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LOCHNER'S LEGACY

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INTRODUCTION

Constitutional law tends to define itself through reaction to great cases. The defining case for the last several decades was *Brown v. Board of Education*[1]—an example of social reorganization, in the interest of a racial minority, brought about through the judiciary. *Roe v. Wade*[2] has to some extent played this role for the past decade, and its status as a defining case may grow larger in the next generation. But for more than a half-century, the most important of all defining cases has been *Lochner v. New York*.[3] The spectre of *Lochner* has loomed over most important constitutional decisions, whether they uphold or invalidate governmental practices.[4] In the different answers to the question, what was wrong with the decision in *Lochner*?, can be found the various posi-

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1. 347 U.S. 483 (1954).

2. 410 U.S. 113 (1973).

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

4. The most recent example is Bowers v. Hardwick, 106 S. Ct. 2841 (1986), where the Court rejected a claim that a state prohibition of sodomy among consenting adults violated the due process clause. According to the Court:

> The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930's, which resulted in the repudiation of much of the substantive gloss that the Court placed on the Due Process Clause of the Fifth and Fourteenth Amendments. There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental.

Id. at 2846. It is this view of the lesson of the *Lochner* period that is questioned here.

tions on most of the major constitutional issues of the modern era.[5]

The received wisdom is that *Lochner* was wrong because it involved "judicial activism": an illegitimate intrusion by the courts into a realm properly reserved to the political branches of government. This view has spawned an enormous literature[6] and takes various forms.[7] The basic understanding has been endorsed by the Court in many cases taking the lesson of the *Lochner* period to be the need for judicial deference to legislative enactments.[8]

The principal purpose of this essay, descriptive in character, is to understand *Lochner* from a different point of view. For the *Lochner* Court, neutrality, understood in a particular way, was a constitutional requirement. The key concepts here are threefold: government inaction, the existing distribution of wealth and entitlements, and the baseline set by the common law. Governmental intervention was constitutionally troublesome, whereas inaction was not; and both neutrality and inaction were defined as respect for the behavior of private actors pursuant to the common law, in light of the existing distribution of wealth and entitlements. Whether there was a departure from the requirement of neutrality, in short, depended on whether the government had altered the common law distribution of entitlements. Market ordering under the common law was understood to be a part of nature rather than a legal construct, and it formed the baseline from which to measure the constitutionally critical lines that distinguished action from inaction and neutrality from impermissible partisanship. This understanding of the *Lochner* period is faithful to what the Court said when it both engaged in and abandoned *Lochner*-like reasoning, and it points to an important element in the *Lochner* Court's approach, one that has little to do with an aggressive judicial role in general.[9]

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5. The view that *Lochner* was wrong is not, however, unanimously held. See R. Epstein, Takings: Private Property and the Law of Eminent Domain 5 (1985).

6. See, e.g., J. Choper, The Supreme Court and the National Political Process (1980); J. Ely, Democracy and Distrust (1980); M. Perry, The Constitution, the Courts, and Human Rights (1982).

7. Sometimes the view is based on the text of the Constitution and the "intent" of its framers, see, e.g., Monaghan, Our Perfect Constitution, 56 N.Y.U. L. Rev. 353 (1981); sometimes it is based on conceptions of democracy, see, e.g., Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1 (1971); sometimes it grows out of "process-perfecting" theories, see, e.g., J. Ely, supra note 6, at 73, 228–29 n.91; sometimes it depends on distinctions between matters of policy, to be resolved by the legislature, and matters of principle, to be resolved by the courts, see R. Dworkin, Taking Rights Seriously (1979).

8. See, e.g., Bowers v. Hardwick, 106 S. Ct. 2841 (1986); Dandridge v. Williams, 397 U.S. 471 (1970); Griswold v. Connecticut, 381 U.S. 479 (1965); Ferguson v. Skrupa, 372 U.S. 726 (1963); Williamson v. Lee Optical, 348 U.S. 483 (1955).

9. Whether this understanding of *Lochner* should be accepted in place of one that stresses an active judicial role is an inescapably normative question, taken up infra notes 144–67 and accompanying text. The principal effort here is to set forth an alternative approach that fits the history at least as well and that has dramatically different implications. See infra notes 168–205 and accompanying text. Moreover, this understanding

Understood in this way, however, *Lochner* has many descendants in current law. Numerous decisions depend in whole or in part on common law baselines or understandings of inaction and neutrality that owe their origin to *Lochner*-like understandings. And if *Lochner* is understood in these terms, its heirs are not *Roe v. Wade*[10] and *Miranda v. Arizona*,[11] but instead such decisions as *Washington v. Davis*,[12] *Buckley v. Valeo*,[13] *Regents of California v. Bakke*,[14] and various cases immunizing those who are thought not to be "state actors" from constitutional constraints. These and other decisions can be understood from a unitary perspective through the lens of the *Lochner* period. Such a perspective may or may not justify dramatic departures from current law. It may be that modern doctrine, insofar as it shares *Lochner*'s premises, is entirely unobjectionable.

The second purpose of the essay is normative. To some degree, *Lochner*-like themes are so deeply ingrained in the constitutional order, indeed in the very concept of constitutionalism,[15] that it would be hopeless to attempt to abandon them even if it were desirable to do so. But in some settings, the modern progeny of *Lochner*, like *Lochner* itself, depend on false premises and lead to unfortunate results. Most important, the baselines selected by the Court and the use of the key concepts—"neutrality" and "inaction"—are often a mistake, for the same reasons that originally led to the rejection of *Lochner* and the common law system of regulation generally. The eventual task is to design a set of constitutional doctrines that does not derive from common law rules but that instead builds on still-emerging principles that might be roughly associated with the New Deal. The final section of this Article ventures some thoughts on how to accomplish that task.

Almost eighty years since the case was decided, the lesson of the *Lochner* period has yet to be settled. The purpose of this Article is to suggest that the case should be taken to symbolize not merely an aggressive judicial role, but an approach that imposes a constitutional requirement of neutrality, and understands the term to refer to preservation of the existing distribution of wealth and entitlements under the baseline of the common law. Thus understood, *Lochner* has hardly been overruled.

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was not invented in the *Lochner* era. See Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) (using contract clause and "general principles . . . common to our free institutions" to invalidate rescissions of a land grant).

10. 410 U.S. 113 (1973).

11. 384 U.S. 436 (1966).

12. 426 U.S. 229 (1976).

13. 424 U.S. 1 (1976).

14. 438 U.S. 265 (1978).

15. For general discussion, see Constitutionalism and Democracy (J. Elster & R. Slagstaad eds. forthcoming 1988).

I. THE RISE AND FALL (?) OF *LOCHNER*

It will be useful to begin with excerpts from two important decisions associated with the *Lochner* period. The first excerpt is from *Adkins v. Childrens Hospital*,[16] a 1923 decision invalidating minimum wage legislation for women and children. The Court said:

> To the extent that the sum fixed [by the minimum wage statute] exceeds the fair value of the services rendered, it amounts to a compulsory exaction from the employer for the support of a partially indigent person, for whose condition there rests upon him no peculiar responsibility, and therefore, in effect, arbitrarily shifts to his shoulders a burden which, if it belongs to anybody, belongs to society as a whole.[17]

The next excerpt is from the case generally thought to spell the downfall of *Lochner*. In the 1937 decision of *West Coast Hotel v. Parrish*,[18] the Court upheld a minimum wage law for women. The Court said:

> The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenceless against the denial of a living wage . . . casts a direct burden for their support upon the community. What these workers lose in wages the taxpayers are called upon to pay. . . . The community is not bound to provide what is in effect a subsidy for unconscionable employers.[19]

The notion of subsidy is of course incoherent without a baseline from which to make a measurement. Both of these excerpts refer to subsidies, but by the time of *West Coast Hotel*, the concept has been turned on its head. In *Adkins*, the Court saw minimum wage legislation as requiring a subsidy to the public from an innocent employer. Such legislation was thus a kind of "taking" from A to B. According to the Court, if B is needy, it is not A, but the public at large, who should pay. In *West Coast Hotel*, it is the failure of a state to have minimum wage legislation that amounts to a subsidy—this time, from the public to the employer.[20] The common law system, for the *West Coast Hotel* Court, turns out to subsidize "unconscionable employers." In the fifteen-year period between *Adkins* and *West Coast Hotel*, the baseline has been shifted. What accounts for the shift? In answering that question, it will be useful to turn to *Lochner* itself.

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16. 261 U.S. 525 (1923).

17. Id. at 557–58.

18. 300 U.S. 379 (1937).

19. Id. at 399.

20. To say this is not, of course, to suggest that minimum wage legislation was constitutionally required. Notably, both *Adkins* and *West Coast Hotel* involved statutes discriminating on the basis of gender; such statutes tended, in both purpose and effect, to diminish the employment prospects of women. See Landes, The Effect of State Maximum-Hours Laws on the Employment of Women in 1920, 88 J. Pol. Econ. 476 (1980); Nelson, Women's Poverty and Women's Citizenship: Some Political Consequences of Economic Marginality, 10 Signs 209, 228-29 (1984).

Lochner involved a regulation enacted by the state of New York prohibiting employers from permitting or requiring bakers to work for more than sixty hours in a week. The Court's analysis came in several steps. The Court said that the right of contract—in particular, the right to buy and sell labor—is part of the liberty protected by the due process clause. But the Court recognized that the "police power" was available to justify intrusions on liberty of contract; thus, for example, the government could protect health or morals by restricting contractual agreements. Here, however, the Court concluded that maximum hour legislation was not permissible as a "labor law," because bakers were of full legal capacity and "in no sense wards of the State."[21] Only wards could be protected through labor legislation.

The Court also concluded that the statute could not be defended as a health law. The problem was that the state could not demonstrate a close connection between maximum hour regulation and the protection of health. There was no sufficient showing that a maximum hour law was necessary to protect health; and if the evidence brought forth here were thought sufficient, the state's power would be unlimited. The Court concluded that the statute was "in reality, passed from . . . motives"[22] other than protection of health—motives that were illegitimate but that the Court did not specify.

For the contemporary observer, two features of the Court's approach are especially distinctive. The first is the sharp limitation of the category of permissible government ends. Efforts to redistribute resources and paternalistic measures were both constitutionally out of bounds. They did not fall within the "police power"; the employer had committed no common law wrong, and regulatory power was largely limited to the redress of harms recoguized at common law. This limitation of the category of permissible ends had important implications, excluding a wide range of measures enacted by majorities. The scope of the "police power," as understood in the *Lochner* era, has never been entirely clear.[23] But there can be no doubt that most forms of redistribution and paternalism were ruled out.

The second step in the Court's approach consists of careful scrutiny of the relationship between the permissible end invoked by the state to support the statute and the means chosen by the state to promote that end. The Court was unsatisfied by the claim that limitations on working hours contributed to the health of bakers, notwithstanding the plausible nature of the claim—hence Justice Harlan's powerful dissent.[24] It would thus be possible to accept, as did Justice Harlan, the limitation of police power and at the same time to uphold the legisla-

21. 198 U.S. at 57.

22. Id. at 64.

23. For an effort proceeding from similar premises, see R. Epstein, supra note 5, at 15–16.

24. 198 U.S. 65–74.

tion attacked in *Lochner*. On the other hand, one could reject both features of the Court's approach, as did Justice Holmes in his famous dissent.

There is, moreover, a close relationship between the two elements of the Court's approach; the one reinforces the other. The careful scrutiny of means-ends connections operates to "flush out"[25] impermissible ends. If there is no class of impermissible ends, means-ends scrutiny is incoherent.[26] And by impermissible ends, the Court appeared to be referring to what we may call "raw" interest-group transfers.[27] Because the only available public justifications were insufficient, the minimum wage statute was invalidated as an interest-group deal, reflecting nothing other than political power. Above all, the Court's concern was that maximum hour legislation was partisan rather than neutral—selfish rather than public-regarding.[28] It was neutrality that the due process clause commanded,[29] and neutrality was served only by the general or "public" purposes comprehended by the police power. If the statute could be justified as a labor or health law, it would be sufficiently public to qualify as neutral. Since no such justification was

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25. See J. Ely, supra note 6, at 146.

26. See Note, Legislative Purpose, Rationality, and Equal Protection, 82 Yale L.J. 123 (1972).

27. To say this is not to say that redistribution was always impermissible. Taxation and other measures might redistribute wealth without running afoul of the due process clause; and the poor laws were generally immune from constitutional attack. Grey, The Malthusian Constitution, 41 U. Miami L. Rev. 21 (1986). But redistribution on an ad hoc basis, of the sort represented by maximum hour and minimum wage laws, was unconstitutional if unsupported by a justification deemed "general" or "public." Cf. Calder v. Bull, 3 U.S. 381 (1798) (Chase, J.) (discussing natural law principles prohibiting transfers from A to B).

The preference for redistribution through taxation rather than regulation might have been the product of the broader interest in promoting generality in lawmaking. If redistribution is ad hoc, it could be perverse and in any event less visible. The requirement of generality in redistribution promotes visibility and at the same time ensures that any redistribution is to those genuinely or most in need. Compare the debate over affirmative action, discussed infra text accompanying notes 113–17. The ad hoc character of affirmative action schemes is sometimes thought to be an argument against them and in favor of more general methods of alleviating the distribution of benefits and burdens among blacks and whites. On the other hand, the requirement of generality might allow well-organized private groups to mobilize in defense of the status quo. In this sense the requirement fits comfortably with the broader hostility to redistribution.

28. Stated in this way, the requirement remains the law. Statutory classifications must be defensible as public-regarding under a wide range of constitutional provisions. See Sunstein, Naked Preferences and the Constitution, 84 Colum. L. Rev. 1689 (1984); for various defenses, see infra note 166. In the *Lochner* era, however, the category of justifications that would count as "public" was small, excluding paternalistic and redistributive matters. Cf. Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984) (rendering meaningless the public use requirement under the eminent domain clause).

29. Cf. Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1 (1959) (discussing similar requirement of neutrality imposed on judges), discussed in more detail infra notes 109–11 and accompanying text.

available, it was invalidated as impermissibly partisan—what might now be called special-interest legislation. The legislative result was thus unprincipled; it depended on "whose ox is gored." Under this framework, the common law categories were taken as a natural rather than social construct. The status of the common law as a part of nature undergirded the view that the common law should form the baseline from which to measure deviations from neutrality, or self-interested "deals."[30]

Justice Holmes' celebrated dissenting opinion is a rejection of neutrality altogether. It comes close to modern interest-group pluralism, which treats the political process as an unprincipled struggle among self-interested groups for scarce social resources.[31] Under this view, *Lochner*'s means-ends scrutiny, examining whether there is a "public" and hence neutral justification for the statute, is difficult to understand. Holmes' opinion treats the political process as a kind of civil war, in which the powerful succeed; if courts interfere, they will be bottling up forces that will express themselves elsewhere in other and more destructive forms.[32] Thus for Holmes, the Constitution does not prevent "the natural outcome of a dominant opinion."[33]

Holmes' opinion is probably best known for its apparent humility: the rejection of Spencer's *Social Statics*,[34] with which Holmes was sympathetic as a matter of personal predilection; the proposition that the Constitution does not embody any particular social and economic theory; and its author's apparent willingness to disregard his personal views in the process of constitutional interpretation. But the opinion is

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30. Two qualifications are in order here. First, not every common law right was, by virtue of its status as such, immunized from collective control. Marginal and not-so-marginal adjustments were permissible. Nonetheless, the basic framework of the common law formed the baseline from which to decide cases. Indeed, one can trace to this period the idea that legislative extinguishment of "core" common law rights was permissible only if the legislature furnished an adequate alternative remedy. See, e.g., New York Cent. R.R. v. White, 243 U.S. 188 (1917) (upholding workers' compensation in part because of quid pro quo); see also Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 88 & n.32 (1978) (upholding liability-limiting provisions of Price-Anderson Act against due process challenge but suggesting relevance of quid pro quo).

Second, the protection of common law rights depended not merely on the fact that the rights at issue were protected by the common law, but also on the (unsurprising) fact that the common law corresponded to a widely held normative theory about the proper role of government. The interests protected at common law thus tracked the category of natural rights. For a modern statement, see Epstein, A Theory of Strict Liability, 2 J. Legal Stud. 151 (1973); R. Epstein, supra note 5.

31. See, e.g., R. Dahl, A Preface to Democratic Theory (1956); Stigler, The Theory of Economic Regulation, 2 Bell J. Econ. & Mgmt. Sci. 3 (1971); see also R. Posner, Federal Courts: Crisis and Reform (1985) (making a similar point about Holmes).

32. See Becker, A Theory of Competition Among Pressure Groups for Political Influence, 98 Q.J. Econ. 371 (1983) (making this argument). On Holmes, see Rogat, Some Modern Views—The Judge as Spectator, 31 U. Chi. L. Rev. 213 (1964).

33. 198 U.S. at 76.

34. H. Spencer, Social Statics (1882).

best understood as an outgrowth of the very species of constitutional social Darwinism that it purports to reject. Holmes' market-oriented conception of politics and his skepticism about normative argument are the very personal building blocks for his enthusiasm for judicial deference.[35]

The decline of the *Lochner* understanding was slow and wavering. In some cases the Court upheld statutes by deferring to claims of plausible means-ends connections. Elsewhere the Court seemed gradually to conclude that redistributive goals were permissibly public and thus in some sense neutral, even if there was a departure from the common law; the common law categories thus broke down.[36] But it was in *West Coast Hotel* that the Court rejected the theoretical foundations of the *Lochner* period. The case involved a statute providing minimum wages for women. Perhaps oddly, at least to modern readers, the emphasis of the opinion was not on the undemocratic character of the Court's previous approach or on the value of judicial deference to legislative determinations.[37] Instead the Court stressed the need for minimum wage regulation, referring to "the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living" and the fact that "the exploitation of a class of workers who are in an unequal position with respect to bargaining power casts a direct burden for their support upon the community."[38] In perhaps the most striking passage of the opinion, the Court referred to the subsidy problem and added, "[t]he community may direct its law-making power to correct the abuse which springs from [employers'] selfish disregard of the public interest."[39]

In the *Lochner* era itself, of course, the police power could not be used to help those unable to protect themselves in the marketplace.[40] The expansion of the police power in *West Coast Hotel* signalled a critical theoretical shift, amounting to a rejection of the *Lochner* Court's conception of the appropriate baseline. The key lies in the notion that failure to act would amount to "a subsidy for unconscionable employers." The idea that what appears, in the *Lochner* framework, to be government "inaction," or neutrality, might amount to a subsidy is at first glance quite puzzling. The Court's claim is that the failure to impose a minimum wage is not nonintervention at all but simply another form of action—a decision to rely on traditional market mechanisms, within the

35. See, e.g., Rogat, supra note 32, at 251–55; Rogat & O'Fallon, Mr. Justice Holmes, A Dissenting Opinion—The Speech Cases, 36 Stan. L. Rev. 1349 (1984).

36. See, e.g., Nebbia v. New York, 291 U.S. 502 (1934); Bunting v. Oregon, 243 U.S. 426 (1917); Muller v. Oregon, 208 U.S. 412 (1908).

37. The Court did, however, refer to these themes. See West Coast Hotel, 300 U.S. at 397–98.

38. Id. at 399.

39. Id. at 399–400.

40. This oversimplifies a complicated framework; the scope of the *Lochner* era police power was by no means precisely defined.

common law framework, as the basis for regulation.[41] *West Coast Hotel* rests on an understanding that in any case, government—through minimum wage laws or the common law system—is making a choice. The common law could not be regarded as a natural or unchosen baseline. The traditional treatment of the police power was unable to survive this understanding.[42] For the Court in *West Coast Hotel*, the baseline for analysis was instead a system in which all workers had a living wage.

Similar developments occurred in other areas of the law. Consider for example, the law of eminent domain, with which *Lochner* must be closely associated: both involved perceived "takings" from A to B, and an underlying framework built on common law baselines.[43] *Miller v. Schoene*[44] tested the constitutionality of a statute requiring the destruction of ornamental cedar trees infected with a disease damaging to local apple orchards. The owners of the cedar trees complained that the statute amounted to a "taking" of their property for which compensation was constitutionally required. The Court responded that "the state was under the necessity of making a choice between the preservation of one class of property and that of the other wherever both existed in dangerous proximity. It would have been nonetheless a choice if, instead of enacting the present statute, the state, by doing nothing, had permitted serious injury to the apple orchards within its borders to go unchecked. When forced to such a choice the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another . . . ."[45] This was so notwithstanding the fact that the injury at issue was not tortious at common law. In *Miller* as in *West Coast Hotel*, adherence to common law baselines no longer seemed neutral, and departures from those baselines were no longer impermissibly partisan. The same phenomenon occurred under the contracts clause, as the Court expanded the range of justifications that would allow the state to assert its "police power" in order to abrogate private agreements.[46] In these circumstances it should be unsur-

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41. Here the parallel to the affirmative action debate is especially striking. See infra notes 113–17 and accompanying text.

42. The point is emphasized in L. Tribe, American Constitutional Law §§ 8–5 to –7 (1978).

Why this change should have occurred is a complex matter. In part, the Depression was responsible; in a period of widespread poverty and unemployment, it became harder to see nineteenth century market ordering as in the interest of all. In part, the partial but increasing use of government power to alleviate suffering made the common law system seem less and less natural and inviolate. See id. Consider in this regard Franklin Roosevelt's suggestion: "We must lay hold of the fact that economic laws are not made by nature. They are made by human beings." 1 Public Papers of Franklin D. Roosevelt 657 (1938).

43. See infra notes 81–88 and accompanying text (discussing the takings clause).

44. 276 U.S. 272 (1928).

45. Id. at 279.

46. See infra notes 81–88 and accompanying text.

prising that *Erie v. Tompkins*,[47] the principal case recognizing the constructed rather than prepolitical character of the common law, was decided only one year after *West Coast Hotel*.

We may thus understand *Lochner* as a case that failed because it selected, as the baseline for constitutional analysis, a system that was state-created, hardly neutral, and without prepolitical status. Once the Court's baseline shifted, its analysis became impossible to sustain. As every student of the law of torts is aware, one cannot treat as a "taking" from A to B a decision to transfer resources to which A had no entitlement in the first place. The whole notion of "taking" depends on a belief in an antecedent right to the property in question.[48] Once the common law itself was seen to allocate entitlements and wealth, and the allocation seemed controversial, a decision to generate a new pattern of distribution could not be for that reason impermissible.

The defect of the *Lochner* era might, then, be understood in three ways that are closely related but that have some significant differences as well. In its narrowest form, the problem was the Court's decision to take market ordering under the substantive standards of the common law as the baseline from which to decide constitutional cases.[49] In this formulation, the difficulty lay in the use of the common law as the starting point from which to administer the critical line distinguishing action from inaction and partisanship from neutrality. More broadly, the *Lochner* Court regarded consideration of "whose ox is gored"—when those helped were the disadvantaged—as impermissible partisanship; consideration of the plight of the disadvantaged was insufficiently public or general and not neutral at all. This conclusion, reflecting a kind of legal formality, turned out to depend on the antecedent selection of a baseline grounded in the common law. More broadly still, the Court took as natural and inviolate a system that was legally constructed and took the status quo as the foundation from which to measure neutrality.[50] The use of the status quo as the foundation for measurement is of course different from similar use of the common law. We shall see both uses in the discussion to follow.

These three understandings are closely related to one another. The decision about what is partisanship and what is neutrality depends

47. 304 U.S. 64 (1938).

48. See, e.g., Calabresi & Malamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089 (1972); Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165 (1967).

49. The terms "common law" and "nineteenth century market ordering" will be used interchangeably throughout; the reference is to the allocation of rights of use, ownership, transfer, and possession of property associated with "laissez-faire" systems and captured in the common law of the late nineteenth century. Of course common law systems have not always taken this form, and market ordering could take place under dramatically different allocations of entitlements.

50. The status quo need not, of course, be the common law.

on the baseline used for measurement; thus the second defect presupposes some variation on the first. The third understanding, stressing use of the status quo, is in turn simply a generalization of the *Lochner* Court's treatment of the common law. For better or worse, these understandings of the *Lochner* era treat judicial activism as a secondary concern. The central problem of the *Lochner* Court had to do with its conceptions of neutrality and inaction and its choice of appropriate baseline.

II. *Lochner* and Current Constitutional Law

This understanding of *Lochner* is hardly uncontroversial, but variants have been offered.[51] And if *Lochner* is understood in these terms, it has not been entirely overruled. Numerous decisions, in widely disparate areas of constitutional law, depend on *Lochner*-like baselines and similar principles of neutrality and inaction; one or more of the understandings of *Lochner* set above are reflected in many areas of current law. The areas to be covered span a wide range, including affirmative action, campaign finance regulation, gender discrimination, the state action doctrine, the distinction between de facto and de jure discrimination, and judicial review of inaction by federal administrative agencies. The discussion begins with areas using common law baselines and later shifts to areas in which the status quo is the foundation for decision.

It is important to understand that for present purposes, the goal is descriptive rather than normative. To say that a decision depends on *Lochner*-like premises is not to say that it was wrong. The normative issue is dealt with below.

A. *Funding Limitations and the First Amendment*

We begin with *Buckley v. Valeo*,[52] which involved a first amendment attack on campaign finance regulation. The regulation at issue im-

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51. See B. Ackerman, Reconstructing American Law (1984); L. Tribe, supra note 42, at 427–55; Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685 (1976); MacKinnon, Pornography, Civil Rights, and Speech, 20 Harv. C.R.-C.L. L. Rev. 1 (1985).

Similar points were made by the legal realists. See Cohen, Property and Sovereignty, 13 Cornell L.Q. 8 (1927); Hale, Coercion and Distribution in a Supposedly Non-Coercive State, 38 Pol. Sci. Q. 470 (1923).

A question arises here about the criteria for deciding when a particular understanding of the *Lochner* era, or of any other period, ought to be accepted. Of course the primary requirement is that the understanding be true to the decided cases—certainly in terms of result, and, it is to be hoped, in terms of the rhetoric as well. But among conflicting understandings that fit the cases equally well, the choice has an inescapable normative dimension. R. Dworkin, Law's Empire 90–98 (1986). On the different implications of the approach set out here and the more conventional understanding, see infra notes 167–205 and accompanying text.

52. 424 U.S. 1 (1976).

posed a ceiling on campaign expenditures by candidates and political parties. In defense of the regulation, the government argued that it sought to equalize the relative ability of individuals and groups to influence the outcomes of elections. Disparities in wealth, the government claimed, enabled some to drown out the voices of others. Restrictions on the speech of the wealthy served the interest of "dissemination of information from 'diverse and antagonistic sources.' "[53] By equalizing participation in the political realm, campaign finance regulation, it was said, did not undermine but instead promoted first amendment interests.

In *Buckley*, the Court concluded that this justification for regulation was illegitimate. In the Court's words, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[54] The effort at equalization was not within the permissible ends of government. As far as the first amendment is concerned, the state must take disparities in wealth, and the existence of some with more "voice" than others, as part of nature for which government bears no responsibility. To do otherwise was, for the *Buckley* Court, a kind of first amendment "taking."

Buckley is a direct heir to *Lochner*. In both cases, the existing distribution of wealth is seen as natural, and failure to act is treated as no decision at all. Neutrality is inaction, reflected in a refusal to intervene in markets or to alter the existing distribution of wealth. *Buckley*, like *Lochner*, grew out of an understanding that for constitutional purposes, the existing distribution of wealth must be taken as simply "there," and that efforts to change that distribution are impermissible. Under both cases, the category of permissible legislative ends was sharply limited. To be sure, *Buckley* was a construction of the first amendment, whereas *Lochner* rested on the due process clause; and that distinction may turn out to be important.[55] But whether or not *Buckley* was rightly decided, it has much in common with *Lochner*.

B. *Defining Liberty and Property*

The due process clause accords procedural protection to "liberty" and "property," terms that the Court has had some difficulty defining in recent years.[56] The principal problems have arisen in deciding which, if any, statutory benefits—those said to be "conferred by the

53. Nicholson, Buckley v. Valeo: The Constitutionality of the Federal Election Campaign Act Amendments of 1974, 1977 Wis. L. Rev. 323, 336 (quoting *Buckley*, 424 U.S. at 49).

54. 424 U.S. at 48–49.

55. See infra notes 190–203 and accompanying text.

56. See, e.g., Monaghan, Of "Liberty" and "Property," 62 Cornell L. Rev. 405 (1977); Stewart & Sunstein, Public Programs and Private Rights, 95 Harv. L. Rev. 1193 (1982); Van Alstyne, Cracks in the New Property, 62 Cornell L. Rev. 445 (1977).

government"—are entitled to procedural protection.[57] For a long period the Court concluded that some benefits were "created" by the government, whereas other benefits were not. Only the latter—generally interests protected by the common law—were entitled to procedural protection. In the wake of an assault on this position, rejecting *Lochner*-like baselines deriving from common law,[58] the Court has apparently concluded that statutory benefits will sometimes be considered "liberty" or "property"—but only when there is a statutory entitlement, defined as a limitation on the administrator's discretion to provide the benefit in question.[59]

Lochner-like premises powerfully influence this debate. For the most part, liberty and property are defined by reference to the common law.[60] Interests protected at common law—including most prominently the right to private property, the right to bodily integrity, and other rights protected in the *Lochner* era—are axiomatically entitled to protection. The difficulties arise with other sorts of rights, including the right to freedom from discrimination, the right to government employment, and the right to welfare. The statutory entitlement approach is based on a partial rejection of *Lochner*-era understandings. But the Court's failure to put benefits said to be created by the government on the same footing with benefits said to be "natural" is a clear holdover from the *Lochner* period. The distinction itself treats the common law as unchosen and statutory benefits as a form of "intervention"—the same choice of baseline that affected the *Lochner* Court. An alternative approach would have been to select liberty and property interests by reference to some criterion of importance independent of the common law, or at least not determined by common law categories.[61]

Similar issues have arisen as a matter of substantive due process.

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57. See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985); Arnett v. Kennedy, 416 U.S. 134 (1974); Board of Regents v. Roth, 408 U.S. 564 (1972).

58. See Goldberg v. Kelly, 397 U.S. 254 (1970); Reich, The New Property, 73 Yale L.J. 733 (1963).

59. See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. at 538–42.

60. See, e.g., Ingraham v. Wright, 430 U.S. 651 (1977) (bodily integrity). For a recent statement, see Easterbrook, Substance and Due Process, 1982 Sup. Ct. Rev. 85, which draws a sharp distinction between common law and statutory interests and which understands the distinction in *Lochner*-like terms, as responding to the differences between interests created by government and interests from some other source.

Sometimes, however, the statutory entitlement approach has been used to remove even common law interests from the category of liberty and property. See Paul v. Davis, 424 U.S. 693 (1976). Note also that it would be possible to treat common law interests as protected only because and to the extent that they can be classified as "entitlements"; under this view, the statutory entitlement and common law cases are closer than they might at first appear. But this sort of positivist approach to liberty and property misconceives the intended function of the due process clause, which was to protect important interests from procedural irregularity, regardless of whether there was a state-created right. See Monaghan, supra note 56, at 433–34, 442–43.

61. See Stewart & Sunstein, supra note 56, at 1257–58, for a discussion of the difficulties produced by such an approach.

In *Flemming v. Nestor*,[62] the Court concluded that social security benefits were not constitutionally protected "property."[63] The same conclusion has been reached elsewhere, as courts have concluded that government may eliminate benefits of its own creation—where that notion is defined by reference to the common law.[64] The failure to accord substantive protection to statutory benefits derives from *Lochner* era distinctions between common law interests and other benefits. Similarly, the constraints of Article III have been administered under *Lochner*-like premises. The Court is less likely to require an Article III tribunal when a right created by Congress is at stake. The common law thus defines a large amount of the territory captured by Article III requirements.[65]

C. *State Action*

The state action doctrine is a product of an (uncontroversial) understanding that the Constitution is directed to acts of government rather than acts of private individuals. But how does one decide whether government is "acting"? The legal test could in theory depend on whether government agents are involved in the process. But as the dispute provoked by such cases as *Shelley v. Kraemer*[66] makes clear, such a test would be inadequate. State officials are involved in the enforcement of private contract, tort, and property law every day, and their involvement does not subject all private arrangements to constitutional constraints. Instead, state action doctrine has always depended on a baseline establishing the legitimate or at least ordinary functions of government. And in setting forth such a theory, and using it as the basis of inquiry, courts have not merely searched for state "action," but instead relied on common law baselines like those in *Lochner*.

For example, the Constitution is frequently said to be a charter of "negative" rather than "positive" rights.[67] This understanding can be found in a number of areas of state action doctrine. When the government fails to provide protection against private racial discrimination, the failure is said not to be "state action" and thus raises no constitutional question.[68] Nongovernmental discrimination is created by the private rather than the public sphere. So too, no constitutional ques-

62. 363 U.S. 603 (1960).

63. Id. at 608–11.

64. See United States R.R. Retirement Bd. v. Fritz, 449 U.S. 160 (1980).

65. The point emerges explicitly in Northern Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50 (1982); see also Commodity Futures Trading Comm'n v. Schor, 106 S. Ct. 3245 (1986); Thomas v. Union Carbide Agric'l Prods. Co., 473 U.S. 568 (1985).

66. 334 U.S. 1 (1948) (invalidating racially restrictive covenant).

67. See, e.g., Currie, Positive and Negative Constitutional Rights, 53 U. Chi. L. Rev. 864 (1986).

68. Reitman v. Mulkey, 387 U.S. 369, 374–77 (1967); see Black, "State Action," Equal Protection, and California's Proposition 14, 81 Harv. L. Rev. 69 (1967); Karst &

tion is raised when private property owners deny the public access to their property. As the Court held in *Hudgens v. NLRB*,[69] the first amendment is not violated when landowners invoke state trespass law in order to prevent picketers from displaying their messages on private lands. All of these issues are resolved by the choice of a *Lochner*-like baseline of government "inaction," one that appears neutral and natural. Neither enforcement of the trespass law nor repeal of laws forbidding private discrimination is taken as state action—a conclusion that relies upon common law notions about the role of government.

But consider *PruneYard Shopping Center v. Robins*.[70] That case involved a decision by the California Supreme Court extending rights of free speech, under the state constitution, so as to permit people to picket on privately owned shopping centers. The shopping center owners invoked the due process and takings clauses as a bar to the abrogation of their property rights, as those rights had been understood before the California court's decision. The Supreme Court upheld the abrogation, but left no doubt that the partial abrogation of the state law of trespass was "state action" sufficient to call for constitutional scrutiny. Indeed, a fair reading of the opinion is that some abrogations of state trespass law would amount to an unconstitutional taking—a conclusion that should be unexceptionable. Property rights are defined by state law. Abrogation of trespass law, either with respect to particular persons or across-the-board, is ordinarily the central meaning of a taking of property.

Why did the abrogation of trespass law in *PruneYard* appear uncontroversially to be state action, while application of the same law was understood to be no such thing in *Hudgens*? Indeed, which case involved "action," and which "inaction"? At first glance, the invocation of a trespass law might seem more plausibly to be action than the abrogation or removal of the very same law. The cases confirm that the state action inquiry is not a search for whether the state has "acted," but instead an examination of whether it has deviated from functions that are perceived as normal and desirable. And that examination is powerfully influenced by the common law; thus it is the abrogation rather than the enforcement of a trespass law that appears to be state action. The baseline, in short, has been defined in terms that are reminiscent of that in *Lochner*.

It will be useful to return to the treatment of private racial discrimination. There is general agreement, at least in the courts,[71] that no constitutional question is raised if a state fails to provide protection

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Horowitz, Reitman v. Mulkey: A Telophase of Substantive Equal Protection, 1967 Sup. Ct. Rev. 39.

69. 424 U.S. 507, 512–21 (1976).

70. 447 U.S. 74, 82–85 (1980).

71. But see Black, supra note 68, at 83–91; Karst & Horowitz, supra note 68 (relating *Reitman* to an "expanding concept" of equality and state responsibility).

from private racial discrimination, or if a state repeals a statute that had provided such protection. This understanding is made explicit in one of the most vexing of modern state action cases, *Reitman v. Mulkey*.[72] At issue in *Reitman* was a California constitutional amendment providing that no state statute may be enacted that interferes with the private right to sell property to whomever the property owner chooses. By a five-to-four vote, the Court invalidated the amendment on the ground that its purpose and effect were to encourage private racial discrimination. But the Court was careful to emphasize that the amendment stood on a very different footing from a "mere" failure to provide protection against private racial discrimination.[73] For purposes of the Constitution, *PruneYard* appeared an easy case, and the failure to provide protection against trespass was obviously state action; whereas *Reitman* was quite difficult, and the failure to provide protection against racial discrimination was obviously not state action. What accounts for this?

The answer lies in the fact that the search for state action can he made coherent only against a background normative theory of the legitimate or normal activities of government. Without such a theory, the search is unguided. It is only because of the persistence of *Lochner*-like theory that state action was uncontroversially at stake in *PruneYard* but difficult to find in *Reitman v. Mulkey*.[74] In *PruneYard*, there was a deviation from the common law baseline. In a case in which the state fails to provide protection against racial discrimination, or enforces the law of trespass, there is not. In state action doctrine, as in the *Lochner* period, the common law provides the benchmark from which to measure intervention.

D. *Affirmative Rights: Of Welfare and Others*

For the last two decades there has been considerable debate about the existence of affirmative rights against government.[75] The conventional wisdom,[76] referred to above, has it that the Constitution is a charter of negative guarantees—rights against government interference—and that "affirmative" rights are exceptional or nonexistent. Thus it is said that government may not intrude on private rights, but there is no claim against the government if it has failed to act. The basic position has resulted in rejection of claims to various public serv-

72. 387 U.S. 369 (1967).

73. Id. at 373–77.

74. The distinction may be defended, however, because of the difference between the first amendment and the equal protection clause; different provisions may repudiate or incorporate *Lochner*-like principles. See infra notes 190–203 and accompanying text.

75. See, e.g., Currie, supra note 67; Michelman, Welfare Rights in a Constitutional Democracy, 1979 Wash. U.L.Q. 659; Winter, Poverty, Economic Equality and the Equal Protection Clause, 1972 Sup. Ct. Rev. 41.

76. Currie, supra note 67; Winter, supra note 75.

ices, ranging from police protection to welfare. Perhaps the most well-known example is *Harris v. McRae*,[77] in which the plaintiffs challenged the government's failure to fund abortions needed by poor women. The Court held that government had no duty to remove barriers "not of its own creation."[78] The idea is that poverty is simply "there"; it is not a product of government action. By now it should be easy to see that this idea depends on *Lochner*-like definitions of neutrality, inaction, and appropriate baselines.

There is, however, a peculiarity in the notion that the Constitution does not guarantee "affirmative rights." We have seen that the takings clause protects against repeals, partial or total, of the trespass laws. When a state abrogates the law of trespass, it is removing what might be seen as "affirmative" protection; but its action does not become for that reason constitutionally acceptable. The protection of private contracts can be understood in similar terms. The contracts clause amounts to a right to state enforcement of contractual agreements; if the state fails to protect by refusing to enforce a contract, it is violating the clause.

Here and elsewhere, it is misleading to understand the Constitution solely as a guarantor of "negative" rights. The Constitution protects some rights and not others. Whether rights are treated as "negative" or "positive" turns out to depend on antecedent assumptions about baselines—the natural or desirable functions of government. State protection of private property and contract appears to be a "negative" guarantee because it is so usual, indeed built into the very concepts of property and contract.[79] Provision of welfare is treated differently because it is in some respects new and in any event hedged with limitations and reservations. Here *Lochner*'s premises, having to do with neutrality and inaction, account critically for current constitutional doctrine with respect to "affirmative" rights.

All this sheds some light on claims of a constitutional right to "affirmative" protection. Viewed through the lens of the *Lochner* period, claims for "positive rights" cannot be dismissed by reference to the "negative" character of constitutional guarantees or the word "deprive" in the fourteenth amendment. Whether there is a deprivation depends on antecedent conceptions of entitlement; if there were a preexisting right to welfare, the failure to provide it would in fact be a deprivation. In these circumstances one might argue that there have always been constitutional rights to certain kinds of positive guarantees, and that in the modern era the right to a minimal level of material goods, like the right to protection against trespass, has constitutional status. In mature form, this argument would be quite elaborate, and

77. 448 U.S. 297 (1980).

78. Id. at 316.

79. See Currie, supra note 67, at 864–67.

for present purposes it is unnecessary to say whether the argument might be made persuasive.[80] It should suffice to suggest that cases rejecting so-called "affirmative" rights depend on *Lochner*-like premises.

E. *Takings and Contractual Impairments*

The most conspicuously *Lochner*-like provisions in the Constitution are the contracts and takings clauses, especially in their incorporation of the status quo and of common law principles. The takings clause, protecting private property, provides the analytical foundations for *Lochner* itself. And it is hard to read the provision without accepting, at least to some degree, certain premises about neutrality, inaction, and common law baselines. The contracts clause protects a species of private property; it thus grows out of the same framework as *Lochner*. But in the last fifty years, the constraints of the contracts and takings clauses have been significantly curtailed, in part for the same reasons that led to the abandonment of *Lochner* itself. These developments suggest, among other things, that text and animating purposes have been far from central to decisions about whether to rely on *Lochner*-like principles.

The decline of the contracts clause has been a subject of increasing modern controversy. The clause provides that no state shall enact any law "impairing the obligations of contracts." For a long period the clause operated as a significant barrier to government action; the clause is now for the most part[81] a dead letter. How might this development be explained?

The answer lies in the dramatic expansion of the police power—in short, from an understanding based on *Lochner* to one rooted in *West Coast Hotel*. For a long period the contracts clause has permitted states to abrogate contracts so long as they are operating within the "police power." If a state bans the sale of heroin, and the ban applies retroactively to prevent enforcement of a contract, there is no constitutional problem.[82] The reserved powers of the state, it is said, operate as an implicit limitation on the power to contract. But if the police power is understood in *Lochner*-like terms, there is still enormous room for immunity from legislative interference—a claim demonstrated by the interpretation of the contracts clause for much of the nation's history.[83]

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80. See Black, Further Reflections on the Constitutional Right of Livelihood, 86 Colum. L. Rev. 1103 (1986); Michelman, Foreword: On Protecting the Poor Through the Fourteenth Amendment, 83 Harv. L. Rev. 7 (1969); S. Holmes, Liberal Guilt: Some Theoretical Origins of the Welfare State *in* Responsibility, Rights and Welfare (D. Moon ed. forthcoming 1987).

81. The qualification is necessary because of Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) (invalidating statute on contract clause grounds).

82. See Manigault v. Springs, 199 U.S. 473 (1905). The Court might, however, have decided that there was a requirement of compensation.

83. See G. Gunther, Constitutional Law: Cases and Materials 487–90 (11th ed. 1985).

In *Home Building Loan Association v. Blaisdell*,[84] however, the Court read the police power very broadly—thus replicating the outcome in *West Coast Hotel* and rendering the contracts clause functionally identical to the due process clause.

Similar developments occurred under the law of eminent domain. Here *Lochner*-like premises might be expected in two places: the interpretation of the "public use" requirement and of the police power exception to the compensation requirement. The public use requirement traditionally meant that the property had actually to be used by the public.[85] But gradually the requirement was expanded to refer to any plausible public justification, including those that are redistributive in character.[86] Thus it is said that the public use requirement has been rendered effectively unenforceable, much like the rationality requirement of the due process clause post-*Lochner*.

Moreover, the police power exception to the eminent domain clause immunizes various regulatory measures from constitutional attack, even if they diminish the value of property. An actual physical invasion of property is often a prerequisite for a finding of a "taking."[87] All this is a product of an abandonment of *Lochner*-like baselines. It would be difficult, however, to abandon those baselines altogether without reading the contracts and takings clauses out of the Constitution; in nature, those provisions are *Lochner*-like, though their scope is uncertain.[88] The narrowing of the scope of the contracts clause has almost converted it into a constitutional redundancy; the takings clause is still important in the context of physical invasions.

F. *Judicial Review of Agency Inaction*

One of the most important issues in modern administrative law is whether inaction by administrative agencies, defined as the failure to enforce regulatory statutes, should be subject to the same standards as administrative action, defined as regulatory enforcement. Under the traditional approach, agency action is subject to a strong presumption of reviewability.[89] Much of administrative law grows out of an under-

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84. 290 U.S. 398 (1934).

85. See Dunham, Griggs v. Alleghany County in Perspective: Thirty Years of Supreme Court Expropriation Law, 1962 Sup. Ct. Rev. 63, 66.

86. See, e.g., Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 239–48 (1984); Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 304 N.W.2d 455 (1981); Dunham, supra note 85, at 66–71; Note, The Public Use Limitation on Eminent Domain: An Advance Requiem, 58 Yale L.J. 599 (1949).

87. See, e.g., Penn Central Transp. Co. v. New York City, 438 U.S. 104, 130–31 (1978). An interesting example here is Pacific Gas & Elec. Co. v. Public Util. Comm'n, 106 S. Ct. 903 (1986), in which the Court dealt with the question of "ownership" of extra space in a billing envelope. The discussion of the plurality, id. at 912–13, assumed a prepolitical property right in the relevant utility.

88. See infra notes 193–95 and accompanying text.

89. See, e.g., Abbott Laboratories v. Gardner, 387 U.S. 136, 139–41 (1967).

standing that government may interfere with common law rights only if it has been authorized to do so by the legislature.[90] Judicial review is necessary to test the question of authorization.

Under this framework, there is little room for review at the behest of beneficiaries of statutes. In such suits, no common law right is at stake. This framework accounts for conventional limitations on the class of persons entitled to obtain "standing" to review agency action[91] and also for a longstanding presumption against reviewability of agency inaction.[92] In the last decade, there has been a substantial trend against this traditional understanding,[93] as beneficiaries of regulatory programs have been allowed to challenge unlawful agency inaction.

In its recent decision in *Heckler v. Chaney*,[94] however, the Supreme Court held that agency inaction should be presumed unreviewable. In so holding, the Court emphasized that "when an agency refuses to act it generally does not exercise its *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect."[95]

This understanding is a direct modern analogue to *Lochner*. In both cases, deviations from the common law status quo demand special justification. In *Heckler*, as in *Lochner*, it is government interference with the common law allocation that is subject to legal concern. Governmental "inaction" is treated as neutral and legally unobjectionable; indeed, it does not furnish a predicate for judicial intervention. In the context of administrative law, this phenomenon is especially striking. The rise of the modern administrative state was based largely on a rejection of common law ordering. For the proponents of the administrative agency, the common law system was hardly unchosen or neutral, but was instead highly partisan[96]—a perception shared, as we have seen, by the Court in *West Coast Hotel* and also in *Erie*. Regulatory intervention was based largely on a substantive rejection of the common law

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90. See J. Vining, Legal Identity (1978); Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1667, 1672–73 (1975).

91. See, e.g., Alabama Power Co. v. Ickes, 302 U.S. 464, 478 (1938).

92. See, e.g., Vaca v. Sipes, 386 U.S. 171, 181–83 (1967).

93. See, e.g., Dunlop v. Bachowski, 421 U.S. 560 (1975); Carpet, Linoleum & Resilient Tile Layers Local 419 v. Brown, 656 F.2d 564 (10th Cir. 1981); Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973); EDF v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971).

94. 470 U.S. 821 (1985).

95. Id. at 832. Other considerations, quite independent of *Lochner*, might be brought forth to support distinctions between review of agency action and review of agency inaction. In particular, review of inaction implicates concerns having to do with scarce prosecutorial resources, which make judicial review for arbitrariness harder to undertake. For a discussion of such considerations, see Sunstein, Reviewing Agency Inaction after *Heckler v. Chaney*, 52 U. Chi. L. Rev. 653 (1985).

96. See, e.g., J. Landis, The Administrative Process 31–39 (1938); see also Hale, supra note 51 (criticizing the view that government's proper role is limited to protecting private property rights).

system. Administrative law doctrines, rooted in traditional private law, thus continue to reflect *Lochner*-like premises despite the repudiation of those premises during the rise of the administrative state.

G. *Standing*

Similar considerations apply to the problem of standing. Originally, only those whose common law interests were at stake had standing to challenge administrative action. Thus the requirement of a "legal interest" meant, at its inception, that a litigant must be able to show that an interest protected by the common law was at stake.[97] This test was built on an analogy to private law. Those adversely affected by illegality could not always challenge it; it was necessary to show that the defendant violated some duty owed to plaintiff. Thus the issues of standing, of a cause of action, and of a persuasive claim on the merits were inextricably intertwined, in a system of public law that owed its origin and shape to common law understandings.

Eventually the Court recognized that an interest protected by statute could also form the predicate for standing.[98] Thus competitors and regnlatory beneficiaries might have standing to sue if they had an interest protected by statute. Finally, in *Association of Data Processing Service Organization v. Camp*,[99] the Supreme Court rejected the legal interest test altogether, requiring only an injury "in fact" and "arguably within the zone" of statutory protection in order to test administrative action.[100] The *Data Processing* decision has been celebrated as a rejection of private property as the predicate for judicial intervention in favor of an approach that calls on courts to ensure the identification and implementation of public values.[101]

In three ways, however, modern standing doctrine still contains principles from the common law. First, the requirement of an injury in fact is often justified on the ground that officious intermeddlers ought not to be permitted to disrupt mutually advantageous relationships.[102] This idea is a direct analogne to the common law view insofar as it understands public law cases in right-duty terms. Second, the notion of judicial restraint in the law of standing often has built into it a tacit distinction between the interests of regulatory beneficiaries and those of regulated industries. The former, it is said, are for the political process rather than the courts; the judicial role is said to be the protection of traditional private rights—a *Lochner*-like understanding.[103] This rea-

97. See Alabama Power Co. v. Ickes, 302 U.S. 464 (1938); Stewart, supra note 90, at 1723–24.

98. See Chicago Junction Case, 264 U.S. 258 (1924).

99. 397 U.S. 150 (1970).

100. Id. at 153–57.

101. See J. Vining, supra note 90, at 27–33, 38–41, 179–81.

102. See Stewart, supra note 90, at 1739.

103. See Allen v. Wright, 468 U.S. 737, 750–52 (1984).

soning is not a tribute to "judicial restraint" in the abstract, but distinguishes between two categories of interests in terms of the respective roles of politics and courts.[104] This distinction should be quite controversial; it is held over from the *Lochner* era and its premises were repudiated during the New Deal.

Finally, the Court has recently used various requirements of "nexus" as a basis for denying standing.[105] Thus the plaintiff must show that his injury is attributable to the defendant's conduct and that the injury is likely to be remedied by a decree in his favor. In such cases the categorization of the injury is critical; the Court has frequently refused to recognize probabilistic or systemic harms and instead has required a showing of the sort required by traditional private law.[106] Such cases express an understanding that the distinctive judicial role is to protect traditional sorts of legal harms. In these respects, standing doctrine, even in the era following *Data Processing*, continues to be based on *Lochner*-like conceptions of the role of the courts.[107]

H. *Racial Discrimination*

The law of racial discrimination is centrally affected by *Lochner*-like premises, but here the similarity to *Lochner* lies, not in the use of the common law, but in notions of action and inaction and in the importation of the status quo and the existing distribution of wealth and entitlements.

In particular, three areas of modern discrimination law reflect a debate between conceptions that can be traced to *Lochner* and *West Coast Hotel* respectively. The same debate can be found in an earlier generation, during the discussion of the decision in *Brown v. Board of Education*,[108] and indeed in the most famous use of the term "neutrality" in constitutional scholarship. In *Toward Neutral Principles of Constitutional Law*,[109] Professor Herbert Wechsler criticized the opinion in *Brown* on the ground that the Court had not supplied a "neutral" justification for the result. In Wechsler's view, the decision provided a conflict between two sorts of associational preferences: the desire of blacks to attend

104. This approach is especially questionable when the legal claim is statutory rather than constitutional; in such cases, statutory beneficiaries have already won in the political process. See *Wright*, 468 U.S. at 737.

105. See id.; Eastern Kentucky Welfare Rights Org. v. Simon, 426 U.S. 26 (1976); Warth v. Seldin, 422 U.S. 490 (1975).

106. See *Wright*, 468 U.S. at 737; *Simon*, 426 U.S. at 26; *Warth*, 422 U.S. at 490.

107. There is an irony here. Case-or-controversy limitations were originally based largely on concerns, associated with Justice Frankfurter, that "progressive" programs should not readily be subject to judicial challenge; the limitations were thus rooted in anti-*Lochner* efforts to immunize from judicial challenge revisions in the common law. In recent years, such limitations have been used so as to prevent those challenging government action to do so if a common law interest is not at stake.

108. 347 U.S. 483 (1954).

109. 73 Harv. L. Rev. 1 (1959).

school with whites, and the desire of whites to attend school without blacks. So far as Wechsler was concerned, no neutral principle had been brought forward to permit a choice between these two sets of preferences.[110] The decision depended on "whose ox was gored," and was thus not shown to be neutral.[111]

This criticism has a powerful *Lochner*-like dimension. The existing distribution of power and resources as between blacks and whites should be taken by courts as simply "there"; neutrality lies in inaction; it is threatened when the Court "takes sides" by preferring those disadvantaged. Like the minimum wage legislation in *Lochner*, and for similar reasons, the attack on school segregation appeared impermissibly partisan to some of *Brown*'s critics.

In both cases, moreover, the appropriate response derives from *West Coast Hotel*: the existing distribution is not natural and does not provide a neutral baseline; it resulted in part from government decisions; efforts to improve the lot of the disadvantaged fall comfortably within the police power, should not be treated as impermissibly partisan, and may even be constitutionally compelled, especially where there is racial discrimination on the face of a statute. Indeed, the notion that the associational preferences of whites and blacks shold be treated the same seems to have an otherworldly quality. To some degree, of course, Wechsler's objection was institutional. He was requiring of courts a justification of the sort that the *Lochner* Court required of legislatures. The category of neutral principles, as he understood it, was analogous to the police power as understood by the *Lochner* Court. Both forbade consideration of the plight of the disadvantaged as a sufficiently neutral or general reason for action. But the institutional differences should not deflect attention from the same basic normative foundation. In both cases, "taking sides" in favor of the disadvantaged seemed impermissibly partisan.[112]

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110. Id. at 31–34. Consider the parallel to contemporary debates over affirmative action, where favoring blacks over whites is also said to be neutral. See generally Strauss, The Myth of Colorblindness, 1986 Sup. Ct. Rev. 99, for an argument that affirmative action is not in principle different from nondiscrimination.

111. Thus understood, Wechsler's view imposed sharp constraints on judges. A more modest formulation of the requirement of neutral principles is set out in Greenawalt, The Enduring Significance of Neutral Principles, 78 Colum. L. Rev. 982 (1978), where the requirement is understood to be a largely procedural injunction that judges conduct a kind of internal Socratic dialogue. Wechsler's view appeared to impose a substantive constraint, forbidding consideration of "whose ox is gored," in a way that borrows from *Lochner* era conceptions of neutrality. Id. at 1001–13. The relationship between the procedural and substantive versions of the requirement of neutral principles precisely parallels the relationship between the modern requirement of rationality review and the understanding of the *Lochner* Court. In both Wechsler's view and that of the *Lochner* Court, impermissible ends are ruled out.

112. Here, of course, the problem does not stem from use of common law baselines.

Similar considerations can be found, in somewhat different form, in several areas of modern discrimination law.

1. *Affirmative Action.* — It is now clear that "affirmative action"—discrimination in favor of traditionally disadvantaged groups—will be treated more leniently than discrimination against members of such groups.[113] But the validity of a particular affirmative action scheme will depend on a variety of factors: the nature of the institution that made the decision; the flexible or inflexible character of the scheme; the nature of the harm to members of the majority; and, perhaps most important, the existence of "findings" to the effect that the institution engaging in affirmative action has discriminated in the past.[114] The final factor has been the most sharply disputed among the justices. The dispute centers on when, if ever, past societal discrimination is a sufficient predicate for an affirmative action scheme, or whether affirmative action must be justified by a more particularized showing of discriminatory conduct on the part of the institution in question. Current indications are that societal discrimination is insufficient.[115]

The constitutional attack on affirmative action depends on a perception that the natural course is to rely on market measures. The Constitution, in this view, requires government to allocate employment and other opportunities according to criteria that have nothing to do with race. To distinguish discrimination against blacks from discrimination against whites is not neutral; it makes the issue depend on "whose ox is gored." Government intervention to redress social discrimination, or some other harm, is partisan. Indeed, the suggestion in *Adkins*—that individuals should not be singled out for burdens that ought to be placed on the public as a whole—is very close to the understanding that underlies contemporary attacks on affirmative action. But if the current position of blacks is thought not simply to be "there," but instead to be a product of past and present social choices, the argument for affirmative action becomes much more powerful.[116] No requirement of "neutrality" would be understood as mandating measures that are (or seem) indifferent to race. The constitutional arguments for and against affirmative action thus track the arguments for and against minimum wage legislation.

Indeed, the very term "affirmative action"—ironically, embraced by defenders of the practice—is based on *Lochner*-like premises. The term suggests that indifference to race (understood here as "inaction") is the natural course, that discriminatory effects deriving from color-

113. Johnson v. Transportation Agency of Santa Clara County, 107 S. Ct. 1442 (1987); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986); Fullilove v. Klutznick, 448 U.S. 448 (1980); Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265 (1978).

114. See cases cited supra note 113.

115. See Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).

116. Cf. Strauss, supra note 110, at 100–08 (suggesting that the antidiscrimination principle and affirmative action are compatible rather than conflicting).

blind rules are simply "there," and that something that counters those effects should be labelled "affirmative." The terms "affirmative" and "action" both rely on *Lochner*-like conceptions of appropriate baseline; both understand respect for the status quo and the existing distribution of power and resources as the point of departure for constitutional analysis. Moreover, racial discrimination is objectionable because of its purposes and effects; discrimination against blacks is usually accompanied by racial hostility on the part of the discriminators, and its effect is to perpetuate the social subordination of blacks. Critics of "affirmative action" take advantage of the rhetorical power of the notion of racial discrimination in a context in which the reasons for that rhetorical power—the purposes and effects of discrimination—are not at work and indeed argue in the other direction. Thus it is that *Lochner*-like premises infect the affirmative action controversy.

2. *Discriminatory Effects.* — The Supreme Court has now made it clear that a showing of discriminatory intent is necessary in order to make out a violation of the equal protection clause.[117] Discriminatory effects are in themselves insufficient. Thus, for example, if a facially neutral test for police officers happens to exclude a disproportionate number of blacks, there is no equal protection problem even if the test has little relation to capacity to perform the job.

The Court has required proof of discriminatory purpose in part because of a concern that if discriminatory effects were enough, numerous government decisions would be called into constitutional doubt.[118] Wealth and opportunities correlate with race; a disproportionate number of blacks are poor, uneducated, unable to perform well on standard examinations, the perpetrators (and victims) of crimes, and so forth. Building on private law models of culpability, the Court has thus concluded that the Constitution is violated only when there is an intent to discriminate, not when discriminatory outcomes are produced by government actions that do not take race into account.

This understanding also depends on a *Lochner*-like premise that discriminatory effects are simply "there," so that the course of neutrality lies in indifference to race (what appears and is treated as inaction).[119] But if discriminatory effects were seen as partly the product of past discrimination by the state, it would be hard to treat them as natural and unobjectionable. If disproportionate harms to blacks result from a legacy of discrimination, a set of legal doctrines that treated

117. See Washington v. Davis, 426 U.S. 229 (1976).

118. The point is made explicitly in *Washington v. Davis*. See id. at 239–41.

119. The intent test, as set out in such cases as Personnel Adm'r v. Feeney, 442 U.S. 256 (1979), also disregards the phenomenon of selective racial care and indifference. Under *Feeney* the question is whether the government actor made the decision "because of" not merely "in spite of" its racially discriminatory effects. Id. at 279. But the equality question should be whether the actor would have made the decision *regardless of which group was helped and which hurt*. Such an inquiry would also turn on intent, but it would call into question a larger number of government decisions.

such harms as constitutionally troublesome would hardly seem odd. Doctrine based on compensatory goals would be a permissible and perhaps mandatory course.

3. *De jure/de facto.* — For a long period it was unclear whether de facto segregation was a cause for constitutional concern.[120] De facto segregation, largely in the North, is said to arise from the voluntary choices of blacks and whites; de jure segregation is the product of law. But here, as in the case of affirmative action, the terminology itself rests on *Lochner*-like premises. The notion of de facto segregation suggests that segregation simply happened; it is "just there." But if the existence of patterns of segregation were seen as an outgrowth of the legacy of racial discrimination, an attack on "de facto" segregation might have been more plausible. There may be good reasons to immunize some kinds of segregation from legal control, but the doctrinal distinction depends partly on understandings of neutrality and inaction that are close cousins of *Lochner*.

I. *Gender Discrimination*

In the last two decades, the Court has given "heightened scrutiny" to discrimination against women, invalidating a wide range of statutes. Sometimes the Court invalidates statutes because they are based on inaccurate stereotypes.[121] But the difficult cases arise when the Court faces measures reflecting differences that are in some sense real. Consider, for example, *Califano v. Goldfarb*,[122] involving a statute allowing spouses of men automatically to qualify for social security benefits, but requiring spouses of women to establish dependency; *Craig v. Boren*,[123] invalidating a law prohibiting boys from drinking alcoholic beverages until age twenty-one, but allowing girls to drink at age eighteen; *Mississippi University for Women v. Hogan*,[124] involving a nursing school limited to women; and *Rostker v. Goldberg*,[125] upholding a law requiring men but not women to register for the military draft. In all of these cases, the statute under attack responded, albeit sometimes crudely, to differences between men and women that were in some sense real. On what basis did the Court invalidate the first three measures?

A clue can be found in *Craig v. Boren*, where the Court, responding to statistics showing that boys tended to be cited for drunk driving more often than girls, said that statistical demonstrations are "in tension with the normative philosophy that underlies the Equal Protection

120. See G. Stone, L. Seidman, C. Sunstein & M. Tushnet, Constitutional Law 558–59, 567–75 (1986).

121. See Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982); Reed v. Reed, 404 U.S. 71 (1971).

122. 430 U.S. 199 (1977).

123. 429 U.S. 190 (1976).

124. 458 U.S. 718 (1982).

125. 453 U.S. 57 (1981).

Clause."[126] In all of these cases, the differences, even if "real," are not simply there, but are at least to some degree[127] artifactual: a product of cultural forces, including the legal system, that have created and perpetuated differences between the sexes. Thus in *Goldfarb*, the fact that men tend to be wage-earners more often than women was not treated as exogenous to the legal system. Indeed, the fact was reinforced as such, even if in a minimal way, by the very statute in *Goldfarb*, which made the package of benefits more attractive for men than for women and tended to make it more desirable for men to work. Thus in the *Hogan* case, the Court said that the statute at issue "makes the assumption that nursing is a field for women a self-fulfilling prophecy."[128]

Rostker is a striking contrast. There the Court reasoned that since Congress had excluded women from combat, the difference in registration requirements responded to "real differences" between men and women. But those real differences were a product of law; it was a statute that created them. *Rostker* is in this sense reminiscent of a wide range of earlier cases failing to recognize the constructed character of gender distinctions and upholding discrimination because of a perception that subordination of women was a part of nature.[129]

With the exception of *Rostker*, the cases under discussion derive from a partial rejection of *Lochner*-like principles that would take gender differences as exogenous variables, and would understand neutrality to lie in reasonable responses to those differences.[130] To this extent, the

126. 429 U.S. at 204.

127. Two qualifications are necessary here. First, it is not necessary to ask to what degree gender differences have a biological component. Even if there is such a component, it hardly justifies the measures at issue in most cases; it is by no means clear that the legal system should turn biological differences into social disadvantages. The point here is that *Lochner*-like reasoning would take gender differences as a proper basis for legal differentiation, no matter their source, and that some of the current law of gender discrimination is opposed to such reasoning. Cf. C. MacKinnon, Feminism Unmodified (1987) (discussing ways in which legal system naturalizes discrimination against women).

The second problem lies in deciding when something is artifactual or not. A strong view of the lesson of the *Lochner* period is that everything is—precisely because government decisions not to change matters are, after all, decisions. In this view, qualifications of the sort in the text—suggesting that gender differences, poverty, and the distribution of benefits and burdens along racial lines are "partly" a product of the legal system—are unnecessary and misleading. Such qualifications themselves import *Lochner*-like premises.

128. 458 U.S. at 730. Compare the suggestion in J. Ely, supra note 6, at 153, that prejudice is "the lens that distorts reality," an understanding that depends on the premise that there is a prepolitical reality that law should reflect. See C. MacKinnon, Feminism Unmodified 40–42 (1987).

129. See, e.g., Bradwell v. Illinois, 83 U.S. 130 (1872) (Bradley, J., concurring). Note, however, that in *Rostker* the plaintiffs had conceded the legality of the combat restriction, so the Court's conclusion was perhaps defensible in context.

130. Cf. Strauss, supra note 110, at 108–13 (exploring how rational responses to racial differences might justify racist classifications). See also the discussion of rape in Estrich, Rape, 95 Yale L.J. 1087 (1986); MacKinnon, Feminism, Marxism, Method & the State: Toward Feminist Jurisprudence, 8 Signs 635 (1983).

law of gender discrimination is an outgrowth of ideas that abandon the status quo as a neutral baseline and instead rely on a baseline of gender equality operating to some extent as a criticism of the existing order. But many areas of the law of gender discrimination share *Lochner*-like premises. Consider, in addition to the *Rostker* decision, cases finding discriminatory effects insufficient for constitutional invalidation;[131] decisions permitting employers to exclude fertile women from employment when actual or potential fetuses may be endangered;[132] and *Michael M. v. Sonoma County Superior Court*,[133] upholding distinctions in age for statutory rape. Above all, cases involving discrimination on the basis of actual or potential pregnancy, or control of reproductive functions, are *Lochner*-like to the extent that they turn differences that are often regarded as natural into legal disadvantages.[134] In this sense, *Roe v. Wade* itself might be seen as profoundly anti-*Lochner* insofar as it accorded to women the power to make a decision that it had been previously thought was not theirs because of nature.[135]

To say that such cases treat gender differences as real, when the social and legal meaning of those differences is a decision of the legal system, is not necessarily to say that they were wrongly decided.[136] But it is to suggest that they depend on *Lochner*-like premises about neutrality.

J. *Preferences and the Law*

Both public and private law generally take private preferences as the appropriate basis for social choice. In private law, paternalism tends to be disfavored,[137] and the most well-known conceptions of public law understand the purpose of legislation to be the aggregation

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131. See Personnel Adm'r v. Feeney, 442 U.S. 256 (1979).

132. See generally Becker, From *Muller v. Oregon* to Fetal Vulnerability Policies, 53 U. Chi. L. Rev. 1219 (1986).

133. 450 U.S. 464 (1981). Although the reasoning in *Michael M* depended on *Lochner*-like premises, the outcome might be defended on quite different grounds. See Olsen, Statutory Rape: A Feminist Critique of Rights Analysis, 63 Tex. L. Rev. 387 (1984).

134. C. MacKinnon, Sexual Harassment of Working Women 119–27 (1979).

135. See Tribe, The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence, 99 Harv. L. Rev. 330 (1985). But the general effort in the law of gender discrimination to examine whether differences are "real," or to understand gender discrimination in terms of irrational distinctions reflects *Lochner*-like reasoning.

136. Even if the differences are in some sense a product of biology, it is hardly clear that the legal system should recognize them; it is the legal system that makes such differences count, and legal ratification may itself be a form of discrimination. See C. MacKinnon, supra note 134, at 116–27 (discussing how differences are turned into disadvantages); L. Tribe, Constitutional Choices 238–45 (1985).

137. The most extreme views come from some law and economics and rights-based theorists. See R. Epstein, supra note 5 (presenting Lockean theory of "takings" clause); R. Posner, Economic Analysis of Law (3d ed. 1986).

of private preferences.[138] To this degree, preferences are treated in *Lochner*-like fashion as exogenous variables; and legal interferences with those preferences are generally thought to be partisan and illegitimate. The processes of preference formation and the possibility of distorting factors are generally not a subject for legal inquiry.[139]

Sometimes, however, constitutional courts conclude that preferences are a product of some kind of distortion. Consider, for example, the constitutional hostility to freedom-of-choice plans as a remedy for school segregation.[140] At first glance it is hard to see why such plans should be objectionable, for they allow blacks and whites to send their children to whatever schools they prefer. If the result is continuing segregation, the problem might be thought to lie in private choices rather than in the legal system.

The Court's hostility to such plans depends at least in part on a conclusion that the preferences of whites and blacks are distorted by the history of discrimination.[141] Blacks may prefer not to send their children to predominantly white schools because of a fear of racial hostility and antagonism. Whites may be reluctant to send their children to black schools because of racial prejudice brought about at least in part through law. In these circumstances, the preferences are not simply "there" and to be taken as natural; they are a result of legal structures, and remedial measures must take that into account.

A similar issue is raised by *Palmore v. Sidoti*,[142] in which the Court invalidated a child custody plan giving preferences to parents of the same race as the child. The Court said that the state may not sanction racial prejudice through law, but it is unclear why the Constitution should forbid government from taking into account the reality of private racism. Here too the answer depends on a perception that racism is not simply exogenous; it is a product of public and private choices and is properly subject to legal remedy. The same considerations apply in the area of gender. What emerges is therefore a system that generally treats preferences as exogenous and a proper basis for social

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138. See Bork, supra note 7, at 2–3; R. Dahl, A Preface to Democratic Theory (1956); R. Posner, supra note 137.

139. See Sunstein, Legal Interference with Private Preferences, 53 U. Chi. L. Rev. 1129 (1986).

But note here that in the *Lochner* era, regulation of "morals" was frequently permitted even outside of the context of harm to others. In this sense, the *Lochner* Court did not take all preferences for granted. But see Epstein, Conference Proceedings, 417 U. Miami L. Rev. 49, 74 (1987) (suggesting that basis of the regulation of morals actually was harm to others).

140. Green v. County School Bd., 391 U.S. 430 (1968). See Gewirtz, Choice in the Transition: School Desegregation and the Corrective Ideal, 86 Colum. L. Rev. 728 (1986).

141. See Gewirtz, supra note 140, at 745–48. There is also a collective action problem here. Individual black families may rationally decide not to send their children to white schools, even though it would be in their interest if all black families did so.

142. 466 U.S. 429 (1984).

choice, but that in certain limited contexts[143] concludes that preferences reflect relations of power brought about by, among other things, the legal system itself.

III. ABANDONING *LOCHNER*

We have seen that *Lochner* has many progeny in modern constitutional law.[144] Sometimes, as in *Buckley* and *Wygant*, *Lochner*-like premises are used as a basis for invalidating government measures. Sometimes, as in *Harris v. McRae* and *Washington v. Davis*, premises of that sort are used in order to uphold such measures. Nor is the problem limited to constitutional provisions protecting individual rights. The structural provisions of the Constitution were designed partly to protect private property and liberty from government incursion.[145] The rise of the modern administrative state is based largely on a perception that aggressive governmental action, repudiating the common law, has become necessary.[146] One of the most important tasks of modern constitutional theory is to implement the original purposes of the structural provisions in a time when traditional conceptions of limited government have been repudiated.[147]

The claim that there is in many areas of current public law an analytic connection to *Lochner* is only descriptive, and it does not necessar-

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143. The limitation derives from a fear that if the legal system is generally permitted to intervene whenever preferences are "distorted," lines will become difficult or impossible to draw and the range of permissible interventions will be limitless. See Sunstein, supra note 139, at 1169–73, for general discussion; on the related problem of "false consciousness," see also J. Elster, Making Sense of Marx (1984).

144. The issue arises in private law as well. One might, for example, understand the Coase theorem as above all a rejection of *Lochner*-like approaches to such concepts as causation, action, and inaction. Cf. B. Ackerman, Reconstructing American Law 46–71 (1984) (discussing effect of Coase theorem on the way lawyers structure the facts). Much private law theory in the past two decades has attempted to come to terms with the destabilizing effect of the Coase theorem—just as public law theory has had to face the confusions produced by abandonment of common law baselines.

145. See H. Pitkin, The Concept of Representation (1967); J. Nedelsky, Private Property and the American Conception of Representative Government (1984) (unpublished manuscript).

146. See Sunstein, Constitutionalism After the New Deal, 101 Harv. L. Rev. (forthcoming 1987); J. Landis, supra note 96 (rejecting traditional conceptions of separation of powers).

147. See Sunstein, supra note 146; B. Ackerman & W. Hassler, Clean Coal/Dirty Air (1981); Strauss, The Place of Agencies in Government: The Separation of Powers and the Fourth Branch, 84 Colum. L. Rev. 573 (1984).

Statutory interpretation is affected by *Lochner*-like premises as well—most familiarly in the notion that "statutes in derogation of the common law should be narrowly construed," but in more modern approaches as well. See, e.g., Easterbrook, Statutes' Domains, 50 U. Chi. L. Rev. 533 (1983), which amounts to an argument that when there are statutory "gaps," courts should resolve all doubts in favor of market ordering. See also Macey, Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model, 86 Colum. L. Rev. 223 (1986) (defining factional tyranny in part by reference to departures from the common law). An important task is to develop

ily argue for doctrinal change. Indeed, it would be difficult to imagine a constitutional system that did not have some premises in common with *Lochner*. The framers themselves shared those premises, and versions can be found at every stage of American constitutionalism. But the argument for *Lochner*-like premises is conceptual as well as historical. It is hard to escape *Lochner* in thinking about this or any other legal system; its premises are built into our language itself.[148] Without some foundations or baselines from which to make measurements, legal analysis cannot go forward, and in some cases it is hard to dispute that understandings like those reflected in the common law or the status quo are the appropriate baseline. The point is buttressed by the fact that in any legal system, one should hope for some degree of continuity over time. The current system owes its foundations to the common law. It would be most surprising, and probably undesirable, to find those foundations entirely abandoned.[149]

But *Lochner* was wrongly decided, and one of the reasons that it was wrong is that it depended on baselines and consequent understandings of action and neutrality that were inappropriate for constitutional analysis. The New Deal to a large degree rejected those understandings, and the rejection has only partly found its way into law. Which, if any, of current doctrines should be abandoned for the same reason? How should constitutional law proceed if it is to escape its roots in *Lochner*-like reasoning? It is difficult to answer these questions in the abstract; whether and how *Lochner*-like premises should be rejected is too large a question to discuss as a whole. This section ventures some thoughts on the relevant inquiries.

A. *Naturalness and the Problem of Baseline*

The *Lochner* Court chose the status quo, as reflected in market ordering under the common law system, as the baseline for measurement of departures from neutrality and of action and inaction. There are

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approaches to statutory construction that are not based on hostility to departures from common law categories.

The same view is reflected in approaches to administrative law that distinguish between the rights of statutory beneficiaries and those of regulated class members. See Scalia, Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court, 1978 Sup. Ct. Rev. 345 (suggesting that ordinary concerns supporting procedural safeguards do not apply when statutory beneficiaries are the complainants); Smith, Judicialization: The Twilight of Administrative Law, 1985 Duke L.J. 427 (suggesting that the principal concern of administrative law is the protection of private property).

See also Stewart & Sunstein, supra note 56; Note, Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court, 95 Harv. L. Rev. 892 (1982), for related discussions of the use of supplemental principles in statutory construction.

148. See G. Lakoff, Women, Fire, and Dangerous Things: What Categories Reveal About the Mind (1987).

149. Cf. Kronman, Alexander Bickel's Philosophy of Prudence, 94 Yale L.J. 1567, 1599–1605 (1985) (suggesting a Burkean understanding of the legal system).

often good reasons to abandon that baseline, at least as a general rule.[150] The common law is not prepolitical; its conception of the function of the state has been repudiated by the political branches of government, and for good reasons. Constitutional and statutory interpretation is properly informed by this repudiation.[151] Efforts to change the common law framework are not by virtue of the fact constitutionally suspect, and measures that respect that framework are not "inaction" necessarily to be immunized from legal scrutiny. Use of the status quo as a baseline is sometimes objectionable for similar reasons. Consider the fact that discrimination on the basis of race is responsible for the existing distribution of benefits and burdens along racial lines.

If the baseline provided by the common law or the status quo is abandoned, there are two principal alternatives. One possible response to the decline of *Lochner* would be to conclude that constitutional courts ought to play little or no role in deciding whether the existing distribution of wealth and entitlements should be changed. Associated with one strand in the New Deal but presaged by Holmes' *Lochner* opinion, this view appears prominently in Learned Hand's lectures on the Bill of Rights,[152] James Landis' work on administrative law,[153] and the opinions of Justice Frankfurter.[154]

Under the Holmesian view it does not matter, for constitutional purposes, whether the state is reaffirming or rejecting the common law, or whether it is dramatically changing the existing allocation of entitlements and power. The abandonment of common law baselines requires an abandonment of baselines altogether, at least for purposes of constitutional law. Neutrality is not required because it cannot be achieved; all legal categories are socially constructed and irreducibly subjective.[155] Such an approach would mean that the basic terms of social life are for political rather than legal determination.[156]

Sometimes this view is founded on interest-group pluralism;[157] sometimes it is derived from skepticism about the notion of objectiv-

150. See the discussion of baselines in Kreimer, Allocational Sanctions: The Problem of Negative Rights in a Positive State, 132 U. Pa. L. Rev. 1293 (1984).

151. I collapse a complex argument here. Cf. B. Ackerman, supra note 144 (interpreting the New Deal as a structural amendment of the Constitution). One need not accept Ackerman's view in order to recognize that the developments in the New Deal bear on the interpretation of ambignous constitutional provisions.

152. See L. Hand, The Bill of Rights (1958).

153. See J. Landis, supra note 96.

154. See, e.g., West Virginia State Board of Educ. v. Barnette, 319 U.S. 624, 646 (1943) (Frankfurter, J., dissenting).

155. Cf. Peller, The Metaphysics of American Law, 73 Calif. L. Rev. 1151 (discussing the constrncted character of legal categories).

156. The tradition discussed here did not apply its usual skepticism to its own principles about the primacy of democratic politics; if it had, this conclusion would have been harder to reach.

157. See supra note 31.

ity[158] and about distinctions between reason and power.[159] For those who believe in interest-group pluralism, efforts to ensure neutrality, in the form of public-regarding legislation, ignore the inevitably self-interested character of political behavior. Neutrality, however understood, is thus inconsistent with the very nature of politics.[160] The conclusion is that baselines should be rejected for purposes of constitutional law; courts should uphold legislation except in the most extreme cases. For those skeptical about objectivity, neutrality is an unacceptable effort to privilege a position that is itself contingent and likely to reflect some kind of social interest.[161] At its most general level, this concern is reflected in a wide range of work questioning the legacy of the Enlightenment.[162] This position offers obscure guidance for constitutional courts; it counsels a general rejection both of neutrality and of baselines, but at least in some forms, it offers no alternative position from which to decide cases.

Approaches that follow Holmes and abandon baselines for the purposes of constitutional law, like the approach in *Lochner*, have the advantage of easy administration; they are reflected in some of current law under the contracts, due process, and takings clauses; and they can claim as well a proper appreciation of democratic values.[163] The Holmesian abandonment of baselines is of course reflected in traditional understandings of the lesson of the *Lochner* period. The decision

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158. See T. Nagel, The View from Nowhere (1986); R. Bernstein, Beyond Objectivism and Relativism (1983).

159. Compare M. Foucault, Power/Knowledge: Selected Interviews and Other Writings, 1972–77 (C. Gordon ed. 1981) (suggesting that knowledge depends on particular constellations of interest) with J. Habermas, Knowledge and Human Interests (1971) (suggesting possibility of escaping power through communication). For recent discussion, see Nagel, supra note 158.

160. Compare Linde, Due Process of Lawmaking, 55 Neb. L. Rev. 197 (1976) (setting forth this conception of legislation) with R. Dworkin, supra note 51 (arguing in favor of efforts to create "integrity" in law). On this approach to the interpretation of statutes, compare Easterbrook, supra note 147, at 539–44, with Posner, Legal Formalism, Legal Realism, and the Interpetation of Statutes and the Constitution, 37 Case W. Res. L. Rev. 179 (1987).

161. See M. Foucault, supra note 159. Cf. Minow, Foreword: Justice Engendered, 101 Harv. L. Rev. (forthcoming 1987) (challenging neutrality). But see J. Habermas, Autonomy and Solidarity (1986) (challenging tendency to relativism and irrationalism in Foucault).

162. See J. Derrida, Of Grammatology (G. Spivak trans. 1976); M. Foucault, supra note 159; J. Kristeva, Desire in Language (1980); G. Lakoff, supra note 148; R. Rorty, Consequences of Pragmatism (1982). Despite the enormous differences among them, all are united in their skepticism about Enlightenment reason. J. Habermas, supra note 161, contains a brief summary at one of the most well-known responses; see also J. Habermas, Reason and the Rationalization of Society (1984).

163. See, e.g., J. Ely, supra note 6, at 105–34; R. Posner, supra note 137, at 581–87; Bork, supra note 7, at 18–19; Easterbrook, Legal Interpretation and the Power of the Judiciary, 7 Harv. J.L. & Pub. Pol'y 87 (1984); Monaghan, supra note 7, 395–96.

whether to accept those understandings is inescapably normative, and the traditional view might be defended on the foregoing grounds.

In so extreme a form, however, this position is unacceptable precisely because it is based on odd understandings of republicanism[164] and of the workings of majoritarianism.[165] The Holmesian position would result in a failure to enforce many constitutional provisions that invite judicial use of baselines, sometimes deriving from the common law, and that are self-conscious limits on the ability of government to restructure or to fail to restructure the existing order. Consider the first amendment, the takings clause, the equal protection clause, and the contracts clause, all of which impose limits on governmental power. Moreover, neutrality—understood not as preservation of market ordering or as disregard of past discrimination but as a requirement of a public-regarding justification for legislation—continues to be required, and for good reasons.[166] The Holmesian position, reflected in some traditional thinking about *Lochner*, would amount to an abandonment of constitutionalism altogether. Its crude and conclusory references to the primacy of electoral politics are insufficient to support that abandonment.[167]

A third approach would avoid the difficulties associated with both *Lochner* and the Holmesian alternative, but it would carry with it large

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164. Consider, for example, the interpretation of Madison in Bork, supra note 7, at 2–3, suggesting that in a Madisonian system majorities are allowed to rule in some areas of life "for no better reason than that they are majorities." Compare the interpretation in D. Epstein, The Political Theory of The Federalist 178 (1984) (suggesting that the system was intended to ensure a large measure of deliberation on the part of national representatives).

165. Some of the problems here include the difficulties, stressed in public choice theory, in aggregating private preferences through majority rule. See, e.g., W. Riker, Liberalism vs. Populism: A Confrontation Between the Theory of Democracy and the Theory of Social Choice (1982). Moreover, for various reasons some preferences should not be counted, see Goodin, Laundering Preferences, *in* Foundations of Social Choice Theory (J. Elster & A. Hylland eds. 1986). Consider also the slippage between constituent pressures and legislative outcomes, and the various obstacles, captured in the collective action problem, to accurate preference-aggregation through majoritarianism, see R. Hardin, Collective Action (1982). On these various questions, see generally Sunstein, Constitutions and Democracies: An Epilogue, *in* Constitutionalism and Democracy (J. Elster & R. Slagstaad eds. forthcoming 1988).

166. That requirement has a disciplining effect, albeit a weak one, on the sorts of measures that can be proposed and enacted, and also tends to transform the nature of political discourse in desirable ways. See Goodin, Laundering Preferences, *in* Foundations of Social Choice Theory (J. Elster & A. Hylland eds. 1986); Sunstein, Interest Groups in American Public Law, 38 Stan. L. Rev. 29 (1985); Sunstein, Naked Preferences and the Constitution, 84 Colum. L. Rev. 1689 (1984). In the area of judicial decision, the requirement of neutrality—in the form of an effort to justify differential treatment—remains important, see R. Dworkin, supra note 51 at 176–224; Greenawalt, supra note 111, at 989, 992. That requirement is the judicial analogue of the requirement of public-regardingness imposed on legislators, and in neither context should it be confused by importation of *Lochner*-like premises.

167. See supra notes 164–65 (suggesting that majoritarianism, understood in plu-

problems of its own. That approach would attempt to generate a baseline independent of either the common law or the status quo through some theory of justice, to be derived from the language and animating purposes of the text and based to a greater or lesser degree on existing interpretations. Such an endeavor would require a theory of interpretation, a theory of institutional role, and a theory of justice. The effort would be the legal analogue to the various efforts in modern political theory to go beyond or replace classically liberal social contract theories.[168] The text would be the foundation for a theory[169] that would be independent of common law ordering, or the status quo, and would serve as a basis for evaluating it. Approaches of this sort might treat the Constitution as a unit, reflecting a single overarching theory. For reasons explored below, it would be preferable to proceed provision-by-provision,[170] constructing theories for each constitutional clause and allowing considerable variation among them. Helpful guidance can be found in republican theories of politics, which carry with them substantive constraints[171] and whose premises are highly congenial to

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ralist fashion, does not capture the view of the framers and is not likely to provide desirable outcomes).

A closely related approach would attempt to cabin judicial discretion by referring to the intent of the framers, the text of the Constitution, or some other limitation on judicial discretion. Such an approach would reflect a belief that because of the problems posed by democratic theory for an aggressive judicial role, constitutional courts ought not to rely on principles of distributive justice at all. See Monaghan, supra note 7, at 374; Easterbrook, supra note 163, at 91, 97.

That view cannot be dealt with in detail here; it has been amply discussed elsewhere. Partial responses are set out in Brest, The Misconceived Quest for the Original Understanding, 60 B.U.L. Rev. 204 (1986); Dworkin, The Forum of Principle, 56 N.Y.U. L. Rev. 469 (1981); Sunstein, Interest Groups in American Public Life, 38 Stan. L. Rev. 29 (1985); Tushnet, Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles, 96 Harv. L. Rev. 781 (1983). Such responses point out the difficulties of "applying" the framers' judgments in changed circumstances; the difficulties of deciding at what level of generality "intent" should be read; the problem of ascertaining the framers' intentions with respect to interpretation; the various difficulties faced by majoritarianism in aggregating private preferences; and the fact that it is by no means self-evident that a well-functioning democracy merely reflects constituent preferences. A final position on such matters is of course necessary in order to decide whether the Holmesian understanding of the *Lochner* period should be accepted in favor of the approach set out here.

168. See, e.g., B. Ackerman, Social Justice in the Liberal State (1980); R. Dworkin, supra note 7; J. Habermas, The Theory of Communicative Action (T. McCarthy trans. 1984); J. Rawls, A Theory of Justice (1971). For present purposes it is unnecessary to say whether and how such an approach would build on novel understandings of neutrality or generate baselines on some independent grounds. Compare various feminist approaches to the neutrality criterion, set out in A. Jaggar, Feminist Politics and Human Nature (1984); N. Hartsock, Money, Sex, and Power: Toward a Feminist Historical Materialism (1985); MacKinnon, supra note 130; Minow, supra note 161.

169. See infra note 180 and accompanying text.

170. See infra note 183 and accompanying text.

171. See Michelman, Foreword: Traces of Self-Government, 100 Harv. L. Rev. 4, 17–24 (1986); Sunstein, supra note 166.

the New Deal attack on the common law.[172] A profitable strategy would be to avoid abstraction and to examine particular areas with considerable care.[173]

Such an approach would force courts to confront the question of why and how the artifactual quality of a particular system is relevant to the legal question. The fact that a practice is artifactual hardly means that it should be changed; and the fact that it is in some sense natural is not necessarily a reason to respect it.[174] Consider here the area of gender discrimination; it is the legal system that makes relevant any biological difference, and a decision to turn a difference into a disadvantage demands independent support.[175] But a finding that a practice or system is a product of government is relevant in various respects. First, it may suggest that changes should not be regarded as "takings"; the notion of a taking depends on an antecedent baseline, and if the baseline is not natural, one needs an independent reason to respect it. Moreover, if a practice is revealed as simply an adaptation to the status quo, new legal rules will not be futile. Finally, it is sometimes thought that interferences with practices that are an outgrowth of nature infringe on liberty or on some other right. The *Lochner* era is itself an example, and the areas of race and gender discrimination might be similarly understood. A recognition that the practices in question are artifactual may weaken such objections. The fact that a practice is a creature of government thus removes some argnments for retaining it, though standing by itself, it is hardly a powerful reason to change it.

Development of a theory of justice that interprets the constitutional text but that is independent of the status quo is extremely difficult. A strong version of anti-*Lochner* thinking would make it hard to provide foundations from which to begin the inquiry; even theories of distributive justice need to accept some grounds from which to proceed.[176] Such theories must be culturally situated. The notion of a foundational theory existing entirely apart from conventions is likely to be chimerical, and in its own way reflective of *Lochner*-like premises. If

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172. Republican approaches tend not to see rights as prepolitical; the *Lochner* understanding of the common law can thus be criticized on republican grounds, and those grounds tend to replicate the ideas described supra notes 7–8, 39–45 and accompanying text.

173. V. Held, Rights and Goods: Justifying Social Action (1984); Minow, Where Difference has Its Home, 22 Harv. C.R.-C.L. L. Rev 111 (1987). But see the criticisms of Held in Fishkin, Book Review, 97 Ethics 473–74 (1987) (arguing in favor of impartiality and abstraction). This sort of approach fits comfortably with the emerging enthusiasm for various forms of contextualized practical reason in various fields. See R. Bernstein, Beyond Objectivism and Relativism (1983); M. Nussbaum, The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy (1986); Michelman, supra note 171.

174. See L. Tribe, supra note 136; C. MacKinnon, supra note 134.

175. See C. MacKinnon, supra note 134; C. MacKinnon, supra note 127.

176. See M. Nussbaum, supra note 173; Lukes, Of Gods and Demons: Habermas and Practical Reason, *in* Habermas: Critical Debates (J. Thompson & D. Heble eds. 1982).

so, the task is instead to be critical of existing practices without pretending to have transcended the particular culture altogether.[177]

One can point to some such efforts in current law. The first amendment prohibitions of discrimination on the basis of point of view and of government preference of particular religions are prominent examples.[178] The law of racial discrimination is a particularly helpful illustration here. Courts have developed theories that permit them to evaluate particular social practices from an independent baseline, one that prohibits intentional discrimination against blacks. Discrimination on the basis of gender, alienage, and illegitimacy is handled in similar terms. The principal effort here is to develop and justify an alternative baseline, and to imagine a world in which the illegitimate or irrelevant considerations were not at work.

In some areas, this task appears easy, but the setting of school segregation suggests why development of a baseline independent of the status quo is sometimes difficult. For a long period, the controversial questions here had to do with the constitutionality of freedom of choice and other plans in attempting to eliminate the effects of segregation.[179] Freedom-of-choice plans do not significantly reduce segregation, but court-ordered transportation plans, including racial percentages, can hardly be said to be restoring the system to what it would be if discrimination had never taken place. The problem here is to imagine a hypothetical world in which housing patterns and educational choices were unaffected by past discrimination. The search for a status quo ante in the area of school segregation has an arbitrary quality, and sometimes the Court has had to come close to requiring integration in the absence of any other plausible version of a reconstructed system.[180]

The problem is hardly limited to the area of school segregation. It arises in many cases in which courts are asked to reject the status quo as the appropriate baseline. Consider, for example, a decision to allow a showing of discriminatory effects to trigger the equal protection clause. To a greater or lesser degree, such a decision would require courts to imagine what the system of benefits and burdens across the races would look like in a world unaffected by a legacy of racism. Although inquir-

177. See P. Ricoeur, Lectures on Ideology and Utopia (1986) (discussing critique of prevailing ideology from within that ideology and from standpoint of "utopia"); M. Nussbaum, supra note 173 (arguing in favor of Aristotelean approach to ethics); M. Walzer, Interpretation and Social Criticism (1987) (urging "connected criticism"); see also R. Bernstein, supra note 173 (exploring various approaches that attempt to criticize status quo without pretending to evade convention entirely); R. Rorty, Philosophy and the Mirror of Nature 155–64 (1980) (criticizing foundationalism in philosophy).

178. See supra note 120.

179. See Fiss, The Fate of an Idea Whose Time Has Come: Antidiscriminatory Law in the Second Decade After Brown v. Board of Education, 41 U. Chi. L. Rev. 742 (1974); Gewirtz, Remedies and Resistance, 92 Yale L.J. 585 (1983).

180. See, e.g., Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979); Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979).

ies of this sort are familiar in some areas of the law, in the present context they would be difficult to anchor; the causal links are so complex that a reconstruction of the past would inevitably rest on uncertain premises.[181] The area of gender discrimination poses similar problems. Imagine efforts to see how veterans' preferences or abortion would be treated in a world unaffected by sexism.[182]

This is not the occasion to set out a general theory of appropriate baselines from which to decide constitutional cases; as we will see, the answer is likely to vary across provisions. It should suffice to suggest that the common law or status quo baseline in *Lochner* will often be unacceptable; that the existing order should not be regarded as natural or inviolate; that the abandonment of baselines altogether is also unacceptable; and that generation of an independent alternative is sometimes necessary but poses large difficulties of its own. Current law is an amalgam of all three approaches. The primary purpose here is to suggest some of the ingredients in the decision why and when *Lochner*-like premises should be abandoned.

An important lesson of the discussion to follow is the need to proceed with some particularity. Abstract or general approaches are unlikely to be helpful here, at least for the foreseeable future.[183] The examination of particular areas is the starting point for extrapolating more general principles.

B. *Swords and Shields*

Even if the Holmesian approach is rejected, a less extreme version would suggest that in deciding whether *Lochner*-like premises should be accepted, it is highly relevant whether the Court is permitting government to act or prohibiting it from doing so. Courts might, in short, be inclined to uphold measures defended in terms like those in *West Coast Hotel*, even as they were disinclined to invalidate legislation under premises derived from either *Lochner* or *West Coast Hotel*. Deference to representative processes argues in favor of this result.[184] Under this view, the parallel of modern decisions to *Lochner* is closest when the

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181. Cf. J. Vining, supra note 90 (discussing difficulties of reconstruction of past in general).

182. See Personnel Adm'r v. Feeney, 442 U.S. 256 (1979); see Seidman, Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law, 96 Yale L.J. 1006 (1987). Cf. C. MacKinnon, supra note 134 (proposing a test of whether legal rules perpetuate subordination of women); and compare Law, Rethinking Sex and the Constitution, 132 U. Pa. L. Rev. 956 (1984) (criticizing that approach for not being subject to judicial management).

183. See L. Tribe, Constitution as Point of View (unpublished manuscript, January 1981).

184. To some degree this position itself incorporates *Lochner*-like premises; it distinguishes judicial action from inaction, and makes the distinction turn on whether the Court is forcing dramatic changes in the status quo. Here, however, the inquiry depends on institutional concerns having to do with the role of the judiciary.

Court is invalidating democratically-enacted legislation. Even if one rejects the most extreme claims about the undemocratic character of judicial review, one might agree that *Lochner*-like premises should rarely be used to invalidate legislation.

The argument for upholding the statute in *Buckley v. Valeo* was therefore quite strong; the case was very close to *Lochner* itself—unless there is some difference in the nature of the right, an issue taken up below. Similarly, measures calling for "affirmative action," viewed through the lens of the *Lochner* era, should generally not be thought to raise a serious constitutional issue. When a legislature or other entity enacts an affirmative action program, it should not be treated as operating against a status quo baseline that is in some sense natural or neutral. The current distribution of benefits and burdens along racial lines is an outgrowth of a long history of discrimination. Efforts to eliminate the subordination of blacks can hardly be regarded in the same way as efforts to perpetuate it.[185]

Similar considerations apply to redistributive measures enacted under the constracts and taking clauses. Notwithstanding recent criticism under *Lochner*-like premises,[186] current law under both clauses is generally correct. It permits a wide realm of action for legislatures, an appropriate conclusion in the face of textual ambiguity, the evident desires of the majority, changed circumstances, and the growing scope of the police power.[187] In all of these contexts, an understanding like that in *West Coast Hotel* should operate, at least prima facie, as a "shield" against constitutional attacks on legislation, just as it does under the due process clause in the aftermath of *Lochner*.

Because of institutional concerns, more difficult questions are raised by the prospect of using *West Coast Hotel* as a "sword," that is, as the basis for constitutional attacks on existing social structures. In this category can be put the various arguments for a discriminatory effects test under the equal protection clause. So too, some of the arguments in the racial and gender area attempt to use an understanding like that in *West Coast Hotel* as a sword against government. In the same category can be placed the claims for welfare rights. In such cases, the fact that the plaintiff is attacking legislation enacted by a popular majority counts against recognition of the claim.[188]

All this is hardly to suggest that the issue of swords and shields

185. See Lempert, The Force of Irony: On the Morality of Affirmative Action and United Steelworkers v. Weber, 95 Ethics 86 (1984); Strauss, supra note 110.

186. Epstein, Toward a Revitalization of the Contract Clause, 51 U. Chi. L. Rev. 703 (1984); R. Epstein, supra note 5.

187. See Grey, supra note 27; Sax, Book Review, 53 U. Chi. L. Rev. 279 (1986) (reviewing R. Epstein, Takings (1985)).

188. The relevant norms might, however, be regarded as binding on legislators and administrators even if they are not enforced by the judiciary. See Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212 (1978).

should control the constitutional question; that would represent a return to Holmesian understandings about the judicial role and in its own way reflect *Lochner*-like distinctions between action and inaction.[189] But the issue is highly relevant. Constitutional law is often an uneasy mixture of substantive theory and institutional constraint.[190] The existence of institutional limits on the part of the judiciary forces the courts to limit the scope of substantive constraints on government action. This combination sometimes produces doctrinal awkwardness, but it is hard to think of an alternative. In these circumstances, it is important whether a decision would call for simple validation of a measure enacted by Congress or instead would require courts to undertake significant social change on their own.

C. *The Nature of the Clause*

The catalog of *Lochner*-like premises in modern public law spans a wide range, and it implicates a large number of constitutional provisions, including the contracts, takings, due process, and equal protection clauses as well as the first amendment. But *Lochner*-like premises are more necessary or appropriate under some provisions than under others. A lawyer's natural reaction to the problem would be to disentangle the various provisions. The interpretive process, informed to a greater or lesser degree by the text and original purposes, might well vary across clauses; different clauses may abandon or include *Lochner*-like premises. A theory of constitutional interpretation would of course be necessary to accomplish this task.

At the most general level, it is possible to understand the original Constitution as having a substantial *Lochner*-like dimension. Both the institutional and the individual rights provisions of the document were influenced by an understanding of the naturalness of the distribution of property.[191] The Civil War Amendments were at least a partial recognition of the artifactual quality of existing distributions, and subsequent judicial interpretation carried that recognition much further. The various developments associated with the New Deal[192] were a substantial abandonment of the *Lochner*-like features of constitutionalism, in its institutional and individual rights dimensions. One of the most important tasks of modern constitutional theory is to integrate these various developments into a theory of constitutional interpretation.

Lochner, under a textual approach, was wrong above all because it was an interpretation of the due process clause. That clause may be

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189. See supra note 163.

190. See Sager, supra note 188, at 1212.

191. See The Federalist No. 10, at 83–84 (J. Madison) (C. Rossiter ed. 1961); J. Nedelsky, supra note 145.

192. See generally Sunstein, supra note 146; Ackerman, Discovering the Constitution, 93 Yale L.J. 1013 (1984).

only procedural in character;[193] it may require the government only to show some minimal justification for its decisions; it may not sharply confine the permissible ends of the state. The takings clause, by contrast, was built on a belief in the meaning and importance of private property, and it would be difficult to read that clause in the fashion of *West Coast Hotel* without reading it out of the Constitution. The same conclusion may be appropriate under the contracts clause. At a minimum, then, the takings and contracts clauses cannot easily be read to create a constitutional baseline other than that of the status quo; the notion of property itself develops and evolves from common cultural understandings that cannot easily be subject to independent judicial reconstruction.[194] The eminent domain and contracts clauses are most naturally read to embody *Lochner*-like premises about neutrality and inaction.

At the same time, it would be possible to remove both provisions from their foundations in *Lochner*. In particular, courts might recognize the social construction of property and understand the term "takings" against the backdrop set by independent theories of entitlement and an appreciation of the social functions of private ownership. Such an approach would produce difficult questions of judicial authority and competence, but some have argned in favor of an effort of that sort.[195] If such an effort is to be made, however, it should proceed slowly and incrementally in light of the history and current interpretation of the clause.

By contrast to the takings and contracts clauses, the equal protection clause is most easily read as a self-conscious rejection of *Lochner*-like premises. The purpose of the clause was, at least to some degree, to break up the system of subordination of blacks; the best interpretation of the clause recognizes that the existing allocation of power among the races is both artifactual and illegitimate, and its purpose is, to a greater or lesser extent, to equalize that allocation. It should not be surprising that insofar as understandings deriving from *West Coast Hotel* have been used as a sword against government, the equal protection clause has usually been the textual source of decision.

Much of equal protection law grows directly out of *West Coast Hotel*. Consider not only the attack on racial discrimination, but antidiscrimination law involving poverty, illegitimacy, alienage, and perhaps above all gender. The equal protection clause is most obviously a

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193. See J. Ely, supra note 6, at 18.

194. See B. Ackerman, Private Property and the Constitution (1977) (comparing views of "ordinary observer" and "scientific policymaker" in interpretation of eminent domain clause).

195. See, e.g., B. Ackerman, supra note 194; Baker, Property and Its Relation to Constitutionally Protected Liberty, 134 U. Pa. L. Rev. 741 (1986); Michelman, Property as a Constitutional Right, 38 Wash. & Lee L. Rev. 1097 (1981).

rejection of *Lochner*'s premises, just as the takings and contracts clauses are most obviously their constitutional embodiment.

What of the first amendment? In *Buckley* itself, the Court suggested that the provision disposed of the issue: the constitutional guarantee of freedom of speech prohibits the silencing of some in order to promote the speech of others. But it is much too facile to point to the text of the clause. Whether regulation of powerful private speakers might sometimes promote "freedom of speech" is the question to be decided. There was a powerful argument in *Buckley* that campaigu finance regulation was necessary in order to promote freedom of speech; one could argue that such regulation was closer to being compelled than proscribed.[196] On the other hand, a wholesale abandonment of *Lochner*-like premises, requiring courts to look at the content of speech, would wreak havoc with existing first amendment doctrine—as it did earlier in the century with private property under the due process clause.

Indeed, the central commitment of the first amendment, as currently interpreted, is to neutrality on the basis of content or viewpoint,[197] and this commitment has a *Lochner*-like feature. Issues of substantive power and powerlessness do not enter into the constitutional inquiry. Government must be neutral between those viewpoints that are good and bad, or those speakers that have power and those that have none.[198] A set of doctrines growing out of *West Coast Hotel* would repudiate *Buckley*; efforts to redress the distorting effects of financial contributions can be fit within the police power, especially in light of theories of free speech that grow out of republican conceptions of politics.[199] But doctrines based on *West Coast Hotel* might also be led to reject the commitment to viewpoint neutrality.[200] Under such an approach, redistributive and paternalistic goals would be permissible under the first amendment.[201] The police power under the first amendment would thus be close to the police power under the fourteenth. Such an approach would permit government to impose a wide range of regulatory restrictions, mostly on the speech of the powerful, in the interest of reassessment of the existing distribution of power.

There are reasons to be skeptical of so general an approach. The problem of deciding who is powerful and who is not is too manipulable and too likely to be skewed by impermissible factors to be the basis for

196. See Fiss, Free Speech and Social Structure, 71 Iowa L. Rev. 1485 (1986).

197. See Stone, Content Regulation and the First Amendment, 25 Wm. & Mary L. Rev. 189 (1983).

198. See MacKinnon, supra note 51.

199. See A. Meiklejohn, Free Speech and Its Relation to Self-Government (1948).

200. See Fiss, supra note 196.

201. See Fiss, supra note 196; Fiss, Why the State?, 100 Harv. L. Rev. 781, 790–94 (1987). Cf. R. Wolff, B. Moore & H. Marcuse, A Critique of Pure Tolerance (1968) (criticizing traditional beliefs in free expression and tolerance).

first amendment doctrine. Moreover, there are good reasons to complain about restrictions on the speech of the powerful. *Buckley* itself was wrongly decided; the principle at issue there might be confined to financial expenditures without endangering the general principle of viewpoint neutrality.[202] But it should not be surprising to find *Lochner*-like premises in first amendment doctrine.

All this suggests that some constitutional provisions incorporate *Lochner*-like premises, others reject them, and still others create difficult interpretive problems. The nature of the provisions will thus be a significant factor in deciding about appropriate baselines.

D. *The Nature of the Causal Links*

Another factor has to do with the reality or perception of a close causal link between identifiable government action and the practice under attack. In the context of welfare, the link between government action and poverty may seem too attenuated to justify a claim of causation; numerous other causal factors play a role. The same conclusion is drawn in the context of de facto segregation. School and housing patterns are affected by many factors, and the relevant legal rules were not in force in the immediate past. The case of discriminatory effects may be similarly understood, for the existence of such effects is the result of a wide range of factors. Consider by contrast the courts' ready acceptance of remedial plans for actual racial discrimination in the recent past by the defendant. Here the link between state action and racially based harm is so tight that causation is unquestionable. Judgments about causation thus play a significant role in the cases.

This concern, however, imports some *Lochner*-like premises about action and inaction and is in any event secondary. In the cases under consideration, there is almost always "but for" causation. The causation issue produces difficulties when and because it is hard to imagine a status quo ante. Consider, for example, a claim that de facto segregation is unconstitutional, or even an attack on de jure segregation thirty years ago. To imagine what the system would look like if the conduct under attack had not occurred is necessarily speculative and largely unanchored. This point presents the problem of baseline in another form.

E. *The Consequences: Utilitarian and Other Losses*

Judgments about caustion are not based solely on a reconstruction of history.[203] Sometimes the decision is affected by the perceived consequences of finding a causal link. Consider, for example, recognition of a constitutional right to welfare. It may be conceded here that pov-

202. For general discussion, see Fiss, supra note 196 (arguing against viewpoint neutrality because of maldistributions of social power).

203. See H. Hart & A. Honoré, Causation in the Law (1984).

erty is in some sense a creation of the state. But if it were to follow that welfare was constitutionally guaranteed, the result may be to undermine incentives for productive labor. Another example has to do with discriminatory effects. If such effects were sufficient to produce invalidity, the consequences would be enormous. Affirmative action would be constitutionally mandated. Such a step would impose a severe strain on the judiciary. Moreover, it would impose costs of two kinds. The decision about which discriminatory effects were permissible and why would be enormously complex. Serious strains would be imposed on the judiciary, particularly in the remedial process.

The utilitarian and other losses—including enforcement problems—of abandoning *Lochner* are thus relevant to the constitutional inquiry. They will tend to be largest in cases in which other branches of government support the practice under attack. When, for example, Congress has enacted a statute abandoning *Lochner*-like principles, these considerations are secondary. In such cases the elected branches have decided that the utilitarian losses are properly incurred, and problems of enforcement are minimized. When the elected branches are on the other side, however, those losses and problems are properly taken into account. They are a secondary consideration, buttressing the development of substantive and institutional theories in the wake of *Lochner*.

F. *Summary*

We have seen that the question whether *Lochner*-like premises should be ahandoned cannot be answered in the abstract. The issue depends on a mixture of substantive, institutional, and interpretive considerations. The substantive problems present issues of distributive justice; the institutional issues present problems of democratic theory; the interpretive questions raise problems of linguistic theory as well as substantive and institutional issues.[204] In generating a set of constitutional doctrines in the aftermath of *Lochner*, it is necessary to proceed with considerable caution. No formula is available. But the foregoing discussion suggests some generalizations and examples that may prove helpful here. In *Lochner* itself, the textual pedigree of the decision was uncertain; and the outcome reached by the Court ran in the face of a powerful and mounting national consensus in the other direction. Similar considerations justify, at least in broad outline, the Court's current approach to the takings and contracts clauses. These provisions are necessarily *Lochner*-like in character; they cannot be read out of the Constitution, but a generous approach to the police power is appropri-

204. For some, the three problems, in concert, mean that judges must decide cases by reference to the "intent of the framers," or original meaning, or some other purportedly sharp constraint on judicial decisions. That approach is rejected here. See supra note 167 and accompanying text.

ate under both provisions. Affirmative action for both race and gender is relatively easy. The measures in question have been adopted democratically; the equal protection clause is a repudiation of *Lochner*-like principles; utilitarian concerns cannot be said to count powerfully against affirmative action and may argue in favor of validation; the uncertainty of causation is a secondary matter. Judicial review of agency inaction and standing for regulatory beneficiaries are also relatively easy. Here Congress has created and endorsed a broad presumption of reviewability, and most important, review would serve only to vindicate constitutional and statutory provisions as against the executive branch. Some benefits that are the creature of statute should stand on the same footing as common law interests for purposes of both procedural and substantive due process. The rise of hearing rights for beneficiaries of spending programs is therefore appropriate.[205] *Buckley v. Valeo* was decided incorrectly. In the context of financial expenditures, the first amendment need hardly be read in the *Lochner*-like fashion suggested by the Court.

The most difficult cases here involve discriminatory effects under the equal protection clause, welfare rights, and some of the state action cases, including those that raise the possibility of a right to protection against private racial discrimination. Viewed through the lens of the *Lochner* period, these decisions seem incorrect in their reasoning and questionable in their outcomes. All of them depend on premises about the appropriate baseline that were properly rejected during the *Lochner* period. But as we have seen, there are powerful prudential and institutional considerations that argue in favor of caution. The primary purpose here is not to suggest how such cases should be decided, now or in the near future, but instead to remove one of the props supporting current doctrine and to suggest some of the relevant inquiries.

CONCLUSION

The *Lochner* Court required government neutrality and was skeptical of government "intervention"; it defined both notions in terms of whether the state had threatened to alter the common law distribution of entitlements and wealth, which was taken to be a part of nature rather than a legal construct. Once the common law system came to be seen as a product of legal rules, the baseline from which constitutional decisions were made had to shift. When the *Lochner* framework was abandoned in *West Coast Hotel*, the common law system itself appeared to be a subsidy to employers. The *West Coast Hotel* Court thus adopted an alternative baseline and rejected *Lochner* era understandings of neutrality and action.

If the *Lochner* era is thought to embody less an active judicial role

205. Cf. J. Mashaw, Due Process in the Administrative State (1985) (justifying such rights on participatory and dignatory grounds).

and more particular conceptions of baseline, neutrality, and action, it has not been entirely overruled. Numerous modern decisions reflect similar understandings. Cases distinguishing between "positive" and "negative" rights are built on *Lochner*-like premises that take the common law as the baseline for decision. Much of the law of racial discrimination can be understood similarly, though here the baseline is the status quo rather than the common law. The constitutional attack on affirmative action, indeed the very term, suggests that the current distribution of benefits and burdens along racial lines is simply "there." The state action doctrine borrows heavily from common law understandings about the proper role of government. Some of first amendment doctrine, especially that involving campaign financing, is based on similar premises.

It is one thing to identify *Lochner*-like premises in current constitutional law; it is quite another to suggest when and how they should be abandoned. One possible approach would be to reject, in the fashion of Justice Holmes, any baseline as a matter of constitutional law. Under this approach, the distribution of wealth and entitlements would be for political rather than legal determination. But we have seen that such an approach is too crude, for it would spell an end to constitutionalism. If the idea of baselines is to be retained, and if *Lochner* is at least sometimes to be abandoned, the task for the future is to develop theories of distributive justice, derived from constitutional text and purposes, that might serve as the basis for evaluating any particular practice.

Whether and how to develop and implement such theories is a mixture of substantive and institutional problems. We have seen that whether *Lochner*-like premises are used to invalidate or uphold legislation is relevant. Moreover, some provisions are most plausibly understood in *Lochner*-like terms, whereas others self-consciously reject those premises; consider the equal protection clause. Second-order considerations include whether there is a clear causal connection between identifiable social practices and the harms invoked by the plaintiff. Social consequences, including utilitarian losses, properly play a role in the decision. Development and implementation of an alternative approach that would incorporate those inquiries is a large task indeed. But there is reason to reject several lines of cases that depend on *Lochner*-like premises, as in the areas of campaign finance regulation, judicial review of agency inaction, gender discrimination, and affirmative action. There is reason as well to raise questions about the reasoning and perhaps the outcome in more difficult areas, involving discriminatory effects and "positive" rights.

However these questions are resolved, the central issue in numerous areas of the law—involving campaign finance regulation, hearing rights, affirmative action, gender and race discrimination, standing, review of agency inaction, state action, and "positive" rights—is whether there is a constitutional requirement of neutrality that commands pres-

ervation of the status quo as reflected in market outcomes, or instead whether the Constitution, recognizing the artifactual quality of the market allocation, permits and sometimes demands change. One might understand the *Lochner* era as, above all, a warning about constitutional doctrine that defines neutrality in terms of the perpetuation of current practice, and that treats government conduct tending to sustain it as "inaction" invariably escaping legal sanction, and government conduct proposing change as "action" tending to raise legal doubts.