

The Trump Administration and the Law of the *Lochner* Era

MILA SOHONI*

During the Lochner era, the Supreme Court shielded liberty of contract and property rights; it privileged private ordering and restrained the reach of government regulation; and it embraced robust conceptions of national sovereignty with respect to immigration and trade. Though Lochner itself remains an anti-canonical case, many of the conceptions of rights, state power, and sovereignty embraced by the Lochner-era Court persist in legal and political discourse today. This Article shows that these ideas now have a politically powerful sponsor and proponent in the Trump Administration. The motif of a constitutional framework over a century old appears in the Trump Administration's policy positions and legal approach to areas as diverse as health insurance regulation, administrative law, regulatory reform, net neutrality, drug law, immigration, and tariffs. Grappling with these resemblances reacquaints us with some neglected aspects of the constitutional thought of our past, casts fresh light upon the unfolding events of the present day, and allows us to better anticipate what the future will bring. Mapping the grammar of rights and power that permeates the Trump Administration's agenda for government and law, this Article explains how that Administration might bend the road forward back to the past.

TABLE OF CONTENTS

INTRODUCTION	1324
I. <i>LOCHNER</i> -ERA LAW: THEN AND NOW	1330

* Professor of Law, University of San Diego School of Law; Visiting Professor of Law, Harvard Law School, Fall 2018; Visiting Professor of Law, University of Pennsylvania Law School, Spring 2018. © 2019, Mila Sohoni. For helpful comments and conversations, I thank Larry Alexander, Randy Barnett, Rebecca Brown, Barry Cushman, Don Dripps, Justin Driver, Chris Egleson, Sam Erman, Richard Fallon, Dov Fox, Jonah Gelbach, Herbert Hovenkamp, Aziz Huq, Andy Koppelman, Randy Kozel, Alex Lee, Sophia Lee, Daryl Levinson, Ken Mack, David McGowan, Elizabeth Pollman, David Pozen, Zach Price, Sabeel Rahman, Robert Rasmussen, Daphna Renan, Peter Schuck, David Schwartz, Miriam Seifter, Amanda Shanor, Kate Shaw, Ted Sichelman, Steven Smith, and Adam Zimmerman. This paper benefitted from feedback received at the National Conference of Constitutional Law Scholars at the University of Arizona School of Law, the Constitutional Law Workshop at the University of Chicago School of Law, and faculty workshops at the Cardozo Law School, the Harvard Law School, the Loyola Law School in Los Angeles, the Northwestern University Pritzker School of Law, the University of Connecticut School of Law, the University of Pennsylvania School of Law, the USC Gould School of Law, and the University of San Diego School of Law. I am grateful to the law librarians at University of Pennsylvania and USD, to Britany Kabakov for research assistance, and to USD for its generous summer support of this Article. I am also indebted to the talented editors of *The Georgetown Law Journal* for their hard work and thoughtful suggestions.

A.	THE LANDSCAPE OF <i>LOCHNER</i> -ERA LAW	1332
1.	Immigration	1335
2.	Foreign Trade	1340
B.	THE COMPLICATED QUESTION OF <i>LOCHNERISM</i> 'S "DEMISE"	1344
II.	MAKING AMERICA "LOCHNERIST" AGAIN.	1348
A.	METHODOLOGY	1348
B.	PRIVATE ORDERING AND PROTECTION FROM REGULATION.	1350
C.	INDIVIDUAL RIGHTS	1357
D.	IMMIGRATION AND SOVEREIGNTY	1365
E.	A CODA ON PREDICTION.	1370
III.	IMPLICATIONS	1372
A.	POLICING THE BORDERS: SITUATING THE TRUMP ADMINISTRATION AGENDA	1375
B.	THE COURTS AND THE PRESIDENT	1381
1.	Appointments	1381
2.	Presidents, Courts, and Constitutional Culture	1384
	CONCLUSION	1390

INTRODUCTION

For well over two years now, observers have struggled to situate the positions and policies of the Trump Administration on the political spectrum. The Administration has embraced the small-government principles that have been a conservative staple since at least the Reagan Administration, but it has joined that embrace with other positions that diverge from the contemporary conservative tradition.¹ The Trump Administration's policies have skewed toward economic nationalism rather than toward free trade;² many conservatives disagree with the

1. Christopher DeMuth, *A Trump-Ryan Constitutional Revival*, WALL ST. J. (Nov. 25, 2016, 5:11 PM), <https://www.wsj.com/articles/a-trump-ryan-constitutional-revival-1480111914> [<https://perma.cc/9C88-3A2R>] (noting that some of Trump's positions "are solidly Republican," "others are nervous-making departures," and "some are outright heresies").

2. See Exec. Order No. 13,788, 82 Fed. Reg. 18,837 (Apr. 18, 2017) [hereinafter *Buy American Order*] (announcing "the policy of the executive branch to buy American and hire American"); Ted Mann, Damien Paletta & Andrew Tangel, *Donald Trump Warns of Penalties if U.S. Firms Take Jobs Abroad*, WALL ST. J., (Dec. 1, 2016), <https://www.wsj.com/articles/trump-takes-credit-for-saving-indiana-jobs-1480628609> [<https://perma.cc/86F4-XTXU>]; William Mauldin, *Trump's Steel Tariff*

Administration's policies on immigration, a signature issue of the Trump platform;³ and the Administration's efforts to deploy funds to construct a border wall recently prompted a Congressional rebuke that drew the support of several members of the President's own party.⁴

The positions of the Trump Administration do not map easily onto the landscape of conventional partisan divides. This Article situates them instead within a different landscape—the landscape of constitutional discourse. It examines the set of ideas about the law that the Trump Administration is urging in tandem with its overall agenda for the federal government, including its implied and express conceptions of individual rights, government power, and sovereignty. It then explores the implications of this vision for our law.

A survey of the Trump Administration's legal and constitutional vision reveals a picture at once familiar and startling: it markedly resembles the conception of rights, state power, and sovereignty articulated in the constitutional jurisprudence of the Supreme Court from the late 1880s through the late 1930s—the *Lochner* era.⁵ In health law, the Trump Administration has declined to defend the constitutionality of the individual mandate and related regulatory provisions of the Affordable Care Act (ACA),⁶ and has taken administrative measures to shield the right of for-profit employers—even those without religious objections—to refuse to provide their employees with insurance coverage for contraception;⁷ these moves renovate the *Lochner*-era Court's commitment to protecting liberty of contract from state encroachment. In the immigration and trade arenas, the Trump Administration is pushing for restrictions on the entry of foreign labor and for tariffs on foreign goods on the grounds that these restrictions will safeguard

Threat Faces Resistance from Lawmakers, WALL ST. J., (June 23, 2017, 5:30 AM), <https://www.wsj.com/articles/trumps-steel-tariff-threat-faces-resistance-from-lawmakers-1498210202> [<https://perma.cc/72TZ-A8C9>]; *Why Trumponomics Won't Make America Great Again*, ECONOMIST (May 13, 2017), <https://www.economist.com/leaders/2017/05/13/why-trumponomics-wont-make-america-great-again> [<https://perma.cc/M8BD-CNPQ>] (noting Trump's support for tax cuts and deregulation, but cautioning that "to see Trumponomics as a refresh of Republican orthodoxy is a mistake—and not only because its economic nationalism is a departure for a party that has championed free trade"); see also Peter Beinart, *Trump Takes His Party Back to the 1920s*, ATLANTIC (June 14, 2018), <https://www.theatlantic.com/ideas/archive/2018/06/the-death-of-cold-war-conservatism/562811/> [<https://perma.cc/V8BT-MSWF>] (arguing that Trump foreign policy revives the isolationism of Harding, Coolidge, and Hoover).

3. See, e.g., Philip Elliott, *Why Republican Lawmakers Aren't Backing Trump on Family Separations*, TIME (June 19, 2018), <http://time.com/5315504/donald-trump-congress-immigration/> [<https://perma.cc/G4K6-B56C>].

4. See H.R.J. Res. 46, 116th Cong. (2019).

5. Legal historians have sometimes referred to this period as the era of classical legal thought. See, e.g., WILLIAM M. WIECEK, *THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886–1937*, at 3 (1998). Because my focus is on the Supreme Court's actual jurisprudence in this period rather than on the commitments of classical legal thinkers generally, I prefer the term "*Lochner* era." The constitutional law of this era departed in significant ways from the ideals of classical thinkers. See, e.g., Matthew J. Lindsay, *In Search of "Laissez-Faire Constitutionalism,"* 123 HARV. L. REV. F. 55, 61 (2010); see also *infra* note 30 (discussing the issue of periodizing the *Lochner* era). See generally *infra* Section I.A (describing the landscape of *Lochner*-era law).

6. See *infra* text accompanying notes 248–55.

7. See *infra* text accompanying notes 223–25.

American workers and industries.⁸ When lawmakers of the *Lochner* era sought to shield American workers and industries from foreign competition on the same logic, the *Lochner*-era Court upheld those parallel efforts in sweeping terms. The Trump Administration has proposed a crackdown on immigrants who have accessed public resources or funds by reviving enforcement of long-unused laws concerning “public charges”;⁹ antecedents of such policies were first proposed at the federal level during the *Lochner* era and were first upheld as constitutional by the *Lochner*-era Court. It was the *Lochner*-era Court that, by reference to the government’s *own* contract and property rights, placed the imprimatur of constitutionality upon the forerunners of the “Buy American” and “Hire American” policies that the Trump Administration now advocates.¹⁰ And the 2,000-mile-long border wall that formed the centerpiece of President Trump’s campaign (and that caused his Administration’s historically unprecedented budget standoff with Congress) is, quite simply, a physical metaphor for the linchpin of the *Lochner*-era Court’s view of the nation’s property rights; the *Lochner*-era Court regarded the sovereign, no less than the individual, as entitled to exercise freely the core element of the right of property—the right to exclude.¹¹

In these and other ways, the Trump Administration’s platform joins together “big government” nationalist, protectionist, and law-and-order planks with “small government” deregulatory and libertarian planks, altogether advancing a package of commitments that resembles that advanced in the Supreme Court’s *Lochner*-era jurisprudence. To be clear, there is no reason to think that this Administration is consciously consulting or mimicking that body of law, and indeed it has not taken the position that *Lochner* itself was correctly decided. But the Trump Administration has nonetheless pressed for results that would shield the liberty of contract and other values honored by *Lochner*-era law by using executive-branch action, advocating for legislation, and making constitutional arguments before the courts.¹² *Masterpiece Cakeshop*¹³—our own century’s “baker’s case”—offers an example of the last technique. The Trump Administration took the baker’s side, and its amicus brief before the Supreme Court advanced a First Amendment free-speech argument,¹⁴ not a *Lochner*-esque liberty of contract claim. Judicial recognition of a free-speech “out” to nondiscrimination laws could, however, pave the way to a legal regime not much different from one in which the state was forbidden from interfering with the liberty of contract of places of public

8. See *infra* text accompanying notes 186, 267–82.

9. See *infra* text accompanying notes 284–86.

10. See *infra* text accompanying notes 287–98.

11. See *infra* text accompanying notes 66–74.

12. See *infra* Part II.

13. *Masterpiece Cakeshop v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018).

14. See Brief for the United States as Amicus Curiae Supporting Petitioners at 9, *Masterpiece Cakeshop v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018) (No. 16-111).

accommodation.¹⁵ The doctrinal means utilized would be different, but the ultimate end results would not be dissimilar.

By thus looking beneath the hood of the Trump Administration's legal and political stances in a variety of domains, this Article sets out a noteworthy new instance of a presidential administration serving as the sponsor of an agenda for fundamental legal and constitutional change. Trump is not the first president whose legal positions, policy measures, and judicial appointments have appeared to reflect and advance a discernible constitutional vision.¹⁶ Franklin Roosevelt and, to a lesser degree, Reagan were both presidents who embraced a vision of constitutional powers and rights in tandem with a political agenda that specified how those powers should be used and how those rights should be protected. And some of the Trump Administration's commitments, such as advancing economic liberty through deregulation, have animated prior presidential administrations—both conservative and liberal—since the New Deal. But the Trump Administration has broken from its predecessors in the vehemence of its exclusionary stance on immigration¹⁷ and in its energetic embrace of trade protectionism.¹⁸ What makes the Trump Administration noteworthy, then, is not that it *has* a constitutional vision and agenda for legal and political change, but rather *the particular vision that it has*—a vision that splits this administration off from the mainstream conservative, neoliberal, and progressive presidential administrations of the post-New Deal period, and that can instead be understood as advancing a linked set of ideas

15. See Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205, 1229 (2014) (“[F]reedom of association has long been a key argument offered against public accommodations laws.”); *id.* at 1233 (explaining why the “strategic retreat” to the “more politically congenial ground of the First Amendment” has the potential to threaten “even the core applications of public accommodations laws”); see also Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199, 1207–09 (2015) (describing structural similarities between antiregulatory freedom of contract claims and First Amendment claims).

16. See, e.g., CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR’S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* 61–95 (2004); Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L.J. 363, 387 (2003); Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 728–29 n.180 (2005) (citing Roosevelt, Reagan, and Clinton as examples of presidents who “have had strong jurisprudential visions that pervasively informed executive conduct under their watch”); see also *infra* note 369 (collecting sources on presidential and executive-branch influence on constitutional law).

17. See, e.g., David Bier & Stuart Anderson, *House GOP Proposes Largest Restriction on Legal Immigrants Since the 1920s*, CATO INST. (Jan. 22, 2018, 2:25 PM), <https://www.cato.org/blog/house-gop-proposes-largest-restriction-legal-immigrants-1920s> [<https://perma.cc/M47B-UTKL>] (noting White House support for two bills—the Securing America’s Future Act, H.R. 4760, and the RAISE Act, S. 1720—that would cut legal immigration to an extent not seen since the Emergency Quota Act of 1921 and the Quota Act of 1924).

18. Compare Donald J. Trump, U.S. President, Inaugural Address (Jan. 20, 2017), <https://www.whitehouse.gov/briefings-statements/the-inaugural-address/> [<https://perma.cc/4NKZ-8QMY>] (“We must protect our borders from the ravages of other countries making our products, stealing our companies, and destroying our jobs. Protection will lead to great prosperity and strength.”), with President Ronald Reagan, International Trade: Radio Address to the Nation (Aug. 2, 1986), 22 WEEKLY COMP. PRES. DOC. 1031 (Aug. 11, 1986) (“[H]igh trade barriers, what is often called protectionism, undermines economic growth and destroys jobs. I don’t call it protectionism; I call it destructionism.”).

concerning government powers, individual rights, and sovereignty that hearken back to those of the *Lochner* era.

This Article maps the Trump Administration's vision for law and government and shows how this vision may place pressure on elements of the constitutional framework developed since the New Deal, while entrenching and resurrecting elements of the constitutional and legal framework that preceded the New Deal.¹⁹ It also traces the surrounding political forces and intellectual currents that may explain why that vision has today coalesced in this Administration. Many of the same deep anxieties and sharp fault lines that divided American society during the tenure of the *Lochner*-era Court seem to be again prominent in American society now—worries about immigration and a revived nativism, profound disagreements about racial equality and economic inequality, anxiety about the strength of the national economy, and unease over both the power of government and the power of concentrated wealth. Just as these forces ultimately left an imprint on the constitutional jurisprudence of the *Lochner*-era Court a hundred years ago, the interplay between these forces is today apparently shaping the Trump Administration's legal and constitutional vision, which similarly emphasizes economic liberty, private ordering, and deregulation alongside law-and-order, nationalist, and protectionist impulses. Today, the political and ideological dimensions of this agenda are naturally more salient than its legal or jurisprudential dimensions; presidential administrations tend to urge their claims in the language and register of politics and policies, rather than of law. But the barrier between constitutional law and constitutional politics is a permeable one;²⁰ constitutional law and “constitutional culture” have a dialogic relationship.²¹ It is therefore worthwhile to examine the total package of commitments advanced by the Trump Administration—its ideas about law, rights, state power, and sovereignty, as well as its immediate policy agenda—because that vision may supply an impetus to which the law will adapt in the long run.

Working through the connections between the present moment and the debates that consumed our law a century ago offers other, more particular payoffs. First, the parallels may be useful to the extent that they have predictive power. Insofar as this Administration appears to find congenial various tenets of *Lochner*-era law, understanding those tenets may help us to anticipate the kinds of legal and political moves that it and its ideological successors will place their weight behind.²² Second, these parallels illuminate the potential effects of the new influx of Trump Administration nominees to the federal courts. The arrival of these new judges may amplify an existing tendency within the courts to recreate Lochnerist

19. See *infra* Part III.

20. Richard H. Fallon, Jr., *Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age*, 96 TEX. L. REV. 487, 512–13 (2018).

21. Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003) (defining “constitutional culture” as “a specific subset of culture that encompasses extrajudicial beliefs about the substance of the Constitution”).

22. See *infra* Section II.E.

results through both constitutional and non-constitutional doctrinal pathways,²³ thereby entrenching this Administration's constitutional vision beyond this President's tenure in office. Third, the parallels help us to understand the linkages between the President's seemingly eccentric personal contributions to political discourse and his Administration's broader approach. The President's own conceptions of individual rights and constitutional values appear to diverge in startling ways from that of the post-New Deal Court, and the broadcasting of his indifference to important post-New Deal constitutional commitments should be seen as a facet of what this Article theorizes as his Administration's overall effort to return constitutional law and discourse to something more like its pre-New Deal configuration.²⁴

Two points about this project's ambitions are worth stressing at the outset. First, although this Article's framing of *Lochner*-era jurisprudence includes elements that are often cropped out of depictions of that era's law, this Article's aim is not to provide a new history of the *Lochner* era. Rather, this Article is, in essence, a project of comparative law that, by cutting across time and the branches, excavates and assimilates the ideas about law, rights, state power, and sovereignty advanced by two different institutions—the *Lochner*-era Supreme Court and the Trump Administration. These ideas can be compared—*mutatis mutandis*—notwithstanding the different institutional contexts and powers of courts and presidents.²⁵ Second, and relatedly, any candid description of such homologies must acknowledge that some aspects of the Trump Administration's agenda *cannot* be squared easily with *Lochner*-era constitutional precepts. In part, this is because time invents new issues, issues that the *Lochner*-era Court did not have any occasion to address; in part, it is because the terrain of questions addressed by the Supreme Court is not coextensive with the terrain addressed by the White House, so each will speak to some issues upon which the other remains silent. But there are also straightforward divergences between the doctrine of the past and the policies pursued by today's Administration,²⁶ and this Article seeks only to glean what is useful and noteworthy from the parallels that do exist. My goal, in short, is to detect some underlying pattern in the ideological, legal, and constitutional commitments of the incumbent Administration—insofar as that is

23. See *infra* Section III.B.1.

24. See *infra* Section III.B.2.

25. Cf. Cass R. Sunstein, *Lochnering*, 82 TEX. L. REV. 65, 70 (2003) (commenting that *West Coast Hotel* “came fairly close” to the opinion that Franklin Roosevelt might have written in that case).

26. The *Lochner*-era Court, for example, decided *Plessy v. Ferguson*, 163 U.S. 537 (1896); I do not claim that the Trump Administration is seeking to revive policies of *de jure* racial segregation. Cf. *infra* text accompanying notes 368–88 (discussing President Trump's statements about white supremacists). Several decisions of the *Lochner*-era Court approved the issuance of injunctions by federal courts that restrained the enforcement of state laws beyond just the plaintiffs; in various ongoing lawsuits, the Trump Administration has taken the position that Article III and equitable principles bar federal courts from issuing such injunctions as to federal laws and regulations. See Mila Sohoni, *The Lost History of the 'Universal Injunction'*, 133 HARV. L. REV. (forthcoming 2020). On the *Lochner*-era Court's approach to class legislation, see *infra* note 155.

possible—and to distill from it a sense of how that pattern relates to the constitutional thought of our past—insofar as that is knowable.

The Article proceeds in three parts. Part I introduces *Lochner*-era jurisprudence, taking in not only its laissez-faire aspects but also its immigration and foreign trade strands, and explains how these elements were connected to each other; it then describes how parts of that jurisprudence continue to persist in our law. Part II sets out various congruencies between *Lochner*-era jurisprudence and the Trump Administration's conceptions of rights, state power, and sovereignty. Part III contextualizes these parallels, explores their sources, and unpacks their implications. A conclusion follows.

I. *LOCHNER*-ERA LAW: THEN AND NOW

The bare facts and holding of *Lochner*—the case—hardly need recitation. In *Lochner v. New York*, the Supreme Court addressed a challenge to a state labor law that limited the number of hours that bakers could work to no more than sixty per week.²⁷ Justice Rufus Peckham, writing for the Court, explained that the law was an “unreasonable, unnecessary and arbitrary interference” with the right of bakers and their employees to contract freely.²⁸ Rejecting the state's argument that the law was a proper means of safeguarding bakers' health and safety, the Court invalidated the legislation under the Due Process Clause of the Fourteenth Amendment.²⁹

Lochner—the era—deserves a fuller introduction. That era extended from the late 1880s to the late 1930s,³⁰ from the start of the Fuller Court through most of

27. 198 U.S. 45, 68–69 (1905).

28. *Id.* at 56.

29. *Id.* at 59–61, 64. The famous dissent from Justice Holmes excoriated the Court for treating the Fourteenth Amendment as if it enacted “Mr. Herbert Spencer's Social Statics.” *Id.* at 75 (Holmes, J., dissenting). That clause, Justice Holmes remarked, “is perverted when it is held to prevent the natural outcome of a dominant opinion.” *Id.* at 75–76. See Scott Horton, *Rufus Wheeler Peckham, Jr.*, in *THE SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY* 351, 353 (Melvin I. Urofsky ed., 1994) (describing Spencer's book as “a popular and widely read presentation of the doctrine of laissez-faire”); G. Edward White, *Revisiting Substantive Due Process and Holmes's Lochner Dissent*, 63 *BROOK. L. REV.* 87, 110 (1997) (discussing Holmes's critique that the *Lochner* Court had improperly broadened the meaning of “liberty”).

30. See *supra* note 5 (regarding choice of terminology); WIECEK, *supra* note 5 (describing 1886 to 1937 as the heyday of classical legal thought). *Lochner* was decided in 1905, but the Fuller Court's pre-1905 jurisprudence already elaborated principles later applied in *Lochner*. See, e.g., *Allgeyer v. Louisiana*, 165 U.S. 578 (1897). Well before *Allgeyer*, Justice Field's dissents in *Munn v. Illinois*, 94 U.S. 113 (1877), and *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), supplied the “founding texts of *Lochner* era constitutionalism.” Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 *N.C. L. REV.* 1, 92 (1991); see Matthew J. Lindsay, *Federalism and Phantom Economic Rights in NFIB v. Sebelius*, 82 *U. CIN. L. REV.* 687, 707–08 (2014). Stephen Siegel identifies *Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362 (1894), as the first instance of the Court invalidating a law on economic substantive due process grounds. Stephen A. Siegel, *Understanding the Lochner Era: Lessons from the Controversy over Railroad and Utility Rate Regulation*, 70 *VA. L. REV.* 187, 189 n.9 (1984). The conventional end date cited for the *Lochner* era is 1937, which of course marks the decision of *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). But scholars vigorously disagree on this date, too. For example, Barry Cushman instead regards *Nebbia v. New York*, 291 U.S. 502 (1934), as the beginning of the end, while treating the decisions of *United States*

the tenure of the Hughes Court. The period's best-known cases are those in which the Court struck down economic laws that restricted the employer–employee relationship, the freedom to contract, the freedom to manufacture, and the freedom to sell goods and services.³¹ Because of the notoriety of these cases, the *Lochner* era is conventionally (and sometimes nostalgically³²) associated with notions of limited government and laissez-faire, often neatly wrapped up in the supposition that the law of the *Lochner* era is a bygone.

That picture is misleading, in that it is incomplete. The *Lochner* era coincided with the period that we now label as the heyday of classical legal thought,³³ but the Supreme Court's jurisprudence was *not* a jurisprudence of classical liberalism (or of libertarianism),³⁴ at least as we understand those terms today. The *Lochner*-era Court did frequently promote laissez-faire precepts while curbing government interventions in the marketplace, but it simultaneously—notably, in the area of immigration and foreign trade³⁵—ratified government power and market controls in ways that many modern observers would regard as neither classically liberal nor laissez-faire. And though the New Deal Court did abandon certain elements of *Lochner*-era jurisprudence, other elements of that jurisprudence endured.

The remainder of this Part first sketches the Court's jurisprudence during the *Lochner* era,³⁶ and then moves to the question of what from this landscape was abandoned and what was left intact when the Court turned its back on *Lochner*.³⁷

v. Darby Lumber Co., 312 U.S. 100 (1941), and *Wickard v. Filburn*, 317 U.S. 111 (1942), as ultimately conclusive. See BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* 154–55, 224 (1998); Laura Kalman, *Law, Politics, and the New Deal(s)*, 108 *YALE L.J.* 2165, 2183 (1999); see also Barry Cushman, *Some Varieties and Vicissitudes of Lochnerism*, 85 *B.U. L. REV.* 881, 991 (2005) (noting that it is “misleading [to] characterize *West Coast Hotel* as signaling the demise of *Lochner*”).

31. See, e.g., *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 609–11 (1936) (striking down New York women's minimum wage law); *Williams v. Standard Oil Co.*, 278 U.S. 235, 238, 245 (1929) (striking down Tennessee gasoline price-fixing statute); *Adkins v. Children's Hosp.*, 261 U.S. 525, 539, 545 (1923) (striking down D.C. women and children minimum wage law); *Adams v. Tanner*, 244 U.S. 590, 593 (1917) (striking down Washington ban on paid employment agents); *Coppage v. Kansas*, 236 U.S. 1, 6, 13 (1915) (striking down Kansas statute criminalizing coercing employees not to join labor unions); *Adair v. United States*, 208 U.S. 161, 171–72 (1908) (striking down federal statute criminalizing discrimination against an employee for being member of a labor union); *Allgeyer*, 165 U.S. at 589 (striking down Louisiana statute preventing insurance contracting out of state); see Michael J. Phillips, *Another Look at Economic Substantive Due Process*, 1987 *WIS. L. REV.* 265, 275.

32. Victoria F. Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 *CALIF. L. REV.* 751, 758 (2009) (noting the growing vein of scholarship that treats *Lochner* as standing for “a halcyon day of strong rights, an important foreboding of laissez-faire principles and skepticism about big government”).

33. WIECEK, *supra* note 5.

34. Herbert Hovenkamp, *Progressive Legal Thought*, 72 *WASH. & LEE L. REV.* 653, 678 (2015) (“The classical theory opposing regulation in the United States included a strongly moral and thus anti-libertarian set of exceptions—even permitting such things as the uncompensated shutdown of distilleries that had been legal when they were built, Sunday work, or commercial transactions.”).

35. Lindsay, *supra* note 5, at 61 (noting that the “protests” of “late-nineteenth-century ‘laissez-faireists’” against tariffs, regulations, and land grants “failed to shape either public policy or constitutional law”).

36. See *infra* Section I.A.

37. See *infra* Section I.B.

A. THE LANDSCAPE OF *LOCHNER*-ERA LAW

This section begins by reviewing the more commonly known aspects of the *Lochner*-era Court's jurisprudence—its cases dealing with the proper scope of government regulation and economic rights. It then moves on to address the relatively less well-known lines of cases concerning immigration and foreign trade also decided by the Court during this period.

The *Lochner*-era Court began from a premise that disfavored regulation and that presumptively privileged private ordering and individual liberty of action;³⁸ as Chief Justice Taft stated, “[f]reedom is the general rule, and restraint the exception.”³⁹ The *Lochner*-era Court treated the government as possessing limited “police powers,” which the government could use only in the furtherance of certain bounded aims—health, safety, and morals.⁴⁰ Another concept that played a prominent role was whether the regulated business or property was “affected with a public interest”; if so, it was susceptible to regulation and managerial control.⁴¹

The collective upshot of these doctrines was that laissez-faire was not an absolute demand in this period;⁴² rather, the *Lochner*-era Court treated some types of

38. 2 G. EDWARD WHITE, *LAW IN AMERICAN HISTORY: FROM RECONSTRUCTION THROUGH THE 1920S*, at 403 (2016) (“There was a presumption [by the *Lochner*-era Court] that the state, in whatever form, could not invade the residual liberties of citizens, or interfere with their acquisition, holding, or use of property.”); Howard Gillman, *Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties Jurisprudence*, 47 POL. RES. Q. 623, 625 (1994) (tracing the nineteenth century “limited powers-residual freedoms” model and its evolution to the modern-day “general powers-preferred freedoms” model).

39. *Charles Wolff Packing Co. v. Court of Ind. Relations*, 262 U.S. 522, 534 (1923); see also Owen M. Fiss, *Troubled Beginnings of the Modern State, 1888–1910*, in 8 THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES 389 (Stanley N. Katz ed., 1993) (noting that the “state was seen as the natural enemy of freedom”); Robert C. Post, *Defending the Lifeworld: Substantive Due Process in the Taft Court Era*, 78 B.U. L. REV. 1489, 1517 (1998) (quoting Justice Taft in *Charles Wolff Packing Co.*).

40. See Fiss, *supra* note 39, at 160–61 (explaining the “pigeonhole[s]” of the police power jurisprudence—safety, health, morals, and welfare—and how each was “carefully bounded by a number of principles”); Hovenkamp, *supra* note 34, at 678 (noting that the “health, safety, and morals triumvirate dominated constitutional discussion about the limits of economic regulation during the Gilded Age,” and noting that 1,200 cases used that phrase between 1890 and 1930).

41. Post, *supra* note 39, at 1505 (“Railroads, utilities, insurance companies, and grain elevators were examples of such property.”); *id.* at 1508 (“The function of the doctrine of ‘property affected with a public interest’ was precisely to demarcate social life in ways that would both give ample scope to the managerial requirements of the burgeoning administrative state, and yet also confine those requirements to an appropriate sphere.”). When a business was found to be affected with the public interest, the *Lochner*-era Court countenanced extensive regulatory intervention. See generally William J. Novak, *The Public Utility Idea and the Origins of Modern Business Regulation*, in CORPORATIONS AND AMERICAN DEMOCRACY 139 (Naomi R. Lamoreaux & William J. Novak eds., 2017) (discussing the role of public utility corporations in the emergent regulatory state); GAIL RADFORD, *THE RISE OF THE PUBLIC AUTHORITY: STATEBUILDING AND ECONOMIC DEVELOPMENT IN TWENTIETH-CENTURY AMERICA* (2013) (same).

42. See 2 WHITE, *supra* note 38, at 400 (“[I]n the vast majority of the cases involving due process challenges to federal and state legislation, the *Lochner*-era Court upheld the legislation.”); Post, *supra* note 39, at 1508 (cautioning “against any coarse equation of *Lochner*ism with a ‘narrow protective view of the privileges of property and business,’ or against any simple reduction of *Lochner*ism to the

government interferences with the market as permissible,⁴³ while treating others as out-of-bounds.⁴⁴ But private ordering, if not sacrosanct, was certainly privileged. The burden lay on the government to justify departures from the perceived neutral baseline set by private ordering;⁴⁵ absent a sufficient showing by the state, the Court would not countenance “mere meddling interference[] with the rights of the individual.”⁴⁶

The *Lochner*-era Court’s commitments to natural rights and to the idea of neutrality underpinned this jurisprudence. The idea that courts should protect natural rights—such as the right to liberty of contract—figured prominently in the *Lochner*-era Court’s decisions.⁴⁷ The idea of neutrality also played an important role;⁴⁸ the Court often regarded as illegitimate legislation that flowed from the impetus to enhance the bargaining power or wealth of certain groups at the expense of others.⁴⁹ Drawing together these strands, Barry Cushman has explained that “*Lochnerism* was a phenomenon with more than one face”⁵⁰:

‘concept . . . that the power of government could not legitimately be exercised to benefit one person or group at the expense of others.’”)

43. See, e.g., *Crane v. Campbell*, 245 U.S. 304, 307–08 (1917) (upholding restrictions on liquor); *Jacobson v. Massachusetts*, 197 U.S. 11, 39 (1905) (upholding mandatory smallpox vaccinations); *Holden v. Hardy*, 169 U.S. 366, 366, 398 (1898) (upholding daily restriction on number of hours for underground mining laborers).

44. See Jack M. Balkin, “*Wrong the Day It Was Decided*”: *Lochner* and Constitutional Historicism, 85 B.U. L. REV. 677, 687–88 (2005) (noting scholarly observations that “rather than reflecting a rigid ideology of laissez-faire, the [*Lochner*-era] Court’s jurisprudence represented a fairly sophisticated police power theory of limited government”); David E. Bernstein, *Lochner’s Legacy’s Legacy*, 82 TEX. L. REV. 1, 23–24, 39 (2003); see also HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF *LOCHNER* ERA POLICE POWERS JURISPRUDENCE 7, 56 (1993).

45. See, e.g., *Charles Wolff Packing Co. v. Court of Ind. Relations*, 262 U.S. 522, 534 (1923) (requiring “exceptional circumstances” to justify restraints on freedom of contract); *Adkins v. Children’s Hosp.*, 261 U.S. 525, 546 (1923); see also Post, *supra* note 39, at 1517.

46. *Lochner v. New York*, 198 U.S. 45, 61 (1905).

47. See David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 12 (2003) (“[T]he basic motivation for *Lochnerian* jurisprudence was the Justices’ belief that Americans had fundamental unenumerated constitutional rights, and that the Fourteenth Amendment’s Due Process Clause protected those rights.”); Nourse, *supra* note 32, at 762 (explaining that “rights were not textual, because to consider them textual was to belittle them. Rather, they were held by the people prior to, and did not depend upon, textual instantiation”).

48. See GILLMAN, *supra* note 44, at 12 (describing the *Lochner*-era Court’s commitment to government neutrality); see also Daryl J. Levinson, *Rights and Votes*, 121 YALE L.J. 1286, 1326–27 n.193 (2012) (“Due Process and related rights were understood to protect against ‘partial’ legislation directed at particular classes or toward ‘private’ ends.”); Cushman, *supra* note 30, at 943 (“[T]he principle of neutrality appears to have lain at the root of a significant body of the Court’s *Lochner*-era Due Process jurisprudence.”).

49. AKHIL REED AMAR, AMERICA’S UNWRITTEN CONSTITUTION 561 n.26 (2012) (“Protecting workers’ health and safety was a legitimate purpose; but it was illegitimate for government to enhance workers’ bargaining power for its own sake or to intentionally shift economic surplus from employers to employees. Thus the Court condemned any law that was a ‘labor law, pure and simple,’ in which government openly favored Labor at the expense of Capital.”).

50. Cushman, *supra* note 30, at 998.

Some *Lochnerian* decisions framed the right in question as one sounding in liberty Other decisions . . . emphasized a right sounding more in formally neutral treatment, prohibiting government from favoring one citizen over another by, for example, taking the property of A and giving it to B. Yet still other *Lochner*-era opinions . . . instead focused rather narrowly on whether the particular means employed by the regulation in question were reasonable under the circumstances.⁵¹

Cushman astutely points out the “intersect[ing]” nature of these “categories of rights”: “concern for both formally neutral treatment and the protection of fundamental liberty each found prominent expression in the opinion of the Court” and “together compris[ed] the phenomenon we have come to know as *Lochnerism*.”⁵²

Although the lion’s share of scholarly attention to the *Lochner* era has been devoted to the cases that, like *Lochner* itself, set out the constitutionally permissible bounds of domestic economic regulation of markets and workers, the *Lochner*-era Court also decided cases involving immigration, foreign relations, criminal law, and myriad other topics.⁵³ And although the Court curtailed certain exercises of federal and state regulatory power over domestic markets and workers, the Court in this period also defended and greatly expanded federal powers with respect to immigrants and foreign trade.

To some modern eyes, this juxtaposition may be jarring: as Owen Fiss posed it, “How could the Court responsible for *Lochner* also have decided . . . *Fong Yue Ting* . . . ?”⁵⁴ For that matter, how could the Court responsible for *Lochner* also have decided *Field v. Clark*,⁵⁵ or—a mere year before the *Lochner* decision—*Buttfield v. Stranahan*?⁵⁶ One might have assumed, as Fiss put it, that “a group of justices who believed in the free market and rendered decisions like *Lochner v. New York*” would also take a “special interest” in the question of “who may lawfully enter the country.”⁵⁷ One might equally have assumed that they would also

51. *Id.* at 998–99.

52. *Id.* at 999.

53. See Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 557 (1996) (“One could reasonably assume that the *Lochner* opinion, in which the Supreme Court invoked the Fourteenth Amendment Due Process Clause to invalidate a New York law limiting the hours that bakers could work, has no connection with the Fourth Amendment. In fact, the connections between the Supreme Court’s decisions interpreting the two Amendments are both fundamental and striking.”); WHITE, *supra* note 38 *passim*.

54. Fiss, *supra* note 39, at 297; see *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893) (approving the summary deportation of lawfully resident aliens on grounds that “[t]he power to exclude aliens and the power to expel them rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power”).

55. 143 U.S. 649, 692–93 (1892) (approving a delegation authorizing President to suspend duty-free imports of goods from countries that the President deemed to have imposed unjust duties on United States products).

56. 192 U.S. 470, 493 (1904) (rejecting argument that federal restrictions on imports violated a due process right to trade and asserting that “a statute which restrains the introduction of particular goods into the United States from considerations of public policy does not violate the due process clause of the Constitution”).

57. Fiss, *supra* note 39, at 301.

be specially concerned with the imposition of restrictions on the goods that may lawfully enter the country. Nowadays, it would be odd for a proponent of free markets to be indifferent to whether the federal government could cordon off markets from foreign entrants and foreign goods. But if one explores these decisions and the backdrop against which they were decided, it is possible to discern the linkages between these seemingly disconnected doctrines and the *Lochner*-era Court's commitments to individual economic liberty and market competition. The following discussion explores these links, beginning with immigration and then moving to foreign trade.

1. Immigration

The changing “ethnic, cultural and class composition of the immigrant population” between the end of the nineteenth century and World War I “triggered the explosive passions of racial and religious prejudice, fears of revolutionary contagion, class conflict, and other deep-seated animosities.”⁵⁸ As the twentieth century dawned, “apprehensiveness about ‘aliens’ had become a familiar feature of American life.”⁵⁹ As a result, “[p]owerful pressures to limit both the level of immigration and the rights of aliens consequently developed.”⁶⁰ Convinced that many immigrants were criminals, or at least morally deficient, the lawmakers of the *Lochner* era enacted federal immigration provisions that would authorize exclusion and deportation of criminal non-citizens on the basis of ill-defined offenses such as “moral turpitude.”⁶¹ In 1920, Congress debated imposing a full moratorium on immigration, hearing as evidence a report from New York that “all of the homicides and most of the graver, most desperate, and heinous crimes were committed by foreigners.”⁶² The *Lochner* era also saw the creation of the U.S. Border Patrol in 1924, and with it the first serious efforts to enforce immigration restrictions at the United States’ border with Mexico,⁶³ as well as the nation’s

58. PETER H. SCHUCK, *CITIZENS, STRANGERS, AND IN-BETWEENS: ESSAYS ON IMMIGRATION AND CITIZENSHIP* 23 (1998). Writing of 1876 to 1898, Rogers Smith notes that “the era of Alger and Carnegie was equally the era of Chinese exclusion . . . [and] the emergence of the literary test and other proposals to curb non-Nordic immigration . . . It was, in short, the era of the militant WASP, whose concerns to protect and enhance his cultural hegemony were vastly more pronounced in citizenship laws than efforts to aid capitalism.” ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* 348 (1997).

59. WHITE, *supra* note 38, at 163.

60. SCHUCK, *supra* note 58, at 23.

61. See *Developments in the Law: Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1301–02 (1983) (“Aliens were understood to present a direct threat to the continued existence and security of the nation.”); Emily C. Torstveit Ngara, *Aliens, Aggravated Felons, and Worse: When Words Breed Fear and Fear Breeds Injustice*, 12 STAN. J. C.R. & C.L. 389, 401–02 (2016).

62. Ngara, *supra* note 61, at 401–02 (quoting 60 CONG. REC. 133 (1920)).

63. See MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 64 (2004) (“Before the 1920s the Immigration Service paid little attention to the nation’s land borders.”); *id.* at 64–71 (describing immigration acts of 1924 and 1929).

first national-origin quotas.⁶⁴ Although “[d]eportation was not invented in the 1920s . . . it was then that it came of age.”⁶⁵

In the courts, the *Lochner* era marked the birth of the plenary power doctrine⁶⁶ and of “classical” immigration law. Because this body of law adhered to “the highly individualistic values that underlay the prevailing social and legal order,”⁶⁷ it is useful to pause briefly to probe some aspects of that “prevailing . . . order.”

As Duncan Kennedy framed it, “[t]he premise of [classical legal thought] was that the legal system consisted of a set of institutions, each of which had the traits of a legal actor.”⁶⁸ Within each “sphere”—whether the sphere of the individual or the sphere of the nation—“power . . . was absolute.”⁶⁹ This notion of sovereignty was fractal,⁷⁰ in the sense that the same broad conception of sovereignty and autonomy appeared at the scale of the individual and at the scale of the nation.⁷¹ For immigration, as Peter Schuck notes, this meant that the relationship between the sovereign and the alien “resembled the relationship in late nineteenth century private law between a landowner and a trespasser.”⁷² Just as the tort and property law of that era shielded the private individual’s right to exclude, “[s]overeignty entailed the unlimited power of the nation, *like that of the free individual*, to decide whether, under what conditions, and with what effects it would consent to enter into a relationship with a stranger.”⁷³ And “[t]he essential purpose of

64. See WHITE, *supra* note 38, at 148 (describing the United States’ national-origin quotas and restrictions in the 1920s after increased immigration from Europe).

65. NGAI, *supra* note 63, at 58.

66. The plenary power doctrine holds that courts will not review determinations by the political branches with respect to immigration. See LUCY E. SALYER, *LAW HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW* 31 (1995) (describing the plenary power of Congress and how immigrants were not protected); *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892) (“It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicil[e] or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government.”).

67. Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 5 (1984); see also Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 131–33 (2002).

68. DUNCAN KENNEDY, *THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT* 5–6 (1975).

69. *Id.* at 6; see, e.g., *Jacobson v. Massachusetts*, 197 U.S. 11, 29 (1905) (“There is, of course, a sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government, especially of any free government existing under a written constitution, to interfere with the exercise of that will.”).

70. My thanks to Kiel Brennan-Marquez for suggesting this term.

71. KENNEDY, *supra* note 68, at 6 (“[A]ll the actors held formally identical powers of absolute dominion . . .”).

72. Schuck, *supra* note 67, at 7; see also *id.* at 6 (noting that although “individual[] sovereignty” in this period was protected by “an array of private property rights,” governmental sovereignty was protected by “analogous public property rights” and that individuals “enjoyed a plenary right to exclude trespassers, including those who had entered with the owner’s permission but had violated the conditions under which the permission was granted”).

73. *Id.* (emphasis added); see also *id.* (the only legal obligations owed either by individuals or sovereigns were those that they had voluntarily undertaken—“[t]hat a stranger was desperate to enter,

immigration law, . . . like that of property law, was to preserve and enhance this sovereignty.”⁷⁴

The “right–privilege” distinction that was a general fixture of *Lochner*-era jurisprudential thought also influenced the Court’s immigration decisions. Traditional property rights commanded solicitude, but privileges conferred by the government were rescindable at will; “new property” was a long way from being invented.⁷⁵ In the right–privilege rubric, the alien possessed only a privilege to enter the United States, and it was a privilege that could be conditioned at the sovereign’s will and revoked at any time.⁷⁶ By mediating the nation’s relationship with immigrants, the right–privilege distinction offered “a seductive principle through which the dominant ideas of consent, sovereignty, and national community could be vindicated.”⁷⁷

Finally, classical immigration law was also shaped by then-prevailing conceptions of the *individual* right to contract and of fair competition. Policymakers in that era took pains to explain that too much labor competition—“an excess of economic competitiveness” caused by an influx of “foreign pauper laborers” who were “willing[] to work for virtually any wage”—might also “degrad[e] the labor market.”⁷⁸ In the thinking of the time, permissive immigration laws produced a skewed labor market that “robbed ‘American’ workers of the income required to secure for their families a ‘civilized’ standard of living,”⁷⁹ and thereby threatened the ability of American workers to compete for wages in a fair, competitive market. The Court deferred to efforts by Congress to halt an “influx” of

and had invested a great deal in the effort, was as immaterial as the reasons that prompted the government to refuse her admittance”).

74. *Id.* at 7; see also SALYER, *supra* note 66, at 248 (tracing the connection between inherent sovereign power, “the plenary power to exclude and deport,” the “power to devise whatever procedures [Congress] desired to implement its policies,” and the “other premises of immigration law, which placed a high premium on government objectives and saw aliens’ rights as virtually nonexistent”).

75. See Goldberg v. Kelly, 397 U.S. 254, 262 n.8 (1970) (“It may be realistic today to regard welfare entitlements as more like ‘property’ than a ‘gratuity.’ Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property.” (citing Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964))).

76. See *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889) (“Whatever license, therefore, Chinese laborers may have obtained, previous to the act of October 1, 1888, to return to the United States after their departure, is held at the will of the government, revocable at any time, at its pleasure.”).

77. Schuck, *supra* note 67, at 48–49.

78. Matthew J. Lindsay, *Immigration as Invasion: Sovereignty, Security, and the Origins of the Federal Immigration Power*, 45 HARV. C.R.-C.L. L. REV. 1, 7 (2010) [hereinafter Lindsay, *Immigration as Invasion*] (emphasis omitted); see also Matthew J. Lindsay, *Preserving the Exceptional Republic: Political Economy, Race, and the Federalization of American Immigration Law*, 17 YALE J.L. & HUMAN. 181, 220–23 (2005) [hereinafter Lindsay, *Preserving the Exceptional*] (“Pauper labor presented a problem that, in the mid-1880s, eclipsed earlier concerns As one Senate Republican explained in *The Forum*, a leading public affairs magazine, there is ‘a constantly increasing influx within our borders of classes of immigrants of a most undesirable character. The danger is the reduction of wages, to the injury of the American workman and his home and family, the debasement of the suffrage, and a wide contamination of society.’ The undesirable quality of such classes lay not in their dependency or refusal to labor for a wage, but rather in their willingness to labor for virtually any wage.”).

79. Lindsay, *Immigration as Invasion*, *supra* note 78, at 14 n.46.

“cheap unskilled labor” that could “degrade American labor.”⁸⁰ The minister in the famous *Holy Trinity Church v. United States* won his case partly because “[i]t was never suggested that . . . the market for the services of Christian ministers was depressed by foreign competition.”⁸¹

These notions of sovereignty, rights, privileges, and fair competition collectively help to illuminate how it came to be that the same Court that decided *Lochner* also decided the Chinese exclusion cases as the *Lochner* era dawned.⁸² In *Chae Chan Ping v. United States*,⁸³ although the immigrant’s “arguments expressed prestigious liberal traditions of procedural and economic rights that had been reinforced by the free labor ideology of the postwar constitutional amendments,” Justice Field, who was “so often the champion of economic liberties and contractual rights, rejected them here for a stonefaced Supreme Court.”⁸⁴ Justice Field began his opinion by criticizing the opening of America’s borders to Chinese immigration on the basis that the actual experience of two decades of Chinese immigration had belied the “general” and “confidently expressed” notion that “great benefits would follow to the world generally and especially to the United States” by allowing free migration.⁸⁵ Rather, Justice Field claimed, the competitiveness of domestic workers was undercut by the arrival of these new migrants: “‘content with the simplest fare, such as would not suffice for our laborers and artisans,’ and without families to support, the labor market competition ‘between them and our people was . . . altogether in their favor.’”⁸⁶ If one’s main concern is with preventing legislative meddling with the right of domestic workers to contract to earn a living,⁸⁷ then a permissive immigration system created by a treaty may seem no different than a legislative restriction on wages or hours—both are state interventions that distort the market for domestic labor, and both will therefore be suspect. Although the rhetoric of these cases was suffused

80. *Holy Trinity Church v. United States*, 143 U.S. 457, 464–65 (1892).

81. *Id.* at 464; *see also id.* at 465 (“The inevitable tendency of [the presence of immigrants] among us is to degrade American labor, and to reduce it to the level of the imported pauper labor.” (quoting 48 CONG. REC. 5359 (1884))); *id.* at 464 (“It appears, also, from the petitions, and in the testimony presented before the committees of Congress, that it was this cheap unskilled labor which was making the trouble, and the influx of which Congress sought to prevent.”); *id.* at 465 (“[T]he intent of Congress was simply to stay the influx of this cheap unskilled labor.”).

82. *See Wong Wing v. United States*, 163 U.S. 228, 237 (1896); *Fong Yue Ting v. United States*, 149 U.S. 698, 728–32 (1893); *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889); *see also* SALYER, *supra* note 66, at 52–53 (describing *Fong Yue Ting*’s repercussions).

83. *Chae Chan Ping*, 130 U.S. 581. *Chae Chan Ping* had lived in the United States for twelve years. He had obtained the required certificate of re-entry before making a trip to visit China. But when he sought to return to the United States, he was barred from doing so because a new federal law, enacted a few days before his return, blocked entry of all Chinese workers, even those who had valid re-entry certificates. *Id.* at 581–83.

84. SMITH, *supra* note 58, at 367.

85. *Chae Chan Ping*, 130 U.S. at 592.

86. Lindsay, *Immigration as Invasion*, *supra* note 78, at 41–42 (quoting *Chae Chan Ping*, 130 U.S. at 595).

87. Martha Minow, *Confronting the Seduction of Choice: Law, Education, and American Pluralism*, 120 YALE L.J. 814, 819 (2011) (noting *Lochner*-era Court’s commitment to secure “people’s ability to earn a living”).

with racist sentiments and with dark invocations of national security concerns,⁸⁸ these cases turned on more than just racial prejudice; they also pivoted on the Court's conception of what counted as a fairly competitive domestic labor market.⁸⁹

The *Lochner*-era Court's solicitude for the right of property shaped its immigration jurisprudence in another and more direct way: the Court endorsed the idea that the government had the power, as steward of its own property, to refrain from spending public resources on immigrants and aliens. Soon after the decision in *Chae Chan Ping*, Congress enacted the Immigration Act of 1891.⁹⁰ This law made an important change to the federal law of immigration, a change that remains on the books today: "it supplemented the previous list of excludable classes with 'persons likely to become a public charge.'" ⁹¹ In a case brought by a Japanese woman who was alleged to be excludable because she was "liable to become a public charge,"⁹² the Court upheld the Act in sweeping terms in an opinion that laid the foundation of the plenary power doctrine.⁹³

On similar logic, the *Lochner*-era Court sustained several states' laws that restricted the ability of aliens to enter certain kinds of private contracts—for example, contracts to own or to farm agricultural land, or to access natural resources such as wild game. The *Lochner*-era Court sustained the anti-alien land acts of several western states on the logic that the "safety and power of the State itself" could be affected by "[t]he quality and allegiance of those who own, occupy and use the farm lands within its borders."⁹⁴ The *Lochner*-era Court ruled that the state's prerogative over property in which the state had a "special public interest"

88. See *Fong Yue Ting v. United States*, 149 U.S. 698, 717 (1893) ("[T]he presence within our territory of large numbers of Chinese laborers . . . might endanger good order, and be injurious to the public interests."); *Chae Chan Ping*, 130 U.S. at 594–95 (discussing the "great danger" arising in California that "that portion of our country would be overrun by [Chinese immigrants] unless prompt action was taken to restrict their immigration.").

89. See *Chae Chan Ping*, 130 U.S. at 594–95 ("[A]s their numbers increased, they began to engage in various mechanical pursuits and trades, and thus came in competition with our artisans and mechanics, as well as our laborers in the field."); SALYER, *supra* note 66, at 15 ("The proponents of Chinese restriction warned of the economic threat Chinese immigrants posed to the well-being of American laborers.").

90. See Act of Mar. 3, 1891, ch. 551, § 1, 26 Stat. 1085; SALYER, *supra* note 66, at 28–32.

91. Lindsay, *Immigration as Invasion*, *supra* note 78, at 46 (quoting Act of Mar. 3, 1891 § 1); see also *Nishimura Ekiu v. United States*, 142 U.S. 651, 662–64 (1892) (describing Act).

92. Lindsay, *Immigration as Invasion*, *supra* note 78, at 47–49 (citing *Nishimura Ekiu*, 142 U.S. at 656, 664).

93. See *Nishimura Ekiu*, 142 U.S. at 659–60, 664; *Turner v. Williams*, 194 U.S. 279, 291 (1904) ("No limits can be put by the courts upon the power of Congress to protect, by summary methods, the country from the advent of aliens whose race or habits render them undesirable as citizens, or to expel such if they have already found their way into our land and unlawfully remain therein.").

94. *Terrace v. Thompson*, 263 U.S. 197, 221 (1923); see also *Frick v. Webb*, 263 U.S. 326, 333–34 (1923) (holding that the state had the power to "deny to ineligible aliens permission to own, lease, use or have the benefit of land within its borders for agricultural purposes"); *Webb v. O'Brien*, 263 U.S. 313, 324 (1923) ("We think it within the power of the State to deny to ineligible aliens the privilege so to use agricultural lands within its borders."); *Porterfield v. Webb*, 263 U.S. 225, 233 (1923) ("In the matter of classification, the states have wide discretion.").

overrode claims by *aliens* of the right to contract or to own property⁹⁵—and, concomitantly, the right of citizens to contract with aliens.⁹⁶ Although many of these acts faced constitutional and treaty-based challenges, “all of [the challenges] were rejected.”⁹⁷ Aspects of the *Lochner*-era Court’s jurisprudence were more solicitous toward immigrants,⁹⁸ but the *Lochner*-era Court never abandoned the substantive tenet that the federal government had the plenary power to exclude non-citizen immigrants or to set and alter the terms and conditions under which they might remain.⁹⁹

2. Foreign Trade

A similar story unfolded with respect to foreign trade. During the period from the Civil War until the Great Depression, as economic historian Douglas Irwin has explained, the chief end of American trade policy was “the restriction of imports to protect certain industries from foreign competition.”¹⁰⁰ In this era, “the

95. Doctrinally, the *Lochner*-era Court ratified these measures under the rubric of the “special public interest” that states possessed in safeguarding “either ownership of land, employment, or preservation of natural resources.” Valerie L. Barth, *Anti-Immigrant Backlash and the Role of the Judiciary: A Proposal for Heightened Review of Federal Laws Affecting Immigrants*, 29 ST. MARY’S L.J. 105, 120–23 (1997); see, e.g., *Patsone v. Pennsylvania*, 232 U.S. 138 (1914) (sustaining state restrictions on gun ownership by aliens on the grounds that wild game in the state was a public resource that the state could validly protect from non-citizens); see also *Developments in the Law*, *supra* note 61, at 1305 (“Under the ‘special public interest’ doctrine, the Supreme Court permitted states to withhold benefits from aliens in order to preserve limited public funds for the benefit of citizens.”).

96. *Webb*, 263 U.S. at 321–22 (“O’Brien, who is a citizen, has no legal right to enter into the proposed contract with Inouye, who is an ineligible Japanese alien The provision of the act which limits the privilege of ineligible aliens to acquire real property or any interest therein to that prescribed by treaty is not in conflict with the Fourteenth Amendment.”).

97. Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1655 (1997).

98. See *United States v. Wong Kim Ark*, 169 U.S. 649, 695 (1898) (extending birthright citizenship to American-born children of foreign nationals); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (concluding that aliens were “persons” entitled to equal protection of the law). The *Lochner*-era Court recognized some procedural due process protections for immigrants, particularly those who claimed to be citizens. See, e.g., *The Japanese Immigrant Case*, 189 U.S. 86, 101–02 (1903) (holding that executive officers may not take an alien into custody and deport him “without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States”). It also struck down certain state laws that restrained employment of aliens. See, e.g., *Truax v. Raich*, 239 U.S. 33, 39 (1915) (holding that state could not prohibit private businesses from employing lawfully resident aliens); see Barry Cushman, *The Secret Lives of the Four Horsemen*, 83 VA. L. REV. 559, 582–84 (1997).

99. “The basic principle of immigration law doctrine that privileged Congress’s plenary power over the individual rights of immigrants remained intact.” NGAI, *supra* note 63, at 90; see also *id.* at 77 (“By the 1920s aliens had won only a few procedural rights, among them the right to an administrative hearing and the right to counsel.”); SALYER, *supra* note 66, at 119, 182–207 (discussing the Court’s immigration jurisprudence in the early twentieth century); WHITE, *supra* note 38, at 160–66 (describing the Court’s tendency to allow summary dispositions of cases involving Chinese immigrants).

100. DOUGLAS A. IRWIN, *CLASHING OVER COMMERCE: A HISTORY OF US TRADE POLICY* 7, 689 (2017). Irwin explained that “from the establishment of the federal government until the Civil War, revenue was the key objective of trade policy,” and “from the Great Depression to the present, reciprocal trade agreements to reduce tariff and non-tariff barriers to trade have been the main priority.” *Id.* at 2. He adds that since the Great Depression, “the United States has moved from isolationism and protectionism in its trade policy to global leadership in promoting freer trade around the world.” *Id.* at 3; see also Note, *The Trade Agreements Act of 1934*, 46 YALE L.J. 647, 647 (1937) (“Although free-trade economists

economic growth and development of the United States was associated with the policy of high protective tariffs.¹⁰¹ Tariffs were a key element of the Republican Party's platform of "economic nationalism" in the latter part of the nineteenth century,¹⁰² and between 1870 and 1893, presidents of that party were able to appoint over a dozen Justices who shared that philosophy.¹⁰³ These appointments set the stage for subsequent decisions by the *Lochner*-era Court that gave the federal government greater latitude and authority in dealing with outsiders than it possessed domestically.

In its decisions concerning trade, the *Lochner*-era Court eventually embraced the idea that the federal government had unenumerated, extraconstitutional, inherent "powers of external sovereignty."¹⁰⁴ Just a year before the *Lochner* decision, *Buttfield v. Stranahan*¹⁰⁵ alluded to the idea that "the power to regulate foreign commerce is of greater scope than the power to regulate commerce among the States."¹⁰⁶ According to Edward Corwin, the Court had rejected this same proposition "no fewer than ten times prior to 1904."¹⁰⁷ Nonetheless, it thereafter became clear that whatever restrictions the Constitution imposed on congressional power concerning interstate commerce, they would not apply to

habitually win arguments, protectionists have consistently won the battles of practical politics, and the history of American tariffs from the Civil War to 1934 is a record of almost uninterrupted increases in protection, engineered by effective pressure groups, and justified by a literature of economic nationalism.").

101. IRWIN, *supra* note 100, at 25.

102. Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891*, 96 AM. POL. SCI. REV. 511, 516 (2002) (describing "economic nationalism" and noting that "Republican national party platforms during this period were distinguished by their consistent support for tariff protection and the gold standard").

103. *See id.* at 518 ("A review of the 15 justices who were appointed between 1870 and 1893 confirms that they 'were selected by presidents and confirmed by senators who carefully noted both their devotion to party principles and 'soundness' on the major economic questions of the day These nominees were not always of one mind on all issues relating to economic nationalism. Still, it still [is] worth emphasizing that all of these nominees fit within a fairly narrow ideological space"); Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27, 30–31 (2005) ("In the second half of the nineteenth century the Republican Party's judicial appointments promoted that party's favored policies of economic nationalism.").

104. G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* 73–75 (2000); *see also* Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 854 (1987) (noting that for the first one hundred years of American history, "there was no suggestion that the international sovereignty of the United States implied powers for the federal government not enumerated in the Constitution").

105. 192 U.S. 470 (1904).

106. Edward S. Corwin, *Standpoint in Constitutional Law*, 17 B.U. L. REV. 513, 525–26 (1937); *see also Buttfield*, 192 U.S. at 492–93 ("Whatever difference of opinion, if any, may have existed or does exist concerning the limitations of the power, resulting from other provisions of the Constitution, *so far as interstate commerce is concerned*, it is not to be doubted that from the beginning Congress has exercised a plenary power in respect to the exclusion of merchandise brought from foreign countries; not alone directly by the enactment of embargo statutes, but indirectly as a necessary result of provisions contained in tariff legislation." (emphasis added)).

107. Corwin, *supra* note 106, at 526.

foreign commerce.¹⁰⁸ The Court rejected the idea that individual economic due process rights could obstruct the exercise of federal power to regulate foreign trade:¹⁰⁹ “so complete is the authority of Congress over the subject that no one can be said to have a vested right to carry on foreign commerce with the United States.”¹¹⁰ Nor did the nondelegation doctrine prove a bar.¹¹¹ The *Lochner*-era Court—in *Field v. Clark*,¹¹² *J.W. Hampton, Jr. & Co. v. United States*,¹¹³ and *United States v. Curtiss-Wright Export Corp.*¹¹⁴—issued landmark holdings that allowed Congress to delegate to the President broad authority to set tariffs upon foreign trade and to restrict the import or export of goods.

Laissez-faire theorists of the nineteenth century complained that protective tariffs were “special legislation”¹¹⁵—legislation that impermissibly favored the interests of a chosen few at the expense of the many. Protectionists, on the other hand, “justified the protective tariff on the grounds that it protected American workers from competition with products made by cheap foreign labor.”¹¹⁶ Why did the *Lochner*-era Court’s rulings effectively side with the latter instead of the former? The tariff cases can best be understood as a facet of the Court’s broader project in this period of constructing a *national* domestic economy.¹¹⁷ The tariff

108. See *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 434 (1932) (“In the regulation of foreign commerce an embargo is admissible; but it reasonably cannot be thought that, in respect of legitimate and unobjectionable articles, an embargo would be admissible as a regulation of interstate commerce, since the primary purpose of the clause in respect of the latter was to secure freedom of commercial intercourse among the states.”).

109. See *Buttfield*, 192 U.S. at 493 (“[N]o individual has a vested right to trade with foreign nations, which is so broad in character as to limit and restrict the power of Congress to determine what articles of merchandise may be imported into this country and the terms upon which a right to import may be exercised. This being true, it results that a statute which restrains the introduction of particular goods into the United States from considerations of public policy does not violate the due process clause of the Constitution.”).

110. *The Abby Dodge*, 223 U.S. 166, 176–77 (1912).

111. See WHITE, *supra* note 104, at 34 (noting that the early twentieth century “transformation in constitutional foreign relations jurisprudence” that established “the principle of virtually limitless federal executive discretion in foreign affairs policymaking” occurred “at the same time that a Court majority was resisting extensions of federal power in the domestic arena”).

112. 143 U.S. 649, 692–93 (1892); see WHITE, *supra* note 104, at 37 (noting that *Field* examined a “new form of executive foreign affairs policymaking”).

113. 276 U.S. 394, 409–10 (1928).

114. 299 U.S. 304, 319–320 (1936).

115. Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 L. & HIST. REV. 293, 309–10 (1985).

116. *Id.* at 309; see also Daniel K. Tarullo, *Law and Politics in Twentieth Century Tariff History*, 34 UCLA L. REV. 285, 291 (1986) (“[Around 1900, protectionists] invoked a fairness argument in support of their position. They declared that all segments of society ought to participate in the nation’s growing wealth One finds frequent reference to the tariff’s role in protecting American working people from low-cost foreign labor and numerous appeals to maintain the American standard of living for all workers.”).

117. The Court used a variety of doctrinal mechanisms to achieve this end: it curbed protectionism at the state level by invalidating discriminatory state taxes against out-of-state sellers, it recognized corporations as persons entitled to Fourteenth Amendment protection, it preempted state laws it deemed inconsistent with the “uniform national law of interstate commerce,” and it reformed “procedural and jurisdictional law to enlarge the reach of the federal district courts over economic policy.” Richard C. Schragger, *The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive*

cases reflect this nationalist conception by treating the American economy as a single unit competing with the world, with the president delegated to act as the nation's negotiator in chief. As John Marshall Harlan noted in rejecting the constitutional attack levied in *Field v. Clark*,¹¹⁸ it was

often desirable, if not essential for the protection of the interests of our people, against the unfriendly or discriminating regulations established by foreign governments, in the interests of their people, to invest the President with large discretion in matters arising out of the execution of statutes relating to trade and commerce.¹¹⁹

A later case would likewise approve the federal government's power "to encourage the growth of *the industries of the Nation* by protecting home production against foreign competition."¹²⁰ Although the Justices would have understood that a fragmented set of winners and losers within the country would differentially bear the benefits and burdens of tariffs, it is hard to glean any more than a hint of this idea from the Court's decisions. The right–privilege distinction had an impact on these cases as well, as evinced in the Court's rejection of the idea that individuals had any "vested" right to trade with those abroad: "so complete is the authority of Congress over the subject that no one can be said to have a vested right to carry on foreign commerce with the United States."¹²¹

In sum, in the arenas of immigration and trade, the *Lochner*-era Court's conceptions of government power, sovereignty, liberty, and property played out in very different ways than they did in the arena of domestic economic regulation. Rather than limiting government power and expanding individual rights, in these domains the *Lochner*-era Court expanded *government* power and limited *individual* rights. These ideas are not entirely inconsonant. Property, as Morris Cohen famously argued, is a form of sovereignty;¹²² the "essential attribute" of each is the right to exclude.¹²³ If one conceives of sovereignty as a type of property right belonging to the nation, it is possible to understand why a Court committed to the vigorous defense of property rights should likewise defend vigorously the

Constitution, 1920–1940, 90 IOWA L. REV. 1011, 1034–35 (2005) (quoting EDWARD A. PURCELL, *BRANDEIS AND THE PROGRESSIVE CONSTITUTION* 41 (2000)); see also Gillman, *supra* note 102, at 518–19.

118. See Timothy Meyer & Ganesh Sitaraman, *Trade and the Separation of Powers*, 107 CALIF. L. REV. (forthcoming 2019) (manuscript at 13), <https://ssrn.com/abstract=3136086> [<https://perma.cc/D7PR-RZ84>] (noting that "[t]he first delegations of authority to set tariff rates took place in 1890 with the McKinley Tariff," which was the subject of *Field*).

119. *Field v. Clark*, 143 U.S. 649, 691 (1892).

120. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 411 (1928) (emphasis added).

121. *The Abby Dodge*, 223 U.S. 166, 176–77 (1912); see also *Buttfield v. Stranahan*, 192 U.S. 470, 493 (1904) ("As a result of the complete power of Congress over foreign commerce, it necessarily follows that no individual has a vested right to trade with foreign nations.").

122. See Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 12 (1927).

123. Fiss, *supra* note 39, at 302 (noting that in *Chae Chan Ping*, Field "viewed the power to exclude as an essential attribute of national sovereignty"); see also Cohen, *supra* note 122, at 12 ("But the essence of private property is always the right to exclude others.").

sovereign's assertion of its power to exclude—whether it is exercising that power to exclude people or to exclude goods.

B. THE COMPLICATED QUESTION OF LOCHNERISM'S "DEMISE"

A powerful critique of *Lochner*-era law took shape in the early twentieth century, and reached a crescendo in the 1930s.¹²⁴ The legal realists and the Progressives charged the *Lochner*-era Court with relying on manipulable notions of natural law and rights and the legitimate scope of the police power to privilege existing distributions of economic resources.¹²⁵ The reformers' prime target was the common law "regulatory scheme"¹²⁶ and its perceived deficiencies: "[t]he common law catalog of rights included both too much and too little—excessive protection of established property interests and insufficient protection of the interests of the poor, the elderly, and the unemployed."¹²⁷ By conferring constitutional protections upon the rights of property and contract, reformers charged, the Court was stymieing valuable legislative measures necessary to protect the vulnerable and equip government to act more flexibly and responsively to social and economic concerns.¹²⁸ The Great Depression made that charge stick;¹²⁹ the "intellectual class" had already abandoned *Lochnerism*, and "with the unemployed and underemployed clamoring for government intervention," and the ascent of "statism" elsewhere around the world, "the Court's commitment to limited government seemed outlandishly reactionary to much of the public."¹³⁰

124. See Ernst Freund, *Constitutional Limitations and Labor Legislation*, 4 U. ILL. L. REV. 609, 622–23 (1910); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 470 (1923) ("[T]he systems advocated by professed upholders of *laissez-faire* are in reality permeated with coercive restrictions of individual freedom."); Learned Hand, *Due Process of Law and the Eight-Hour Day*, 21 HARV. L. REV. 495, 507–08 (1908); Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 41 (1918); Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 454 (1909); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 614 (1908); see also Adrian Vermeule, *A New Deal for Civil Liberties: An Essay in Honor of Cass R. Sunstein*, 43 TULSA L. REV. 921, 923 (2008) (explaining that in John Dewey's *LIBERTY AND SOCIAL CONTROL* (1935), Dewey's "central argument [was] that it is illusory, a kind of conceptual mistake, to contrast 'social control' or government 'intervention' on the one hand with liberty on the other. A claim of liberty is itself a claim to exercise social control over others, control enforced by law or politics.").

125. See Thomas B. Colby & Peter J. Smith, *The Return of Lochner*, 100 CORNELL L. REV. 527, 548 n.157 (2015) ("The Progressive critique of *Lochner* often focused on the Court's misguided appeals to natural law."); Holmes, *supra* note 124, at 41 ("The jurists who believe in natural law seem to me to be in that naïve state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere.").

126. Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 437 (1987) ("[M]any New Deal reformers regarded the common law itself as a regulatory scheme, not as prepolitical, and asserted that the common law had proved wholly inadequate in this regulatory role.").

127. *Id.* at 423.

128. See *id.* at 423–24.

129. See David E. Bernstein, *Lochner v. New York: A Centennial Retrospective*, 83 WASH. U. L.Q. 1469, 1510 (2005) ("The classical liberal foundations of *Lochnerian* jurisprudence . . . could not survive the strains of the Great Depression.").

130. *Id.*

As the 1930s drew to a close,¹³¹ the Court executed its famous change of constitutional course.¹³² The Court approved broad delegations to federal regulatory agencies, and it expanded Congress's Article I legislative powers.¹³³ The Court largely ceased to speak in terms of natural rights and the "police power." *Lochner*—the case—commenced in earnest its long fall from grace.¹³⁴ Ultimately, it became "associated, rightly or wrongly, with everything retrograde and wrong in constitutional law, from formalism to anti-regulation to the creation of unenumerated rights."¹³⁵

That, at least, is the conventional narrative arc of *Lochnerism's* demise. But parts of *Lochner*-era constitutional law remained good law, though they often became subsumed within other doctrines. Consider the protections accorded by the *Lochner*-era Court to liberty of contract and to the right to pursue an occupation in the realm of schooling. In *Meyer v. Nebraska*, the Court struck as unconstitutional a Nebraskan law that banned private schools and private tutors from teaching foreign languages.¹³⁶ In *Pierce v. Society of Sisters*, the Court held

131. I bracket here the rich debate among legal historians on the explanation for that shift—i.e., the debate between "internalists" and "externalists" concerning the extent to which politics affected the legal outcomes. For an overview, see Laura Kalman, *The Constitution, the Supreme Court, and the New Deal*, 110 AM. HIST. REV. 1052, 1054–55 (2005). See also Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1287 (2007) ("By 1937, *Lochner*-style reasonableness review of economic regulatory legislation had become practically and politically untenable, in part because the classical assumption that clear, apolitical boundaries separated the sphere of governmental powers from that of private rights had ceased to be credible."); G. Edward White, *West Coast Hotel's Place in American Constitutional History*, 122 YALE L.J. ONLINE 69, 69–70 (2012); Post, *supra* note 39, at 1530 (noting the Taft Court's failure to articulate a "theory capable of clarifying when particular aspects of everyday experience should justifiably be given constitutional shelter from [managerial] control" by government).

132. See *United States v. Darby*, 312 U.S. 100 (1941); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); cf. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938). As Richard Friedman has noted, "the phrase 'constitutional revolution of 1937'" is somewhat misleading: "[s]ome liberal outcomes were possible even in the 1920s, became far more probable after 1930, and virtually inevitable by 1941; other liberal outcomes that could scarcely be imagined in 1930 became achievable by the early 1940s. The shift may have been incremental, a repeated altering of probabilities, but it was both rapid and momentous." Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. PA. L. REV. 1891, 1897–98 (1994).

133. Mila Sohoni, *Notice and the New Deal*, 62 DUKE L.J. 1169, 1170–71 (2013).

134. See Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 449–52 (2011) (explaining that Justice Frankfurter played a key role in demoting the case to its "anticanonical" status). If Justice Frankfurter began this process, then many more hands—including John Hart Ely's and Laurence Tribe's—added momentum to the fall. See Balkin, *supra* note 44, at 682–83 ("When John Hart Ely sought to denounce *Roe v. Wade* in 1973, he coined a term—'*Lochnering*'—to display his disagreement. *Roe* was *Lochner*, Ely proclaimed, and that was as damning an indictment as one could imagine."); Bernstein, *supra* note 129, at 1521 ("Following publication of Tribe's treatise, use of the phrase '*Lochner* era' in the law review literature skyrocketed.").

135. Nourse, *supra* note 32, at 758. For a sample of the extensive literature debating why *Lochner* was flawed, see Rebecca L. Brown, *The Art of Reading Lochner*, 1 N.Y.U. J. L. & LIBERTY 570, 575–76 (2005) and David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373 (2003).

136. 262 U.S. 390, 401–02 (1923).

unconstitutional a state law requiring, with few exceptions, that children be sent to public rather than private schools.¹³⁷ These cases secured the right of parents to buy private educations for their children and the right of private schools to exercise autonomy in deciding the kinds of education they would sell.¹³⁸ *Pierce* and *Meyer* have remained good law, though their liberty-of-contract pedigree has been repudiated by the Court.¹³⁹ Similarly, in the immigration realm, when modern courts invoke the federal government's plenary power over immigration,¹⁴⁰ they are invoking a *Lochner*-era doctrine permeated by and founded upon that era's core commitments.¹⁴¹ *Lochner*-era precedents concerning the legality of broad delegations to the Executive Branch to regulate foreign trade have likewise endured.¹⁴²

The conventional narrative of *Lochner*'s decline is also complicated by a more recent development: a growing effort to rehabilitate the core of *Lochner* itself. The rehabilitation project has sought to erase the anti-canonical status of the case and to revive judicial recognition of constitutional protections for individual

137. 268 U.S. 510, 531 (1925) (noting that “without doubt enforcement of the statute would seriously impair, perhaps destroy, the profitable features of appellees’ business and greatly diminish the value of their property”); see also Martha Minow, *Confronting the Seduction of Choice: Law, Education, and American Pluralism*, 120 YALE L.J. 814, 819 (2011) (“[*Pierce*] fell within the Court’s view that government could not regulate private property in a way that destroys people’s ability to earn a living—that is, the state could not put private schools out of business.”).

138. See Minow, *supra* note 137, at 820, 833.

139. *Griswold v. Connecticut* recast *Pierce* and *Meyer* as First Amendment cases. 381 U.S. 479, 482 (1965). Ultimately, the Court placed these rights, along with *Griswold*'s, within the rubric of the right to privacy shielded by substantive due process's liberty component. Modern strict scrutiny and First Amendment jurisprudence also owe a debt to *Lochner*-era thinking, though this awkward pedigree is often elided. See LAURA WEINRIB, *THE TAMING OF FREE SPEECH: AMERICA'S CIVIL LIBERTY COMPROMISE* 5 (2016) (tracing development of First Amendment jurisprudence to both the “conservative legal tradition of individual rights” and to “a state-skeptical brand of labor radicalism”); David E. Bernstein, *The Conservative Origins of Strict Scrutiny*, 19 GEO. MASON L. REV. 861, 861 (2012); Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915, 1918 (2016) (noting that civil liberties decisions were criticized as *Lochnerist*); see also SOPHIA Z. LEE, *THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT* 72–75, 121–32 (2014) (tracing conservative efforts to ground a right-to-work in the First Amendment).

140. See, e.g., *Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015) (“Given Congress’ plenary power to ‘suppl[y] the conditions of the privilege of entry into the United States,’ . . . it follows that the Government’s decision to exclude an alien it determines does not satisfy one or more of those conditions is facially legitimate.” (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950))). The quoted passage in *Knauff* cites, *inter alia*, *Nishimura Ekiu* and *Fong Yue Ting*. See 338 U.S. at 543.

141. See Harold Hongju Koh, *Bitter Fruit of the Asian Immigration Cases*, CONST., Fall 1994, at 77 (“[I]mmigration is caught in a time warp . . . *Dred Scott* and *Plessy* . . . have been overruled, both at law and in the court of public opinion. But the Asian immigration cases of that era—no less shocking—still bear bitter fruit. Today, no public official would embrace the racism, hatred and nativism that drove those decisions. Yet the legal principles they enunciated still rule our borders.”); Lindsay, *Immigration as Invasion*, *supra* note 78, at 8 (“Although the Supreme Court in recent decades has muted some of the more severe aspects of the plenary power doctrine, the constitutional exceptionalism of the immigration power, as well as its core legal rationale, remain fundamentally intact.”).

142. See, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–20, 322 (1936); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

economic rights and liberties.¹⁴³ Richard Epstein was an early contributor, having “argued since the 1980s that courts should aggressively protect economic rights and that *Lochner*’s ‘fault’ was that it did not provide *enough* protection for the liberty of contract.”¹⁴⁴ Legal scholars such as Randy Barnett and David Bernstein took up the cause of rehabilitation,¹⁴⁵ winning accolades from politicians such as the libertarian senator Rand Paul,¹⁴⁶ and pundits such as the conservative George Will.¹⁴⁷ Certain prominent judges have seemed to indicate their amenability to claims of constitutional protection for economic rights.¹⁴⁸

Pointing to these and other data points, Tom Colby and Peter Smith predicted in 2013 that “[c]onservative legal thought about the validity of *Lochner* is about to come full circle.”¹⁴⁹ To some extent, this prediction has been vindicated, at least insofar as courts have tended to show greater amenability to using the First Amendment to shield economic rights.¹⁵⁰ As we shall see, however, courts are not the only institution capable of “rehabilitating” *Lochner*-era thinking. The next Part explains how the ideas and commitments that underpinned *Lochner*-era

143. See Daryl J. Levinson, *Looking for Power in Public Law*, 130 HARV. L. REV. 31, 116 (2016) (noting scholarship from “the libertarian right” that has urged “the rehabilitation of the Supreme Court’s *Lochner*-era condemnation of economic legislation”).

144. Colby & Smith, *supra* note 125, at 564.

145. See RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004); DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* (2011); DAVID N. MAYER, *LIBERTY OF CONTRACT: REDISCOVERING A LOST CONSTITUTIONAL RIGHT* (2011). For an overview of the history of conservative lawyering, see STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* (2008).

146. See Colby & Smith, *supra* note 125, at 579.

147. See *id.* at 578.

148. See *id.* at 573–77; see also David E. Bernstein, *The Due Process Right to Pursue a Lawful Occupation: A Brighter Future Ahead?*, 126 YALE L.J. F. 287, 296 (2016).

149. Colby & Smith, *supra* note 125, at 579.

150. This development has drawn the fire of myriad commentators. See, e.g., Ellen D. Katz, *Election Law’s Lochnerian Turn*, 94 B.U. L. REV. 697, 705–06 (2014); Helen Norton, *Truth and Lies in the Workplace: Employer Speech and the First Amendment*, 101 MINN. L. REV. 31, 34 (2016); Robert Post & Amanda Shanor, Commentary, *Adam Smith’s First Amendment*, 128 HARV. L. REV. F. 165, 167 (2015); Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 L. & CONTEMP. PROBS. 195, 198–203 (2014); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453 (2015); Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 134–138; Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 399–402 (2015); Rebecca Tushnet, *COOL Story: Country of Origin Labeling and the First Amendment*, 70 FOOD & DRUG L.J. 25, 26 (2015); Kessler, *supra* note 139, at 1915–16; see also Rebecca L. Brown, *The Harm Principle and Free Speech*, 89 S. CAL. L. REV. 953, 964 n.48 (2016) (collecting sources from growing literature on Lochnerism and First Amendment doctrine); John C. Coates IV, *Corporate Speech & the First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223, 269 (2015) (providing empirical data establishing “the increasing and broadening use by corporations of challenges under the First Amendment to laws and regulations generally, and especially and increasingly laws that do not constrain expressive businesses”).

constitutional jurisprudence are now the cornerstones of the current presidential administration's policy agenda.

II. MAKING AMERICA "LOCHNERIST" AGAIN

A notable homomorphism exists between the Trump Administration's policy program and the ideas that animated the jurisprudence of the *Lochner*-era Court. In the domestic, economic realm in which the *Lochner*-era Court enforced limits on state power and shielded liberty of contract and property rights, the Trump Administration likewise shows an unwillingness to act, or has taken legal positions and policy steps that curb federal authority. Conversely, in the realms of immigration, foreign trade, and criminal law, in which the *Lochner*-era Court accorded broad leeway to state power and approved its exercise, the Trump Administration has pressed its authorities to the hilt in policymaking and in law enforcement and has sought to promote its goals through appointments, in litigation, and by lobbying its allies in Congress.

Because drawing comparisons across legal and political regimes at different points in time is an inherently challenging enterprise, this Part begins with a brief word on methodology. It then compares the Trump Administration's agenda with the jurisprudence of the *Lochner*-era Court with respect to three areas: the scope of the federal government's regulatory powers, including its powers over foreign trade; individual rights; and matters implicating immigration. It ends with a coda that assesses this comparison's potential predictive utility.

A. METHODOLOGY

The following discussion starts with the premise that a presidential administration can have ideas (even if shifting or in conflict) about law, rights, and state power, and that although those ideas are hardly the sole motivator behind every executive-branch action, one can still discern those ideas by examining an administration's statements, policies, and acts. It further assumes that once one distills out the conceptions of law, rights, and power held by the President and his administration, that aggregate vision can then be held up and compared with that of the Supreme Court.

To attribute such conceptions to a presidential administration, as I do here, is not to pretend that presidential administrations each follow some ivory-tower academic cogitation from first principles upwards in deciding on their agendas. It is safe to assume that the Trump Administration is advocating a particular constellation of substantive policies because they command support from key constituencies today; there is no reason to think its officials either know or care that the Administration's conceptions of law are congruent in important respects with legal principles articulated by the Supreme Court

during the *Lochner* era.¹⁵¹ But we can accept that point while still exploring the conceptions of law, rights, and the proper scope of government power that help describe and unify the actions of this Administration. Such conceptions need not be deliberately adopted in order to exist.¹⁵² Indeed, those in the Administration today may be “all the more captive of their philosophical outlook for being unaware that they [have] one.”¹⁵³

There next arises the question of the propriety of drawing comparisons between the jurisprudence of a Supreme Court of one era and the conceptions held by a presidential administration of another era. How can one be sure that the ideas deployed by the earlier set of thinkers are meaningfully similar to the ideas deployed by the latter set of thinkers? And even though in some respects the Trump Administration’s agenda correlates with and resembles *Lochner*-era notions of law and power, might it not be that the comparison only partially describes its commitments?

As to the first concern, the jurisprudence of the *Lochner*-era Court is not hidden, while the commitments of the Trump Administration are only hidden in plain view; no great leaps of inference are necessary to hold the concepts employed by one up against the other and compare them. In addition, by relying—as I have sought to do throughout—on both contemporaneous explanations of *Lochner*-era jurisprudence and on legal historians’ nuanced accounts of those concepts, one can mitigate the risk of presentist comparison drawing.¹⁵⁴ As to the second, my purpose is only to establish the existence of a significant amount of overlap between the *Lochner*-era Court’s commitments and those that

151. The problem of “observational equivalence” is one that frequently arises when scholars debate whether law constrains the President. Presidents respond to both politics and law, which makes it challenging to decide where legal constraint ends and political self-interest begins. See Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1121–22 (2013) (“The mere fact that the President acts in accordance with law in particular cases is not enough to show that law constrains the executive. After all, the President might have taken the same action even if there were no legal rule on point—for example, out of political self-interest or some sort of tacit coordination. If so, the alignment between presidential action and law would simply be an instance of observational equivalence.”); see also Pillard, *supra* note 16, at 680–81 (collecting examples). Likewise, establishing that *Lochner*-era commitments are the actual motivation of the Administration would be difficult, because we would have to pick between two “competing . . . accounts” of presidential motivation—but without any ability to “access . . . empirical facts that would resolve which motivational account is true.” Richard H. Pildes, *Law and the President*, 125 HARV. L. REV. 1381, 1394 (2012) (reviewing ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* (2010)). I am grateful to Alex Lee, Daphna Renan, and David Schwartz for their thoughts on this point.

152. See WIECEK, *supra* note 5, at 80 (addressing an analogous issue with respect to the philosophical outlook of classical-era jurists, while noting that “in their writings we can detect lawyers’ assumptions about reality, truth, justice, and human destiny” and that their failure to “self-consciously adopt or review these assumptions is irrelevant”).

153. *Id.*

154. Some historians have drawn similar parallels between the modern day and the *Lochner* era. See, e.g., Mae Ngai, *Why Trump Is Making Muslims the New Chinese*, CNN (Jan. 30, 2017, 6:58 AM), <https://www.cnn.com/2017/01/30/opinions/muslims-are-new-chinese-ngai-opinion/index.html> [https://perma.cc/49ZA-ZSB5].

animate the Trump Administration's agenda, not to demonstrate that the two sets are coextensive.¹⁵⁵ To meet that threshold, I have limited my focus to areas of high-salience policy—that is, areas that matter to the public and to which the Trump Administration has presumably paid some degree of attention. I have also sought to draw a sufficient number of parallels, and in thick enough ink, that their quality and quantity will together demonstrate that the comparison is viable and noteworthy.

B. PRIVATE ORDERING AND PROTECTION FROM REGULATION

A core principle of *Lochner*-era jurisprudence was its commitment to liberty, which it conceived of as a “demand for limited government.”¹⁵⁶ Wariness of overregulation suffused many judicial opinions of this era, including the *Lochner* decision itself. If the Court did not vigilantly patrol the boundaries of the police power, the worry went, the burgeoning regulations of the state would subsume and smother all aspects of individual liberty: “No trade, no occupation, no mode of earning one’s living, could escape this all-pervading power,”¹⁵⁷ and, consequently, the state “would assume the position of a supervisor, or *pater familias*, over every act of the individual, and its right of governmental interference with his hours of labor, his hours of exercise, the character thereof . . . would be recognized and upheld.”¹⁵⁸

The Trump Administration's agenda for domestic administrative law reflects a similar distrust of government. Soon after Trump took office, his advisor Steve Bannon announced the new administration's vision for the future of regulatory government: “the deconstruction of the administrative state.”¹⁵⁹ In its early

155. One might, for example, query whether the Trump Administration's commitments accord with the suspicion evinced by courts during the *Lochner* era toward “class legislation,” or “attempts by competing classes to use public power to gain unfair or unnatural advantages over their market adversaries.” GILLMAN, *supra* note 42, at 61. It is difficult to answer this question. Class legislation is a malleable concept, see Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 395 n.147 (2000), which makes it as hard today as it was then to reliably identify what counts as class or “partial” legislation. Moreover, ferreting out the independent impact of the idea of neutrality upon the decisions of the *Lochner*-era Court is challenging. Cases that invoked the neutrality principle to strike down legislation often also implicated redistribution of property or limitations on liberty of contract. See MICHAEL J. PHILLIPS, *THE LOCHNER COURT, MYTH AND REALITY: SUBSTANTIVE DUE PROCESS FROM THE 1890S TO THE 1930S*, at 105–14 (2001). Compare Bernstein, *supra* note 47, at 21–31 (advancing the thesis that the *Lochner*-era Court was “reluctan[t] to rely on class legislation arguments to invalidate regulatory legislation”), with Cushman, *supra* note 30, at 883–944 (criticizing this view). If the principle of neutrality is seen mainly as an injunction against redistribution or the regulation of prices, the analogy to the modern day might hold; if it is seen more abstractly as an injunction against “regulatory capture” or “special interest” legislation, then the analogy may fray. I am indebted to Richard Fallon and Daryl Levinson for prompting me to consider this question.

156. Fiss, *supra* note 39, at 389.

157. *Lochner v. New York*, 198 U.S. 45, 59 (1905).

158. *Id.* at 62.

159. Philip Rucker & Robert Costa, *Bannon Vows a Daily Fight for the ‘Deconstruction of the Administrative State,’* WASH. POST (Feb. 23, 2017), https://www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643_story.html?utm_term=.07b230179a04 [<https://perma.cc/HXH3-QUMD>].

months, the Trump Administration moved on various fronts to begin to translate this vision into reality. President Trump issued executive orders that require cutting regulatory costs without consideration of the foregone regulatory benefits and that require a reduction in the raw numbers of regulations.¹⁶⁰ The Administration suspended the issuance of new rules,¹⁶¹ failed to defend regulations in court,¹⁶² and sought to slash agency budgets.¹⁶³

The Trump Administration is not unique in endorsing deregulation; most recent presidents have attempted some type of regulatory reform project.¹⁶⁴ But the approach taken in the Trump rollback is nonetheless distinctive—and not just because of the energy with which it is being pursued.¹⁶⁵ The Trump deregulatory agenda is structured around the premise—one familiar from *Lochner*-era jurisprudence—that people and entities must be shielded *from* government regulation rather than given the protection *of* government regulation. A regulatory

160. See Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Jan. 30, 2017); OFFICE OF INFO. & REGULATORY AFFAIRS, EXEC. OFFICE OF THE PRESIDENT, INTERIM GUIDANCE IMPLEMENTING SECTION 2 OF THE EXECUTIVE ORDER OF JANUARY 30, 2017, TITLED “REDUCING REGULATION AND CONTROLLING REGULATORY COSTS” (2017); see also Exec. Order No. 13,765, 82 Fed. Reg. 8351 (Jan. 20, 2017) (ordering agency heads to “exercise all authority and discretion” to “minimize the unwarranted economic and regulatory burdens of the [Affordable Care] Act”); Exec. Order No. 13,772, 82 Fed. Reg. 9965 (Feb. 3, 2017) (ordering the Secretary of the Treasury to identify financial regulations which inhibit economic growth); Exec. Order No. 13,783, 82 Fed. Reg. 16,093 (Mar. 28, 2017) (revoking environmental protection actions taken by previous Administration and ordering agency heads to identify rules “that burden domestic energy production” for repeal); Memorandum for the Secretary of Labor, 82 Fed. Reg. 9675 (Feb. 3, 2017) (ordering the Secretary of Labor to consider rescinding certain financial regulations).

161. MAEVE P. CAREY & KATHRYN A. FRANCIS, CONG. RESEARCH SERV., R45032, THE TRUMP ADMINISTRATION AND THE UNIFIED AGENDA OF FEDERAL REGULATORY AND DEREGULATORY ACTIONS 2 (2017) (summarizing the Trump Administration’s first Unified Agenda, which “lists 469 actions that agencies have withdrawn since the previous (Fall 2016) edition of the Unified Agenda”); see also Philip Bump, *What Trump Has Undone*, WASH. POST (Dec. 15, 2017), https://www.washingtonpost.com/news/politics/wp/2017/08/24/what-trump-has-undone/?utm_term=.c7a4d32b001a [<https://perma.cc/Y4BX-5UUH>].

162. See Memorandum from Jefferson Sessions to the U.S. Attorneys, Attorney Gen., U.S. Dep’t of Justice, Revised Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964 (October 4, 2017); Julie Moreau, *Federal Civil Rights Law Doesn’t Protect Transgender Workers, Justice Department Says*, NBC (Oct. 5, 2017, 4:30 PM), <https://www.nbcnews.com/feature/nbc-out/federal-civil-rights-law-doesn-t-protect-transgender-workers-justice-n808126> [<https://perma.cc/87NP-7W2N>]; Julia Horowitz, *Trump Administration Backs Away From Obama Overtime Rule*, CNN MONEY (June 30, 2017, 5:24 PM), <https://money.cnn.com/2017/06/30/news/trump-labor-department-obama-overtime-rules/index.html> [<https://perma.cc/5L3D-TRQF>].

163. Gregor Aisch & Alicia Parlapiano, *How Trump’s Budget Would Affect Every Part of Government*, N.Y. TIMES (May 23, 2017), <https://www.nytimes.com/interactive/2017/05/23/us/politics/trump-budget-details.html> [<https://perma.cc/Q968-ZUFA>] (listing hundreds of billions of dollars in Trump proposed budget cuts over a ten-year period).

164. See Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 13–17 (2017) (noting that “Trump is hardly the first or even the most anti-administrative modern President”); Sidney A. Shapiro, *Talking About Regulation: Political Discourse and Regulatory Gridlock*, 7 WAKE FOREST J.L. & POL’Y 1, 20 (2017) (describing the effects of the Reagan election on discourse about regulatory government).

165. See Christopher DeMuth, *Trump vs. the Deep Regulatory State*, WALL ST. J. (Nov. 17, 2017, 6:10 PM), <https://www.wsj.com/articles/trump-vs-the-deep-regulatory-state-1510952431> [<https://perma.cc/QB4U-LUY8>].

reformer driven by that idea will have a much different reform agenda than the technocratic reformer interested in improving agencies' cost-benefit calculations or on restricting state intervention to areas of market failure. The difference, though stark, can be encapsulated in a single word: the Reagan Administration called for cost-benefit analysis,¹⁶⁶ but the Trump Administration has called for cost analysis,¹⁶⁷ full stop—a stance that prioritizes shielding private property over generating public benefits to such a degree that it excludes the very consideration of such benefits.¹⁶⁸

The Trump Administration has also restricted federal power in particular regulatory domains using techniques that the *Lochner*-era Justices once used. Consider the issue of net neutrality. Today's net neutrality debate "is a reincarnation of an age-old debate about the duties of firms that supply infrastructure services essential to the economy, or—in the old common law phrase—firms 'affected with the public interest.'"¹⁶⁹ *Lochner* itself rejected the idea that the Bakeshop Law affected the public interest "in the slightest degree."¹⁷⁰ It was just one of a set of important decisions from this period that sharply confined the "affectation doctrine," so as to exclude a variety of industries and enterprises,¹⁷¹ but to include public utilities and businesses that "served a traditional public function such as an inn or other place of public accommodation."¹⁷² The lines drawn by the affectation doctrine in this period limited "the scope of public regulatory authority in cases involving rates and prices, the conduct of businesses, and governmental regulations of the conditions, wages, and hours of employment."¹⁷³

166. See Exec. Order No. 12,291, 1981 PUB. PAPERS 104, 104 (Feb. 17, 1981).

167. See Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Jan. 30, 2017).

168. See Cary Coglianese, *It's Time to Think Strategically About Retrospective Benefit-Cost Analysis*, REG. REV. (April 30, 2018), <https://www.theregreview.org/2018/04/30/coglianese-think-strategically-retrospective-benefit-cost-analysis/> [<https://perma.cc/UNF9-CMM4>] (describing past efforts at cost reduction and noting that "past administrations have given at least a passing nod to the prospect of increasing regulatory benefits By contrast, President Trump's Executive Order 13,771 contains nary a mention of regulatory benefits. Although White House guidance on implementing the Trump order does require analysis of [the] benefits of new rules, nothing in that guidance guarantees any consideration will be given to foregone benefits from modifying existing regulations."). For a critique of the precursors of a pure cost-analysis approach, see Mila Sohoni, *The Idea of "Too Much Law,"* 80 FORDHAM L. REV. 1585, 1619–20 (2012), which explains why "[a]ttempting to reduce or cap regulatory costs . . . will reliably make the regulatory system worse, not better," and cautions against substituting "[s]ticker shock" for "a reasoned analysis of whether a rule is worthwhile."

169. Robin S. Lee & Tim Wu, *Subsidizing Creativity Through Network Design: Zero-Pricing and Net Neutrality*, 23 J. ECON. PERSP. 61, 74 (2009).

170. *Lochner v. New York*, 198 U.S. 45, 57 (1905) ("Viewed in the light of a purely labor law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act." (emphasis added)).

171. See Samuel R. Olken, *The Decline of Legal Classicism and the Evolution of New Deal Constitutionalism*, 89 NOTRE DAME L. REV. 2051, 2059–60 (2014); see also *id.* at 2058 (noting that, in the 1920s, the Taft Court "applied a particularly rigid notion of the affectation doctrine").

172. *Id.* at 2059.

173. *Id.* at 2058.

The contest over what counts as a business affected with the public interest has moved from courts to agencies—most prominently, to the FCC. In adopting net neutrality rules, the Obama Administration took the position that common-carrier regulations—regulations applicable to enterprises “affect[ed] with the public interest”¹⁷⁴—could be applied to Internet service providers.¹⁷⁵ In December 2017, the Trump Administration—to quote the FCC—“reverse[d] the [Obama FCC’s] heavy-handed utility-style regulation of broadband Internet access service,”¹⁷⁶ and preempted the states from adopting “any so-called ‘economic’ or ‘public utility-type’ regulations, including common-carriage requirements” that might conflict with the FCC’s “deregulatory approach.”¹⁷⁷ Common-carrier regulation was inappropriate, explained the Trump Administration’s appointee, FCC Chairman Ajit Pai, because—in reasoning that echoes Justice George Sutherland’s analysis of analogous questions under the affectation doctrine¹⁷⁸—“[t]he digital world bears no resemblance to a water pipe or electric line or sewer” and “the government shouldn’t be in the business of picking winners and losers in the Internet economy.”¹⁷⁹

Of course, the Executive Branch cannot regulate if Congress cannot delegate. And with respect to delegation, the *Lochner*-era Court had a Janus-faced approach. As noted above, the *Lochner*-era Court countenanced sweeping delegations of power to the Executive to address foreign trade,¹⁸⁰ culminating in the decision in *Curtiss-Wright*, in which the Court affirmed criminal sanctions for arms sales made in violation of an executive proclamation.¹⁸¹ This stance toward executive-branch power in the international realm contrasted with the Court’s attitude toward delegation in the domestic realm.¹⁸² Nearly contemporaneously with *Curtiss-Wright*, the Court famously struck down two provisions of the National

174. See Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC, 533 F.2d. 601, 610 (D.C. Cir. 1976) (presenting test for when a business is “affect[ed] with the public interest” and therefore subject to common-carrier regulation).

175. See Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601, 5610 (2015), *abrogated by* Restoring Internet Freedom, 33 FCC Rcd. 311 (2018).

176. Restoring Internet Freedom, 33 FCC Rcd. at 312.

177. *Id.* at 428.

178. See *Williams v. Standard Oil Co.*, 278 U.S. 235, 240 (1929) (dismissing the argument that an industry was affected with the public interest merely because it was “necessary and indispensable in carrying on commercial and other activities within the state”); *Ribnik v. McBride*, 277 U.S. 350, 350 (1928) (noting that “[t]he interest of the public in the matter of employment” is not the same as the “‘public interest’ which the law contemplates as the basis for legislative . . . control”); *Tyson & Brother – United Theatre Ticket Offices, Inc. v. Banton*, 273 U.S. 418, 430–31 (1927) (“A business is not affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance.”).

179. Chairman Ajit Pai, *Statement on Restoring Internet Freedom*, FCC (Jan. 4, 2018), <https://docs.fcc.gov/public/attachments/FCC-17-60A2.pdf>.

180. See *supra* notes 112–17 and accompanying text.

181. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 333 (1936).

182. See WHITE, *supra* note 102, at 72 (“The ordinary characteristics of a legitimate delegation, as implicitly defined by the Court in its 1935 decisions striking down New Deal statutes as unconstitutional delegations of congressional power, seemed to be lacking in *Curtiss-Wright*.”). For a contemporary analysis, see Note, *supra* note 100, at 664 (describing *Curtiss-Wright* as “advanc[ing] another

Industrial Recovery Act as unconstitutional delegations, citing the need to prevent Congress from abdicating its “lawmaking function” to the Executive.¹⁸³ In sum, with respect to “internal” matters of domestic regulation, the *Lochner*-era Court proved willing to enforce the nondelegation limit (even if only rarely¹⁸⁴). With respect to “external” matters, however, a different and laxer standard prevailed: in “the maintenance of our international relations,” Congress “must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.”¹⁸⁵ The cumulative upshot was that the Court adopted a bivalent attitude toward delegation and separation of powers in the respective spheres of foreign trade and domestic regulation.

This bivalent attitude toward delegation is now echoed in the Trump Administration’s stance. On the one hand—with respect to tariffs on imports and restrictions on trade—the Trump Administration has demonstrated its willingness to wield expansive executive-branch authority. Utilizing the broad executive-branch powers that the *Lochner*-era Court ratified as constitutional, the Trump Administration has imposed tariffs on hundreds of billions of dollars’ worth of steel, aluminum, and other goods.¹⁸⁶ But on the other hand—with respect to “internal” or domestic administrative law—the Trump Administration has shown more queasiness about the propriety of delegation and of agency power.¹⁸⁷ Citing the “monstrosity that is the Federal Government with its pages and pages of rules and regulations,” candidate Trump promised that if elected he would sign the

proposition, apparently novel in the literature relating to delegation of power, to explain why an unusual degree of discretion could constitutionally be given to the executive under the embargo resolution”).

183. *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 430 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935); see also *Carter v. Carter Coal Co.*, 298 U.S. 238, 318 (1936) (Hughes, C.J., concurring).

184. See Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 405 (2017). Various canons of statutory interpretation, clear-statement rules, and administrative law doctrines indirectly shield the nondelegation principle. See Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 315–17 (2000).

185. *Curtiss-Wright*, 299 U.S. at 318–20. Surveying these decisions, Professor White has noted that *Lochner*-era jurisprudence displays a “growing sense that foreign relations issues were ‘different’ in kind from domestic legal issues,” although “it was hard to say exactly how or why.” WHITE, *supra* note 36, at 116.

186. “Where Do We Have Tariffs?” *Trump Asks. Here’s a List*, WALL ST. J. (Oct. 24, 2018, 5:30 PM), <https://www.wsj.com/articles/where-do-we-have-tariffs-trump-asks-heres-a-list-1540416617> [https://perma.cc/7VJB-BS3L]. Interestingly, in a March 2019 speech, President Trump referenced the “Great Tariff Debate of 1888” and praised then-Representative William McKinley, the sponsor of the Tariff Act of 1890 that the Court sustained in *Field*. See Donald J. Trump, Remarks by President Trump at the 2019 Conservative Political Action Conference (Mar. 3, 2019, 12:17 PM), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-2019-conservative-political-action-conference/> [https://perma.cc/9FPD-UMYS] (“[W]e had so much money we didn’t know what the hell to do with it. Tough, tough, tough. It was called the Great Tariff Debate . . . the Great Tariff Debate of 1888. And the debate was: We didn’t know what to do with all of the money we were making. We were so rich. And McKinley, prior to being President, he was very strong on protecting our assets, protecting our country.”); *id.* (“I found some very old laws from when our country was rich—really rich. The old tariff laws—we had to dust them off; you could hardly see, they were so dusty.”).

187. For an overview, see Metzger, *supra* note 164, at 9–14.

Regulations In Need of Scrutiny Act (REINS Act),¹⁸⁸ which would require that any major new rule receive a congressional resolution of approval before going into effect.¹⁸⁹ In the wake of Trump's election, congressional Republicans reintroduced this and other regulatory reform measures,¹⁹⁰ which would upend post-1946 administrative law and give Congress a far greater capacity to check administrative policymaking.¹⁹¹ Note that measures such as the REINS Act would "weaken [Trump's] own presidency" by making it more difficult for agencies not only to regulate *but also to deregulate*.¹⁹² It may be that the Trump Administration "missed this twist"¹⁹³—but it may also be that it agreed with the backers of these measures that the domestic administrative state has too much power,¹⁹⁴ and that it was willing to see these restrictions enacted notwithstanding the cost to the Executive Branch's own latitude. Some support for that latter explanation can be found in the Trump Administration's Department of Justice (Trump DOJ) moving to tie its own hands with respect to guidance: citing the "fundamental requirement that agencies regulate only within the authority delegated to them by Congress," the Trump DOJ has adopted voluntary limits on the issuance of guidance documents and ordered the review and rescission of existing Department of Justice guidance documents,¹⁹⁵ even though no court has held that such guidance is illegal.

The Administration's choice of appointments is also illuminating because of the doubts these appointees have expressed with respect to the domestic

188. Jonathan H. Adler, *Will a Republican Congress Place REINS on a President Trump?*, WASH. POST (Jan. 2, 2017), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/02/will-a-republican-congress-place-reins-on-a-president-trump/> [<https://perma.cc/4FEU-X4BY>].

189. See H.R. 26, 115th Cong. (2017).

190. See Ronald M. Levin, *The Regulatory Accountability Act and the Future of APA Revision 1–3*, 51–53 (Wash. Univ. in St. Louis Legal Studies Research Paper Series, Working Paper No. 18-12-14, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3310363 [<https://perma.cc/W7CL-HFG4>] (describing regulatory reform measures considered by the 115th Congress).

191. For descriptions of these proposals, see generally *id.* (describing The Regulatory Accountability Act); Metzger, *supra* note 164, at 11–13 (describing REINS, RAA, and Separation of Powers Restoration Act).

192. William W. Buzbee, *Regulatory 'Reform' That Is Anything But*, N.Y. TIMES (June 15, 2017), <https://www.nytimes.com/2017/06/15/opinion/regulatory-reform-bills-congress-trump.html> [<https://perma.cc/G2B3-K83W>] ("In a paradoxical twist, the Senate's new regulatory-reform bills would further Mr. Trump's deregulatory leanings, but also tie him in knots. All new major regulations would be hamstrung, even business-friendly deregulation. It is hard to imagine why he would so weaken his own presidency. Maybe he has missed this twist.")

193. *Id.*

194. See Levin, *supra* note 190, at 52 ("[T]he Trump administration was itself committed, at least nominally, to 'deconstruction of the administrative state,' a brand of rhetoric that was largely compatible with the premises of RAA proponents. The apparent absence of objection to the RAA from the Trump administration can also be seen as a reminder that the impetus for the current pressure for legislative restructuring of the administrative process has not been solely a matter of appealing to business interests. It has also had an ideological flavor, reflecting libertarian or 'antiadministrativist' impulses."); Metzger, *supra* note 164, at 13.

195. See Press Release, U.S. Dep't of Justice, Memorandum on Prohibition on Improper Guidance Documents (Nov. 16, 2017), <https://www.justice.gov/opa/press-release/file/1012271> [<https://perma.cc/FN32-2TQE>].

nondelegation doctrine. The Trump Administration's first Supreme Court pick, Justice Neil Gorsuch, wrote an impassioned opinion praising the nondelegation doctrine and questioning "whether Congress may constitutionally pass the potato in the first place."¹⁹⁶ Its second, Justice Brett Kavanaugh, has expressed doubts about the wisdom of *Chevron*.¹⁹⁷ Trump's Office of Information and Regulatory Affairs (OIRA) Administrator and nominee to the D.C. Circuit, Judge Neomi Rao, has argued that "courts should articulate and enforce a more robust nondelegation doctrine" and that the political branches should also "rein in delegations."¹⁹⁸

Finally, one important tool of federal regulatory power today is regulation that is tethered to federal spending, and the Trump Administration's stance toward such regulation also finds a parallel in *Lochner*-era law. The *Lochner*-era Court had little patience for claims by states or private individuals asserting that the federal government could not spend its money how it wished or on the conditions that it chose.¹⁹⁹ Like the individual, the sovereign had a right of property in its money and a right to bargain over how it should be spent. States had freedom of contract, too, and if they did not like the conditions proposed by the federal government, they could walk away from the table. *Massachusetts v. Mellon*²⁰⁰ is one important example. In this challenge to a federal conditional-spending scheme, Justice Sutherland alluded to the absurdity of recognizing a right of states to challenge the conditions the federal government wished to impose on receipt of federal monies: "[p]robably, it would be sufficient to point out," he noted, "that the powers of the State are not invaded, since the statute imposes no obligation but simply extends an option which the State is free to accept or reject."²⁰¹ He then

196. *United States v. Nichols*, 784 F.3d 666, 674 (10th Cir. 2015) (Gorsuch, J., dissenting from denial of rehearing en banc).

197. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2150–52 (2016) (calling *Chevron* "an atextual invention by courts" and "nothing more than a judicially orchestrated shift of power from Congress to the Executive Branch").

198. Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1467–68 (2015); see also Neomi Rao, *The Administrative State and the Structure of the Constitution*, HERITAGE FOUND. (June 18, 2018), <https://www.heritage.org/the-constitution/report/the-administrative-state-and-the-structure-the-constitution> [<https://perma.cc/Y4MB-EA4T>] ("Much less and more effective regulation is an important goal of this Administration, and it's animated by these broader principles of individual liberty and more accountable government President Trump has launched major regulatory reforms; some Members of Congress have introduced reform bills; judges and justices have indicated the need for more probing judicial review. Let's hope that each branch succeeds in its sphere, because limiting the reach of regulation will promote individual liberty, restore more accountable government, and ultimately benefit the American people.").

199. See, e.g., *Ellis v. United States*, 206 U.S. 246 (1907) (upholding—two years after *Lochner*—the constitutionality of a law limiting federal contractors and employees working on public works to an eight-hour workday); *id.* at 256 ("Congress, as incident to its power to authorize and enforce contracts for public works, may require that they shall be carried out only in a way consistent with its views of public policy, and may punish a departure from that way.").

200. 262 U.S. 447 (1923) (decided together with *Frothingham v. Mellon*).

201. *Id.* at 480.

went on to reach the holding for which the case is more widely known—that the state lacked standing to challenge the scheme.²⁰²

Today, the Trump Administration has sought to rescind federal funds from states and local governments that do not comply with the conditions that (in its view) the Attorney General can lawfully place on those funds.²⁰³ In litigation, the Attorney General has objected to the “counterintuitive conclusion that [local government] applicants can insist on their entitlement to federal law enforcement grants even as they refuse to provide the most basic cooperation in immigration enforcement, which the Attorney General has identified as a federal priority.”²⁰⁴ Many contemporary observers, and perhaps especially many conservatives, would prefer to cabin the federal spending power in order to preserve greater state and local sovereignty and autonomy.²⁰⁵ But the Trump Administration’s willingness to pull aggressively on the pursestrings of federal spending at the expense of state and local government autonomy allies it more with the *Lochner*-era Court, which likewise “did not translate its general commitment to individual liberty into a comprehensive program favoring state sovereignty.”²⁰⁶

C. INDIVIDUAL RIGHTS

The *Lochner*-era Court is most famous for its holdings that shielded the liberty of contract, and in particular the right to contract for the terms and conditions of employment.²⁰⁷ “[I]mmersed in a legal culture that exalted individualism and

202. See *id.* at 488–89; see also Barry Cushman, *The Jurisprudence of the Hughes Court: The Recent Literature*, 89 NOTRE DAME L. REV. 1929, 1948, 1955, 1961–62 (2014) (“Undoubtedly because the *Mellon* doctrine posed such an insuperable obstacle to securing judicial review, a vast array of New Deal spending programs, all financed from general revenue, never underwent constitutional challenge.”).

203. See, e.g., Exec. Order No. 13,768, 82 Fed. Reg. 8799, 8801 (Jan. 25, 2017) (providing that “sanctuary jurisdictions” are not eligible to receive Federal grants); see also *City of Chicago v. Sessions*, 888 F.3d 272, 278–80 (7th Cir. 2018), *reh’g en banc granted in part, opinion vacated in part*, No. 17-2991, 2018 WL 4268817 (7th Cir. June 4, 2018), *vacated*, No. 17-2991, 2018 WL 4268814 (7th Cir. Aug. 10, 2018) (describing the Attorney General’s imposition of conditions upon funding from the Byrne JAG program, “the primary provider of federal criminal justice funding for state and local governments”).

204. *City of Chicago*, 888 F.3d at 283 (quoting brief of the Department of Justice).

205. See Ilya Somin, *Making Federalism Great Again: How the Trump Administration’s Attack on Sanctuary Cities Unintentionally Strengthened Judicial Protection for State Autonomy*, TEX. L. REV. (forthcoming 2019) (manuscript at 172–173), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3347171 [<https://perma.cc/UMA4-N2PS>] (“At least until recently, judicial enforcement of federalism was a cause championed primarily by conservatives and libertarians, while progressives tended to be highly skeptical, if not downright hostile.”).

206. See Fiss, *supra* note 39, at 260 (explaining that “the contemporary student of constitutional law tends to link conservatism with the enhancement of the power of the states,” but that the Fuller Court “did not translate its general commitment to individual liberty into a comprehensive program favoring state sovereignty”); see also *id.* (citing railroad regulation, antitrust, and state prohibition as instances where the Court “curbed the powers of the state and affirmatively strengthened the powers of the federal government,” in keeping with its commitment to “economic nationalism”).

207. See WHITE, *supra* note 36, at 403 (explaining that in the doctrine of the time, “[c]itizens had a ‘liberty’ to pursue a calling, and once a job was acquired, they had ‘property’ rights in it,” in addition to being “free to enter into contracts setting the terms of their employment”); WIECEK, *supra* note 5, at 86–87 (tracing the Free Labor and abolitionist roots of the liberty of contract doctrine).

was skeptical of class legislation,” jurists in this era invoked liberty of contract “to preserve economic autonomy in an age of increased regulation.”²⁰⁸ So, bakers with “full legal capacity” had a natural right to contract for an eleven-hour workday; a law limiting them to ten hours was thus invalid.²⁰⁹ A law setting a minimum wage likewise was invalid because it impaired the right of employers and workers to bargain for a lower hourly wage.²¹⁰ Through its enforcement of “affirmative, extrinsic constraint[s] on governmental authority rooted in natural, pre-political rights,” the *Lochner*-era Court shielded its conception of “the sovereignty of the individual in his relation to the authority of the state.”²¹¹ In the domains of drug regulation, health insurance law, education law, and elsewhere, the Trump Administration has taken an approach that is consonant with these conceptions.

For a thumbnail sketch of this consonance, consider the Trump Administration’s stance toward the “right to try” experimental drugs not approved by the FDA. Over a decade ago, patient advocates had asserted the right to try in a substantive due process challenge to FDA restrictions on the sale of experimental drugs.²¹² The D.C. Circuit eventually rejected that claim, treating it as a now-disfavored argument for a *Lochneresque* economic right.²¹³ Unexpectedly, the right to try emerged as a legislative priority of the Trump Administration. Candidate Trump seems never to have spoken the phrase, nor did President Trump in his first year in office.²¹⁴ Yet this policy plank was placed in the limelight by the President’s 2018 State of the Union Address, pushed by lawmakers at the Administration’s behest, and eventually came to fruition through the enactment of a federal statute that Trump enthusiastically signed, hailing the right to try as a “fundamental freedom.”²¹⁵ The right to try had been rejected by the federal courts, but it nonetheless caught the eye and commanded the political capital of an Administration more favorably inclined toward the proposition that an administrative agency

208. Samuel R. Olken, *Justice Sutherland Reconsidered*, 62 VAND. L. REV. 639, 658 (2009).

209. *Lochner v. New York*, 198 U.S. 45, 61 (1905) (calling the Bakeshop Act an “illegal interference with the rights of individuals, both employers and [employees], to make contracts regarding labor upon such terms as they may think best”).

210. *Adkins v. Children’s Hosp.*, 261 U.S. 525, 561 (1923).

211. Lindsay, *supra* note 30, at 715, 719.

212. Abigail All. for Better Access to Developmental Drugs v. von Eschenbach, 495 F.3d 695, 702 (D.C. Cir. 2007).

213. *Id.* at 702 (“As the history of the *Lochner* era demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court.” (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977))).

214. “Right to Try,” FACTBASE, <https://factba.se/search#%22right%2Bto%2Btry%22> (navigate to tab Search; select Donald Trump; type in search bar “right to try”; select all dates (1946-2018)) (showing Trump’s first mention of the phrase was January 30, 2018).

215. President Donald J. Trump, Remarks at S.204, “Right to Try” Bill Signing (May 30, 2018, 12:31 PM), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-s-204-right-try-bill-signing/> [<https://perma.cc/43UF-YQRQ>] (“[P]atients, advocates, and lawmakers have fought for this fundamental freedom. And as I said, incredibly, they couldn’t get it. And there were reasons. A lot of it was business. A lot of it was pharmaceuticals. A lot of it was insurance. A lot of it was liability. I said, so you take care of that stuff. And that’s what we did.”).

should not stand between willing sellers and willing purchasers of unapproved pharmaceuticals.

The Trump Administration's stance with respect to the ACA also merits examination. One aspect of the Act's implementation triggered a wave of religious liberty litigation: the Obama Administration's determination that the ACA authorized it to require employee health insurance plans to cover all FDA-approved contraceptive methods.²¹⁶ The Obama Department of Health and Human Services (HHS) initially applied that requirement to private groups, whether for-profit or not-for-profit.²¹⁷ Plaintiffs brought suits raising claims under the First Amendment, the Religious Freedom Restoration Act (RFRA), and other grounds, contending that these FDA-approved contraceptive methods induced abortion. These lawsuits culminated in the Supreme Court's decision in *Burwell v. Hobby Lobby Stores*.²¹⁸ In that decision, the Court held that RFRA required that accommodations be made for certain "closely held" private employers with bona fide religious beliefs.²¹⁹ The Obama Administration responded by allowing those employers to opt out of offering contraceptive coverage, while also ensuring that female employees of an employer that had opted out could still receive free contraceptive coverage.²²⁰ Employers, however, challenged this broader accommodation by arguing that the accommodation continued to make religious employers complicit in the act of procuring contraception.²²¹

The Trump Administration's response to this issue has revealed a view of rights that hearkens back to the thinking of the *Lochner*-era Court. In May 2017, the Administration issued an executive order, "Promoting Free Speech and Religious Liberty,"²²² which contained a provision directing the Secretaries of Treasury, Labor, and HHS to "consider issuing amended regulations, consistent with applicable law, to address conscience-based objections to the preventive-care mandate."²²³ In October 2017, the Trump Administration released two

216. See Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, and 45 C.F.R. pt. 147); 45 C.F.R. § 147.130(a)(1) (2017). Failure to cover the specified types of contraception triggers "steep financial penalties." *Korte v. Sebelius*, 735 F.3d 654, 660–61 (7th Cir. 2013). If an employer with more than fifty employees withdraws altogether from offering health-insurance coverage, the employer may also face financial penalties. *Id.*

217. 45 C.F.R. § 147.130(a)(1); 45 C.F.R. § 147.131(b) (2017).

218. 573 U.S. 682 (2014).

219. *Id.* at 733.

220. See Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. 41,318, 41,323, 41,343 (July 14, 2015) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pts. 2510, 2590, and 45 C.F.R. pt. 147).

221. *Zubik v. Burwell*, 136 S. Ct. 1557, 1560 (2016) (per curiam) (without resolving the question presented, remanding seven consolidated cases to their originating circuit courts to allow the government and employers an opportunity to negotiate a resolution that did not require employers to notify their insurers or the government of their objections).

222. Exec. Order No. 13,798, 82 Fed. Reg. 21,675 (May 4, 2017).

223. *Id.* at 21,675.

interim final rules that carried out that directive.²²⁴ Following a comment period, it thereafter issued final rules on November 15, 2018, which became effective on January 14, 2019.²²⁵

The new rules broaden the exemption from the contraceptive coverage mandate in two important ways. First, they extend the exemption for for-profit groups with sincerely held religious beliefs beyond entities that are “closely held”—the Court’s standard in *Hobby Lobby*—to all objecting for-profit entities regardless of their ownership structure, including publicly traded companies.²²⁶ Second, the new rules extend the exemption from offering contraception to many for-profit entities that hold *non*-religious moral objections to covering contraception,²²⁷ drawing for justification upon “the laws and founding principles of the United States,”²²⁸ including statements by George Washington, Thomas Jefferson, and James Madison.²²⁹

These new accommodations go beyond existing First Amendment doctrine; the Supreme Court’s jurisprudence does not currently recognize, nor has it ever recognized, a free-exercise right to refuse to comply with an otherwise applicable law because of *non*-religious belief.²³⁰ And RFRA required accommodations

224. See Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,792 (Oct. 13, 2017) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, and 45 C.F.R. pt. 147); Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,838 (Oct. 13, 2017) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, and 45 C.F.R. pt. 147). See *Pennsylvania v. Trump*, 281 F. Supp. 3d 553 (E.D. Pa. 2019); *California v. Dep’t of Health & Human Servs.*, 281 F. Supp. 3d 806, 814–19 (N.D. Cal. 2017), *aff’d in part, vacated in part, remanded sub nom.* *California v. Azar*, 911 F.3d 558, 566–68 (9th Cir. 2018) (summarizing history of regulation and litigation concerning ACA contraceptive mandate).

225. See Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,536 (Nov. 15, 2018) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, and 45 C.F.R. pt. 147) [hereinafter *Religious Exemptions Rule*]; Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,592 (Nov. 15, 2018) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, and 45 C.F.R. pt. 147) [hereinafter *Moral Exemptions Rule*]. The day before the rules were to go into effect, a district court issued a preliminary injunction against enforcement of the rules in thirteen states and the District of Columbia. See *California v. Dep’t of Health & Human Servs.*, 351 F. Supp. 3d 1267 (N.D. Ca. 2019).

226. 45 C.F.R. § 147.132(a)(i)(D).

227. 45 C.F.R. § 147.133 (allowing a “for-profit entity that has no publicly traded ownership interests” to claim an exemption based on its “sincerely held moral convictions”).

228. *Moral Exemptions Rule*, *supra* note 225, at 57,601.

229. *Id.* at 57,601–02.

230. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (“A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief.”); *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1140–41 (9th Cir. 2009) (“The Free Exercise Clause . . . does not protect those with moral or other objections Therefore, the injunction . . . is fatally overbroad because it is not limited to the only type of refusal that may be protected by the First Amendment—one based on religious belief.”); see also Erwin Chemerinsky & Michele Goodwin, *Religion Is Not a Basis for Harming Others*, 104 GEO. L.J. 1111, 1116–22 (2016) (summarizing history of free-exercise jurisprudence).

only for religious beliefs,²³¹ not for non-religious objections based on conscience; nor has the Court held that all for-profit entities—including publicly traded corporations—are eligible to claim an exemption under RFRA.

What is the basis for the Trump Administration to claim the authority to shield so robustly the right of refusal to supply contraception by this broad spectrum of entities with religious or moral objections? Again, at the federal level, no statute—not the ACA, not RFRA, not the riders in various federal appropriations laws devoted to protecting conscience²³²—requires such a broad exemption. Nor does the First Amendment.²³³ The thicket of state laws that shield conscience over and above the requirements of the First Amendment have no relevance here.²³⁴ Viewed from the perspective of current law, then, the new rules pose a puzzle: as Nick Bagley has wondered, when no statute gives it the power to exempt moral objectors, “where does the agency find that authority?”²³⁵ To Bagley, the Trump Administration is senselessly pushing “a weak legal theory that potentially imperils the whole rule.”²³⁶

But step back a hundred years and the “legal theory” does not look so “weak.” The *Lochner*-era Court did not recognize religious exemptions from otherwise applicable laws.²³⁷ It did hold, however, that the right to liberty of contract merits protection from regulatory intervention,²³⁸ and that corporations could claim this constitutional right.²³⁹ A *Lochner*ist commitment to liberty of contract would amply justify a modern-day position that the federal government should not obligate corporate entities of diverse sorts to contract in a way to which they object—whether as a moral or religious matter—notwithstanding Congress’ failure to specify by statute that the agency should accord protection to that right and the Court’s refusal to recognize such a right. It is true that the Trump

231. See 42 U.S.C. § 2000bb-1(a) (providing only that “[g]overnment shall not substantially burden a person’s exercise of religion,” with limited exceptions not relevant here).

232. See Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2538 n.89, 2540–41 (2015) (discussing the creation of conscience clauses in state and federal laws concerning abortion).

233. See *Emp’t Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872, 881, 889 (1990).

234. Cf. *Religious Exemptions Rule*, *supra* note 225, at 57,543 (“Although the practice of states is not a limit on the discretion delegated to HRSA by the ACA, nor is it a statement about what the federal government may do consistent with RFRA or other limitations or protections embodied in federal law, such state practices can inform the Department’s view that it is appropriate to protect religious liberty as an exercise of agency discretion.”).

235. Nick Bagley, *Moral Convictions and the Contraception Exemptions*, TAKE CARE (June 5, 2017), <http://takecareblog.com/blog/moral-convictions-and-the-contraception-exemptions> [<https://perma.cc/4EM5-HQM6>].

236. *Id.*

237. See *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 594–95 (1940) (collecting cases spanning the *Lochner* era in which the Court had held that “mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities”); see also *City of Boerne v. Flores*, 521 U.S. 507, 537–38 (1997) (Scalia, J., concurring in part) (discussing the historical basis for the Court’s holding in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990)).

238. *Lochner v. New York*, 198 U.S. 45, 61 (1905).

239. *Allgeyer v. Louisiana*, 165 U.S. 578, 593 (1897).

Administration's rules do not expressly invoke liberty of contract; it is equally true, however, that they have the effect of shielding that value.

The proposition that the Trump Administration's concern is with the right to liberty of contract is buttressed by its approach to another aspect of the ACA—the individual mandate. The ACA required people to purchase health insurance or to pay a penalty.²⁴⁰ As soon as the law was enacted, litigants challenged this provision on multiple legal theories. The challenge that ultimately reached the Supreme Court in *NFIB v. Sebelius* pressed a Commerce Clause objection asserting that the regulation of mere inactivity—the non-purchasing of insurance—exceeded the scope of Congress's power to enact laws necessary and proper for regulating interstate commerce.²⁴¹

As Jamal Greene has explained, the framing of *NFIB* as a Commerce Clause challenge was telling.²⁴² One objection initially levied in the trial courts against the mandate was that it infringed on liberty of contract and personal autonomy²⁴³—the famous “broccoli horrible.”²⁴⁴ But because of the anticonstitutional status of *Lochner* and the disfavored nature of constitutional economic rights claims, pressing the liberty-of-contract theory was legally unwise; because of Republican presidential candidate Mitt Romney's implementation of a similar mandate in Massachusetts, it may also have been politically unpalatable.²⁴⁵ Whatever the reason, the liberty-of-contract argument quickly fell out of the myriad lawsuits attacking the mandate.²⁴⁶ When the Supreme Court ultimately took up the case in *NFIB*, it addressed a Commerce Clause challenge and not a *Lochner*ist liberty of contract claim, even though the “broccoli horrible” loomed in the background.²⁴⁷

Unlike the savvy lawyers pressing the nearly-successful *NFIB* attack, however, President Trump evidently does not feel bound by the etiquette of post-New Deal

240. 26 U.S.C. § 5000A (2012); *NFIB v. Sebelius*, 567 U.S. 519, 539 (2012).

241. 567 U.S. at 552.

242. Jamal Greene, *What the New Deal Settled*, 15 U. PA. J. CONST. L. 265, 270 (2012).

243. *Florida ex rel. McCollum v. U.S. Dep't of Health & Human Servs.*, 716 F. Supp. 2d 1120, 1161–62 (N.D. Fla. 2010) (rejecting plaintiffs' contention that the mandate “does, in fact, implicate fundamental rights to the extent that people have ‘recognized liberty interests in the freedom to eschew entering into a contract, to direct matters concerning dependent children, and to make decisions regarding the acquisition and use of medical services’”).

244. *NFIB*, 567 U.S. at 615 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (“The Chief Justice cites a Government mandate to purchase green vegetables. One could call this concern ‘the broccoli horrible.’”).

245. Greene, *supra* note 242, at 267–69.

246. *Id.* at 269 (“Of . . . the twenty-two complaints [challenging the mandate], only eleven argued that the mandate to purchase health insurance violated the Due Process Clause of the Fifth Amendment . . . [N]one alleged it as its first argument. Just one district court opinion and no court of appeals opinions have addressed the merits of these substantive due process claims. The one opinion to reach the argument rejected it as foreclosed by *Lochner* and its progeny and the claim was subsequently abandoned on appeal.”).

247. *Id.* at 266–67; see Bryan J. Leitch, *Where Law Meets Politics: Freedom of Contract, Federalism, and the Fight over Health Care*, 27 J.L. & POL. 177, 180–81 (2011) (identifying the linkages between the *NFIB* attack and “*Lochner*-era ‘freedom of contract’ theories”). It is worth noting that the Commerce Clause attack was itself associated with *Lochner*ist ideas.

sensibilities. Echoing the economic libertarianism of the Tea Party and of Republicans who castigated the mandate as a violation of basic constitutional commitments to freedom and liberty,²⁴⁸ Trump’s “seven-point plan” for government proclaimed that “[n]o person should be required to buy insurance unless he or she wants to.”²⁴⁹ The Trump Administration has since taken steps to put teeth into this *ipse dixit*.²⁵⁰ Initially, in 2017, the Trump Administration took steps to cease the enforcement of the individual mandate,²⁵¹ even though *NFIB* held that the mandate was constitutional as an exercise of the taxing power and the mandate continued to be part of the corpus of federal law that the Trump Administration was charged with faithfully executing. Subsequently, in December 2017, Congress enacted a tax reform law that reduced the tax penalty associated with the mandate to zero.²⁵² In June 2018, the Trump Administration declined to defend the constitutionality of the zero-penalty mandate and further contended that the guaranteed-issue and community-ratings provisions of the ACA must also be declared invalid, on the grounds that they were not severable from the (avowedly unconstitutional) mandate.²⁵³

These three provisions collectively form the heart of the ACA’s insurance market reforms, and at least the last two fall comfortably within any (post-New Deal) conception of the Commerce Clause power and the Due Process Clause’s demands. But they also collectively create a system of forced purchases (the mandate), forced sales (guaranteed issue), and price caps (community rating) that would most affront a commitment to contractual liberty and to government non-interference in private, competitive markets.²⁵⁴ Before the district court, the Trump Administration targeted these three provisions for invalidation; it trained

248. See Colby & Smith, *supra* note 125, at 571–73 (explaining the constitutionally-inflected economic liberty arguments espoused by opponents of the ACA).

249. Tami Luhby, *Trump’s Health Care Plan: What He Promises and What It Really Says*, CNN MONEY (Mar. 3, 2016, 6:35 PM), <https://money.cnn.com/2016/03/03/news/economy/trump-health-care/index.html> [<https://perma.cc/G7M3-LVSC>].

250. Cf. Exec. Order No. 13,765, 82 Fed. Reg. 8351 (Jan. 20, 2017) (“It is the policy of my Administration to seek the prompt repeal of the Patient Protection and Affordable Care Act.”).

251. Haeyoun Park & Margot Sanger-Katz, *4 Ways Trump Is Weakening Obamacare, Even After Repeal Plan’s Failure*, N.Y. TIMES (Sept. 27, 2017), <https://www.nytimes.com/interactive/2017/07/19/us/what-trump-can-do-to-let-obamacare-fail.html> [<https://perma.cc/3TCB-UQFM>]; Peter Suderman, *Major Blow to Obamacare Mandate: IRS Won’t Reject Tax Returns That Don’t Answer Health Insurance Question*, REASON (Feb. 14, 2017, 9:44 PM), <http://reason.com/blog/2017/02/14/irs-blow-to-obamacare-individual-mandate> [<https://perma.cc/NS3G-ZNDS>].

252. Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092 (2017).

253. See Fed. Defendants’ Memorandum in Response to Plaintiffs’ Application for Preliminary Injunction at 12–16, *Texas v. United States*, No. 4:18-cv-00167 (N.D. Tex. June 7, 2018). In December 2018, the district court ruled for the plaintiffs and held that the entire ACA was invalid. *Texas v. United States*, 340 F. Supp. 3d 579 (N.D. Tex. 2018). As of this writing, appeals are underway.

254. See, e.g., Richard A. Epstein, *Obama’s Constitution: The Passive Virtues Writ Large*, 26 CONST. COMMENT. 183, 191 (2010) (“[T]he strongest constitutional argument against [the ACA] was that it treated the private insurers as regulated public utilities who, at the end of the day, could not earn a sufficient rate of return to remain in business. But the Commerce Clause argument mistakenly cast the autonomy issue as a federalism issue when it is in fact one about individual entitlements against government, which should be as powerful against state action as against federal action.”).

its fire on those portions of the ACA that most directly regulate private contracts between insurers and purchasers.²⁵⁵ In this Administration, the liberty of contract objections to the ACA seem to have at last found an audience that is both friendly and influential.

Turn now to the domain of education. In 1925, in *Pierce v. Society of Sisters*, the Court struck down a compulsory public-education law on the grounds that “[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only.”²⁵⁶ As Martha Minow noted, *Pierce* “accorded enduring constitutional protection to parental choice of parochial and other private schooling.”²⁵⁷ *Pierce*, she wrote, “also propelled nearly a century of advocacy for public aid for private religious schools—a movement that succeeded constitutionally but stalled politically.”²⁵⁸ The Trump Administration has now attempted to reignite that cause, arguing that parental control over education dollars ensures “freedom of choice” and “educational freedom for all Americans.”²⁵⁹ The Administration’s first budget proposed dedicating \$1.4 billion to promoting school choice and the creation of a \$250 million private-school voucher program,²⁶⁰ and its choice for Secretary of Education, Betsy DeVos, is a long-term advocate of school choice.²⁶¹

255. The plaintiffs in *Texas v. United States* argued that the mandate was inseverable from the remainder of the ACA, *Texas*, 340 F. Supp. 3d at 591, and the district court so held, *id.* at 618. As noted, the Trump Administration contended before the district court that the ACA’s guaranteed-issue and community-ratings provisions were inseverable from the mandate. *Id.* at 605. In a recent letter to the Fifth Circuit, however, the Trump Administration stated its view that the district court’s judgment should be affirmed, thus adopting the position that the ACA in its entirety is invalid. See Letter from Joseph H. Hunt, Assistant Attorney Gen., *Texas v. United States*, No. 19-10011 (5th Cir. Mar. 25, 2019), ECF No. 00514887530. As of this writing, the Trump Administration has not filed its merits brief or elsewhere explained the reason for this radical shift in its position.

256. 268 U.S. 510, 535 (1925); see also *id.* (“Appellees are corporations . . . [T]hey have business and property for which they claim protection. These are threatened with destruction through the unwarranted compulsion which appellants are exercising over present and prospective patrons of their schools.”).

257. Minow, *supra* note 137, at 819.

258. *Id.* at 843; see also *id.* at 820 (“*Pierce* . . . gave rise to decades of efforts by parents and religious organizations seeking legislative and constitutional reforms to secure public funding for religious schooling.”).

259. Proclamation No. 9692, National School Choice Week, 83 Fed. Reg. 3539 (Jan. 22, 2018).

260. Laura Meckler, *The Education of Betsy DeVos: Why Her School Choice Agenda Has Not Advanced*, WASH. POST (Sept. 4, 2018), https://wapo.st/2Q5VKyf?tid=ss_tw&utm_term=.3ad55d5c22bc [<https://perma.cc/E5FJ-6SQY>]; see also Aria Bendix, *Trump’s Education Budget Revealed*, ATLANTIC (Mar. 16, 2017) <https://www.theatlantic.com/education/archive/2017/03/trumps-education-budget-revealed/519837/> [<https://perma.cc/WBX5-KKU2>] (“Under the new budget, the Trump administration wants to spend \$1.4 billion to expand vouchers in public and private schools, leading up to an eventual \$20 billion a year in funding. About \$250 million of these funds will go toward a private school-choice program, while \$168 million will be set aside for charter schools.”).

261. Erica L. Green, *Betsy DeVos Backs \$5 Billion in Tax Credits for School Choice*, N.Y. TIMES (Feb. 28, 2019), <https://www.nytimes.com/2019/02/28/us/politics/devos-tax-credit-school-choice.html> [<https://nyti.ms/2IG8w71>]; Erica L. Green, *Betsy DeVos Calls for More School Choice, Saying Money Isn’t the Answer*, N.Y. TIMES (Mar. 29, 2017), <https://www.nytimes.com/2017/03/29/us/politics/betsy-devos-education-school-choice-voucher.html> [<https://perma.cc/45RZ-3Y9K>]. The idea that public tax

Finally, the Trump Administration also displays a lack of solicitude for certain individual rights—rights that the *Lochner*-era Court likewise did not see fit to shield. The *Lochner*-era Court had little quarrel with federal or state restrictions on the manufacture, sale, or possession of alcohol; it repeatedly rejected constitutional attacks on such laws, holding that they did not violate constitutional rights to liberty, property, or due process.²⁶² As Lindsay Rogers dolefully summed it up in 1919, “[t]he citizen still has a right to life and a right to liberty, but he no longer has any constitutional right to liquor.”²⁶³

Today, of course, the battle over legitimate prohibition of controlled substances concerns marijuana, not liquor. And, consistent with the *Lochner*-era Court’s understanding of the scope of individual rights and the police power, the Trump Administration perceives no impediment to the vigorous enforcement of federal laws that criminalize marijuana cultivation and distribution.²⁶⁴ Former Attorney General Sessions recently urged federal prosecutors to seek the death penalty in prosecutions for drug-related crimes.²⁶⁵ Notwithstanding its commitment to individual liberty in the economic arena, the *Lochner*-era Court was certainly not “libertarian” when it came to owning, buying, or selling controlled substances;²⁶⁶ neither is the Trump Administration.

D. IMMIGRATION AND SOVEREIGNTY

The most familiar aspect of President Trump’s platform overlaps with one of the least familiar domains of *Lochner*-era jurisprudence: immigration. The Trump Administration has demanded a sharp uptick in the scope, scale, and variety of responses by the federal government to illegal immigration, and a comprehensive revision of its approach to legal immigration. Trump advisor Kellyanne

dollars should flow to private schools was not at issue in *Pierce* or endorsed by it; that notion would instead find support in the *Lochner*-era cases that gave broad leeway to the federal government in how it chose to spend federal dollars, including when those federal funds flowed to private corporations “conducted under the auspices” of a church. See *Bradfield v. Roberts*, 175 U.S. 291, 298–99 (1899) (“That the influence of any particular church may be powerful over the members of a non-sectarian and secular corporation, incorporated for a certain defined purpose and with clearly stated powers, is surely not sufficient to convert such a corporation into a religious or sectarian body. That fact does not alter the legal character of the corporation . . .”); *supra* text accompanying notes 199–204.

262. See, e.g., *Barbour v. Georgia*, 249 U.S. 454, 459–60 (1919); *Clark Distilling Co. v. W. Md. Ry. Co.*, 242 U.S. 311 (1917); *Crane v. Campbell*, 245 U.S. 304, 308 (1917) (“[T]he right to hold intoxicating liquors for personal use is not one of those fundamental privileges of a citizen of the United States which no State may abridge.”); *Mugler v. Kansas*, 123 U.S. 623, 675 (1887).

263. Lindsay Rogers, “*Life, Liberty, and Liquor*”: A Note on the Police Power, 6 VA. L. REV. 156, 181 (1919).

264. See Press Release, U.S. Dep’t of Justice, Justice Department Issues Memo on Marijuana Enforcement (Jan. 4, 2018), <https://www.justice.gov/opa/pr/justice-department-issues-memo-marijuana-enforcement> [https://perma.cc/BH43-66F7] (reversing Obama Administration DOJ guidance on marijuana enforcement).

265. Memorandum from Jeff Sessions, Attorney Gen., to U.S. Attorneys, U.S. Dep’t of Justice, Guidance Regarding Use of Capital Punishment in Drug-Related Prosecutions (Mar. 20, 2018), <https://www.justice.gov/file/1045036/download/> [https://perma.cc/6TTC-VS5L].

266. See Hovenkamp, *supra* note 34, at 678 (noting the “strongly moral and thus anti-libertarian set of exceptions” embedded in the “classical theory opposing regulation”).

Conway commented that Trump has changed the “national conversation” on immigration to focus on four questions: “What’s fair to the American worker who’s competing with the illegal immigrant for the job? What’s fair to the local economy? What’s fair to our local resources—law enforcement, the school system, housing? What’s fair to a sovereign nation that needs physical borders that are respected?”²⁶⁷ These precise questions were addressed by the *Lochner*-era Court, and each received the same response that the Trump Administration now gives. The *Lochner*-era Court regarded the federal and state governments as possessing broad rights of property and contract, just as individuals did. As a result, the *Lochner*-era Court endorsed a robust view of national sovereignty in matters of immigration, treating the federal government as holding plenary power to exclude and deport non-citizen aliens. It concomitantly approved the constitutionality of a slew of federal and state measures targeting aliens, including laws that restricted aliens’ ability to access public funds and resources, own certain kinds of property, or engage in certain kinds of contracts.²⁶⁸

The Trump Administration’s nationalist agenda for immigration now recapitulates the commitments of the *Lochner*-era Court. The 2,000-mile-long, thirty-foot-high border wall that formed the centerpiece of Trump’s campaign platform is, quite simply, a physical metaphor for the linchpin of the *Lochner*-era view of the nation’s property rights; the fundamental property right of the state, like that of the individual, is the right to exclude.²⁶⁹ But the parallels extend beyond the mere fact of exclusion to the level of justification, too. The Trump Administration’s arguments against immigration, like the immigration decisions of the *Lochner*-era Court, can be grouped around three key ideas—that immigrants threaten public safety and national security; that immigrants steal Americans’ jobs; and that immigrants consume limited public resources and should therefore be barred from benefitting from state property or government contracts.

Like the opinions penned in the *Lochner* era,²⁷⁰ the Trump Administration stresses the criminality of immigrants and the obligation of the federal

267. Ashley Parker, David Nakamura & Philip Rucker, *Trump’s Wall: The Inside Story of How the President Crafts Immigration Policy*, WASH. POST (July 19, 2017), http://wapo.st/2tfq7qd?tid=ss_tw&utm_term=.6f5e07c4dc81 [<https://perma.cc/YV2G-XAD6>].

268. See *supra* Section I.A.1.

269. See Exec. Order No. 13,767, 82 Fed. Reg. 8793, § 2(a) (Jan. 25, 2017) [hereinafter Wall Construction Order] (“It is the policy of the executive branch to . . . secure the southern border of the United States through the immediate construction of a physical wall on the southern border, monitored and supported by adequate personnel so as to prevent illegal immigration, drug and human trafficking, and acts of terrorism.”); see also, e.g., Donald J. Trump (@realDonaldTrump), TWITTER (June 19, 2018, 6:52 AM), <https://twitter.com/realdonaldtrump/status/1009071378371313664> [<https://perma.cc/ATQ8-VZC5>] (“If you don’t have Borders, you don’t have a Country!”); Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 30, 2016, 5:27 AM), <https://twitter.com/realdonaldtrump/status/770568584443539456> [<https://perma.cc/8FJZ-FALR>] (“From day one I said that I was going to build a great wall on the SOUTHERN BORDER, and much more. Stop illegal immigration.”).

270. See, e.g., *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889) (“If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and

government to exclude such undesirables.²⁷¹ Trump has given a prominent national stage to parents of victims of crimes committed by illegal immigrants, blaming the government for these crimes because of its laxity in enforcing immigration laws.²⁷² The Trump Administration has urged Congress to enact bills such as Kate’s Law, which would enhance penalties for convicted and deported aliens who reenter the country illegally.²⁷³ One of the only new federal offices that the Trump Administration has created is the “Victims of Immigration Crime Engagement” office (“VOICE”),²⁷⁴ which is directed by executive order to ensure that victims receive “adequate information” about offenders’ immigration and custody statuses.²⁷⁵

Again like the *Lochner*-era Court, the Trump Administration appears to consider aliens who are not criminals as harmful to American society for a separate reason: because they are job-stealers. With rhetoric that echoes cases like *Chae Chan Ping*,²⁷⁶ the Administration has justified its immigration policies on the ground that immigration—whether illegal or legal—damages the domestic labor market by eroding the rights of American workers to compete for jobs. In various executive orders, either announced²⁷⁷ or

security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects.”); *id.* (“To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character or from vast hordes of its people crowding in upon us.”).

271. *See, e.g.*, 163 CONG. REC. H1387 (daily ed. Feb. 28, 2017) (statement of Pres. Trump) (“To any in Congress who do not believe we should enforce our laws, I would ask you this one question: What would you say to the American family that loses their jobs, their income, or their loved one because America refused to uphold its laws and defend its borders?”); Memorandum from John Kelly, Sec’y, U.S. Dep’t of Homeland Sec., to Kevin McAleenan, Acting Comm’r, U.S. Customs & Border Prot., et al. 4 (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf [hereinafter *Enforcement of Immigration Laws Order*] (“Criminal aliens routinely victimize Americans and other legal residents.”); Memorandum from John Kelly, Sec’y, U.S. Dep’t of Homeland Sec., to Kevin McAleenan, Acting Comm’r, U.S. Customs & Border Prot., et al. 2 (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf (“Detention also prevents such aliens from committing crimes while at large in the United States”); Wall Construction Order, *supra* note 269, § 1 (“Among those who illegally enter are those who seek to harm Americans through acts of terror or criminal conduct. Continued illegal immigration presents a clear and present danger to the interests of the United States.”).

272. *See, e.g.*, President Donald J. Trump, Weekly Address (June 30, 2017), <https://www.whitehouse.gov/the-press-office/2017/06/30/president-donald-j-trumps-weekly-address> [<https://perma.cc/45R5-6J35>] (“These beautiful American lives were stolen because our government refused to do its job. If the government had simply enforced our immigration laws, these Americans would still be alive today.”).

273. *Id.*

274. Exec. Order No. 13,768, 82 Fed. Reg. 8799, 8801, § 13 (Jan. 25, 2017) (directing creation of office); *see also* *Victims of Immigration Crime Engagement (VOICE) Office*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <https://www.ice.gov/voice> [<https://perma.cc/8TEA-CJJZ>] (last updated Aug. 9, 2018).

275. *See* *Enforcement of Immigration Laws Order*, *supra* note 271, at 4–5.

276. *See supra* notes 82–86 and accompanying text.

277. *See* Buy American Order, *supra* note 2, § 2. In an executive-order provision captioned “Ensuring the Integrity of the Immigration System in Order to ‘Hire American,’” the President has

leaked,²⁷⁸ the Trump Administration reiterates the claim that immigration by foreign workers undercuts the economic interests of American workers. The Administration has embraced a plan to cut legal immigration by half within a decade²⁷⁹ and to “institute a merit-based system to determine who is admitted to the country . . . favoring applicants based on skills, education and language ability,”²⁸⁰ ostensibly in order to ensure that visas go to only highly skilled and highly paid migrants. It has undertaken administrative measures that have tamped down the issuance of H-1B visas and visas for seasonal workers.²⁸¹ Such measures would be well-fitted to address *Lochner*-era worries over an influx of “foreign pauper labor” that “offend[s] through an excess of economic competitiveness.”²⁸²

The *Lochner*-era Court regarded the state as possessing the right to steward its own property or property in which it held a “special public interest,” and therefore upheld both federal and state restrictions on immigrants’ access to public funds and resources.²⁸³ Like these jurists, the Trump Administration has endorsed the idea that immigrants place a strain on public dollars; claiming it is a “basic principle that those seeking to enter a country ought to be able to support themselves financially,” the President has complained that “yet in America, we do not enforce this rule, straining the very public resources that our poorest citizens rely upon.”²⁸⁴ The Administration has proposed rules that call for a crackdown on immigrants who are “public charges.”²⁸⁵ In explaining its authority, it relies in

directed cabinet officials to “propose new rules and issue new guidance . . . to protect the interests of United States workers in the administration of our immigration system . . .” *Id.* § 5(a).

278. See Memorandum from Andrew Bremberg to the President, Protecting American Jobs and Workers by Strengthening the Integrity of Foreign Worker Visa Programs 4, 6 (Jan. 23, 2017), <http://apps.washingtonpost.com/g/documents/national/draft-executive-orders-on-immigration/2315/> [https://perma.cc/TK8G-XY8D] (requiring departmental reports “on the actual or potential injury to U.S. workers caused, directly or indirectly” by the H-1B program and directing the government to consider revising the program). The draft was obtained by the Washington Post. See Abigail Hauslohner & Janell Ross, *Trump Administration Circulates More Draft Immigration Restrictions, Focusing on Protecting U.S. Jobs*, WASH. POST (Jan. 31, 2017), http://wapo.st/2kOhRNp?tid=ss_tw&utm_term=.cbc5cbf1b0bb [https://perma.cc/XVQ9-KPL8].

279. See Bier & Anderson, *supra* note 17.

280. Peter Baker, *Trump Supports Plan to Cut Legal Immigration by Half*, N.Y. TIMES (Aug. 2, 2017), <https://www.nytimes.com/2017/08/02/us/politics/trump-immigration.html> [https://perma.cc/ZFQ9-TNED].

281. Miriam Jordan, *Without New Laws or Walls, Trump Presses the Brake on Legal Immigration*, N.Y. TIMES (Dec. 20, 2017), <https://www.nytimes.com/2017/12/20/us/trump-immigration-slowdown.html> [https://perma.cc/AWW4-WVK5].

282. See Lindsay, *Immigration as Invasion*, *supra* note 78, at 7.

283. See *supra* text accompanying notes 90–97.

284. See Julie Hirschfield Davis, *How Trump’s ‘Merit-Based’ Immigration System Might Work*, N.Y. TIMES (Mar. 1, 2017), <https://www.nytimes.com/2017/03/01/us/politics/immigration-trump.html> [https://perma.cc/J2BJ-8BDC].

285. Michael D. Shear & Emily Baumgaertner, *Trump Administration Aims to Sharply Restrict New Green Cards for Those on Public Aid*, N.Y. TIMES (Sept. 22, 2018), <https://www.nytimes.com/2018/09/22/us/politics/immigrants-green-card-public-aid.html> [https://perma.cc/BKL5-5DAC]; see 8 U.S.C. § 1182(a)(4)(A) (2012) (“Any alien who, in the opinion of the consular at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible.”); 8 U.S.C. § 1183 (2012)

part on the same statute enacted in 1891 and upheld during the *Lochner* era.²⁸⁶

Finally, it is worth recalling the *Lochner*-era Court's attitude toward government contracts and government hiring in order to better understand the Trump Administration's stance concerning these matters. The *Lochner*-era Court held that—like the individual—the federal and state governments had broad power to contract and to set the terms on which they would contract.²⁸⁷ In *Atkin v. Kansas*, the Court reasoned that a state statute limiting state government contractors to an eight-hour day posed no due process problem,²⁸⁸ even though two years later the Court would strike down a state restriction on private-sector working hours in *Lochner* itself.²⁸⁹ Citing the power of the state to “prescribe the conditions upon which it will permit public work to be done on its behalf,”²⁹⁰ the *Atkin* Court rejected the contractor's liberty of contract claim: “It cannot be deemed a part of the liberty of any contractor that *he* be allowed to do public work in any mode he may choose to adopt, without regard to the wishes of the State.”²⁹¹ *Ellis v. United States* then extended this principle to the federal government, which had enacted a similar working-hours restriction on its contractors.²⁹² The *Ellis* Court held that the United States' power to enter into contracts included the power to decide “the mode in which contracts with the United States shall be performed.”²⁹³

This broad principle of freedom of (government) contract underpinned the cases that addressed state laws that restricted the hiring of aliens for public projects or public works²⁹⁴—measures that were in essence state-level “Hire American” policies. Again, the Court's endorsement of these measures rested on the view that the state, like the private individual, had broad power to steward its property and to specify with whom it would contract and upon whom it would bestow benefits.²⁹⁵ Eventually, the *Lochner*-era Court's recognition of the

(discussing public charge inadmissibility); Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51, 114 (proposed Oct. 10, 2018) (to be codified at 8 C.F.R. pts. 103, 212, 213, 214, 245, 248).

286. See Inadmissibility on Public Charge Ground, 83 Fed. Reg. at 51,134 & n.161 (citing Immigration Act of 1891, ch. 551, 26 Stat. 1084); see also *id.* at 51,125 (“Since at least 1882, the United States has denied admission to aliens on public charge grounds.”); *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892); *supra* text accompanying notes 90–93.

287. See, e.g., *Perry v. United States*, 294 U.S. 330, 352 (1935) (“When the United States, with constitutional authority, makes contracts, it has rights and incurs responsibilities similar to those of individuals who are parties to such instruments.”); *id.* at 353 (“[T]he right to make binding obligations is a competence attaching to sovereignty.”); see also *supra* text accompanying notes 200–03.

288. 191 U.S. 207, 218–24 (1903).

289. *Lochner v. New York*, 198 U.S. 45, 61 (1905).

290. *Atkin*, 191 U.S. at 222–23.

291. *Id.* at 222.

292. 206 U.S. 246, 254–58 (1907).

293. *Id.* at 256.

294. See *Heim v. McCall*, 239 U.S. 175, 194 (1915) (upholding state law giving preference to citizens over aliens in hiring for public works projects); *Crane v. New York*, 239 U.S. 195, 198 (1915) (same).

295. *Crane*, 239 U.S. at 198. As then-Judge Cardozo explained, “To disqualify aliens is discrimination, indeed, but not arbitrary discrimination; for the principle of exclusion is the restriction of the resources of the state to the advancement and profit of the members of the state. Ungenerous and unwise such discrimination may be. It is not for that reason unlawful.” *People v. Crane*, 214 N.Y. 154,

government's liberty of contract supplied the constitutional foundation for Congress to enact the Buy American Act,²⁹⁶ which became law at the tail end of Herbert Hoover's presidency in 1933. That statute was motivated by the idea that economic protectionism and nationalism in trade would protect workers and help the economy to recover from the Great Depression.²⁹⁷ The Trump Administration has now called for a crackdown on the enforcement of federal Buy American rules.²⁹⁸ Again, the Administration's agenda traces its lineage to the heartland of the *Lochner* era.

E. A CODA ON PREDICTION

As we have seen, across a constellation of substantive policy domains, the Trump Administration's agenda and vision for government bears a conspicuous resemblance to the set of ideas that animated the constitutional jurisprudence of the *Lochner*-era Court. Grappling with these resemblances helps to reacquaint us with important aspects of the constitutional thought of our past and casts in fresh light unfolding events of the present day. Can it help to illuminate the future?

Insofar as a homomorphism exists between the Trump Administration's implicit commitments and the commitments of the *Lochner*-era Court, there are some predictions we might venture to make.²⁹⁹ For example, we should not be surprised to see a hospitable stance toward antitrust enforcement, which, as Daniel Crane has argued, is an exercise of state regulatory power that is wholly consistent with *Lochner*-era understandings of how corporations should be restrained: “[e]ven in the *Lochner* era, the liberty of contract and of property did not entail a right to invoke the privileges of the corporate form”—privileges that the *state* conferred—“and then insist on the right to be left alone by the government to expand the corporation to a monopolistic size.”³⁰⁰ We might expect to

161, 164, *aff'd*, 239 U.S. 195 (1915) (“The state, in determining what use shall be made of its own moneys, may legitimately consult the welfare of its own citizens, rather than that of aliens.”).

296. 41 U.S.C. § 10a (2012).

297. *See, e.g.*, 72 CONG. REC. 2985 (1933) (statement of Sen. Davis) (“The adoption of [the Buy American Act] will mean work for our workers. It will help stem the tide of foreign competition and thus prevent further reduction of wages of the American worker.”).

298. *See* Buy American Order, *supra* note 2.

299. My thanks to Jonah Gelbach for posing this question.

300. Daniel A. Crane, *Lochnerian Antitrust*, 1 N.Y.U. J.L. & LIBERTY 496, 511 (2005); *see also* N. Sec. Co. v. United States, 193 U.S. 197, 345 (1904) (“[N]othing in the record tends to show that the State of New Jersey had any reason to suspect that those who took advantage of its liberal incorporation laws had in view, when organizing the Securities Company, to destroy competition between two great railway carriers engaged in interstate commerce in distant States of the Union If the certificate of the incorporation of that company had expressly stated that the object of the company was to destroy competition between competing, parallel lines of interstate carriers, all would have seen, at the outset, that the scheme was in hostility to the national authority, and that there was a purpose to violate or evade the act of Congress.”); Alan J. Meese, *Liberty and Antitrust in the Formative Era*, 79 B.U. L. REV. 1, 34–36 (1999) (“[H]ow could antitrust laws survive the jurisprudence of liberty of contract that was emerging in the 1880s–1890s? . . . [C]ourts concluded that the state could only abridge liberty of contract when the primary effect . . . was to produce prices above the natural level. . . . [A]s judges began to realize that purely private cartels *could* raise prices well above the competitive level, regulation of such arrangements fell comfortably within the classical paradigm.”).

see additional instances of a failure to defend legislation or regulation that the Administration views as interfering too much with the economic rights of regulated parties.³⁰¹ We might expect the Administration's lawyers to urge the Court to curb doctrines that shield administrative agency discretion to regulate domestic economic matters, even as they mount a vigorous defense of broad delegations that empower the Executive to engage in trade deals, impose tariffs, or build walls.³⁰² Conversely, we should be at least mildly surprised to see the Administration take concrete steps to pursue the elimination of birthright citizenship for American-born children of *all* noncitizens.³⁰³ We should instead anticipate that the Administration would abide by the determination of a divided *Lochner*-era Court that the Fourteenth Amendment confers birthright citizenship upon American-born children of non-citizens who are lawfully residing here.³⁰⁴

These examples suggest the kinds of predictions that one might make based on this Article's account. The ones given here may not all seem daring, and indeed any one of these predictions might be made independently for its own particular reasons. My point is that they can all be predicted collectively for a single reason; they would all follow from a vision of law, rights, and state power that is congruent with that enunciated in the *Lochner*-era Court's jurisprudence. Moreover, instead of reading the tea-leaves of Twitter or polling data, all that is necessary to

301. See *supra* note 253–55 and accompanying text (discussing Trump Administration's failure to defend the ACA).

302. The Trump Administration did defend the delegation in *Gundy v. United States*, an unusual case that did not involve delegation of the power to regulate domestic economic matters. See generally Transcript of Oral Argument, *Gundy v. United States*, 138 S. Ct. 1260 (2018) (No. 17-6086) (mem.), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/17-6086_9ol1.pdf. Interestingly, the Solicitor General's brief placed a notable emphasis on cases establishing the propriety of delegations of the power to set tariffs. See Brief for the United States at 16–17, *Gundy v. United States*, 138 S. Ct. 1260 (2018) (No. 17-6086) (mem.). In *Kisor v. Wilkie*, the Trump Administration urged the Court to narrow the doctrine of *Auer* or *Seminole Rock* deference, arguing that such deference has “harmful practical consequences.” See Brief for the Respondent at 26, *Kisor v. Wilkie*, 139 S. Ct. 657 (2018) (No. 18-15) (mem.). As of this writing, the Court has not decided either *Gundy* or *Kisor*.

303. See Alex Leary & Jess Bravin, *Trump Wants to Curb Birthright Citizenship, Escalating Immigration Debate*, WALL ST. J. (Oct. 30, 2018, 8:02 PM), <https://www.wsj.com/articles/trump-plans-executive-order-to-end-birthright-citizenship-in-u-s-1540901506> [<https://perma.cc/6GV9-GURX>] (noting that “[i]n an interview . . . [President] Trump said he planned an executive order to end . . . birthright citizenship”). Former Trump advisor Michael Anton argued that the President has the power to eliminate birthright citizenship for all children of noncitizens by executive order. Michael Anton, *Citizenship Shouldn't Be a Birthright*, WASH. POST (July 18, 2018), https://www.washingtonpost.com/opinions/citizenship-shouldnt-be-a-birthright/2018/07/18/7d0e2998-8912-11e8-85ae-511bc1146b0b_story.html?noredirect=on&utm_term=.127f7f9bf7a7 [<https://perma.cc/Y3M8-DALA>] (“An executive order could specify to federal agencies that the children of noncitizens are not citizens.”). As of this writing, the Trump Administration has not issued an executive order purporting to eliminate birthright citizenship for any class of person.

304. See *United States v. Wong Kim Ark*, 169 U.S. 649, 704–05 (1898). As noted by Owen Fiss, “the outcome in the case was hardly a foregone conclusion”: Harlan and Fuller dissented, and over a year elapsed between oral argument and the decision. Fiss, *supra* note 39, at 300 & n.11. In *Plyler v. Doe*, the Court noted that another clause of the Fourteenth Amendment—the Equal Protection Clause—made “no plausible distinction . . . between resident aliens whose entry into the United States was lawful, and resident aliens whose entry was unlawful,” but this decision came well after the *Lochner* era. 457 U.S. 202, 211 n.10 (1982).

make that set of predictions is an understanding of the character of that implicit vision.

One possible reward, then, of the account urged in this Article may lie in its ability to parsimoniously integrate and forecast the legal and political measures that prove appealing to the incumbent Administration or its ideological heirs. The next Part explores other implications of this account.

III. IMPLICATIONS

In August 2011, as Senator Elizabeth Warren was about to commence her campaign for Senate, she gave a speech discussing progressive economic theory. Warren remarked that “there is nobody in this country who got rich on his own.”³⁰⁵ If “[y]ou built a factory,” she explained, “you moved your goods to market on the roads the rest of us paid for; you hired workers the rest of us paid to educate; you were safe in your factory because of police forces and fire forces that the rest of us paid for.”³⁰⁶

Some months later, then-President Obama sounded a similar note at a reelection campaign event, stating:

If you were successful, somebody along the line gave you some help Somebody helped to create this unbelievable American system that we have that allowed you to thrive. Somebody invested in roads and bridges. If you’ve got a business—you didn’t build that The Internet didn’t get invented on its own. Government research created the Internet so that all the companies could make money off the Internet [W]hen we succeed, we succeed because of our individual initiative, but also because we do things together.³⁰⁷

In their remarks, Warren and Obama—both law professors before they were politicians—were each making a fairly quotidian legal realist observation about baselines. Warren might have added, in the spirit of Robert Hale, that the factory owner has enforceable property rights to begin with only because the government protects those rights.³⁰⁸ Obama more or less said, following Cass Sunstein, that “people continue to neglect the large presence of government, and law, in areas that are in fact pervaded by them.”³⁰⁹ But what Warren and Obama did say was

305. Lucy Madison, *Elizabeth Warren: “There Is Nobody in This Country Who Got Rich on His Own,”* CBS NEWS (Sept. 22, 2011, 9:55 AM), <https://www.cbsnews.com/news/elizabeth-warren-there-is-nobody-in-this-country-who-got-rich-on-his-own/> [<https://perma.cc/C49C-MRRG>].

306. *Id.*

307. Eugene Kiely, *‘You Didn’t Build That,’ Uncut and Unedited*, FACTCHECK.ORG (July 24, 2012), <https://www.factcheck.org/2012/07/you-didnt-build-that-uncut-and-unedited/> [<https://perma.cc/AM2P-X4P2>].

308. See Hale, *supra* note 124, at 472; see also Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 586 (1933) (“The law of contract . . . through judges, sheriffs, or marshals puts the sovereign power of the state at the disposal of one party to be exercised over the other party.”).

309. Sunstein, *supra* note 25, at 71 (“*Lochnering* is not just one thing. But *Lochner*’s legacy can be found in the many domains in which people continue to neglect the large presence of government, and law, in areas that are in fact pervaded by them.”).

vivid enough, and their essential point about baselines is familiar to anybody who has ever puzzled over the dividing line between the “private” and the “public.”

To say that these statements were not received as mundane would be a considerable understatement. Transcripts and clips of their remarks immediately went viral and were dissected by a slew of columnists and television pundits. Conservative commentators denigrated Obama for claiming that “the self-made man is an illusion,”³¹⁰ and castigated Warren for promoting a “collectivist political agenda.”³¹¹ The Romney presidential campaign swiftly created ads, hashtags, and merchandise around the “you didn’t build that” meme. In his stump speeches, Romney started to include regular condemnations of Obama for “insulting” American entrepreneurs and innovators.³¹² The second day of the 2012 Republican National Convention was themed “We Built It,” at which a country-music singer delivered a song specially written for the event, called “I Built It.”³¹³

The rapid escalation of a simple legal realist point about baselines into something like a plank of the 2012 Republican presidential campaign is one of any number of occurrences that illustrate a crucial and simple fact about our politics nowadays: it is just not very legally realist. The basic Lockean notion of property rights—“I built it”—can be loudly promoted by the GOP, while “you didn’t build that” has to be quickly ushered offstage by fretful Obama aides. Claims of “too much law”³¹⁴ and scary stories about red tape—often promoted by the government itself³¹⁵—swamp countervailing efforts to stress the good that government does. Those who assert that freedom may not in fact be enhanced by having *more* choices, or that seemingly neutral and voluntary choices are in fact *involuntary* or *non-neutral*,³¹⁶ risk hitting a brick wall of voters’ instincts and intuitions; the framework of choice, as Martha Minow aptly put it, is “seductive.”³¹⁷ As for the

310. ‘*You Didn’t Build That*,’ WALL ST. J. (July 19, 2012, 12:01 AM), <https://www.wsj.com/articles/SB10001424052702304388004577533300916053684> [<https://perma.cc/9QWK-CUKE>].

311. George F. Will, Opinion, *Elizabeth Warren and Liberalism, Twisting the ‘Social Contract,’* WASH. POST: OPINIONS (Oct. 5, 2011), https://www.washingtonpost.com/opinions/elizabeth-warren-and-liberalism-twisting-the-social-contract/2011/10/04/gIQAXi5VOL_story.html?utm_term=.bf3bfcefe3fb [<https://perma.cc/E3YS-CJXS>].

312. Sara Murray, *Romney: Obama Insults Entrepreneurs and Innovators*, WALL ST. J. (July 17, 2012, 3:11 PM), <https://blogs.wsj.com/washwire/2012/07/17/romney-obama-insults-entrepreneurs-and-innovators/> [<https://perma.cc/QK84-869K>].

313. Associated Press, *Say It in Song*, SAN DIEGO UNION-TRIBUNE (Aug. 27, 2012, 3:00 PM), <http://www.sandiegouniontribune.com/sdut-say-it-in-song-2012aug27-story.html> [<https://perma.cc/VRA3-QEVE>].

314. See generally Sohoni, *supra* note 168, at 1585 (analyzing and critiquing claims that “federal laws and regulations are too numerous, too complex, too costly, and too invasive”).

315. See, e.g., Jodi L. Short, *The Trouble with Counting: Cutting Through the Rhetoric of Red Tape Cutting*, 103 MINN. L. REV. 93 (2018).

316. See Purdy, *supra* note 150, at 213 (noting that “[t]he danger of negative conceptions of autonomy” is that “they become means to rationalize and insulate structurally produced inequality as being simply the product of fair relations among equally free individuals”).

317. Minow, *supra* note 137, at 817 (describing why “school choice can involve ‘seduction,’ . . . powerful attraction and appeal that can also carry diversion, obfuscation, or deceit” and explaining that “the seductive attractions of ‘choice’ as a framework imply that freedom and equality exist even when

ideas that there are *no* natural, pre-political entitlements, that *no* distinction exists between “government action” and “inaction,” or that *no* dividing line meaningfully separates the private and the public, these are notions that professors may fearlessly profess—but if they become politicians, they would do so at their peril.

We are evidently not all legal realists now. Consequently, the ongoing contest in contemporary politics is not so different from the one that consumed the American legal and political scene a hundred years ago: a contest between two markedly different visions of law. In the pre-legal realist, contractarian vision, the individual pursuit of self-interest and market exchange forms the “basic ordering mechanism of society”; the state is “an artificial creation, not part of the social order nor responsible for it.”³¹⁸ The legal realist vision broke with this construct, inasmuch as the legal realists and their fellow travelers conceived of the state as deeply implicated in shaping the market and regarded robust state power as a necessary tool and predicate for securing human flourishing.³¹⁹

That latter vision has more or less dominated legal thinking in both the judiciary and the academy for the last eighty years.³²⁰ But—as the vignette about Warren and Obama illustrates—the other, older vision of law has continued to persist, and to persist powerfully, outside those domains. The draw of this older vision should not be underestimated. That individuals should be left alone to pursue their private interests; that an unregulated market is both neutral and natural; that people should be responsible for their own fates rather than reliant on the state to protect them from their shortcomings or their free choices; that redistributive measures are suspect because they take away what people have earned fair and square; that democratic government is a threat to private economic power rather than the other way around; and that America’s safety, sovereignty, and prosperity depends on keeping *out* outsiders and the goods they produce, rather than letting them in—these are all ideas that continue to possess an immense amount of intuitive appeal and political clout. That older vision had enough traction to be embraced by the *Lochner*-era Court and encoded into constitutional

they are absent; the framework of choice suggests neutrality even when effectively tilting in particular directions”).

318. Fiss, *supra* note 39, at 47.

319. *See id.* at 392 (“The social contract tradition seemed to be at an end [after the New Deal]. . . . Charged with the duty of eradicating social conditions that impaired personal autonomy and fulfillment, the state was required to intervene in social and economic affairs on a broad and continuous basis. No longer a night watchman acting to prevent outbreaks of violence or other lapses in the social order, the state would now have to reconstruct that order and redistribute resources to make freedom possible.” (footnote omitted)); *see also* CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION* 19 (1990) (noting that one component of the “New Deal reformation” was “a wholesale assault on the system of common law ordering” based upon the “conviction that that system reflected anachronistic, inefficient, and unjust principles of *laissez-faire*”).

320. *See* David Singh Grewal & Jedediah Purdy, Introduction, *Law and Neoliberalism*, 77 *LAW & CONTEMP. PROBS.* 1, 12 (2014) (noting that after the New Deal, “[c]onstitutional interpretation turned to the noneconomic dimensions of personal liberty and equality, while in ‘private-law’ areas such as property, scholars and judges alike largely adopted the legal-realist view that economic rights are political creations that give shape to economic life, not boundaries on political intrusion into the private economy”); Sunstein, *supra* note 126, at 437–38.

doctrine for half a century. That it is now being advanced by a powerful political sponsor and his party indicates the immense traction that it still exerts today.

Today, the President and his Administration are collectively voicing the themes of nationalism, protectionism, economic rights, and deregulation, and urging the particular combination of “small government” and “big government” proposals that flow from those ideas. The remainder of this Part examines this combination of commitments from two angles. First, it explores why that package of ideas—with its minimalism about domestic regulatory power, its emphasis on economic liberty, and its accouterments of nationalism and protectionism—appears to have coalesced in the Administration today. Second, it turns to the effects, direct and indirect, that this Administration’s espousal of that vision may have upon the courts going forward.

A. POLICING THE BORDERS: SITUATING THE TRUMP ADMINISTRATION AGENDA

The Supreme Court’s famous rejection of *Lochner*-era law was incomplete on at least three scores: doctrinally, institutionally, and politically. It was doctrinally incomplete because, as we have seen, the post-New Deal Court preserved intact consequential *Lochner*-era doctrines,³²¹ and also because many areas of law continue to be pervaded by “*Lochner*’s Legacy.”³²² It was institutionally incomplete because the post-New Deal Court treated *Lochnerism* as purely a sin of separation of powers; though it held that courts should not “impose a particular economic philosophy upon the Constitution,”³²³ the Court did not bar the political branches from obeying the tenets of “Mr. Herbert Spencer’s Social Statics” in *their* exercises of power.³²⁴ It was politically incomplete because the ascension of a long succession of new Justices who embraced the legal realist model of law could not and did not obliterate the older, contractarian way of thinking about the law or efface its deep-seated appeal.³²⁵

The Trump Administration is today taking advantage of all three of these openings. It is leveraging the legal and doctrinal tools left available by the *Lochner*-era Court, deploying Executive Branch power on multiple fronts, and both feeding and feeding upon the political and ideological precepts held by it and its

321. See *supra* text accompanying notes 136–43.

322. Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 883 (1987) (tracing influence of “*Lochner*-like baselines and similar principles of neutrality and inaction” in multiple areas of constitutional doctrine); cf. Bernstein, *supra* note 44, at 61–62 (taking issue with elements of Sunstein’s account but not with this broader theoretical thesis).

323. See, e.g., Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 691 (1999) (“We had always thought that the *distinctive* feature of *Lochner*, nicely captured in Justice Holmes’s dissenting remark about ‘Mr. Herbert Spencer’s Social Statics,’ was that it sought to impose a particular economic philosophy upon the Constitution.” (citation omitted)).

324. The post-New Deal Court later spoke “scornful[ly]” of *Lochner*-era precepts, but when the Court had the opportunity to “constitutionalize the New Deal settlement,” it declined. Purdy, *supra* note 150, at 210; see also SUNSTEIN, *supra* note 16, at 5 (tracing the Supreme Court’s rejection of social and economic constitutional rights to Nixon’s election in 1968).

325. Purdy, *supra* note 150, at 210 (“[T]he social base of laissez-faire politics never went away in the United States . . . [A]n enduring substrate of opposition to the New Deal and the Great Society persisted both in demotic political culture and among economic elites.”).

supporters, all in a combined effort to advance a particular constitutional vision for how American law, state, and society should be organized. As this Article has stressed, that package of commitments is not novel or unprecedented, but rather has a precursor in the law of the *Lochner* era. Yet to think of that earlier judicially articulated body of law as *causing* today's developments would be to commit a category error. When we observe an ice cube melt into water, we do not say that the fact that the water had once been an ice cube is the "cause" of the fact that it can later be frozen again into an ice cube. But from that observation we nonetheless learn something important: we now know that the ice cube is a state that the water can assume, when it is exposed to a particular force in a particular setting.

That, in a nutshell, is perhaps the best way to understand what is unfolding today. Surrounding the *Lochner*-era Court were a broader set of social and political forces that have a familiar ring to modern ears—racism and nativism, resentment of immigration, the impetus to build a strong national economy, worries over immense concentrations of wealth and rising levels of inequality, fears of robust corporate power, concerns about an uptick in socialism and anti-capitalist tendencies, efforts to restrict suffrage and to limit the bounds of the "constitutional community,"³²⁶ and anxiety over ethnic and religious diversity. The *Lochner*-era Court acted as a focal point or fulcrum for those multifarious and conflicting cross-currents, and it accommodated them, if in sometimes awkward ways, in its constitutional jurisprudence. Through various legal techniques and doctrines—by cabining the extent of the police power, choosing which rights were and were not natural and worthy of protection, treating domestic economic regulation and class legislation (so deemed) with suspicion, and sharply distinguishing the foreign-facing and domestic-facing powers of the federal government—the *Lochner*-era Court channeled and reconciled these extrinsic pressures within the framework of constitutional adjudication. And in doing so, it managed to create a constitutional structure with a kind of rough internal coherence that was satisfying to itself and its adherents, if not to its contemporaneous and subsequent critics on both the left and the right, for a considerable period of time.

Today, many of the fault lines that divided *Lochner*-era American society, including those that ultimately made an imprint upon *Lochner*-era jurisprudence, seem to have reemerged with startling force and intensity. American society is again wracked with debates over immigration, inequality of wealth and opportunity, the size and reach of government, the strength of the American economy, race relations, anxieties over both rising corporate power and calls to "adopt socialism,"³²⁷ and how to cope with increasing ethnic, social, and cultural diversity. Today, the Trump Administration is acting as one fulcrum at which these similar, and similarly variegated, cross-currents are meeting. And its response to

326. Fiss, *supra* note 39, at 179.

327. *State of the Union 2019*, CNN POLITICS (Feb. 6, 2019, 11:00 AM), <https://www.cnn.com/2019/02/05/politics/donald-trump-state-of-the-union-2019-transcript/index.html> [<https://perma.cc/YS22-Q79N>] ("Here, in the United States, we are alarmed by new calls to adopt socialism in our country. America was founded on liberty and independence—not government coercion, domination, and control.").

those cross-currents has been to construct a notably similar constitutional vision: a view of law, government power, and rights that fuses notions of individual liberty and constrained government domestically, with nationalistic, heavy-handed government concerning matters of immigration and foreign trade. Politics are doubtless the driving force shaping that agenda, but for that agenda to be implemented and effectuated, a mated set of interlocking legal and jurisprudential ideas must also be pressed in tandem with that agenda. Thus, as we have seen, the same doctrinal techniques and tools crafted by the *Lochner*-era Court are now deployed by this Administration, which has likewise restrained the extent of the affectation doctrine, chosen to defend certain economic rights, sought to curb or invalidate domestic economic regulation, and emphatically insisted on the vast powers of the federal government in matters concerning immigration and foreign trade.

If the overall thrust of this vision can be summed up in a phrase, it is to police the boundaries:³²⁸ the boundaries between the individual and the state; between the state and the market; between the domestic economy and economies abroad; and between those who can be part of this nation and claim its full and equal protections and those who cannot. Trump is fond of repeating that a nation without borders is not a nation;³²⁹ the slogan is a handy shorthand for the overall approach. Let it build a border around the country, a border around governmental power, and a border around private property, the Trump Administration urges, and it will be able to secure the sovereignty and strength of the nation and the autonomy and agency of the individual.

The stance of the Obama Administration is worth contrasting here, because it advanced a vision of law and an agenda for government that was in important respects threatening to each of those boundaries. With the ACA, the Obama Administration pushed for a new scheme of social insurance that was frankly predicated on the proposition that private costs are inevitably public costs and that even young and healthy individuals are never really tubs on their own bottoms when it comes to their consumption of health care.³³⁰ In the wake of the financial crash of 2008, the Troubled Asset Relief Program and the federal bailouts of

328. Resonant here is Professor White's usage of the idea of "pricking out the boundar[ies]" or "tracing the boundaries" as a description of the *Lochner*-era Court's "dominant methodology." See G. Edward White, *Historicizing Judicial Scrutiny*, 57 S.C. L. REV. 1, 35, 50, 65 n.335 (2005).

329. See, e.g., Donald J. Trump (@realDonaldTrump), TWITTER (June 19, 2018, 6:52 AM), <https://twitter.com/realdonaldtrump/status/1009071378371313664?lang=en> [<https://perma.cc/ATQ8-VZC5>] ("If you don't have Borders, you don't have a Country!"); *Trump Orders Wall to be Built on Mexico Border*, BBC (Jan. 26, 2017), <https://www.bbc.com/news/world-us-canada-38740717> [<https://perma.cc/KF5E-LB4M>] ("A nation without borders is not a nation," [Trump] said. "Beginning today the United States gets back control of its borders."); see also Chris Mills Rodrigo, *Trump on Venezuela 'The Days of Socialism are Numbered'*, HILL (Feb. 18, 2019, 5:56 PM), <https://thehill.com/latino/430498-trump-on-latin-america-the-days-of-socialism-are-numbered> [<https://perma.cc/BKK4-FGHV>] (quoting Trump's comment: "Socialism by its very nature does not respect borders. It does not respect the boundaries or the sovereign rights of its citizens or its neighbors. It's always seeking to expand, to encroach and subjugate others to its will.").

330. See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1501(a)(2)(A), 124 Stat. 119, 907 (2010) (codified at 42 U.S.C. § 18091 (2012)) ("In the absence of the requirement [to maintain health insurance], some individuals would make an economic and financial decision to forego health

General Motors and other automakers scrambled the ledgers of private and public dollars, risk, and responsibility.³³¹ The Obama Administration continued to deport illegal immigrants energetically, but it also tried to ameliorate the consequences of the rigid line between legal and illegal aliens by giving millions of people—the Dreamers, who had arrived in this country as children—legal protections that conscience might have demanded but blackletter law did not.³³² With the Trans-Pacific Partnership, the Obama Administration carried forward the idea that the United States market should compete openly with the world rather than be cordoned off from it.³³³ Meanwhile, new theories of American constitutional democracy have been germinating; following in the Progressive and legal realist traditions, these theories reconceived robust administrative power as necessary predicates of democratic government and high concentrations of private wealth and power as threatening to individual freedom, agency, and democracy.³³⁴ Each of the old boundaries was thus candidly and confidently assailed.

In the most immediate sense, the Trump Administration’s approach can be understood as a response of retrenchment and backlash against the Obama era’s renewed and more muscular progressivism. In a broader sense, the Trump Administration’s response can be understood as an unforeseen outgrowth and

insurance coverage and attempt to self-insure, which increases financial risks to households and medical providers.”).

331. See David Zaring, *The Post-Crisis and Its Critics*, 12 U. PA. J. BUS. L. 1169, 1170, 1172 (2010) (“The ongoing presence of government in the business sector blurs the public-private distinction and evidences the government’s role in business practices in which, as recently as 2007, it would not have dreamed of overseeing.”).

332. See Office of the Press Secretary, White House, *Remarks by the President on Immigration* (June 15, 2012, 2:19 PM) <https://obamawhitehouse.archives.gov/the-press-office/2012/06/15/remarks-president-immigration> [<https://perma.cc/CB8-7GYE>] (remarks by President Obama) (“[I]t makes no sense to expel talented young people, who, for all intents and purposes, are Americans . . .”); see also Office of the Press Secretary, White House, *Remarks by the President in Address to the Nation on Immigration* (Nov. 20, 2014, 8:01 PM), <https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration> [<https://perma.cc/Z6XS-MF3Y>] (remarks by President Obama) (“I know some worry immigration will change the very fabric of who we are, or take our jobs, or stick it to middle-class families at a time when they already feel like they’ve gotten the raw deal for over a decade. I hear these concerns. But that’s not what these steps would do. Our history and the facts show that immigrants are a net plus for our economy and our society.”).

333. See Office of the Press Secretary, White House, *Statement by the President on the Trans-Pacific Partnership* (Oct. 5, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/10/05/statement-president-trans-pacific-partnership> [<https://perma.cc/Z8SY-QEKT>] (statement by President Obama) (“When more than 95 percent of our potential customers live outside our borders, we can’t let countries like China write the rules of the global economy. We should write those rules, opening new markets to American products while setting high standards for protecting workers and preserving our environment.”).

334. See Metzger, *supra* note 164, at 87–95 (contending that the administrative state is constitutionally mandated, as the consequence of delegation); see also K. SABEEL RAHMAN, *DEMOCRACY AGAINST DOMINATION* 21 (2017) (framing “the threats to democracy from concentrated economic and political power”); Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 530–51 (2015) (contending that the separation of powers should be reconceived as running through agencies); Levinson, *supra* note 143, at 38 (“In light of the much-cited Madisonian maxim, for instance, one might think that the increasing concentration of economic and political power in the hands of what many now describe as an ‘oligarchy’ or a ‘moneyed aristocracy’ in recent decades would be a constitutional problem of some urgency.”).

mutation of an accelerating conservative effort to undo the New Deal settlement. As recently as 1994, Gary Lawson could write with only modest flourish that the “essential features of the modern administrative state have, for more than half a century, been taken as unchallengeable postulates by virtually all players in the legal and political worlds, including the Reagan and Bush administrations,” and that “[t]he post-New Deal conception of the national government has not changed one iota, nor even been a serious subject of discussion, since the Revolution of 1937.”³³⁵ But that was now a quarter-century ago, and since then that post-New Deal conception has come under significant and sustained attacks from many quarters.³³⁶ What has been conspicuously absent from many of these critiques, however, is a brass-tacks blueprint of what the law would actually look like and how government would actually operate once that post-New Deal framework was overthrown; the logically subsequent question—whether such a blueprint could ever be made politically attractive to any large number of voters, as opposed to judges or legal academics—was never quite broached. Now the Trump Administration is the wholly unexpected vehicle for both advancing that blueprint and for placing a national political coalition behind it. Unlike the lawyerly critics of the New Deal settlement and the modern administrative state,³³⁷ however, this Administration appears to have no interest whatsoever in reinventing the wheel of post-New Deal administrative government so that it conforms to some posited original meaning of the Constitution or in remolding American law to adhere to the ideals of classical liberalism; indeed, it has no interest in developing a *new* vision of law or government at all. It instead appears content to urge that we simply peel back much of the topsoil of law built up since the New Deal, discard it, and revert to the *Lochner*-era understandings that have lain latent in the layer immediately beneath. And it seems willing to take that layer of law more or less as it finds it—notwithstanding its many inconsonances with classical liberal ideals, with original meaning, or with other values cherished by contemporary (pre-Trump) conservatism.³³⁸

335. Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1232 (1994).

336. See Metzger, *supra* note 164, at 9–17, 31–33; see also Jack M. Beermann, *The Never-Ending Assault on the Administrative State*, 93 NOTRE DAME L. REV. 1599, 1634–51 (2018); Cass R. Sunstein & Adrian Vermeule, *The New Coke: On the Plural Aims of Administrative Law*, 2015 SUP. CT. REV. 41, 41–46.

337. For examples of such critiques, see RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT* (2014); PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014); JOSEPH POSTELL, *BUREAUCRACY IN AMERICA: THE ADMINISTRATIVE STATE’S CHALLENGE TO CONSTITUTIONAL GOVERNMENT* (2017); Michael B. Rappaport, *Classical Liberal Administrative Law in a Progressive World*, in *CLASSICAL LIBERALISM HANDBOOK* (forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3078924 [<https://perma.cc/TU4Z-VHL2>]. See also Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 472 (2015) (explaining that “an enduring theme in American debates about the nature of constitutional law” has been the idea that “the Constitution has a distinctive libertarian valence, sometimes captured in the phrase ‘classical liberalism’”).

338. During the period in which neoliberalism was ascendant, elite thought tended to favor the free movement of capital and goods, along with freer (certainly not free) movement of people across borders.

The internal inconsistencies riddling that vision may strike some as problematic for its future prospects. In the Administration's view, for example, the ACA's directives are a threat to liberty that must be eradicated—but the same complaint apparently has no traction against restrictions of marijuana use. The powers of the administrative state, a headless fourth branch, should be curbed radically—but not entirely eliminated, at least where these powers might come in handy for promoting desired ends, such as imposing tariffs, enforcing conditions on federal spending, or deporting people quickly. A laissez-faire market, not the government, should pick winners and losers—unless, it seems, corporations want to hire immigrants. The elements of the vision pressed by Trump Administration appear partial, selective, and mutually incompatible, in a way that may make it difficult to see how they could come together to function as an operating framework for American government and society.

It is worth bearing in mind, however, that such internal tensions were themselves a cardinal trait of the *Lochner*-era Court's jurisprudence.³³⁹ *Lochner*-era jurisprudence was a jurisprudence that underwrote not only liberty and laissez-faire, but also plenary power, Prohibition, and protectionism. It was a jurisprudence that regularly exalted individual rights, but that also regularly rendered them ephemeral. It was a jurisprudence that created a "no-man's-land" for state power in some spheres,³⁴⁰ while allowing state power to occupy the field completely in others.³⁴¹ It is *because* of these variations, not despite them, that *Lochner*-era jurisprudence was so effectual in constructing a particular vision of the state, of the market, of individual autonomy, and of the character of the American people, and—in its time—was so potent a weapon in defending that vision against the mounting political and social forces arrayed against it.³⁴² If today the Trump Administration seems inconsistent in its commitments as it

Those who adhere to the ideals of classical liberalism may have sensibly seen those positions as fully compatible with the project of reducing regulation and promoting economic liberty domestically. But, although that collection of views may be consistent with a pure or textbook theory of classical liberalism, they are incompatible with the strong conception of national sovereignty that emerged as a prominent feature of classical legal thought *as it was actually practiced* by the Supreme Court. *See supra* text accompanying notes 66–123. Likewise, the Trump Administration's vision is not an articulation of "pure" classical liberal principles or ideals. *See supra* note 5. It should instead be understood as (another) illustration of what can apparently happen when those textbook ideals run through the minds of actual actors in our legal and political system, and eventually produce—alongside commitments to individual economic autonomy and deregulation—equally deep commitments to sovereignty, protectionism, and exclusion. Then as now, the upshot is a conception of American law and the American state that is not the textbook classical liberal ideal of "the state as night-watchman"; it is, rather, the state as night-watchman, plus border guard, plus DEA agent—and with a customs collector on retainer.

339. Fiss, *supra* note 39, at 297 (describing the "jagged and puzzling character" of the Fuller Court's "activism"). My thanks to Sabeel Rahman for his thoughts on this point.

340. WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 133 (1995) (quoting Franklin Roosevelt's reaction to the *Tipaldo* decision).

341. *See Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892).

342. *See* Fiss, *supra* note 39, at 20–21 (noting that the "activism" of the Fuller Court "was a method of resistance, a way of coping with new forms of social and political organization and activity," and

seeks to construct and defend its own version of that vision, then this is an inconsistency that should make us more alert, not less, to the possibility that—in our time—it might serve as a similarly potent weapon of legal transformation and retrenchment.

B. THE COURTS AND THE PRESIDENT

This Article has stressed that ideas about law, government, rights, and sovereignty that were prominent during the tenure of the *Lochner*-era Court are today championed by a powerful political sponsor and his Administration. The ultimate effects of that effort upon American law will depend in part on the extent to which the Trump Administration and its ideological successors can enlist the courts in the project of revivifying commitments to smaller domestic government, greater economic liberty, nationalism, and protectionism.

In this regard, it is worth underscoring that the President is not a passive observer of the federal judiciary—he is a shaper of it. This is true in two senses. First, the President can exercise the appointment power to nominate judges who will shift constitutional jurisprudence in the direction he prefers.³⁴³ Second, the President has considerable power to communicate and sell his vision to the public,³⁴⁴ and to thereby inflect “constitutional culture” in the direction of his preferred vision of law, state, and society.³⁴⁵ In crafting that vision, the President may well be indifferent to whether it runs afoul of the extant jurisprudence of the federal courts; indeed, the very point and thrust of a president’s efforts may be to push for the fundamental reform and overthrow of that extant jurisprudence.³⁴⁶ The remainder of this section explores these two vectors.

1. Appointments

President Trump has already filled two Supreme Court seats, and there are over a hundred federal trial and appellate court vacancies that the Trump Administration is working diligently to fill.³⁴⁷ The Trump Administration will presumably not fill these seats randomly; instead, it will choose nominees with

stressing the varied nature of the Court’s efforts to shield its “conception of liberty” in response to these developments).

343. See Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1067 (2001) (noting that the appointment power is “an especially important engine of constitutional change”).

344. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2417–18 (2018) (“The President of the United States possesses an extraordinary power to speak to his fellow citizens . . .”).

345. Post, *supra* note 21, at 8 (defining “constitutional culture” as “a specific subset of culture that encompasses extrajudicial beliefs about the substance of the Constitution”); see also *infra* note 369 (collecting sources on presidential influence on constitutional law).

346. See, e.g., Johnsen, *supra* note 16, at 375 (explaining how “many” Roosevelt proposals “aimed at altering the Court’s constitutional interpretations”); see also sources cited *infra* note 368.

347. *Donald Trump’s Judicial Appointments May Prove His Most Enduring Legacy*, ECONOMIST (Jan. 13, 2018), <https://www.economist.com/united-states/2018/01/13/donald-trumps-judicial-appointments-may-prove-his-most-enduring-legacy> [<https://perma.cc/Q5CU-BGRA>] (“The dithering and incompetence that have defined much of his tenure have been absent from his judicial-selection process.”).

outlooks on law, government power, and rights that accord with its own. Then-Judge Gorsuch, for example, showed that he was dubious of the constitutionality of aspects of administrative government,³⁴⁸ and Justice Gorsuch has been inclined to shield private contracts from legislative action.³⁴⁹ Then-Judge Kavanaugh likewise “may fairly be characterized as an administrative state skeptic,”³⁵⁰ and he has regarded the government as having an “obvious,” “substantial,” and “historically rooted interest” in “supporting American manufacturers, farmers, and ranchers as they compete with foreign manufacturers, farmers, and ranchers.”³⁵¹ Based on the President’s critical comments concerning federal judges who ruled against the travel ban and the asylum ban,³⁵² it seems fair to predict the nomination of jurists who endorse a broad view of plenary power in immigration and of presidential power with respect to foreign trade.³⁵³

These new nominees may shift the Court’s jurisprudence in the direction of increased constraints on domestic administrative government and relaxed constraints upon government intervention in the zones of immigration and foreign trade. Their ascension to the bench may also give new impetus to a tendency

348. See *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152–53 (10th Cir. 2016) (Gorsuch, J., concurring) (“And it is a problem for the people whose liberties may now be impaired not by an independent decisionmaker seeking to declare the law’s meaning as fairly as possible—the decisionmaker promised to them by law—but by an avowedly politicized administrative agent seeking to pursue whatever policy whim may rule the day.”); see also *supra* note 196 (noting then-Judge Gorsuch’s views on delegation).

349. See *Sveen v. Melin*, 138 S. Ct. 1815, 1831 (2018) (Gorsuch, J., dissenting) (“The judicial power to declare a law unconstitutional should never be lightly invoked. But the law before us cannot survive an encounter with even the breeziest of Contracts Clause tests.”).

350. See Beermann, *supra* note 336, at 1620; Kavanaugh, *supra* note 197, at 2150–52; Mila Sohoni, *King’s Domain*, 93 NOTRE DAME L. REV. 1419, 1433–37 (2018) (describing then-Judge Kavanaugh’s expansive conception of the major-questions exception to *Chevron* deference); see also *supra* note 198 (noting views on delegation expressed by Judge Neomi Rao, who Trump appointed to the D.C. Circuit to take the seat vacated by Justice Kavanaugh).

351. *Am. Meat Inst. v. Dep’t of Agric.*, 760 F.3d 18, 30 (D.C. Cir. 2014) (en banc) (Kavanaugh, J., concurring) (upholding country-of-origin labeling requirements against First Amendment challenge); *id.* at 32–33 (“[T]he Executive Branch has refrained during this litigation from expressly articulating its clear interest in supporting American farmers and ranchers in order to justify this law But the interest here is obvious the Government has a substantial interest in this case in supporting American farmers and ranchers against their foreign competitors.”).

352. See *Trump, Chief Justice Spar over ‘Obama Judge’ Remark*, VOICE OF AM. (Nov. 22, 2018, 4:45 AM), <https://www.voanews.com/a/chief-justice-john-roberts-criticizes-donald-trump-for-obama-judge-asylum-comment/4668342.html> [<https://perma.cc/Q688-XPAY>] (“Last year, the president scorned the ‘so-called judge’ who made the first federal ruling against his travel ban.”); *id.* (“The new drama began with remarks Trump made Tuesday in which [he] went after a judge who ruled against his migrant asylum order. The president claimed, not for the first time, that the federal appeals court based in San Francisco was biased against him. . . . The president went on to say about the asylum ruling: ‘This was an Obama judge. And I’ll tell you what, it’s not going to happen like this anymore.’”).

353. Such jurists may find an ally in Justice Thomas, who is skeptical of the constitutionality of domestic delegations but has suggested that the Constitution “likely . . . grants the President a greater measure of discretion in the realm of foreign relations.” See *Dep’t of Transp. v. Ass’n of Am. R.R.s*, 135 S. Ct. 1225, 1248 n.5 (2015) (Thomas, J., concurring) (citing *Curtiss-Wright* and *Buttfield*); see also *id.* at 1248 (“The 1794 embargo statute involved the external relations of the United States, so the determination it authorized the President to make arguably did not involve an exercise of core legislative power.”).

already widely noted in judicial decisionmaking—the tendency to recreate Lochnerist economic results through tools other than the substantive due process clause, and without directly overturning *Lochner*.³⁵⁴ This larger jurisprudential development, which has unfolded over the last ten years or so, has used First Amendment religious, association, and speech claims to invalidate government regulation and to shield private ordering.³⁵⁵ Through these cases, the First Amendment is being applied in such a way that—as was the case in the heyday of the *Lochner* era—“everyday economic transactions” are again gradually becoming “morally significant sites for the enactment of independence from state control.”³⁵⁶

The most prominent recent exemplar of this tendency is *Janus v. AFSCME*, in which the Court, in an opinion by Justice Alito, held that a state law that required non-members of public-sector unions to pay a “fair share” of agency fees violated the First Amendment.³⁵⁷ In dissent, Justice Kagan argued that the majority had “weaponiz[ed] the First Amendment” by “using it against workaday economic and regulatory policy.”³⁵⁸ Speech, she noted, is “a part of every human activity (employment, health care, securities trading, you name it). . . . [A]lmost all economic and regulatory policy affects or touches speech.”³⁵⁹ Though she did not use this locution, Justice Kagan’s dissent argued in essence that the Court was being Lochnerist in its end-results (by constitutionally invalidating “workaday” economic policy), if not in its means (because it used the First Amendment rather than substantive due process).³⁶⁰

In *Janus* and other decisions, the majority used the First Amendment, but the courts can also use non-constitutional tools to achieve results that resemble those reached by the *Lochner*-era Court. This scenario recently arose in *Epic Systems Corp. v. Lewis*, which held that federal arbitration and labor law do not prohibit the enforcement of class-action waiver clauses in employment agreements.³⁶¹ Writing for four dissenters, Justice Ginsburg began by describing employers’ efforts at the turn of the last century to suppress organized labor through the mechanism of the “yellow dog” contract and the *Lochner*-era jurisprudence that shielded those contracts from legislative invalidation.³⁶² She concluded by contending that the *Epic* Court’s “edict that employees with wage and hours claims may seek relief only one-by-one . . . is the result of take-it-or-leave-it labor

354. See Shanor, *supra* note 150, at 189–91.

355. See *supra* note 150 (collecting sources).

356. Post, *supra* note 39, at 1542; see also Shanor, *supra* note 150, at 182 (“A number of scholars, commentators, and more than one Supreme Court Justice have suggested that courts’ growing protection for commercial speech threatens to revive a new form of *Lochnerian* constitutional economic deregulation.” (footnote omitted)).

357. 138 S. Ct. 2448, 2486 (2018).

358. *Id.* at 2501 (Kagan, J., dissenting).

359. *Id.* at 2502 (Kagan, J., dissenting).

360. I am grateful to Sophia Lee for suggesting the distinction between a “Lochnerism of ends” and a “Lochnerism of means.”

361. 138 S. Ct. 1612, 1632 (2018).

362. *Id.* at 1634–35 (Ginsburg, J., dissenting).

contracts harking back to the type called ‘yellow dog.’”³⁶³ Writing for the Court, Justice Gorsuch rejected the dissent’s charge that the Court was “Lochnerizing,” reasoning that the Court was enforcing Congress’s policy judgments with respect to class-action waivers, not imposing its own: “This Court is not free to substitute its preferred economic policies for those chosen by the people’s representatives. *That*, we had always understood, was *Lochner*’s sin.”³⁶⁴ The dissent, however, had a broader and more pragmatic conception of “*Lochner*’s sin.” The dissent was objecting to the Court’s reading of statutory text in a manner that ignored the considerable differences in bargaining power between employers and employees—a method that created results (ends) that “hark[ed] back” to those achieved by the constitutional holdings of the *Lochner* era, but through the distinct tool (means) of statutory interpretation. Here, too, the Court was being Lochnerist in its end-results, if not Lochnerist in its means.

There is a complementarity between such decisions and the Trump Administration’s *Lochner*-inflected vision. Such decisions have inured to the benefit of corporations, making it easier for them to engage in profitable activities through freeing them from the constraints of government regulation; conversely, they have made it harder for governments to regulate and for employees, consumers, and others to receive the benefits of government regulations.³⁶⁵ These results cohere with the tenets that animated *Lochner*-era economic constitutional jurisprudence (though not its First Amendment jurisprudence, which was non-existent when it came to corporations and commercial speech).³⁶⁶ As more Trump Administration nominees ascend to the bench, it seems reasonable to anticipate more opinions that are similarly “Lochnerist” in the end-results they generate.

2. Presidents, Courts, and Constitutional Culture

Aside from directly altering the composition of the courts, Presidents possess a more diffuse and indirect mechanism through which they can exert influence on courts: through affecting what Robert Post has called “constitutional culture.”³⁶⁷ Presidents sponsor their own understandings of rights and government power and then sell those visions to the public.³⁶⁸ Presidents may also capture, lens-like, the notions of rights and power held by the political coalitions that support them. It is

363. *Id.* at 1648–49 (Ginsburg, J., dissenting).

364. *Id.* at 1632 (Gorsuch, J.).

365. Coates, *supra* note 150, at 224 (“Nearly half of First Amendment legal challenges now benefit business corporations and trade groups, rather than other kinds of organizations or individuals.”); *id.* at 265 (“[T]he effect of the Supreme Court’s decision in *Sorrell* . . . was not to vindicate the expressive interests of any individual associated with IMS Health Inc., but simply to make it easier for that company, as a business organization, to make money, at the expense of the privacy of Vermont residents.”).

366. *See id.* at 233–34, 239–41.

367. *See* Post, *supra* note 21, at 8.

368. JEFFREY K. TULIS, *THE RHETORICAL PRESIDENCY* (1987) (explaining the power of presidential use of rhetoric); Robert L. Tsai, *Obama’s Conversion on Same-Sex Marriage: The Social Foundations of Individual Rights*, 50 *CONN. L. REV.* 1, 6 (2018) (“Presidents do more than dutifully ‘enforce’ judicially created rights; they also make rights on an everyday basis by manipulating the social foundations for individual rights. Presidents . . . theorize about rights, implement what they believe to be

therefore worth paying attention when a president engages in constitutional politics, such as by advocating for a conception of rights that differs from those that extant law protects, or by advocating for the continued sanctity of government powers (such as the plenary power doctrine) that were starting to show signs of cracks. Because that presidential advocacy may both shape and be shaped by public understandings of what the Constitution demands and permits, it may provide an early warning signal of the kinds of notions that we will eventually see in constitutional law as articulated by the courts.³⁶⁹

President Trump frequently expresses views of the proper scope of government power, placing particular emphasis on notions of nationalism, sovereignty, and the benefits of a strong presidential hand in trade negotiations. Crucially, however, he also evinces a distinct indifference or antagonism to constitutional principles that *Lochner*-era jurisprudence did *not* valorize and that were securely shielded by constitutional law only after the *Lochner* era ended.

It is worth pausing on this latter point to trace a few examples of the divergences between Trump's announced views and the values secured by the modern constitutional law of individual rights. Although modern constitutional law abhors discrimination on the basis of race,³⁷⁰ Trump said that a group of neo-

the proper conception of legal concepts, and in so doing, effectively create rights that differ from juridically conceived ones.”).

369. For scholarship on presidential influence on constitutional law, see, for example, Bruce Ackerman, *2006 Oliver Wendell Holmes Lectures: The Living Constitution*, 120 HARV. L. REV. 1737 (2007) and Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984). See also KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994); Johnsen, *supra* note 16 (discussing Reagan); *id.* at 387 n.121 (collecting sources). For scholarship on “constitutionalism outside the courts,” see, for example, WILLIAM N. ESKRIDGE JR. & JOHN FERREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION (2010); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION (1993); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); William E. Forbath, *The New Deal Constitution in Exile*, 51 DUKE L.J. 165 (2001); Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596 (2003); and Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003). For literature on administrative constitutionalism, see, for example, Anjali S. Dalal, *Shadow Administrative Constitutionalism and the Creation of Surveillance Culture*, 2014 MICH. ST. L. REV. 59; Anuj C. Desai, *Wiretapping Before the Wires: The Post Office and the Birth of Communications Privacy*, 60 STAN. L. REV. 553 (2007); Jeremy K. Kessler, *The Administrative Origins of Modern Civil Liberties Law*, 114 COLUM. L. REV. 1083 (2014); Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799 (2010); Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897 (2013); Bertrall L. Ross II, *Administering Suspect Classes*, 66 DUKE L.J. 1807 (2017); Bertrall L. Ross II, *Embracing Administrative Constitutionalism*, 95 B.U. L. REV. 519 (2015); Karen M. Tani, *Welfare and Rights Before the Movement: Rights as a Language of the State*, 122 YALE L.J. 314 (2012); and Sophia Z. Lee, *From the History to the Theory of Administrative Constitutionalism* (Univ. of Pa. Law Sch., Public Law Research Paper No. 17-52), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3079739 [<https://perma.cc/GT92-U6EZ>]. See also MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000); Daphna Renan, *The Law Presidents Make*, 103 VA. L. REV. 805 (2017).

370. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 493, 495 (1954) (holding state laws establishing separate public schools for black and white students to be inherently unequal and unconstitutional).

Nazis and white nationalists included “some very fine people,”³⁷¹ and asserted that a federal judge could not impartially adjudicate a case against him because the judge is “Mexican.”³⁷² Although modern constitutional law treats aliens within the United States as a quintessential “discrete and insular” minority in need of protection from majoritarian government because they are shut out of the political process,³⁷³ Trump has attempted to stoke majoritarian sentiment against an “invasion” of aliens and immigrants.³⁷⁴ Although modern constitutional law forbids state action based on religious animus,³⁷⁵ Trump campaigned on a promise to ban Muslims from entering the United States.³⁷⁶ Although modern constitutional law now shields freedom of political speech and of the press perhaps more solicitously than any other value,³⁷⁷ Trump has called for the delicensing of news networks, the weakening of “libel laws,” and the criminalization of flag

371. Rosie Gray, *Trump Defends White-Nationalist Protestors: ‘Some Very Fine People on Both Sides,’* ATLANTIC (Aug. 15, 2017), <https://www.theatlantic.com/politics/archive/2017/08/trump-defends-white-nationalist-protesters-some-very-fine-people-on-both-sides/537012/> [<https://perma.cc/5RPR-BSLY>]; see also Emily Cochrane, *Ryan Condemns Trump’s ‘Both Sides’ Remark but Tries to Move on,* N.Y. TIMES (Aug. 21, 2017), <https://www.nytimes.com/2017/08/21/us/politics/speaker-paul-ryan.html> [<https://nyti.ms/2vky51u>].

372. Paul Gigot, *Trump and the ‘Mexican Judge’: Why Equating Ethnicity With Judicial Bias Is So Offensive,* WALL ST. J. (June 5, 2016, 6:56 PM), <https://www.wsj.com/articles/trump-and-the-mexican-judge-1465167405> [<https://perma.cc/289Z-L8CC>].

373. See, e.g., *Toll v. Moreno*, 458 U.S. 1, 23 (1982) (Blackmun, J., concurring) (“[T]he fact that aliens constitutionally may be—and generally are—formally and completely barred from participating in the process of self-government makes particularly profound the need for searching judicial review of classifications grounded on alienage.”).

374. See Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 11, 2019, 8:04 AM), <https://twitter.com/realdonaldtrump/status/1083756525196320773> [<https://perma.cc/P7HL-HW7Z>] (“Humanitarian Crisis at our Southern Border. I just got back and it is a far worse situation than almost anyone would understand, an invasion! I have been there numerous times - The Democrats, Cryin’ Chuck and Nancy don’t know how bad and dangerous it is for our ENTIRE COUNTRY. . . .”); see also Donald Trump, *Speech on Immigration and the Democratic Response* (Jan. 8, 2019), <https://www.nytimes.com/2019/01/08/us/politics/trump-speech-transcript.html> [<https://nyti.ms/2RCDTct>] (“Over the last several years I have met with dozens of families whose loved ones were stolen by illegal immigration. . . . How much more American blood must we shed before Congress does its job?”); *Donald Trump Announces a Presidential Bid*, WASH. POST (June 16, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a-presidential-bid/> [<https://perma.cc/6NKM-VB73>] (“When Mexico sends its people, they’re not sending their best. They’re not sending you. They’re not sending you. They’re sending people that have lots of problems, and they’re bringing those problems with us. They’re bringing drugs. They’re bringing crime. They’re rapists. And some, I assume, are good people.”).

375. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) (“[A] law targeting religious beliefs as such is never permissible . . . if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral . . .” (citation omitted)).

376. See, e.g., *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 575 (4th Cir. 2017) (setting forth Trump’s 2016 campaign statements), *vacated by Trump v. Int’l Refugee Assistance Project*, 138 S. Ct. 353 (2017) (mem.); *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017) (same), *vacated by Trump v. Hawaii*, 138 S. Ct. 377 (2017) (mem.).

377. See, e.g., *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

burning.³⁷⁸ He has also said that sports players who do not stand for the national anthem “maybe shouldn’t be in the country.”³⁷⁹

Through these and other statements, President Trump has derogated political dissent and an unfettered press; displayed and ratified governmental religious animus; endorsed the espousal of racial subordination; and advocated for a kind of exclusive nationalism and a compulsory patriotism that many Americans have long resisted. *Roe v. Wade*³⁸⁰ has drawn the fire of many conservatives,³⁸¹ but Trump’s statements have leapfrogged *Roe* to call into question the values protected by *New York Times Co. v. Sullivan*,³⁸² *Barnette*,³⁸³ *Graham v. Richardson*,³⁸⁴ and perhaps even *Brown*.³⁸⁵ And although Trump’s sentiments may seem startling today, they are resonant with *Chae Chan Ping*’s anxiety about the threats of “vast hordes” of foreigners,³⁸⁶ *Patterson v. Colorado*’s contemplation of “subsequent punishment” for speech “deemed contrary to the public

378. Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 29, 2016, 3:55 AM), <https://twitter.com/realdonaldtrump/status/803567993036754944> [<https://perma.cc/V59G-NTEF>] (“Nobody should be allowed to burn the American flag - if they do, there must be consequences - perhaps loss of citizenship or year in jail!”); Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 30, 2017, 7:27 AM), <https://twitter.com/realdonaldtrump/status/847455180912181249> [<https://perma.cc/NYP9-YPX4>] (“The failing @nytimes has disgraced the media world. Gotten me wrong for two solid years. Change libel laws?”); Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 11, 2017, 5:09 PM), <https://twitter.com/realdonaldtrump/status/918267396493922304> [<https://perma.cc/B4U7-P6YQ>] (“Network news has become so partisan, distorted and fake that licenses must be challenged and, if appropriate, revoked. Not fair to public!”).

379. Domenico Montanaro, *Trump Praises NFL Decision, Questions if Protesting Players Should Be in the Country*, NPR (May 24, 2018, 6:39 AM), <https://www.npr.org/2018/05/24/613976960/trump-praises-nfl-decision-questions-if-protesting-players-should-be-in-the-coun> [<https://perma.cc/ZW8R-JY63>] (quoting President Trump as saying “You have to stand, proudly, for the national anthem or you shouldn’t be playing, you shouldn’t be there, maybe you shouldn’t be in the country.”)

380. 410 U.S. 113 (1973).

381. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 111–17 (1990); Stuart Taylor Jr., *Supreme Court Receives Reagan Plea on Abortion*, N.Y. TIMES (July 30, 1982), <https://www.nytimes.com/1982/07/30/us/supreme-court-receives-reagan-plea-on-abortion.html> [<https://nyti.ms/29QM4qk>] (describing Reagan Administration’s filing of a brief urging the Supreme Court to cabin *Roe*). For a contemporaneous criticism of *Roe* by a liberal scholar, see John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

382. See 376 U.S. 254, 270 (1964) (“[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”).

383. See 319 U.S. 624, 641 (1943) (“To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds.”).

384. See 403 U.S. 365, 372 (1971) (“Aliens as a class are a prime example of a ‘discrete and insular’ minority for whom such heightened judicial solicitude is appropriate.” (citation omitted)).

385. 347 U.S. 483, 495 (1954).

386. 130 U.S. 581, 606 (1889) (“To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character or from vast hordes of its people crowding in upon us.”).

welfare,”³⁸⁷ *Gobitis*’s equation of “[n]ational unity” with “national security,”³⁸⁸ *Halter v. Nebraska*’s notion of what “every true American” feels about the flag,³⁸⁹ and *Plessy*’s accommodating stance toward what that opinion delicately termed “social prejudices.”³⁹⁰ These echoes of the values of a seemingly bygone era by the President in his personal utterances cohere with his Administration’s broader embrace of *Lochner*-era constitutional tenets. Such statements by President Trump should thus be understood not simply as ordinary politicking in the age of Twitter, but instead as part and parcel of what this Article has theorized as the Trump Administration’s overall effort to roll back the post-New Deal “topsoil.”³⁹¹

The Supreme Court has so far been mute in its response to the broader constitutional agenda and vision that these statements both imply and help to advance. In *Trump v. Hawaii*, the Court held that the President could by executive order suspend the issuance of visas to foreign nationals from several Muslim-majority countries.³⁹² The Court ultimately regarded as immaterial that Trump had made a number of statements reflecting that the ban stemmed from religious animus toward Muslims because, in the Court’s view, the ban could “reasonably be understood” as justified on other grounds that were not tainted by animus.³⁹³ That in itself is noteworthy, both because the Court was unwilling to rebuke those statements of animus directly,³⁹⁴ and because the Court was willing to adhere to the plenary power doctrine³⁹⁵—a creation of the *Lochner*-era Court³⁹⁶—even when doing so created such a palpable clash with the “principles of religious freedom

387. 205 U.S. 454, 462 (1907) (“[T]he main purpose of [the First and Fourteenth Amendments] is ‘to prevent all such *previous restraints* upon publications as had been practiced by other governments,’ and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare.”).

388. 310 U.S. 586, 595 (1940) (“National unity is the basis of national security.”), *overruled by Barnette*, 319 U.S. 624 (1943).

389. 205 U.S. 34, 41 (1907) (“For that flag every true American has not simply an appreciation but a deep affection. . . . [I]nsults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot.”). Statutes prohibiting flag desecration proliferated during the *Lochner* era. See *Texas v. Johnson*, 491 U.S. 397, 429 (1989) (Rehnquist, J., dissenting).

390. 163 U.S. 537, 551 (1896) (“The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition.”), *overruled by Brown*, 347 U.S. 483 (1954).

391. See *supra* text accompanying notes 337–39.

392. 138 S. Ct. 2392, 2420, 2423 (2018).

393. *Id.* (“[W]e may consider plaintiffs’ extrinsic evidence, but will uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds.”).

394. See *id.* at 2418 (“Plaintiffs argue that this President’s words strike at fundamental standards of respect and tolerance, in violation of our constitutional tradition. But the issue before us is not whether to denounce the statements.”).

395. The Court did not so much as use the word “plenary,” but it relied on the cases that have extended that doctrine to the post-New Deal period. See *id.* at 2418–19.

396. See *supra* text accompanying notes 66–99.

and tolerance”³⁹⁷ that its modern-day decisions revere.³⁹⁸ What is perhaps as pertinent, however, is the separate concurrence by Justice Kennedy. He began by accurately pointing out that “[t]here are numerous instances in which the statements and actions of Government officials are not subject to judicial scrutiny or intervention,” and “spheres” where “an official may have broad discretion, discretion free from judicial scrutiny,” in which courts cannot “correct or even comment upon what those officials say or do.”³⁹⁹ But he then went on to note the “urgent necessity that officials adhere to . . . constitutional guarantees and mandates in all their actions,” so that the “anxious world” could “know that our Government remains committed always to the liberties the Constitution seeks to preserve and protect, so that freedom extends outward, and lasts.”⁴⁰⁰

Here, Justice Kennedy seemed to reveal an unselfconsciousness about what he and the Court were dealing with that was truly startling. Kennedy appeared to take it as a given that “Government officials”—and this was surely meant to encompass President Trump—would abide by the *Supreme Court’s* understandings of “constitutional guarantees and mandates,” and the *Supreme Court’s* view of “the liberties the Constitution seeks to preserve and protect.”⁴⁰¹ Further, he wrote as if he believed that such officials would be willing to do so “in all their actions,” even when they were operating in “spheres” that are essentially immune from judicial scrutiny.⁴⁰²

These assumptions may have left the Court along with Justice Kennedy, as no other Justice joined in his concurrence. One hopes that this is so, because presidential administrations generally, and this one in particular, are patently capable of developing their own understandings, quite different from the Court’s, of what “rights” the Constitution “proclaims and protects” and what “liberties” it “seeks to preserve.” Moreover, when the Executive Branch is operating within the capacious terrain that is exempt from the purview of courts or lightly checked by them—as, for example, when it sets enforcement priorities,⁴⁰³ when it decides what laws it will refuse to defend,⁴⁰⁴ when it purports to craft national security justifications for immigration restrictions,⁴⁰⁵ and in myriad other arenas—there is little reason to think that it will reliably adhere to constitutional rules or values as articulated by the federal courts. Indeed, far from being constrained by the

397. *Trump v. Hawaii*, 138 S. Ct. at 2418.

398. See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1412 (1990); see also, e.g., *Masterpiece Cakeshop v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018); *Gonzales v. O Centro Espírita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

399. *Trump v. Hawaii*, 138 S. Ct. at 2424 (Kennedy, J., concurring).

400. *Id.*

401. See *id.*

402. See *id.*

403. See Mila Sohoni, *Crackdowns*, 103 VA. L. REV. 31, 42–55 (2017).

404. See *supra* text accompanying notes 252–55 (describing Trump Administration’s failure to defend the ACA).

405. See *Trump v. Hawaii*, 138 S. Ct. at 2417.

constitutional understandings of the courts, Trump and his Administration are placing pressure on them to change.

The possibility that this effort might prevail—the possibility, that is, that constitutional law might yet revert or regress to something more like its earlier configuration—is a difficult thought to digest. In the time of *Lochner*, the federal regulatory state was a fraction of its current size, the civil-rights movement had not occurred, and the full flowering of globalization lay beyond the horizon. The world has changed enormously. But it would be a mistake to start from that premise—that things have changed dramatically—and to infer from it the conclusion that things must therefore stay mostly the same. Sharpened constitutional constraints upon domestic regulatory government and reincarnated constitutional safeguards for contractual liberty and private property rights are more than possible.⁴⁰⁶ So are an uptick in statutory or constitutional holdings that reduce protections for workers, consumers, or the indigent; a redefinition of who is entitled to citizenship and a renewed dedication to a strong vision of plenary power; and an ossification or even a partial amputation of protections for those rights that gained protection only after the New Deal, such as the right to abortion, sexual privacy, and rights of racial, alienage, and gender equality. These and other effects may flow from a presidential administration that embraces a vision of American law and society suffused by *Lochner*-era precepts and that channels the ideals that underpin that vision into its choices of judicial appointments and into the ears of a malleable public.

CONCLUSION

Justice Rufus Peckham, a New Yorker, “was a strong earthy character.”⁴⁰⁷ According to his archnemesis, Oliver Wendell Holmes, Justice Peckham had no particular intellectual bent; rather, Holmes said, Justice Peckham was “a master of Anglo-Saxon monosyllabic interjections” whose “major premise” was “God damn it!”⁴⁰⁸ As the author of cases such as *Allgeyer* and *Lochner*, Justice Peckham has been relegated to the bottom of the heap of Supreme Court justices—one of the “pygmies of the court.”⁴⁰⁹ To say that a judicial opinion echoes Peckham is as much as to say that one condemns it.⁴¹⁰

406. Cf. Mila Sohoni, *A Bureaucracy—If You Can Keep It*, 131 HARV. L. REV. FORUM 13, 26 (2017) (“To assume that the status quo on delegation will persist is to elide a key lesson of the 1930s—that constitutional revolutions happen.”).

407. BERNARD SCHWARTZ, *A HISTORY OF THE SUPREME COURT* 179 (1993).

408. *Id.* (quoting Justice Oliver Wendell Holmes). Holmes later explained that “he meant ‘thereby that emotional predilections governed him on social themes.’” *Id.*

409. Carl Hulse, *Supreme Court Fight Rescues a Justice from Obscurity*, N.Y. TIMES (Apr. 1, 2016), <https://www.nytimes.com/2016/04/02/us/politics/supreme-court-fight-rescues-a-justice-from-obscurity.html> [<https://nyti.ms/1pSzZDE>].

410. See, e.g., *Roe v. Wade*, 410 U.S. 113, 174 (1973) (Rehnquist, J., dissenting) (“While the Court’s opinion quotes from the dissent of Mr. Justice Holmes in *Lochner v. New York*, . . . the result it reaches is more closely attuned to the majority opinion of Mr. Justice Peckham in that case.” (citation omitted)).

Today, another “strong” and “earthy” New Yorker, with a similar penchant for monosyllabic utterances (“Sad!”, “Great!”, “Huge!”), and a similar disdain for intellectual theorizing, sits in the White House. And his Administration is restoring elements of the worldview emblemized by Justice Peckham—the jurisprudence of the *Lochner* era—to American government. The Trump Administration’s vision of law, rights, state power, and sovereignty repackages the core commitments of *Lochner*-era constitutional jurisprudence. These ideas were linked together during the *Lochner* era, and by collectively resuscitating them, the Trump Administration is placing behind them the might and power of the Executive Branch.

When one happens to be engaged in a fight about fundamentals, it is useful to know which fundamentals one is fighting about. The debate over the Trump Administration’s agenda is unfolding in homes, polling places, courtrooms, and Congress. We experience that debate not as an esoteric drawing-room conversation about competing ideas about law or abstract jurisprudential tenets, but as a debate about vital questions of substantive policy. We experience it as a debate over the future of American democracy, not over its past. But understanding the constitutional law and thought of the past is an essential part of understanding the terms and stakes of this ongoing debate. *Lochner*-era jurisprudence had many flaws and it ratified many outcomes that modern eyes would regard as abhorrent. But it was nonetheless a vision of law that *actually governed America for fifty years*. In many respects, it continues to shape America to this day; the “legacy” of the *Lochner* era persists throughout law,⁴¹¹ including in constitutional law and especially in immigration and trade law, and the ideas that underpinned that vision continue to resonate powerfully in everyday political discourse. To press a political and legal agenda suffused by that legacy is to urge the resurrection of a vision of rights, government power, and sovereignty that proved itself, for a considerable period, to be compatible with American constitutional democracy—at least, in the understanding of the Supreme Court for a half-century of American history. Those who today wish to urge that vision will draw intellectual inspiration and precedential strength from this history, even as they retool and repurpose it to address present-day controversies that those Justices could never have imagined. Conversely, those who wish to defend against that impulse will be required to develop a theory and a politics that equally and forcefully addresses how all of our governing institutions (including, but not only, the federal courts) should resolve these fundamental questions about the scope of state power, individual rights, and the meaning of sovereignty in the years ahead.

411. Cf. Sunstein, *supra* note 322, at 875.