more immediate — and in my view indispensable — causes and contexts of the “laissez-faire constitutionalism” of the late nineteenth and early twentieth century. If we are to draw a line of historical causation from the mid-century “vested rights” decisions to the so-called “substantive due process” of the *Lochner* era, it must necessarily run through the watershed historical events of slave emancipation and the industrialization of labor, and the transformative constitutional changes set in motion by the Reconstruction Amendments.

II. LAISSEZ-FAIRE IDEOLOGY AND STATE REGULATORY AUTHORITY IN THE NINETEENTH CENTURY

The first generation of elected judges did indeed act as the “more aggressive and populist judiciary”²⁰ that the reformers had hoped for,²¹ striking down many more state statutes than had their elected predecessors and “establishing a more widespread practice and acceptance of judicial review in America.”²² Perhaps most remarkably, as Shugerman demonstrates, these judges justified their increasingly frequent practice of judicial review not as a “majoritarian institution, a means of protecting the people” against an “overreaching legislature,”²³ as we might expect, but rather as a countermajoritarian defense of individual rights rooted in an anti-populist conception of majority rule as a “threat to higher law.”²⁴ Shugerman further argues, however, that increased prevalence of, and changing rationale for, judicial review spurred, or at least abetted, a “shift from the active industry-building state to the laissez-faire state.”²⁵ That argument depends on two key factual premises: first, that there in fact was a shift from the “active” state to the “laissez-faire” state; and second, that judicial review mea-

²⁰ *Id.* at 1115.

²¹ Shugerman’s study poses a compelling challenge to leading historical accounts of the origins of elected state judiciaries, which cast the adoption of judicial elections as one element of a concerted Jacksonian program to “rein in the power of all officials to act independently of the people.” *Id.* at 1064 n.14 (quoting Caleb Nelson, *A Re-Evaluation of the Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190, 224 (1993)). Shugerman demonstrates that for its advocates, the purpose of judicial elections was instead “to bolster judicial power and to propel the courts toward voiding more statutes.” *Id.* at 1068. Convention delegates and others concluded that judges elected directly by “the people” would be independent of the patronage and cronyism that plagued the judicial appointments process and thus better able to protect the rights of the people against legislatures that had been “disgraced as corrupt and incompetent.” *Id.* at 1067.

²² *Id.* at 1115.

²³ *Id.* at 1124.

²⁴ *Id.*

²⁵ *Id.* at 1070.

ningfully shaped the broad trajectory of state economic regulation during the late nineteenth and early twentieth centuries. The first premise is at odds with a large and convincing body of historical scholarship. The second is partially accurate with respect to a particular subclass of police regulations — namely, laws regulating the terms of labor — but does not describe a broad ideological project or a general approach to constitutional review that can properly be labeled “laissez-faire constitutionalism.”

This Part begins by explaining that laissez-faire ideology did not shape the general practice of state governance at any time in the nineteenth century, and that during the period Shugerman labels laissez-faire, the state actually extended its regulatory reach into the economic marketplace as never before. It then poses some interpretive challenges to Shugerman’s contention that the adoption of judicial elections in the 1840s and 1850s was animated by “an overall laissez-faire, anti-regulation, anti-legislation ideology.”²⁶ It proposes, in particular, that much of the evidence on which Shugerman relies to demonstrate the connection between judicial elections and laissez-faire constitutionalism suggests that it was not a general opposition to state interference in the economy that motivated delegates, but rather a Jacksonian aversion to the corruption, patronage, and special privilege that had plagued state legislatures in recent decades. Finally, it challenges Shugerman’s conclusion that elected judges in the 1850s developed the doctrinal pillars of laissez-faire constitutionalism, and maintains that Shugerman misreads a mid-century expansion of judicial review in the service of “vested” property rights as both an expression of laissez-faire ideology and an early exposition of “substantive due process.”

A. *The Myth of the Laissez-Faire State*

Shugerman states throughout the article that the upsurge in judicial review in the 1850s helped to displace the “active industry-building state” of the Jacksonian era with the “laissez-faire state” of the *Lochner* era.²⁷ Although Shugerman is a bit elusive regarding the precise definition of the “laissez-faire state,”²⁸ he suggests at several points that the late nineteenth and early twentieth centuries were cha-

²⁶ *Id.* at 1087.

²⁷ *See id.* at 1068, 1070, 1123.

²⁸ In contrast to the depth, specificity, and conceptual subtlety with which Shugerman defines and explores the meaning of key concepts like “judicial independence” and “majoritarian” versus “countermajoritarian” justifications for judicial review, he does not define with much precision the article’s other key concept — “laissez-faire,” or more specifically, “laissez-faire constitutionalism.” This permits Shugerman to classify as an expression of “laissez-faire ideology” a collection of evidence involving the motives of the convention delegates, the meaning of the constitutions they produced, and the decisions rendered by the first generation of elected judges that probably does not warrant that label, at least as it is generally understood.

racterized by the “remov[al] [of] the state from intervention in the capitalism that the state had helped to build.”²⁹ Shugerman’s “laissez-faire state” thus connotes something more than a kind of neo-Jacksonian opposition to special legislative privileges — something closer to the liberal “night watchman” state that is often associated with the *Lochner* era. Shugerman’s supposition that there was something properly termed a “laissez-faire state” is curious, in light of the burgeoning body of historical literature documenting precisely the opposite: that notwithstanding a handful of “tabloid” judicial decisions striking down police regulations, state intervention in the economy not only continued, but accelerated during the period he labels “laissez-faire.”

Even as late-nineteenth-century “laissez-faireists” insisted that the state and federal governments cease interfering with freedom of trade and the natural laws of supply and demand, their protests failed to shape either public policy or constitutional law. Leading laissez-faire propagandists such as the sociologist William Graham Sumner and the English philosopher Herbert Spencer advocated that government relinquish virtually all influence over private economic ordering, including protective tariffs, tax-funded subsidies for transportation development, postal subsidies, land grants, and the regulation of wages and working conditions.³⁰ If this was the laissez-faire agenda, it failed entirely. As Professor Michael Les Benedict explained in a now-classic article, “[m]erely cataloging these positions . . . indicates that most Americans found unpersuasive the argument that government could not improve upon the ‘natural’ laws of economy.”³¹ Indeed, as the so-called the “commonwealth historians” chronicled several decades ago, nineteenth-century state legislatures were deeply involved in the economic development and regulation through the funding of public works projects, subsidization of “private” development projects, issuance of corporate charters, and the liberal exercise of the police power and the power of eminent domain.³²

²⁹ *Id.* at 1145.

³⁰ See Benedict, *supra* note 6, at 301–02.

³¹ *Id.* at 301.

³² See, e.g., OSCAR HANDLIN & MARY FLUG HANDLIN, *COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY: MASSACHUSETTS, 1774–1861* (rev. ed. 1969); HARRY N. SCHEIBER, *OHIO CANAL ERA* (1968). For helpful discussions of the “commonwealth” histories, see William J. Novak, *The Legal Origins of the Modern American State*, in *LOOKING BACK AT LAW’S CENTURY* 249 (Austin Sarat, Bryant Garth & Robert A. Kagan eds., 2002); and Harry N. Scheiber, *Government and the Economy: Studies of the “Commonwealth” Policy in Nineteenth-Century America*, 3 *J. INTERDISC. HIST.* 135 (1972). On the nineteenth-century state’s active involvement in economic regulation and development, see JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* (1956), which Benedict characterizes as “from beginning

State governments actively and consistently violated the fundamental tenets of laissez-faire, Benedict observes, as local authorities continued throughout the nineteenth century “to promote transportation development with tax abatements, debt guarantees, and public subscription to stock issues,” and to adopt “law after law promoting and subsidizing economic development, regulating business practices, employment conditions, and labor relations.”³³ The basic complexion of federal authority during the nineteenth century mirrored that of the states.³⁴ Notwithstanding the mythology of the “*Lochner* era,” and contrary to Shugerman’s premise, state and federal intermeddling in “private” economic relationships actually proliferated in the late nineteenth and early twentieth centuries. “A new forcefulness and resourcefulness” infused discussions of the police power in the *Lochner* era, concludes a leading historian of the American state, “as Progressives expanded the scale and scope of American legislative power.”³⁵ Far from withdrawing its hand from capitalism, as Shugerman suggests, the state thus extended its regulatory reach into the economic marketplace as never before.

to end an implicit repudiation of the notion that Americans adhered to laissez-faire doctrines in the 1800s.” Benedict, *supra* note 6, at 297 n.15; see also GABRIEL KOLKO, RAILROADS AND REGULATION, 1877–1916 (1965); LEONARD W. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW (1957); GEORGE H. MILLER, RAILROADS AND THE GRANGER LAWS (1971).

³³ Benedict, *supra* note 6, at 302. Benedict thus concludes that “[f]rom Missouri to Maine, from the beginning to the end of the nineteenth century, governments were deeply involved in lending, borrowing, building, and regulating.” *Id.* at 302 (quoting Robert A. Lively, *The American System: A Review Article*, 29 BUS. HIST. REV. 81, 86 (1955)) (internal quotation marks omitted).

³⁴ The reality of federal governance throughout the nation’s history, Professor William Novak writes, “bears not the slightest resemblance to ideas about American laissez-faire, voluntarism, or anti-statism.” William J. Novak, *The Myth of the “Weak” American State*, 113 AM. HIST. REV. 752, 760 (2008); see also RICHARD R. JOHN, SPREADING THE NEWS (1995); Karen Orren, *The Laws of Industrial Organizations, 1870–1920*, in 2 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 531 (Michael Grossberg & Christopher Tomlins eds., 2008). Novak emphasizes the extensive historical “scale and scope” of the American state’s “*infrastructural power*”:

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

Novak, *supra*, at 763. Professor Brian Balogh’s instructive recent book, *A Government Out of Sight: The Mystery of National Authority in Nineteenth-Century America* (2009), similarly chronicles the myriad (if sometimes inconspicuous) ways in which federal authority penetrated American social life and shaped economic development throughout the nineteenth century.

³⁵ Novak, *supra* note 32, at 269.

*B. Was Laissez-Faire in the Air? Some Interpretive Skepticism
About New York's 1846 Constitutional Convention*

Shugerman's argument that the adoption of judicial elections was animated by laissez-faire ideology rests largely on his analysis of New York's 1846 constitutional convention. The "Barnburner" Democrats who dominated the convention and controlled its agenda, Shugerman claims,

were liberal in the classical sense: they embraced laissez-faire and the limited state because they perceived that the wealthy and the party insiders . . . had captured state power and used the state for patronage, 'class legislation,' paper money, public debt, internal improvements, and redistributing property to play favorites and tighten their grip on power.³⁶

The Barnburners forged an alliance at the convention with the Whigs, Shugerman explains, and together constitutionalized a host of provisions designed to check legislative spending, prevent party patronage and corruption, and prohibit the granting of monopolies and other special privileges to individuals or corporations.³⁷ "[T]hese impulses drove an overall laissez-faire, anti-regulation, anti-legislation ideology with a broad populist base,"³⁸ he concludes, thus helping to "lay the foundation for the laissez-faire constitutionalism that ascended after the Civil War."³⁹

Shugerman's own evidence, however, suggests that Barnburners and their allies can be characterized as "laissez-faire" only if one comprehends that term to encompass virtually any effort to constrain legislative authority, regardless of the proposed scope of such constraints, or the ideology or political principle that animated them. Delegates appear to have been motivated not by a general opposition to government involvement in the economy, but rather, as Shugerman acknowledges, by their aversion to the corruption, patronage, and special privilege that had plagued the legislative process in recent decades.⁴⁰ Indeed, the only direct evidence from the convention of a "laissez-faire, anti-regulation, anti-legislation ideology" comes not from Barnburner delegates, or even a Whig ally, but rather from a single renegade "Hunker"⁴¹ — a faction of conservative Democrats that, though dominant in the mid-century New York Democratic Party (and thus closely

³⁶ Shugerman, *supra* note 11, at 1082.

³⁷ *Id.* at 1086–87.

³⁸ *Id.* at 1087.

³⁹ *Id.* at 1125.

⁴⁰ *See id.* at 1087–88.

⁴¹ Shugerman quotes that delegate, Campbell White, as stating that the people of the state are "perfectly capable of taking care of themselves" and insisting that "all the interference of government that is desired or wanted" is the enforcement of contracts. *Id.* at 1087; *see also id.* n.155.

associated with the corruption and patronage that suffused state governance), constituted only a small minority of convention delegates.⁴²

Otherwise, Shugerman relies on Democratic sources from outside the convention to bolster his argument that convention delegates adopted judicial elections in the service of a laissez-faire agenda. The language quoted from a number of these supplementary sources, too, tends to suggest that the authors opposed government intervention in economic matters not out of principle, but because, again, they shared in the widespread Jacksonian critique of special legislative privileges. Shugerman's discussion of Samuel Medary's *The New Constitution* provides a case in point. In 1849, Shugerman explains, Medary, a "populist Democrat," published a series of pamphlets advocating a new Ohio state constitution that provided for greater judicial independence.⁴³ Each issue of *The New Constitution*, Shugerman reports, "was filled with statements like the following: "The people are governed too much." . . . We have too much law Give us but few laws and a simple government, and the people will be prosperous, happy and contended,"⁴⁴ and finally, "that Government is best which governs least."⁴⁵ From this, Shugerman concludes that the pamphlets expressed an "anti-legislature and anti-regulation perspective" and suggests that *The New Constitution* could have been called "*The Libertarian Manifesto*."⁴⁶ Yet other evidence — evidence that Shugerman quotes — resists this characterization. "Legislatures . . . favored the tyranny of property in place of protecting the meritorious and poor," charged another article.⁴⁷ "As it now is, we see legislatures spurning the good and wise [candidates], and bribing men to become hypocrites, and to rob us, as has been done in our public works, where knaves have made fortunes in a few years out of the tax-ridden, oppressed people."⁴⁸ When we consider, as Shugerman notes, that *The New Constitution* often reprinted "socialist, pro-labor" articles⁴⁹ and that some

⁴² See *id.* at 1081–82.

⁴³ See *id.* at 1099–1100.

⁴⁴ *Id.* at 1100 (omissions in original) (quoting *Reform*, NEW CONST., Nov. 17, 1849, reprinted in SAMUEL MEDARY, THE NEW CONSTITUTION 401, 405 (Columbus, Ohio, Samuel Medary 1849) (reprinting an article from the *Georgetown Standard*)).

⁴⁵ *Id.* at 1100 (quoting *Biennial Sessions of the Legislature*, NEW CONST., June 2, 1849, reprinted in MEDARY, *supra* note 44, at 65, 68 (internal quotation marks omitted) (reprinting an article from the *Piqua Enquirer*)).

⁴⁶ *Id.* at 1099.

⁴⁷ *Id.* at 1100–01 (quoting *The New Constitution Assuming Shape*, NEW CONST., Aug. 25, 1849, reprinted in MEDARY, *supra* note 44, at 257, 268 (reprinting an article from the *St. Clairsville Gazette*)) (internal quotation marks omitted).

⁴⁸ *Id.* at 1101 (alteration in original) (quoting *The New Constitution Assuming Shape*, NEW CONST., Aug. 25, 1849, reprinted in MEDARY, *supra* note 44, at 257, 268 (reprinting an article from the *St. Clairsville Gazette*)) (internal quotation marks omitted).

⁴⁹ *Id.* at 1099.

of its populist writers favored protection for debtors against their creditors (a classic bogeyman of nineteenth-century laissez-faireists) the motto on its masthead — “Power is always stealing from the many to the few”⁵⁰ — takes on a different valence. Read through a populist Jacksonian lens, *The New Constitution* begins to look less like a “libertarian manifesto” steeped in the ideology of laissez-faire than a critique of legislative favoritism for the wealthy at the expense of the poor that sometimes opportunistically adopted libertarian, laissez-faire rhetoric.

My purpose here is not to nitpick Shugerman’s analysis, but rather to highlight one particularly stark example of his overreading opposition to special legislative privileges as an embrace of laissez-faire. To my mind, Shugerman’s evidence expresses less libertarian values than Jacksonian antagonism toward a more discrete species of “class legislation” that granted “special” privileges to the favored few. Populist Democrats sought to reign in the legislature not because they despised legislation per se, but because it had served as a vehicle of corruption and of favoritism toward the wealthy. As one leading historian concluded after surveying the commonwealth histories and more recent scholarship, “[I]t is simply no longer intellectually justifiable to characterize New York state policy circa 1846 as ‘laissez-faire’ or ‘negative government.’”⁵¹

C. What “Laissez-Faire Constitutionalism” Was Not

Just as laissez-faire ideology never dictated the actual practice of state governance in the nineteenth century, neither did it shape judicial decisionmaking. As a generation of revisionist scholarship has persuasively demonstrated, the so-called “laissez-faire constitutionalism” of the late nineteenth and early twentieth centuries was marked less by a general opposition to government involvement in the economic marketplace — the hallmark of the era’s laissez-faireists — than a neo-Jacksonian disapproval of “class” legislation that extended special privileges to the favored few. Further, even if we understand “laissez-faire” to mean something narrower and more modest than “removing the state from intervention in . . . capitalism,”⁵² I find unpersuasive Shugerman’s contention that the countermajoritarian vested rights decisions issued by elected judges in the 1850s laid the foundation of *Lochner*-era police powers jurisprudence. Although the mid-century decisions, with their aggressive use of judicial review in defense of

⁵⁰ *Id.* at 1100 (quoting NEW CONST., May 5, 1849, reprinted in MEDARY, *supra* note 44, at 1, 1).

⁵¹ William J. Novak, *The Not-So-Strange Birth of the Modern American State: A Comment on James A. Henretta’s “Charles Evans Hughes and the Strange Death of Liberal America,”* 24 LAW & HIST. REV. 193, 197 (2006).

⁵² Shugerman, *supra* note 11, at 1145.

“vested rights,” must be counted among the many historical precursors to the constitutional economic rights announced in later cases, they cannot properly be called the “major precedents”⁵³ or “cause[s]”⁵⁴ or “pillars of the *Lochner* era.”⁵⁵

1. *The Folklore of “Laissez-Faire Constitutionalism.”* — Neither state nor federal police power jurisprudence during the late nineteenth and early twentieth centuries can be accurately described as “laissez-faire.” As the U.S. Supreme Court explained at the height of the so-called *Lochner* era, the police power was and remained expansive; it was “not confined . . . to the suppression of what is offensive, disorderly or unsanitary,”⁵⁶ but extended as well to “regulations designed to promote the public convenience or the general prosperity.”⁵⁷

And in fact, federal and state courts — including those that authored such landmarks of “substantive due process” as *Lochner*, *In re Jacobs*⁵⁸ and *Godcharles v. Wigeman*⁵⁹ — upheld the vast majority of police regulations against constitutional challenge. While this observation is now a staple of modern revisionist scholarship, perhaps the most compelling evidence for it lies in two empirical studies published at the height of the *Lochner* era by the progressive legal historian Charles Warren.⁶⁰ Warren examined the 560 decisions rendered between 1887 and 1911 in which the U.S. Supreme Court passed on the constitutionality of a state statute in order to test the prevailing progressive critique that a Court in the grip of an outmoded individualism had fallen out of step with “modern conditions,” frustrating the ability of state legislatures to exercise police authority in the interest of the “general public welfare.”⁶¹ Of those 560 cases involving “a social or economic question,” Warren reported, the Court had struck down only three (including *Lochner*).⁶² “The actual record of the Court,” he concluded, “thus shows how little chance a litigant has of inducing the Court to restrict the police power of a State, or to overthrow State laws under the ‘due process’ clause; in other words, it shows the Court

⁵³ *Id.* at 1121.

⁵⁴ *Id.* at 1123.

⁵⁵ *Id.* at 1145.

⁵⁶ *Bacon v. Walker*, 204 U.S. 311, 318 (1907) (rejecting due process challenge to Idaho law regulating the grazing of animals).

⁵⁷ *Id.* at 317.

⁵⁸ 98 N.Y. 98 (1885).

⁵⁹ 6 A. 354 (Pa. 1886).

⁶⁰ Charles Warren, *A Bulwark to the State Police Power — The United States Supreme Court*, 13 COLUM. L. REV. 667 (1913) [hereinafter Warren, *A Bulwark*]; Charles Warren, *The Progressiveness of the United States Supreme Court*, 13 COLUM. L. REV. 294 (1913) [hereinafter Warren, *Progressiveness*].

⁶¹ Warren, *A Bulwark*, *supra* note 60, at 667; *see also id.* at 669.

⁶² Warren, *Progressiveness*, *supra* note 60, at 295.

to be a bulwark to the State police power, not a destroyer.”⁶³ Modern scholars confirm Warren’s assessment.⁶⁴ The handful of iconic cases that are held up as emblems of laissez-faire constitutionalism, in other words, were the exception rather than the rule.

Lochner-era courts did indeed discover novel constitutional economic rights, as Shugerman suggests, and occasionally mounted robust (and even dramatic) defenses of those rights against overzealous legislatures. Shugerman misreads this judicial escalation of rights talk, however, as an expression of laissez-faire. Viewed within its broader historical trajectory, rather than through the narrow lens of a few exceptional cases, the constitutionalization of individual economic rights reflected not a far-reaching constraint on the regulatory authority of the states, but rather a complement to, and even a component of, the unprecedented expansion of that authority. As the historian William Novak puts it, “An expanded zone of private protection and individual autonomy” in the form of new constitutional protections “was *quid pro quo* for the radical extension of state power in this period.”⁶⁵ Far from impeding the development of the liberal, progressive state, with its myriad regulatory interventions into the industrial economy, the constitutionalization of private economic rights constructively mediated between public power and individual autonomy, thus making the expansion of state authority possible.

2. “*Vested Rights*” and the Origins of “*Substantive Due Process*.” — Shugerman similarly over-interprets mid-century judges’ increasing willingness to protect vested property rights against legislative encroachment, coupled with the emerging countermajoritarian rationale for judicial review, as the doctrinal cornerstone of a full-blown “laissez-faire constitutionalism” that would prevail decades later. His discussion of the 1856 case *Wynehamer v. People*⁶⁶ is illustrative. In *Wynehamer*, the New York Court of Appeals struck down a criminal statute prohibiting the sale of intoxicating liquors.⁶⁷ The court relied “on the innovative grounds of substantive due process,”⁶⁸ Shugerman maintains, thus furnishing a “major precedent[.]”⁶⁹ and a “core weapon”⁷⁰ of *Lochner*-era jurisprudence. While *Wynehamer* furnishes a ter-

⁶³ *Id.* at 310.

⁶⁴ See, e.g., GILLMAN, *supra* note 6, at 4; Benedict, *supra* note 6, at 297, 304; William E. Forbath, *Politics, State-Building, and the Courts, 1870–1920*, in 2 THE CAMBRIDGE HISTORY OF LAW IN AMERICA, *supra* note 34, at 643, 645; Novak, *supra* note 34, at 273; Orren, *supra* note 34, at 532.

⁶⁵ Novak, *supra* note 32, at 265.

⁶⁶ 13 N.Y. 378 (1856).

⁶⁷ See *id.* at 405–06.

⁶⁸ Shugerman, *supra* note 11, at 1126.

⁶⁹ *Id.* at 1121.

⁷⁰ *Id.* at 1123.

rific example of an early “anti-populist, countermajoritarian”⁷¹ theory of judicial review, however, it requires an interpretive stretch to read it as “establish[ing] . . . one of the pillars of laissez-faire constitutionalism.”⁷²

Wynehamer was decided by a divided court, which produced four separate opinions. The lead opinion — and the one on which Shugerman bases his interpretation — was written by the court’s junior judge, George Comstock, who wrote only for himself. Judge Comstock’s opinion striking down the statute was indeed grounded in the New York Constitution’s injunction that “no person shall be deprived of life, liberty or property without due process of law.”⁷³ Because New Yorkers held a vested property right in the liquor they possessed at the time of the statute’s enactment, Judge Comstock concluded, the regulation constituted an unlawful confiscation, and even “destruction,” of property.⁷⁴ Despite Judge Comstock’s invocation of the state’s due process clause and vested property rights, the opinion actually reads less like a *Lochner*-era “substantive due process” decision than a historically familiar defense of vested property rights.⁷⁵ Indeed, the statute encroached unconstitutionally upon the plaintiff’s property right in his liquor precisely because the legislature failed to distinguish between liquor that he already possessed at the time the statute was enacted and his right to sell liquor acquired in the future. Regulation of the latter, Judge Comstock insisted, remained comfortably within legislature’s authority to police the health, morals, and welfare of the state’s citizens.⁷⁶ Had the legislature prohibited the sale only of intoxicating liquors imported or manufactured after the statute took effect, and not applied the law to “*property* innocently acquired under exist-

⁷¹ *Id.* at 1124.

⁷² *Id.* at 1121.

⁷³ *Wynehamer*, 13 N.Y. at 383 (quoting N.Y. CONST. art. 1 § 6).

⁷⁴ *Id.* at 385–86.

⁷⁵ See, e.g., *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819); *Dash v. Van Kleeck*, 7 Johns. 477 (N.Y. 1811). Shugerman similarly claims that newly elected judges relied on “substantive due process” to limit New York’s Married Women’s Property Act of 1848. Shugerman, *supra* note 11, at 1125. Like in *Wynehamer*, however, in that case the New York Court of Appeals merely held that a husband held a vested right under the state Due Process Clause in a legacy bequeathed to his wife by her father before the 1848 Act took effect. See *Westervelt v. Gregg*, 12 N.Y. 202 (1854).

⁷⁶ As Judge Comstock assured his readers, the court’s decision was “not intended to narrow the field of legislature discretion in regulating and controlling the traffic in intoxicating liquors. We only say that, in all such legislation, the essential right of the citizen to his property must be preserved.” *Wynehamer*, 13 N.Y. at 405. Indeed, Judge Comstock quotes *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), at length to emphasize the ex post facto nature of the constitutional infirmity: “The legislature cannot change innocence into guilt, or punish innocence as a crime, or violate the right of antecedent lawful private contract, or the right of private property.” *Wynehamer*, 13 N.Y. at 391 (quoting *Calder*, 3 U.S. (3 Dall.) at 388 (emphasis added)) (internal quotation mark omitted).

ing laws,”⁷⁷ Judge Comstock suggested, the regulation would have survived constitutional review.

I do not mean to suggest that Judge Comstock’s robust, high-profile defense of private property rights is unrelated to the “substantive due process” decisions of the *Lochner* era. Indeed, the New York Court of Appeals later relied on *Wynehamer* in *In re Jacobs*⁷⁸ for the important proposition that “[w]hen a law annihilates the value of property,” the owner is deprived of his property within the meaning of the constitutional right to due process of law.⁷⁹ However, while *Wynehamer* furnished helpful precedent for the police powers jurisprudence of the *Lochner* era, it remains a far cry from later prototypical “substantive due process” opinions, including Justice Field’s dissent in the *Slaughter-House Cases*,⁸⁰ high-profile state court decisions such as *Jacobs* and *Godcharles v. Wigeman*,⁸¹ as well as *Lochner* itself. As I explain below, such decisions are distinctive not for their protection of vested property rights, but rather for their constitutionalization of the economic liberty to pursue one’s avocation and sell one’s labor.

III. IN SEARCH OF “LAISSEZ-FAIRE CONSTITUTIONALISM”

This Part attempts to reground the *Lochner* era’s iconic, if unrepresentative, police powers jurisprudence within its immediate historical context in order to explain why the Jacksonian vocabulary of class interest and special privilege resonated with courts in the final decades of the nineteenth century and the first decades of the twentieth. It suggests that by overstating the role of mid-century vested rights decisions, Shugerman’s account obscures subsequent, more immediate historical “causes” of laissez-faire constitutionalism. If we are to draw a line of historical causation between *Wynehamer* and the substantive due process of the *Lochner* era, it must necessarily run through the watershed historical events of slave emancipation and the emergence of an industrial proletariat, and the transformative constitutional changes ushered in by the Reconstruction Amendments. To the extent that *Lochner*-era courts did selectively constitutionalize economic liberty, postbellum doctrinal innovations by jurists such as Justice Stephen Field and Thomas Cooley are indispensable to the origins story that Shugerman proposes to tell.

⁷⁷ *Id.* at 385–86.

⁷⁸ 98 N.Y. 98 (1885) (striking down a state law prohibiting the manufacture of cigars in tenement houses as an unconstitutional deprivation of economic liberty and property).

⁷⁹ *Id.* at 106 (quoting *Wynehamer*, 13 N.Y. at 398) (internal quotation mark omitted).

⁸⁰ 83 U.S. (16 Wall.) 36, 83–111 (1873) (Field, J., dissenting).

⁸¹ 6 A. 354 (Pa. 1886) (striking down a state law providing that laborers in iron mills be paid in U.S. currency as an unconstitutional deprivation of liberty of contract).

A. *Free Labor, the Fourteenth Amendment, and the Constitutionalization of Economic Liberty*

Justice Field's seminal dissenting opinion in the *Slaughter-House Cases*⁸² is essential to any account of the origins of the *Lochner* era. With three co-dissenters, Justice Field insisted that the Louisiana legislature, by chartering a slaughterhouse and granting it a twenty-five-year butchering monopoly, had deprived New Orleans butchers excluded from the monopoly of their privileges and immunities as citizens of the United States, in violation of the Fourteenth Amendment.⁸³ Of what, exactly, did those privileges and immunities consist? Justice Field's answer provided an indispensable precedent for the constitutionalization of economic liberty during the last third of the nineteenth century. He wrote:

This equality of right . . . in the lawful pursuits of life . . . is the distinguishing privilege of citizens of the United States. To them, everywhere, all pursuits, all professions, all avocations are open without other restrictions than such as are imposed equally upon all others . . . This is the fundamental idea upon which our institutions rest, and unless adhered to in the legislation of the country our government will be a republic only in name. The fourteenth amendment . . . makes it essential . . . that this equality of right should be respected. . . . And it is to me a matter of profound regret that [the] validity [of the butchering monopoly] is recognized by a majority of this court, for by it the right of free labor, one of the most sacred and imprescriptible rights of man, is violated.⁸⁴

Justice Field's rendering of constitutional economic liberty channeled a generation of republican "free labor" ideology into a constitutional injunction against state abridgment of the "equality of right among citizens in the pursuit of the ordinary avocations of life."⁸⁵ At the heart of the "free labor" ideal was the figure of the self-employed farmer or skilled artisan. In republican political theory, a man's ownership of productive property, and his "independence" in the pursuit of his economic calling, had long guaranteed both his economic self-sufficiency and his virtuous, independent citizenship.⁸⁶ To labor for a wage, by contrast, was to forfeit one's independence — to subject one's personal autonomy, and even political will, to the authority of an

⁸² 83 U.S. (16 Wall.) at 83–111 (Field, J., dissenting). My analysis draws from William Forbath's important article, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, *supra* note 7, at 773–79.

⁸³ *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 110 (Field, J., dissenting).

⁸⁴ *Id.* at 109–10.

⁸⁵ *Id.* at 109.

⁸⁶ See generally DAVID MONTGOMERY, *BEYOND EQUALITY* 25–44 (1967); Forbath, *supra* note 7, at 774–77.

employer.⁸⁷ In the post-Civil War period, the republican vision fell into jeopardy as never before as the industrial revolution transformed small farmers and skilled craftsmen into propertyless wage earners, and as immigrants from Europe and China joined the ranks of the nation's growing army of industrial hirelings. "The butchers whose rights Justice Field championed in the *Slaughter-House Cases*," explains historian William Forbath, stood as exemplars of the old free labor ideal: They were self-employed petty entrepreneurs struggling against a state-imposed monopoly that threatened to subject them to the control of the new corporation, depriving them of their independence and reducing them to the condition of wage laborers.⁸⁸

If Justice Field's opinion championed the butchers' republican independence, however, it also laid the constitutional groundwork for a very different and, in the postbellum period, ascendant conception of economic liberty. Immediately following the passage quoted above trumpeting the republican virtues of free labor, Justice Field inserted a long footnote quoting at length Adam Smith's *Wealth of Nations*:

"The property which every man has in his own labor," says Adam Smith, "as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands; and to hinder him from employing his strength and dexterity in what manner he thinks proper, without injury to his neighbor, is a plain violation of this most sacred property. It is a manifest encroachment upon the just liberty both of the workman and of those who might be disposed to employ him. As it hinders the one from working at what he thinks proper, so it hinders the other from employing whom they think proper."⁸⁹

If this was an expression of economic liberty lifted directly from one of the seminal texts of classical liberal political economy, it was also a vision that resonated deeply with the great moral and political cause of the previous generation — the abolition of slavery. Abolitionists had celebrated the voluntary sale of one's labor as the antithesis of slavery, and the right to dispose of one's labor at market price had taken on the moral and emotional weight of opposing human bondage. Slave emancipation and the adoption of the Civil Rights Act of 1866,⁹⁰ securing the right to contract for the sale of one's labor as an essential

⁸⁷ See generally LAWRENCE B. GLICKMAN, *A LIVING WAGE* 22–24 (1997); MONTGOMERY, *supra* note 86, at 30–33; AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT* 9–10 (1998); Forbath, *supra* note 7, at 774–75.

⁸⁸ Forbath, *supra* note 7, at 776.

⁸⁹ *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 110 n.* (Field, J., dissenting) (quoting ADAM SMITH, *THE WEALTH OF NATIONS* 225 (Penguin Classics 1986) (1776)).

⁹⁰ Ch. 31, 14 Stat. 27 (codified as amended in scattered sections of 42 U.S.C.).

right of citizenship, enshrined this vision into law.⁹¹ Most importantly, by extolling workers' "sacred property" in their own labor and their "liberty" to dispose of that property as they thought proper, Smith, and Justice Field, offered a vision of economic liberty adapted not to a republic of independent artisans and craftsmen, but to the propertyless hirelings who populated the swelling industrial labor force. It was the liberal, Smithian, abolitionist, and distinctly industrial-era conception of economic liberty that occasionally found its way into late-nineteenth-century judicial opinions.

Whether we read Justice Field's dissent as a conservative defense of the waning republican free labor ideal or the handmaiden of an emergent industrial-era political economy, the intellectual and jurisprudential legacy of the opinion lies in its radical redefinition of "liberty" and "property." In this project, Justice Field was joined by the jurist and treatise writer Thomas Cooley, whose influential *Treatise on Constitutional Limitations*, first published in 1868, argued that the state due process clauses placed significant substantive limits on the authority of legislatures to regulate common law property rights.⁹² For Cooley and for Justice Field, "property" could encompass not only land and tangible goods, but anything with market value; "liberty" meant not only physical freedom, but freedom to act in the marketplace, and particularly to sell one's labor.⁹³ After *Slaughter-House*, Forbath notes, those who felt unjustly burdened by a particular economic regulation "could proceed to court with Field's sacred banner of Free Labor in one hand and Cooley's *Treatise* in the other."⁹⁴

When litigants did exactly that, they were received warmly by state high courts on at least a few occasions. Indeed, the handful of opinions from the 1880s striking down state labor regulations read like tributes to Justice Field and Cooley. The New York Court of Appeals'

⁹¹ See generally STANLEY, *supra* note 87, at 1–59; Forbath, *supra* note 7, at 782–86. In determining what, exactly, were the privileges and immunities that the Fourteenth Amendment protected from state abridgement, Justice Field turned first to the recently enacted Civil Rights Act of 1866. Although passed before the adoption of the Fourteenth Amendment, Justice Field explained, the Civil Rights Act expressed Congress' interpretation of the term "privileges and immunities" as it was used in section 1. It includes, Justice Field wrote, quoting directly from the Act, the right "to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property." *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 96 (Field, J., dissenting) (quoting Civil Rights Act of 1866, ch. 31 § 1, 14 Stat. 27, 27 (codified as amended at 42 U.S.C. § 1981)) (internal quotation marks omitted). Among such rights, Justice Field continued, "must be placed the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally effects all persons." *Id.* at 97.

⁹² THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 351–61 (5th ed. 1883).

⁹³ See Benedict, *supra* note 6; Forbath, *supra* note 7, at 792–94.

⁹⁴ Forbath, *supra* note 7, at 794.

opinion in *In re Jacobs*, which invalidated a law prohibiting the manufacture of cigars in tenement houses, exemplifies the new property and liberty: “The constitutional guaranty that no person shall be deprived of his property without due process of law may be violated without the physical taking of property”⁹⁵ Any law that “destroys it or its value, or takes away any of its essential attributes,” would deprive a person of his property.⁹⁶ So, too, could a person be unconstitutionally deprived of his liberty “without the actual imprisonment or restraint of his person.”⁹⁷ “Liberty, in its broad sense as understood in this country,” the court continued, “means the right, not only of freedom from actual servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation.”⁹⁸ Laws that “limit one in his choice of a trade or profession, or confine him to work or live in a specified locality,”⁹⁹ are therefore “infringements upon his fundamental rights of liberty.”¹⁰⁰

If the term “substantive due process” means anything, then, it is that the state, and later federal, due process clauses protect both a man’s property right in his avocation — whether the means of conducting his trade or the sale of his labor — and his liberty to pursue it. If the statute at issue in *Wynehamer* had been reviewed through this distinctly late-nineteenth-century constitutional lens, the analysis may have looked quite different. At issue would have been not only *Wynehamer*’s “vested” right to dispose of the liquor he already had in his warehouse, but also his constitutional liberty to engage in his avoca-

⁹⁵ *In re Jacobs*, 98 N.Y. 98, 105 (1885).

⁹⁶ *Id.*

⁹⁷ *Id.* at 106.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 107. Two years later, the Supreme Court of Pennsylvania echoed the *Jacobs* court’s conception of economic liberty. In *Godcharles v. Wigeman*, the court struck down a state law requiring that iron workers be paid in cash at regular intervals, rather than in company “script,” as an unconstitutional attempt to

prevent persons who are *sui juris* from making their own contracts. The act is an infringement alike of the rights of the employer and the employe. More than this, it is an insulting attempt to put the laborer under a legislative tutelage, which is not only degrading to his manhood, but subversive of his rights as a citizen of the United States. He may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal; and any and every law that proposes to prevent him from so doing so is an infringement of his constitutional privileges, and consequently vicious and void.

6 A. 354, 356 (Pa. 1886). See also *State v. Goodwill*, 10 S.E. 285 (W. Va. 1889) (striking down a law forbidding payment in company script on the ground that it interfered with the “liberty” of every man “to pursue any lawful trade or avocation,” *id.* at 286 (quoting *People v. Gillson*, 17 N.E. 345 (N.Y. 1888)) (internal quotation mark omitted), and the “property which every man has in his own labor,” *id.* at 287).

tion of selling liquor, including liquor that he might acquire in the future.

B. "Class Legislation" in the Industrial Era

As I suggest above,¹⁰¹ there is today broad recognition among historians and legal scholars that *Lochner*-era courts little resembled the hyper-vigilant guardians of the private market and individual economic liberty long imagined by the "progressive" critics of "laissez-faire constitutionalism." State and federal judges did not oppose government interference in the market per se, but rather those forms of interference that they interpreted as "class" legislation, serving the narrow interests of a particular social or economic group over those of the general public. A generation of legal historians has produced a sizeable and fascinating literature tracing *Lochner*-era scrutiny of such class legislation to the Jacksonian opposition to special legislative privileges. In particular, a series of intellectual-biographical studies of leading icons of laissez-faire constitutionalism persuasively present jurists such as Justice Stephen Field and Thomas Cooley not as laissez-faire ideologues, but rather as principled neo-Jacksonians, committed to the defense of the general good against the corrupting influence of powerful economic interests.¹⁰² Even though I have taken issue with Shugerman's characterization of this Jacksonian impulse as a variety of "laissez faire," his contention that *Lochner*-era police powers jurisprudence was built on Jacksonian foundations enjoys abundant support in the existing literature.

As historians and legal scholars continue to excavate evidence of the *Lochner* era's rich ancestry, however, we should not lose sight of why the Jacksonian vocabulary of class interest and special privilege resonated with American courts in the final decades of the nineteenth century and first decades of the twentieth — in other words, why the *Lochner*-era happened when it did. Notwithstanding the splendid, multivalent complexity of its intellectual origins, "laissez-faire constitutionalism" was in fact deeply imbedded in its immediate historical context — a context characterized, above all, by the industrial reorganization of labor, the consequent escalation of class conflict, and the emergence of a host of reform initiatives directed toward redressing

¹⁰¹ See sources cited *supra* notes 64–65 and accompanying text.

¹⁰² See, e.g., Alan Jones, *Thomas M. Cooley and "Laissez-Faire Constitutionalism": A Reconsideration*, 53 J. AM. HIST. 751 (1967); McCurdy, *supra* note 6. But see Manuel Cachán, *Justice Stephen Field and "Free Soil, Free Labor Constitutionalism": Reconsidering Revisionism*, 20 LAW & HIST. REV. 541 (2002) (challenging Justice Field's Jacksonian bona fides and arguing that by the Gilded Age, free labor ideology had absorbed elements of laissez-faire ideology).

industrial inequality. As Professor Howard Gillman explains, during the last third of the nineteenth century,

changes were occurring in the structure of capitalist social relations that led increasing numbers of people to question whether their well-being could be protected by a formally neutral polity. These changes triggered a proliferation of group and class activity as powerful interests began demanding special favors from government and vulnerable groups began demanding special protection from the coercive effects of a corporate industrial economy. These demands constituted a direct challenge to an established tenet of political legitimacy, and the legal community — state courts and legal commentators — responded accordingly in repeated condemnations of illegitimate “class” politics.¹⁰³

The critical duty of *Lochner*-era courts, as the guardians of state neutrality, was thus to distinguish between the vast majority of police regulations that were legitimately directed toward the public health and welfare and the illegitimate minority that were calculated to serve the interests of a narrow class.

In one respect, then, *Lochner*-era resistance to legislation that appeared to promote narrow class interests rather than the general welfare simply continued the judiciary’s traditional commitment to the principle of state neutrality. But the complexion of that resistance — especially the kinds of legislation that courts interpreted as “class” legislation — was also fundamentally a product of the class conflict and economic inequality that accompanied the industrialization of the northern economy. Indeed, the police regulations that attracted the most aggressive judicial scrutiny tended to be statutes that sought to restore to wage laborers some measure of bargaining power relative to their employers¹⁰⁴ — the signature reforms of the industrial era.

Lochner itself is a prime example. It was precisely the majority’s recognition of a newly minted constitutional right of property in and liberty to dispose of one’s labor that triggered the Court’s scrutiny of the challenged regulation.¹⁰⁵ Echoing the conception of constitutional

¹⁰³ GILLMAN, *supra* note 6, at 14 (footnote omitted). As Professor Owen Fiss pointedly observes, “[t]he activism of Melville Fuller . . . was a method of resistance, a way of coping with new forms of social and political organization and activity.” FISS, *supra* note 8, at 20. Other leading scholars likewise characterize *Lochner*-era police powers jurisprudence as a reaction to legislative efforts to address the era’s accelerating economic inequality. As Professor Morton Horwitz explains, “the inherently redistributive potential of the police power emerged with a vengeance” in response to “the reality of an increasingly unequal society,” thus dissolving “the relatively fixed common law categories on which police power doctrines had been erected” and blurring the traditional “distinction between the health of a worker and the conditions of industrial life.” MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960*, at 30 (1992).

¹⁰⁴ See Forbath, *supra* note 64, at 649; Orren, *supra* note 34 at 533.

¹⁰⁵ In this I differ with some among the current generation of revisionist historians, whose insistence that “laissez-faire constitutionalism” was animated by Jacksonian principles of state neutrality rather than by laissez-faire economic ideology or naked class interest has minimized, al-

economic liberty set forth in Justice Field's *Slaughter-House* dissent — a conception, as I noted above, that was inseparable from both abolitionism and the industrial transformation of labor — the majority concluded with little difficulty that the “right to make a contract in relation to [one’s] business,” and particularly the “right to purchase or to sell labor,” was “part of the liberty of the individual protected by the Fourteenth Amendment.”¹⁰⁶

With the constitutional stakes thus clarified, the Court turned to whether the regulation was a “reasonable and appropriate exercise of the police power of the State,” or instead “an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty.”¹⁰⁷ The Court “dismissed in a few words” any suggestion that legislation enacted to benefit workers *qua* workers implicated the *general* welfare. “Viewed in the light of a purely labor law,” it concluded, “the interest of the public is not in the slightest degree affected”¹⁰⁸ The Court likewise denied that a law regulating the hours of labor worked by bakers might lie within the state’s police authority as a “health law.” The state’s contention that the purpose of the act was to protect the public health was so utterly unpersuasive, the majority maintained, that it was “impossible for [the Court] to shut [its] eyes” to the legislature’s “other motives.”¹⁰⁹ “[T]he real object and purpose” of the act, the majority charged, “were simply to regulate the hours of labor between the master and his employés.”¹¹⁰

In thus concluding that a law altering the existing balance of bargaining power between employers and workers could not reasonably be interpreted as serving the general welfare, the Court plunged head-first into the consuming social and political issue of the day — the so-called “labor problem.” Even as the venerable Jacksonian value of state neutrality guided the Court’s scrutiny of New York’s “labor law,” the majority’s basic justification for that scrutiny — the reason, by its own insistence, that it was compelled to scrutinize this interference with the purchase and sale of labor — lay not in the anti-class-legislation principles of the Jacksonians, or the vested rights precedents of the 1850s, but rather in an emergent conception of workers’ liberty

most to the point of invisibility, the role played by the constitutionalization of economic liberty in *Lochner*-era police powers jurisprudence. Under this view, the *Lochner* Court upheld “liberty of contract” against legislative encroachment not as a positive constitutional right that imposed an “external” constraint on the authority of the state, but rather as a residuum of freedom that “remained to the individual after the state reached the outer bounds of its authority.” FISS, *supra* note 8, at 159.

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

¹⁰⁷ *Id.* at 56.

¹⁰⁸ *Id.* at 57.

¹⁰⁹ *Id.* at 64.

¹¹⁰ *Id.*

to dispose of their labor that was rooted in the anti-slavery movement and the neoclassical political economy of the industrial era.¹¹¹

IV. CONCLUSION

Jed Shugerman's article offers an enlightening account of how the first generation of elected state judges transformed the Jacksonian antagonism toward "class" legislation into a countermajoritarian rationale for robust judicial review, characterized by an enhanced protection of individual rights and an anti-populist conception of majority rule as a "threat to higher law." This Response challenges Shugerman's further suggestion, however, that the expansion of judicial review in the 1850s, sometimes in the service of "vested" property rights, helped to effect a "transition from the early republic's active industry-building state to the laissez-faire constitutionalism that dominated the late nineteenth century and early twentieth century."¹¹²

The challenge rests on two related grounds. First, despite the persistence of "progressive" mythology, the late nineteenth and early twentieth centuries were hardly "dominated" by an approach to constitutional review that can fairly be characterized as "laissez-faire." Despite a handful of now-notorious decisions striking down police regulations in a manner that, in hindsight, can appear almost ostentatious, state and federal courts upheld the vast majority of *Lochner*-era economic legislation. Second, Shugerman overemphasizes the mid-century origins of "laissez-faire constitutionalism" at the expense of the watershed historical events that transformed American constitutional culture during the last third of the nineteenth century. These historical developments provide the immediate context for, and give essential meaning to, the era's iconic (if unrepresentative) police power jurisprudence. To the extent that *Lochner*-era courts did constitutionalize economic liberty (and they did, albeit highly selectively), they were inspired less by the vested rights jurisprudence that preceded the Civil War than by the constitutional and industrial revolutions that followed it. Shugerman's account both overdetermines the historical meaning of the mid-century decisions and correspondingly casts *Lochner*-era courts as his-

¹¹¹ The frequent observation that the *Lochner* Court measured the neutrality of police regulations against a "common law baseline" may likewise dehistoricize the constitutionalization of economic liberty. As Sunstein writes of *Lochner*, "Market ordering under the common law was understood to be a part of nature rather than a legal construct, and it formed the baseline from which to measure the constitutionally critical lines that distinguished . . . neutrality from impermissible partisanship." Sunstein, *supra* note 5 at 874. While I agree that the Court's conception of state neutrality was informed by its presumption of a "common law baseline," that fact, without more, does not account for why the Court constitutionalized certain forms of economic liberty when it did.

¹¹² Shugerman, *supra* note 11, at 1068.

torically decontextualized receptacles of decades-old precedent. The result is an account of the origins of the *Lochner* era that tells us little about why, exactly, the *Lochner* era happened when it did.