What Was It That the Supreme Court Did in *Lochner v. New York* That Was So Horrible?

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Note to Readers: This paper is a draft of Chapter 2 of a book project (with Linda C. McClain) on the legal enforcement and promotion of morals and public values. I prepared the draft as a public lecture, hence the polemical and conversational style of a lecture. I should mention that I always write early drafts in outline format. Doing so helps me to distill my points and to hammer out a draft without having to worry about transitions or footnotes.

I. INTRODUCTION: THE GHOST OF *LOCHNER*

A. A specter is haunting constitutional law—the specter of *Lochner v. New York*.

1. In the *Lochner* era, from 1887 to 1937, the Supreme Court gave heightened judicial protection to substantive economic liberties through the Due Process Clauses of the Fifth and Fourteenth Amendments.

2. In 1937, during the constitutional revolution wrought by the New Deal, *West Coast Hotel v. Parrish* repudiated the *Lochner* era's special judicial protection for business interests, marking the first death of substantive due process.

3. Nevertheless, the ghost of *Lochner* has haunted constitutional law ever since, manifesting itself in charges that judges are "Lochnering" in the guise of interpreting the Constitution.

4. The cries of Lochnering have been most unrelenting with respect to *Roe v. Wade* (1973), which held that the Due Process Clause protects a realm of substantive personal liberty or privacy broad enough to encompass the right of women to decide whether to terminate a pregnancy.

5. In a well-known critique, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, John Hart Ely attacked the Court for engaging in Lochnering, arguing that to avoid doing so it must confine itself to perfecting the processes of representative democracy, as intimated in Justice Stone's famous footnote four of *United States v. Carolene Products Co.* (1938).

6. Despite these cries, *Planned Parenthood v. Casey* (1992) reaffirmed the "central holding" *Roe* instead of marking the second death of substantive due process by overruling it.

7. In an apoplectic dissent, Justice Scalia blasted the Court for continuing to engage in Lochnering, protesting that the Court must limit itself to giving effect to the original meaning of the Constitution, narrowly conceived, and must renounce protecting "unenumerated" fundamental rights.

8. *Obergefell v. Hodges* (2015) solidified the Court's commitment to substantive due process by extending the fundamental right to marry to same-sex couples primarily on the basis of the Due Process Clause, not the Equal Protection Clause.

9. In a scolding dissent, Chief Justice Roberts charged the Court with repeating the "grave errors" of *Lochner*.

B. After *Casey* and *Obergefell*, one might have expected that the long-anticipated second death of substantive due process would be unlikely to come anytime soon.

1. But Donald Trump campaigned on a promise to appoint justices to the Court like Scalia who would overrule *Roe*, *Casey*, and *Obergefell* (though he later stated that he personally was "fine" with *Obergefell*).

2. Given this re-emergence of the possibility of the second death of substantive due process, it is timely and important to provide a vigorous defense of it.

3. The book of which this lecture is a chapter develops such a defense.

   a. My co-author Linda C. McClain and I aim to vanquish the ghost of *Lochner* by showing that *Roe*, *Casey*, and *Obergefell* do not embody the "grave errors" of *Lochner*.

   b. Instead, we contend, these cases grow out of a coherent and durable practice of protecting basic liberties significant for personal self-government and essential to securing ordered liberty and the status and benefits of equal citizenship for all (here, women as well as gays and lesbians).

   c. The practice of substantive due process—constructing basic liberties in building out our commitment to ordered liberty—contrary to the cries of Lochnering, is not illegitimate in our system of constitutional self-government: where basic liberties related to personal self-government limit majorities from compelling answers to the most important decisions people make in their lifetimes.

d. Indeed, this practice is vital to securing the basic liberties which are preconditions for social cooperation on the basis of mutual respect and trust in a diverse constitutional democracy such as our own.

C. You may ask, why do I put all this so dramatically? For example, why do I speak of the "ghost of *Lochner*" haunting constitutional law?

1. Because that is the only way to capture the spookiness and dread surrounding the invocations of *Lochner*.

2. What do I mean by the "ghost of *Lochner*"?

3. It is an apparition that constitutional law professors have been conjuring to frighten law students since 1973.

a. Especially but not only in *Roe*, *Casey*, and *Obergefell*.

4. It is a phantom that dissenters have been summoning to demonize majority opinions in such cases.

5. You may wonder, do I believe in summoning ghosts? My response, like that of Mark Twain when asked whether he believed in infant baptism, is: "Yes, I've seen it done."

D. As my title indicates, I shall ask: "What was it that the Supreme Court did in *Lochner* that was so horrible?" My analysis will proceed through five questions:

1. First, what did the Supreme Court do in *Lochner*?

2. Second, what did the dissenters say (in 1905) was wrong in *Lochner*? And what did the majority in *West Coast Hotel*, the case that repudiated *Lochner*, say (in 1937) was wrong?

3. Third, what have contemporary critics of *Roe*, *Casey*, and *Obergefell* said (from 1973 to the present) was wrong in *Lochner*?

a. When I teach *Lochner*, I ask my students, why is *Lochner* infamous? What does it mean to summon the ghost of *Lochner*?

b. My response is that it means to charge someone with doing whatever it was that the Court did in *Lochner* that was so horrible!

c. The response may seem vacuous, but it is not.

d. The point is that, at least since the New Deal, constitutional scholars and judges have used *Lochner* as a rhetorical club to criticize their opponents.

e. Each theory of constitutional interpretation and judicial review has different implications for what, if anything, was wrong with *Lochner* as well as for the relationship between *Lochner* (i.e., judicial protection of economic liberties), on the one hand, and *Roe* and *Obergefell* (i.e., judicial protection of personal liberties), on the other).

f. Below, I distinguish several prominent theories' views concerning what was wrong in *Lochner* in relation to *Roe* and *Obergefell*.

4. Fourth, what is the best account of what was wrong in *Lochner*?

a. As you know, *Lochner* involved heightened judicial protection of economic liberties under the Due Process Clause.

b. How many of you think that economic liberties and property rights are fundamental rights protected by our Constitution?

c. I thought so!

d. I should frankly acknowledge that the folks in this audience may be more conservative than the crowd with whom I usually travel up in Massachusetts. Accordingly, at the outset, I want to say something ingratiating. Then, I will say something provocative.

e. Here is the ingratiating part: economic liberties and property rights, like personal liberties, are fundamental rights secured by our Constitution.

(1) *Lochner* was right about that.

f. Now for the provocative part: In fact, economic liberties and property rights are so fundamental in our constitutional scheme, and so sacred in our constitutional culture, that there is neither need nor good argument for aggressive judicial protection of them.

(1) Rather, such liberties are understood properly as "judicially underenforced norms," to use Lawrence G. Sager's term.

(2) As Cass Sunstein would put it, their fuller enforcement and protection is secure with legislatures and executives in "the Constitution outside the Courts."

g. That is clearly not the case with personal liberties such as reproductive freedom for women and freedom to marry for gays and lesbians, which are vulnerable in the political process.

(1) vulnerable to majoritarian efforts to impose conceptions of the good life upon them, such as how best to respect the sanctity of life in *Roe* and *Casey*.

(2) And vulnerable to majoritarian efforts to deny the status and benefits of equal citizenship to some, including women and gays and lesbians.

h. On this view, the Court was wrong to fear that economic liberties needed heightened judicial protection in *Lochner*, but right to see that basic personal liberties warrant more searching judicial protection in *Roe*, *Casey*, and *Obergefell*.

i. Thus, contrary to Justice Scalia's and Chief Justice Roberts's charge, *Roe*, *Casey*, and *Obergefell* do not revive the "grave errors" of *Lochner*.

5. Finally, what is the best approach to vanquishing the ghost of *Lochner*?

a. My tack is not so much to vilify *Lochner* as to defend cases like *Roe*, *Casey*, and *Obergefell*.

(1) I show the coherence and structure of our practice of substantive due process and

(2) I argue that protecting basic liberties significant for personal self-government is integral to securing constitutional democracy.

b. My related, further tack is to unmask the ghost of *Lochner*.

(1) I contend that the dissents in *Lochner* and the majority in *West Coast Hotel* were largely right about what it was that the Supreme Court actually did in *Lochner* itself in 1905 that was

wrong.

(2) You will notice I said "wrong," not "horrible."

(3) Whatever it was that the Supreme Court supposedly did in *Lochner* that was so "horrible"—it did not do until *Roe*, which was decided in 1973.

(4) I argue that the ghost of *Lochner* is an apparition critics of substantive due process have been summoning since 1973.

(5) Like all ghosts, this *Lochner* that is so horrible is a fabrication —of those who conjure it to frighten us away from the salutary and durable practice of protecting basic liberties essential to personal self-government.

c. If constitutional theorists and judges of today didn't have *Lochner* to invoke in criticizing *Roe*, *Casey*, and *Obergefell*, they would have had to make it up.

E. Thus, it is important to understand that criticism of Lochnering is less about *Lochner* itself than about *Roe*, *Casey*, and *Obergefell*.

1. It is criticism of theories of constitutional interpretation that support and justify the practice of substantive due process: protecting substantive personal liberties through the Due Process Clauses.

2. For the most part, *Lochner* is a prism through which people refract their criticisms of *Roe*, *Casey*, and *Obergefell*.

3. That said, I should acknowledge that three kinds of people write about *Lochner*:

a. Not only those who are deeply critical of *Roe*, *Casey*, and *Obergefell* and want to frighten us away from these decisions by summoning the ghost of *Lochner*.

b. But also those who support *Lochner* and want to avenge *Lochner*'s ghost by rehabilitating it or resurrecting aggressive judicial protection of economic liberties.

c. Last but not least, there is a third group, progressives who condemn *Lochner*'s consequences for the lives of real people rather than

criticizing or defending its approach to constitutional interpretation.

II. WHAT DID THE SUPREME COURT DO IN *LOCHNER*?

A. During the era of *Lochner v. New York* (1905), the Court aggressively protected economic liberties—such as liberty to contract—along with personal liberties—such as the liberty of parents to direct the upbringing and education of their children, *Meyer v. Nebraska* (1923) and *Pierce v. Society of Sisters* (1925)—without distinguishing between the two.

1. Both were seen as essential liberties to be protected under the Due Process Clauses.

B. Justice Rufus Peckham's opinion for the majority in *Lochner* ranks as one of the most infamous opinions in Supreme Court history.

1. This explains Chief Justice Roberts's strenuous attempt to portray the majority opinion in *Obergefell* as a reprise of *Lochner*.

2. I have some questions for the students who have taken Constitutional Law and read *Lochner v. New York*.

a. Did you approach reading it with an appropriate fear?

b. Did you come away from reading it with a proper loathing?

c. Or was reading *Lochner* anticlimactic, and did you wonder what all the fuss is about?

3. The question in *Lochner* was whether New York could impose a maximum ten-hour day and sixty-hour week on bakers without violating the liberty to contract that the Court held was guaranteed by the Due Process Clause of the Fourteenth Amendment.

C. What is the basis for the state legislature passing this legislation?

1. The police power of the state: its power to legislate to provide for the safety, health, morals, and general welfare of the public.

2. Specifically, to protect the health of bakers by protecting them from overexposure to the dirty air of bakeries.

D. How does the Court frame the test for whether the law has transgressed the limits on

the valid exercise of the police power?

1. "Is this a fair, reasonable and appropriate exercise of the police power of the state"?

2. Or is the invocation of the police power—and protecting the health of bakers—a "mere pretext" for "other motives," that is, *a phony reason*?

3. This formulation signals that the Court is going to apply searching scrutiny of the ends that the state invokes to justify an economic regulation.

4. It is not going to defer to the state's claim that it is appropriately exercising its police power to protect health.

E. What did the Court hold?

1. That "there is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor in the occupation of a baker."

2. Why not? The Court said that bakers are "in no sense wards of the State" who "are not able to assert their rights and care for themselves without the protecting arm of the state."

3. The Court also said that such statutes "are meddlesome interferences with the rights of the individual."

   a. Note the strong anti-paternalism—the indignant objection to what people today would call the "nanny state."

F. What did the Court say about the state's purported end, protecting the health of bakers?

1. The Court pronounced this reason a "mere pretext" for "other motives."

2. That sounds sinister! That sounds scary! More in a moment.

3. The Court seemed to fear that upholding such legislation under the police power would put the nation on a slippery slope that would ultimately permit "the supreme sovereignty of the State to be exercised free from constitutional restraint."

4. The Court asked, rhetorically, "But are we all, on that account, at the mercy

of legislative majorities?"

a. Now, if you believe that our scheme of government is a majoritarian representative democracy, your answer may be an emphatic "yes."

b. But the Court viewed our constitutional scheme as protecting substantive fundamental rights including liberty of contract against encroachment by legislative majorities.

5. What did the Court find is the "real object" of the maximum hours statute?

a. "Simply to regulate the hours of labor between the master and his employees . . . in a private business, not dangerous in any degree to morals or to the health of the employees."

b. To be sure, the New York law was probably motivated by the desire to achieve for the bakers the sixty-hour week they were unable to achieve for themselves at the bargaining table with management.

c. The reason the bakers couldn't achieve a sixty-hour week by themselves was that management had greater bargaining power.

d. Peckham let it be known at the outset of his opinion that the Court would not accept a "mere labor law"—that is, an act of the state legislature giving the bakers what they couldn't get on their own at the bargaining table.

e. Peckham took this position because he believed with the free-marketeers of his day (and ours) that bargaining power amounted to property lawfully earned, and that using law to equalize bargaining power was using force to steal property from one party and give it to another.

6. What illicit "other motive" did the Court fear was at work here?

a. Nothing less than to promote socialism!

b. On the Court's view, using law to equalize bargaining power was using force to steal property from one party and give it to another.

III. WHAT DID THE SUPREME COURT DO THAT WAS WRONG IN *LOCHNER*?

A. The two very famous dissents in *Lochner* provide contemporaneous answers to that

question.

B. First, what did Justice Harlan argue in dissent?

1. He argued that the Court was wrong to doubt the state's motive.

2. He contended that since a reasonable person could see the law as a good-faith effort to protect the bakers from overexposure to the dirty air of bakeries, the Court should uphold the law.

C. What is the test of constitutionality, according to Harlan?

1. "the rule is universal that a legislative enactment, federal or state, is never to be disregarded or held invalid unless it be, beyond question, plainly and palpably in excess of legislative power."

2. Harlan is very deferential in scrutinizing the **end** that the legislature claims to be furthering:

   a. "It is plain that this statute was enacted in order to protect the physical well-being of those who work in bakery and confectionery establishments."

   b. "Whether or not this be wise legislation it is not the province of the court to inquire. Under our systems of government the courts are not concerned with the wisdom or policy of legislation."

3. And Harlan is quite deferential in scrutinizing the **fit** between that permissible legislative end and the means that the legislature has chosen to further it.

   a. "I find it impossible, in view of common experience, to say that there is here no real and substantial relation between the means employed by the state and the end sought to be accomplished by its legislation."

   b. "Nor can I say that . . . the regulation prescribed by the state is utterly unreasonable and extravagant or wholly arbitrary."

   c. Or "beyond question, a plain, palpable invasion of rights secured by the fundamental law."

4. On Harlan's view, what was wrong in *Lochner* is simply that the Supreme Court did not defer to the legislature's judgment that the law was rationally

related to a legitimate governmental interest in protecting the health of bakers.

D. Second, what did Justice Holmes argue in dissent?

1. Holmes said, in effect, that the Court was wrong to see the Constitution as committed to a free-market economic theory that regarded "mere labor laws" as a form of theft.

2. Holmes writes: "This case is decided upon an economic theory which a large part of the country does not entertain." What is that economic theory?

   a. Libertarian theory of laissez faire capitalism, anti-paternalism.

   b. Libertarian social Darwinism, as espoused most prominently by Mr. Herbert Spencer in his book, *Social Statics*.

      (1) Hence Holmes's famous line: The Constitution "does not enact Mr. Herbert Spencer's *Social Statics*."

      (2) Its libertarian slogan or shibboleth, as quoted by Holmes, was "the liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same."

   c. Fast forward from 1905 to 2017: in other words, the *Lochner* Court was interpreting the Constitution basically the way that many contemporary Republican legislators (such as Speaker of the House Paul Ryan and Senator Rand Paul) interpret it.

3. But, Holmes argues: "A constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire."

   a. Does he mean that the Constitution "says nothing about" economics—and makes no presuppositions about the economic system underlying it—and therefore that the legislature may pursue whatever economic theory it desires?

   b. Compare Holmes's statement in *Lochner*—"a constitution is not intended to embody a particular economic theory"—with Justice Black's statement for the majority in *Ferguson v. Skrupa* (1963)—"Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours."

c. Even if the Constitution does not embody "a particular economic theory"—say, Smith's theory of laissez-faire capitalism as opposed to Keynes's theory of government-regulated capitalism—I would argue that the Constitution necessarily embodies some form of private property owning democracy.

(1) On this view, the Constitution would forbid a legislature to take Karl Marx for "its textbook."

(2) Mind you, according to many people, like my dad (who graduated from University of Missouri in 1951), the New York legislature in *Lochner* had taken Marx for its textbook!

d. I do not read Holmes's dissent as incompatible with the view that the Constitution presupposes a commitment to some form of private property owning democracy—rather than socialism or communism.

e. Holmes's larger point seems to be a claim about **Who should interpret**: that the question of which economic theory—among the theories of private property owning democracy—government may act upon is a question for legislatures rather than courts to decide.

4. Holmes continues, in a famous line: The Constitution "is made for people of fundamentally differing views, and the accident of our finding certain opinions **natural and familiar or novel and even shocking** ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States." What does he mean by these statements? What is he charging the majority with doing?

a. "Natural": As I read him, he's charging the majority with assuming that the Constitution embodies laissez faire economic theory as part of the natural order of things—and therefore that any "novel" governmental regulation of this natural economic ordering is presumptively unconstitutional.

b. "Familiar": He's also charging the majority with presuming that the Constitution requires the status quo of existing distributions of wealth and economic power—and therefore, again, that any governmental regulation of the market or redistribution of economic power is "shocking" and presumptively unconstitutional.

c. More later.

5. Holmes, however, evidently makes a concession to substantive due process, for he contemplates that a law might be unconstitutional if it "...would infringe fundamental principles as they have been understood by the traditions of our people and our law."

6. Thus, on Holmes's view, what was wrong in *Lochner* was that the Court interpreted the Constitution to embody a particular economic theory rather than leaving it to the legislature to decide what understanding of private property owning democracy to pursue.

E. In *West Coast Hotel v. Parrish* (1937), at the height of the confrontation between President Franklin Roosevelt and the Supreme Court concerning the constitutionality of the New Deal, the Court repudiated the *Lochner* era and therewith aggressive judicial protection of economic liberties under the Due Process Clauses.

1. The Court instead began to apply what has come to be known as "rational basis scrutiny" in deciding the constitutionality of economic regulations.

2. Applying this standard, the Court upheld a state minimum wage law against the challenge that it violated liberty of contract.

3. In justifying this shift, the Court took judicial notice of "recent economic experience" during the Great Depression.

4. What did Chief Justice Hughes say was wrong in *Lochner*?

   a. He writes: "The Constitution does not speak of freedom of contract."

   b. Rather, "it speaks of liberty and prohibits the deprivation of liberty without due process of law."

   c. Before you anachronistically jump to the conclusion that Hughes is prefiguring Scalia's objection to protecting "unenumerated" rights, I want to point out that he is actually saying that the Constitution protects abstract commitments to liberty and due process of law, not a particular right to liberty of contract.

5. What is Hughes's conception of "liberty"? "[T]he liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people."

6. What, in Hughes's view, constitutes due process of law? "[R]egulation [A]

which is reasonable in relation to its subject and [B] is adopted in the interests of the community is due process."

a. Sound familiar? A version of deferential rational basis scrutiny.

b. (A) contemplates scrutiny of the fit between means and end and

c. (B) contemplates that the law must further a legitimate, general governmental interest.

7. He also observes that liberty and due process permit pervasive and manifold regulations of economic liberties to promote goods that are important to the general public.

8. Hence, the stringent scrutiny that *Lochner* applied to such regulations is not warranted.

9. Government need not have a compelling reason—a good or adequate reason will do—to justify economic regulations (a reason that can withstand the level of scrutiny contemplated in *West Coast Hotel*).

10. The government most certainly had such reasons to support the economic regulations at issue in *Lochner* and *West Coast Hotel*.

11. In fact, as Harlan pointed out in dissent in *Lochner*, the regulation was abundantly justified as a health regulation.

12. Hughes argues, in short, that the liberty safeguarded by our Constitution is ordered liberty—requiring adequate reasons for the regulation of liberty—not a libertarian conception of liberty.

F. Although it may not have been clear from *West Coast Hotel* in 1937, the Court left undisturbed the cases from the *Lochner* era protecting personal liberties (such as the right to direct the upbringing and education of children in *Meyer* and *Pierce*) as distinguished from economic liberties (such as liberty to contract in *Lochner*).

1. Ultimately the Court built upon the former cases from 1965 to the present in protecting substantive personal liberties, including those at issue in *Roe* and *Obergefell*.

2. A recurring issue surrounding judicial protection of substantive liberties is that of the so-called double standard concerning economic liberties as distinguished from personal liberties.

3. The question is whether the Supreme Court can justify aggressively protecting personal liberties while deferring to legislative regulation of economic liberties.

4. Put more concretely, can the Court simultaneously justify its repudiation of *Lochner*'s aggressive judicial protection for economic liberties and its embrace of *Roe*'s and *Obergefell*'s aggressive judicial protection for personal liberties?

IV. WHAT HAVE CRITICS OF *ROE*, *CASEY*, AND *OBERGEFELL* SAID WAS WRONG IN *LOCHNER*?

A. In considering this question, I want to begin with the most famous scholarly account of what was wrong in *Lochner* (and related charge that *Roe* engaged in Lochnering).

B. In 1973, in *The Wages of Crying Wolf,* Ely advanced a famous critique of *Roe* by analogy to the fable of the boy who cried "wolf." The wolf, of course, is *Lochner.*

1. I interpret Ely's fable as follows: Since *West Coast Hotel* officially repudiated *Lochner*'s special judicial protection for substantive economic liberties, every time the Supreme Court has given heightened judicial protection to any constitutional value in any decision, judges and commentators alike have cried "*Lochner.*" They have done so frequently and indiscriminately, regardless of whether the decisions in question could be justified, on the basis of inferences from the text, history, or structure of the Constitution, as being within the *Carolene Products* paradigm and its underlying theory of representative democracy. Therefore, when a real case of Lochnering came along, in the form of *Roe,* judges and commentators ignored the cry of "*Lochner.*" They had heard that cry too often.

2. The point of Ely's fable is that judges and commentators should not have cried "*Lochner*" so indiscriminately.

3. He offers a discriminating account: "What is frightening about *Roe* is that [this] super-protected right is not inferable from the language of the Constitution, the framers' thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation's governmental structure. Nor is it explainable in terms of the unusual political impotence of the group judicially protected vis-à-vis the interest that legislatively prevailed over it. . . . [That is, it does not come within *Carolene Products* footnote four.] And that, I believe, . . . is a charge that can responsibly be leveled at no other decision [since *West Coast Hotel* in 1937]. . . . The Court continues to disavow the philosophy of *Lochner v. New*

York. Yet . . . it is impossible candidly to regard *Roe* as the product of anything else." ["The Wages of Crying Wolf: A Comment on *Roe v. Wade*," 82 *Yale L.J.* 920, 935–36, 939 (1973).]

4. That is the moral of Ely's famous fable as of 1973. But that is not the end of his story.

C. In 1992, after the Supreme Court decided *Casey*, Ely wrote a "fan letter" to the authors of the joint opinion praising their opinion as "excellent": "not only reaching what seem to me entirely sensible results, but defending the refusal to overrule *Roe* splendidly."

1. He published this letter, along with commentary on it, in his book, *On Constitutional Ground* (1996).

2. He added: "*Roe* has contributed greatly to the more general move toward equality for women, which seems to me not only good but also in line with the central themes of our Constitution."

3. In his commentary, he said that he now sees that *Casey* is rightly decided, not just as a matter of stare decisis, but as a matter of constitutional principle, our commitment to equality for women.

4. But, speaking of *Roe* as of 1973, he added: "I don't think a principled opinion along these lines could have been written at the time."

5. As we read him, he is saying that the equality argument just wasn't available in our constitutional culture when *Roe* was decided in 1973.

6. By 1992, though, equality arguments had evolved to the point where Ely could comprehend that women are entitled to the status and benefits of equal citizenship, including reproductive freedom.

D. I seek to avoid indiscriminate charges of Lochnering by showing that each theory of constitutional interpretation and judicial review has different implications for what, if anything, was wrong with *Lochner* (as well as for the relationship between *Lochner* (i.e., judicial protection of economic liberties), on the one hand, and *Roe* and *Obergefell* (i.e., judicial protection of personal liberties), on the other).

1. I shall sketch several theories' views concerning *Lochner* in relation to *Roe* and *Obergefell*.

E. *Deferring to the Representative Processes*:

1. for those who believe that courts should defer to legislatures in all types of cases, *Lochner* was wrong simply because the Court did *not defer* to the legislature's interpretation of the Constitution as permitting the regulation of weekly working hours as a valid exercise of the police power.

2. The first Justice Harlan's dissent in *Lochner* reflects this theory.

3. On this view, what was wrong with *Lochner* is also wrong with *Roe* and *Obergefell*.

   a. In *Roe*, the Court should have deferred to the state legislature's interpretation of the Constitution as permitting it to ban abortion.

   b. In *Obergefell*, the Court should have deferred to the state legislatures' interpretation of the Constitution as permitting it to limit marriage to opposite-sex couples.

F. *Originalism*:

1. for those who profess the version of originalism that entails that courts should enforce only the rights enumerated in the text of the Constitution, *Lochner* was wrong because the Court protected *"unenumerated"* fundamental rights through the Due Process Clause.

   a. Justice Scalia espoused this view, as did Robert Bork in his book, *The Tempting of America*.

   b. From this standpoint, what was wrong with *Lochner* is also wrong with *Roe* and *Obergefell*.

      (1) As Scalia put it, *Roe* and *Casey* are wrong because the Constitution doesn't "say anything" about abortion and therefore the states may prohibit it if they choose.

      (2) And *Obergefell* is wrong because the Constitution doesn't "say anything" about marriage and therefore the states may limit it to opposite-sex couples.

G. *Reinforcing the Representative Process*:

1. for those who believe that the Constitution protects only process-oriented rights, what was wrong with *Lochner* is not that the Court protected

"unenumerated" fundamental rights through the Due Process Clause, but that it protected "unenumerated" *substantive* fundamental rights, rights that are not essential to the *processes* of representative democracy.

2. Justice (later Chief Justice) Stone's footnote four in *United States v. Carolene Products Co.* (1938)—as articulated by John Hart Ely's influential book, *Democracy and Distrust*—reflects this vision.

3. On this view, what was wrong with *Lochner* is also wrong with *Roe* (as a matter of substantive due process).

    a. But Ely subsequently came to see *Casey* as rightly decided (on the basis of the Equal Protection Clause's commitment to gender equality).

4. And he would view *Obergefell* as rightly decided (though under the Equal Protection Clause, not the Due Process Clause) because denying the fundamental right to marry to same-sex couples denies them the status and benefits of equal citizenship

H. *Protecting Fundamental Rights: Personal Liberties*:

1. for those who believe that the Constitution protects not only process-oriented rights, but also substantive fundamental rights essential to personal autonomy, the problem with *Lochner* is that the Court protected the *wrong* substantive fundamental rights, that is, economic liberties as distinguished from personal liberties.

2. Justices Douglas, Brennan, Blackmun, and Stevens, among others, took this view.

3. As did the joint opinion of Justices O'Connor, Kennedy, and Souter in *Casey*.

4. From this standpoint, the Court was wrong to protect substantive *economic* liberties in *Lochner*, but right to protect substantive *personal* liberties in *Roe*, *Casey*, and *Obergefell*.

5. Here we see the most common version of the "double standard."

6. The Supreme Court has taken this view.

I. *Reinforcing Deliberative Democracy/Status Quo Neutrality*:

1. for those who believe that the Constitution establishes a scheme of "deliberative democracy," what was wrong with *Lochner* has nothing to do with protecting "unenumerated" substantive fundamental rights: it was *status quo neutrality*, that the Court took the status quo of existing distributions of wealth and political power as neutral and presumptively justified, such that any governmental regulation of them was presumptively partisan and unconstitutional.

2. Cass Sunstein has articulated the best-known version of this view.

3. This formulation tracks my analysis of Holmes's dissent in *Lochner* regarding "natural and familiar."

4. From this viewpoint, what was wrong with *Lochner* is unrelated to *Roe* and *Obergefell* because, far from evincing status quo neutrality, the latter cases are justified on the basis of an anti-caste principle of equality that is critical of the status quo.

5. Indeed, *Roe* and *Obergefell* are tantamount to a *Brown v. Board of Education* (1954) for women and for gays and lesbians, vital to securing the status and benefits of equal citizenship for them.

6. Here we see another version of the "double standard."

J. *A Variation on Protecting Fundamental Rights: Personal Liberties & Reinforcing Deliberative Democracy*:

1. On this variation, economic liberties and property rights, like personal liberties, are fundamental liberties secured by the Constitution.

    a. In fact, economic liberties and property rights are so fundamental in the constitutional scheme, and so sacred in the constitutional culture, that there is no need and no good argument for aggressive judicial protection of them.

    b. Rather, such liberties are understood properly as "judicially underenforced norms," to use Lawrence G. Sager's term.

    c. As Cass Sunstein would put it, their fuller enforcement and protection is secure with legislatures and executives in "the Constitution outside the courts."

2. On this view, the Court was wrong to protect substantive *economic* liberties

in *Lochner*, but right to protect substantive *personal* liberties in *Roe* and *Obergefell*.

a. For the latter basic liberties are vulnerable in the political process.

b. Vulnerable to majoritarian efforts to coerce conceptions of the good life, such as how best to respect the sanctity of life.

c. And vulnerable to majoritarian efforts to deny the status and benefits of equal citizenship to some, including women and gays and lesbians.

3. This is the view that I defend.

K. I want to point out that on four of these understandings—Ely's, Justice Brennan's, Sunstein's, and my own—the "grave errors" of *Lochner* are not present in *Obergefell* (nor in *Casey*).

L. Let's go back through these theories and ask whether they are right about what was wrong in *Lochner*. I am going to test them against the background of our constitutional law in general as well as our practice of substantive due process in particular.

1. *Deferring to the Representative Processes:*

a. Failing to defer to the representative process—without more—cannot be what is wrong in *Lochner* because in many circumstances the Supreme Court does not defer to legislatures but applies some more stringent level of scrutiny.

b. E.g., First Amendment protection of freedom of speech and freedom of religion, with strict scrutiny of certain forms of regulation and intermediate scrutiny of others.

c. Also Equal Protection Clause, with strict scrutiny of racial classifications, intermediate scrutiny of gender classifications, and rational basis scrutiny with bite of sexual orientation classifications.

d. And Due Process Clause, with a continuum of standards more stringent than deferential rational basis scrutiny for basic liberties.

e. What is wrong in *Lochner* has to be something more specifically wrong about stringent scrutiny of economic regulations.

2. *Originalism:*

   a. Failing to follow original meaning, narrowly conceived, and protecting "unenumerated" fundamental rights, cannot be what is wrong in *Lochner* because we have a durable practice in constitutional law of protecting "unenumerated" fundamental rights essential to the concept of ordered liberty.

   b. Roberts himself conceded the legitimacy of this practice in *Obergefell*; he wanted to narrow it, not repudiate it.

   c. What is wrong with *Lochner* has to be something more specifically wrong about stringent scrutiny protecting economic liberties.

   d. Besides, let's not forget Justice Sutherland's argument in dissent in *West Coast Hotel* that original understanding of the Due Process Clauses requires aggressive judicial protection for economic liberties.

3. *Reinforcing the Representative Process:*

   a. Protecting "unenumerated" substantive fundamental rights—without more—cannot be what is wrong in *Lochner* because we have a durable practice in constitutional law of protecting "unenumerated" substantive fundamental rights essential to the concept of ordered liberty.

   b. But this view is right that regulation of economic liberties does not present a situation of distrust of the political processes warranting more searching judicial scrutiny. (*Carolene Products* footnote four)

4. *Protecting Fundamental Rights: Personal Liberties:*

   a. Viewing economic liberties as fundamental cannot be what is wrong in *Lochner* because economic liberties surely are fundamental in our country and under our Constitution.

   b. What was wrong has to be something about the Court's aggressive judicial protection of economic liberties.

5. *Reinforcing Deliberative Democracy/Status Quo Neutrality:*

   a. Status quo neutrality is a cogent account of what was wrong in *Lochner*.

b. It tracks important parts of Holmes's contemporaneous account: "natural and familiar" versus "novel and shocking."

c. And status quo neutrality is not present in our durable practice of substantive due process, especially not in the cases we have been discussing, *Roe*, *Casey*, and *Obergefell*.

(1) All involve challenges to the status quo in pursuit of realizing aspirational principles of liberty or equality.

(2) E.g., efforts to attain the status and benefits of equal citizenship for women (*Roe* and *Casey*) and gays and lesbians (*Obergefell*).

M. It is striking that Justices Harlan and Holmes in dissent in *Lochner* and Chief Justice Hughes for the majority in *West Coast Hotel* did not make the objections to *Lochner* that are most common in today's criticisms of "Lochnering"—the most common criticisms of *Roe*, *Casey*, and *Obergefell*.

1. No one objected to the Court's protecting "unenumerated" rights as such.

a. To be sure, Hughes does say that "the Constitution does not speak of freedom of contract."

b. But he is arguing that the Constitution does not protect a particular right to liberty of contract; instead, it protects a more abstract right to ordered liberty and due process.

2. No one objected that protecting substantive liberties under the Due Process Clause was a "contradiction in terms"—or that the Due Process Clause is the due PROCESS clause and therefore that it protects only procedural rights.

a. Jamal Greene: that objection/meme begins in 1980 with Ely.

b. And Scalia followed with a version of it.

3. No one objected that protecting liberty of contract was not within the original meaning of the Constitution.

a. To the contrary, as noted above, Justice Sutherland, in dissent in *West Coast Hotel*, forcefully argued that protecting liberty of contract stringently as in *Lochner* is required to be faithful to the original

meaning of the Constitution.

b. As do many contemporary libertarians.

4. And so, the invocation of the ghost of *Lochner* in contemporary constitutional law may tell us more about what frightens people today in *Roe*, *Casey*, and *Obergefell* than about what was wrong or even horrible in *Lochner* itself!

V. *LOCHNER*'S REHABILITATION AND REVENGE

A. Notwithstanding the criticisms directed at *Lochner* all this time, some conservatives have argued in recent years that *Lochner*, properly understood and reconstructed, was rightly decided after all.

1. Here we see a split between the "new right" originalist conservatives like Justice Scalia (who criticize *Lochner*) and the "old right" libertarian conservatives like Bernard Siegan, Richard Epstein, Randy Barnett, and Ilya Somin (who defend or reconstruct it).

2. I draw this distinction from Stephen Macedo's book, *The New Right versus the Constitution* (1987).

3. The new, originalist right has argued for "judicial restraint," while the old, libertarian right has argued for aggressive judicial protection of what they see as constitutionalist limitations upon majorities.

B. *Protecting Fundamental Rights (Libertarian):*

1. Some of the old, libertarian right conservatives argue that *Lochner* was decided rightly, and the Court should revive aggressive judicial protection of economic liberties as well as personal liberties through the Due Process Clause.

2. In short, the Court should abandon the "double standard."

3. This view entails that *Lochner* along with *Roe* and *Obergefell* were decided rightly—all involved judicial protection of basic liberties that are fundamental or integral to personhood, liberty, or autonomy.

C. *Protecting Fundamental rights (Conservative):*

1. Others argue that *Lochner* was decided rightly, and the Court should revive aggressive judicial protection of economic liberties, but should abandon

aggressive judicial protection of personal liberties.

2. In other words, the Court should invert the "double standard."

3. On one version of this view, *Lochner* should have been decided on the basis of the Takings Clause of the Fifth Amendment and/or the Contracts Clause of Article I, Section 10, not the Due Process Clause.

4. That is, the Court should aggressively protect economic liberties that are "enumerated" in the Takings Clause and/or the Contracts Clause; but it should not aggressively protect "unenumerated" personal liberties under the Due Process Clause.

5. On such views, *Lochner* was decided rightly, but *Roe* and *Obergefell* were decided wrongly.

D. These two arguments amount to calls for *Lochner*'s rehabilitation and revenge.

1. These scholars have sought in various ways to rehabilitate *Lochner*.

2. And the ghost of *Lochner* has sought revenge on *West Coast Hotel* for forsaking aggressive judicial protection of economic liberties.

3. I shall distinguish two phases of this revenge, corresponding to the two camps of contemporary conservative constitutional theory I just distinguished: the new, originalist right and the old, libertarian right.

a. *Lochner*'s revenge, phase one, is incarnate in Bork and Scalia.

b. *Lochner*'s revenge, phase two, is embodied in Bernard Siegan, Richard Epstein, Randy Barnett, and Ilya Somin.

E. Starting with *Roe*, we see the revenge of *Lochner*, phase one.

1. As noted above, *West Coast Hotel* repudiated aggressive judicial protection of economic liberties, but time would tell that the Supreme Court did not therewith repudiate aggressive judicial protection of personal liberties that are "essential to the concept of ordered liberty." *Palko v. Connecticut* (1937).

2. *Lochner*'s revenge, phase one, is the cry by conservatives like Bork and Scalia against liberals: if, after *West Coast Hotel*, we conservatives can't have the economic liberties we hold dear (*Lochner*), you liberals can't have the personal liberties you cherish (*Roe*).

3. Why do I call this *Lochner*'s revenge: it is the revenge of conservative champions of economic liberty protected in *Lochner* against the liberals who repudiated *Lochner* in *West Coast Hotel*.

   a. First, these conservatives basically said, although we as conservatives hold economic liberties dear—and under our perfect Constitution there would be aggressive judicial protection of them as in the *Lochner* era—we are pillars of virtue and "judicial restraint"—and so we renounce such aggressive judicial protection of economic liberties under our actual Constitution.

   b. Second, these conservatives accordingly demand that liberals who cherish personal liberties—and under whose perfect Constitution there would be aggressive judicial protection of such liberties—must likewise show virtue and "judicial restraint" by abnegating such aggressive judicial protection of personal liberties under our actual Constitution.

   c. In short: conservatives of the new, originalist right purport to demonstrate their virtue by spurning *Lochner*, and they demand that liberals likewise be virtuous by repudiating *Roe*.

   d. Bork and Scalia are the most conspicuous illustrations.

      (1) Bork in his piece in Wash U L Q (saying that liberty of contract would be protected aggressively by courts under his perfect Constitution).

      (2) Scalia more implicitly (though see whether he anywhere explicitly says liberty of contract would be protected aggressively under his perfect Constitution).

      (3) ask Ken Kersch for more illustrations.

   e. You can see why it becomes important for such conservatives to vilify *Lochner* in order to take a high ground in vilifying *Roe* and liberal constitutional theory more generally.

F. During the Reagan Administration, we see the emergence of the revenge of *Lochner*, phase two.

   1. Phase two is more radical than phase one.

2. The old, libertarian right—who had championed aggressive judicial protection for economic liberties during the *Lochner* era—rises again.

3. They seek revenge on *West Coast Hotel* by claiming that *Lochner* was rightly decided after all and indeed should be rehabilitated or resurrected.

4. We see the emergence of the two varieties of old, libertarian right sketched above.

    a. The first is epitomized by Bernard Siegan, the second by Richard Epstein.

    b. Siegan would revive *Lochner* and abolish the double standard, in favor of aggressive judicial protection of not only economic liberties but also personal liberties. Put bluntly, conservatives get *Lochner* and liberals get *Roe*.

    c. Epstein would revive *Lochner* but invert the double standard, in favor of aggressive judicial protection of economic liberties but not personal liberties. Put bluntly, conservatives get *Lochner* but liberals do not get *Roe*.

G. How does Chief Justice Roberts's dissent in *Obergefell* (2015) relate to these camps of conservative constitutional theory?

1. Roberts's dissent embodies *Lochner*'s revenge, phase one (with Bork and Scalia).

2. It ignores or rejects *Lochner*'s revenge, phase two.

3. Indeed, Roberts's dissent is curiously out of step with much of contemporary conservative constitutional theory with respect to *Lochner*.

4. An entire generation of libertarian scholars has labored long and hard in rehabilitating *Lochner*.

    a. Consider, e.g., Randy Barnett and Ilya Somin.

    b. They have rejected the new, originalist right's understanding of what was wrong in *Lochner*—and its professed commitment to "judicial restraint."

c. Their rehabilitations of *Lochner* have embodied new versions of the old, libertarian right understanding that *Lochner* was rightly decided—and they are committed to reviving aggressive judicial enforcement of constitutionalist limitations upon majorities.

(1) They represent "the return of Justice George Sutherland"—to quote the title of Hadley Arkes's book.

(2) Justice Sutherland dissented in *West Coast Hotel*.

(3) They seek to restore a jurisprudence of natural rights—including economic liberties—in the form of an originalism.

d. They are representatives of the old, libertarian right who seek *Lochner*'s revenge, phase two.

5. Many of these libertarian conservatives were dismayed by Roberts's dissent in *Obergefell*.

VI. WHAT IS THE BEST ACCOUNT OF WHAT WAS WRONG IN *LOCHNER*?

A. Next, I shall develop my own account of what was wrong in *Lochner*.

1. Let me repeat the encapsulation of my view that I stated at the outset. Then I shall elaborate it.

2. Economic liberties and property rights, like personal liberties, are fundamental rights secured by our Constitution.

3. In fact, economic liberties and property rights are so fundamental in our constitutional scheme, and so sacred in our constitutional culture, that there is neither need nor good argument for aggressive judicial protection of them.

a. Rather, such liberties are understood properly as "judicially underenforced norms," to use Lawrence G. Sager's term.

b. As Cass Sunstein would put it, their fuller enforcement and protection is secure with legislatures and executives in "the Constitution outside the Courts."

B. The fact that economic liberties are fundamental by itself does not justify aggressive judicial review protecting them, for there is every indication that they can and do fend

well enough for themselves in the political process.

1. It is important to distinguish between the partial, judicially enforceable Constitution and the whole Constitution that is binding outside the courts upon legislatures, executives, and citizens generally in our constitutional democracy. Constitutional theory is broader than theory of judicial review.

2. I fear that many libertarian proponents of aggressive judicial protection for economic liberties do not recognize this distinction.

3. Apparently, they assume that if economic liberties are not stringently enforced judicially, they have no protection in our constitutional scheme!

4. What turns on this distinction is whether protection of constitutional rights is to be conceived as confined to judicial enforcement or whether it also includes enforcement by legislatures and executives.

    a. A right that is not judicially enforceable nonetheless imposes obligations upon legislatures, executives, and citizens generally to respect it or indeed to protect it affirmatively.

    b. We need to remember that legislatures and executives, as well as courts, have responsibilities to interpret the Constitution conscientiously and to secure our basic liberties.

    c. As Justice Frankfurter once put it: "Judicial review, itself a limitation on popular government, is a fundamental part of our constitutional scheme. But to the legislature no less than to courts is committed the guardianship of deeply-cherished liberties." *Minersville v. Gobitis* (1940).

C. I realize that in our current court-centered constitutional culture, this argument may be a tough sell. Indeed, it may be incomprehensible to the court-lovers among you.

1. How many of you hate and fear legislatures, especially when it comes to protecting your fundamental rights?

2. How many of you love and trust courts?

3. How many of you trust courts more than legislatures to protect your rights?

4. This may be an even tougher crowd than I had expected!

5. Let me work up to the idea that some basic liberties are properly judicially underenforced, and are secure in the Constitution outside the Courts.

D. Here, I would recall 1938, not 1937, and relate my argument to *United States v. Carolene Products Co.* and the preconditions for the trustworthiness of the outcomes of the political processes.

1. In the aftermath of the Court's repudiation of *Lochner* in *West Coast Hotel* (1937), *Carolene Products* (1938) presumed that deferential rational basis judicial review is appropriate in general and, in particular, where legislation touching upon economic liberties is concerned.

2. But footnote four intimates three exceptions where a more searching judicial scrutiny may be appropriate: (1) specific prohibitions of the Constitution; (2) restrictions on political processes; and (3) prejudice against discrete and insular minorities.

3. In *Democracy and Distrust*, Ely famously elaborated footnote four as presenting situations of "distrust":

   a. That is, situations where we could not trust the outcomes of the political processes to be legitimate.

   b. In those situations, more searching judicial scrutiny may be justifiable.

4. He argued—and he was right—that the regulation of economic liberties and property rights does not present a situation of distrust within the *Carolene Products* framework that would warrant more searching judicial protection.

5. I shall consider briefly two arguments to the contrary: one has been made by Richard Epstein (*Lochner*'s revenge, phase two), and the other might be attributed to James Madison.

E. Epstein has argued for bringing the "politics of distrust,"which has operated in the scrutiny of restrictions upon and regulations of freedom of speech, to bear upon the scrutiny of regulations of economic liberties and property rights.

1. In response, Frank Michelman argued cogently that there are "functional differences between expressive liberties on the one hand, and proprietary and economic liberties on the other, [that] can amply explain and justify a practice of exceptionally strict judicial scrutiny of laws directly infringing expressive liberties" but not proprietary and economic liberties.

2. He argued further that distrust of lawmakers should not be exaggerated into a universal solvent that corrodes the legitimacy of all legislation.

3. As I would put it, *Carolene Products* does not stem from a libertarian theory of limited government that entails distrust of all governmental regulation.

F. Madison may be invoked in support of the argument that the regulation of property rights constitutes a situation of distrust and poses dangers of a tyranny of the majority. There are three responses to this line of argument.

1. First, in response to his worry about a tyranny of the majority regarding property rights, Madison did not argue for aggressive judicial protection of such rights; instead, he argued for an "extended republic" as affording the best security against a tyranny of the majority over property rights and, for that matter, rights in general.

2. Second, William Treanor has argued that the original understanding—including Madison's understanding—supports deference to the political processes where regulation of economic liberties and property rights is concerned.

   a. Treanor advocates judicial underenforcement of such liberties, except in situations of *Carolene Products*-style distrust, for example, environmental racism.

3. Third, in any event, Madison presumably contemplated a situation more like class warfare, and a tyranny of the majority of nonwealthy over the minority of wealthy.

   a. It strains credulity to think that the regulation of economic liberties and property rights that we see today in our country involves anything like class warfare.

   b. There is arguably no country on earth where economic liberties and property rights are more secure than in ours—even without aggressive judicial protection of them, they are secure in the Constitution outside the courts.

   c. The only economic phenomenon in the United States approaching class warfare is "the war against the poor," which is waged not just by the rich but also by the middle class and indeed the working class.

d. In short, it is waged by the nonpoor.

G. A reviewer of my proposal for the book of which this lecture is a chapter, while "ha[ving] no trouble distinguishing protection of economic rights from 'personal ones,'" observed that libertarians like Randy Barnett or Ilya Somin will not be persuaded by my distinction and my argument that there is "neither need nor good argument for aggressive judicial protection of [economic liberties]."

1. With all due respect, whether I can persuade scholars like Barnett or Somin cannot be the criterion for a successful argument, any more than whether I could persuade Justice Scalia that *Roe* and *Obergefell* were rightly decided would be an appropriate criterion for success.

2. It should be enough to make a coherent, sustained argument showing the practice of substantive due process in its best light and fairly grappling with the counter-arguments.

3. The reviewer further suggests that I might address *Kelo* and "the enormous controversy it generated about the jurisprudence of eminent domain."

4. In fact, the controversy over *Kelo* confirms my argument rather than undermining it: for *Kelo* prompted the "property rights movement" including over 40 state legislatures passing laws forbidding the very kind of "taking" of property upheld in that case.

5. Clearly, *Kelo* supports my arguments that economic liberties fend quite well for themselves through the political process and that there is no need for aggressive judicial protection of them.

H. Indeed, I daresay that we need aggressive judicial protection for economic liberties about as much as we need aggressive judicial protection for my right to eat apple pie and my right to fly my flag on my front porch on the Fourth of July. Let me explain.

1. Suppose I take the view that unless there is aggressive judicial protection for a right, there is no protection for the right.

2. Suppose I decry the state of things in the U.S.A. in which there is no Supreme Court decision protecting my right to eat apple pie and my right to fly my flag on my front porch on the Fourth of July—while there are decisions protecting the right of a woman to decide whether to terminate a pregnancy and the right of a same-sex couple to marry?

3. Suppose I denounce this as an outrage—an inversion of any proper ordering

of constitutional values?

4. How should you respond to me?

5. You should say that there is no need for aggressive judicial protection of my right to eat apple pie or my right to fly my flag on my front porch.

    a. To be sure, there might be background regulations concerning the food ingredients of a pie and the fabric of a flag.

    b. But we would think that those regulations are justified by adequate reasons—health and safety reasons—and that these reasons are not mere "pretexts," notwithstanding *Lochner*.

    c. And we should have no fear that the rights to eat apple pie and to fly a flag are endangered by such regulations.

    d. We can trust that any serious attempt to restrict eating apple pie and flying flags would trigger swift and sure outrage and legislative protection, not merely judicial protection.

6. So it is with economic liberties in the U.S.A.

    a. Thus, despite the views of economic libertarians like Epstein, the opportunity for consenting adults to perform capitalistic acts in private without governmental regulation is not among the stringently judicially enforced fundamental rights.

    b. Much regulation that would be, as *Lochner* put it, "meddlesome interferences with the rights of the individual" in a libertarian, private society is legitimate, important, or even compelling in a constitutional democracy such as our own.

I. To recapitulate:

1. The fact that a right is fundamental by itself does not justify aggressive judicial review protecting it. We still need an argument that we cannot trust the ordinary political processes to respect and protect it and therefore that aggressive judicial review is warranted.

2. And the fact that there is not aggressive judicial protection for economic liberties by itself does not mean that there is no protection for such liberties.

a. Can anyone say with a straight face that there is no protection for economic liberties in the U.S.A.?

b. Or can anyone say with a straight face that there is less protection for property rights than for reproductive rights or gay and lesbian rights?

3. What types of arguments do constitutional theorists and cases typically make to justify "more searching judicial scrutiny" than deferential rational basis scrutiny?

4. Again, *Carolene Products*, as famously elaborated by Ely in *Democracy and Distrust*, outlines three situations of "distrust" warranting "more searching judicial scrutiny."

a. ~~Paragraph 1: specific prohibition, yes, but just compensation and reasonable regulation, not strict scrutiny.~~

b. ~~Paragraph 2: restrictions on the political process.~~

c. ~~Paragraph 3: prejudice against discrete and insular minorities.~~

5. To Ely's three situations of distrust, I would add a fourth: the regulation imperils a basic liberty significant for personal self-government in making the most important decisions in their lifetimes for themselves.

a. For example, by attempting to craft ideal citizens (*Meyer*, *Pierce*).

b. Or by compelling a conception of how best to respect the sanctity of life (*Roe* and *Casey*).

6. I also would add a gloss on *Carolene Products*, paragraph 3 ("prejudice against discrete and insular minorities"): the regulation denies the status and benefits of equal citizenship (*Roe*, *Casey*, and *Obergefell*).

7. My central contention is that the regulation of economic liberties does not present a situation of distrust of the ordinary political processes that would warrant more searching judicial protection.

8. Instead, it is appropriate to trust the political processes and apply the deferential scrutiny of economic regulations Hughes contemplated in *West Coast Hotel*: There generally is an adequate reason for economic regulations in the common interest and for the common good.

a. Even if we put some bite into rational basis scrutiny, they would be justified.

VII. WHAT IS THE BEST APPROACH TO VANQUISHING THE GHOST OF *LOCHNER*?

A. My approach is not to vilify *Lochner* but to justify our practice of substantive due process, including cases like *Roe*, *Casey*, and *Obergefell*.

1. In chapter 1, I listed the fundamental rights the Court has protected through substantive due process. I shall simply repeat the list here: "liberty of conscience and freedom of thought; freedom of association, including both expressive association and intimate association, whatever one's sexual orientation; the right to live with one's family, whether nuclear or extended; the right to travel or relocate; the right to marry, whatever the gender of one's partner; the right to decide whether to bear or beget children, including the rights to procreate, to use contraceptives, and to terminate a pregnancy; the right to direct the education and rearing of children, including the right to make decisions concerning their care, custody, and control; and the right to exercise dominion over one's body, including the right to bodily integrity and ultimately the right to die (at least to the extent of the right to refuse unwanted medical treatment)."

B. There are two radically different views concerning this list.

1. The first is that it is a subjective, lawless product of judicial fiat and that the enterprise is indefensibly indeterminate and irredeemably undemocratic.

2. The second is that the list represents what *Casey* and Justice John Marshall Harlan called a "rational continuum" of basic liberties stemming from "reasoned judgment" concerning "the individual's right to make certain unusually important decisions that will affect his own, or his family's, destiny."

a. It has been constructed through common law constitutional interpretation: reasoning by analogy through the line of decisions and making judgments about what basic liberties are significant for personal self-government.

3. In our book, we defend the latter view, showing the coherence and structure of this practice against arguments that it is unruly, dangerous, and downright scary.

4. I ask you: Does that list look like spooky, idiosyncratic moral predilections

some rogue justices made up in the guise of interpreting the Constitution?

a. More generally, does it look like someone has been reading his or her particular moral theory into the Constitution?

5. Or does the list represent a coherent practice of protecting basic liberties significant for deliberative autonomy, empowering people to make the most important decisions in their lifetimes for themselves, whatever their own moral theories?

6. In *The Tempting of America* (1990), Robert Bork asserted that the recognition in *Griswold* of a right to privacy amounted to "the construction of a constitutional time bomb" whose full extent we still did not know 25 years later (1990), now 52 years later (2017).

a. Where interpretation of our deepest commitments and highest aspirations is concerned, we never know their full extent in advance.

b. To carry forward Bork's explosive imagery, I contend that we have learned to live with the bomb.

7. I argue that the practice of substantive due process—protecting the basic liberties on this list—stems from reasoned judgment about the best understanding of our commitments to ordered liberty and personal self-government and about how best to build out those commitments over time with coherence and integrity.

C. My related aim is to show that the ghost of *Lochner* is an apparition fabricated by opponents of modern substantive due process.

1. The Supreme Court did not do anything *horrible*—as a matter of constitutional interpretation—in *Lochner*.

2. To be sure, the Court was *wrong* to treat liberty of contract as being in need of aggressive judicial protection.

3. But I would distinguish being horrible from simply being wrong.

4. Furthermore, the Court was wrong to fear the slippery slope concerning the police power and constitutional limitations.

5. It was wrong not to appreciate that economic liberties—though fundamental—are subject to regulation for the common good.

6. It was wrong to overlook that protection of economic liberties is secure in the Constitution outside the courts.

7. But none of these errors in *Lochner* has anything to do with *Roe*, *Casey*, and *Obergefell* or with the practice of substantive due process as such.

8. That *Lochner* was wrongly decided does not justify demonizing or throwing out the whole practice.

VIII. CONCLUSION

A. Fidelity in constitutional interpretation does not require the same level of judicial protection for fundamental economic liberties as for fundamental personal liberties.

1. Don't let the ghost of *Lochner* frighten you away from substantive due process, this noble and durable practice of protecting individuals' rights to make the most significant decisions in their lifetimes for themselves:

a. Shielded from majoritarian compulsion of persons concerning these decisions.

b. And secure in the status and benefits of equal citizenship.

2. We need the practice of substantive due process to secure the basic liberties that are preconditions for trustworthy constitutional self-government.

B. I want to close with an invocation of Shakespeare's *Henry IV Part 1* concerning the summoning of ghosts:

1. Justice Scalia, like Glendower, warned: "I can call spirits from the vasty deep." Translate: I can call the ghost of *Lochner* and warn that it will destroy the Supreme Court and the Constitution.

2. My lecture, like Hotspur, gives a rejoinder: "Why, so can I, or so can any man, But will they come when you do call for them?" Translate: calling the ghost of *Lochner* is hot air.

3. Put another way, calling the ghost of *Lochner* is like crying "wolf" in Ely's fable.

4. But there is no real ghost and no real wolf, just our practice of securing the basic liberties that are preconditions for social cooperation on the basis of

mutual respect and trust in a diverse constitutional democracy such as our own!

C. Though it has always been and likely will continue to be controversial, and though it requires complex judgments, judicial interpretation of the Constitution to protect substantive liberties has proven to be a durable feature of American constitutional practice.

a. Durable enough not to be too frightened by ghosts!